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FEDERAL TRADE COMMISSION

16 CFR Part 305

RIN 3084–AB15

Energy Labeling Rule

AGENCY: Federal Trade Commission (''FTC'' or ''Commission'').

ACTION: Final rule.

SUMMARY: The Commission amends the Energy Labeling Rule (''Rule'') by updating ranges of comparability and unit energy cost figures on EnergyGuide labels for dishwashers, furnaces, room air conditioners, and pool heaters. The Commission also sets a compliance date of October 1, 2019 for EnergyGuide labels on room air conditioner boxes and makes several minor clarifications and corrections to the Rule.

DATES: The amendments are effective May 23, 2018.

ADDRESSES: Relevant portions of the record of this proceeding, including this document, are available at *http://www.ftc.gov.*

FOR FURTHER INFORMATION CONTACT: Hampton Newsome, (202) 326–2889, Attorney, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Room CC–9528, 600 Pennsylvania Avenue NW, Washington, DC 20580.

SUPPLEMENTARY INFORMATION:

I. Background

The Commission issued the Energy Labeling Rule (''Rule'') in 1979,[1] pursuant to the Energy Policy and Conservation Act of 1975 (EPCA).[2] The Rule requires energy labeling for major home appliances and other consumer products to help consumers compare competing models. It also contains labeling requirements for refrigerators, refrigerator-freezers, freezers, dishwashers, water heaters, clothes washers, room air conditioners, furnaces, central air conditioners, heat pumps, plumbing products, lighting products, ceiling fans, and televisions.

The Rule requires manufacturers to attach yellow EnergyGuide labels to many covered products and prohibits retailers from removing these labels or rendering them illegible. In addition, it directs sellers, including retailers, to post label information on websites and in paper catalogs from which consumers can order products. EnergyGuide labels for most covered products contain three key disclosures: Estimated annual energy cost, a product's energy consumption or energy efficiency rating as determined by DOE test procedures, and a comparability range displaying the highest and lowest energy costs or efficiency ratings for all similar models. For cost calculations, the Rule specifies national average costs for applicable energy sources (*e.g.,* electricity, natural gas, oil) as calculated by DOE. Under the Rule, the Commission periodically updates comparability range and annual energy cost information based on manufacturer data submitted pursuant to the Rule's reporting requirements. The Rule also sets a five-year schedule for updating comparability range and annual energy cost information.[3]

II. Proposed Amendments

In a November 9, 2017 Notice of Proposed Rulemaking (NPRM), the Commission sought comment on proposed updates to the Rule's comparability ranges and amendments to set a compliance date for EnergyGuide labels on room air conditioner boxes. The Commission received 10 comments in response.[4] After reviewing the comments, the Commission now issues final amendments addressing these issues.

III. Final Amendments

A. Comparability Range and Energy Cost Revisions

Background: In the NPRM, the Commission proposed revisions to the comparability range and energy cost information for dishwashers, furnaces, pool heaters, and room air conditioners.[5] The comparability ranges (*i.e.,* scales) show the highest and lowest energy costs or energy efficiency ratings of models similar to the labeled product. The Commission derives these ranges from annual data submitted by manufacturers. In addition, the Commission proposed updating the average energy cost figures manufacturers must use to calculate a model's estimated energy cost for the label based on national average cost figures published by DOE.[6] The Commission also proposed amending the energy cost tables in Appendix K to clarify the cost applicable to various covered products.[7] To effect these changes, the Commission proposed amending the applicable tables in the Rule's appendices. Under the Rule (§ 305.10), manufacturers must begin using this new information on product labels within 90 days after publication of the updated tables.

The Commission did not propose amending the range and cost information for EnergyGuide labels for refrigerators, freezers, clothes washers, water heaters, central air conditioners, and televisions because the Commission has recently updated label information for these products.[8] The Commission explained in the NPRM that changing labels for these products so soon would unnecessarily burden manufacturers

[1] 44 FR 66466 (Nov. 19, 1979).

[2] 42 U.S.C. 6294. EPCA also requires the Department of Energy (DOE) to develop test procedures that measure how much energy appliances use, and to determine the representative average cost a consumer pays for different types of energy.

[3] 16 CFR 305.10.

[4] *See* 82 FR 52024. The comments received in response to the NPRM are here: *https://www.ftc.gov/policy/public-comments/2017/12/initiative-730.* The comments included: Air-Conditioning, Heating, and Refrigeration Institute (AHRI) (#00006); American Public Gas Association (APGA) (#00007); National Electrical Manufacturers Association (NEMA) (#00008); Association of Home Appliance Manufacturers (AHAM) (#00009); Earthjustice (''Joint Commenters'') (#00010); Grear (#00011); Kremer (#00005); O'Hare (#00004); Castillo (#00003); and Chambers (#00002).

[5] 16 CFR 305.10. This document also updates the sample labels in the Rule's appendices to reflect the new range and cost information and to include the minor label content changes discussed in this document.

[6] 82 FR 21213 (May 5, 2017) (DOE notice for ''Representative Average Unit Costs of Energy'').

[7] Applicable energy cost figures for ceiling fans, lighting products, and televisions appear in §§ 305.13 (effective September 17, 2018), 305.15, and 305.17 respectively.

[8] *See* 81 FR 63634 (Sept. 15, 2016) (new range information for refrigerators and freezers, water heaters, and central air conditioners effective June 12, 2017); 81 FR 7201 (Feb. 11, 2016) (new ranges for clothes washers effective May 11, 2016); and 80 FR 16259 (Mar. 27, 2015) (updated ranges for televisions effective July 15, 2015).

and potentially confuse consumers by introducing new label information in the marketplace.[9]

Comments: Though commenters generally supported the updated ranges, AHRI and O'Hare recommended minor changes. Specifically, AHRI noted that the new range for oil-fired boilers should reflect several models rated at an Annual Fuel Utilization Efficiency (AFUE) of 82.0. O'Hare suggested the upper end of the pool heater thermal efficiency range on the sample label be 96.0 to reflect the amended table in Appendix J1.

In addition, several energy efficiency and consumer organizations (the ''Joint Commenters'') recommended new ranges for clothes washers. They explained that new DOE standards, which become effective in January 2018, will significantly change the lower end of the ranges for these products (for both standard and compact capacity categories) by removing many existing lower efficiency models from the market. In the Joint Commenters' view, delay in updating the ranges will result in ranges that include products no longer manufactured, thus misleading consumers about the efficiency and operating costs of models in production. The commenters also argued that such inaccurate ranges would violate EPCA's directive (see 42 U.S.C. 6294(c)(1)(B)) to provide range information for ''covered products to which the rule applies.''

Discussion: The Commission amends the Rule to implement the updates proposed in the NPRM and the minor changes suggested by the commenters. The Commission, however, does not update the clothes washer ranges at this time. Because the Commission updated the range data for clothes washer labels in 2016 (81 FR 7201 (Feb. 11, 2016)), it is reluctant to change the labels again after such a short interval because it would create inconsistent labels for consumers during the transition and unnecessarily burden manufacturers. However, the Commission will review new clothes washer data in light of the new DOE 2018 standards and consider whether to propose updating the ranges.

The Commission does not agree with the Joint Commenters that the current ranges violate EPCA's directive to provide range information for ''covered products to which the rule applies.'' The Commission interprets this statutory instruction, together with the directive in 42 U.S.C. 6294(c)(2)(B), as applying to general product types (*i.e.,* categories), not to individual models. Furthermore, models frequently appear in the market that may fall outside of the Rule's current range, and the statute contains no requirement for the Commission to update ranges continuously. Indeed, the law prohibits the Commission from updating ranges more often than annually.[10]

B. Room Air Conditioner Labels on Packages

Background: In the NPRM, the Commission proposed a compliance date for changes to room air conditioner labels. In 2015, the Commission announced final amendments requiring labels on room air conditioner boxes and replacing the EER (''Energy Efficiency Ratio'') disclosure with CEER (''Combined Energy Efficiency Ratio'') (80 FR 67285, 67292–3 (Nov. 2, 2015)). However, to reduce burden on manufacturers that use both the U.S. and Canadian labels, the Commission delayed a compliance date announcement until Natural Resources Canada (NRCan), which administers the Canadian EnerGuide labeling program, had announced similar provisions. On December 28, 2016, NRCan published regulatory amendments providing manufacturers the option to print the EnerGuide label on packaging (Canada Gazette, Vol. 150, No. 26 (Dec. 28, 2016)) in lieu of affixing the EnerGuide label to the product. The Commission then proposed a compliance date of October 1, 2018, explaining that October coincides with the beginning of the industry's annual production cycle (*i.e.,* the cooling season).

Comments: AHAM generally supported the change from EER to CEER, as well as the transition to labels on product boxes. However, it urged the Commission to provide additional time for this transition. Specifically, AHAM argued that the change will require manufacturers to completely redesign their packaging to accommodate the label. Accordingly, AHAM requested that the Commission set an October 1, 2019 date for the box labels.

Discussion: In response to AHAM's concerns, the Commission sets the compliance date at October 1, 2019 to provide manufacturers ample time to make the transition to box labels. As indicated in the NPRM, manufacturers generally deploy their product lines on an annual basis beginning in October of each year. According to AHAM, an October 2018 compliance date likely would not provide adequate time for making the required changes. In addition, the Commission expects a compliance date falling in the middle of the annual production cycle could cause significant disruption. If they so choose, manufacturers may begin using the labels on packages before the October 1, 2019 compliance date. In the meantime, they must continue to affix labels to the products themselves and provide labels online. The amendments also change the label's efficiency disclosure from EER to CEER as proposed.[11] Manufacturers should begin using CEER along with the new ranges published in this document (*i.e.,* within 90 days of publication).

C. Technical Corrections and Clarifications

Background: In the NPRM, the Commission proposed several minor clarifying and corrective amendments. These included a clarification to § 305.10(c) regarding labeling for models falling outside of the current ranges, as well as corrections to §§ 305.5 (obsolete reference to LED bulb tests), 305.8 (reference to the timing of reporting requirements), 305.12 (sample label references for central air conditioners labels), and 305.16 (plumbing disclosures).

Comments: Several commenters, including AHAM and NEMA, supported these minor amendments. No comments opposed them. However, AHAM requested additional clarifications. First, it recommended replacing the term ''operating cost'' with ''energy cost'' in § 305.10(c)(2) and on the sample clothes washer label in appendix L to ensure consistency with other sample labels and Rule provisions. According to AHAM, industry members have used the term ''energy cost'' on labels prepared pursuant to § 305.10 for this reason. In addition, most of the labels and applicable Rule text in § 305.11 use the term ''energy cost.'' AHAM urged the Commission to provide ample time for manufacturers to make any necessary changes.

AHAM also urged the Commission to clarify the label language required for describing refrigerator-freezers that do not have through-the-door ice service. AHAM noted that the Rule's sample label uses the phrase ''no through-the-door ice,'' whereas the comparability range tables in appendix A state ''Without Through-the-door-ice.'' Although AHAM did not express a preference for the applicable language, it requested sufficient time for their members to change labels to avoid waste and unnecessary cost should the Commission issue a clarification.

Discussion: The Commission amends the Rule to include the proposed

[9] The Commission followed a similar approach during the last cycle of range and cost updates. *See* 78 FR 1779 (Jan. 9, 2013).

[10] 42 U.S.C. 6296(c).

[11] 80 FR at 67292–3.

clarifications and technical corrections, including replacing the term ''operating cost'' with ''energy cost'' in § 305.10(c)(2) and on the clothes washer label as suggested by AHAM. The Commission does not expect these corrections to create any additional burden for manufacturers because current practice appears to be consistent with most of these changes. However, to the extent that manufacturers must change existing labels, they may do so after exhausting their current label supply to avoid unnecessary costs. Should individual manufacturers have questions about revising labels, they can contact FTC staff for guidance.[12]

The Commission, however, declines to amend the Rule's descriptions for refrigerator-freezers. The current Rule sets only general requirements for the content of these product descriptions at the labels top left and does not prescribe exact language that manufacturers must use.[13] Accordingly, manufacturers may continue to use their present descriptions provided they are consistent with the Rule's refrigerator-freezer categories. The Commission may consider amending the Rule in the future to require uniform descriptors for refrigerator-freezers should stakeholders desire such a change. For now, without further notice and comment, the Commission does not change this provision of the Rule.

D. Additional Issues Raised in Comments

A few commenters offered broad suggestions to improve aspects of the Energy Labeling Rule not discussed in NPRM, thus falling outside of the scope of the proposed amendments.[14] For instance, the American Public Gas Association (APGA) recommended the Commission consider requiring source-based energy efficiency descriptors on the EnergyGuide labels to provide consumers with broader information about the overall environmental impacts of product use. APGA also urged the Commission to consider using marginal energy cost figures for calculating annual energy costs on labels, indicating that the average cost figures currently used for the labels overstate the costs. APGA urged the Commission to raise these issues in the future for further discussion.

Gear also provided several suggestions to improve the labels. First, Gear recommended state-by-state energy cost disclosures on the label to provide consumers with energy information reflecting the utility rates where they live. If such disclosures prove impracticable for individual labels, the commenter suggested the Commission consider providing this information online. Second, Gear recommended the label contain a ''yearly cost compared to average'' disclosure, as well as other design changes to address reported concerns with consumer comprehension. Finally, Gear recommended the Commission consider requiring labels for clothes dryers.

At this time, the Commission does not propose additional changes to the Rule, though it may consider such broader issues in the future. Without an opportunity for public comment and further consideration, the Commission cannot make such changes at this time. In recent years, the Commission has implemented many broad changes related to label design, reporting, and other aspects of the labeling program to improve information for consumers and industry members.[15] Accordingly, the Commission does not plan to pursue these additional issues as part of the present amendments. Instead, the FTC staff will review these issues and consider whether to recommend additional amendments or non-regulatory measures in the future. It will also continue working outside the rulemaking context with DOE staff to explore online consumer information about the energy use of covered products, including source-based impacts and energy costs reflecting state or regional variations in fuel rates.

IV. Paperwork Reduction Act

The current Rule contains recordkeeping, disclosure, testing, and reporting requirements that constitute information collection requirements as defined by 5 CFR 1320.3(c), the definitional provision within the Office of Management and Budget (OMB) regulations that implement the Paperwork Reduction Act. OMB has approved the Rule's existing information collection requirements through November 30, 2019 (OMB Control No. 3084 0069). The amendments do not change the substance or frequency of the recordkeeping, disclosure, or reporting requirements and, therefore, do not require further OMB clearance.

V. Regulatory Flexibility Act

The provisions of the Regulatory Flexibility Act relating to a Regulatory Flexibility Act analysis (5 U.S.C. 603–604) are not applicable to this proceeding because the amendments do not impose any new obligations on entities regulated by the Energy Labeling Rule. As explained elsewhere in this document, the amendments do not change the substance or frequency of the recordkeeping, disclosure, or reporting requirements. Thus, the amendments will not have a ''significant economic impact on a substantial number of small entities.'' 5 U.S.C. 605. The Commission has concluded, therefore, that a regulatory flexibility analysis is not necessary, and certifies, under Section 605 of the Regulatory Flexibility Act (5 U.S.C. 605(b)), that the amendments will not have a significant economic impact on a substantial number of small entities.

List of Subjects in 16 CFR Part 305

Advertising, Energy conservation, Household appliances, Labeling, Reporting and recordkeeping requirements.

For the reasons set out above, the Commission amends 16 CFR part 305 as follows:

PART 305—ENERGY AND WATER USE LABELING FOR CONSUMER PRODUCTS UNDER THE ENERGY POLICY AND CONSERVATION ACT (''ENERGY LABELING RULE'')

■ 1. The authority citation for part 305 continues to read as follows:

Authority: 42 U.S.C. 6294.

[12] In addition, the final amendments correct § 305.11 to reinsert paragraphs (f)(10) and (11), which were inadvertently omitted in an earlier rulemaking (81 FR 63634, Sept. 15, 2016)). The Commission finds good cause for implementing the technical corrections recommended by AHAM and the correction to § 305.11 without further notice and comment. *See* 5 U.S.C. 553(b)(3)(B); 5 CFR 1.26(b).

[13] Though the model descriptions at the label's top left portion must be ''consistent'' with the tables in appendix A (§ 305.11(f)(4)), such descriptions do not have to track the language in the tables exactly. *See* 81 FR 63634, 63639, n. 39 (Sept. 15, 2016) (adding the requirements in § 305.11(f)(4) to ensure manufacturers do not list extraneous product features). However, explanatory language at the label's lower section must contain the specific descriptors set out in § 305.11(f)(9)(iii)) (''models with similar features . . .'').

[14] Other comments (Castillo and Chambers) expressed general support for the Rule. One commenter (Kremer) argued that the Rule's labeling is ''redundant'' and that consumers only need wattage information.

[15] *See, e.g.,* 75 FR 41696 (July 19, 2010) (new light bulb labels); 76 FR 1037 (Jan. 6, 2011) (television labels); 78 FR 2200 (Jan. 1, 2013) (online labels and streamlined reporting); 78 FR 8362 (Feb. 6, 2013) (regional standards for heating and cooling equipment); 80 FR 67285 (Nov. 2, 2015) (expansion of light bulb label coverage, increase label durability, and improve plumbing disclosures); 81 FR 63633 (Sept. 15, 2016) (improve access to energy labels online and improve labels for refrigerators, ceiling fans, central air conditioners, and water heaters).

§ 305.2 [Amended]

■ 2. In § 305.2(p), remove the words ''*energy efficiency ratio (EER)*'' and add, in their place, ''*combined energy efficiency ratio (CEER)*''.

■ 3. In § 305.5, revise paragraph (a), remove paragraph (c), and redesignate paragraph (d) as paragraph (c) to read as follows:

§ 305.5 Determinations of estimated annual energy consumption, estimated annual operating cost, and energy efficiency rating, water use rate, and other required disclosure content.

(a) Unless otherwise stated in paragraphs (b) and (c) of this section, the content of any disclosures required by this part must be determined in accordance with the testing and sampling provisions required by the Department of Energy as set forth in subpart B to 10 CFR part 430, 10 CFR part 431, and 10 CFR 429.11.

* * * * *

§ 305.7 [Amended]

■ 4. In § 305.7(f), remove the word ''EER'' and add, in its place, ''CEER.''

■ 5. In § 305.8, revise paragraph (c) to read as follows:

§ 305.8 Submission of data.

* * * * *

(c) All information required by paragraphs (a)(1) through (3) of this section must be submitted for new models prior to any distribution of such model. Models subject to design or retrofit alterations which change the data contained in any annual report shall be reported in the manner required for new models. Models which are discontinued shall be reported in the next annual report.

■ 6. In § 305.10, paragraphs (a), (b), and (c)(2) are revised and paragraph (c)(3) is added to read as follows:

§ 305.10 Ranges of comparability on the required labels.

(a) *Range of estimated annual energy costs or energy efficiency ratings.* The range of estimated annual operating costs or energy efficiency ratings for each covered product (except televisions, ceiling fans, fluorescent lamp ballasts, lamps, metal halide lamp fixtures, showerheads, faucets, water closets and urinals) shall be taken from the appropriate appendix to this part in effect at the time the labels are affixed to the product. The Commission shall publish revised ranges in the **Federal Register** in 2022. When the ranges are revised, all information disseminated after 90 days following the publication of the revision shall conform to the revised ranges. Products that have been labeled prior to the effective date of a modification under this section need not be relabeled.

(b) *Representative average unit energy cost.* The Representative Average Unit Energy Cost to be used on labels as required by § 305.11 and disclosures as required by § 305.20 are listed in appendices K1 and K2 to this part. The Commission shall publish revised Representative Average Unit Energy Cost figures in the **Federal Register** in 2022. When the cost figures are revised, all information disseminated after 90 days following the publication of the revision shall conform to the new cost figure.

(c) * * *

(2) Add one of the two sentences below, as appropriate, in the space just below the scale on the label, as follows:

The estimated yearly energy cost of this model was not available at the time the range was published.

The energy efficiency rating of this model was not available at the time the range was published.

(3) For refrigerator and refrigerator-freezer labels:

(i) If the model's energy cost falls outside of either or both ranges on the label, include the language in paragraph (c)(2) of this section.

(ii) If the model's energy cost only falls outside of the range for models with similar features, but is within the range for all models, include the product on the scale and place a triangle below the dollar value.

(iii) If the model's energy cost falls outside of both ranges of comparability, omit the triangle beneath the yearly operating cost value.

■ 7. Amend § 305.11 by revising paragraphs (d) introductory text, (d)(3), and (f)(9)(x) and adding paragraphs (f)(10) and (11) to read as follows:

§ 305.11 Labeling for refrigerators, refrigerator-freezers, freezers, dishwashers, clothes washers, water heaters, room air conditioners, and pool heaters.

* * * * *

(d) *Label types.* Except as indicated in paragraph (d)(3) of this section, the labels must be affixed to the product in the form of an adhesive label or a hang tag as follows:

* * * * *

(3) *Package labels for certain products.* Labels for electric instantaneous water heaters shall be printed on or affixed to the product's packaging in a conspicuous location. Labels for room air conditioners produced on or after October 1, 2019 shall be printed on or affixed to the principal display panel of the product's packaging.

* * * * *

(f) * * *

(9) * * *

(x) For clothes washers covered by appendices F1 and F2 of this part, the statement will read as follows (fill in the blanks with the appropriate capacity and energy cost figures):

Your costs will depend on your utility rates and use.

Cost range based only on [compact/standard] capacity models.

Estimated energy cost is based on six wash loads a week and a national average electricity cost of __ cents per kWh and natural gas cost of $ __ per therm. *ftc.gov/energy.*

* * * * *

(10) The following statement shall appear on each label as illustrated in the prototype and sample labels in appendix L of this part:

Federal law prohibits removal of this label before consumer purchase.

(11) No marks or information other than that specified in this part shall appear on or directly adjoining this label except that:

(i) A part or publication number identification may be included on this label, as desired by the manufacturer. If a manufacturer elects to use a part or publication number, it must appear in the lower right-hand corner of the label and be set in 6-point type or smaller.

(ii) The energy use disclosure labels required by the governments of Canada or Mexico may appear directly adjoining this label, as desired by the manufacturer.

(iii) The manufacturer or private labeler may include the ENERGY STAR logo on the bottom right corner of the label for certified products. The logo must be 1 inch by 1 inch in size. Only manufacturers that have signed a Memorandum of Understanding with the Department of Energy or the Environmental Protection Agency may add the ENERGY STAR logo to labels on certified covered products; such manufacturers may add the ENERGY STAR logo to labels only on those covered products that are contemplated by the Memorandum of Understanding.

■ 8. In § 305.12, revise paragraphs (g)(12)(ii), (g)(13)(ii), (g)(14) introductory text, and (g)(14)(ii) to read as follows:

§ 305.12 Labeling for central air conditioners, heat pumps, and furnaces.

* * * * *

(g) * * *

(12) * * *

(ii) A map appropriate for the model and accompanying text as illustrated in

the sample label 7 in appendix L of this part.

* * * * *

(13) * * *

(ii) A map appropriate for the model and accompanying text as illustrated in the sample label 7 in appendix L of this part.

* * * * *

(14) For any single-package air conditioner with a minimum EER below 11.0, the label must contain the following regional standards information:

* * * * *

(ii) A map appropriate for the model and accompanying text as illustrated in the sample label 7 in appendix L of this part.

* * * * *

§ 305.16 [Amended]

■ 9. Amend § 305.16 by removing paragraph (a)(5).

■ 10. Appendix C1 to part 305 is revised to read as follows:

Appendix C1 to Part 305—Compact Dishwashers

Range Information

''Compact'' includes countertop dishwasher models with a capacity of fewer than eight (8) place settings. Place settings shall be in accordance with appendix C to 10 CFR part 430, subpart B. Load patterns shall conform to the operating normal for the model being tested.

Capacity	Range of estimated annual energy costs (dollars/year)	
	Low	High
Compact	$17	$27

■ 11. Appendix C2 to part 305 is revised to read as follows:

Appendix C2 to Part 305—Standard Dishwashers

Range Information

''Standard'' includes dishwasher models with a capacity of eight (8) or more place settings. Place settings shall be in accordance with appendix C to 10 CFR part 430, subpart B. Load patterns shall conform to the operating normal for the model being tested.

Capacity	Range of estimated annual energy costs (dollars/year)	
	Low	High
Standard	$26	$40

■ 12. Appendix E to part 305 is revised to read as follows:

Appendix E to Part 305—Room Air Conditioners

Range Information

Manufacturer's rated cooling capacity in Btu's/hr	Range of estimated annual energy costs (dollars/year)	
	Low	High
Without Reverse Cycle and with Louvered Sides:		
Less than 6,000 Btu	$40	$53
6,000 to 7,999 Btu	48	72
8,000 to 13,999 Btu	65	127
14,000 to 19,999 Btu	115	182
20,000 and more Btu	189	386
Without Reverse Cycle and without Louvered Sides:		
Less than 6,000 Btu	(*)	(*)
6,000 to 7,999 Btu	58	80
8,000 to 13,999 Btu	69	147
14,000 to 19,999 Btu	117	158
20,000 and more Btu	(*)	(*)
With Reverse Cycle and with Louvered Sides	68	238
With Reverse Cycle, without Louvered Sides	(*)	(*)

* No sufficient data submitted.

■ 13. Revise appendices G1, G2, G3, G4, G5, G6, G7, and G8 to read as follows:

Appendix G1 to Part 305—Furnaces—Gas

Furnace type	Range of annual fuel utilization efficiencies (AFUEs)	
	Low	High
Non-Weatherized Gas Furnaces—All Capacities	80.0	98.7
Weatherized Gas Furnaces—All Capacities	81.0	95.0

Appendix G2 to Part 305—Furnaces—Electric

Furnace type	Range of annual fuel utilization efficiencies (AFUEs)	
	Low	High
Electric Furnaces—All Capacities	100.0	100.0

Appendix G3 to Part 305—Furnaces—Oil

Type	Range of annual fuel utilization efficiencies (AFUEs)	
	Low	High
Non-Weatherized Oil Furnaces—All Capacities	83.0	96.7
Weatherized Oil Furnaces—All Capacities	78.0	83.0

Appendix G4 to Part 305—Mobile Home Furnaces—Gas

Type	Range of annual fuel utilization efficiencies (AFUEs)	
	Low	High
Mobile Home Gas Furnaces—All Capacities	80.0	97.3

Appendix G5 to Part 305—Mobile Home Furnaces—Oil

Type	Range of annual fuel utilization efficiencies (AFUEs)	
	Low	High
Mobile Home Oil Furnaces—All Capacities	80.0	87.0

Appendix G6 to Part 305—Boilers (Gas)

Type	Range of annual fuel utilization efficiencies (AFUEs)	
	Low	High
Gas Boilers (except steam)—All Capacities	82.0	96.8
Gas Boilers (steam)—All Capacities	80.4	83.4

Appendix G7 to Part 305—Boilers (Oil)

Type	Range of annual fuel utilization efficiencies (AFUEs)	
	Low	High
Oil Boilers—All Capacities	82.0	90.0

Appendix G8 to Part 305—Boilers (Electric)

Type	Range of annual fuel utilization efficiencies (AFUEs)	
	Low	High
Electric Boilers—All Capacities	100	100

■ 14. Appendices J1 and J2 are revised to read as follows:

Appendix J1 to Part 305—Pool Heaters—Gas

Range Information

Manufacturer's rated heating capacities	Range of thermal efficiencies (percent)			
	Natural Gas		Propane	
	Low	High	Low	High
All capacities	82.0	96.0	82.0	96.0

Appendix J2 to Part 305—Pool Heaters—Oil

Range Information

Manufacturer's rated heating capacities	Range of thermal efficiencies (percent)	
	Low	High
All capacities	(*)	(*)

* No data submitted.

Appendix K to Part 305 [Removed]

■ 15. Appendix K to part 305 is removed.

■ 16. Appendices K1 and K2 are added to read as follows:

Appendix K1 to Part 305—Representative Average Unit Energy Costs for Refrigerators, Refrigerator–Freezers, Freezers, Clothes Washers, and Water Heater Labels

This Table contains the representative unit energy costs that must be utilized to calculate estimated annual energy cost disclosures required under §§ 305.11 and 305.20 for refrigerators, refrigerator-freezers, freezers, clothes washers, and water heaters. This Table is based on information published by the U.S. Department of Energy in 2013.

Type of energy	In commonly used terms	As required by DOE test procedure
Electricity	¢12.00/kWh [2] [3]	$.1200/kWh.
Natural Gas	$1.09/therm [4] or $11.12/MCF [5] [6]	$0.0000109/Btu.
No. 2 Heating Oil	$3.80/gallon [7]	$0.00002740/Btu.
Propane	$2.41/gallon [8]	$0.00002639/Btu.
Kerosene	$4.21/gallon [9]	$0.00003119/Btu.

[1] Btu stands for British thermal unit.
[2] kWh stands for kiloWatt hour.
[3] 1 kWh = 3,412 Btu.
[4] 1 therm = 100,000 Btu. Natural gas prices include taxes.
[5] MCF stands for 1,000 cubic feet.
[6] For the purposes of this table, 1 cubic foot of natural gas has an energy equivalence of 1,023 Btu.
[7] For the purposes of this table, 1 gallon of No. 2 heating oil has an energy equivalence of 138,690 Btu.
[8] For the purposes of this table, 1 gallon of liquid propane has an energy equivalence of 91,333 Btu.
[9] For the purposes of this table, 1 gallon of kerosene has an energy equivalence of 135,000 Btu.

Appendix K2 to Part 305—Representative Average Unit Energy Costs for Dishwasher and Room Air Conditioner Labels

This Table contains the representative unit energy costs that must be utilized to calculate estimated annual energy cost disclosures required under §§ 305.11 and 305.20 for dishwashers and room air conditioners. This Table is based on information published by the U.S. Department of Energy in 2017.

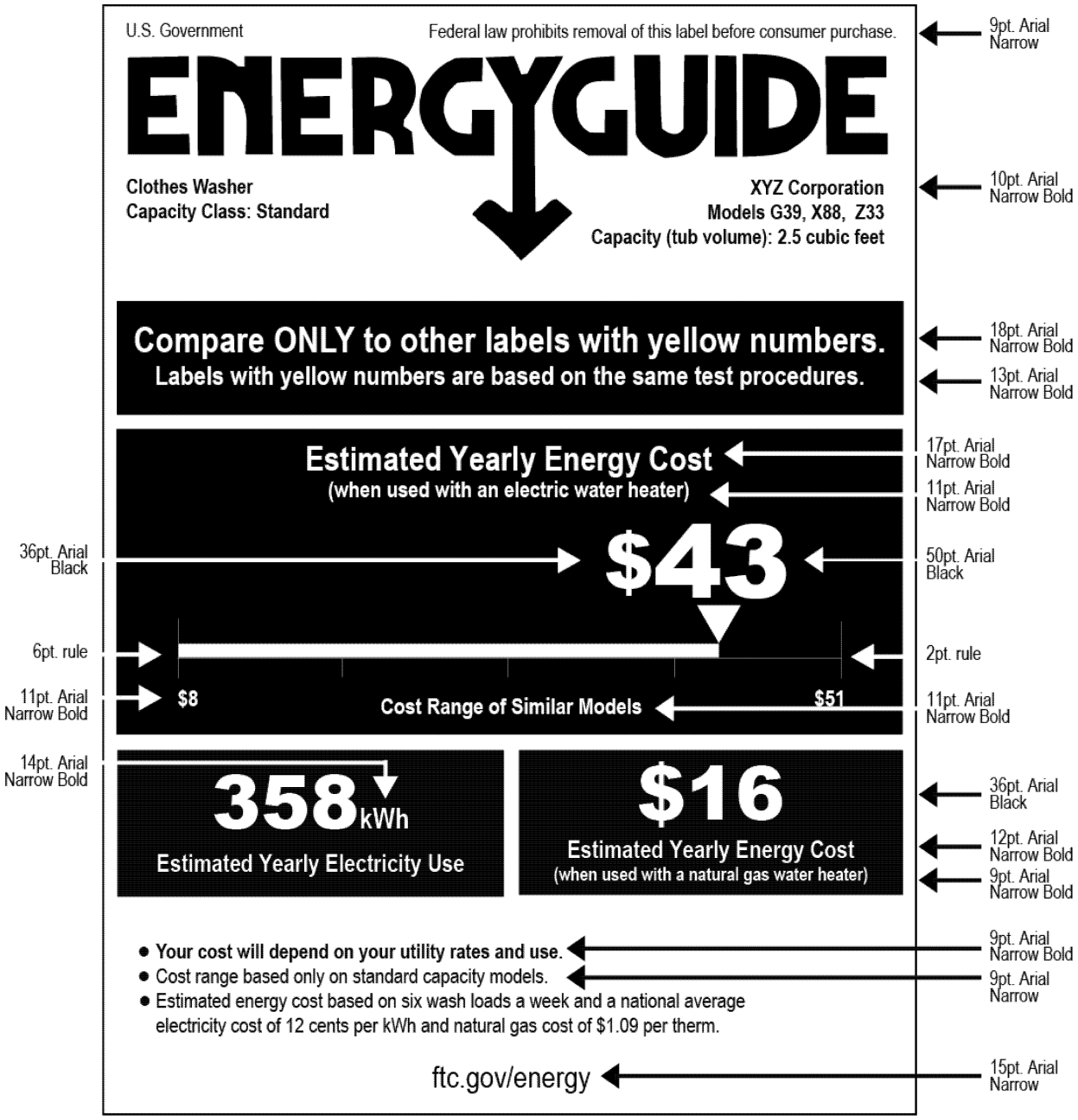
Type of energy	In commonly used terms	As required by DOE test procedure
Electricity	¢13.00/kWh [2] [3]	$.1300/kWh.
Natural Gas	$1.05/therm [4] or $10.86/MCF [5] [6]	$0.00001052/Btu.
No. 2 Heating Oil	$2.59/gallon [7]	$0.00001883/Btu.
Propane	$1.53/gallon [8]	$0.00001672/Btu.
Kerosene	$3.01/gallon [9]	$0.00002232/Btu.

[1] Btu stands for British thermal units.
[2] kWh stands for kilowatt hour.
[3] kWh = 3,412 Btu.
[4] therm = 100,000 Btu.
[5] MCF stands for 1,000 cubic feet.
[6] For the purposes of this table, one cubic foot of natural gas has an energy equivalence of 1,032 Btu.
[7] For the purposes of this table, one gallon of No. 2 heating oil has an energy equivalence of 137,561 Btu.
[8] For the purposes of this table, one gallon of liquid propane has an energy equivalence of 91,333 Btu.
[9] For the purposes of this table, one gallon of kerosene has an energy equivalence of 135,000 Btu.

■ 17. In appendix L, revise prototype label 2, add sample label 2 in alphanumeric order, revise sample labels 3 and 4, add sample label 6 in alphanumeric order, and revise sample labels 9 and 9A to read as follows:

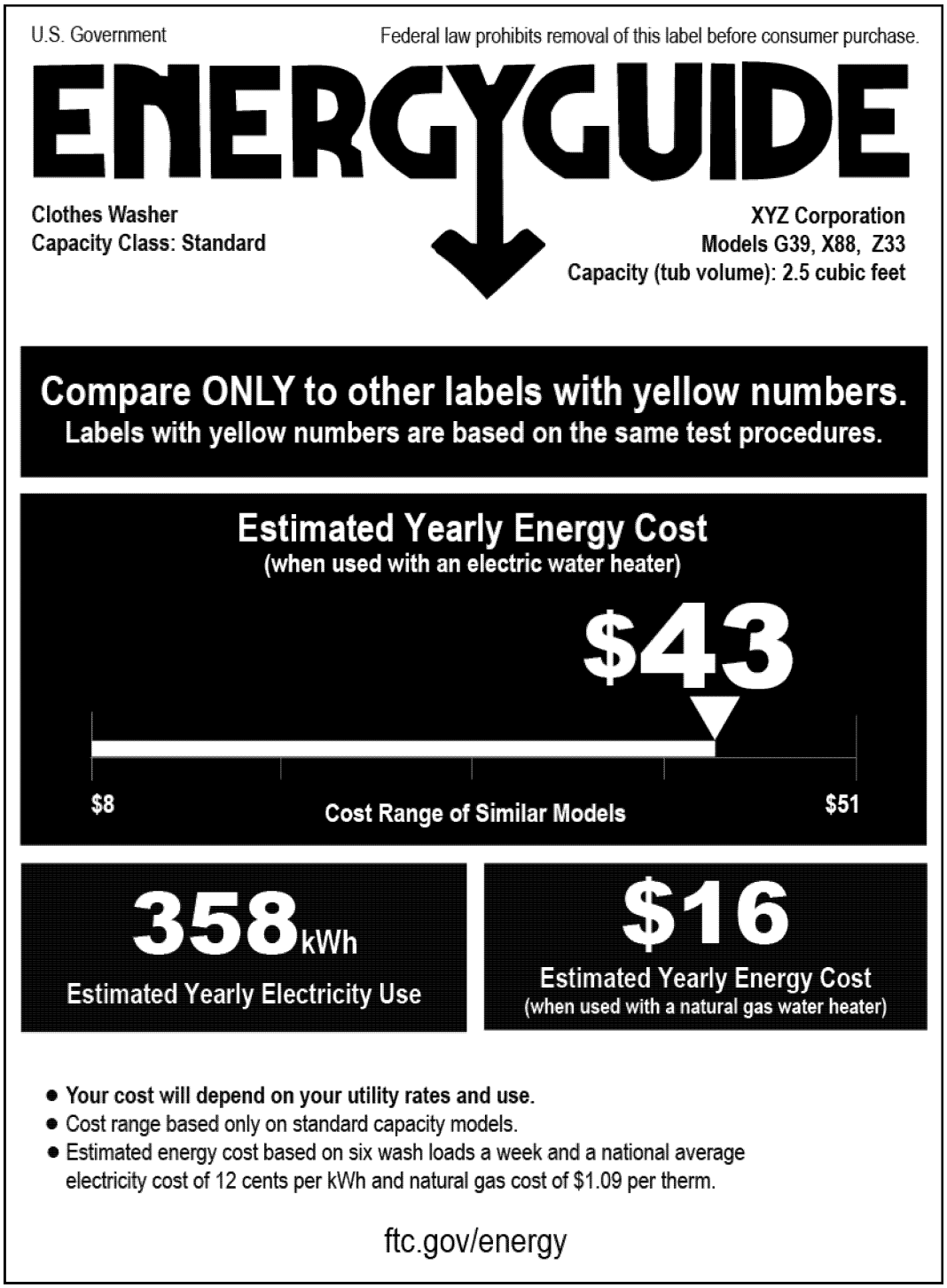
* * * * *

BILLING CODE 6750–01–P



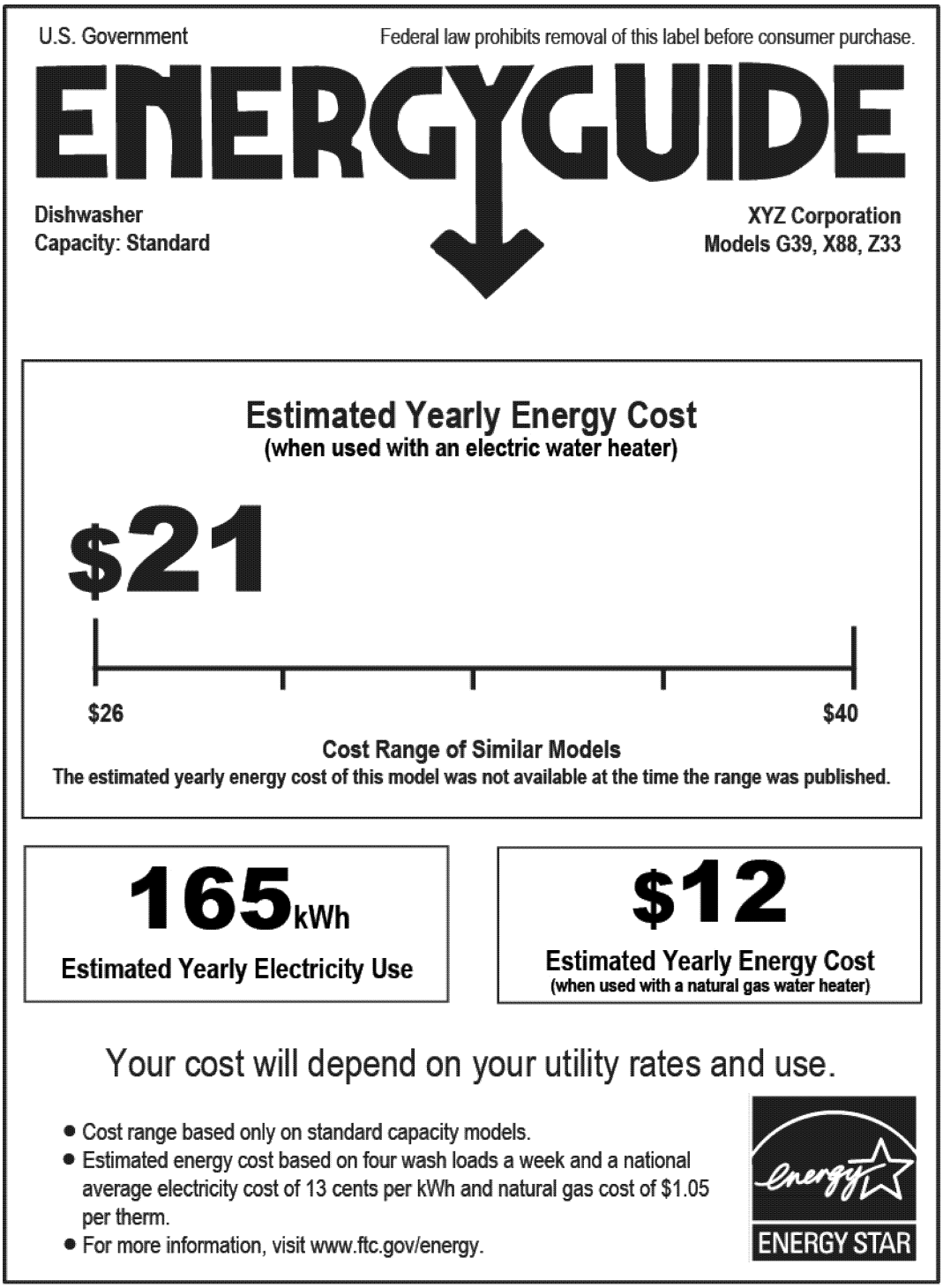
Prototype Label 2 – Clothes Washer

* * * * *



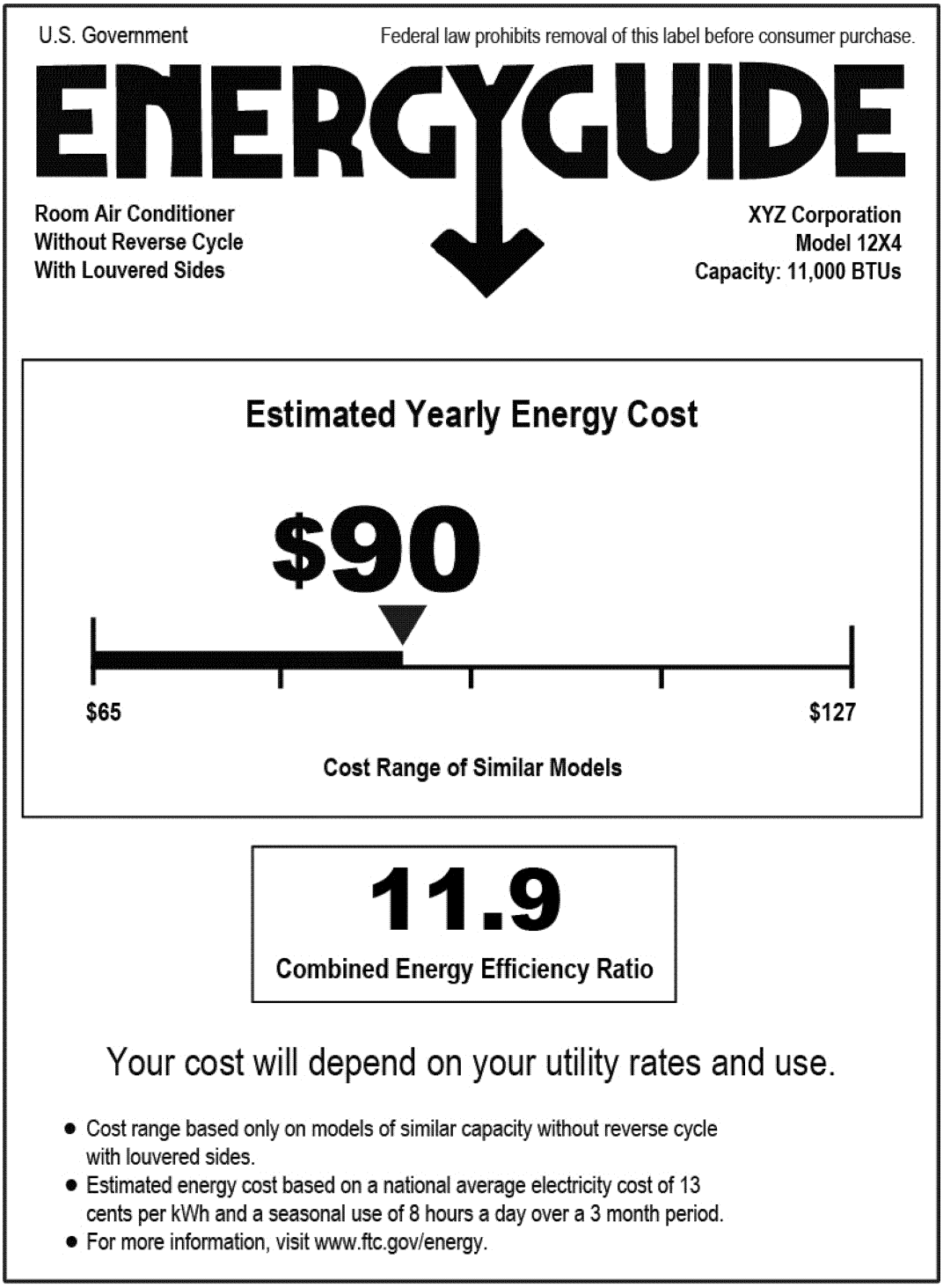
Sample Label 2 – Clothes Washer

* * * * *



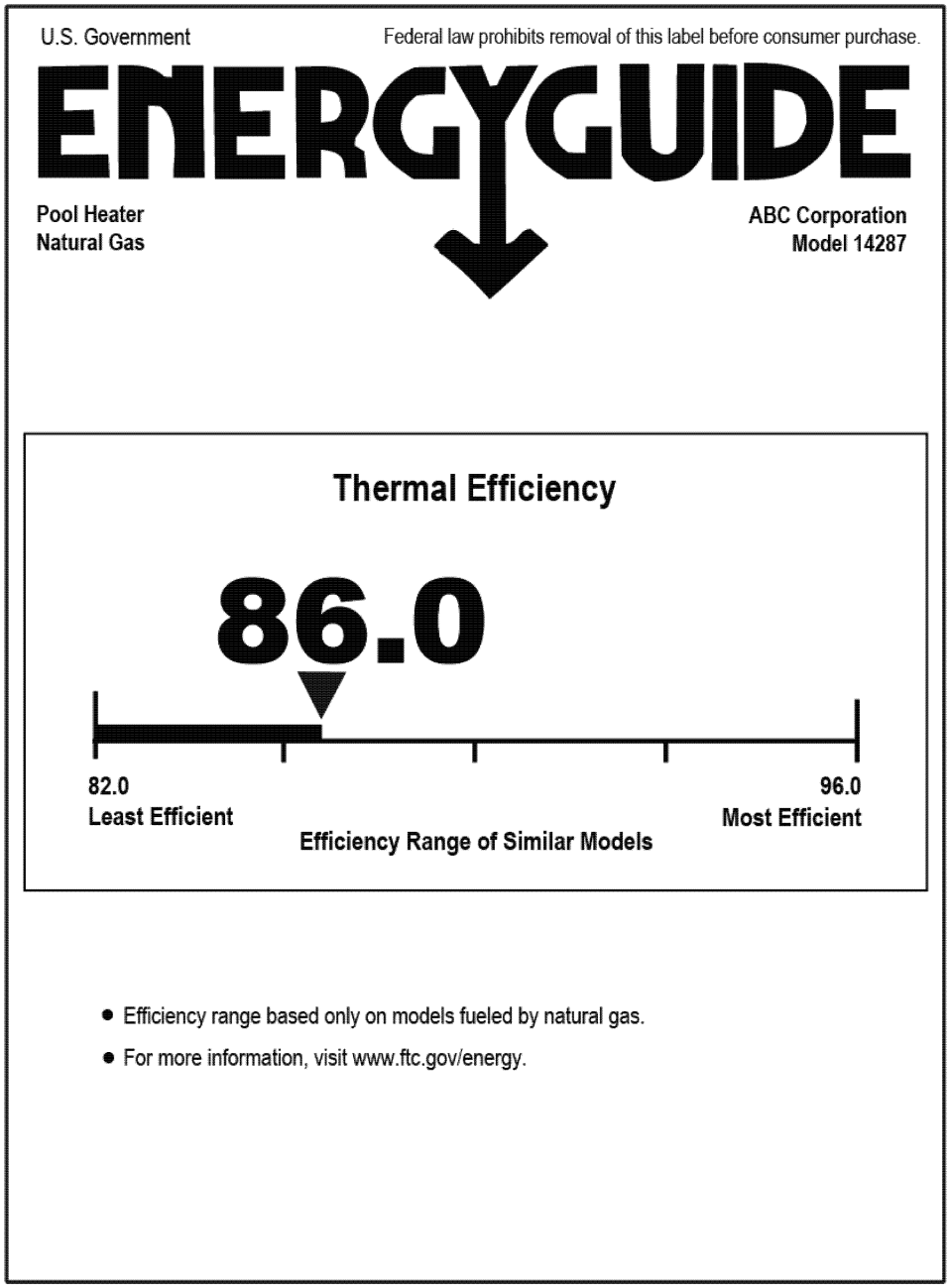
Sample Label 3 -- Dishwasher

* * * * *



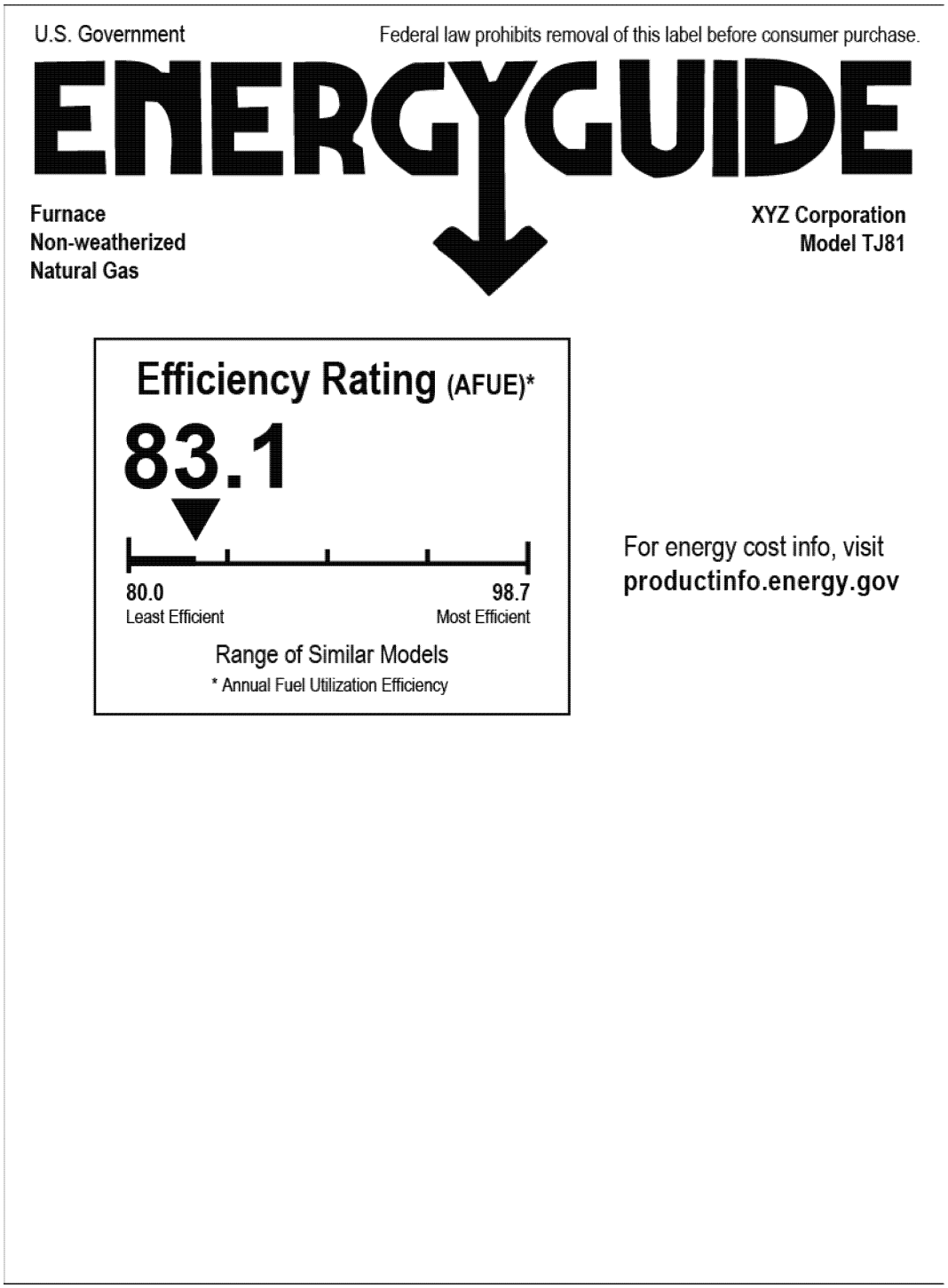
Sample Label 4 – Room Air Conditioner

* * * * *



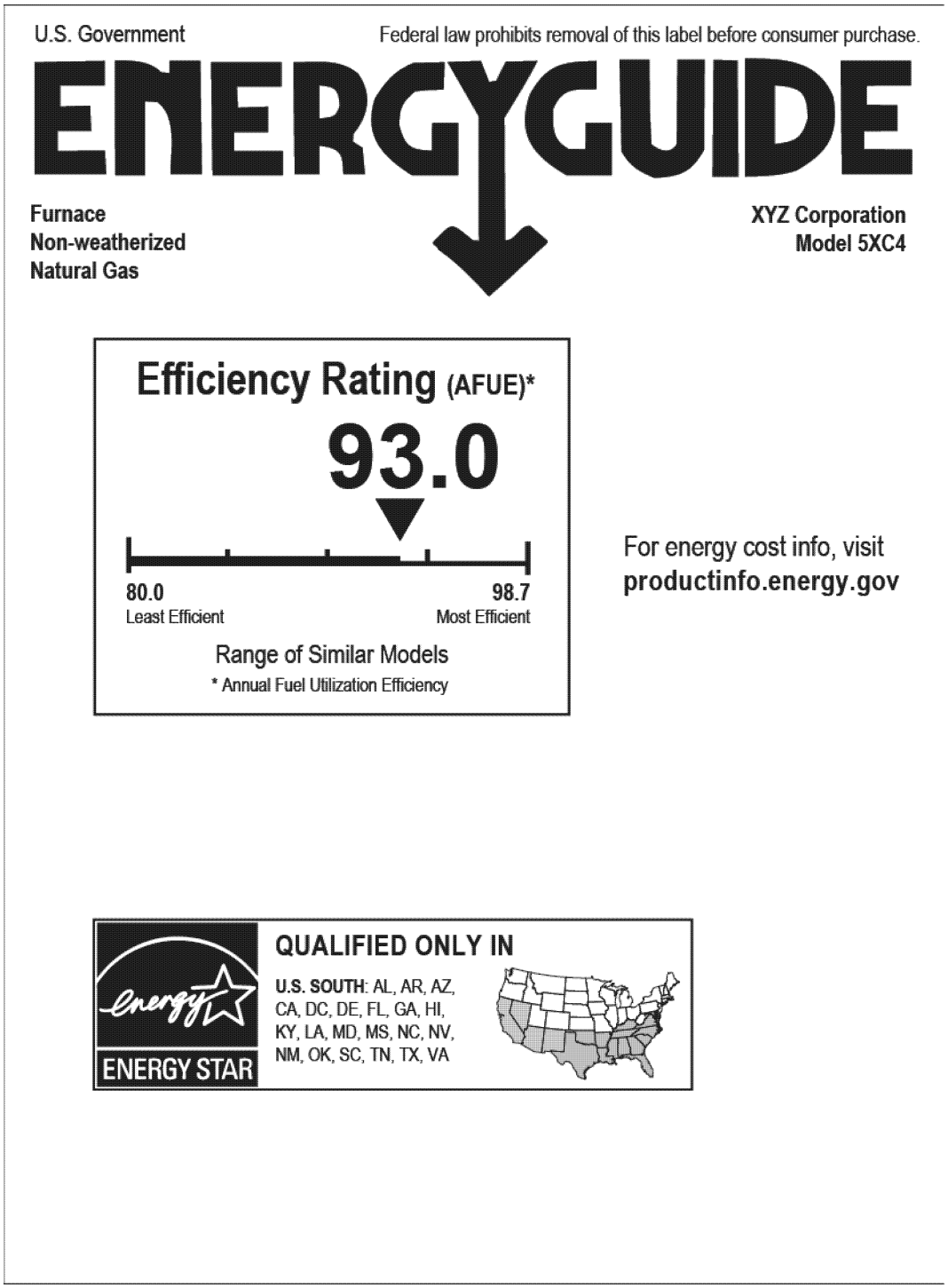
Sample Label 6 -- Pool Heater

* * * * *



Sample Label 9 – Non-weatherized Gas Furnace

* * * * *



Sample Label 9A – Non-weatherized Gas Furnace (ENERGY STAR certified)

* * * * *

By direction of the Commission.

Donald S. Clark,

Secretary.

[FR Doc. 2018–03665 Filed 2–21–18; 8:45 am]

BILLING CODE 6750–01–C

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

19 CFR Part 122

[CBP Dec. 18–01]

Technical Amendment to List of User Fee Airports: Name Changes of Several Airports and the Addition of Five Airports

AGENCY: U.S. Customs and Border Protection; DHS.

ACTION: Final rule; technical amendment.

SUMMARY: This document amends U.S. Customs and Border Protection (CBP) regulations by revising the list of user fee airports to reflect the name changes of several airports and the designation of user fee status for five additional airports: South Texas International Airport at Edinburg in Edinburg, Texas; Florida Keys Marathon Airport in Marathon, Florida; Appleton International Airport in Appleton, Wisconsin; South Bend International Airport in South Bend, Indiana; and Conroe-North Houston Regional Airport in Conroe, Texas. User fee airports are those airports which, while not qualifying for designation as international or landing rights airports, have been approved by the Commissioner of CBP to receive, for a fee, the services of CBP officers for the processing of aircraft entering the United States, and the passengers and cargo of those aircraft.

DATES: *Effective Date:* February 22, 2018.

FOR FURTHER INFORMATION CONTACT: Chris Sullivan, Director, Alternative Funding Program, Office of Field Operations, U.S. Customs and Border Protection at *Christopher.J.Sullivan@cbp.dhs.gov* or 202–344–3907.

SUPPLEMENTARY INFORMATION:

Background

Title 19, part 122 of the Code of Federal Regulations (19 CFR part 122) sets forth regulations relating to the entry and clearance of aircraft in international commerce and the transportation of persons and cargo by aircraft in international commerce. Generally, a civil aircraft arriving from a place outside of the United States is required to land at an airport designated as an international airport. Alternatively, the pilot of a civil aircraft may request permission to land at a specific airport and, if landing rights are granted, the civil aircraft may land at that landing rights airport.

Section 236 of the Trade and Tariff Act of 1984 (Pub. L. 98–573, 98 stat. 2948, 2994 (1984)), codified at 19 U.S.C. 58b, created an option for civil aircraft desiring to land at an airport other than an international airport or a landing rights airport. A civil aircraft arriving from a place outside of the United States may ask for permission to land at an airport designated by the Secretary of Homeland Security [1] as a user fee airport.

Pursuant to 19 U.S.C. 58b, an airport may be designated as a user fee airport if the Commissioner of CBP, as delegated by the Secretary of Homeland Security, determines that the volume or value of business at the airport is insufficient to justify the availability of customs services at the airport and the governor of the state in which the airport is located approves the designation. As the volume or value of business anticipated at this type of airport is insufficient to justify its designation as an international or landing rights airport, the availability of customs services is not paid for out of appropriations from the general treasury of the United States. Instead, customs services are provided on a fully reimbursable basis to be paid for by the user fee airport. The fees charged must be paid by the user fee airport and must be in the amount equal to the expenses incurred by the Commissioner of CBP in providing customs services at such airport, including the salary and expenses of those employed by the Commissioner of CBP to provide the customs services. *See* 19 U.S.C. 58b.

The Commissioner of CBP designates airports as user fee airports in accordance with 19 U.S.C. 58b and pursuant to 19 CFR 122.15. If the Commissioner decides that the conditions for designation as a user fee airport are satisfied, a Memorandum of Agreement (MOA) is executed between the Commissioner of CBP and the user fee airport sponsor. In this manner, user fee airports are designated on a case-by-case basis.

The list of designated user fee airports is set forth in 19 CFR 122.15(b). Periodically, CBP updates the list to reflect designated airports that have not yet been added to the list and to reflect any changes in the names of the designated user fee airports.

Recent Changes Requiring Updates to the List of User Fee Airports

This document updates the list of user fee airports in 19 CFR 122.15(b) by adding the following five airports: South Texas International Airport at Edinburg in Edinburg, Texas; Florida Keys Marathon Airport in Marathon, Florida; Appleton International Airport in Appleton, Wisconsin; South Bend International Airport in South Bend, Indiana; and Conroe-North Houston Regional Airport in Conroe, Texas. During the last several years, the Commissioner of CBP signed MOAs designating each of these five airports as a user fee airport.[2]

Additionally, this document updates the list of user fee airports to reflect name changes of airports that were previously designated as user fee airports. The name changes are shown in the following chart. The left column contains the former name of each airport as it is currently listed in 19 CFR 122.15(b). The right column contains the updated name of each airport.

Name Change From:	*To:*
Melbourne Airport	Orlando Melbourne International Airport.
Jefferson County Airport	Rocky Mountain Metropolitan Airport.
Leesburg Regional Airport	Leesburg International Airport.
Manchester Airport	Manchester-Boston Regional Airport.

[1] Sections 403(1) and 411 of the Homeland Security Act of 2002 (Pub. L. 107–296, 116 stat. 2135, 2178–79 (2002)), codified at 6 U.S.C. 203(1) and 211, transferred certain functions, including the authority to designate user fee facilities, from the U.S. Customs Service of the Department of the Treasury to the Department of Homeland Security.

[2] The Commissioner of CBP signed an MOA designating Conroe-North Houston Regional Airport on June 14, 2016, an MOA designating South Bend International Airport on July 5, 2016, an MOA designating South Texas International Airport at Edinburg on September 18, 2014, an MOA designating Florida Keys Marathon Airport on April 3, 2015, and an MOA designating Appleton International Airport on October 23, 2015.

Name Change From:	*To:*
Collin County Regional Airport	McKinney National Airport.
Midland International Airport	Midland International Air and Space Port.
Rogers Municipal Airport	Rogers Executive Airport—Carter Field.
St. Augustine Airport	Northeast Florida Regional Airport.
Waukegan Regional Airport	Waukegan National Airport.
Binghamton Regional Airport	Greater Binghamton Airport.

Inapplicability of Public Notice and Delayed Effective Date Requirements

Under the Administrative Procedure Act (5 U.S.C. 553(b)), an agency is exempted from the prior public notice and comment procedures if it finds, for good cause, that they are impracticable, unnecessary, or contrary to the public interest. This final rule makes conforming changes by updating the list of user fee airports to add five airports that have already been designated by the Commissioner of CBP in accordance with 19 U.S.C. 58b as user fee airports and to update the name of several user fee airports. Because this conforming rule has no substantive impact, is technical in nature, and does not impose additional burdens on or take away any existing rights or privileges from the public, CBP finds for good cause that the prior public notice and comments procedures are impracticable, unnecessary, and contrary to the public interest. For the same reasons, pursuant to 5 U.S.C. 553(d)(3), a delayed effective date is not required.

Regulatory Flexibility Act and Executive Orders 12866 and 13771

Because no notice of proposed rulemaking is required, the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) do not apply. This amendment does not meet the criteria for a ''significant regulatory action'' as specified in Executive Order 12866. Additionally, because this amendment is not a significant regulatory action it is not subject to the requirements of Executive Order 13771.

Paperwork Reduction Act

There is no new collection of information required in this document; therefore, the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3507) are inapplicable.

Signing Authority

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

List of Subjects in 19 CFR Part 122

Air carriers, Aircraft, Airports, Customs duties and inspection, Freight.

Amendments to Regulations

Part 122, of title 19 of the Code of Federal Regulations (19 CFR part 122) is amended as set forth below:

PART 122—AIR COMMERCE REGULATIONS

■ 1. The general authority citation for part 122 continues to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 58b, 66, 1431, 1433, 1436, 1448, 1459, 1590, 1594, 1623, 1624, 1644, 1644a, 2071 note.

* * * * *

■ 2. In § 122.15, amend the table in paragraph (b) by:

■ a. Adding an entry for ''Appleton, Wisconsin'' in alphabetical order;

■ b. Revising the entry for ''Broomfield, Colorado'';

■ c. Adding entries for ''Conroe, Texas'' and ''Edinburg, Texas'' in alphabetical order;

■ d. Revising the entries for ''Johnson City, New York'', ''Leesburg, Florida'', and ''Manchester, New Hampshire'';

■ e. Adding an entry for ''Marathon, Florida'' in alphabetical order;

■ f. Revising the entries for ''McKinney, Texas'', ''Melbourne, Florida'', ''Midland, Texas'', and ''Rogers, Arkansas'';

■ g. Adding an entry for ''South Bend, Indiana'' in alphabetical order; and

■ h. Revising the entries for ''St. Augustine, Florida'' and ''Waukegan, Illinois''.

The additions and revisions read as follows:

§ 122.15 User fee airports.

* * * * *

(b) * * *

Location	Name
* * * *	* * *
Appleton, Wisconsin	Appleton International Airport.
* * * *	* * *
Broomfield, Colorado	Rocky Mountain Metropolitan Airport.
* * * *	* * *
Conroe, Texas	Conroe-North Houston Regional Airport.
* * * *	* * *
Edinburg, Texas	South Texas International Airport at Edinburg.
* * * *	* * *
Johnson City, New York	Greater Binghamton Airport.
* * * *	* * *
Leesburg, Florida	Leesburg International Airport.
* * * *	* * *
Manchester, New Hampshire	Manchester-Boston Regional Airport.
Marathon, Florida	Florida Keys Marathon Airport.

Location	Name
* * * *	* * *
McKinney, Texas	McKinney National Airport.
Melbourne, Florida	Orlando Melbourne International Airport.
* * * *	* * *
Midland, Texas	Midland International Air and Space Port.
* * * *	* * *
Rogers, Arkansas	Rogers Executive Airport—Carter Field.
* * * *	* * *
South Bend, Indiana	South Bend International Airport.
St. Augustine, Florida	Northeast Florida Regional Airport.
* * * *	* * *
Waukegan, Illinois	Waukegan National Airport.
* * * *	* * *

* * * * *

Dated: February 15, 2018.

Kevin K. McAleenan,

Acting Commissioner, U.S. Customs and Border Protection.

[FR Doc. 2018–03581 Filed 2–21–18; 8:45 am]

BILLING CODE 9111–14–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R03–OAR–2017–0382; FRL–9974–66—Region 3]

Approval and Promulgation of Air Quality Implementation Plans; Virginia; Revisions To Implement the Revocation of the 1997 Ozone NAAQS

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is taking final action to approve revisions to the Commonwealth of Virginia (Virginia) state implementation plan (SIP). The revisions are related to the implementation of the 2008 ozone national ambient air quality standards (NAAQS or standards) and the revocation of the 1997 ozone NAAQS. EPA is approving these revisions updating the Virginia SIP to reflect the revocation of the 1997 ozone NAAQS in accordance with the requirements of the Clean Air Act (CAA).

DATES: This final rule is effective on March 26, 2018.

ADDRESSES: EPA has established a docket for this action under Docket ID Number EPA–R03–OAR–2017–0382. All documents in the docket are listed on the *http://www.regulations.gov* website. Although listed in the index, some information is not publicly available, *e.g.,* confidential business information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy form. Publicly available docket materials are available 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: Sara Calcinore, (215) 814–2043, or by email at *calcinore.sara@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

Under the CAA, EPA establishes NAAQS for criteria pollutants [1] in order to protect human health and the environment. In response to scientific evidence linking ozone exposure to adverse health effects, EPA promulgated the first ozone NAAQS, the 0.12 part per million (ppm) 1-hour ozone NAAQS, in 1979. *See* 44 FR 8202 (February 8, 1979). The CAA requires EPA to review and reevaluate the NAAQS every 5 years in order to consider updated information regarding the effects of the criteria pollutants on human health and the environment. On July 18, 1997, EPA promulgated a revised ozone NAAQS, referred to as the 1997 ozone NAAQS, of 0.08 ppm averaged over eight hours. 62 FR 38855. This 8-hour ozone NAAQS was determined to be more protective of public health than the previous 1979 1-hour ozone NAAQS. In 2008, EPA strengthened the 8-hour ozone NAAQS from 0.08 to 0.075 ppm. The 0.075 ppm standard is referred to as the 2008 ozone NAAQS and is more stringent than the previous 1997 ozone NAAQS. *See* 73 FR 16436 (March 27, 2008).[2]

On March 6, 2015, EPA issued a final rule addressing a range of nonattainment area SIP requirements for the 2008 ozone NAAQS. 80 FR 12264. This final rule also revoked the 1997 ozone NAAQS and established anti-backsliding requirements for areas not attaining the 1997 ozone NAAQS in 40 CFR 51.1105 that became effective once the 1997 ozone NAAQS was revoked. The anti-backsliding provisions require states to retain all applicable control requirements for the 1997 ozone NAAQS, while enabling states, where possible, to focus planning efforts on meeting the more protective 2008 ozone NAAQS. According to EPA's final rule, the revocation of the 1997 ozone NAAQS was effective as of April 6, 2015.

On September 9, 2016, Virginia amended the Virginia Administrative Code to be consistent with EPA's March 6, 2015 final rule. On February 10, 2017, Virginia, through the Virginia Department of Environmental Quality (VADEQ), formally submitted a SIP revision (Revision G16) reflecting these amendments.

On August 17, 2017 (82 FR 39097 and 82 FR 39031), EPA simultaneously published a notice of proposed rulemaking (NPR) and a direct final rule (DFR) for Virginia approving the SIP revision. EPA received two adverse comments on the rulemaking and attempted to withdraw the DFR prior to

[1] The ''criteria pollutants'' include ozone (O_3), particulate matter (PM), sulfur dioxide (SO_2), nitrogen dioxide (NO_2), carbon monoxide (CO), and lead (Pb).

[2] On October 1, 2015, EPA strengthened the ground-level ozone NAAQS to 0.070 ppm. *See* 80 FR 65292 (October 26, 2015). This rulemaking addresses the 2008 ozone NAAQS and does not address the 2015 ozone NAAQS.

the effective date of October 16, 2017. However, EPA inadvertently did not withdraw the DFR prior to that date and the rule automatically and prematurely became effective on October 16, 2017, revising Virginia's SIP to reflect the revocation of the 1997 ozone NAAQS. In the NPR, EPA had proposed to approve the SIP revision, which included amendments made to provisions in Virginia's State Air Pollution Control Board's Regulations for the Control and Abatement of Air Pollution including 9VAC5–20–204, 9VAC5–30–55, 9VAC5–151–20, and 9VAC5–160–30. These revisions to the Virginia Administrative Code amended Virginia's regulatory provisions to reflect EPA's revocation of the 1997 ozone NAAQS and the implementation of the 2008 ozone NAAQS. In this final rulemaking, EPA is responding to the comments submitted on the proposed revision to the Virginia SIP and is reapproving the revisions to the Virginia SIP to reflect the revocation of the 1997 ozone NAAQS after our failure to withdraw the DFR (after EPA received adverse public comments) prior to the October 16, 2017 effective date of the DFR.

II. Summary of SIP Revision and EPA Analysis

Virginia's February 10, 2017 SIP submittal included amended versions of 9VAC5–20–204, 9VAC5–30–55, 9VAC5–151–20, and 9VAC5–160–30. Virginia requested that EPA approve the SIP revision so that these amended regulations would become part of the Virginia SIP. The amendment to 9VAC5–20–204 added text stating that the list of Northern Virginia moderate nonattainment areas under the 1997 ozone NAAQS is no longer effective after April 6, 2015, the effective date of the revocation of the 1997 ozone NAAQS. The amendment to 9VAC5–30–55 added text stating that the primary and secondary ambient air quality standard of 0.08 ppm shall no longer apply after April 6, 2015. Virginia also amended the Regulation for Transportation Conformity and the Regulation for General Conformity by adding clarifying text to 9VAC5–151–20 and 9VAC5–160–30 stating that ''The provisions of this chapter shall not apply in nonattainment and maintenance areas that were designated nonattainment or maintenance under a federal standard that has been revoked.'' These revisions to the Virginia Administrative Code reflect EPA's revocation of the 1997 ozone NAAQS.

EPA's review of this material indicates the February 10, 2017 submittal is approvable as it revises regulations to be consistent with EPA's final rule implementing the 2008 ozone NAAQS. *See* 80 FR 12264 (March 6, 2015). The revisions update regulations to reflect the revocation of the 1997 NAAQS, which was effective April 6, 2015. Therefore, the revisions do not affect emissions of air pollutants or interfere with any applicable requirement concerning attainment or reasonable further progress or any other applicable requirements in the CAA. Thus, EPA finds the revision approvable in accordance with section 110, including section 110(l), of the CAA.

III. Public Comments and EPA's Responses

EPA received two anonymous public comments on our action to approve the February 10, 2017 SIP submittal.

Comment: The first commenter stated that EPA cannot revoke the 1997 ozone NAAQS and cited a current court case in the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit). The commenter recommended that EPA wait until the D.C. Circuit's decision and not ''loosen standards.''

Response: EPA would like to clarify that the proposed revision to the Virginia SIP does not revoke the 1997 ozone NAAQS as the 1997 ozone NAAQS were revoked previously by EPA in a separate rulemaking effective April 6, 2015. *See* 80 FR 12264. The commenter's ability to challenge revocation of the 1997 ozone NAAQS was in that prior rulemaking. This particular rulemaking action is only removing references to the ''revoked'' 1997 ozone NAAQS that had been in Virginia's SIP. Thus, the commenter's statement that EPA should not revoke the 1997 ozone NAAQS is not relevant to this rulemaking.

EPA acknowledges that there is presently a legal challenge in the D.C. Circuit to the rulemaking which revoked the 1997 ozone NAAQS.[3] However, EPA disagrees with the commenter that EPA should wait for the outcome of this litigation before approving the Virginia SIP revision. As stated above, this SIP revision does not revoke the 1997 ozone NAAQS as the revocation of the NAAQS was effective on April 6, 2015 per EPA's March 6, 2015 rule. Additionally, nothing in section 110 of the CAA prevents Virginia from removing its references to the revoked 1997 ozone NAAQS from its SIP, as the removal does not affect emissions of air pollutants as it does not impact any applicable SIP requirements that apply to an area, interfere with any applicable requirements in the CAA, nor interfere with reasonable further progress. *See* section 110(l) of the CAA. Thus, EPA finds the revision approvable in accordance with section 110, including section 110(l), of the CAA.

In response to the commenter's concern that EPA's approval will ''loosen standards,'' EPA notes that the 2008 ozone NAAQS of 0.075 ppm, which EPA is presently implementing in collaboration with states such as Virginia, is more protective of human health and the environment than the 1997 ozone NAAQS of 0.08 ppm. In addition, the ozone nonattainment areas in Virginia are the same for the 1997 ozone NAAQS as for the 2008 ozone NAAQS. Thus, removing the revoked 1997 ozone NAAQS from the Virginia SIP is not expected to have any emissions impact nor interfere with reasonable further progress or any applicable CAA requirement. *See also* 80 FR 12264.

Comment Summary: The second commenter requested that EPA not revoke the ozone NAAQS.

Response: As discussed in detail in response to the first comment, EPA's approval of the removal of references in the Virginia SIP to the revoked 1997 ozone NAAQS does not actually revoke the 1997 ozone NAAQS as EPA previously effectuated that revocation in a prior, separate rulemaking. *See* 80 FR 12264.

IV. Final Action

EPA is approving the Virginia SIP revision submitted on February 10, 2017, which includes amendments made to several sections of the Virginia Administrative Code, including 9VAC5–20–204, 9VAC5–30–55, 9VAC5–151–20, and 9VAC5–160–30, as a revision to the Virginia SIP because the revisions meet the requirements of CAA section 110. EPA is reapproving the revisions to Virginia's SIP because the revisions were added to the SIP prematurely on October 16, 2017 when EPA failed to withdraw its DFR after receiving two adverse comments on our direct final approval of the revisions to the Virginia SIP to reflect the revocation of the 1997 ozone NAAQS. This rule, which responds to the adverse comments received, finalizes our approval.

V. General Information Pertaining to SIP Submittals From the Commonwealth of Virginia

In 1995, Virginia adopted legislation that provides, subject to certain conditions, for an environmental assessment (audit) ''privilege'' for voluntary compliance evaluations

[3] *South Coast Air Quality Management District* v. *EPA,* Case Nos. 15–1115, 15–1123 (U.S. Court of Appeals, D.C. Cir.).

performed by a regulated entity. The legislation further addresses the relative burden of proof for parties either asserting the privilege or seeking disclosure of documents for which the privilege is claimed. Virginia's legislation also provides, subject to certain conditions, for a penalty waiver for violations of environmental laws when a regulated entity discovers such violations pursuant to a voluntary compliance evaluation and voluntarily discloses such violations to the Commonwealth and takes prompt and appropriate measures to remedy the violations. Virginia's Voluntary Environmental Assessment Privilege Law, Va. Code Sec. 10.1–1198, provides a privilege that protects from disclosure documents and information about the content of those documents that are the product of a voluntary environmental assessment. The Privilege Law does not extend to documents or information that: (1) Are generated or developed before the commencement of a voluntary environmental assessment; (2) are prepared independently of the assessment process; (3) demonstrate a clear, imminent and substantial danger to the public health or environment; or (4) are required by law.

On January 12, 1998, the Commonwealth of Virginia Office of the Attorney General provided a legal opinion that states that the Privilege law, Va. Code Sec. 10.1–1198, precludes granting a privilege to documents and information ''required by law,'' including documents and information ''required by federal law to maintain program delegation, authorization or approval,'' since Virginia must ''enforce federally authorized environmental programs in a manner that is no less stringent than their federal counterparts. . . .'' The opinion concludes that ''[r]egarding § 10.1–1198, therefore, documents or other information needed for civil or criminal enforcement under one of these programs could not be privileged because such documents and information are essential to pursuing enforcement in a manner required by federal law to maintain program delegation, authorization or approval.''

Virginia's Immunity law, Va. Code Sec. 10.1–1199, provides that ''[t]o the extent consistent with requirements imposed by federal law,'' any person making a voluntary disclosure of information to a state agency regarding a violation of an environmental statute, regulation, permit, or administrative order is granted immunity from administrative or civil penalty. The Attorney General's January 12, 1998 opinion states that the quoted language renders this statute inapplicable to enforcement of any federally authorized programs, since ''no immunity could be afforded from administrative, civil, or criminal penalties because granting such immunity would not be consistent with federal law, which is one of the criteria for immunity.''

Therefore, EPA has determined that Virginia's Privilege and Immunity statutes will not preclude the Commonwealth from enforcing its program consistent with the federal requirements. In any event, because EPA has also determined that a state audit privilege and immunity law can affect only state enforcement and cannot have any impact on federal enforcement authorities, EPA may at any time invoke its authority under the CAA, including, for example, sections 113, 167, 205, 211 or 213, to enforce the requirements or prohibitions of the state plan, independently of any state enforcement effort. In addition, citizen enforcement under section 304 of the CAA is likewise unaffected by this, or any, state audit privilege or immunity law.

VI. Incorporation by Reference

In this rule, EPA is finalizing regulatory text that includes incorporation by reference. In accordance with requirements of 1 CFR 51.5, EPA is finalizing the incorporation by reference of the revisions to 9VAC5–20–204, 9VAC5–30–55, 9VAC5–151–20, and 9VAC5–160–30 of the State Air Pollution Control Board's Regulation for the Control and Abatement of Air Pollution discussed in Section II of this preamble. EPA has made, and will continue to make, these materials generally available through *http://www.regulations.gov* and at the EPA Region III Office (please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section of this preamble for more information). These materials have been approved by EPA for inclusion in the SIP, have been incorporated by reference by EPA into that plan, are fully federally enforceable under sections 110 and 113 of the CAA as of the effective date of the final rulemaking of EPA's approval, and will be incorporated by reference by the Director of the Federal Register in the next update to the SIP compilation.[4]

VII. Statutory and Executive Order Reviews

A. General Requirements

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

- Is not a ''significant regulatory action'' subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- is not an Executive Order 13771 (82 FR 9339, February 2, 2017) regulatory action because SIP approvals are exempted under Executive Order 12866;
- 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).

The SIP is not approved to apply on any Indian reservation land as defined in 18 U.S.C. 1151 or in any other area where EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the rule does not have tribal implications and will not impose substantial direct costs on tribal governments or preempt tribal law as

[4] 62 FR 27968 (May 22, 1997).

specified by Executive Order 13175 (65 FR 67249, November 9, 2000).

B. Submission to Congress and the Comptroller General

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

C. Petitions for Judicial Review

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by April 23, 2018. 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 to approve revised provisions of the Virginia Administrative Code including 9VAC5–20–204, 9VAC5–30–55, 9VAC5–151–20, and 9VAC5–160–30 for inclusion in the Virginia SIP may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Nitrogen dioxide, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

Dated: February 9, 2018.

Cosmo Servidio,

Regional Administrator, Region III.

40 CFR part 52 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.*

Subpart VV—Virginia

■ 2. In § 52.2420, the table in paragraph (c) is amended by revising the entries for Sections 5–20–204, 5–30–55, 5–151–20, and 5–160–30. The revised text reads as follows:

§ 52.2420 Identification of plan.

* * * * *

(c) * * *

EPA-APPROVED VIRGINIA REGULATIONS AND STATUTES

State citation	Title/subject	State effective date	EPA approval date	Explanation [former SIP citation]
*	*	*	*	*
9 VAC 5, Chapter 20 General Provisions				
*	*	*	*	*
Part II Air Quality Programs				
*	*	*	*	*
5–20–204	Nonattainment Areas	11/16/16	2/22/18, [*Insert **Federal Register** Citation*].	Addition of Subdivision C. Previous approval 8/14/15.
*	*	*	*	*
9 VAC 5, Chapter 30 Ambient Air Quality Standards [Part III]				
*	*	*	*	*
5–30–55	Ozone (8-hour, 0.08 ppm)	11/16/16	2/22/18, [*Insert **Federal Register** Citation*].	Subdivision D. is revised to read that the 1997 8-hour ozone NAAQS no longer apply after April 6, 2015. Previous approval 6/11/13.
*	*	*	*	*
9 VAC 5, Chapter 151 Transportation Conformity				
*	*	*	*	*
Part II General Provisions				
5–151–20	Applicability	11/16/16	2/22/18, [*Insert **Federal Register** Citation*].	Subdivision B. is amended to address revoked federal standards. Previous approval 11/20/09.

EPA-APPROVED VIRGINIA REGULATIONS AND STATUTES—Continued

State citation	Title/subject	State effective date	EPA approval date	Explanation [former SIP citation]
*	*	*	*	*
9 VAC 5, Chapter 160 General Conformity				
*	*	*	*	*
Part II General Provisions				
5–160–30	Applicability	11/16/16	2/22/18, [*Insert **Federal Register** Citation*].	Subdivision A. is amended to address revoked federal standards. Previous approval 12/12/11.
*	*	*	*	*

* * * * *

[FR Doc. 2018–03524 Filed 2–21–18; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R09–OAR–2017–0468; FRL–9974–68—Region 9]

Approval of Arizona Air Plan Revisions, Arizona Department of Environmental Quality

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is taking final action to approve a revision to the Arizona Department of Environmental Quality (ADEQ) portion of the Arizona State Implementation Plan (SIP). This revision concerns emissions of lead-bearing fugitive dust from roads, storage piles and other activities associated with the primary copper smelter located in Hayden, Arizona. We are approving a state rule and associated appendix to regulate these emissions under the Clean Air Act (CAA or the Act).

DATES: This rule is effective on March 26, 2018.

ADDRESSES: The EPA has established a docket for this action under Docket ID No. EPA–R09–OAR–2017–0468. All documents in the docket are listed on the *http://www.regulations.gov* website. Although listed in the index, some information is not publicly available, *e.g.,* Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy form. Publicly available docket materials are available 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: Christine Vineyard, EPA Region IX, (415) 947–4125, *vineyard.christine@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document, ''we,'' ''us'' and ''our'' refer to the EPA.

Table of Contents

I. Proposed Action
II. Public Comments and EPA Responses
III. EPA Action
IV. Incorporation by Reference
V. Statutory and Executive Order Reviews

I. Proposed Action

On November 27, 2017 (82 FR 55966), the EPA proposed to approve the following rule and appendix into the Arizona SIP.

Local agency	Rule No.	Rule title	Submitted
ADEQ	R18–2–B1301.01	Limits on Lead-Bearing Fugitive Dust from the Hayden Smelter	04/06/17
ADEQ	Appendix 15	Test Methods for Determining Opacity and Stabilization of Unpaved Roads	04/06/17

We proposed to approve the rule and associated appendix because we determined that they comply with the relevant CAA requirements. Our proposed action contains more information on the rule and associated appendix and our evaluation.

II. Public Comments and EPA Responses

The EPA's proposed action provided a 30-day public comment period. During this period, we received three comments. Two commenters raised issues that are outside of the scope of this rulemaking, including forest management, wildfire suppression, and greenhouse-gas and other emissions from wildfires. A third commenter requested that the EPA ''regulate the amount of poisonous dust that is kicked up into the air.'' As explained in our proposed action, Rule R18–2–B1301.01 establishes requirements to control lead-bearing fugitive dust emissions surrounding the Hayden copper smelter. Our approval of this rule into the Arizona SIP will make these requirements federally enforceable. Commenters did not raise any specific issues germane to the approvability of the rule and appendix.

III. EPA Action

No comments were submitted that change our assessment of the rule and associated appendix as described in our proposed action. Therefore, as authorized in section 110(k)(3) of the Act, the EPA is fully approving this rule and associated appendix into the Arizona SIP.

IV. Incorporation by Reference

In this rule, the EPA is finalizing regulatory text that includes incorporation by reference. In accordance with requirements of 1 CFR 51.5, the EPA is finalizing the

incorporation by reference of the ADEQ rule and associated appendix described in the amendments to 40 CFR part 52 set forth below. The EPA has made, and will continue to make, these documents available through *www.regulations.gov* and at the EPA Region IX Office (please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section of this preamble for more information).

Therefore, these materials have been approved by the EPA for inclusion in the SIP, have been incorporated by reference by the EPA into that plan, are fully federally enforceable under sections 110 and 113 of the CAA as of the effective date of the final rulemaking of the EPA's approval, and will be incorporated by reference by the Director of the Federal Register in the next update to the SIP compilation.[1]

V. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, the EPA's role is to approve state choices, provided that they meet the criteria of the Act. 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);
- Is not an Executive Order 13771 (82 FR 9339, February 2, 2017) regulatory action because SIP approvals are exempted under Executive Order 12866;
- 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 the 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 the EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the rule does not have tribal implications and will not impose substantial direct costs on tribal governments or pre-empt tribal law as specified by Executive Order 13175 (65 FR 67249, November 9, 2000).

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

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by April 23, 2018. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Lead, Particulate matter, Reporting and recordkeeping requirements.

Dated: February 12, 2018.

Alexis Strauss,

Acting Regional Administrator, Region IX.

Part 52, 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.*

Subpart D—Arizona

■ 2. Section 52.120 is amended by adding in paragraph (c), under the table heading ''Table 2—EPA-Approved Arizona Regulations'' a subheading for ''Article 13 (State Implementation Plan Rules for Specific Locations)'' and entries for ''R18–2–B1301.01'' and ''Appendix 15'' after the entry for ''Table 6'' to read as follows:

§ 52.120 Identification of plan.

* * * * *

(c) * * *

[1] 62 FR 27968 (May 22, 1997).

TABLE 2—EPA-APPROVED ARIZONA REGULATIONS

State citation	Title/subject	State effective date	EPA approval date	Additional explanation
Arizona Administrative Code				
*	*	*	*	*
Article 13 (State Implementation Plan Rules For Specific Locations)				
R18–2–B1301.01 ..	Limits on Lead-Bearing Fugitive Dust from the Hayden Smelter.	December 1, 2018	[INSERT **Federal Register** CITATION], February 22, 2018.	Submitted on April 6, 2017.
Appendix 15	Test Methods for Determining Opacity and Stabilization of Unpaved Roads.	May 7, 2017	[INSERT **Federal Register** CITATION], February 22, 2018.	Submitted on April 6, 2017.
*	*	*	*	*

* * * * *

[FR Doc. 2018–03526 Filed 2–21–18; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2017–0314; FRL–9972–04]

Methyl-alpha-D-mannopyranoside (Alpha Methyl Mannoside); Exemption From the Requirement of a Tolerance

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes an exemption from the requirement of a tolerance for residues of the biochemical methyl-alpha-D-mannopyranoside (alpha methyl mannoside) in or on all raw agricultural commodities when applied/used as a plant growth regulator. BRANDT iHammer submitted a petition to EPA under the Federal Food, Drug, and Cosmetic Act (FFDCA), requesting an exemption from the requirement of a tolerance. This regulation eliminates the need to establish a maximum permissible level for residues of alpha methyl mannoside.

DATES: This regulation is effective February 22, 2018. Objections and requests for hearings must be received on or before April 23, 2018, and must be filed in accordance with the instructions provided in 40 CFR part 178 (see also Unit I.C. of the **SUPPLEMENTARY INFORMATION**).

ADDRESSES: The docket for this action, identified by docket identification (ID) number EPA–HQ–OPP–2017–0314, is available at *http://www.regulations.gov* or at the Office of Pesticide Programs Regulatory Public Docket (OPP Docket) in the Environmental Protection Agency Docket Center (EPA/DC), West William Jefferson Clinton Bldg., Rm. 3334, 1301 Constitution Ave. NW, Washington, DC 20460–0001. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the OPP Docket is (703) 305–5805. Please review the visitor instructions and additional information about the docket available at *http://www.epa.gov/dockets.*

FOR FURTHER INFORMATION CONTACT: Robert McNally, Biopesticides and Pollution Prevention Division (7511P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001; main telephone number: (703) 305–7090; email address: *BPPDFRNotices@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

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

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

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

You may access a frequently updated electronic version of 40 CFR part 180 through the Government Printing Office's e-CFR site at *http://www.ecfr.gov/cgi-bin/text-idx?&c=ecfr&tpl=/ecfrbrowse/Title40/40tab_02.tpl.* To access the OCSPP test guidelines referenced in this document electronically, please go to *http://www.epa.gov/ocspp* and select ''Test Methods and Guidelines.''

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

Under FFDCA section 408(g), 21 U.S.C. 346a, any person may file an objection to any aspect of this regulation and may also request a hearing on those objections. You must file your objection or request a hearing on this regulation in accordance with the instructions provided in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID number EPA–HQ–OPP–2017–0314 in the subject line on the first page of your submission. All objections and requests for a hearing must be in writing, and must be received by the Hearing Clerk on or before April 23, 2018. Addresses for mail and hand delivery of objections and hearing requests are provided in 40 CFR 178.25(b).

In addition to filing an objection or hearing request with the Hearing Clerk as described in 40 CFR part 178, please submit a copy of the filing (excluding any Confidential Business Information (CBI)) for inclusion in the public docket. Information not marked confidential pursuant to 40 CFR part 2 may be disclosed publicly by EPA without prior notice. Submit the non-CBI copy of your objection or hearing request, identified by docket ID number EPA–HQ–OPP–2017–0314, by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the online instructions for submitting comments. Do not submit electronically any information you consider to be CBI or other information whose disclosure is restricted by statute.

• *Mail:* OPP Docket, Environmental Protection Agency Docket Center (EPA/DC), (28221T), 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001.

• *Hand Delivery:* To make special arrangements for hand delivery or delivery of boxed information, please follow the instructions at *http://www.epa.gov/dockets/contacts.html.*

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

II. Background and Statutory Findings

In the **Federal Register** of December 4, 2017 (82 FR 57193) (FRL–9970–76), EPA issued a document pursuant to FFDCA section 408(d)(3), 21 U.S.C. 346a(d)(3), announcing the filing of a pesticide tolerance petition (PP 6F8506) by BRANDT iHammer, 479 Village Park Drive, Powell OH, 43065. The petition requested that 40 CFR part 180 be amended by establishing an exemption from the requirement of a tolerance for residues of alpha methyl mannoside. That document referenced a summary of the petition prepared by the petitioner, BRANDT iHammer, which is available in the docket, EPA–HQ–OPP–2017–0314, at *http://www.regulations.gov.* There were no comments received in response to the notice of filing.

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

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

III. Toxicological Profile

Consistent with FFDCA section 408(b)(2)(D), EPA has reviewed the available scientific data and other relevant information in support of this action and considered its validity, completeness and reliability, and the relationship of this information to human risk. Given that no toxic endpoints were identified for alpha methyl mannoside, consideration of the variability of the sensitivities of major identifiable subgroups of consumers, including infants and children is not necessary for this biochemical pesticide.

A. Overview of Methyl-alpha-D-mannopyranoside (alpha methyl mannoside)

Methyl-alpha-D-mannopyranoside (alpha methyl mannoside) is a naturally occurring monosaccharide (simple sugar), that is ubiquitous in plant tissue in the form of mannose polymers. Alpha methyl mannoside exposure occurs naturally via diet from the breakdown of mannose polymers present in a variety of plant-based foods, with the highest concentrations found in guar gum, a common food additive of thickening and texture in baked goods, dairy items, meats and condiments, and in coffee. Alpha methyl mannoside appears to have a low toxicity profile and is not mutagenic. Alpha methyl mannoside has been recently found to regulate plant growth by modulating glycoconjugation to lectins in plants. As a pesticide, alpha methyl mannoside appears to stimulates the growth and development of a range of crops including vegetables (leafy, *Brassica* leafy, cucurbit, fruiting), alfalfa, blueberries, cherries, corn, cotton, grapes, onions, peanuts, potatoes, sweet potatoes, and nonfood crops such as bedding plants cut flowers, ornamentals, and turf. Submitted information/data show that when applied to the root, shoot or seed of targeted plants, alpha methyl mannoside functions by displacing glucose bond to lectin. The data/information further show that release of glucose in the plant results in increased plant growth including increased yields of fruit, flower growth and turgidity in turf. In pesticide products, proposed application of alpha methyl mannoside is at rates ranging from 6 to 20 fl. oz. per acre for food crops and 0.1 to 1.13% for nonfood crops. At these rates, the use of alpha methyl mannoside should not likely result in significant residues, environmental persistence or bioaccumulation.

B. Biochemical Pesticide Toxicology Data Review for Methyl-alpha-D-mannopyranoside

All applicable toxicology data requirements supporting the petition to establish an exemption from the requirement of a tolerance for the use of alpha methyl mannoside as an active ingredient in or on food commodities, when used in accordance with label direction and good agricultural practices, have been fulfilled. Based on the submitted data and the results of the Agency-developed dietary exposure modeling database DEEM–FCID (version 3.16), dietary exposure to alpha methyl mannoside is not anticipated and there are no human health risks of concern associated with alpha methyl mannoside. Acute studies on alpha methyl mannoside show that this naturally occurring monosaccharide falls within Toxicology Category IV for: Acute oral toxicity, Acute dermal toxicity, Primary eye irritation, and Primary dermal irritation. Alpha methyl mannoside is not a dermal sensitizer. Waivers were granted for subchronic toxicology studies including the 90-day Dermal study, 90-day Inhalation study and Developmental toxicity study. For a more detailed summary of the data upon which EPA relied, please refer to the document entitled, ''Federal Food, Drug, and Cosmetic Act (FFDCA) Considerations for Methyl-alpha-D-mannopyranoside (Alpha Methyl Mannoside)'' December 5, 2017, available in the docket for this action (EPA–HQ–OPP–2017–0314).

IV. Aggregate Exposures

In examining aggregate exposure, FFDCA section 408 directs EPA to consider available information concerning exposures from the pesticide residue in food and all other non-occupational exposures, including drinking water from ground water or surface water and exposure through pesticide use in gardens, lawns, or buildings (residential and other indoor uses).

A. Dietary Exposure

An aggregate risk assessment for alpha methyl mannoside for dietary (food and drinking water) exposures was not

conducted as no toxicological endpoints have been identified in the toxicity database.

B. Other Non-Occupational Exposure

Other non-occupational exposure to alpha methyl mannoside from pesticidal use is not expected to occur as alpha methyl mannoside biodegrades rapidly once applied which would preclude significant post-application exposure. Exposure is further minimized by the relatively low application rates proposed for this biochemical. There are no residential uses for Methyl-alpha-D-mannopyranoside. This biochemical is intended for agricultural, ornamental and turf crop use only. Therefore, the Agency does not anticipate residential exposure.

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

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

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

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

FFDCA section 408(b)(2)(C) provides that, in considering the establishment of a tolerance or tolerance exemption for a pesticide chemical residue, EPA shall assess the available information about consumption patterns among infants and children, special susceptibility of infants and children to pesticide chemical residues, and the cumulative effects on infants and children of the residues and other substances with a common mechanism of toxicity. In addition, FFDCA section 408(b)(2)(C) provides that EPA shall apply an additional tenfold (10X) margin of safety for infants and children in the case of threshold effects to account for prenatal and postnatal toxicity and the completeness of the database on toxicity and exposure, unless EPA determines that a different margin of safety will be safe for infants and children. This additional margin of safety is commonly referred to as the Food Quality Protection Act Safety Factor. In applying this provision, EPA either retains the default value of 10X, or uses a different additional or no safety factor when reliable data are available to support a different additional or no safety factor.

As part of its qualitative assessment, EPA evaluated the available toxicity and exposure data on alpha methyl mannoside and considered its validity, completeness, and reliability, as well as the relationship of this information to human risk. EPA considers the toxicity database to be complete and has identified no residual uncertainty with regard to prenatal and postnatal toxicity or exposure. No hazard was identified in the available studies; therefore, EPA concludes that there are no threshold effects of concern to infants, children, or adults from alpha methyl mannoside. As a result, EPA concludes that no additional margin of exposure (safety) is necessary.

VII. Other Considerations

A. Analytical Enforcement Methodology

An analytical method is not required for enforcement purposes since the Agency is establishing an exemption from the requirement of a tolerance without any numerical limitation.

B. International Residue Limits

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

The Codex has not established a MRL for alpha methyl mannoside.

VIII. Conclusions

Based on its assessment of Methyl-alpha-D-mannopyranoside (alpha methyl mannoside or alpha methyl mannoside), EPA concludes that there is a reasonable certainty that no harm will result to the general population, or to infants and children, from aggregate exposure to alpha methyl mannoside. Therefore, an exemption is established for residues of alpha methyl mannoside on all raw agricultural commodities when used in accordance with label directions and good agricultural practices.

IX. Statutory and Executive Order Reviews

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

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

This action directly regulates growers, food processors, food handlers, and food retailers, not States or tribes, nor does this action alter the relationships or distribution of power and responsibilities established by Congress in the preemption provisions of FFDCA section 408(n)(4). As such, the Agency has determined that this action will not have a substantial direct effect on States or tribal governments, on the

relationship between the national government and the States or tribal governments, or on the distribution of power and responsibilities among the various levels of government or between the Federal Government and Indian tribes. Thus, the Agency has determined that Executive Order 13132, entitled ''Federalism'' (64 FR 43255, August 10, 1999) and Executive Order 13175, entitled ''Consultation and Coordination with Indian Tribal Governments'' (65 FR 67249, November 9, 2000) do not apply to this action. In addition, this action does not impose any enforceable duty or contain any unfunded mandate as described under Title II of the Unfunded Mandates Reform Act (UMRA) (2 U.S.C. 1501 *et seq.*).

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

X. Congressional Review Act

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

List of Subjects in 40 CFR Part 180

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

Dated: February 2, 2018.

Richard P. Keigwin, Jr.,

Director, Office of Pesticide Programs.

Therefore, 40 CFR chapter I is amended as follows:

PART 180—[AMENDED]

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

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

■ 2. Add § 180.1352 to subpart D to read as follows:

§ 180.1352 Methyl-alpha-D-mannopyranoside (Alpha methyl mannoside); exemption from the requirement of a tolerance.

Residues of the biochemical pesticide Methyl-alpha-D-mannopyranoside (alpha methyl mannoside) are exempt from the requirement of a tolerance in or on all raw agricultural commodities.

[FR Doc. 2018–03671 Filed 2–21–18; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 76

[MB Docket No. 12–217; FCC 17–120]

Cable Television Technical and Operational Standards

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In this document, we modernize the Commission's signal leakage and signal quality rules that apply to cable operators and other MVPDs and reflect the cable industry's transition from analog to digital systems. These rules are intended to make sure that cable systems do not leak signals that could interfere with other services and ensure that subscribers receive high-quality picture and sound.

DATES: These rules are effective April 23, 2018, except the amendments to §§ 76.105(b) introductory text, 76.601(b)(1), 76.1610(f) and (g), and 76.1804 introductory text, which contain modified information collection requirements that have not been approved by OMB, subject to the Paperwork Reduction Act. The Federal Communications Commission will publish a document in the **Federal Register** announcing the effective date upon OMB approval. The incorporation by reference of certain publications listed in the rule is approved by the Director of the Federal Register as of April 23, 2018.

FOR FURTHER INFORMATION CONTACT: For additional information on this proceeding, contact Jeffrey Neumann, *Jeffrey.Neumann@fcc.gov,* of the Media Bureau, 202–2046 or Brendan Murray, *Brendan.Murray@fcc.gov,* of the Media Bureau, Policy Division, (202) 418–1573.

For additional information concerning the information collection requirements contained in this document, send an email to *PRA@fcc.gov* or contact Cathy Williams on (202) 418–2918.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's *Report and Order,* FCC 17–120, adopted on September 22, 2017 and released on September 25, 2017. The full text of these documents is available for public inspection and copying during regular business hours in the FCC Reference Center, Federal Communications Commission, 445 12th Street SW, CY–A257, Washington, DC 20554. These documents will also be available via ECFS (*http://www.fcc.gov/cgb/ecfs/*). (Documents will be available electronically in ASCII, Word 97, and/or Adobe Acrobat.) The complete text may be purchased from the Commission's copy contractor, 445 12th Street SW, Room CY–B402, Washington, DC 20554. To request these documents in accessible formats (computer diskettes, large print, audio recording, and Braille), send an email to *fcc504@fcc.gov* or call the Commission's Consumer and Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (TTY).

With this Report and Order (*Order*), we take another step toward modernizing our rules to reflect current technologies. Specifically, we update our signal leakage and signal quality rules that apply to cable operators to reflect the cable industry's transition from analog to digital systems.

In 2012, the Commission adopted the Digital Cable Standards NPRM, 77 FR 61351, to seek comment on proposed digital ''proof of performance'' (*i.e.,* signal quality) rules, signal leakage rules, and updates and corrections to our Part 76 rules. As the Commission explained in that NPRM, the purpose of the proof-of-performance rules is to require cable operators to deliver good-quality video and audio to subscribers. The Commission's authority for adopting such rules stems from Section 624 of the Communications Act of 1934, as amended (the ''Act''). The signal leakage rules prevent cable systems from emitting signals that can interfere with radio services, including certain aeronautical communication services.

The Commission originally adopted the current proof-of-performance and signal leakage rules before the advent of digital cable service, which is now widespread. According to SNL Kagan, almost 97 percent of cable video customers subscribe to digital service, and all major operators provide digital service. As a technical matter, our existing signal quality and interference rules are inapplicable to the digital technologies that cable operators use today. The Commission has not, to date, provided clear guidance on how to ensure digital signal quality and safeguard against digital systems leaking electromagnetic signals into the aeronautical bands. Therefore, in the Digital Cable Standards NPRM, the Commission proposed to update its technical rules to incorporate standards and procedures that cable operators and local franchising authorities (LFAs)

could use to test signal quality and signal leakage on digital cable systems.

The Commission's analog proof-of-performance rules currently include testing requirements, technical standards, testing methods, recordkeeping requirements, and procedures to resolve complaints about signal quality to ensure that cable operators provide their subscribers with good quality signals. In the Digital Cable Standards NPRM, the Commission proposed to replicate this framework by adopting similar rules that would apply to digital cable service. Specifically, the Commission proposed to require Quadrature Amplitude Modulation (QAM) based digital cable systems to test signals in accordance with the Society of Cable Telecommunications Engineers (SCTE) Digital Cable Network Interface Standard, SCTE 40 and maintain records that demonstrate the results of such tests. The Commission sought comment on standards or guidance for testing cable systems that do not rely on QAM because non-QAM systems rely on varied technologies, and the Commission was not aware of any industry standards that non-QAM operators could use to test their signal quality. Accordingly, the Commission sought comment on an alternative proposal under which non-QAM providers would file a proof-of-performance plan with the Commission. The Commission also asked whether there were ''any entities currently analyzing and developing standards for visual signal quality,'' or whether a subjective analysis of visual signal quality could be used to demonstrate proof-of-performance.

As the Commission explained in the Digital Cable Standards NPRM, cable systems have the potential to interfere with over-the-air users of spectrum if the cable operator does not properly maintain its plant. The Commission's existing rules are designed to minimize interference to aircraft communications, and include yearly testing and reporting requirements. In the Digital Cable Standards NPRM, the Commission proposed to add new interference standards that would apply to digital signals to accompany the existing analog signal interference standards. The proposed digital standards would provide protection to aircraft communication from digital cable plant signal leakage that is equivalent to that provided via our existing analog standards. The Commission also sought comment on whether to make other modifications to the rules to protect other frequencies based on the increased bandwidth of modern cable systems.

The Commission also proposed updates to Part 76 of our rules. In the Digital Cable Standards NPRM, the Commission proposed to make necessary updates to various standards, reorganize certain sections of Part 76 to make them easier to read, make numerous rule corrections, and remove numerous obsolete rules and references from the Code of Federal Regulations. These changes are minor and non-substantive and intended to make it easier to comprehend and comply with the Commission's cable rules.

As the Commission proposed in the Digital Cable Standards NPRM, we will require cable operators to adhere to SCTE 40, the technical standard that ensures that cable operators provide ''good quality'' signals to their subscribers. We decline, however, to adopt the proof-of-performance testing and recordkeeping rules proposed in the Digital Cable Standards NPRM. The record and the Commission's log of consumer complaints indicate that there is not a continuing pattern of technical problems with digital signals as historically existed with analog signals. We attribute this, in part, to the process of error correction that the QAM standard uses; it generally ensures that digital signals have suitable picture and audio quality even under suboptimal conditions. Therefore, we conclude that a testing regime for digital service is not necessary, and that an operator's adherence to SCTE 40 is sufficient to ensure consumers are receiving good quality signals. We also decline at this time to adopt performance standards for non-QAM cable systems pending further developments and recommendations from industry standards bodies. Below, we discuss (1) why the SCTE 40 standard is the proper standard to ensure quality digital signals for QAM-based cable operators, (2) why we delay adoption of a standard for non-QAM-based cable operators, (3) why a rigid testing regime is unnecessary, and (4) why subjective testing and set-top box requirements are not necessary at this time. We also dismiss as moot pending requests for exemption from our proof-of-performance rules.

Section 624(e) of the Act requires that the Commission ''establish minimum technical standards relating to cable systems' technical operation and signal quality'' and ''update such standards periodically to reflect improvements in technology.'' Pursuant to that mandate, we adopt the Commission's proposal to adopt the SCTE 40 standard. QAM-based cable operators that adhere to this standard provide good-quality signals to consumers, and a rule that requires cable operators to adhere to it will not increase their regulatory burden. SCTE 40, the ''Digital Cable Network Interface Standard,'' was developed by the Society of Cable Telecommunications Engineers to define the characteristics and specifications of interface between a cable system and commercially available digital cable products, such as set-top boxes. The overwhelming majority of cable operators use QAM to modulate their digital services, but as the Commission explained in the Digital Cable Standards NPRM, QAM use can vary across systems: ''Unlike analog cable transmission . . . QAM is not uniform and may appear in a variety of configurations such as 64 QAM, 256 QAM, and potentially 1024 QAM, each requiring different performance standards.'' The SCTE 40 standard recognizes these differences and incorporates different performance standards for each QAM configuration. Moreover, QAM-based cable operators have followed the SCTE 40 standard for more than a decade because the standard is an essential part of the cable industry's reliance on CableCARD. Therefore, conforming to the standard should not add any additional burdens on cable operators and commenters generally supported its use for this purpose. The standard sets relative channel power limits, carrier-to-noise ratios, and adjacent-channel characteristics that reflect the minimum technical standards necessary to ensure that cable operators deliver quality QAM signals to their subscribers. The standard is for free online at *http://www.scte.org/SCTEDocs/Standards/SCTE%2040%202016.pdf,* and therefore we conclude that it is reasonably available. For these reasons, we conclude that SCTE 40 provides the proper ''minimum technical standards relating to cable systems' technical operation and signal quality,'' as required by Section 624(e) of the Act. Consistent with Section 624(e)'s requirement that we update the standards in our rules ''periodically to reflect improvements in technology'' and to reflect the technology that cable operators rely on today, we incorporate the current version of SCTE 40, which was adopted in 2016.

The City of New York suggests that we set a timeframe for when we will next review these standards. We agree that updating these performance standards in a timely manner is important, but because the SCTE standard is not updated on a set schedule, we do not believe that we need to develop a rigid timeline for review. The SCTE originally adopted the SCTE 40 standard in 2001, and

updated it in 2003, 2004, 2011, and 2016. If the SCTE updates the standard again, and the standard does not change fundamentally, we delegate rulemaking authority to the Media Bureau to update the Commission's rules to reference the newest standard.

Non-QAM Based Proof of Performance Standard

We will delay adopting a proof-of-performance standard for non-QAM cable providers, such as internet Protocol television (IPTV)-based providers, because the record before us does not include any minimum technical standards that could apply to non-QAM signals. As stated above, in the Digital Cable Standards NPRM, the Commission sought comment on whether any industry standards exist for signal quality in non-QAM digital cable systems. Although the National Telecommunications Cooperative Association and The Organization for the Promotion and Advancement of Small Telecommunications Companies (NTCA/OPASTCO) reference certain standards that ''may apply to IPTV systems,'' they note that ''these best practices and standards are relatively new, and a number of [rural local exchange carrier] IPTV systems utilizing many different types of equipment and software were deployed prior to their development and release'' so they may not apply to all IPTV systems. No other comments recommended a standard that could apply to these systems. Accordingly, we believe it would be better to allow industry more time to reach consensus on a non-QAM-specific proof-of-performance standard before adopting a standard for regulatory purposes. When parties can identify and recommend applicable proof-of-performance standards, then we will revisit this issue. We note that in the meantime, under our existing rules non-QAM providers must work with LFAs to address any complaints regarding signal quality.

We will not require non-QAM operators to submit proof-of-performance plans for Commission approval, which is a scheme upon which the Commission sought comment in the Digital Cable Standards NPRM. Cable operators that use technologies other than QAM to deliver video strongly oppose that process as overly burdensome; they argue that non-QAM operators are small and do not have in-house resources to develop signal quality standards and testing regimes in the absence of an industry standard. We find commenters' arguments persuasive; this process would put too large a burden on small cable operators, and likely would result in a variety of metrics rather than a standard as Section 624(e) requires.

We are not persuaded by NATOA's argument that this case-by-case scheme would ''provide regulatory clarity, promote competitive neutrality, and ensure that subscribers to such non-QAM systems enjoy technical and signal quality protections comparable to those enjoyed by subscribers to more traditional QAM-based systems.'' To the contrary, such a scheme would provide no regulatory clarity because each operator would need to develop a testing plan without any guidance from the Commission. It would impose heavier burdens on non-QAM providers than their QAM-based competitors that will follow SCTE 40 rather than develop performance standards in-house.

We also reject NATOA's proposal that ''[e]ach channel tested for proof-of-performance should be observed for at least two minutes and the results of this observation recorded'' by the cable operator. A regime that required that proposal would be subjective, non-technical, and would not be standardized. Accordingly, we do not believe that such a proposal is the type of ''minimum technical standard'' contemplated under Section 624(e).

We conclude that we need not require the testing regime (and attendant certification and recordkeeping requirements) proposed in the Digital Cable Standards NPRM. We come to this conclusion because cable operators have demonstrated that if they design, deploy, and maintain systems that meet or exceed the specifications in SCTE 40, then they are able to deliver good-quality video and audio to their subscribers without testing. As ACA and NCTA point out, the error correction inherent in QAM service helps ensure consistent quality for subscribers. In addition, digital signals are less susceptible to errors introduced by noise and the picture degradation that amplifiers add to analog signals. Nonetheless, some LFA commenters reported problems with pixelation, tiling, and loss of audio. These appear to be isolated incidents, rather than a continuation of a trend of poor signal quality that existed when cable operators delivered analog signals, and the Commission has received few complaints about cable operators' signal quality. Even if there were a trend of poor quality, the record does not reflect that testing would yield any additional information necessary to ensure quality signals.

Moreover, according to the record, the costs associated with testing are high and outweigh the benefits that a federal testing mandate would provide. NCTA states that due to equipment and personnel costs, testing for compliance with SCTE 40 can cost ''just under a million dollars to multiple millions of dollars simply to conduct a one-time test'' of all of a large cable operator's systems, and that testing can be disruptive to subscribers. NATOA argues that ''periodic test reports generate data that assist local authorities with complaint resolution, monitoring performance, and other regulatory responsibilities.'' A rigid testing mandate is not necessary to achieve these benefits. Section 76.1713 of our rules requires cable operators to ''establish a process for resolving complaints from subscribers about the quality of the television signal delivered,'' and maintain aggregate data about those complaints for purposes of Commission and LFA review. This rule section already delivers the benefits that NATOA enumerates without a costly, rigid testing requirement.

Nor does the statute require a testing regime. Rather, the statute directs us to establish ''minimum technical standards,'' and neither the Act nor the legislative history indicates that Congress wanted the Commission to require tests in the absence of service problems. When a consumer complains about signal quality, the cable operator and the local franchisor are better suited than the Commission to work to resolve the problem using industry-standard methods and recommended practices. We invite LFAs and others to keep us informed about the complaints that they receive from their residents; we will consider adopting more rigorous requirements if systemic signal quality problems are demonstrated.

Finally, with respect to analog testing, we adopt the Commission's proposal to ''simplify the formula by which . . . operators determine how many channels must be tested to ensure compliance with the proof-of-performance rules.'' Specifically, the Commission proposed to require cable operators to test five channels on systems with a channel capacity of less than 550 MHz, and to require cable operators to test ten channels on systems with a channel capacity of 550 MHz or more. NCTA is the only commenter to address this proposal and ''agree[s] with the effort to reduce the number of channels that must be tested to demonstrate compliance with the technical standards.'' We adopt this rule for the same reasons the Commission proposed it: The rule change ''simplifies compliance for all operators and will continue to ensure that a sufficient representative sample of channels is

tested to accurately reflect the experience consumers receive.''

We also decline to adopt subjective picture quality and set-top box quality rules. In the Digital Cable Standards NPRM, the Commission noted that cable operators could reduce a channel's visual quality via compression even if the signal itself remains strong and error free. To address this concern, the Commission sought comment on whether to adopt a subjective visual picture quality and auditory sound quality test to ensure that digital cable subscribers receive high quality television images and sound. The Commission also sought comment on whether set-top boxes should play a role in how we assess picture quality of digital cable signals, because set-top boxes can affect the quality of the picture that the viewer sees. We find that the record is insufficient to take any action on these two items, producing neither standards for perceived video quality nor the output of set-top boxes. As some parties point out, subjective tests are, by their nature, difficult to administer. Moreover, the record has not demonstrated that there is a serious problem regarding picture quality that we need to address. Therefore, we decline to extend proof-of-performance beyond the signal quality provided to the consumer's home by the MVPD. We also reject the suggestion that we require proof-of-performance tests for CableCARDs because, as NCTA points out, CableCARDs are responsible solely for decryption of cable programming and do not affect signal quality or display.

Six cable operators have filed requests for exemption from our proof-of-performance rules because those operators cannot apply the analog standards to their digital systems. To the extent these operators utilize QAM-based technologies, as discussed above, we conclude that their adherence to SCTE 40 ensures good signal quality. Accordingly, we dismiss as moot those requests for exemption from the proof-of-performance rules consistent with this order and instruct these cable operators and the rest of the cable industry deploying QAM-based technologies to adhere to SCTE 40 2016, as required by our new proof of performance rule.

For the request pertaining to a non-QAM-based system, and for other operators who use non-QAM and non-analog technologies, such as those based on internet Protocol video over fiber-optics, we will simply retain the duty of those operators to establish and use a process to resolve customer complaints for now and will not require them to adhere to SCTE 40, which does not align technically with the design of their systems. As we explain above, we believe it would be better to allow industry more time to reach consensus on a non-QAM-specific proof-of-performance standard before adopting a standard for regulatory purposes since the record before us does not include any minimum technical standards that could apply to non-QAM signals. If the Commission establishes metrics-based or testing-based rules in the future to cover those non-QAM technologies, those operators will be subject to those rules. As a result, we dismiss as moot the petition for exemption filed by a non-QAM system operator.

In this Section, we adopt the signal leakage rules for MVPDs utilizing digital signals on coaxial cable systems proposed in the Digital Cable Standards NPRM with minor modifications. In the NPRM, the Commission explained the purpose of our cable signal leakage rules: MVPDs that operate coaxial cable plants (''coaxial cable systems'') use frequencies allocated for myriad over-the-air services within their system. Under ideal circumstances, those signals are confined within the cable system and do not cause interference with the over-the-air users of those frequencies. However, under certain circumstances, a coaxial cable plant can ''leak'' and interfere with over-the-air users of spectrum.

To prevent this interference, the Commission's rules impose four major requirements. First, MVPDs that operate coaxial cable plants (referred to as simply ''MVPDs'' below) must notify the Commission and provide geographic information about their systems before they use frequencies in the aeronautical radio frequency bands above an average power level equal to or greater than 10–4 watts across a 25 kHz bandwidth in any 160 microsecond time period. The Commission refers to this requirement as the Aeronautical Frequency Notification (''AFN'') requirement. Second, MVPDs must offset their channels to minimize interference from analog coaxial cable systems to aircraft communication and aircraft navigation services, such as the Instrument Landing System and VHF Omnidirectional Range service. Third, MVPDs must ensure that their system design, installation and operation comply with the rules and conduct compliance testing four times per year. Finally, MVPDs must calculate their cumulative signal leakage and report their results to the Commission once per year.

These requirements protect against interference from analog signals, but have not been updated to protect against interference from digital signals. Therefore, in the Digital Cable Standards NPRM, the Commission proposed to update the signal leakage rules to apply to digital operations. First, the Commission proposed a trigger of 10–5 watts average power over a 30 kHz bandwidth in any 2.5 millisecond time period for the AFN requirement with respect to digital signals. The Commission explained that this proposed trigger would impose only limited burdens on cable operators because it would affect a small number of systems and was vital to prevent interference to aeronautical users and international satellite search and rescue services. Second, the Commission proposed not to apply the channel frequency offset requirement to digital signals. The Commission reasoned that the analog channel frequency offset does not make sense to apply to digital signals because the offset is meant to offset the peak power of a signal from interfering with aeronautical frequencies, but digital signals, unlike analog signals, distribute their power evenly throughout the 6 MHz channel. Third, because the Commission proposed not to adopt a digital signal offset, the Commission proposed to correlate the maximum leakage level for digital signals to that of analog signals, and to require digital leakage in excess of this threshold to be noted and repaired within a reasonable time. The Commission reasoned that this change would help prevent harmful interference due to cable signal leakage. As discussed below, we adopt slightly revised versions of each of these proposals.

Finally, the Commission sought comment on miscellaneous issues, each of which is discussed below, including whether to change the signal leakage testing methodology, whether and how to test for leakage in bands above 400 MHz, and a proposal to modify the formula for calculating the cumulative leakage index (''CLI'').

We adopt the digital AFN filing trigger proposed in the Digital Cable Standards NPRM (10–5 watts over a 30 kHz bandwidth in any 2.5 millisecond time period), and clarify that this filing trigger will apply to digital signals only; the analog trigger will not change. The Commission tentatively concluded in the NPRM that the power threshold should remain unchanged when considering interference from digital, rather than analog, coaxial cable systems, but that the measurement window needed to be adapted. The Commission based its proposal on the fact that unlike analog signals, digital

signals distribute power relatively evenly throughout the channel and, therefore, throughout the bandwidth of the devices receiving the interference.

NCTA suggests two revisions to the Commission's proposal. First, NCTA argues that the Commission's proposed rule would require cable systems that ''operate aural subcarriers of analog television channels at levels that fall between 10–4 watts and 10–5 watts'' to file AFNs. NCTA asserts that requiring operators that carry analog signals at those levels to file AFNs would have no effect on public safety, and would burden cable operators. Instead NCTA suggests that the new power level trigger should apply to digital signals only, and the analog level should remain unchanged. NCTA's recommendation is consistent with the intent of the Commission's proposal in the Digital Cable Standards NPRM, which was to trigger the AFN filing requirement only for systems that had withdrawn their AFNs because they operate at a power level lower than the analog threshold, but operate at a power higher than the digital threshold that we adopt here. Therefore, we adopt NCTA's recommendation.

NCTA also suggests that the Commission align the power threshold for digital signal notifications with the power thresholds discussed in Section III.B.3 below by lowering the AFN threshold by a commensurate amount. We decline to adopt this recommendation. We believe that the threshold for giving the Commission notice of a system's operation, location, and reach should be keyed to the protection of the Marine and Aeronautical Distress and Safety frequency. The burden of filing a one-time notification is low, and the benefit to public health and safety of being able to identify potential sources of interference is significant.

We exempt all-fiber-optic cable systems from the AFN filing trigger and instead allow cable operators with such systems to notify the Commission that the system operates below the relevant power level. Verizon asserts that the signal leakage rules should not apply to operators that, like Verizon, rely primarily on fiber optic systems that are less likely to leak electromagnetic signals. Verizon explains that its cable service is ''delivered over a fiber optic network that delivers signals to customer premises over fiber optic cables using optical wavelengths,'' and that ''[s]uch a network would not represent any threat of interference, because fiber optic cables do not use RF frequencies.'' It further explains that its optical network terminal ''has been designed and built in a manner that operates at a low power level—below the thresholds that would trigger testing under current signal leakage testing standards.'' We agree that all-fiber-optic systems pose less interference risk than other systems and should be subject to less burdensome signal leakage requirements. Specifically, because fiber optic systems with optical network terminals at the customer premises pose minimal risk of signal leakage, such systems need only report in the existing Form 321, Aeronautical Frequency Notification, that their power level is sufficiently low to qualify for a filing exemption. Such cable operators may choose this option instead of complying with the digital AFN filing trigger. Cable operators that do not have optical network terminals at the customer premises or are unable to certify that they operate below a digital threshold of 37.55 dBmV must comply with the digital AFN filing trigger. We find that this approach will appropriately enable cable operators that are unlikely to cause harmful interference to continue their current practice with regard to signal leakage reporting, while still ensuring that the Commission is informed of potential interference risks.

As proposed in the Digital Cable Standards NPRM, we decline to apply the channel frequency offset requirements that apply to analog signals to digital signals. Analog television channel power levels are significantly higher at the center frequencies of the subcarriers contained within the channel. Digital television channel power levels do not share this characteristic because a digital signal does not concentrate all of its power in a narrow carrier. For this reason, the Commission's rules require cable operators to offset their subcarriers from lining up directly with Instrument Landing System (ILS), VHF Omnidirectional Range service (VOR), or communications carriers. With the offset, when a signal leaks it will not align with those important carriers and it will not impact the protected signal as severely as it would without an offset. In the Digital Cable Standards NPRM, the Commission proposed not to apply the channel frequency offset requirement to digital signals because digital signals do not have analog signals' peak power characteristic. Commenters agreed with this reasoning. For the same reasons that the Commission offered in the NPRM, we conclude that the frequency offset requirement would be useless with respect to digital signals.

We adopt rules for general signal leakage limits and for the cumulative leakage index (CLI) that were proposed in the NPRM, with some modifications to provide cable operators with flexibility in the ways they test to demonstrate compliance. Because we cannot use the offset requirement to ensure that the strongest part of the signal does not interfere with ILS, VOR, or communications carriers, the Commission proposed to correlate the signal leakage limits for digital channels to those for analog channels. Specifically, it proposed to adjust the signal leakage threshold for digital signals to 1.2 dB less than the analog threshold. The Commission reasoned that because a digital signal does not concentrate all of its power in a narrow carrier like an analog signal does and because an aircraft receiver's bandwidth should be no wider than 25 kHz, the resulting increase in potential interference is 1.2 dB. The Commission proposed to amend the general signal leakage rule (including the signal leakage monitoring, logging, and repair rule) and the CLI rules accordingly.

We adopt the proposed general signal leakage limit that the Commission proposed for digital signals. NATOA and NCTA were the only commenters that addressed the Commission's proposal to make the general signal leakage threshold for digital signals 1.2 dB lower than the analog threshold, and both supported the proposal. For the reasons the Commission provided in the Digital Cable Standards NPRM, we conclude that the 1.2 dB reduction for digital signals is a technically sound proposal, and therefore we adopt it.

The Commission noted that this change could require cable operators that carry digital signals to obtain more sensitive leakage detection equipment because our rules require regular monitoring of systems that operate in the designated aeronautical communications bands. The Commission sought comment on the burdens that this would impose on cable operators and the extent to which they outweigh the benefits of signal leakage detection and prevention. In response, Arcom Digital, LLC described its low-cost QAM Snare system, which is sensitive enough to detect ''QAM channel leakage signals that are as low as 0.13μV/m at 100 MHz and as low as 0.89μV/m at 700 MHz.'' NCTA described an alternative test methodology ''that would allow cable operators to continue to use existing signal leakage detection equipment with the same sensitivity, measurement procedures, calculations and reporting.'' Under NCTA's proposal (the ''David Large Methodology''), the cable operator simply carries a test signal that has an

average power level equal to the power level of the strongest analog cable television carrier on the cable system. To ensure that digital signal leakage is at least 1.2 dB lower than analog signals, the cable operator keeps all digital signal power levels at least 1.2 dB lower than the test signal. Because Arcom Digital, LLC and NCTA have demonstrated multiple ways to achieve our intended result, we grant NCTA's request that the Commission not impose any specific test methodology, but rather adopt a flexible rule that would allow a cable operator to ''demonstrate compliance using a different methodology.'' Our results-oriented regulation will ensure that cable operators monitor digital cable signal leakage in a less burdensome manner than the one we proposed.

We adopt the level that the Commission proposed to trigger the signal leakage rules, and clarify that proposal as NCTA requests. The Commission proposed to modify the level ''at which the [signal leakage] rules become applicable, the threshold at which leaks must be included in the [CLI] calculation, and the maximum leakage and CLI permissible,'' for digital signals consistent with the 1.2 dB reduction from the analog signal levels. NCTA states that under the David Large Methodology, ''no additional change would be required to [the] CLI calculations since digital power levels would be required to be below the level of the leakage test signal.'' We find that NCTA's proposal is consistent with the Commission's reasoning in the Digital Cable Standards NPRM. Therefore, in a scenario where a cable operator maintains digital signals at least 1.2 dB below the analog leakage test signal, the operator may perform an ''analog'' test on the analog test signal and will be restricted to the maximum CLI for analog signals (64 for I∞). However, we do not require operators to do this, and should they elect to carry digital signals at the same power levels as the analog test signal, or to test the digital signals directly, the reduced ''digital'' CLI applies.

We decline to adjust our signal leakage rules at this time to reflect recent increases in the bandwidth that cable systems use. As the Commission noted in the Digital Cable Standards NPRM, the last time the Commission updated the signal leakage rules, ''400 MHz was near the upper limit of the bandwidth of coaxial cable systems deployed,'' but today ''coaxial cable systems routinely deploy in excess of 750 MHz, and deployments of up to 1 GHz exist.'' Therefore, the Commission sought comment on potential and actual interference from coaxial cable systems to bands above 400 MHz. While such interference may exist (particularly in the 700 MHz band), there is insufficient evidence on the record to take action at this time.

We eliminate the I3000 method of calculating CLI as the Commission proposed because cable operators have abandoned it in favor of the more effective I∞ method. The I∞ method of calculating CLI requires cable operators to treat all leaks equally, rather than discounting leaks the further they are from the geographic center of the cable system. In the Digital Cable Standards NPRM, the Commission reasoned that cable systems now cover much larger geographical areas than they did when the Commission first adopted the rules, which can make the I3000 formula an inadequate way to detect significant leaks. We believe that these changes will make it easier to understand and comply with our cable rules. Accordingly, the Commission proposed to limit the application of I3000 to systems with a total geographic diameter of less than 160 km. We received no comments on this proposal, and careful analysis of filings from operators over the last 10 years shows that the overwhelming majority of operators utilize the I∞ calculation. Therefore, in the interest of simplifying both the submission of information to the Commission, and simplifying the analysis of this data, we instead decide to eliminate the I3000 formula. Operators previously using I3000 will find that less data collection is necessary to submit an I∞ calculation, and so we find no reason to continue accepting and analyzing two separate calculation methods.

In the Digital Cable Standards NPRM, the Commission proposed to ''remove references to effective dates that have passed, make editorial corrections, delete obsolete rules, update various technical standards that are incorporated by reference into our rules, and clarify language in Part 76 of our rules.'' The proposed changes are non-substantive and were unopposed in the record. Accordingly, we adopt those proposals.[1] NATOA recommended several changes to Part 76 of our rules that go beyond our goal of updating our rules and making them easier to follow. These proposals are substantive in nature, and are beyond the stated intent of this proceeding. Moreover, because NATOA's proposed rule changes were not raised for comment in the Digital Cable Standards NPRM, nor a logical outgrowth of the rule changes proposed in that NPRM, there is insufficient notice and comment under the Administrative Procedure Act for the Commission to adopt such proposals.

As required by the Regulatory Flexibility Act of 1980, as amended (RFA), an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the Notice of Proposed Rule Making (NPRM). The Commission sought written public comment on the proposals in the NPRM, including comment on the IRFA. This present Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.

This Report and Order allows the Commission to fulfil its congressional mandate to establish ''minimum technical standards relating to cable systems' technical operation and signal quality'' and ''update such standards periodically to reflect improvements in technology,'' as stated in the Communications Act. It will reduce malfunctions by setting proof-of-performance rules that require operators to ensure that their systems are consistent with industry standards designed to deliver high quality signals, which means that consumers will receive good quality pictures and sound. The Report and Order also makes modifications throughout Part 76 of the Commission's rules to remove outdated language, correct citations, and make other minor or non-substantive updates.

Commenters raised concerns that the proposed reporting requirements, which would have required them to develop a signal quality test and file the results of that test with the Commission, would impose an undue burden on small businesses. After analyzing the responses of commenters, the Commission concludes that cable operators who design, deploy, and maintain a system which meets or exceeds the specifications in SCTE 40 will consistently provide a service producing suitable picture and audio quality to subscribers. Rather than imposing testing on cable operators to ensure that they deliver quality service, we instead require that cable operators adhere to the specifications in the widely followed SCTE 40 standard.

As many commenters highlighted, Quadrature Amplitude Modulated (''QAM'') services are designed with error correction ability which helps to ensure consistent quality for subscribers. Additionally, as opposed to analog, digital signals are far less susceptible to errors introduced by noise and the picture degradation amplifiers add.

[1] We update the incorporation by reference in §§ 76.602 and 76.605 to refer to the 2013 version of the standard, CTA–542–D, which replaces CEA–542–B.

Pursuant to the Small Business Jobs Act of 2010, the Commission is required to respond to any comments filed by the Chief Counsel for Advocacy of the Small Business Administration (SBA), and to provide a detailed statement of any change made to the proposed rules as a result of those comments. The Chief Counsel did not file any comments in response to the proposed rules in this proceeding.

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

Cable and Other Program Distribution. Since 2007, these services have been defined within the broad economic census category of Wired Telecommunications Carriers; that category is defined as follows: ''This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies.'' The SBA has developed a small business size standard for this category, which is: All such firms having 1,500 or fewer employees. According to Census Bureau data for 2007, there were a total of 955 firms in the subcategory of Cable and Other Program Distribution that operated for the entire year. Of this total, 939 firms had employment of 999 or fewer employees, and 16 firms had employment of 1000 employees or more. Thus, under this size standard, the Commission believes that a majority of firms operating in this industry can be considered small.

Cable Companies and Systems (Rate Regulation Standard). The Commission has also developed its own small business size standards, for the purpose of cable rate regulation. Under the Commission's rules, a ''small cable company'' is one serving 400,000 or fewer subscribers, nationwide. Industry data indicate that, of 1,076 cable operators nationwide, all but 11 are small under this size standard. In addition, under the Commission's rules, a ''small system'' is a cable system serving 15,000 or fewer subscribers. Industry data indicate that, of 6,635 systems nationwide, 5,802 systems have under 10,000 subscribers, and an additional 302 systems have 10,000–19,999 subscribers. Thus, under this second size standard, the Commission believes that most cable systems are small.

Cable System Operators. The Act also contains a size standard for small cable system operators, which is ''a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed $250,000,000.'' The Commission has determined that an operator serving fewer than 677,000 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total annual revenues of all its affiliates, do not exceed $250 million in the aggregate. Industry data indicate that, of 1,076 cable operators nationwide, all but 10 are small under this size standard. We note that the Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed $250 million, and therefore we are unable to estimate more accurately the number of cable system operators that would qualify as small under this size standard.

Open Video Services. Open Video Service (OVS) systems provide subscription services. The open video system (''OVS'') framework was established in 1996, and is one of four statutorily recognized options for the provision of video programming services by local exchange carriers. The OVS framework provides opportunities for the distribution of video programming other than through cable systems. Because OVS operators provide subscription services, OVS falls within the SBA small business size standard covering cable services, which is ''Wired Telecommunications Carriers.'' The SBA has developed a small business size standard for this category, which is: All such firms having 1,500 or fewer employees. To gauge small business prevalence for the OVS service, the Commission relies on data currently available from the U.S. Census for the year 2007. According to that source, there were 3,188 firms that in 2007 were Wired Telecommunications Carriers. Of these, 3,144 operated with less than 1,000 employees, and 44 operated with more than 1,000 employees. However, as to the latter 44 there is no data available that shows how many operated with more than 1,500 employees. Based on this data, the majority of these firms can be considered small. In addition, we note that the Commission has certified some OVS operators, with some now providing service. Broadband service providers (''BSPs'') are currently the only significant holders of OVS certifications or local OVS franchises. The Commission does not have financial or employment information regarding the entities authorized to provide OVS, some of which may not yet be operational. Thus, at least some of the OVS operators may qualify as small entities. The Commission further notes that it has certified approximately 45 OVS operators to serve 116 areas, and some of these are currently providing service. Affiliates of Residential Communications Network, Inc. (RCN) received approval to operate OVS systems in New York City, Boston, Washington, DC, and other areas. RCN has sufficient revenues to assure that they do not qualify as a small business entity. Little financial information is available for the other entities that are authorized to provide OVS and are not yet operational. Given that some entities authorized to provide OVS service have not yet begun to generate revenues, the Commission concludes that up to 44 OVS operators (those remaining) might qualify as small businesses that may be affected by the rules and policies adopted herein.

Satellite Master Antenna Television (SMATV) Systems, also known as Private Cable Operators (PCOs). SMATV systems or PCOs are video distribution facilities that use closed transmission paths without using any public right-of-way. They acquire video programming and distribute it via terrestrial wiring in urban and suburban multiple dwelling units such as apartments and condominiums, and commercial multiple tenant units such as hotels and office buildings. SMATV systems or PCOs are now included in the SBA's broad economic census category, ''Wired Telecommunications Carriers,'' which was developed for small wireline firms. Under this category, the SBA deems a wireline business to be small if it has 1,500 or fewer employees. Census data for 2007 indicate that in that year there were 1,906 firms operating businesses as wired telecommunications carriers. Of that 1,906, 1,880 operated with 999 or fewer employees, and 26 operated with 1,000 employees or more.

Based on this data, we estimate that a majority of operators of SMATV/PCO companies were small under the applicable SBA size standard.

Under these new rules, cable operators that use QAM to modulate their signals need only comply with the SCTE 40 standard in lieu of testing digital signals. Cable operators will also be required to file Aeronautical Frequency Notifications with the Commission if they operate at a certain power level. These notifications are necessary to ensure that cable operators' signals do not interfere with aeronautical frequencies that are vital to airplane safety and navigation.

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

The *Digital Cable Standards NPRM* proposed to adopt rules analogous to the Commission's analog proof-of-performance rules which include a testing requirement, technical standards, testing methods, recordkeeping requirements, and procedures to resolve complaints about signal quality. The changes adopted in this Report and Order instead do not impose testing and reporting burdens for digital signals, substantially benefiting smaller businesses, and directly addressing the concerns raised by the comments filed in response to the IRFA. As noted above, because digital signals do not share in the pattern of technical problems which plagued analog services, a rigid periodic testing requirement is not necessary. This item will not impose a significant burden on small cable operators. All QAM-based cable operators already comply with the SCTE 40 standard for signal quality pursuant to the Commission's existing set-top box requirements, and absent complaints from subscribers about signal quality, under the Report and Order cable operators may rely on the standard to ensure proof-of-performance.

Incorporation by reference: We are incorporating by reference 2 standards in this rule: ANSI/SCTE 40 2016 and CTA–542–D.

ANSI/SCTE 40 2016 sets relative channel power limits, carrier-to-noise ratios, and adjacent-channel characteristics that reflect the minimum technical standards necessary to ensure that cable operators deliver quality QAM signals to their subscribers and is discussed more fully elsewhere in this preamble. The standard is freely available online at *www.scte.org/SCTEDocs/Standards/SCTE%2040%202016.pdf,* and therefore we conclude that it is reasonably available.

CTA–542–D defines the frequency allocations for channel numbers on cable systems and is reasonably available for retail purchase from various sources and from the Consumer Technology Association directly at *standards.cta.tech.*

Report to Congress: The Commission will send a copy of the Report and Order, including this FRFA, in a report to Congress pursuant to the Congressional Review Act. In addition, the Commission will send a copy of the Report and Order, including this FRFA, to the Chief Counsel for Advocacy of the SBA. A copy of the Report and Order and FRFA (or summaries thereof) will also be published in the **Federal Register**.

The Commission will send a copy of the Report and Order in MB Docket No. 12–217 in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, see 5 U.S.C. 801(a)(1)(A).

Accordingly, *it is ordered* that, pursuant to the authority found in Sections 1, 4(i), 4(j), 301, 302a, 303, 307, 308, 624, and 624A of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154(i), 154(j), 301, 302a, 303, 307, 308, 544, and 544a, this Report and Order *is adopted.*

It is further ordered that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, *shall send* a copy of this Report and Order in MB Docket No. 12–217, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

It is further ordered that the Commission *shall send* a copy of this Report and Order in MB Docket No. 12–217 in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, see 5 U.S.C. 801(a)(1)(A).

List of Subjects in 47 CFR Part 76

Administrative practice and procedure, Cable television, Equal employment opportunity, Incorporation by reference, Political candidates, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, the Federal Communications Commission amends part 76 of title 47 of the Code of Federal Regulations as follows:

PART 76—MULTICHANNEL VIDEO AND CABLE TELEVISION SERVICE

■ 1. The authority citation for part 76 continues to read as follows:

Authority: 47 U.S.C. 151, 152, 153, 154, 301, 302, 302a, 303, 303a, 307, 308, 309, 312, 315, 317, 325, 338, 339, 340, 341, 503, 521, 522, 531, 532, 534, 535, 536, 537, 543, 544, 544a, 545, 548, 549, 552, 554, 556, 558, 560, 561, 571, 572, 573.

■ 2. Amend § 76.55 by revising the Note to paragraph (d) to read as follows:

§ 76.55 Definitions applicable to the must-carry rules.

* * * * *

Note to Paragraph (d): For the purposes of this section, for over-the-air broadcast, a good quality signal shall mean a signal level of either −45 dBm for analog VHF signals, −49 dBm for analog UHF signals, or −61 dBm for digital signals (at all channels) at the input terminals of the signal processing equipment.

* * * * *

■ 3. Amend § 76.56 by revising paragraph (a)(1)(i) and the introductory text to paragraph (b) to read as follows:

§ 76.56 Signal carriage obligations.

(a) * * *

(1) * * *

(i) Systems with 12 or fewer usable activated channels, as defined in § 76.5(oo), shall be required to carry the signal of one such station;

* * * * *

(b) *Carriage of local commercial television stations.* A cable television system shall carry local commercial broadcast television stations in accordance with the following provisions:

* * * * *

■ 4. Revise § 76.57(e) to read as follows:

§ 76.57 Channel positioning.

* * * * *

(e) At the time a local commercial station elects must-carry status pursuant to § 76.64, such station shall notify the cable system of its choice of channel position as specified in paragraphs (a), (b), and (d) of this section. A qualified NCE station shall notify the cable system of its choice of channel position when it requests carriage.

* * * * *

■ 5. Revise § 76.64(a) to read as follows

§ 76.64 Retransmission consent.

(a) No multichannel video programming distributor shall retransmit the signal of any commercial broadcasting station without the express authority of the originating station, except as provided in paragraph (b) of this section.

* * * * *

■ 6. Amend § 76.105 by revising the introductory text to paragraph (b) to read as follows:

§ 76.105 Notifications.

* * * * *

(b): Broadcasters entering into contracts which contain syndicated exclusivity protection shall notify affected cable systems within sixty calendar days of the signing of such a contract. A broadcaster shall be entitled to exclusivity protection beginning on the later of:

* * * * *

■ 7. Amend § 76.309 by revising the introductory text to paragraph (c) to read as follows:

§ 76.309 Customer service obligations.

* * * * *

(c) Cable operators are subject to the following customer service standards:

* * * * *

■ 8. Revise § 76.601(b) to read as follows:

§ 76.601 Performance tests.

* * * * *

(b) The operator of each cable television system that operates NTSC or similar channels shall conduct performance tests of the analog channels on that system at least twice each calendar year (at intervals not to exceed seven months), unless otherwise noted below. The performance tests shall be directed at determining the extent to which the system complies with all the technical standards set forth in § 76.605 and shall be as follows:

(1) For cable television systems with 1,000 or more subscribers but with 12,500 or fewer subscribers, proof-of-performance tests conducted pursuant to this section shall include measurements taken at six (6) widely separated points. However, within each cable system, one additional test point shall be added for every additional 12,500 subscribers or fraction thereof (*e.g.,* 7 test points if 12,501 to 25,000 subscribers; 8 test points if 25,001 to 37,500 subscribers, etc.). In addition, for technically integrated portions of cable systems that are not mechanically continuous (*e.g.,* employing microwave connections), at least one test point will be required for each portion of the cable system served by a technically integrated hub. The proof-of-performance test points chosen shall be balanced to represent all geographic areas served by the cable system. At least one-third of the test points shall be representative of subscriber terminals most distant from the system input and from each microwave receiver (if microwave transmissions are employed), in terms of cable length. The measurements may be taken at convenient monitoring points in the cable network provided that data shall be included to relate the measured performance of the system as would be viewed from a nearby subscriber terminal. An identification of the instruments, including the makes, model numbers, and the most recent date of calibration, a description of the procedures utilized, and a statement of the qualifications of the person performing the tests shall also be included.

(2) Proof-of-performance tests to determine the extent to which a cable television system complies with the standards set forth in § 76.605(b)(3), (4), and (5) shall be made on each of the NTSC or similar video channels of that system. Unless otherwise noted, proof-of-performance tests for all other standards in § 76.605(b) shall be made on a minimum of five (5) channels for systems operating a total activated channel capacity of less than 550 MHz, and ten (10) channels for systems operating a total activated channel capacity of 550 MHz or greater. The channels selected for testing must be representative of all the channels within the cable television system.

(i) The operator of each cable television system that operates NTSC or similar channels shall conduct semi-annual proof-of-performance tests of that system, to determine the extent to which the system complies with the technical standards set forth in § 76.605(b)(4) as follows. The visual signal level on each channel shall be measured and recorded, along with the date and time of the measurement, once every six hours (at intervals of not less than five hours or no more than seven hours after the previous measurement), to include the warmest and the coldest times, during a 24-hour period in January or February and in July or August.

(ii) The operator of each cable television system that operates NTSC or similar channels shall conduct triennial proof-of-performance tests of its system to determine the extent to which the system complies with the technical standards set forth in § 76.605(b)(11).

* * * * *

■ 9. Amend § 76.602 by revising paragraphs (c) and (d)(3) to read as follows:

§ 76.602 Incorporation by reference.

* * * * *

(c) The following materials are available from the Consumer Technology Association (formerly the Consumer Electronics Association), 1919 S Eads St., Arlington, VA 22202; phone: 703–907–7600; web: *standards.cta.tech/kwspub/published_docs/.*

(1) CTA–542–D, ''Cable Television Channel Identification Plan,'' June 2013, IBR approved for § 76.605.

(2) CEA–931–A, ''Remote Control Command Pass-through Standard for Home Networking,'' 2003, IBR approved for § 76.640. (CEA–931–A is available through the document history of ''CTA–931'' from the reseller in paragraph (e)(2) of this section.)

(d) * * *

(3) ANSI/SCTE 40 2016, ''Digital Cable Network Interface Standard,'' copyright 2016, IBR approved for §§ 76.605, 76.640.

* * * * *

■ 10. Revise § 76.605 to read as follows

§ 76.605 Technical standards.

(a) The following requirements apply to the performance of a cable television system as measured at the input to any terminal device with a matched impedance at the termination point or at the output of the modulating or processing equipment (generally the headend) of the cable television system or otherwise noted here or in ANSI/SCTE 40 2016. The requirements of paragraph (b) of this section are applicable to each NTSC or similar video downstream cable television channel in the system. Each cable system that uses QAM modulation to transport video programming shall adhere to ANSI/SCTE 40 2016 (incorporated by reference, see § 76.602). Cable television systems utilizing other technologies to distribute programming must respond to consumer complaints under paragraph (d) of this section.

(b) For each NTSC or similar video downstream cable television channel in the system:

(1) The cable television channels delivered to the subscriber's terminal shall be capable of being received and displayed by TV broadcast receivers used for off-the-air reception of TV broadcast signals, as authorized under

part 73 of this chapter; and cable television systems shall transmit signals to subscriber premises equipment on frequencies in accordance with the channel allocation plan set forth in CTA–542–D (incorporated by reference, see § 76.602).

(2) The aural center frequency of the aural carrier must be 4.5 MHz ±5 kHz above the frequency of the visual carrier at the output of the modulating or processing equipment of a cable television system, and at the subscriber terminal.

(3) The visual signal level, across a terminating impedance which correctly matches the internal impedance of the cable system as viewed from the subscriber terminal, shall not be less than 1 millivolt across an internal impedance of 75 ohms (0 dBmV). Additionally, as measured at the end of a 30 meter (100 foot) cable drop that is connected to the subscriber tap, it shall not be less than 1.41 millivolts across an internal impedance of 75 ohms (+3 dBmV). (At other impedance values, the minimum visual signal level, as viewed from the subscriber terminal, shall be the square root of 0.0133 (Z) millivolts and, as measured at the end of a 30 meter (100 foot) cable drop that is connected to the subscriber tap, shall be 2 times the square root of 0.00662(Z) millivolts, where Z is the appropriate impedance value.)

(4) The visual signal level on each channel, as measured at the end of a 30 meter cable drop that is connected to the subscriber tap, shall not vary more than 8 decibels within any six-month interval, which must include four tests performed in six-hour increments during a 24-hour period in July or August and during a 24-hour period in January or February, and shall be maintained within:

(i) 3 decibels (dB) of the visual signal level of any visual carrier within a 6 MHz nominal frequency separation;

(ii) 10 dB of the visual signal level on any other channel on a cable television system of up to 300 MHz of cable distribution system upper frequency limit, with a 1 dB increase for each additional 100 MHz of cable distribution system upper frequency limit (*e.g.,* 11 dB for a system at 301–400 MHz; 12 dB for a system at 401–500 MHz, etc.); and

(iii) A maximum level such that signal degradation due to overload in the subscriber's receiver or terminal does not occur.

(5) The rms voltage of the aural signal shall be maintained between 10 and 17 decibels below the associated visual signal level. This requirement must be met both at the subscriber terminal and at the output of the modulating and processing equipment (generally the headend). For subscriber terminals that use equipment which modulate and remodulate the signal (*e.g.,* baseband converters), the rms voltage of the aural signal shall be maintained between 6.5 and 17 decibels below the associated visual signal level at the subscriber terminal.

(6) The amplitude characteristic shall be within a range of ±2 decibels from 0.75 MHz to 5.0 MHz above the lower boundary frequency of the cable television channel, referenced to the average of the highest and lowest amplitudes within these frequency boundaries. The amplitude characteristic shall be measured at the subscriber terminal.

(7) The ratio of RF visual signal level to system noise shall not be less than 43 decibels. For class I cable television channels, the requirements of this section are applicable only to:

(i) Each signal which is delivered by a cable television system to subscribers within the predicted Grade B or noise-limited service contour, as appropriate, for that signal;

(ii) Each signal which is first picked up within its predicted Grade B or noise-limited service contour, as appropriate;

(iii) Each signal that is first received by the cable television system by direct video feed from a TV broadcast station, a low power TV station, or a TV translator station.

(8) The ratio of visual signal level to the rms amplitude of any coherent disturbances such as intermodulation products, second and third order distortions or discrete-frequency interfering signals not operating on proper offset assignments shall be as follows:

(i) The ratio of visual signal level to coherent disturbances shall not be less than 51 decibels for noncoherent channel cable television systems, when measured with modulated carriers and time averaged; and

(ii) The ratio of visual signal level to coherent disturbances which are frequency-coincident with the visual carrier shall not be less than 47 decibels for coherent channel cable systems, when measured with modulated carriers and time averaged.

(9) The terminal isolation provided to each subscriber terminal:

(i) Shall not be less than 18 decibels. In lieu of periodic testing, the cable operator may use specifications provided by the manufacturer for the terminal isolation equipment to meet this standard; and

(ii) Shall be sufficient to prevent reflections caused by open-circuited or short-circuited subscriber terminals from producing visible picture impairments at any other subscriber terminal.

(10) The peak-to-peak variation in visual signal level caused by undesired low frequency disturbances (hum or repetitive transients) generated within the system, or by inadequate low frequency response, shall not exceed 3 percent of the visual signal level. Measurements made on a single channel using a single unmodulated carrier may be used to demonstrate compliance with this parameter at each test location.

(11) The following requirements apply to the performance of the cable television system as measured at the output of the modulating or processing equipment (generally the headend) of the system:

(i) The chrominance-luminance delay inequality (or chroma delay), which is the change in delay time of the chrominance component of the signal relative to the luminance component, shall be within 170 nanoseconds.

(ii) The differential gain for the color subcarrier of the television signal, which is measured as the difference in amplitude between the largest and smallest segments of the chrominance signal (divided by the largest and expressed in percent), shall not exceed ±20%.

(iii) The differential phase for the color subcarrier of the television signal which is measured as the largest phase difference in degrees between each segment of the chrominance signal and reference segment (the segment at the blanking level of 0 IRE), shall not exceed ±10 degrees.

(c) As an exception to the general provision requiring measurements to be made at subscriber terminals, and without regard to the type of signals carried by the cable television system, signal leakage from a cable television system shall be measured in accordance with the procedures outlined in § 76.609(h) and shall be limited as shown in table 1 to paragraph (c):

TABLE 1 TO PARAGRAPH (c)

Frequencies	Signal leakage limit	Distance in meters (m)
Analog signals less than and including 54 MHz, and over 216 MHz	15 μV/m	30
Digital signals less than and including 54 MHz, and over 216 MHz	13.1 μV/m	30
Analog signals over 54 MHz up to and including 216 MHz	20 μV/m	3
Digital signals over 54 MHz up to and including 216 MHz	17.4 μV/m	3

(d) Cable television systems distributing signals by methods other than 6 MHz NTSC or similar analog channels or 6 MHz QAM or similar channels on conventional coaxial or hybrid fiber-coaxial cable systems and which, because of their basic design, cannot comply with one or more of the technical standards set forth in paragraphs (a) and (b) of this section, are permitted to operate without Commission approval, provided that the operators of those systems adhere to all other applicable Commission rules and respond to consumer and local franchising authorities regarding industry-standard technical operation as set forth in their local franchise agreements and consistent with § 76.1713.

Note 1: Local franchising authorities of systems serving fewer than 1,000 subscribers may adopt standards less stringent than those in § 76.605(a) and (b). Any such agreement shall be reduced to writing and be associated with the system's proof-of-performance records.

Note 2: For systems serving rural areas as defined in § 76.5, the system may negotiate with its local franchising authority for standards less stringent than those in § 76.605(b)(3), (7), (8), (10) and (11). Any such agreement shall be reduced to writing and be associated with the system's proof-of-performance records.

Note 3: The requirements of this section shall not apply to devices subject to the TV interface device rules under part 15 of this chapter.

Note 4: Should subscriber complaints arise from a system failing to meet § 76.605(b)(10), the cable operator will be required to remedy the complaint and perform test measurements on § 76.605(b)(10) containing the full number of channels as indicated in § 76.601(b)(2) at the complaining subscriber's terminal. Further, should the problem be found to be system-wide, the Commission may order that the full number of channels as indicated in § 76.601(b)(2) be tested at all required locations for future proof-of-performance tests.

Note 5: No State or franchising authority may prohibit, condition, or restrict a cable system's use of any type of subscriber equipment or any transmission technology.

■ 11. Revise § 76.606 to read as follows:

§ 76.606 Closed captioning.

(a) The operator of each cable television system shall not take any action to remove or alter closed captioning data contained on line 21 of the vertical blanking interval.

(b) The operator of each cable television system shall deliver intact closed captioning data contained on line 21 of the vertical blanking interval, as it arrives at the headend or from another origination source, to subscriber terminals and (when so delivered to the cable system) in a format that can be recovered and displayed by decoders meeting § 79.101 of this chapter.

■ 12. Revise § 76.610 to read as follows:

§ 76.610 Operation in the frequency bands 108–137 MHz and 225–400 MHz—scope of application.

The provisions of §§ 76.605(d), 76.611, 76.612, 76.613, 76.614, 76.616, 76.617, 76.1803 and 76.1804 are applicable to all MVPDs (cable and non-cable) transmitting analog carriers or other signal components carried at an average power level equal to or greater than 100 microwatts across a 25 kHz bandwidth in any 160 microsecond period or transmitting digital carriers or other signal components at an average power level of 75.85 microwatts across a 25 kHz bandwidth in any 160 microsecond period at any point in the cable distribution system in the frequency bands 108–137 and 225–400 MHz for any purpose. Exception: Non-cable MVPDs serving less than 1000 subscribers and less than 1,000 units do not have to comply with § 76.1803.

■ 13. Revise § 76.611 to read as follows:

§ 76.611 Cable television basic signal leakage performance criteria.

(a) No cable television system shall commence or provide service in the frequency bands 108–137 and 225–400 MHz unless such systems is in compliance with one of the following cable television basic signal leakage performance criteria:

(1) Prior to carriage of signals in the aeronautical radio bands and at least once each calendar year, with no more than 12 months between successive tests thereafter, based on a sampling of at least 75% of the cable strand, and including any portion of the cable system which are known to have or can reasonably be expected to have less leakage integrity than the average of the system, the cable operator demonstrates compliance with a cumulative signal leakage index by showing that 10 log I_∞ is equal to or less than 64 using the following formula:

$$I_\infty = \frac{1}{\theta}\sum_{i=1}^{n} E_i^2,$$

θ is the fraction of the system cable length actually examined for leakage sources and is equal to the strand kilometers (strand miles) of plant tested divided by the total strand kilometers (strand miles) in the plant;

E_i is the electric field strength in microvolts per meter (μV/m) measured 3 meters from the leak i; and

n is the number of leaks found of field strength equal to or greater than 50 μV/m measured pursuant to § 76.609(h).

The sum is carried over all leaks i detected in the cable examined; or

(2) Prior to carriage of signals in the aeronautical radio bands and at least once each calendar year, with no more than 12 months between successive tests thereafter, the cable operator demonstrates by measurement in the airspace that at no point does the field strength generated by the cable system exceed 10 microvolts per meter (μV/m) RMS at an altitude of 450 meters above the average terrain of the cable system. The measurement system (including the receiving antenna) shall be calibrated against a known field of 10 μV/m RMS produced by a well characterized antenna consisting of orthogonal resonant dipoles, both parallel to and one quarter wavelength above the ground plane of a diameter of two meters or more at ground level. The dipoles shall have centers collocated and be excited 90 degrees apart. The half-power bandwidth of the detector shall be 25 kHz. If an aeronautical receiver is used for this purpose it shall meet the standards of the Radio Technical Commission for Aeronautics (RCTA) for aeronautical communications receivers. The aircraft antenna shall be horizontally polarized.

Calibration shall be made in the community unit or, if more than one, in any of the community units of the physical system within a reasonable time period to performing the measurements. If data is recorded digitally the 90th percentile level of points recorded over the cable system shall not exceed 10 μV/m RMS as indicated above; if analog recordings is used the peak values of the curves, when smoothed according to good engineering practices, shall not exceed 10 μV/m RMS.

(b) In paragraphs (a)(1) and (2) of this section the unmodulated test signal used for analog leakage measurements on the cable plant shall—

(1) Be within the VHF aeronautical band 108–137 MHz or any other frequency for which the results can be correlated to the VHF aeronautical band; and

(2) Have an average power level equal to the greater of:

(i) The peak envelope power level of the strongest NTSC or similar analog cable television signal on the system, or

(ii) 1.2 dB greater than the average power level of the strongest QAM or similar digital cable television signal on the system.

(c) In paragraphs (a)(1) and (2) of this section, if a modulated test signal is used for analog leakage measurements, the test signal and detector technique must, when considered together, yield the same result as though an unmodulated test signal were used in conjunction with a detection technique which would yield the RMS value of said unmodulated carrier.

(d) If a sampling of at least 75% of the cable strand (and including any portions of the cable system which are known to have or can reasonably be expected to have less leakage integrity than the average of the system) as described in paragraph (a)(1) of this section cannot be obtained by the cable operator or is otherwise not reasonably feasible, the cable operator shall perform the airspace measurements described in paragraph (a)(2) of this section.

(e) Prior to providing service to any subscriber on a new section of cable plant, the operator shall show compliance with either:

(1) The basic signal leakage criteria in accordance with paragraphs (a)(1) or (2) of this section for the entire plant in operation or

(2) a showing shall be made indicating that no individual leak in the new section of the plant exceeds 20 μV/m at 3 meters in accordance with § 76.609 for analog signals or 17.4 μV/m at 3 meters for digital signals.

(f) Notwithstanding paragraph (a) of this section, a cable operator shall be permitted to operate on any frequency which is offset pursuant to § 76.612 in the frequency band 108–137 MHz for the purpose of demonstrating compliance with the cable television basic signal leakage performance criteria.

■ 14. Revise the introductory text to § 76.612 to read as follows:

§ 76.612 Cable television frequency separation standards.

All cable television systems which operate analog NTSC or similar channels in the frequency bands 108–137 MHZ and 225–400 MHz shall comply with the following frequency separation standards for each NTSC or similar channel:

* * * * *

■ 15. Revise § 76.640(b)(1)(i) to read as follows:

§ 76.640 Support for unidirectional digital cable products on digital cable systems.

* * * * *

(b) * * *

(1) * * *

(i) ANSI/SCTE 40 2016 (incorporated by reference, see § 76.602), provided however that the ''transit delay for most distant customer'' requirement in Table 4.3 is not mandatory.

* * * * *

■ 16. Revise § 76.1508(a) to read as follows:

§ 76.1508 Network non-duplication.

(a) Sections 76.92 through 76.95 shall apply to open video systems in accordance with the provisions contained in this section.

* * * * *

■ 17. Revise § 76.1509 to read as follows:

§ 76.1509 Syndicated program exclusivity.

(a) Sections 76.101 through 76.110 shall apply to open video systems in accordance with the provisions contained in this section.

(b) Any provision of § 76.101 that refers to a ''cable community unit'' shall apply to an open video system.

(c) Any provision of § 76.105 that refers to a ''cable system operator'' or ''cable television system operator'' shall apply to an open video system operator. Any provision of § 76.105 that refers to a ''cable system'' or ''cable television system'' shall apply to an open video system except § 76.105(c) which shall apply to an open video system operator. Open video system operators shall make all notifications and information regarding exercise of syndicated program exclusivity rights immediately available to all appropriate video programming provider on the system. An open video system operator shall not be subject to sanctions for any violation of the rules in §§ 76.101 through 76.110 by an unaffiliated program supplier if the operator provided proper notices to the program supplier and subsequently took prompt steps to stop the distribution of the infringing program once it was notified of a violation.

(d) Any provision of § 76.106 that refers to a ''cable community'' shall apply to an open video system community. Any provision of § 76.106 that refers to a ''cable community unit'' or ''community unit'' shall apply to an open video system or that portion of an open video system that operates or will operate within a separate and distinct community or municipal entity (including unincorporated communities within unincorporated areas and including single, discrete unincorporated areas). Any provision of §§ 76.106 through 76.108 that refers to a ''cable system'' shall apply to an open video system.

(e) Any provision of § 76.109 that refers to ''cable television'' or a ''cable system'' shall apply to an open video system.

(f) Any provision of § 76.110 that refers to a ''community unit'' shall apply to an open video system or that portion of an open video system that is affected by this rule.

■ 18. Revise § 76.1510 to read as follows:

§ 76.1510 Application of certain Title VI provisions.

The following sections within part 76 shall also apply to open video systems: §§ 76.71, 76.73, 76.75, 76.77, 76.79, 76.1702, and 76.1802 (Equal Employment Opportunity Requirements); §§ 76.503 and 76.504 (ownership restrictions); § 76.981 (negative option billing); and §§ 76.1300, 76.1301 and 76.1302 (regulation of carriage agreements); § 76.610 (operation in the frequency bands 108–137 and 225–400 MHz—scope of application provided, however, that these sections shall apply to open video systems only to the extent that they do not conflict with this subpart S. Section 631 of the Communications Act (subscriber privacy) shall also apply to open video systems.

■ 19. Revise § 76.1601 to read as follows:

§ 76.1601 Deletion or repositioning of broadcast signals.

A cable operator shall provide written notice to any broadcast television

station at least 30 days prior to either deleting from carriage or repositioning that station. Such notification shall also be provided to subscribers of the cable system.

■ 20. Amend § 76.1602 by revising the introductory text to paragraph (b) to read as follows:

§ 76.1602 Customer service—general information.

* * * * *

(b) The cable operator shall provide written information on each of the following areas at the time of installation of service, at least annually to all subscribers, and at any time upon request:

* * * * *

§ 76.1610 [Amended]

■ 21. Amend § 76.1610 by removing paragraphs (f) and (g).

■ 22. Revise § 76.1701(d) to read as follows:

§ 76.1701 Political file.

* * * * *

(d) Where origination cablecasting material is a political matter or matter involving the discussion of a controversial issue of public importance and a corporation, committee, association or other unincorporated group, or other entity is paying for or furnishing the matter, the system operator shall, in addition to making the announcement required by § 76.1615, require that a list of the chief executive officers or members of the executive committee or of the board of directors of the corporation, committee, association or other unincorporated group, or other entity shall be made available for public inspection at the local office of the system. Such lists shall be kept and made available for two years.

■ 23. Revise the introductory text to § 76.1804 to read as follows:

§ 76.1804 Aeronautical frequencies notification: leakage monitoring (CLI).

An MVPD shall notify the Commission before transmitting any digital signal with average power exceeding 10^{-5} watts across a 30 kHz bandwidth in a 2.5 millisecond time period, or for other signal types, any carrier of other signal component with an average power level across a 25 kHz bandwidth in any 160 microsecond time period equal to or greater than 10^{-4} watts at any point in the cable distribution system on any new frequency or frequencies in the aeronautical radio frequency bands (108–137 MHz, 225–400 MHz). The notification shall be made on FCC Form 321. Such notification shall include:

* * * * *

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. 2018–03547 Filed 2–21–18; 8:45 am]

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GENERAL SERVICES ADMINISTRATION

48 CFR Parts 502, 512, 513, 532, and 552

[GSAR Change 83; GSAR Case 2015–G512; Docket No. 2016–0010; Sequence No. 2]

RIN 3090–AJ67

General Services Administration Acquisition Regulation; Unenforceable Commercial Supplier Agreement Terms

AGENCY: Office of Acquisition Policy, General Services Administration (GSA).

ACTION: Final rule.

SUMMARY: GSA is amending the General Services Administration Acquisition Regulation (GSAR) to address common commercial supplier agreement terms that are inconsistent with or create ambiguity with Federal Law.

DATES: *Effective:* February 22, 2018.

FOR FURTHER INFORMATION CONTACT: Ms. Janet Fry, Senior Policy Advisor, GSA Acquisition Policy Division, at 703–605–3167 or *janet.fry@gsa.gov.* For information pertaining to status or publication schedules, contact the Regulatory Secretariat at 202–501–4755. Please cite GSAR Case 2015–G512.

SUPPLEMENTARY INFORMATION:

I. Background

GSA published a proposed rule in the **Federal Register** at 81 FR 34302 on May 31, 2016, to amend the GSAR and address common commercial supplier agreement terms that are inconsistent with or create ambiguity with Federal Law.

Standard commercial supplier agreements contain terms and conditions that make sense when the purchaser is a private party but are inappropriate when the purchaser is the Federal Government. Discrepancies between commercial supplier agreements and Federal law or the Government's needs create recurrent points of inconsistency. As a result, industry and Government representatives must spend significant time and resources negotiating and tailoring commercial supplier agreements to comply with Federal law and to ensure both parties have agreement on the contract terms. Explicitly addressing common unenforceable terms eliminates the need for negotiation on these identified terms.

This approach will: (1) Decrease proposal costs associated with negotiating the identified unenforceable commercial supplier agreement terms; (2) facilitate faster procurement and contract lead times, therefore decreasing the time it takes for contractors to make a return on their investment; (3) reduce administrative costs for companies that maintain alternate Federally compliant commercial supplier agreements; and (4) for small business concerns, level the playing field with larger competitors since negotiations will only be required if the commercial supplier agreements contain objectionable clauses outside of those already identified in the GSAR clause. Lastly, this approach ensures consistent application and understanding of these unenforceable terms, potentially reducing unnecessary legal costs.

II. Discussion of Proposed Rule

Two respondents submitted comments on the proposed rule. The General Services Administration has reviewed the comments in the development of the final rule. A discussion of the comments and the changes made to the rule as a result of those comments are provided as follows:

A. Summary of Significant Changes

This final rule makes the following significant changes from the proposed rule:

- GSAR 552.212–4(s)—Reverts the order of precedence to move ''Addenda to the solicitation or contract, including any license agreements for computer software'' back to number 4, and ''Solicitation provisions of the solicitation'' and ''Other paragraphs of the clause'' back to number 5 and 6, respectively. Additionally, language was added to clarify the Commercial Supplier Agreements—Unenforceable Clauses provision takes precedence over the commercial supplier agreement terms and conditions.
- GSAR 552.212–4(w)(1)(vi)—Deletes the requirement for providing full text terms with the offer, adds a definition of a material change, and adds clarification on when a commercial supplier agreement must be bilaterally modified in the contract.

B. Analysis of Public Comments

Public comments are grouped into categories in order to provide clarification and to better respond to the issues raised.

1. Order of Precedence

Comment: Both respondents addressed concerns with the change to the order of precedence in paragraph(s) of GSAR clause 552.212–4 which places commercial supplier agreements in a lower position. The commenters stated that this could result in terms, which are not required by law or regulation, taking precedence over the standard commercial terms in a commercial supplier agreement. The commenters provided the example of a non-standard warranty contained in a solicitation provision or in 552.212–4 paragraph (o), Warranty, taking precedence over a company's standard commercial warranty contained in their commercial supplier agreement. Additional examples included title and ownership of software intellectual property (''IP''), warranty and exclusion of implied warranties, limitations of liability and exclusive remedies, and IP indemnification. One respondent stated the change in precedence creates a preference for Government terms and conditions that appears to contradict the language of existing statute (Federal Acquisition Streamlining Act) and regulation (Federal Acquisition Regulation (FAR) part 12).

Response: The intent of the change in the order of precedence was (1) to ensure the Commercial Supplier Agreement—Unenforceable Clauses provisions take precedence over the standard commercial supplier agreements and (2) to provide clarity that awarded terms (*i.e.* those agreed to by both parties during contract formation), including the negotiated and awarded commercial supplier agreement, take precedence to unilateral changes to commercial supplier agreements made by the contractor. GSA reviewed the unintended impacts identified by the respondents and agrees that there are better ways to solve the problem.

Instead, GSA addressed intent (1) by adding language to 552.212–4(s)(4)to clarify that the Commercial Supplier Agreement—Unenforceable Clauses provisions take precedence over any commercial supplier agreement.

GSA addressed intent (2) by adding a new subparagraph to 552.212–4(w)(1)(vi) to clearly state that material changes to a commercial supplier agreement after award must be bilaterally modified into the contract to be enforceable against the Government. Additionally, subparagraph (C) was updated to more clearly state that unilateral revisions that are found to be inconsistent with a material term of the contract are not enforceable against the Government (*i.e.*, awarded commercial supplier terms will take precedence over terms updated unilaterally). Equivalent changes were made to the language at GSAR 552.232–78.

2. Full Text Terms

Comment: Both respondents voiced concerns about the burden on contractors to provide full text for all terms. Commercial supplier agreements may include terms by reference which can be voluminous. The terms may change at any time and providing full text would unduly delay awards and modifications. One respondent stated the requirement to submit the terms in writing seemed to imply they will be fixed terms, and that providing full text terms is not a commercial practice.

Response: The intent of this language was to ensure that the Government fully understands the terms and conditions agreed upon during contract formation.

As stated in the public comments, referenced terms on a website can be changed at any time, which is problematic during contract formation for the Government. The time between an offer and award of a contract could be several weeks. There is no assurance that the referenced terms reviewed early in contract formation have not changed. When awarding contracts, contracting officers must be fully aware of the terms that will bind the Government, which is why static full text terms were proposed.

After consideration of the public comments, GSA decided that maintaining the commercial practice of providing the commercial supplier agreement with referenced terms and by improving internal controls for intake and management of commercial supplier agreements could reduce Government risk and accomplish the intended outcome.

For this reason, GSA has deleted the language in 552.212–4(w)(1)(vi)(A) which required full text for *all* terms. An equivalent change was made to the language at GSAR 552.232–78. GSA will add supplementary guidance in the General Services Acquisition Manual to clarify the contracting officer's responsibilities regarding commercial supplier agreement reviews, negotiations and documentation.

3. Enforceability of Unilateral Revisions

Comment: One respondent stated the intent of 552.212–4(w)(1)(vi)(C) is unclear. If the intent is the order of precedence clause of the contract is not enforceable with respect to any software license terms unilaterally revised subsequent to award, then the respondent recommends the Paragraph be revised for purposes of clarity.

Response: The intent of the clause is to ensure material changes to the term of the contract are agreed to by both parties. 552.212–4(w)(1)(vi)(C) has been revised to more clearly state the intent, and an additional paragraph has been added to require bilateral modifications for material changes to commercial supplier agreements after contract award.

4. Significant Regulatory Action

Comment: One respondent stated ''the proposed rule is a significant action, due to the change in the order of precedence, which should be subject to OMB review'' pursuant to Executive Order 12866.

Response: As previously addressed, the order of precedence will be reverted back to the order enumerated in the FAR 52.212–4 based on the unintended impacts brought to light by the respondents. Therefore, this rule is not a significant change, and is not subject to Office of Management and Budget (OMB) review pursuant to Executive Order 12866.

5. Burdensome Information Collection

Comment: One respondent believes the requirement to provide full text of terms is an unnecessary and burdensome information collection and subject to the Paperwork Reduction Act (PRA).

Response: GSA has removed the requirement to provide all full text terms and therefore this rule is not subject to the PRA.

C. Other Changes

This final rule makes the following additional changes from the proposed rule:

- GSAR 512.301, Solicitation provisions and contract clauses for the acquisition of commercial items, a conforming change is made to subparagraph (e) to clarify the applicability of the deviated language to FAR 52.212–4 Alternate I.
- GSAR 552.212–4(w)(1)(ix), Audits, a typographical error in the disputes clause reference was fixed.
- GSAR 552.232–78, Commercial Supplier Agreements—Unenforceable Clauses, is renumbered and amended to make conforming changes.
- GSAR 552.232–78(a)(4), previously (a)(1)(iv), Continued performance, is revised to correct the reference of the

disputes clause from ''subparagraph (d) (Disputes)'' to ''FAR 52.233–1, Disputes.''

• GSAR 552.232–78(a)(6), Updating terms, previously (a)(1)(vi), Additional terms, is updated to reflect equivalent text changes previously described for subparagraph (w)(1)(vi) of 552.212–4.

III. Expected Cost Savings of This Final Rule

Information was gathered from GSA's Information Technology Category (ITC) business line and GSA's Office of General Counsel (OGC) to estimate total annualized cost savings associated with reviewing and negotiating the 15 incompatible CSA terms for both industry and Government. A 7 percent discount rate was used for all calculations.

Government Cost Savings

Based on the ITC CSA data for Fiscal Year 2016 (FY16), GSA estimates approximately 600 CSAs will be reviewed each year. CSAs must be reviewed for each procurement because terms of CSAs are updated often. Therefore, the review of a CSA for a new procurement is not eliminated by a previous review of a CSA for the same item purchased previously.

GSA ITC subject matter experts and GSA OGC were consulted to identify the activities associated with the review of CSAs and the hourly estimates for the activities in relation to the 15 CSA terms. It is estimated that on average OGC review takes 0.9 hours and contracting officer review and negotiation takes 2.7 hours for each CSA. Using the 2017 General Schedule, average pay rates were identified for attorneys and contracting officers and fringe benefits were included. The estimated annualized cost savings for the Government is $119,103.

Public Cost Savings

Apparent successful offerors have at least a negotiator and an attorney participate in the review and negotiation of a CSA prior to award. It is assumed, at a minimum, the time required by an offeror's attorney and negotiator to review the 15 CSA terms are equivalent to the Government legal and contracting officer hours; 0.9 and 2.7 hours respectively. Fully burdened labor rates equivalent to the Government were used to estimate industry cost savings. Therefore for industry the estimated annualized cost savings is $119,103.

The total annualized cost savings of this rule is estimated at $238,206.

IV. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

V. Executive Order 13771

This final rule is considered an E.O. 13771 deregulatory action. Details on the estimated cost savings can be found in Section III–Expected Cost Savings of this Final Rule.

VI. Executive Order 13777

This final rule was identified by GSA's Regulatory Reform Task Force as a rule that improves efficiency by eliminating procedures with costs that exceed the benefits as described in Section IV.

VII. Regulatory Flexibility Act

GSA does not expect this rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*

GSA has prepared a Final Regulatory Flexibility Analysis (FRFA) consistent with the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* The FRFA is summarized as follows:

This effort is expected to reduce the overall burden on small entities by reducing the amount of time and resources required to negotiate commercial supplier agreements in GSA contracts. GSA believes that such an approach will disproportionately benefit small business concerns since they are less likely to retain in-house counsel and the GSAR revision will reduce or eliminate the costs associated with the negotiation of the identified unenforceable elements. Furthermore, this approach will allow small businesses that do not have commercial supplier agreements tailored to Federal Government procurements to potentially utilize their otherwise compliant, standard commercial supplier agreements when conducting business with the Government. No comments were received on the Initial Regulatory Flexibility Analysis (IRFA) from the Chief Counsel for Advocacy of the Small Business Administration.

Interested parties may obtain a copy of the FRFA from the Regulatory Secretariat. The Regulatory Secretariat has submitted a copy of the FRFA to the Chief Counsel for Advocacy of the Small Business Administration.

VII. Paperwork Reduction Act

The final rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Parts 502, 512, 513, 532, and 552

Government procurement.

Dated: February 14, 2018.

Jeffrey A. Koses,

Senior Procurement Executive, Office of Acquisition Policy.

Therefore, GSA is amending 48 CFR parts 502, 512, 513, 532, and 552 as set forth below:

■ 1. Add part 502 to read as follows:

PART 502—DEFINITIONS OF WORDS AND TERMS

Authority: 40 U.S.C. 121(c).

Subpart 502.1—Definitions

502.101 Definitions.

Commercial supplier agreements means terms and conditions customarily offered to the public by vendors of supplies or services that meet the definition of ''commercial item'' set forth in FAR 2.101 and intended to create a binding legal obligation on the end user. Commercial supplier agreements are particularly common in information technology acquisitions, including acquisitions of commercial computer software and commercial technical data, but they may apply to any supply or service. The term applies—

(a) Regardless of the format or style of the document. For example, a commercial supplier agreement may be styled as standard terms of sale or lease, Terms of Service (TOS), End User License Agreement (EULA), or another similar legal instrument or agreement, and may be presented as part of a proposal or quotation responding to a solicitation for a contract or order;

(b) Regardless of the media or delivery mechanism used. For example, a commercial supplier agreement may be presented as one or more paper documents or may appear on a computer or other electronic device screen during a purchase, software installation, other product delivery,

registration for a service, or another transaction.

PART 512—ACQUISITION OF COMMERCIAL ITEMS

■ 2. The authority citation for part 512 is revised to read as follows:

Authority: 40 U.S.C. 121(c).

■ 3. Add subpart 512.2, consisting of section 512.216, to read as follows:

Subpart 512.2—Special Requirements for the Acquisition of Commercial Items

512.216 Unenforceability of unauthorized obligations.

GSA has a deviation to FAR 12.216 for this section. For commercial contracts, supplier license agreements are referred to as commercial supplier agreements (defined in 502.101). Paragraph (u) of clause 552.212–4 prevents violations of the Anti-Deficiency Act (31 U.S.C. 1341) for supplies or services acquired subject to a commercial supplier agreement.

■ 4. Amend section 512.301 by adding paragraph (e) to read as follows:

512.301 Solicitation provisions and contract clauses for the acquisition of commercial items.

* * * * *

(e) GSA has a deviation to revise certain paragraphs of FAR clause 52.212–4. Use clause 552.212–4 Contract Terms and Conditions–Commercial Items (FAR DEVIATION), for acquisitions of commercial items in lieu of FAR 52.212–4 or 52.212–4 Alternate I. The contracting officer may tailor this clause in accordance with FAR 12.302 and GSAM 512.302.

■ 5. Add part 513 to read as follows:

PART 513—SIMPLIFIED ACQUISITION PROCEDURES

Subpart 513.2—Actions at or Below the Micro-Purchase Threshold

Sec.
513.202 Unenforceability of unauthorized obligations in micro-purchases.

Subpart 513.3—Simplified Acquisition Methods

513.302 Purchase orders.
513.302–5 Clauses.

Authority: 40 U.S.C. 121(c).

Subpart 513.2—Actions at or Below the Micro-Purchase Threshold

513.202 Unenforceability of unauthorized obligations in micro-purchases.

Clause 552.232–39, Unenforceability of Unauthorized Obligations (FAR DEVIATION), will automatically apply to any micro-purchase in lieu of FAR 52.232–39 for supplies and services acquired subject to a commercial supplier agreement (as defined in 502.101).

Subpart 513.3—Simplified Acquisition Methods

513.302–5 Clauses.

Where the supplies or services are offered under a commercial supplier agreement (as defined in 502.101), the purchase order or modification shall incorporate clause 552.232–39, Unenforceability of Unauthorized Obligations (FAR DEVIATION), in lieu of FAR 52.232–39, and clause 552.232–78, Commercial Supplier Agreements–Unenforceable Clauses.

PART 532—CONTRACT FINANCING

■ 6. The authority citation for part 532 continues to read as follows:

Authority: 40 U.S.C. 121(c).

■ 7. Add subpart 532.7 to read as follows:

Subpart 532.7—Contract Funding

Sec.
532.705 Unenforceability of unauthorized obligations.
532.706–3 Clause for unenforceability of unauthorized obligations.

Subpart 532.7—Contract Funding

532.705 Unenforceability of unauthorized obligations.

Supplier license agreements defined in FAR 32.705 are equivalent to commercial supplier agreements defined in 502.101.

532.706–3 Clause for unenforceability of unauthorized obligations.

(a) The contracting officer shall utilize the clause at 552.232–39, Unenforceability of Unauthorized Obligations (FAR DEVIATION) in all solicitations and contracts in lieu of FAR 52.232–39.

(b) The contracting officer shall utilize the clause at 552.232–78, Commercial Supplier Agreements—Unenforceable Clauses, in all solicitations and contracts (including orders) when not using FAR part 12.

PART 552—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 8. The authority citation for 48 CFR 552 continues to read as follows:

Authority: 40 U.S.C. 121(c).

■ 9. Amend section 552.212–4 by—

■ a. Revising the section heading, introductory text, and date of the clause; and

■ b. Adding paragraphs (s), (u), and (w).

The revisions and additions read as follows:

552.212–4 Contract Terms and Conditions-Commercial Items (FAR DEVIATION).

As prescribed in 512.301(e), replace subparagraph (g)(2), paragraph (s), and paragraph (u) of FAR clause 52.212–4. Also, add paragraph (w) to FAR clause 52.212–4.

Contract Terms and Conditions—Commercial Items (FAR DEVIATION) (Feb. 2018)

* * * * *

(s) *Order of precedence.* Any inconsistencies in this solicitation or contract shall be resolved by giving precedence in the following order:

(1) The schedule of supplies/services.

(2) The Assignments, Disputes, Payments, Invoice, Other Compliances, Compliance with Laws Unique to Government Contracts, Unauthorized Obligations, and Commercial Supplier Agreements–Unenforceable Clauses paragraphs of this clause.

(3) The clause at 52.212–5.

(4) Addenda to this solicitation or contract, including any commercial supplier agreements as amended by the Commercial Supplier Agreements—Unenforceable Clauses provision.

(5) Solicitation provisions if this is a solicitation.

(6) Other paragraphs of this clause.

(7) The Standard Form 1449.

(8) Other documents, exhibits, and attachments.

(9) The specification.

(u) *Unauthorized Obligations.* (1) Except as stated in paragraph (u)(2) of this clause, when any supply or service acquired under this contract is subject to any commercial supplier agreement (as defined in 502.101) that includes any language, provision, or clause requiring the Government to pay any future fees, penalties, interest, legal costs or to indemnify the Contractor or any person or entity for damages, costs, fees, or any other loss or liability that would create an Anti-Deficiency Act violation (31 U.S.C. 1341), the following shall govern:

(i) Any such language, provision, or clause is unenforceable against the Government.

(ii) Neither the Government nor any Government authorized end user shall be deemed to have agreed to such clause by virtue of it appearing in the commercial supplier agreement. If the commercial supplier agreement is invoked through an ''I agree'' click box or other comparable mechanism (*e.g.,* ''click-wrap'' or ''browse-wrap'' agreements), execution does not bind the Government or any Government authorized end user to such clause.

(iii) Any such language, provision, or clause is deemed to be stricken from the commercial supplier agreement.

(2) Paragraph (u)(1) of this clause does not apply to indemnification or any other payment by the Government that is expressly authorized by statute and specifically authorized under applicable agency regulations and procedures.

(w) *Commercial supplier agreements—unenforceable clauses.* When any supply or service acquired under this contract is subject to a commercial supplier agreement (as defined in 502.101), the following language shall be deemed incorporated into the commercial supplier agreement. As used herein, ''this agreement'' means the commercial supplier agreement:

(1) Notwithstanding any other provision of this agreement, when the end user is an agency or instrumentality of the U.S. Government, the following shall apply:

(i) *Applicability.* This agreement is a part of a contract between the commercial supplier and the U.S. Government for the acquisition of the supply or service that necessitates a license or other similar legal instrument (including all contracts, task orders, and delivery orders under FAR Part 12).

(ii) *End user.* This agreement shall bind the ordering activity as end user but shall not operate to bind a Government employee or person acting on behalf of the Government in his or her personal capacity.

(iii) *Law and disputes.* This agreement is governed by Federal law.

(A) Any language purporting to subject the U.S. Government to the laws of a U.S. state, U.S. territory, district, or municipality, or a foreign nation, except where Federal law expressly provides for the application of such laws, is hereby deleted.

(B) Any language requiring dispute resolution in a specific forum or venue that is different from that prescribed by applicable Federal law is hereby deleted.

(C) Any language prescribing a different time period for bringing an action than that prescribed by applicable Federal law in relation to a dispute is hereby deleted.

(iv) *Continued performance.* The supplier or licensor shall not unilaterally revoke, terminate or suspend any rights granted to the Government except as allowed by this contract. If the supplier or licensor believes the ordering activity to be in breach of the agreement, it shall pursue its rights under the Contract Disputes Act or other applicable Federal statute while continuing performance as set forth in subparagraph (d) (Disputes).

(v) *Arbitration; equitable or injunctive relief.* In the event of a claim or dispute arising under or relating to this agreement, a binding arbitration shall not be used unless specifically authorized by agency guidance, and equitable or injunctive relief, including the award of attorney fees, costs or interest, may be awarded against the U.S. Government only when explicitly provided by statute (*e.g.,* Prompt Payment Act or Equal Access to Justice Act).

(vi) *Updating terms.* (A) After award, the contractor may unilaterally revise terms if they are not material. A material change is defined as:

(*1*) Terms that change Government rights or obligations;

(*2*) Terms that increase Government prices;

(*3*) Terms that decrease overall level of service; or

(*4*) Terms that limit any other Government right addressed elsewhere in this contract.

(B) For revisions that will materially change the terms of the contract, the revised commercial supplier agreement must be incorporated into the contract using a bilateral modification.

(C) Any agreement terms or conditions unilaterally revised subsequent to award that are inconsistent with any material term or provision of this contract shall not be enforceable against the Government, and the Government shall not be deemed to have consented to them.

(vii) *No automatic renewals.* If any license or service tied to periodic payment is provided under this agreement (*e.g.,* annual software maintenance or annual lease term), such license or service shall not renew automatically upon expiration of its current term without prior express consent by an authorized Government representative.

(viii) *Indemnification.* Any clause of this agreement requiring the commercial supplier or licensor to defend or indemnify the end user is hereby amended to provide that the U.S. Department of Justice has the sole right to represent the United States in any such action, in accordance with 28 U.S.C. 516.

(ix) *Audits.* Any clause of this agreement permitting the commercial supplier or licensor to audit the end user's compliance with this agreement is hereby amended as follows:

(A) Discrepancies found in an audit may result in a charge by the commercial supplier or licensor to the ordering activity. Any resulting invoice must comply with the proper invoicing requirements specified in the underlying Government contract or order.

(B) This charge, if disputed by the ordering activity, will be resolved in accordance with subparagraph (d) (Disputes); no payment obligation shall arise on the part of the ordering activity until the conclusion of the dispute process.

(C) Any audit requested by the contractor will be performed at the contractor's expense, without reimbursement by the Government.

(x) *Taxes or surcharges.* Any taxes or surcharges which the commercial supplier or licensor seeks to pass along to the Government as end user will be governed by the terms of the underlying Government contract or order and, in any event, must be submitted to the Contracting Officer for a determination of applicability prior to invoicing unless specifically agreed to otherwise in the Government contract.

(xi) *Non-assignment.* This agreement may not be assigned, nor may any rights or obligations thereunder be delegated, without the Government's prior approval, except as expressly permitted under subparagraph (b) of this clause.

(xii) *Confidential information.* If this agreement includes a confidentiality clause, such clause is hereby amended to state that neither the agreement nor the contract price list, as applicable, shall be deemed ''confidential information.'' Issues regarding release of ''unit pricing'' will be resolved consistent with the Freedom of Information Act. Notwithstanding anything in this agreement to the contrary, the Government may retain any confidential information as required by law, regulation or its internal document retention procedures for legal, regulatory or compliance purposes; provided, however, that all such retained confidential information will continue to be subject to the confidentiality obligations of this agreement.

(2) If any language, provision, or clause of this agreement conflicts or is inconsistent with the preceding paragraph (w)(1), the language, provisions, or clause of paragraph (w)(1) shall prevail to the extent of such inconsistency.

(End of clause)

■ 10. Add section 552.232–39 to read as follows:

552.232–39 Unenforceability of Unauthorized Obligations (FAR DEVIATION).

As prescribed in 513.302–5 and 532.706–3, insert the following clause:

Unenforceability of Unauthorized Obligations. (FAR DEVIATION) (Feb. 2018)

(a) Except as stated in paragraph (b) of this clause, when any supply or service acquired under this contract is subject to any commercial supplier agreement (as defined in 502.101) that includes any language, provision, or clause requiring the Government to pay any future fees, penalties, interest, legal costs or to indemnify the Contractor or any person or entity for damages, costs, fees, or any other loss or liability that would create an Anti-Deficiency Act violation (31 U.S.C. 1341), the following shall govern:

(1) Any such language, provision, or clause is unenforceable against the Government.

(2) Neither the Government nor any Government authorized end user shall be deemed to have agreed to such language, provision, or clause by virtue of it appearing in the commercial supplier agreement. If the commercial supplier agreement is invoked through an ''I agree'' click box or other comparable mechanism (*e.g.,* ''click-wrap'' or ''browse-wrap'' agreements), execution does not bind the Government or any Government authorized end user to such clause.

(3) Any such language, provision, or clause is deemed to be stricken from the commercial supplier agreement.

(b) Paragraph (a) of this clause does not apply to indemnification or any other payment by the Government that is expressly authorized by statute and specifically authorized under applicable agency regulations and procedures.

(End of clause)

■ 11. Add section 552.232–78 to read as follows:

552.232–78 Commercial Supplier Agreements—Unenforceable Clauses.

As prescribed in 513.302–5 and 532.706–3 insert the following clause:

Commercial Supplier Agreements–Unenforceable Clauses (Feb. 2018)

When any supply or service acquired under this contract is subject to a commercial supplier agreement (as defined in 502.101), the following language shall be deemed incorporated into the commercial supplier agreement. As used herein, ''this agreement'' means the commercial supplier agreement:

(a) Notwithstanding any other provision of this agreement, when the end user is an agency or instrumentality of the U.S. Government, the following shall apply:

(1) *Applicability.* This agreement is part of a contract between the commercial supplier and the U.S. Government for the acquisition of the supply or service that necessitates a license or other similar legal instrument (including all contracts, task orders, and delivery orders under FAR Parts 13, 14 or 15).

(2) *End user.* This agreement shall bind the ordering activity as end user but shall not operate to bind a Government employee or person acting on behalf of the Government in his or her personal capacity.

(3) *Law and disputes.* This agreement is governed by Federal law.

(i) Any language purporting to subject the U.S. Government to the laws of a U.S. state, U.S. territory, district, or municipality, or foreign nation, except where Federal law expressly provides for the application of such laws, is hereby deleted.

(ii) Any language requiring dispute resolution in a specific forum or venue that is different from that prescribed by applicable Federal law is hereby deleted.

(iii) Any language prescribing a different time period for bringing an action than that prescribed by applicable Federal law in relation to a dispute is hereby deleted.

(4) *Continued performance.* The supplier or licensor shall not unilaterally revoke, terminate or suspend any rights granted to the Government except as allowed by this contract. If the supplier or licensor believes the ordering activity to be in breach of the agreement, it shall pursue its rights under the Contract Disputes Act or other applicable Federal statute while continuing performance as set forth in FAR 52.233–1, Disputes.

(5) *Arbitration; equitable or injunctive relief.* In the event of a claim or dispute arising under or relating to this agreement, a binding arbitration shall not be used unless specifically authorized by agency guidance, and equitable or injunctive relief, including the award of attorney fees, costs or interest, may be awarded against the U.S. Government only when explicitly provided by statute (*e.g.,* Prompt Payment Act or Equal Access to Justice Act).

(6) *Updating terms.* (i) After award, the contractor may unilaterally revise terms if they are not material. A material change is defined as:

(A) Terms that significantly change Government rights or obligations; and

(B) Terms that increase Government prices;

(C) Terms that decrease overall level of service; or

(D) Terms that limit any other Government right addressed elsewhere in this contract.

(ii) For revisions that will materially change the terms of the contract, the revised commercial supplier agreement must be incorporated into the contract using a bilateral modification.

(iii) Any agreement terms or conditions unilaterally revised subsequent to award that are inconsistent with any material term or provision of this contract shall not be enforceable against the Government, and the Government shall not be deemed to have consented to them.

(7) *No automatic renewals.* If any license or service tied to periodic payment is provided under this agreement (*e.g.,* annual software maintenance or annual lease term), such license or service shall not renew automatically upon expiration of its current term without prior express consent by an authorized Government representative.

(8) *Indemnification.* Any clause of this agreement requiring the commercial supplier or licensor to defend or indemnify the end user is hereby amended to provide that the U.S. Department of Justice has the sole right to represent the United States in any such action, in accordance with 28 U.S.C. 516.

(9) *Audits.* Any clause of this agreement permitting the commercial supplier or licensor to audit the end user's compliance with this agreement is hereby amended as follows:

(i) Discrepancies found in an audit may result in a charge by the commercial supplier or licensor to the ordering activity. Any resulting invoice must comply with the proper invoicing requirements specified in the underlying Government contract or order.

(ii) This charge, if disputed by the ordering activity, will be resolved through the Disputes clause at FAR 52.233–1; no payment obligation shall arise on the part of the ordering activity until the conclusion of the dispute process.

(iii) Any audit requested by the contractor will be performed at the contractor's expense, without reimbursement by the Government.

(10) *Taxes or surcharges.* Any taxes or surcharges which the commercial supplier or licensor seeks to pass along to the Government as end user will be governed by the terms of the underlying Government contract or order and, in any event, must be submitted to the Contracting Officer for a determination of applicability prior to invoicing unless specifically agreed to otherwise in the Government contract.

(11) *Non-assignment.* This agreement may not be assigned, nor may any rights or obligations thereunder be delegated, without the Government's prior approval, except as expressly permitted under the clause at FAR 52.232–23, Assignment of Claims.

(12) *Confidential information.* If this agreement includes a confidentiality clause, such clause is hereby amended to state that neither the agreement nor the contract price list, as applicable, shall be deemed ''confidential information.'' Issues regarding release of ''unit pricing'' will be resolved consistent with the Freedom of Information Act. Notwithstanding anything in this agreement to the contrary, the Government may retain any confidential information as required by law, regulation or its internal document retention procedures for legal, regulatory or compliance purposes; provided, however, that all such retained confidential information will continue to be subject to the confidentiality obligations of this agreement.

(b) If any language, provision or clause of this agreement conflicts or is inconsistent with the preceding paragraph (a), the language, provisions, or clause of paragraph (a) shall prevail to the extent of such inconsistency.

(End of clause)

[FR Doc. 2018–03350 Filed 2–21–18; 8:45 am]

BILLING CODE 6820–61–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 622

[Docket No. 160426363–7275–02]

RIN 0648–XG034

Coastal Migratory Pelagic Resources of the Gulf of Mexico and Atlantic Region; 2017–2018 Commercial Hook-and-Line Closure for King Mackerel in the Gulf of Mexico Southern Zone

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

ACTION: Temporary rule; closure.

SUMMARY: NMFS implements an accountability measure (AM) to close the hook-and-line component of the commercial sector for king mackerel in the Gulf of Mexico (Gulf) southern zone. This closure is necessary to protect the Gulf king mackerel resource.

DATES: This temporary rule is effective from 12:01 a.m., local time, February 20, 2018, through June 30, 2018.

FOR FURTHER INFORMATION CONTACT: Kelli O'Donnell, NMFS Southeast Regional Office, telephone: 727–824–5305, email: *kelli.odonnell@noaa.gov.*

SUPPLEMENTARY INFORMATION: The fishery for coastal migratory pelagic fish includes king mackerel, Spanish mackerel, and cobia, and is managed under the Fishery Management Plan for the Coastal Migratory Pelagic Resources of the Gulf of Mexico and Atlantic Region (FMP). The FMP was prepared by the Gulf of Mexico and South Atlantic Fishery Management Councils and is implemented by NMFS under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) by regulations at 50 CFR part 622. All weights for Gulf migratory group king mackerel (Gulf king mackerel) below apply as either round or gutted weight.

On April 11, 2017, NMFS published a final rule to implement Amendment 26 to the FMP in the **Federal Register** (82 FR 17387). That final rule adjusted the management boundaries, zones, and annual catch limits for Gulf king mackerel. King mackerel in the Gulf is divided into western, northern, and southern zones, which have separate commercial quotas.

The southern zone for Gulf king mackerel encompasses an area of the exclusive economic zone (EEZ) south of a line extending due west from the boundary of Lee and Collier Counties on the Florida west coast, and south of a line extending due east from the boundary of Monroe and Miami-Dade Counties on the Florida east coast, which includes the EEZ off Collier and Monroe Counties in south Florida (50 CFR 622.369(a)(1)(iii)).

The commercial quota for the hook-and-line component of the commercial sector in the southern zone is 596,400 lb (270,522 kg) for the current fishing year, July 1, 2017, through June 30, 2018 (50 CFR 622.384(b)(1)(iii)(A)).

Under 50 CFR 622.8(b) and 622.388(a)(1), NMFS is required to close any component of the king mackerel commercial sector when its quota has been reached, or is projected to be reached, by filing a notification at the Office of the Federal Register. NMFS has determined the commercial quota for the hook-and-line component of the commercial sector for Gulf king mackerel in the southern zone will be reached by February 20, 2018. Accordingly, the hook-and-line component of the commercial sector for Gulf migratory group king mackerel in the southern zone is closed effective at 12:01 a.m., local time, February 20, 2018, through the end of the fishing year on June 30, 2018.

During the commercial hook-and-line closure in the southern zone, no person aboard a vessel for which a valid commercial permit for king mackerel has been issued may harvest or possess Gulf migratory group king mackerel in or from Federal waters of the closed zone, as specified in 50 CFR 622.384(e), unless a valid Federal commercial gillnet permit for king mackerel has been issued to the vessel and the gillnet fishery is open. There is one other exception. A person aboard a vessel that has a valid Federal charter vessel/headboat permit and also has a commercial king mackerel permit for coastal migratory pelagic fish may continue to retain king mackerel in or from the closed zone under the 3-fish daily recreational bag limit, provided the vessel is operating as a charter vessel or headboat, and as long as the recreational sector for Gulf king mackerel is open. Charter vessels or headboats that have a valid commercial king mackerel permit are considered to be operating as a charter vessel or headboat when they carry a passenger who pays a fee or when more than three persons are aboard, including operator and crew.

Also during the closure, king mackerel caught with hook-and-line gear from the closed zone, including those harvested under the bag and possession limits, may not be purchased or sold. This prohibition does not apply to king mackerel caught with hook-and-line gear from the closed zone that were harvested, landed ashore, and sold prior to the closure and were held in cold storage by a dealer or processor (50 CFR 622.384(e)(2)).

Classification

The Regional Administrator for the NMFS Southeast Region has determined this temporary rule is necessary for the conservation and management of Gulf king mackerel and is consistent with the Magnuson-Stevens Act and other applicable laws.

This action is taken under 50 CFR 622.8(b) and 622.388(a)(1), and is exempt from review under Executive Order 12866.

These measures are exempt from the procedures of the Regulatory Flexibility Act because the temporary rule is issued without opportunity for prior notice and comment.

This action responds to the best scientific information available. The Assistant Administrator for NOAA Fisheries (AA) finds good cause to waive the requirements to provide prior notice and opportunity for public comment on this temporary rule pursuant to the authority set forth in 5 U.S.C. 553(b)(B), as such procedures are unnecessary and contrary to the public interest. Such procedures are unnecessary because the rule implementing the commercial quota and the associated AM has already been subject to notice and public comment, and all that remains is to notify the public of the closure. Additionally, allowing prior notice and opportunity for public comment is contrary to the public interest because of the need to implement immediately this action to protect the king mackerel stock, because the capacity of the fishing fleet allows for rapid harvest of the commercial quota. Prior notice and opportunity for public comment would require time and could potentially result in a harvest well in excess of the established commercial quota.

For the aforementioned reasons, the AA also finds good cause to waive the 30-day delay in effectiveness of the action under 5 U.S.C. 553(d)(3).

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

Dated: February 16, 2018.

Emily H. Menashes,

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

[FR Doc. 2018–03651 Filed 2–16–18; 4:15 pm]

BILLING CODE 3510–22–P

Proposed Rules

Federal Register
Vol. 83, No. 36
Thursday, February 22, 2018

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

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 25

[Docket No. FAA–2018–0011; Notice No. 25–18–01–SC]

Special Conditions: SWS Certification Services, Ltd., Boeing Model 747–8 Airplanes; Installation of an Overhead Passenger-Sleeping Compartment in the Main Deck

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed special conditions.

SUMMARY: This action proposes special conditions for the Boeing Model 747–8 airplane. This airplane, as modified by SWS Certification Services, Ltd. (SWS), will have a novel or unusual design feature when compared to the state of technology envisioned in the airworthiness standards for transport-category airplanes. This design feature is the installation of an overhead passenger-sleeping compartment in the main deck. The applicable airworthiness regulations do not contain adequate or appropriate safety standards for this design feature. These proposed special conditions contain the additional safety standards that the Administrator considers necessary to establish a level of safety equivalent to that established by the existing airworthiness standards.

DATES: Send your comments on or before March 14, 2018.

ADDRESSES: Send comments identified by docket number FAA–2018–0011 using any of the following methods:

- *Federal eRegulations Portal:* Go to *http://www.regulations.gov/* and follow the online instructions for sending your comments electronically.
- *Mail:* Send comments to Docket Operations, M–30, U.S. Department of Transportation (DOT), 1200 New Jersey Avenue SE, Room W12–140, West Building Ground Floor, Washington, DC 20590–0001.
- *Hand Delivery or Courier:* Take comments to Docket Operations in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE, Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.
- *Fax:* Fax comments to Docket Operations at 202–493–2251.

Privacy: The FAA will post all comments it receives, without change, to *http://www.regulations.gov/,* including any personal information the commenter provides. Using the search function of the docket website, anyone can find and read the electronic form of all comments received into any FAA docket, including the name of the individual sending the comment (or signing the comment for an association, business, labor union, etc.). DOT's complete Privacy Act Statement can be found in the **Federal Register** published on April 11, 2000 (65 FR 19477–19478).

Docket: Background documents or comments received may be read at *http://www.regulations.gov/* at any time. Follow the online instructions for accessing the docket or go to Docket Operations in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE, Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Alan Sinclair, FAA, Airframe and Cabin Safety Section, AIR–675, Transport Standards Branch, Policy and Innovation Division, Aircraft Certification Service, 1601 Lind Avenue SW, Renton, Washington 98057–3356; telephone 425–227–2195; facsimile 425–227–1320.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite interested people to take part in this rulemaking by sending written comments, data, or views. The most helpful comments reference a specific portion of the special conditions, explain the reason for any recommended change, and include supporting data.

We will consider all comments we receive by the closing date for comments. We may change these special conditions based on the comments we receive.

Background

On February 10, 2016, SWS applied for a supplemental type certificate for the installation of overhead passenger-sleeping compartments in the main deck of Boeing Model 747–8 airplanes. The Model 747–8 airplane is a wide-body airplane equipped with four turbofan engines. This airplane has a maximum seating capacity of 605 passengers and 12 cabin crewmembers, and has a maximum takeoff weight of 987,000 lbs.

Type Certification Basis

Under the provisions of title 14, Code of Federal Regulations (14 CFR) 21.101, SWS must show that the Boeing Model 747–8 airplane, as changed, continues to meet the applicable provisions of the regulations listed in Type Certificate No. A20WE, or the applicable regulations in effect on the date of application for the change, except for earlier amendments as agreed upon by the FAA. The regulations listed in the type certificate are commonly referred to as the ''type certification basis.'' The certification basis for the Model 747–8 is part 25, as amended by amendment 25–1 through amendment 25–120, with exceptions permitted by § 21.101.

In addition, the certification basis includes certain special conditions, exemptions, or later amended sections of the applicable part that are not relevant to these proposed special conditions.

If the Administrator finds that the applicable airworthiness regulations (*i.e.,* 14 CFR part 25) do not contain adequate or appropriate safety standards for the Boeing Model 747–8 airplane because of a novel or unusual design feature, special conditions are prescribed under the provisions of § 21.16.

Special conditions are initially applicable to the model for which they are issued. Should the applicant apply for a supplemental type certificate to modify any other model included on the same type certificate to incorporate the same novel or unusual design feature, these special conditions would also apply to the other model under § 21.101.

In addition to the applicable airworthiness regulations and special conditions, the Model 747–8 airplane must comply with the fuel-vent and exhaust-emission requirements of 14 CFR part 34, and the noise-certification requirements of 14 CFR part 36.

The FAA issues special conditions, as defined in 14 CFR 11.19, in accordance with § 11.38, and they become part of the type certification basis under § 21.101.

Novel or Unusual Design Features

The Boeing Model 747–8 airplane, as modified by SWS, will incorporate the following novel or unusual design feature: Overhead passenger-sleeping compartments in the main deck.

Discussion

SWS, located in the United Kingdom, proposes to install an Aeroloft™ Overhead Passenger Sleeping/Rest Compartment (OPSC) in the crown area of the Boeing Model 747–8 airplane, in front of the Overhead Flight Attendant Rest (OFAR) Compartment. The operation of this airplane is limited for private use only, not for hire, not for common carriage. The OPSC is similar in function and design to the OFAR but will be for passenger use. Specifically, the OPSC consists of eight passenger-sleeping compartments, with single occupancy for each compartment. The OPSC includes a station for a trained flight attendant, and is intended for in-flight use only; not during taxi, takeoff, or landing. The size of the installation is similar to the OFAR and will have a separate staircase for access in the front of the compartment, in the main deck near the door 4 area. The OPSC is open for passengers only when a flight attendant is present in the OPSC. This dedicated flight attendant is allocated for passenger briefing on emergency procedures, evacuation, and for the use of emergency equipment and systems within the OPSC.

These special conditions establish seating, communication, lighting, personal safety, and evacuation requirements for the OPSC compartment. In addition, passenger information signs and placards, supplemental oxygen, and a seat or berth for each occupant of the OPSC compartment are required. These items are necessary because of turbulence and/or decompression. When applicable, the requirements parallel the existing requirements for an overhead service compartment, and provide an equivalent level of safety to that provided for main-deck occupants.

These proposed special conditions contain the additional safety standards that the Administrator considers necessary to establish a level of safety equivalent to that established by the existing airworthiness standards.

Applicability

As discussed above, these special conditions are applicable to the Boeing Model 747–8 airplane as modified by SWS. Should SWS apply at a later date for a supplemental type certificate to modify any other model included on Type Certificate No. A20WE, to incorporate the same novel or unusual design feature, these special conditions would apply to that model as well.

Conclusion

This action affects only certain novel or unusual design features on one model series of airplane. It is not a rule of general applicability and affects only the applicant who applied to the FAA for approval of these features on the airplane.

List of Subjects in 14 CFR Part 25

Aircraft, Aviation safety, Reporting and recordkeeping requirements.

The authority citation for these special conditions is as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701, 44702, 44704.

The Proposed Special Conditions

Accordingly, the Federal Aviation Administration (FAA) proposes the following special conditions as part of the type certification basis for Boeing Model 747–8 airplanes, operated for private use only, not for hire, not for common carriage, as modified by SWS Certification Services, Ltd.

(1) During flight, occupancy of the Overhead Passenger Sleeping/Rest Compartment is limited to the total number of installed bunks in the compartment that are approved to the maximum flight-loading conditions. Therefore, the OPSC is limited to a maximum of eight occupants for in-flight use only.

(a) Occupancy of the OPSC is for passengers only when a dedicated flight attendant is present in the OPSC.

(b) The OPSC design must include appropriate placards located inside and outside each entrance to the OPSC to indicate:

(i) The maximum number of eight occupants allowed during flight.

(ii) Occupancy is prohibited during taxi, take-off, and landing.

(iii) Smoking is prohibited in the OPSC.

(iv) Stowage in the OPSC area is limited to personal luggage. The stowage of cargo is not allowed.

(c) The airplane must contain at least one ashtray on both the inside and the outside of any entrance to the OPSC.

(2) The following requirements are applicable to OPSC door(s):

(a) For any door installed between the OPSC and the passenger cabin, a means must be provided to allow the door to be quickly opened from inside the OPSC, even when crowding from an emergency evacuation occurs at each side of the door.

(b) Doors installed across emergency egress routes must have a means to latch them in the open position. The latching means must be able to withstand the loads imposed upon it when the door is subjected to the ultimate inertia forces, relative to the surrounding structure, listed in § 25.561(b).

(c) The OPSC design must include a placard displayed in a conspicuous location on the outside of the entrance door of the OPSC, and on any other door(s) installed across emergency egress routes of the OPSC, requiring those doors to be latched closed during taxi, takeoff, and landing (TT&L).

(i) This requirement does not apply to emergency-escape hatches installed in the OPSC.

(ii) The OPSC design must include a placard displayed in a conspicuous place on the outside of the entrance door to the OPSC that requires the door to be closed and locked when it is not occupied.

(iii) The design-approval holder must transmit procedures for meeting these requirements to the operator for incorporation into training programs and appropriate operational manuals.

(d) For all outlet doors installed in the OPSC, a means must be in place to preclude anyone from being trapped inside the OPSC. If the design installs a locking mechanism, the locking mechanism must be capable of being unlocked from the outside without the aid of special tools. The lock must not prevent opening from the inside of the OPSC at any time.

(3) At least two emergency-evacuation routes must be available, and which could be used by each occupant of the OPSC to rapidly evacuate to the main cabin. A person must be able to close these evacuation routes from the main passenger cabin after evacuation. In addition;

(a) The design must include routes with sufficient separation within the OPSC to minimize the possibility of an event either inside or outside of the OPSC, rendering both routes inoperative. The design-approval holder may show compliance by inspection or by analysis. Regardless of which method is used, the maximum acceptable distance between OPSC exits is 60 feet.

(b) The design-approval holder must design routes to minimize the possibility of blockage, which might result from fire, mechanical or structural

failure, or persons standing below or against the OPSC outlets. If an evacuation route is in an area where normal movement or evacuation of passengers occurs, the applicant must demonstrate that passengers would not impede egress to the main deck. If low headroom is at or near the evacuation route, the design must make provisions to prevent or to protect occupants of the OPSC from head injury. Use of evacuation routes must not depend on any powered device. If an OPSC evacuation route outlet is over an area of passenger seats, the design may allow the temporary displacement of a maximum of five passengers from their seats during the process of evacuating an incapacitated person(s). If such an evacuation procedure involves the evacuee stepping on seats, the evacuee must not damage seats to the extent that the seats would not be acceptable for occupancy during an emergency landing.

(c) The design-approval holder must establish emergency-evacuation procedures, including procedures for emergency evacuation of an incapacitated occupant from the OPSC. The design-approval holder must transmit all of these procedures to the operator for incorporation into training programs and appropriate operational manuals.

(d) The design-approval holder must include a limitation in the airplane flight manual (AFM), or other suitable means, to require that crewmembers are trained in the use of the OPSC evacuation routes. This training must instruct crewmembers to ensure that the OPSC (including seats, doors, etc.) is in the proper TT&L configuration during TT&L.

(e) In the event no flight attendant is present in the area around the OPSC outlet door, and also during an emergency, including an emergency evacuation, a means must be available to prevent passengers from entering the OPSC.

(f) Doors or hatches separating the OPSC from the main deck must not adversely affect evacuation of occupants on the main deck (slowing evacuation by encroaching into aisles, for example), or cause injury to those occupants during opening or while opened.

(g) The means of opening outlet doors and hatches to the OPSC compartment must be simple and obvious. The OPSC compartment outlet doors and hatches must be able to be closed from the main passenger cabin.

(4) A means must be available for evacuating an incapacitated person (representative of a 95th percentile male) from the OPSC compartment to the passenger cabin floor. The design-approval holder must demonstrate such an evacuation for all evacuation routes.

(5) The design-approval holder must provide the following signs and placards in the OPSC, and the signs and placards must meet the following criteria:

(a) At least one exit sign, located near each OPSC evacuation-route outlet, meeting the emergency-lighting requirements of § 25.812(b)(1)(i). One allowable exception would be a sign with reduced background area of no less than 5.3 square inches (excluding the letters), provided that it is installed so that the material surrounding the exit sign is light in color (white, cream, light beige, for example). If the material surrounding the exit sign is not light in color, a sign with a minimum of a one-inch-wide background border around the letters would be acceptable. Another allowable exception is a sign with a symbol that the FAA has determined to be equivalent for use as an exit sign in an OPSC.

(b) The OPSC design must conspicuously locate an appropriate placard on or near each OPSC outlet door or hatch that defines the location and the operating instructions for access to, and operation of, the outlet door or hatch.

(c) Placards must be readable from a distance of 30 inches under emergency lighting conditions.

(d) The design must illuminate the door or hatch handles and operating-instruction placards, required by Special Condition 5b of these special conditions, to at least 160 microlamberts under emergency-lighting conditions.

(6) An automatic means of emergency illumination must be available in the OPSC in the event of failure of the airplane main power system, or failure of the normal OPSC lighting system.

(a) The design must power this emergency illumination independently of the main lighting system.

(b) The sources of general cabin illumination may be common to both the emergency and the main lighting systems if the power supply to the emergency lighting system is independent of the power supply to the main lighting system.

(c) The illumination level must be sufficient to allow occupants of the OPSC to locate and move to the main passenger cabin floor by means of each evacuation route.

(d) The illumination level must be sufficient, with the privacy curtains in the closed position, for each occupant of the OPSC compartment to locate a deployed oxygen mask.

(7) A means must be available for two-way voice communications between crewmembers on the flight deck and occupants of the OPSC. Two-way communications must also be available, between occupants of the OPSC and each flight-attendant station in the passenger cabin, per § 25.1423(g) for areas required to have a public-address-system microphone. In addition, the public-address system must include provisions to provide only the relevant information to the crewmembers in the OPSC (*e.g.,* fire in flight, airplane depressurization, preparation of the compartment for landing, etc.). That is, provisions must be made so that occupants of the OPSC will not be disturbed with normal, non-emergency announcements made to the passenger cabin.

(8) A means must be available for manual activation of an aural emergency-alarm system, audible during normal and emergency conditions, to enable crewmembers on the flight deck and at each pair of required floor-level emergency exits to alert occupants of the OPSC of an emergency situation. Use of a public-address or crew-interphone system will be acceptable, provided an adequate means of differentiating between normal and emergency communications is incorporated. The design must power the system in flight, after the shutdown or failure of all engines and auxiliary power units, for a period of at least ten minutes.

(9) A means must be in place, readily detectable by seated or standing occupants of the OPSC, to indicate when seat belts should be fastened. The design must provide seatbelt-type restraints for berths and must be compatible with the sleeping position during cruise conditions. A placard on each berth must require that these restraints be fastened when occupied. If compliance with any of the other requirements of these special conditions is predicated on specific head position, a placard must identify that head position.

(10) In lieu of the requirements specified in § 25.1439(a) pertaining to isolated compartments, and to provide a level of safety equivalent to that provided to occupants of an isolated galley, the design must provide the following equipment in the OPSC:

(a) At least one approved, hand-held fire extinguisher appropriate for the kinds of fires likely to occur.

(b) Two protective breathing equipment (PBE) devices, suitable for firefighting, or one PBE for each hand-held fire extinguisher, whichever is greater. All PBE devices must be

approved to Technical Standard Order (TSO)–C116 or equivalent.

(c) One flashlight.

Note: The design may require additional PBE devices and fire extinguishers in specific locations, beyond the minimum numbers prescribed in Special Condition 10 as a result of the egress analysis accomplished to satisfy Special Condition 4.

(11) The design must provide a smoke- or fire-detection system (or systems) to monitor each occupiable space within the OPSC, including those areas partitioned with curtains or doors. The design-approval holder must conduct flight tests to show compliance with this requirement. If a fire occurs, each system must provide:

(a) A visual indication to the flight deck within one minute after the start of a fire.

(b) An aural warning in the OPSC compartment.

(c) A warning in the main passenger cabin. A flight attendant must readily detect this warning, taking into consideration the locations of flight attendants throughout the main passenger compartment during various phases of flight.

(12) The design must provide a means to fight a fire. This ability can be either a built-in extinguishing system or a manual, hand-held extinguishing system.

(a) For a built-in extinguishing system:

(i) The system must have adequate capacity to suppress a fire considering the fire threat, volume of the compartment, and the ventilation rate. The system must have sufficient extinguishing agent to provide an initial knockdown and suppression environment per the minimum performance standards that have been established for the agent being used. In addition, certification flight testing will verify the acceptable duration that the suppression environment can be maintained.

(ii) If the capacity of the extinguishing system does not provide effective fire suppression that will last for the duration of flight from the farthest point in route to the nearest suitable landing site expected in service, the design-approval holder must establish an additional manual firefighting procedure. For the built-in extinguishing system, the design must establish and document the time duration for effective fire suppression in the firefighting procedures in the AFM. If the duration of time for demonstrated effective fire suppression provided by the built-in extinguishing agent will be exceeded, the firefighting procedures must instruct the crew to:

(1) Enter the OPSC at the time that demonstrated fire-suppression effectiveness will be exceeded.

(2) Check for and extinguish all residual fire.

(3) Confirm that the fire is out.

(b) For a manual, hand-held extinguishing system (designed as the sole means to fight a fire or to supplement a built-in extinguishing system of limited suppression duration) for the OPSC:

(i) The design-approval holder must include a limitation in the AFM or other suitable means requiring that crewmembers be trained in firefighting procedures.

(ii) The OPSC design must allow crewmembers equipped for firefighting to have unrestricted access to all parts of the OPSC.

(iii) The time for a crewmember on the main deck to react to the fire alarm, don the firefighting equipment, and gain access to the OPSC must not exceed the time it would take for the compartment to become filled with smoke, thus making it difficult to locate the fire source.

(iv) The design-approval holder must establish approved procedures describing methods for searching the OPSC for fire source(s). The design-approval holder must transmit these procedures to the operator for incorporation into its training programs and appropriate operational manuals.

(13) Design must provide a means to prevent hazardous quantities of smoke or extinguishing agent, originating in the OPSC, from entering any other occupiable compartment.

(a) Small quantities of smoke may penetrate from the OPSC into other occupied areas during the one-minute smoke detection time.

(b) A provision in the firefighting procedures must ensure that all doors and hatches at the OPSC outlets are closed after evacuation of the compartment and during firefighting to minimize smoke and extinguishing agent entering other occupiable compartments.

(c) All smoke entering any occupiable compartment, when access to the OPSC is open for evacuation, must dissipate within five minutes after the access to the OPSC is closed.

(d) Hazardous quantities of smoke may not enter any occupied compartment during access to manually fight a fire in the OPSC. The amount of smoke entrained by a firefighter exiting the OPSC is not considered hazardous.

(e) The design-approval holder must conduct flight tests to show compliance with this requirement.

(14) A supplemental oxygen system within the OPSC must provide the following:

(a) At least one oxygen mask for each berth in the OPSC.

(b) If the OPSC provides a destination area (such as a changing area), an oxygen mask must be readily available for each occupant who can reasonably be expected to be in the destination area, with the maximum number of required masks within the destination area being limited to the placarded maximum occupancy of the OPSC.

(c) An oxygen mask must be readily accessible to each occupant who can reasonably be expected to be moving from the main cabin into the OPSC, moving around within the OPSC, or moving from the OPSC to the main cabin.

(d) The system must provide an aural and visual alert to warn occupants of the OPSC to don oxygen masks in the event of decompression. The aural and visual alerts must activate concurrently with deployment of the oxygen masks in the passenger cabin. To compensate for sleeping occupants, the aural alert must be heard in each section of the OPSC and must sound continuously for a minimum of five minutes or until a reset switch within the OPSC is activated. A visual alert that informs occupants that they must don an oxygen mask must be visible in each section.

(e) The design must provide a means by which oxygen masks can be manually deployed from the flight deck.

(f) The design-approval holder must establish approved procedures for the OPSC in the event of decompression. The design-approval holder must transmit these procedures to the operator for incorporation into its training programs and appropriate operational manuals.

(g) The supplemental oxygen system for the OPSC must meet the same part 25 regulations as the supplemental oxygen system for the passenger cabin occupants, except for the 10 percent additional-masks requirement of § 25.1447(c)(1).

(15) The following additional requirements apply to an OPSC that are divided into several sections by the installation of curtains or partitions:

(a) The OPSC design requires a placard adjacent to each curtain that visually divides or separates, for example, for privacy purposes, the OPSC into multiple sections. The placard must require that the curtain(s) remains open when the section it creates is unoccupied. The vestibule section adjacent to the stairway is not considered a private section and, therefore, does not require a placard.

(b) For each section of the OPSC created by the installation of a curtain, the following requirements of these special conditions must be met with the curtain open or closed:

(i) No-smoking placard requirement (Special Condition 1).

(ii) Emergency illumination requirement (Special Condition 6).

(iii) Emergency alarm-system requirement (Special Condition 8).

(iv) Seatbelt-fasten signal or return-to-seat signal as applicable requirement (Special Condition 9).

(v) Smoke- or fire-detection system requirement (Special Condition 11).

(vi) Oxygen-system requirement (Special Condition 14).

(c) OPSC that are visually divided to the extent that evacuation could be adversely affected must have exit signs directing occupants to the primary stairway outlet. The design must provide exit signs in each separate section of the OPSC, except for curtained bunks, and must meet requirements of § 25.812(b)(1)(i). The design-approval holder may use an exit sign with reduced background area or a symbolic exit sign, as described in special condition 5a, to meet this requirement.

(d) For sections within an OPSC created by the installation of a rigid partition with a door separating the sections, the design must meet the following special conditions with the door open or closed:

(i) A secondary evacuation route from each section to the main deck, or the applicant must show that any door between the sections precludes anyone from being trapped inside a section of the compartment. The design must consider the removal of an incapacitated occupant from within this area. The design does not require a secondary evacuation route from a small room designed for only one occupant for a short time duration, such as a changing area or lavatory, but the design must consider the removal of an incapacitated occupant from within such a small room.

(ii) The design-approval holder must show any door between the sections to be openable when crowded against, even when crowding occurs at each side of the door.

(iii) The design may locate no more than one door between any seat or berth and the primary stairway door.

(iv) In each section, exit signs meeting the requirements of § 25.812(b)(1)(i), or shown to have an equivalent level of safety, must direct occupants to the primary stairway outlet. The design may use an exit sign with reduced background area, or a symbolic exit sign, as described in special condition 5a, to meet this requirement.

(v) The design must meet special conditions 1 (no-smoking placards), 6 (emergency illumination), 8 (emergency alarm system), 9 (fasten-seatbelt signal or return-to-seat signal as applicable), 11 (smoke- or fire-detection system), and 14 (oxygen system) with the OPSC door open or closed.

(vi) The design must meet special conditions 7 (two-way voice communication) and 10 (emergency firefighting and protective equipment) independently for each separate section, except for lavatories or other small areas that are not intended to be occupied for extended periods of time.

(16) If a waste-disposal receptacle is fitted in the OPSC, it must be equipped with an automatic fire extinguisher that meets the performance requirements of § 25.854(b).

(17) Materials (including finishes or decorative surfaces applied to the materials) must comply with the flammability requirements of § 25.853 as amended by amendment 25–116 or later. Seat cushions and mattresses must comply with the flammability requirements of § 25.853(c) as amended by amendment 25–116 or later, and the test requirements of part 25, appendix F, part II, or other equivalent methods.

(18) The addition of a lavatory within the OPSC would require the lavatory to meet the same requirements as those for a lavatory installed on the main deck, except with regard to special condition 11 for smoke detection.

(19) The design must completely enclose each stowage compartment in the OPSC, except for underseat compartments for occupant convenience. All enclosed stowage compartments within the OPSC that are not limited to stowage of emergency equipment or airplane-supplied equipment (*i.e.,* bedding) must meet the design criteria described in the table below. Enclosed stowage compartments greater than 200 ft.^{3} in interior volume are not addressed by this special condition. The in-flight accessibility of very large, enclosed, stowage compartments and the subsequent impact on the crewmembers' ability to effectively reach any part of the compartment with the contents of a hand-held fire-extinguishing system, will require additional fire-protection considerations similar to those required for inaccessible compartments such as Class C cargo compartments.

(20) The AFM must state that this airplane is to be operated for private use only, not for hire, not for common carriage.

DESIGN CRITERIA FOR ENCLOSED STOWAGE COMPARTMENTS NOT LIMITED TO STOWAGE OF EMERGENCY OR AIRPLANE-SUPPLIED EQUIPMENT

Fire protection features	Applicability of fire protection requirements by interior volume		
	less than 25 ft^3	25 ft^3 to 57 ft^3	57 ft^3 to 200 ft^3
Compliant Materials of Construction [1]	Yes	Yes	Yes
Smoke or Fire Detectors [2]	No	Yes	Yes
Liner [3]	No	Conditional	Yes
Fire Location Detector [4]	No	Yes	Yes

[1] *Compliant Materials of Construction:* The material used in constructing each enclosed stowage compartment must at least be fire resistant and must meet the flammability standards established for interior components (*i.e.,* part 25 Appendix F, Parts I, IV, and V) per the requirements of § 25.853. For compartments less than 25 ft.^{3} in interior volume, the design must ensure the ability to contain a fire likely to occur within the compartment under normal use.

[2] *Smoke or Fire Detectors:* Enclosed stowage compartments equal to or exceeding 25 ft.^{3} in interior volume must be provided with a smoke- or fire-detection system to ensure that a fire can be detected within a one-minute detection time. Flight tests must be conducted to show compliance with this requirement. Each system (or systems) must provide:

(a) A visual indication in the flight deck within one minute after the start of a fire.

(b) An aural warning in the OPSC.

(c) A warning in the main passenger cabin. This warning must be readily detectable by a flight attendant, taking into consideration the locations of flight attendants throughout the main passenger compartment during various phases of flight.

[3] *Liner:* If material used in constructing the stowage compartment can be shown to meet the flammability requirements of a liner for a Class B cargo compartment (*i.e.,* § 25.855 at amendment 25–116, and Appendix F, part I, paragraph (a)(2)(ii)), then no liner would be required for enclosed stowage compartments equal to or greater than 25 ft.^{3} but less than 57 ft.^{3} in interior volume. For all enclosed stowage compartments equal to or greater than 57 ft.^{3} in interior volume but less than or equal to 200 ft.^{3}, a liner must be provided that meets the requirements of § 25.855 for a Class B cargo compartment.

[4] *Fire-Location Detector:* If an OPSC has enclosed stowage compartments exceeding 25 ft.^{3} interior volume and that are located separately from the other stowage compartments (located, for example, away from one central location, such as the entry to the OPSC or a common area within the OPSC, where the other stowage compartments are), that OPSC would require additional fire-protection features or devices to assist the firefighter in determining the location of a fire.

Issued in Renton, Washington, on February 15, 2018.

Victor Wicklund,

Manager, Transport Standards Branch, Policy and Innovation Division, Aircraft Certification Service.

[FR Doc. 2018–03587 Filed 2–21–18; 8:45 am]

BILLING CODE 4910–13–P

FEDERAL TRADE COMMISSION

16 CFR Part 18

Guides for the Nursery Industry

AGENCY: Federal Trade Commission.

ACTION: Regulatory review; request for public comment.

SUMMARY: The Federal Trade Commission (''FTC'' or ''Commission'') requests public comments on its Guides for the Nursery Industry (''Nursery Guides'' or ''Guides''). The Commission is soliciting the comments as part of the Commission's systematic review of all current Commission regulations and guides.

DATES: Comments must be received by April 20, 2018.

ADDRESSES: Interested parties may file a comment online or on paper by following the instructions in the Request for Comment part of the **SUPPLEMENTARY INFORMATION** section below. Write ''Nursery Guides, P994248'' on your comment, and file your comment online at *https://ftcpublic.commentworks.com/ftc/nurseryguides* by following the instructions on the web-based form. If you prefer to file your comment on paper, mail your comment to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue NW, Suite CC–5610 (Annex A), Washington, DC 20580, or deliver your comment to the following address: Federal Trade Commission, Office of the Secretary, Constitution Center, 400 7th Street SW, 5th Floor, Suite 610, Washington, DC 20024.

FOR FURTHER INFORMATION CONTACT: Megan Gray, (202) 326–3408, *mgray@ftc.gov,* Attorney, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Room CC–9541, 600 Pennsylvania Avenue NW, Washington, DC 20580.

SUPPLEMENTARY INFORMATION:

I. Background

The Commission issued the Guides for the Nursery Industry in 1979.[1] These Guides address numerous sales practices for outdoor plants, including deceptive claims regarding quantity, size, grade, kind, species, age, maturity, condition, vigor, hardiness, growth ability, price, and origin or place where grown. As part of its periodic regulatory review, the Commission substantively amended the Nursery Guides in 1994 and adopted a technical amendment to the Guides in 2007.[2]

II. Regulatory Review Program

The Commission periodically reviews all Commission rules and guides. These reviews seek information about the costs and benefits of the Commission's rules and guides and their economic impact. The information obtained assists the Commission in identifying rules and guides that warrant modification or rescission. Therefore, the Commission solicits comment on, among other things, the economic impact of and the continuing need for its Nursery Guides; possible conflict between the Guides and state, local, federal, or international laws; and the effect of any technological, economic, environmental, or other industry changes on the Guides.

III. Request for Comment

The Commission is particularly interested in comments and supporting data on the following questions. These questions are designed to assist the public and should not be construed as a limitation on the issues on which public comment may be submitted. In their replies to each of these questions, commenters should provide any available evidence and data, such as empirical data, consumer perception studies, or consumer complaints, that support the commenter's asserted position.

(1) Is there a continuing need for the Nursery Guides as currently promulgated?

(2) Are any specific provisions of the Guides no longer necessary?

(3) Are the deceptive or unfair practices addressed by the Guides prevalent in the marketplace? Are the Guides effective in addressing those practices? Are there deceptive or unfair practices in the selling of plants that are not covered by the Guides, such as vegetable plants marketed to consumers? Should the Guides be extended to cover other types of plants that consumers purchase? Are there alternatives, such as individual enforcement actions under the FTC Act, that would be more effective or equally effective in addressing those practices?

(4) Have covered businesses adopted the Nursery Guides as part of their routine business practice? What is the degree of compliance with the Guides? How, and what effect, if any, does this have on the continuing need for the Guides? Do covered businesses self-regulate or have voluntary standards or guidance, such as through trade associations, that overlap with the Guides?

(5) What benefits, if any, have the Nursery Guides provided to consumers of the products affected by the Guides? Do the Guides impose any significant costs on consumers?

(6) What impact, if any, have the Guides had on the flow of truthful or deceptive information to consumers?

(7) What changes, if any, should be made to the Nursery Guides to increase their benefits to consumers or reduce their costs to businesses? How would these changes affect consumer benefits or business costs?

(8) What burdens or costs, including costs of compliance, have the Guides imposed on covered businesses? What burdens or costs have the Guides imposed on small businesses in particular? Have the Guides provided benefits to businesses? If so, what benefits?

(9) What changes, if any, should be made to the Guides to reduce the burdens or costs imposed on businesses? In particular, should the Commission eliminate Section 18.7 (Misrepresentation as to character of business)? Does this section imply that

[1] Industry guides are administrative interpretations of laws administered by the Commission. 16 CFR 1.5.

[2] *See* 59 FR 64546 (December 14, 1994); 72 FR 902 (January 9, 2007).

occupational licensing is a prerequisite for covered businesses? How would these changes affect the benefits provided by the Guides?

(10) Is it necessary to include reference works in the Note to Section 18.2? Are the reference works in the Note to Section 18.2 authoritative and readily and freely available to the public? If not, are there updated editions that are more authoritative and readily and freely available? Are there other works in the public domain that the Commission should consider in determining whether claims made for a covered plant's quality, size, grade, kind, species, age, maturity, condition, etc. are truthful and non-misleading? For example, do federal or state agricultural authorities provide guidance sufficient for the Commission, consumers, and covered businesses to determine whether claims made for covered products are truthful and non-misleading?

(11) Is it necessary to include the mention in the Note to Section 18.2 of ''plant name lists periodically published by the plant societies and the horticultural organizations selected as international and national cultivar registration authorities as enumerated in Appendix of Naming and Registering New Cultivars?'' Is the plant name list sufficiently specific to be useful to consumers or businesses? Can more specificity be provided as to which international and national cultivar registration authorities are relevant, and how to locate the Appendix of Naming and Registering New Cultivars?

(12) Should the Commission remove mentions of ''industry recommendation'' and ''industry consensus'' from the Notes to Sections 18.2 and 18.4? Should the Commission include in the Guides only its own views, consistent with the Guide's purpose of furthering the public interest in preventing deception?

(13) Do the Guides overlap or conflict with federal, state, or local laws or regulations? Do the Guides overlap or conflict with any international laws or regulations?

(14) Have consumer perceptions changed since the Guides were issued and, if so, do these changes warrant revising the Guides?

(15) Since the Guides were issued, what effects, if any, have changes in relevant technological, economic, or environmental conditions had on the need for or usefulness of the Guides?

You can file a comment online or on paper. For the Commission to consider your comment, we must receive it on or before April 20, 2018. Write ''Nursery Guides, P994248'' on your comment. Your comment—including your name and your state—will be placed on the public record of this proceeding, including, to the extent practicable, on the public Commission website, at *https://www.ftc.gov/policy/public-comments.*

Postal mail addressed to the Commission is subject to delay due to heightened security screening. As a result, we encourage you to submit your comments online. To ensure the Commission considers your online comment, you must file it at *https://ftcpublic.commentworks.com/ftc/nurseryguides,* by following the instruction on the web-based form. If this Notice appears at *http://www.regulations.gov,* you also may file a comment through that website.

If you file your comment on paper, write ''Nursery Guides, P994248'' on your comment and on the envelope, and mail it to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue NW, Suite CC–5610 (Annex A), Washington, DC 20580, or deliver your comment to the following address: Federal Trade Commission, Office of the Secretary, Constitution Center, 400 7th Street SW, 5th Floor, Suite 5610, Washington, DC 20024. If possible, please submit your paper comment to the Commission by courier or overnight service.

Because your comment will be placed on the publicly accessible FTC website at *https://www.ftc.gov,* you are solely responsible for making sure that your comment does not include any sensitive personal information, such as your or anyone's Social Security number; date of birth; driver's license number or other state identification number or foreign country equivalent; passport number; financial account number; or credit or debit card number. You are also solely responsible for ensuring your comment does not include any sensitive health information, such as medical records or other individually identifiable health information. In addition, your comment should not include any ''[t]rade secret or any commercial or financial information which . . . is privileged or confidential''—as provided in Section 6(f) of the FTC Act, 15 U.S.C. 46(f), and FTC Rule 4.10(a)(2), 16 CFR 4.10(a)(2)—including in particular competitively sensitive information such as costs, sales statistics, inventories, formulas, patterns, devices, manufacturing processes, or customer names.

Comments containing material for which confidential treatment is requested must be filed in paper form, must be clearly labeled ''Confidential,'' and must comply with FTC Rule 4.9(c). In particular, the written request for confidential treatment that accompanies the comment must include the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. *See* FTC Rule 4.9(c). Your comment will be kept confidential only if the General Counsel grants your request in accordance with the law and the public interest. Once your comment has been posted on the public FTC website—as legally required by FTC Rule 4.9(b)—we cannot redact or remove your comment from the FTC website, unless you submit a confidentiality request that meets the requirements for such treatment under FTC Rule 4.9(c), and the General Counsel grants that request.

Visit the FTC website to read this Notice and the news release describing it. The FTC Act and other laws that the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. The Commission will consider all timely and responsive public comments that it receives on or before April 20, 2018. For information on the Commission's privacy policy, including routine uses permitted by the Privacy Act, see *https://www.ftc.gov/site-information/privacy-policy.*

By direction of the Commission.

Donald S. Clark,

Secretary.

[FR Doc. 2018–03569 Filed 2–21–18; 8:45 am]

BILLING CODE 6750–01–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket Number USCG–2018–0086]

RIN 1625–AA08

Safety Zone; Pensacola Bay, Pensacola, FL

AGENCY: Coast Guard, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Coast Guard proposes to establish a temporary safety zone for all navigable waters on Pensacola Bay within 100 yards of each vessel participating in the Tall Ships Pensacola marine event and parade in Pensacola, FL and within 100 yards of the Port of Pensacola for the duration of the marine event and parade. The proposed rulemaking is necessary to provide for the safety of life and property on these

navigable waters during the Tall Ships Pensacola marine event. This proposed rulemaking would prohibit persons and vessels from entering the safety zone unless specifically authorized by the Captain of the Port Sector Mobile (COTP) or a designated representative. We invite your comments on this proposed rulemaking.

DATES: Comments and related material must be received by the Coast Guard on or before March 9, 2018.

ADDRESSES: You may submit comments identified by docket number USCG–2018–0086 using the Federal eRulemaking Portal at *http://www.regulations.gov*. See the ''Public Participation and Request for Comments'' portion of the **SUPPLEMENTARY INFORMATION** section for further instructions on submitting comments.

FOR FURTHER INFORMATION CONTACT: If you have questions about this proposed rulemaking, call or email LT Kyle D. Berry, Sector Mobile, Waterways Management Division, U.S. Coast Guard; telephone 251–441–5940, email *Kyle.D.Berry@uscg.mil*.

SUPPLEMENTARY INFORMATION:

I. Table of Abbreviations

CFR Code of Federal Regulations
COTP Captain of the Port Sector Mobile
DHS Department of Homeland Security
FR Federal Register
MM Mile Marker
NPRM Notice of Proposed Rulemaking
PATCOM Patrol Commander
§ Section
U.S.C. United States Code

II. Background, Purpose, and Legal Basis

The sponsor for the Tall Ships Pensacola marine event submitted an application for a marine event permit for the event that will take place from 8 a.m. on April 12, 2018 through 8 p.m. on April 15, 2018. The event will consist of a boat parade of the tall ships in Pensacola Bay on April 12, 2018. The event will also consist of several days of public tours and sailings of the tall ships at the Port of Pensacola, Pensacola, FL, which is expected to attract several thousand spectators. The Captain of the Port Sector Mobile (COTP) has determined a safety zone is necessary to protect the public from the potential hazards associated with the tall ships during the organized parade, and public tours and sailings of these tall ships.

The purpose of this proposed rulemaking is to ensure the safety of vessels and persons during the tall ships' visit on the navigable waters of the Pensacola Bay in Pensacola, FL. The Coast Guard proposes this rulemaking under authority in 33 U.S.C. 1231.

The Coast Guard is issuing this Notice of Proposed Rulemaking (NPRM) with 15-day prior notice and opportunity to comment pursuant to authority under section (d)(3) of the Administrative Procedure Act (APA) (5 U.S.C. 553(d)). This provision authorizes an agency to publish a rule in less than 30 days before its effective date for ''good cause found and published with the rule.'' Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for publishing this NPRM with a 15-day comment period because it is impractical to provide a 30-day comment period. This proposed safety zone is necessary to ensure the safety of vessels and persons during the tall ships' visit to Pensacola. It is impracticable to publish an NPRM with a 30-day comment period because we must establish this safety zone by April 12, 2018.

III. Discussion of Proposed Rule

The Coast Guard proposes to establish a temporary safety zone on Pensacola Bay within 100 yards of each vessel participating in the Tall Ships Pensacola marine event from 8 a.m. on April 12, 2018 through 8 p.m. on April 15, 2018, covering each vessel from when the vessel arrives at Pensacola, FL, when moored at the Port of Pensacola, 30°24′07.2″ N, 87°12′44.7″ W, when underway in parade from position 30°24′07.2″ N, 87°12′44.7″ W to 30°19′52.6″ N, 87°18′31.5″ W, and when the vessel departs Pensacola, FL. The Coast Guard also proposes to establish a temporary safety zone on Pensacola Bay within 100 yards of the Port of Pensacola for the duration of the Tall Ships Pensacola marine event from 8 a.m. on April 12, 2018 through 8 p.m. on April 15, 2018. The proposed rulemaking is needed to provide for the safety of life and property on these navigable waters during the Tall Ship Pensacola marine event. This proposed rulemaking restricts transit into, through, and within the zone unless specifically authorized by the COTP or a designated representative. No vessel or person would be permitted to enter the zone without obtaining permission from the COTP or a designated representative. A designated representative may be a Patrol Commander (PATCOM). The PATCOM would be aboard either a Coast Guard or Coast Guard Auxiliary vessel. The PATCOM may be contacted on Channel 16 VHF–FM (156.8 MHz) by the call sign ''PATCOM''. All persons and vessels not registered with the sponsor as participants or official patrol vessels are considered spectators. The ''official patrol vessels'' consist of any Coast Guard, state, or local law enforcement and sponsor provided vessels assigned or approved by the COTP or a designated representative to patrol the zone.

Spectator vessels desiring to transit the zone may do so only with prior approval of the COTP or a designated representative and when so directed by that officer would be operated at a minimum safe navigation speed in a manner which will not endanger any other vessels. No spectator vessel shall anchor, block, loiter, or impede the through transit of official patrol vessels in the zone during the effective dates and times, unless cleared for entry by or through the COTP or a designated representative. Any spectator vessel may anchor outside the zone, but may not anchor in, block, or loiter in a navigable channel. Spectator vessels may be moored to a waterfront facility within the zone in such a way that they shall not interfere with the progress of the event. Such mooring must be complete at least 30 minutes prior to the establishment of the zone and remain moored through the duration of the event.

The COTP or a designated representative may forbid and control the movement of all vessels in the zone. When hailed or signaled by an official patrol vessel, a vessel shall come to an immediate stop and comply with the directions given. Failure to do so may result in expulsion from the zone, citation for failure to comply, or both.

The COTP or a designated representative may terminate the operation of any vessel at any time it is deemed necessary for the protection of life or property. The COTP or a designated representative would terminate enforcement of the safety zone at the conclusion of the event.

The regulatory text we are proposing appears at the end of this document.

IV. Regulatory Analyses

We developed this proposed rule after considering numerous statutes and Executive orders related to rulemaking. Below we summarize our analyses based on a number of these statutes and Executive orders and we discuss First Amendment rights of protestors.

A. Regulatory Planning and Review

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits. Executive Order 13771 directs agencies

to control regulatory costs through a budgeting process. This NPRM has not been designated a ''significant regulatory action,'' under Executive Order 12866. Accordingly, the NPRM has not been reviewed by the Office of Management and Budget (OMB), and pursuant to OMB guidance it is exempt from the requirements of Executive Order 13771.

This regulatory action determination is based on size, location, and duration of the proposed rulemaking. The proposed safety zone would take place on a small area of Pensacola Bay, lasting for only four days from April 12, 2018 through April 15, 2018. Additionally, the Coast Guard would issue Broadcast Notices to Mariners via VHF–FM marine channel 16 about the safety zone so that waterway users may plan accordingly for transits during this restriction, and the proposed rule would also allow vessels to seek permission from the COTP or a designated representative to enter the zone.

B. Impact on Small Entities

The Regulatory Flexibility Act of 1980, 5 U.S.C. 601–612, as amended, requires Federal agencies to consider the potential impact of regulations on small entities during rulemaking. The term ''small entities'' comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. The Coast Guard certifies under 5 U.S.C. 605(b) that this proposed rule would not have a significant economic impact on a substantial number of small entities.

While some owners or operators of vessels intending to transit the safety zone may be small entities, for the reasons stated in section IV.A above, this proposed rule would not have a significant economic impact on any vessel owner or operator.

If you think that your business, organization, or governmental jurisdiction qualifies as a small entity and that this proposed rule would have a significant economic impact on it, please submit a comment (see **ADDRESSES**) explaining why you think it qualifies and how and to what degree this rule would economically affect it.

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we want to assist small entities in understanding this proposed rule. If the rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section. The Coast Guard will not retaliate against small entities that question or complain about this proposed rule or any policy or action of the Coast Guard.

C. Collection of Information

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

D. Federalism and Indian Tribal Governments

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. We have analyzed this proposed rule under that Order and have determined that it is consistent with the fundamental federalism principles and preemption requirements described in Executive Order 13132.

Also, this proposed rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it would not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes. If you believe this proposed rule has implications for federalism or Indian tribes, please contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section.

E. Unfunded Mandates Reform Act

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

F. Environment

We have analyzed this rule under Department of Homeland Security Directive 023–01, which guides the Coast Guard in complying with the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4370f), and have determined that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This rule involves a safety zone on Pensacola Bay within 100 yards of the Port of Pensacola and within 100 yards of any vessel participating in the Tall Ships Pensacola marine event and parade from April 12, 2018 through April 15, 2018. It is categorically excluded from further review under paragraph L60 of Appendix A, Table 1 of DHS Instruction Manual 023–01–001–01, Rev. 01. A Record of Environmental Consideration (REC) supporting this determination is available in the docket where indicated under **ADDRESSES**.

We seek any comments or information that may lead to the discovery of a significant environmental impact from this proposed rule.

G. Protest Activities

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

V. Public Participation and Request for Comments

We view public participation as essential to effective rulemaking, and will consider all comments and material received during the comment period. Your comment can help shape the outcome of this rulemaking. If you submit a comment, please include the docket number for this rulemaking, indicate the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation.

We encourage you to submit comments through the Federal eRulemaking Portal at *http://www.regulations.gov.* If your material cannot be submitted using *http://www.regulations.gov,* contact the person in the **FOR FURTHER INFORMATION CONTACT** section of this document for alternate instructions.

We accept anonymous comments. All comments received will be posted without change to *http://www.regulations.gov* and will include any personal information you have provided. For more about privacy and the docket, visit *http://www.regulations.gov/privacyNotice.*

Documents mentioned in this NPRM as being available in the docket, and all public comments, will be in our online

docket at *http://www.regulations.gov* and can be viewed by following that website's instructions. Additionally, if you go to the online docket and sign up for email alerts, you will be notified when comments are posted or a final rule is published.

List of Subjects in 33 CFR Part 165

Harbors, Marine safety, Navigation (water), Reporting and recordkeeping requirements, Waterways.

For the reasons discussed in the preamble, the Coast Guard proposes to amend 33 CFR part 165 as follows:

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

■ 1. The authority citation for part 165 continues to read as follows:

Authority: 33 U.S.C. 1231; 50 U.S.C. 191; 33 CFR 1.05–1; 6.04–1, 6.04–6, and 160.5; Department of Homeland Security Delegation No. 0170.1.

■ 2. Add § 165.T08–0086 to read as follows:

§ 165.T08–0086 Safety Zone; Pensacola Bay, Pensacola, FL

(a) *Location.* The following area is a safety zone: All navigable waters of the Pensacola Bay within 100 yards of each vessel participating in the Tall Ships Pensacola marine event and parade and within 100 yards of the Port of Pensacola, 30°24′07.2″ N, 87°12′44.7″ W, Pensacola, FL.

(b) *Enforcement period.* This section is effective from 8 a.m. on April 12, 2018 through 8 p.m. on April 15, 2018.

(c) *Regulations.*

(1) In accordance with the general regulations in § 165.23 of this part, entry into, transiting through, or exiting from this area is prohibited unless authorized by the Captain of the Port Sector Mobile (COTP) or a designated representative. A designated representative may be a Patrol Commander (PATCOM). The PATCOM will be aboard either a Coast Guard or Coast Guard Auxiliary vessel. The PATCOM may be contacted on Channel 16 VHF–FM (156.8 MHz) by the call sign ''PATCOM''.

(3) Persons or vessels seeking to enter into or transit through the zone must request permission from the COTP or a designated representative. They may be contacted on VHF–FM channels 16 or by telephone at 251–441–5976.

(4) If permission is granted, all persons and vessels must comply with the instructions of the COTP or designated representative.

(5) All persons and vessels not registered with the event sponsor as participants or official patrol vessels are considered spectators. The ''official patrol vessels'' consist of any Coast Guard, state, or local law enforcement and sponsor provided vessels assigned or approved by the COTP or a designated representative to patrol the regulated area.

(6) Spectator vessels desiring to transit the regulated area may do so only with prior approval of the COTP or a designated representative and when so directed by that officer will be operated at a minimum safe navigation speed in a manner that will not endanger participants in the zone or any other vessels.

(7) No spectator vessel shall anchor, block, loiter, or impede the through transit of participants or official patrol vessels in the regulated area during the effective dates and times, unless cleared for entry by the COTP or a designated representative.

(8) Any spectator vessel may anchor outside the regulated area, but may not anchor in, block, or loiter in a navigable channel. Spectator vessels may be moored to a waterfront facility within the regulated area in such a way that they shall not interfere with the progress of the event. Such mooring must be complete at least 30 minutes prior to the establishment of the regulated area and remain moored through the duration of the event.

(9) The COTP or designated representative may forbid and control the movement of all vessels in the regulated area. When hailed or signaled by an official patrol vessel, a vessel shall come to an immediate stop and comply with the directions given. Failure to do so may result in expulsion from the area, citation for failure to comply, or both.

(10) The COTP or a designated representative may terminate the event or the operation of any vessel at any time it is deemed necessary for the protection of life or property.

(11) The COTP or a designated representative will terminate enforcement of the safety zone prior to or at the conclusion of the event.

(d) *Informational broadcasts.* The COTP or a designated representative will inform the public through Broadcast Notices to Mariners of the enforcement period for the temporary safety zone as well as any changes in the planned schedule.

Dated: February 15, 2018.

M.R. McLellan,

Captain, U.S. Coast Guard, Captain of the Port Sector Mobile.

[FR Doc. 2018–03663 Filed 2–21–18; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket Number USCG–2018–0102]

RIN 1625–AA00

Safety Zones; Recurring Events in Captain of the Port Duluth Zone

AGENCY: Coast Guard, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Coast Guard proposes to amend its safety zones regulations for annual events in the Captain of the Port Duluth Zone. This rule would update the locations for seven safety zones, add three new safety zones, increase the safety zone radius of six existing fireworks events, and modify the format of the regulation to list the annual events and corresponding safety zones in table form. These proposed amendments would protect spectators, participants, and vessels from the hazards associated with annual marine events and improve the clarity and readability of the regulation.

DATES: Comments and related material must be received by the Coast Guard on or before March 26, 2018.

ADDRESSES: You may submit comments identified by docket number USCG–2018–0102 using the Federal eRulemaking Portal at *http://www.regulations.gov.* Type the docket number (USCG–2018–0102) in the ''SEARCH'' box and click ''SEARCH.'' See the ''Public Participation and Request for Comments'' portion of the **SUPPLEMENTARY INFORMATION** section for further instructions on submitting comments.

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call or email Lieutenant John Mack, Chief of Waterways Management, Marine Safety Unit Duluth, U.S. Coast Guard; telephone 218–725–3818, email *John.V.Mack@uscg.mil.*

SUPPLEMENTARY INFORMATION:

I. Table of Abbreviations

CFR Code of Federal Regulations
COTP Captain of the Port
DHS Department of Homeland Security
FR Federal Register
NPRM Notice of proposed rulemaking
§ Section
U.S.C. United States Code

II. Background, Purpose, and Legal Basis

On May 31, 2013 the Coast Guard published an NPRM in the **Federal**

Register (78 FR 32608) entitled ''Recurring Events in the Captain of the Port Duluth Zone.'' The NPRM proposed to establish 8 permanent safety zones for annually recurring events in the Captain of the Port Duluth Zone under § 165.943. The NPRM was open for comment for 30 days.

On August 12, 2013 the Coast Guard published the Final Rule in the **Federal Register** (78 FR 48802), after receiving no comments on the NPRM. Since that time there have been changes to the events that were listed in the Final Rule and additional annual events have been established. Through this proposed rule the Coast Guard seeks to update § 165.943 to reflect the current status of recurring marine events in the Captain of the Port Duluth zone.

III. Discussion of Proposed Rule

The Coast Guard is proposing this rule under authority in 33 U.S.C. 1231. The Captain of the Port Duluth (COTP) has determined that an amendment to the recurring events list as published in 33 CFR 165.943 will be necessary to: Update the location of seven existing safety zones (Bridgefest Regatta Fireworks Display, Cornucopia 4th of July Fireworks Display, Duluth 4th Fest Fireworks Display, LaPointe 4th of July Fireworks Display, Point to LaPointe Swim, Lake Superior Dragon Boat Festival, and Superior Man Triathlon), add three new safety zones for additional annual events (City of Bayfield 4th of July Fireworks Display, Two Harbors 4th of July Fireworks Display, and Superior 4th of July Fireworks Display), increase the safety zone radius of six fireworks events (Bridgefest Regatta Fireworks Display, Ashland 4th of July Fireworks Display, Cornucopia 4th of July Fireworks Display, LaPointe 4th of July Fireworks Display, and Lake Superior Dragon Boat Festival), and format the existing regulations into a table format. The purpose of this rule is to ensure safety of vessels and the navigable waters in the safety zone before, during, and after the scheduled events and to improve the overall clarity and readability of the rule. The regulatory text we are proposing appears at the end of this document.

The amendments to this proposed rule are necessary to ensure the safety of vessels and people during annual events taking place on or near federally maintained waterways in the Captain of the Port Duluth Zone. Although this proposed rule would be in effect year-round, the specific safety zones listed in Table 165.943 would only be enforced during a specified period of time coinciding with the happening of the annual events listed.

When a Notice of Enforcement for a particular safety zone is published, entry into, transiting through, or anchoring within the safety zone is prohibited unless authorized by the Captain of the Port Duluth, or his or her designated representative. The Captain of the Port Duluth or his or her designated representative may be contacted via VHF Channel 16 or telephone at (906) 635–3233. No vessel or person will be permitted to enter the safety zone without obtaining permission from the COTP or a designated representative.

V. Regulatory Analyses

We developed this proposed rule after considering numerous statutes and Executive Orders related to rulemaking. Below we summarize our analyses based on a number of these statutes and Executive orders, and we discuss First Amendment rights of protestors.

A. Regulatory Planning and Review

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits. Executive Order 13771 directs agencies to control regulatory costs through a budgeting process. This NPRM has not been designated a ''significant regulatory action,'' under Executive Order 12866. Accordingly, the NPRM has not been reviewed by the Office of Management and Budget (OMB), and pursuant to OMB guidance it is exempt from the requirements of Executive Order 13771.

This regulatory action determination is based on the size, location, duration, and time-of-day for each safety zone. Vessel traffic would be able to safely transit around all safety zones which would impact small designated areas within Lake Superior for short durations of time. Moreover, the Coast Guard will issue Broadcast Notice to Mariners via VHF–FM marine channel 16 about the zone and the rule allows vessels to seek permission to enter the zone.

B. Impact on Small Entities

The Regulatory Flexibility Act of 1980, 5 U.S.C. 601–612, as amended, requires Federal agencies to consider the potential impact of regulations on small entities during rulemaking. The term ''small entities'' comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities.

While some owners or operators of vessels intending to transit the safety zones may be small entities, for the reasons stated in section V.A above, this rule will not have a significant economic impact on any vessel owner or operator.

If you think that your business, organization, or governmental jurisdiction qualifies as a small entity and that this rule would have a significant economic impact on it, please submit a comment (see **ADDRESSES**) explaining why you think it qualifies and how and to what degree this rule would economically affect it.

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we want to assist small entities in understanding this rule. If the rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section. The Coast Guard will not retaliate against small entities that question or complain about this rule or any policy or action of the Coast Guard.

C. Collection of Information

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

D. Federalism and Indian Tribal Governments

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. We have analyzed this proposed rule under that Order and have determined that it is consistent with the fundamental federalism principles and preemption requirements described in Executive Order 13132.

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

Federal Government and Indian tribes. If you believe this rule has implications for federalism or Indian tribes, please contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section.

E. Unfunded Mandates Reform Act

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

F. Environment

We have analyzed this proposed rule under Department of Homeland Security Management Directive 023–01, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4370f), and have made a preliminary determination that this action is one of a category of actions that does not individually or cumulatively have a significant effect on the human environment. This proposed rule involves: The update of seven safety zone locations, the addition of three new safety zones, an increase of size for six safety zone radiuses for fireworks related events, and the reformatting of regulations into an easier to read table format. Normally such actions are categorically excluded from further review under paragraph L60a of Appendix A, Table 1 of DHS Instruction Manual 023–01–001–01, Rev. 01. A preliminary Record of Environmental Consideration supporting this determination is available in the docket where indicated under **ADDRESSES**. We seek any comments or information that may lead to the discovery of a significant environmental impact from this rule.

G. Protest Activities

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

V. Public Participation and Request for Comments

We view public participation as essential to effective rulemaking, and will consider all comments and material received during the comment period. Your comment can help shape the outcome of this rulemaking. If you submit a comment, please include the docket number for this rulemaking, indicate the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation.

We encourage you to submit comments through the Federal eRulemaking Portal at *http://www.regulations.gov.* If your material cannot be submitted using *http://www.regulations.gov,* contact the person in the **FOR FURTHER INFORMATION CONTACT** section of this document for alternate instructions.

We accept anonymous comments. All comments received will be posted without change to *http://www.regulations.gov* and will include any personal information you have provided. For more about privacy and the docket, visit *http://www.regulations.gov/privacyNotice.*

Documents mentioned in this NPRM as being available in the docket, and all public comments, will be in our online docket at *http://www.regulations.gov* and can be viewed by following that website's instructions. Additionally, if you go to the online docket and sign up for email alerts, you will be notified when comments are posted or a final rule is published.

List of Subjects in 33 CFR Part 165

Harbors, Marine safety, Navigation (water), Reporting and record keeping requirements, Security measures, Waterways.

For the reasons discussed in the preamble, the Coast Guard proposes to amend 33 CFR part 165 as follows:

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

■ 1. The authority citation for part 165 continues to read as follows:

Authority: 33 U.S.C. 1231; 50 U.S.C. 191; 33 CFR 1.05–1, 6.04–1, 6.04–6, and 160.5; Department of Homeland Security Delegation No. 0170.1.

■ 2. Revise § 165.943 to read as follows:

§ 165.943 Safety zones; recurring events in captain of the Port Duluth Zone.

(a) Regulations. The following regulations apply to the safety zones listed in Table 165.943 of this section:

(1) The Coast Guard will provide advance notice of the enforcement date and time of the safety zone being enforced in Table 165.943, by issuing a Notice of Enforcement, as well as, a Broadcast Notice to Mariners.

(2) In accordance with the general regulations in § 165.23 of this part, entry into, transiting, or anchoring in this safety zone is prohibited unless authorized by the Captain of the Port Duluth, or the designated on-scene representative.

(b) *Contacting the Captain of the Port.* While a safety zone listed in this section is enforced, the Captain of the Port Duluth or his or her on-scene representative may be contacted via VHF Channel 16 or telephone at (906) 635–3233. Vessel operators given permission to enter or operate in a safety zone must comply with all directions given to them by the Captain of the Port Duluth, or his or her on-scene representative.

(c) *Exemption.* Public vessels, defined as any vessel owned or operated by the United States or by State or local governments, operating in an official capacity are exempted from the requirements of this section.

TABLE 165.943

[Datum NAD 1983]

Event	Location	Event date
(1) Bridgefest Regatta Fireworks Display.	All waters of the Keweenaw Waterway in Hancock, MI within the arc of a circle with a radius of no more than 1,120 feet from the launch site at position 47°07′22″ N, 088°35′28″ W.	Mid June.
(2) Ashland 4th of July Fireworks Display.	All waters of Chequamegon Bay in Ashland, WI within the arc of a circle with a radius of no more than 1,120 feet from the launch site at position 46°35′50″ N, 090°52′59″ W.	On or around July 4th.

TABLE 165.943—Continued

[Datum NAD 1983]

Event	Location	Event date
(3) City of Bayfield 4th of July Fireworks Display.	All waters of the Lake Superior North Channel in Bayfield, WI within the arc of a circle with a radius of no more than 1,120 feet from the launch site at position 46°48′40″ N, 090°48′32″ W.	On or around July 4th.
(4) Cornucopia 4th of July Fireworks Display.	All waters of Siskiwit Bay in Cornucopia, WI within the arc of a circle with a radius of no more than 1,120 feet from the launch site at position 46°51′35″ N, 091°06′15″ W.	On or around July 4th.
(5) Duluth 4th Fest Fireworks Display.	All waters of the Duluth Harbor Basin, Northern Section in Duluth, MN within the arc of a circle with a radius of no more than 1,120 feet from the launch site at position 46°46′14″ N, 092°06′16″ W.	On or around July 4th.
(6) LaPointe 4th of July Fireworks Display.	All waters of Lake Superior in LaPointe, WI within the arc of a circle with a radius of no more than 1,120 feet from the launch site at position 46°46′40″ N, 090°47′22″ W.	On or around July 4th.
(7) Two Harbors 4th of July Fireworks Display.	All waters of Agate Bay in Two Harbors, MN within the arc of a circle with a radius of no more than 1,120 feet from the launch site at position 47°00′54″ N, 091°40′04″ W.	On or around July 4th.
(8) Superior 4th of July Fireworks Display.	All waters of Superior Bay in Superior, WI within the arc of a circle with a radius of no more than 1,120 feet from the launch site at position 46°43′28″ N, 092°03′38″ W.	On or around July 4th.
(9) Point to LaPointe Swim	All waters of the Lake Superior North Channel between Bayfield and LaPointe, WI within an imaginary line created by the following coordinates: 46°48′50″ N, 090°48′44″ W, moving southeast to 46°46′44″ N, 090°47′33″ W, then moving northeast to 46°46′52″ N, 090°47′17″ W, then moving northwest to 46°49′03″ N, 090°48′25″ W, and finally returning to the starting position.	Early August.
(10) Lake Superior Dragon Boat Festival Fireworks Display.	All waters of Superior Bay in Superior, WI within the arc of a circle with a radius of no more than 1,120 feet from the launch site at position 46°43′28″ N, 092°03′47″ W.	Late August.
(11) Superior Man Triathlon	All waters of the Duluth Harbor Basin, Northern Section in Duluth, MN within an imaginary line created by the following coordinates: 46°46′36″ N, 092°06′06″ W, moving southeast to 46°46′32″ N, 092°06′01″ W, then moving northeast to 46°46′45″ N, 092°05′45″ W, then moving northwest to 46°46′49″ N, 092°05′49″ W, and finally returning to the starting position.	Late August.

Dated: February 14, 2018.

E.E. Williams,

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

[FR Doc. 2018–03624 Filed 2–21–18; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 660

[Docket No. 171031999–8160–01]

RIN 0648–BH40

Fisheries Off West Coast States; West Coast Salmon Fisheries; Management Measures To Limit Fishery Impacts on Sacramento River Winter Chinook Salmon

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

ACTION: Proposed rule; request for comments.

SUMMARY: NMFS proposes to approve new fishery management measures to limit incidental catch of endangered Sacramento River winter Chinook salmon (SRWC) in fisheries managed under the Pacific Fishery Management Council's (Council) Pacific Salmon Fishery Management Plan (FMP). These new management measures replace existing measures, which have been in place since 2012, with updated salmon abundance modeling methods that utilize the best available science and address concerns that the existing measures were overly conservative.

DATES: Comments on this proposed rule must be received on or before March 9, 2018.

ADDRESSES: You may submit comments, identified by NOAA–NMFS–2017–0139, by any one of the following methods:

- *Electronic Submissions:* Submit all electronic public comments via the Federal e-Rulemaking Portal. Go to *www.regulations.gov/#!docketDetail;D=NOAA-NMFS-2017-0139,* click the ''Comment Now!'' icon, complete the required fields, and enter or attach your comments.
- *Mail:* Barry A. Thom, Regional Administrator, West Coast Region, NMFS, 7600 Sand Point Way NE, Seattle, WA 98115–0070.

Instructions: Comments must be submitted by one of the above methods to ensure that the comments are received, documented, and considered by NMFS. 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. All comments received are a part of the public record and will generally be posted for public viewing on *http://www.regulations.gov* without change. All personal identifying information (*e.g.,* name, address, etc.) submitted voluntarily by the sender will be publicly accessible. Do not submit confidential business information or otherwise sensitive or protected information. NMFS will accept anonymous comments (enter N/A in the required fields if you wish to remain anonymous).

FOR FURTHER INFORMATION CONTACT: Peggy Mundy at 206–526–4323.

SUPPLEMENTARY INFORMATION:

Background

Ocean salmon fisheries off the coasts of Washington, Oregon, and California are managed by the Council according to the FMP. The FMP includes harvest controls that are used to manage salmon stocks sustainably. The FMP also requires that the Council manage fisheries consistent with ''consultation standards'' for stocks listed as

endangered or threatened under the Endangered Species Act (ESA) for which NMFS has issued biological opinions. NMFS has issued biological opinions for every ESA listed salmon species impacted by the fisheries governed by the FMP, and reminds the Council of requirements to maintain consistency with those opinions (''consultation standards'') in its annual guidance letter to the Council regarding development of the annual ocean salmon management measures.

SRWC has been listed as endangered under the ESA since 1990 (55 FR 46515, November 5, 1990). These fish are impacted by ocean salmon fisheries south of Point Arena, California; thus NMFS has consulted on these impacts under section 7 of the ESA. Since the original consultation, NMFS has periodically reinitiated consultation on the impacts of ocean salmon fisheries on SRWC, most recently in 2010. In its 2010 biological opinion, NMFS determined that ocean salmon fisheries were likely to jeopardize the continued existence of SRWC, but not modify or destroy critical habitat. To address this jeopardy conclusion, NMFS issued and implemented an interim reasonable and prudent alternative (RPA) for fisheries in 2010 and 2011, and required development of an abundance-based framework for limiting impacts on SRWC during this interim period. In 2012, NMFS issued and implemented the current RPA to limit impacts of fisheries on SRWC. The RPA consists of two parts: Part one includes fishing season and size limit restrictions (see Table 1, below); part two specifies an abundance-based harvest control rule. The harvest control rule uses a forecast abundance that is based on the 3-year geometric mean of prior spawning escapement. At 3-year geometric mean abundance greater than 5,000, no impact rate cap is imposed. At 3-year geometric mean abundance between 5,000 and 4,000, the impact rate cap is 20 percent. At 3-year geometric mean abundance between 4,000 and 500, the impact rate cap declines linearly from 20 percent at 4,000 abundance to 10 percent at 500 abundance. At 3-year geometric mean abundance below 500, the impact rate cap is zero percent.

TABLE 1—FISHING SEASON AND SIZE RESTRICTIONS FOR OCEAN CHINOOK SALMON FISHERIES, SOUTH OF POINT ARENA, CALIFORNIA

Fishery	Location	Shall open no earlier than	Shall close no later than	Minimum size limit (total length [1]) shall be
Recreational	Between Point Arena and Pigeon Point	1st Saturday in April	2nd Sunday in November.	20 inches.
	Between Pigeon Point and the U.S./Mexico border.	1st Saturday in April	1st Sunday in October	
Commercial	Between Point Arena and the U.S./Mexico border †.	May 1	September 30 †	26 inches.
	† Exception: Between Point Reyes and Point San Pedro, there may be an October commercial fishery conducted Monday through Friday, but shall end no later than October 15.			

[1] Total length of salmon means the shortest distance between the tip of the snout or jaw (whichever extends furthest while the mouth is closed) and the tip of the longest lobe of the tail, without resort to any force or mutilation of the salmon other than fanning or swinging the tail (50 CFR 660.402).

Since implementation of the RPA, two issues with the control rule have arisen from Council discussion. First, the control rule does not allow for any fishery impacts when the most recent 3-year geometric mean of spawning escapement for SRWC falls below 500. This would result in closure of all salmon fisheries south of Point Arena, CA, which the Council felt was unnecessarily restrictive. Second, because the control rule is based on spawning escapement, it is not responsive to more forward looking indicators of stock productivity, *e.g.,* poor juvenile salmon survival during the prolonged California drought. The Council did not raise any issues with respect to the fishing season and size limit restrictions that formed the first part of the 2012 RPA; and continues to consider this part of the applicable ESA ''consultation standard.'' Thus NMFS includes maintaining those restrictions as part of this action.

In 2015, the Council created an ad hoc SRWC Workgroup to develop a new harvest control rule that would address the two issues mentioned above; the SRWC workgroup comprised staff from NMFS, California Department of Fish and Wildlife, and the U.S. Fish and Wildlife Service. The SRWC Workgroup's meetings to develop and analyze alternative harvest control rules were open to the public. Additionally, the SRWC Workgroup presented their reports to the Council at regularly scheduled Council meetings in 2016 and 2017. These workgroup and Council meetings were noticed in the **Federal Register**, public input was invited, and the meetings were open to the public through either in-person attendance, webinar, conference call, or live streaming on the internet. At the Council's September 2017 meeting, the Council selected four of the alternatives developed by the Workgroup for final analysis. The Council then selected a final preferred alternative at their November 2017 meeting. Documents considered by the Council are available on the Council website: (*https://www.pcouncil.org/resources/archives/briefing-books/november-2017-briefing-book/#salNov2017*). The Council transmitted their recommendation to NMFS on December 6, 2017.

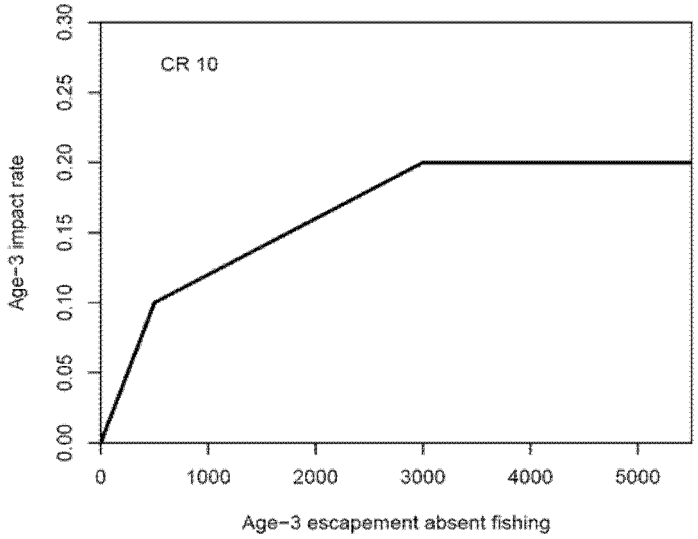
Council's Recommended Harvest Control Rule

The new harvest control rule recommended by the Council uses juvenile survival (*i.e.,* fry to the end of age-2 in the ocean) to model a forecast of age-3 escapement absent fishing (E^0_3). The model used is a modification of Winship *et al.* (2014) and is detailed in O'Farrell *et al.* (2016). The recommended control rule will provide a forward-looking forecast rather than the current hind-cast methodology.

The new harvest control rule sets the maximum allowable age-three impact rate based on the forecast age-three escapement in the absence of fisheries (E^0_3). At E^0_3 above 3,000, the allowable impact rate is fixed at 20 percent. At E^0_3 between 3,000 and 500, the allowable impact rate declines linearly from 20 percent to 10 percent. At E^0_3 between 500 and 0, the allowable impact rate declines linearly from 10 percent to 0

percent, thus providing fishing opportunity at all levels of SRWC abundance. See Figure 1.

Figure 1. The Proposed Harvest Control Rule (CR10), Recommended by the Pacific Fishery Management Council, for Management of Ocean Salmon Fisheries that Affect Sacramento River Winter Chinook Salmon (SRWC Workgroup 2017).



The SRWC Workgroup compared the alternative harvest control rules with respect to extinction risk to SRWC and how the alternatives would affect fishing opportunity. With respect to extinction risk, the workgroup found little contrast among the alternatives in their simulation analyses. With respect to fishing opportunity, the workgroup did find differences among the alternatives, and concluded that the Council's recommended alternative was intermediate in constraining the fishery compared to the other alternatives under consideration. Fisheries south of Point Arena, where SRWC are contacted, impact several salmon stocks. In the six years that the current harvest control rule has been in place, these fisheries have been constrained by impacts to SRWC as well as California Coastal Chinook (ESA-listed as threatened), Sacramento River fall Chinook (not ESA-listed), and Klamath River fall Chinook (not ESA-listed). However, in recent years, the only closures of the fishery south of Point Arena were due to Sacramento River fall Chinook (2008, 2009). Under the new control rule for SRWC, fishing impacts would be allowed at all non-zero forecast abundance of SRWC; therefore, the new control rule would not, in itself, result in a fishery closure.

The harvest control rule recommended by the Council would address the issues raised by the current harvest control rule. The new harvest control rule would allow for fishing opportunity in the affected area at all levels of abundance of SRWC, and uses juvenile productivity and survival to develop a responsive, forward-looking abundance forecast. The new harvest control rule is expected to accomplish these goals without appreciably increasing the extinction risk to SRWC over the current harvest control rule. The new harvest control rule was developed in a public process with opportunity for the States, Tribes, and the public to provide input. The Council recommended and NMFS proposes to implement this new harvest control rule, together with the size and fishing season limits described above, beginning with the 2018 ocean salmon fishing season that will begin May 1, 2018.

References Cited

O'Farrell, M., N. Hendrix, and M. Mohr. 2016. An evaluation of preseason abundance forecasts for Sacramento River winter Chinook salmon. Pacific Fishery Management Council Briefing Book for November 2016, 35p.

SRWC Workgroup. 2017. Further evaluation of Sacramento River winter Chinook control rules, dated October 18, 2017. Pacific Fishery Management Council Briefing Book for November 2017, 9 p.

Winship, A.J., M.R. O'Farrell, and M.S. Mohr. 2014. Fishery and hatchery effects on an endangered salmon population with low productivity. Transactions of the American Fisheries Society 143, 957–971.

Classification

Pursuant to section 304(b)(1)(A) of the MSA, the NMFS Assistant Administrator has determined that this proposed rule is consistent with the Pacific Salmon Fishery Management Plan, the MSA, and other applicable law, subject to further consideration after public comment.

The West Coast Regional Administrator has determined that the actions of this proposed rule will be analyzed in an environmental assessment under the National Environmental Policy Act.

This proposed rule has been determined to be not significant for purposes of Executive Order 12866.

As required by section 603 of the Regulatory Flexibility Act (RFA), an Initial Regulatory Flexibility Analysis (IRFA) was prepared. The IRFA describes the economic impact this proposed rule, if adopted, would have on small entities. A summary of the analysis follows. A copy of this analysis is available from NMFS.

Provision is made under SBA's regulations for an agency to develop its own industry-specific size standards after consultation with Advocacy and an opportunity for public comment (see 13 CFR 121.903(c)). NMFS has established

a small business size standard for businesses, including their affiliates, whose primary industry is commercial fishing (80 FR 81194, December 29, 2015). This standard is only for use by NMFS and only for the purpose of conducting an analysis of economic effects in fulfillment of the agency's obligations under the RFA.

NMFS' small business size standard for businesses, including their affiliates, whose primary industry is commercial fishing is $11 million in annual gross receipts. This standard applies to all businesses classified under North American Industry Classification System (NAICS) code 11411 for commercial fishing, including all businesses classified as commercial finfish fishing (NAICS 114111), commercial shellfish fishing (NAICS 114112), and other commercial marine fishing (NAICS 114119) businesses. (50 CFR 200.2; 13 CFR 121.201).

The proposed rule would specify the annual amount of fishery impact that will be allowed on ESA-listed SRWC and, thereby, affect the fishing opportunity available in the area south of Point Arena, CA. This would affect commercial and recreational fisheries. Using the high from the last 3 years, 153 commercial trollers are likely to be impacted by this rule, all of whom would be considered small businesses. The 16–25 commercial vessels who have greater than 75 percent of their annual revenue from Chinook salmon south of Point Arena would be most impacted by this rule. Charter license holders operating south of Point Arena will be directly regulated under the updated harvest control rule. The number of license holders has fluctuated with harvest levels, varying from 70 in 2010 to 93 in 2014. Of these, 20–50 vessels could be considered ''active'', landing more than 100 salmon in the year. The proposed rule would impact about 90 charter boat entities, about 50 of whom were ''active'' in peak years (2013–2014). In summary, this rule will directly impact about 250 entities made up of commercial and charter vessels, with about 75 of these highly active in the fishery and likely to experience the largest impacts, in proportion to their total participation.

The proposed action includes a de minimis provision and would allow impacts at all non-zero forecast abundance. Because of this feature, this proposed action is unlikely to result in fishery closure in the analysis area. The alternative would also provide increased certainty to operators over the status quo, in which the Council has elected lower impact rates than specified by the current control rule. Therefore, this action would be expected to have a positive impact of low magnitude on economic benefits to fishery-dependent communities that would vary year-to-year, but not likely to be significant.

Commercial trollers and charter operators face a variety of constraining stocks. In no year has SWRC been the only constraining stock. Entities are constrained by both ESA-listed and non-listed species; the years that had the most constrained fisheries in the last decade were 2008 and 2009, when fisheries in the analysis area were closed to limit impacts to Sacramento River fall Chinook, not an ESA-listed species, rather than the ESA-listed species SRWC. Thus, while entities will likely continue to face constraints relative to fishing opportunities, because the proposed action is expected to provide low-positive benefits to both commercial and charter operators, NMFS does not expect the rule to impose significant negative economic effects.

This proposed rule would not establish any new reporting or recordkeeping requirements. This proposed rule does not include a collection of information. No Federal rules have been identified that duplicate, overlap, or conflict with this action.

This action is the subject of a consultation under section 7 of the ESA. NMFS is currently preparing a biological opinion on the effects of this action on SRWC, which will be completed prior to publishing a final rule. This action is not expected to have adverse effects on any other species listed under the Endangered Species Act (ESA) or designated critical habitat. This action implements a new harvest control rule to limit impacts on SRWC from the ocean salmon fishery and would be used in the setting of annual management measures for West Coast salmon fisheries. NMFS has current ESA biological opinions that cover fishing under annual regulations adopted under the FMP on all listed salmon species. NMFS reiterates what is required for consistency with these opinions for all ESA-listed salmon and steelhead species in their annual guidance letter to the Council. Some of NMFS past biological opinions have found no jeopardy, and others have found jeopardy, but provided reasonable and prudent alternatives to avoid jeopardy. The annual management measures are designed to be consistent with the biological opinions that found no jeopardy, and with the reasonable and prudent alternatives in the jeopardy biological opinions.

This proposed rule was developed after meaningful collaboration with West Coast tribes, through the Council process. Under the MSA at 16 U.S.C. 1852(b)(5), one of the voting members of the Council must be a representative of an Indian Tribe with Federally recognized fishing rights from the area of the Council's jurisdiction. No tribes with Federally recognized fishing rights are expected to be affected by this rule.

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

Dated: February 15, 2018.

Samuel D. Rauch, III,

Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

[FR Doc. 2018–03596 Filed 2–21–18; 8:45 am]

BILLING CODE 3510–22–P

Notices

Federal Register

Vol. 83, No. 36

Thursday, February 22, 2018

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

Animal and Plant Health Inspection Service

[Docket No. APHIS–2017–0086]

Availability of a Final Environmental Assessment and Finding of No Significant Impact for Release of Aceria drabae for Biological Control of Hoary Cress

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Notice.

SUMMARY: We are advising the public that an environmental assessment and finding of no significant impact have been prepared by the Animal and Plant Health Inspection Service relative to the release of the gall mite, *Aceria drabae,* for classical biological control of hoary cress in the contiguous United States. Based on its finding of no significant impact, the Animal and Plant Health Inspection Service has determined that an environmental impact statement need not be prepared.

FOR FURTHER INFORMATION CONTACT: Dr. Colin D. Stewart, Assistant Director, Pests, Pathogens, and Biocontrol Permits, Permitting and Compliance Coordination, PPQ, APHIS, 4700 River Road, Unit 133, Riverdale, MD 20737–1231; (301) 851–2327, email: *Colin.Stewart@aphis.usda.gov.*

SUPPLEMENTARY INFORMATION: The Animal and Plant Health Inspection Service (APHIS) is proposing to issue permits for the release of a mite, *Aceria drabae,* into the continental United States for use as a biological control agent to reduce the severity of hoary cress infestations.

On December 5, 2017, we published in the **Federal Register** (82 FR 57424–57425, Docket No. APHIS–2017–0086) a notice [1] in which we announced the availability, for public review and comment, of an environmental assessment (EA) that examined the potential environmental impacts associated with the proposed release of this biological control agent into the continental United States.

We solicited comments on the EA for 30 days ending January 4, 2018. We received one comment by the close of the comment period. The commenter was generally opposed to the release of insects for biological control but did not raise any specific or substantive issues.

In this document, we are advising the public of our finding of no significant impact (FONSI) regarding the release of *Aceria drabae* into the continental United States for use as a biological control agent to reduce the severity of hoary cress infestations. The finding, which is based on the EA, reflects our determination that release of this biological control agent will not have a significant impact on the quality of the human environment.

The EA and FONSI may be viewed on the *Regulations.gov* website (see footnote 1). Copies of the EA and FONSI are also available for public inspection in our reading room, which is located in room 1141 of the USDA South Building, 14th Street and Independence Avenue SW, Washington, DC. Normal reading room hours are 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. To be sure someone is there to help you, please call (202) 799–7039 before coming. In addition, copies may be obtained by calling or writing to the individual listed under **FOR FURTHER INFORMATION CONTACT**.

The EA and FONSI have been prepared in accordance with: (1) The National Environmental Policy Act of 1969 (NEPA), as amended (42 U.S.C. 4321 *et seq.*), (2) regulations of the Council on Environmental Quality for implementing the procedural provisions of NEPA (40 CFR parts 1500–1508), (3) USDA regulations implementing NEPA (7 CFR part 1b), and (4) APHIS' NEPA Implementing Procedures (7 CFR part 372).

Done in Washington, DC, this 15th day of February 2018.

Kevin Shea,

Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 2018–03552 Filed 2–21–18; 8:45 am]

BILLING CODE 3410–34–P

[1] To view the notice, EA, and FONSI, and the comment we received, go to *http://www.regulations.gov/#!docketDetail;D=APHIS-2017-0086.*

COMMISSION ON CIVIL RIGHTS

Agenda and Notice of Public Meeting of the Rhode Island Advisory Committee

AGENCY: Commission on Civil Rights.

ACTION: Announcement of monthly planning meetings.

SUMMARY: Notice is hereby given, pursuant to the provisions of the rules and regulations of the U.S. Commission on Civil Rights (Commission), and the Federal Advisory Committee Act (FACA), that a planning meeting of the Rhode Island State Advisory Committee to the Commission will convene by conference call, on Tuesday, March 6, 2018 at 11:00 a.m. (EST). The purpose of the meeting is project planning so that members can begin discussing potential topics for its civil rights project.

DATES: Tuesday, March 6, 2018, at 11:00 a.m. (EST).

Public Call-In Information: Conference call number: 1–800–310–7032 and conference call ID: 2757439.

FOR FURTHER INFORMATION CONTACT: Barbara de La Viez, at *ero@usccr.gov* or by phone at 202–376–7533

SUPPLEMENTARY INFORMATION: Interested members of the public may listen to the discussion by calling the following toll-free conference call number: 1–800–310–7032 and conference call ID: 2757439. Please be advised that before placing them into the conference call, the conference call operator may ask callers to provide their names, their organizational affiliations (if any), and email addresses (so that callers may be notified of future meetings). Callers can expect to incur charges for calls they initiate over wireless lines, and the Commission will not refund any incurred charges. Callers will incur no charge for calls they initiate over land-line connections to the toll-free telephone number herein.

Persons with hearing impairments may also follow the discussion by first

calling the Federal Relay Service at 1–800–877–8339 and providing the operator with the toll-free conference call number: 1–800–310–7032 and conference call ID: 2757439.

Members of the public are invited to submit written comments; the comments must be received in the regional office approximately 30 days after each scheduled meeting. Written comments may be mailed to the Eastern Regional Office, U.S. Commission on Civil Rights, 1331 Pennsylvania Avenue, Suite 1150, Washington, DC 20425, or emailed to Evelyn Bohor at *ero@usccr.gov.* Persons who desire additional information may contact the Eastern Regional Office at (202) 376–7533.

Records and documents discussed during the meeting will be available for public viewing as they become available at *https://www.facadatabase.gov/committee/meetings.aspx?cid=272;* click the ''Meeting Details'' and ''Documents'' links. Records generated from this meeting may also be inspected and reproduced at the Eastern Regional Office, as they become available, both before and after the meetings. Persons interested in the work of this advisory committee are advised to go to the Commission's website, *www.usccr.gov,* or to contact the Eastern Regional Office at the above phone number, email or street address.

Agenda: Tuesday, March 6, 2018 at 11:00 a.m.

I. Welcome and Introductions

Rollcall

II. Planning Meeting

Project Topic Planning and Discussions

III. Other Business

IV. Open Comment

V. Adjournment

Dated: February 15, 2018.

David Mussatt,

Supervisory Chief, Regional Programs Unit.

[FR Doc. 2018–03550 Filed 2–21–18; 8:45 am]

BILLING CODE P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–351–852, A–560–832, A–580–896, A–535–905, and A–583–862]

Polyethylene Terephthalate Resin From Brazil, Indonesia, the Republic of Korea, Pakistan, and Taiwan: Postponement of Preliminary Determinations of Antidumping Duty Investigations

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

DATES: Applicable February 22, 2018.

FOR FURTHER INFORMATION CONTACT: Kathryn Wallace (Brazil) at (202) 482–6251, Caitlin Monks (Indonesia) at (202) 482–2670, Sean Carey (Republic of Korea) at (202) 482–3964, Lauren Caserta (Pakistan) at (202) 482–4737, Alex Cipolla at (202) 482–4956 (Taiwan), 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 23, 2017, the Department of Commerce (Commerce) initiated antidumping duty (AD) investigations on polyethylene terephthalate resin from Brazil, Indonesia, the Republic of Korea, Pakistan, and Taiwan.[1] Commerce exercised its discretion to toll all deadlines affected by the closure of the Federal Government from January 20 through 22, 2018. If the new deadline falls on a non-business day, in accordance with Commerce's practice, the deadline will become the next business day. Accordingly, the current deadline for the preliminary determinations of these investigations is March 8, 2018.

Postponement of Preliminary Determinations

Section 733(b)(1)(A) of the Tariff Act of 1930, as amended (the Act), requires Commerce to issue the preliminary determination in an AD investigation within 140 days after the date on which Commerce initiated the investigation. However, section 733(c)(1)(A) of the Act and 19 CFR 351.205(e) allow Commerce to postpone the preliminary determination at the request of the petitioner.

On January 29, 2018, the petitioners[2] submitted a timely request pursuant to 19 CFR 351.205(e) to postpone the preliminary determinations.[3] They noted that Commerce is still gathering data and questionnaire responses from the foreign producers in these investigations and additional time is necessary for Commerce and interested parties to fully and properly analyze all questionnaire response.[4] For these reasons, and because there are no compelling reasons to deny the request, Commerce, in accordance with section 733(c)(1)(A) of the Act and 19 CFR 351.205(e), is postponing the deadline for the preliminary determinations to no later than 190 days after the day on which the investigations were initiated. Accordingly, Commerce will issue the preliminary determinations no later than April 27, 2018, a date that has been adjusted for the period of the closure of the Federal Government. In accordance with section 735(a)(1) of the Act and 19 CFR 351.210(b)(1), the deadline for the final determinations of these investigations will continue to be 75 days after the date of the preliminary determinations, unless postponed.

This notice is issued and published pursuant to section 733(c)(2) of the Act and 19 CFR 351.205(f)(1).

Dated: February 16, 2018.

Christian Marsh,

Deputy Assistant Secretary for Enforcement and Compliance.

[FR Doc. 2018–03670 Filed 2–21–18; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XF850

Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental To Site Characterization Surveys Off of New York

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

[1] *See Polyethylene Terephthalate Resin from Brazil, Indonesia, the Republic of Korea, Pakistan, and Taiwan: Initiation of Less-Than-Fair-Value Investigations,* 82 FR 48977 (October 23, 2017).

[2] The petitioners for Brazil, Pakistan, Korea, and Taiwan are DAK Americas LLC, Indorama Ventures USA Inc., M&G Polymers USA LLC, and Nan Ya Plastics Corporation America. The petitioners for Indonesia are DAK Americas LLC, M&G Polymers USA LLC, and Nan Ya Plastics Corporation America.

[3] *See* letter from the petitioners, ''Polyethylene Terephthalate Resin from Brazil, Indonesia, the Republic of Korea, Pakistan and Taiwan—Petitioners' Request to Postpone the Preliminary Determinations,'' dated January 29, 2018.

[4] *Id.* At 2.

ACTION: Notice; proposed incidental harassment authorization; request for comments.

SUMMARY: NMFS has received a request from Statoil Wind U.S. LLC (Statoil) for authorization to take marine mammals incidental to marine site characterization surveys off the coast of New York as part of the Empire Wind Project in the area of the Commercial Lease of Submerged Lands for Renewable Energy Development on the Outer Continental Shelf (OCS–A 0512) (Lease Area) and coastal waters where one or more cable route corridors will be established. Pursuant to the Marine Mammal Protection Act (MMPA), NMFS is requesting comments on its proposal to issue an incidental harassment authorization (IHA) to incidentally take marine mammals during the specified activities. NMFS will consider public comments prior to making any final decision on the issuance of the requested MMPA authorizations and agency responses will be summarized in the final notice of our decision.

DATES: Comments and information must be received no later than March 26, 2018.

ADDRESSES: Comments 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.carduner@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 received electronically, 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 online at *www.nmfs.noaa.gov/pr/permits/incidental/energy_other.htm* without change. All personal identifying information (*e.g.,* name, address) voluntarily submitted by the commenter may be publicly accessible. Do not submit confidential business information or otherwise sensitive or protected information.

FOR FURTHER INFORMATION CONTACT: Jordan Carduner, Office of Protected Resources, NMFS, (301) 427–8401. Electronic copies of the applications and supporting documents, as well as a list of the references cited in this document, may be obtained by visiting the internet at: *www.nmfs.noaa.gov/pr/permits/incidental/energy_other.htm.* In case of problems accessing these documents, please call the contact listed above.

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 (as delegated to NMFS) 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) 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 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.

The MMPA states that the term ''take'' means to harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal.

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).

National Environmental Policy Act

To comply with the National Environmental Policy Act of 1969 (NEPA; 42 U.S.C. 4321 *et seq.*) and NOAA Administrative Order (NAO) 216–6A, NMFS must review our proposed action (*i.e.,* the issuance of an incidental harassment authorization) with respect to potential impacts on the human environment.

Accordingly, NMFS is preparing an Environmental Assessment (EA) to consider the environmental impacts associated with the issuance of the proposed IHA. We will review all comments submitted in response to this notice prior to concluding our NEPA process or making a final decision on the IHA request.

Summary of Request

On November 9, 2017, NMFS received a request from Statoil for an IHA to take marine mammals incidental to marine site characterization surveys off the coast of New York as part of the Empire Wind Project in the area of the Commercial Lease of Submerged Lands for Renewable Energy Development on the Outer Continental Shelf (OCS–A 0512) and coastal waters where one or more cable route corridors will be established. A revised application was received on January 8, 2018. NMFS deemed that request to be adequate and complete. Statoil's request is for take of 11 marine mammal species by Level B harassment. Neither Statoil nor NMFS expects serious injury or mortality to result from this activity and the activity is expected to last no more than one year, therefore, an IHA is appropriate.

Description of the Proposed Activity

Overview

Statoil proposes to conduct marine site characterization surveys including high-resolution geophysical (HRG) and geotechnical surveys in the marine environment of the approximately 79,350-acre Lease Area located approximately 11.5 nautical miles (nm) from Jones Beach, New York (see Figure 1 in the IHA application). Additionally, one or more cable route corridors will be established between the Lease Area and New York, identified as the Cable Route Area (see Figure 1 in the IHA application). See the IHA application for further information. Cable route corridors are anticipated to be 152 meters (m, 500 feet (ft)) wide and may have an overall length of as much as 135 nm. For the purpose of this IHA, the survey area is designated as the Lease Area and cable route corridors that will be established in advance of conducting the HRG survey activity. Water depths across the Lease Area range from approximately 22 to 41 m (72 to 135 ft) while the cable route corridors will extend to shallow water areas near landfall locations. Surveys would occur from approximately March 2018 through July 2018.

The purpose of the marine site characterization surveys are to support the siting, design, and deployment of up to three meteorological data buoy deployment areas and to obtain a baseline assessment of seabed/sub-surface soil conditions in the Lease Area and cable route corridors to support the siting of the proposed wind farm. Underwater sound resulting from Statoil's proposed site characterization surveys have the potential to result in incidental take of marine mammals in the form of behavioral harassment.

Dates and Duration

Surveys will last for approximately 20 weeks and are anticipated to commence upon issuance of the requested IHA, if appropriate. This schedule is based on 24-hour operations and includes potential down time due to inclement weather. Based on 24-hour operations, the estimated duration of the HRG survey activities would be approximately 142 days (including estimated weather down time).

Specific Geographic Region

Statoil's survey activities will occur in the approximately 79,350-acre Lease Area located approximately 11.5 nm from Jones Beach, New York (see Figure 1 in the IHA application). Additionally, one or more cable route corridors would be surveyed between the Lease Area and New York. Cable route corridors are anticipated to be 152 meters (m, 500 ft) wide and may have an overall length of as much as 135 nm.

Detailed Description of the Specified Activities

Statoil's proposed marine site characterization surveys include HRG and geotechnical survey activities. These activities are described below.

HRG Survey Activities

The HRG survey activities proposed by Statoil would include the following:

- Depth sounding (multibeam echosounder) to determine site bathymetry and elevations;
- Magnetic intensity measurements for detecting local variations in regional magnetic field from geological strata and potential ferrous objects on and below the bottom;
- Seafloor imaging (sidescan sonar survey) for seabed sediment classification purposes, to identify natural and man-made acoustic targets resting on the bottom as well as any anomalous features;
- Shallow penetration sub-bottom profiler (pinger/chirp) to map the near surface stratigraphy (top 0 to 5 m (0 to 16 ft) of soils below seabed);
- Medium penetration sub-bottom profiler (sparker) to map deeper subsurface stratigraphy as needed (soils down to 75 to 100 m (246 to 328 ft) below seabed); and
- Ultra short baseline positioning system (USBL) for position referencing for the dynamic positioning (DP) vessel.

Table 1 identifies the representative survey equipment that may be used in support of planned HRG survey activities. The make and model of the listed HRG equipment will vary depending on availability but will be finalized as part of the survey preparations and contract negotiations with the survey contractor. The final selection of the survey equipment will be confirmed prior to the start of the HRG survey program. Any survey equipment selected would have characteristics similar to the systems described below, if different.

HRG system	Representative HRG survey equipment	Operating frequencies	RMS source level [1]	Peak source level [1]	Pulse duration (millisec)
Subsea Positioning/USBL	Sonardyne Ranger 2 USBL[2]	35–50kHz	188 dB_{rms}	200 dB_{Peak}	1.
Sidescan Sonar	Klein 3900 Sidescan Sonar	445/900 kHz	220 dB_{rms}	226 dB_{Peak}	0.0016 to 0.1.
Shallow penetration sub-bottom profiler	EdgeTech 512i	0.4 to 12 kHz	179 dB_{rms}	186 dB_{Peak}	1.8 to 65.8.
Medium penetration sub-bottom profiler	SIG ELC 820 Sparker	0.9 to 1.4 kHz	206 dB_{rms}	215 dB_{Peak}	0.8.
Multibeam Echo Sounder	Reson T20–P	200/300/400 kHz	221 dB_{rms}	227 dB_{Peak}	2 to 6.

[1] All source levels are measured at 1 m and are from Crocker and Fratantonio (2016) except those for the Sonardyne Ranger 2 USBL which are based on manufacturer specifications (as source levels for the Sonardyne Ranger 2 USBL are not listed in Crocker and Fratantonio (2016)).

The HRG survey activities would be supported by a vessel approximately 30 to 55 m (98 to 180 ft) in length and capable of maintaining course and a survey speed of approximately 4 nm per hour (7.4 kilometers per hour (km/hr)) while transiting survey lines. Surveys would be conducted along tracklines spaced 30 m (98 ft) apart, with tie-lines spaced every 500 m (1640 ft). The multichannel array sub-bottom profiler would be operated on 150-m (492-ft) spaced primary lines, while the single channel array sub-bottom profiler would be operated on 30-m (98-ft) line spacing to meet Bureau of Ocean Energy Management (BOEM) requirements as set out in BOEM's *Guidelines for Providing Geophysical, Geotechnical, and Geohazard Information Pursuant to Archeological and Historic Property Information to 30 CFR part 585.*

To minimize cost, the duration of survey activities, and the period of potential impact on marine species while surveying, Statoil has proposed that HRG survey operations would be conducted continuously 24 hours per day. Based on 24-hour operations, the estimated duration of the HRG survey activities would be approximately 142 days (including estimated weather down time) including 123 survey days in the Lease Area and 19 survey days in the cable route corridors.

The deployment of HRG survey equipment, including the equipment planned for use during Statoil's planned activity, produces sound in the marine environment that has the potential to result in harassment of marine mammals. Based on the frequency ranges of the potential equipment planned to be used in support of HRG survey activities (Table 1) the ultra-short baseline (USBL) positioning system and the sub-bottom profilers (shallow and medium penetration) operate within functional marine mammal hearing ranges and have the potential to result in harassment of marine mammals.

Geotechnical Survey Activities

Statoil's proposed geotechnical survey activities would include the following:

- Vibracores would be taken to determine the geological and geotechnical characteristics of the sediments; and
- Cone Penetration Testing (CPT) would be performed to determine stratigraphy and in-situ conditions of the sediments.

Statoil's proposed geotechnical survey activities would begin no earlier than March 2018 and would last up to 30 days. It is anticipated that geotechnical surveys would entail sampling of vibracores and CPT. A sample would be taken approximately every one kilometer (km) along the selected cable route, alternating between CPTs and vibracores, such that intervals for each vibracore and CPT location would be

approximately 2 km. Precise cable routes were not known at the time the IHA application was submitted. As many as three cable routes may be identified for geotechnical sampling, with cable routes likely to range in length from 20 km to 65 km. Assuming a maximum, minimum, and median route length for the three potential cable corridors, the total length of survey corridor would be approximately 128 km. Therefore it is anticipated that approximately 128 locations would be sampled (approximately one sample taken per km), located equidistant between the lease area and the New York shoreline (as depicted in Figure 1 of the IHA Application as the Cable Route Area). The duration of each sampling event would take approximately 2–4 hours and geotechnical survey activities would occur 24 hours per day during the survey. Statoil anticipates a production rate of approximately 5 samples per day.

In considering whether marine mammal harassment is an expected outcome of exposure to a particular activity or sound source, NMFS considers both the nature of the exposure itself (*e.g.,* the magnitude, frequency, or duration of exposure) and the conditions specific to the geographic area where the activity is expected to occur (*i.e.,* whether the activity is planned in a foraging area, breeding area, nursery or pupping area, or other biologically important area for the species). We then consider the expected response of the exposed animal and whether the nature and duration or intensity of that response is expected to cause disruption of behavioral patterns (*e.g.,* migration, breathing, nursing, breeding, feeding, or sheltering) or injury.

Geotechnical survey activities would be conducted from a drill ship equipped with DP thrusters. DP thrusters would be used to position the sampling vessel on station and maintain position at each sampling location during the sampling activity. A ship has not yet been assigned to conduct the survey, but Statoil anticipates that survey activities would likely be conducted from a typical offshore sampling vessel, ranging from 250ft to 350ft (76 m to 107 m). Sound produced through use of DP thrusters is similar to that produced by transiting vessels and DP thrusters are typically operated in a similarly predictable manner. NMFS does not believe acoustic impacts from DP thrusters are likely to result in take of marine mammals in the absence of activity- or location-specific circumstances that may otherwise represent specific concerns for marine mammals (*i.e.,* activities proposed in area known to be of particular importance for a particular species), or associated activities that may increase the potential to result in take when in concert with DP thrusters, largely due to the low likelihood of marine mammal behavioral response to DP thrusters that would rise to the level of a take (versus less consequential behavioral reactions). In this case, we are not aware of any such circumstances. Monitoring of past projects that entailed use of DP thrusters has shown a lack of observed marine mammal responses as a result of exposure to sound from DP thrusters. Therefore, NMFS believes the likelihood of DP thrusters used during the proposed geotechnical surveys resulting in harassment of marine mammals to be so low as to be discountable. As DP thrusters are not expected to result in take of marine mammals, these activities are not analyzed further in this document.

Vibracoring entails driving a hydraulic or electric pulsating head through a hollow tube into the seafloor to recover a stratified representation of the sediment. The vibracoring process is short in duration and is performed from a dynamic positioning vessel. The vessel would use DP thrusters to maintain the vessel's position while the vibracore sample is taken, as described above. The vibracoring process would always be performed in concert with DP thrusters, and DP thrusters would begin operating prior to the activation of the vibracore to maintain the vessel's position; thus, we expect that any marine mammals in the project area would detect the presence and noise associated with the vessel and the DP thrusters prior to commencement of vibracoring. Any reaction by marine mammals would be expected to be similar to reactions to the concurrent vessel noise, which are expected to be minor and short term. In this case, vibracoring is not planned in any areas of particular biological significance for any marine mammals. Thus while a marine mammal may perceive noise from vibracoring and may respond briefly, we believe the potential for this response to rise to the level of take to be so low as to be discountable, based on the short duration of the activity and the fact that marine mammals would be expected to react to the vessel and DP thrusters before vibracoring commences, potentially through brief avoidance. In addition, the fact that the geographic area is not biologically important for any marine mammal species means that such reactions are not likely to carry any meaningful significance for the animals.

Field studies conducted off the coast of Virginia to determine the underwater noise produced by CPTs found that these activities did not result in underwater noise levels that exceeded current thresholds for Level B harassment of marine mammals (Kalapinski, 2015). Given the small size and energy footprint of CPTs, NMFS believes the likelihood that noise from these activities would exceed the Level B harassment threshold at any appreciable distance is so low as to be discountable. Therefore, geotechnical survey activities, including CPT and vibracores, are not expected to result in harassment of marine mammals and are not analyzed further in this document.

Proposed mitigation, monitoring, and reporting measures are described in detail later in this document (please see ''Proposed Mitigation'' and ''Proposed Monitoring and Reporting'').

Description of Marine Mammals in the Area of Specified Activity

Sections 3 and 4 of Statoil's IHA application summarize available information regarding status and trends, distribution and habitat preferences, and behavior and life history, of the potentially affected species. Additional information regarding population trends and threats may be found in NMFS's Stock Assessment Reports (SAR; *www.nmfs.noaa.gov/pr/sars/*) and more general information about these species (*e.g.,* physical and behavioral descriptions) may be found on NMFS's website (*www.nmfs.noaa.gov/pr/species/mammals/*).

Table 2 lists all species with expected potential for occurrence in the survey area and summarizes information related to the population or stock, including regulatory status under the MMPA and ESA and potential biological removal (PBR), where known. For taxonomy, we follow Committee on Taxonomy (2017). PBR is defined by the MMPA as the maximum number of animals, not including natural mortalities, that may be removed from a marine mammal stock while allowing that stock to reach or maintain its optimum sustainable population (as described in NMFS's SARs). While no mortality is anticipated or authorized here, PBR is included here as gross indicators of the status of the species and other threats.

Marine mammal abundance estimates presented in this document represent the total number of individuals that make up a given stock or the total number estimated within a particular study or survey area. NMFS's stock abundance estimates for most species represent the total estimate of

individuals within the geographic area, if known, that comprises that stock. For some species, this geographic area may extend beyond U.S. waters. All managed stocks in this region are assessed in NMFS's U.S. 2017 draft SARs (*e.g.,* Hayes *et al.,* 2018). All values presented in Table 2 are the most recent available at the time of publication and are available in the 2017 draft SARs (Hayes *et al.,* 2018).

TABLE 2—MARINE MAMMALS KNOWN TO OCCUR IN THE SURVEY AREA

Common name	Stock	NMFS MMPA and ESA status; strategic (Y/N) [1]	Stock Abundance (CV,N_{min}, most recent abundance survey) [2]	PBR [3]	Occurrence and seasonality in the NW Atlantic OCS
Toothed whales (Odontoceti)					
Atlantic white-sided dolphin (*Lagenorhynchus acutus).*	W. North Atlantic	-; N	48,819 (0.61; 30,403; n/a)	304	rare.
Atlantic spotted dolphin (*Stenella frontalis)*	W. North Atlantic	-; N	44,715 (0.43; 31,610; n/a)	316	rare.
Bottlenose dolphin (*Tursiops truncatus)*	W. North Atlantic, Offshore	-; N	77,532 (0.40; 56,053; 2011)	561	Common year round.
Clymene dolphin (*Stenella clymene)*	W. North Atlantic	-; N	Unknown (unk; unk; n/a)	Undet	rare.
Pantropical Spotted dolphin (*Stenella attenuata).*	W. North Atlantic	-; N	3,333 (0.91; 1,733; n/a)	17	rare.
Risso's dolphin (*Grampus griseus)*	W. North Atlantic	-; N	18,250 (0.46; 12,619; n/a)	126	rare.
Short-beaked common dolphin (*Delphinus delphis).*	W. North Atlantic	-; N	70,184 (0.28; 55,690; 2011)	557	Common year round.
Striped dolphin (*Stenella coeruleoalba)*	W. North Atlantic	-; N	54,807 (0.3; 42,804; n/a)	428	rare.
Spinner Dolphin (*Stenella longirostris)*	W. North Atlantic	-; N	Unknown (unk; unk; n/a)	Undet	rare.
White-beaked dolphin (*Lagenorhynchus albirostris).*	W. North Atlantic	-; N	2,003 (0.94; 1,023; n/a)	10	rare.
Harbor porpoise (*Phocoena phocoena)*	Gulf of Maine/Bay of Fundy	-; N	79,833 (0.32; 61,415; 2011)	706	Common year round.
Killer whale (*Orcinus orca)*	W. North Atlantic	-; N	Unknown (unk; unk; n/a)	Undet	rare.
False killer whale (*Pseudorca crassidens)*	W. North Atlantic	-; Y	442 (1.06; 212; n/a)	2.1	rare.
Long-finned pilot whale (*Globicephala melas)*	W. North Atlantic	-; Y	5,636 (0.63; 3,464; n/a)	35	rare.
Short-finned pilot whale (*Globicephala macrorhynchus).*	W. North Atlantic	-; Y	21,515 (0.37; 15,913; n/a)	159	rare.
Sperm whale (*Physeter macrocephalus)*	North Atlantic	E; Y	2,288 (0.28; 1,815; n/a)	3.6	Year round in continental shelf and slope waters, occur seasonally to forage.
Pygmy sperm whale [4] (*Kogia breviceps)*	W. North Atlantic	-; N	3,785 (0.47; 2,598; n/a)	26	rare.
Dwarf sperm whale [4] (*Kogia sima)*	W. North Atlantic	-; N	3,785 (0.47; 2,598; n/a)	26	rare.
Cuvier's beaked whale (*Ziphius cavirostris)*	W. North Atlantic	-; N	6,532 (0.32; 5,021; n/a)	50	rare.
Blainville's beaked whale [5] (*Mesoplodon densirostris).*	W. North Atlantic	-; N	7,092 (0.54; 4,632; n/a)	46	rare.
Gervais' beaked whale [5] (*Mesoplodon europaeus).*	W. North Atlantic	-; N	7,092 (0.54; 4,632; n/a)	46	rare.
True's beaked whale [5] (*Mesoplodon mirus)*	W. North Atlantic	-; N	7,092 (0.54; 4,632; n/a)	46	rare.
Sowerby's Beaked Whale [5] (*Mesoplodon bidens).*	W. North Atlantic	-; N	7,092 (0.54; 4,632; n/a)	46	rare.
Rough-toothed dolphin *(Steno bredanensis)*	W. North Atlantic	-; N	271 (1.0; 134; 2013)	1.3	rare.
Melon-headed whale (*Peponocephala electra)*	W. North Atlantic	-; N	Unknown (unk; unk; n/a)	Undet	rare.
Northern bottlenose whale (*Hyperoodon ampullatus).*	W. North Atlantic	-; N	Unknown (unk; unk; n/a)	Undet	rare.
Pygmy killer whale *(Feresa attenuata)*	W. North Atlantic	-; N	Unknown (unk; unk; n/a)	Undet	rare.
Baleen whales (Mysticeti)					
Minke whale (*Balaenoptera acutorostrata)*	Canadian East Coast	-; N	2,591 (0.81; 1,425; n/a)	162	Year round in continental shelf and slope waters, occur seasonally to forage.
Blue whale (*Balaenoptera musculus)*	W. North Atlantic	E; Y	Unknown (unk; 440; n/a)	0.9	Year round in continental shelf and slope waters, occur seasonally to forage.
Fin whale (*Balaenoptera physalus)*	W. North Atlantic	E; Y	1,618 (0.33; 1,234; n/a)	2.5	Year round in continental shelf and slope waters, occur seasonally to forage.
Humpback whale (*Megaptera novaeangliae)*	Gulf of Maine	-; N	823 (0; 823; n/a)	2.7	Common year round.
North Atlantic right whale (*Eubalaena glacialis)*	W. North Atlantic	E; Y	458 (0; 455; n/a)	1.4	Year round in continental shelf and slope waters, occur seasonally to forage.
Sei whale (*Balaenoptera borealis)*	Nova Scotia	E; Y	357 (0.52; 236; n/a)	0.5	Year round in continental shelf and slope waters, occur seasonally to forage.
Earless seals (Phocidae)					
Gray seal [6] (*Halichoerus grypus)*	W. North Atlantic	-; N	27,131 (0.10; 25,908; n/a)	1,554	Unlikely.
Harbor seal (*Phoca vitulina)*	W. North Atlantic	-; N	75,834 (0.15; 66,884; 2012)	2,006	Common year round.
Hooded seal (*Cystophora cristata)*	W. North Atlantic	-; N	Unknown (unk; unk; n/a)	Undet	rare.

TABLE 2—MARINE MAMMALS KNOWN TO OCCUR IN THE SURVEY AREA—Continued

Common name	Stock	NMFS MMPA and ESA status; strategic (Y/N) [1]	Stock Abundance (CV,N_{min}, most recent abundance survey) [2]	PBR [3]	Occurrence and seasonality in the NW Atlantic OCS
Harp seal (*Phoca groenlandica*)	North Atlantic	-; N	Unknown (unk; unk; n/a)	Undet	rare.

[1] ESA status: Endangered (E), Threatened (T)/MMPA status: Depleted (D). A dash (-) indicates that the species is not listed under the ESA or designated as depleted under the MMPA. Under the MMPA, a strategic stock is one for which the level of direct human-caused mortality exceeds PBR (see footnote 3) or which is determined to be declining and likely to be listed under the ESA within the foreseeable future. Any species or stock listed under the ESA is automatically designated under the MMPA as depleted and as a strategic stock.

[2] CV is coefficient of variation; Nmin is the minimum estimate of stock abundance. In some cases, CV is not applicable. For certain stocks, abundance estimates are actual counts of animals and there is no associated CV. The most recent abundance survey that is reflected in the abundance estimate is presented; there may be more recent surveys that have not yet been incorporated into the estimate. All values presented here are from the 2016 Atlantic SARs.

[3] Potential biological removal, defined by the MMPA as the maximum number of animals, not including natural mortalities, that may be removed from a marine mammal stock while allowing that stock to reach or maintain its optimum sustainable population size (OSP).

[4] Abundance estimate includes both dwarf and pygmy sperm whales.

[5] Abundance estimate includes all species of *Mesoplodon* in the Atlantic.

[6] Abundance estimate applies to U.S. population only, actual abundance is believed to be much larger.

All species that could potentially occur in the proposed survey areas are included in Table 2. However, the temporal and/or spatial occurrence of 26 of the 37 species listed in Table 2 is such that take of these species is not expected to occur, and they are not discussed further beyond the explanation provided here. Take of these species is not anticipated either because they have very low densities in the project area, are known to occur further offshore than the project area, or are considered very unlikely to occur in the project area during the proposed survey due to the species' seasonal occurrence in the area.

Three marine mammal species are listed under the Endangered Species Act (ESA) and are known to be present, at least seasonally, in the survey area and are included in the take request: North Atlantic right whale, fin whale, and sperm whale.

Below is a description of the species that are both common in the survey area southeast of New York and that have the highest likelihood of occurring, at least seasonally, in the survey area and are thus are expected to be potentially be taken by the proposed activities. For the majority of species potentially present in the specific geographic region, NMFS has designated only a single generic stock (*e.g.,* ''western North Atlantic'') for management purposes. This includes the ''Canadian east coast'' stock of minke whales, which includes all minke whales found in U.S. waters. For humpback and sei whales, NMFS defines stocks on the basis of feeding locations, *i.e.,* Gulf of Maine and Nova Scotia, respectively. However, our reference to humpback whales and sei whales in this document refers to any individuals of the species that are found in the specific geographic region.

North Atlantic Right Whale

The North Atlantic right whale ranges from the calving grounds in the southeastern United States to feeding grounds in New England waters and into Canadian waters (Waring *et al.,* 2016). Surveys have demonstrated the existence of seven areas where North Atlantic right whales congregate seasonally, including Georges Bank, Cape Cod, and Massachusetts Bay (Waring *et al.,* 2016). In the late fall months (*e.g.*, October), right whales generally disappear from the feeding grounds in the North Atlantic and move south to their breeding grounds. The proposed survey area is within the North Atlantic right whale migratory corridor. During the proposed survey (*i.e.,* March through August) right whales may be migrating through the proposed survey area and the surrounding waters.

The western North Atlantic population demonstrated overall growth of 2.8 percent per year between 1990 to 2010, despite a decline in 1993 and no growth between 1997 and 2000 (Pace *et al.* 2017). However, since 2010 the population has been in decline, with a 99.99 percent probability of a decline of just under 1 percent per year (Pace *et al.* 2017). Between 1990 and 2015, calving rates varied substantially, with low calving rates coinciding with all three periods of decline or no growth (Pace *et al.* 2017). On average, North Atlantic right whale calving rates are estimated to be roughly half that of southern right whales (*Eubalaena australis*) (Pace *et al.* 2017), which are increasing in abundance (NMFS 2015).

The current abundance estimate for this stock is 458 individuals (Hayes *et al.,* 2018). Data indicates that the number of adult females fell from 200 in 2010 to 186 in 2015 while males fell from 283 to 272 in the same timeframe (Pace *et al.,* 2017). In addition, elevated North Atlantic right whale mortalities have occurred since June 7, 2017. A total of 17 confirmed dead stranded whales (12 in Canada; 5 in the United States), with an additional 5 live whale entanglements in Canada, have been documented to date. This event has been declared an Unusual Mortality Event (UME). More information is available online at: *http://www.nmfs.noaa.gov/pr/health/mmume/2017northatlanticrightwhaleume.html.*

Humpback Whale

Humpback whales are found worldwide in all oceans. The humpback whale population within the North Atlantic has been estimated to include approximately 11,570 individuals (Waring *et al.,* 2016). Humpbacks occur off southern New England in all four seasons, with peak abundance in spring and summer. In winter, humpback whales from waters off New England, Canada, Greenland, Iceland, and Norway migrate to mate and calve primarily in the West Indies (including the Antilles, the Dominican Republic, the Virgin Islands and Puerto Rico), where spatial and genetic mixing among these groups occurs (Waring *et al.,* 2015). While migrating, humpback whales utilize the mid-Atlantic as a migration pathway between calving/mating grounds to the south and feeding grounds in the north (Waring *et al.* 2007).

Since January 2016, elevated humpback whale mortalities have occurred along the Atlantic coast from Maine through North Carolina. Partial or full necropsy examinations have been conducted on approximately half of the 62 known cases. A portion of the whales have shown evidence of pre-mortem vessel strike; however, this finding is not consistent across all of the whales examined so more research is needed. NOAA is consulting with researchers that are conducting studies on the

humpback whale populations, and these efforts may provide information on changes in whale distribution and habitat use that could provide additional insight into how these vessel interactions occurred. Three previous UMEs involving humpback whales have occurred since 2000, in 2003, 2005, and 2006. More information is available at *www.nmfs.noaa.gov/pr/health/mmume/2017humpbackatlanticume.html.*

Fin Whale

Fin whales are common in waters of the U.S. Atlantic Exclusive Economic Zone (EEZ), principally from Cape Hatteras northward (Waring *et al.,* 2016). Fin whales are present north of 35-degree latitude in every season and are broadly distributed throughout the western North Atlantic for most of the year (Waring *et al.,* 2016). Fin whales are found in small groups of up to 5 individuals (Brueggeman *et al.,* 1987). The current abundance estimate for the western North Atlantic stock of fin whales is 1,618 individuals (Hayes *et al.,* 2017). The main threats to fin whales are fishery interactions and vessel collisions (Waring *et al.,* 2016).

Minke Whale

Minke whales can be found in temperate, tropical, and high-latitude waters. The Canadian East Coast stock can be found in the area from the western half of the Davis Strait (45° W) to the Gulf of Mexico (Waring *et al.,* 2016). This species generally occupies waters less than 100 m deep on the continental shelf. There appears to be a strong seasonal component to minke whale distribution in which spring to fall are times of relatively widespread and common occurrence, and when the whales are most abundant in New England waters, while during winter the species appears to be largely absent (Waring *et al.,* 2016). The main threats to this stock are interactions with fisheries, strandings, and vessel collisions.

Sperm Whale

The distribution of the sperm whale in the U.S. EEZ occurs on the continental shelf edge, over the continental slope, and into mid-ocean regions (Waring *et al.,* 2014). The basic social unit of the sperm whale appears to be the mixed school of adult females plus their calves and some juveniles of both sexes, normally numbering 20–40 animals in all. There is evidence that some social bonds persist for many years (Christal *et al.,* 1998). This species forms stable social groups, site fidelity, and latitudinal range limitations in groups of females and juveniles (Whitehead, 2002). In summer, the distribution of sperm whales includes the area east and north of Georges Bank and into the Northeast Channel region, as well as the continental shelf (inshore of the 100-m isobath) south of New England. In the fall, sperm whale occurrence south of New England on the continental shelf is at its highest level, and there remains a continental shelf edge occurrence in the mid-Atlantic bight. In winter, sperm whales are concentrated east and northeast of Cape Hatteras. The current abundance estimate for this stock is 2,288 (Hayes *et al.,* 2017).

Atlantic White-Sided Dolphin

White-sided dolphins are found in temperate and sub-polar waters of the North Atlantic, primarily in continental shelf waters to the 100-m depth contour from central West Greenland to North Carolina (Waring *et al.,* 2016). There are three stock units: Gulf of Maine, Gulf of St. Lawrence, and Labrador Sea stocks (Palka *et al.,* 1997). The Gulf of Maine population of white-sided dolphins is most common in continental shelf waters from Hudson Canyon (approximately 39° N) to Georges Bank, and in the Gulf of Maine and lower Bay of Fundy. Sighting data indicate seasonal shifts in distribution (Northridge *et al.,* 1997). During January to May, low numbers of white-sided dolphins are found from Georges Bank to Jeffreys Ledge (off New Hampshire), with even lower numbers south of Georges Bank, as documented by a few strandings collected on beaches of Virginia to South Carolina. From June through September, large numbers of white-sided dolphins are found from Georges Bank to the lower Bay of Fundy. From October to December, white-sided dolphins occur at intermediate densities from southern Georges Bank to southern Gulf of Maine (Payne and Heinemann 1990). Sightings south of Georges Bank, particularly around Hudson Canyon, occur year round but at low densities. The current abundance estimate for this stock is 48,819 (Hayes *et al.,* 2017). The main threat to this species is interactions with fisheries.

Short-Beaked Common Dolphin

The short-beaked common dolphin is found worldwide in temperate to subtropical seas. In the North Atlantic, short-beaked common dolphins are commonly found over the continental shelf between the 100-m and 2,000-m isobaths and over prominent underwater topography and east to the mid-Atlantic Ridge (Waring *et al.,* 2016). Only the western North Atlantic stock may be present in the Lease Area. The current abundance estimate for this stock is 70,184 animals (Hayes *et al.,* 2017). The main threat to this species is interactions with fisheries.

Bottlenose Dolphin

There are two distinct bottlenose dolphin morphotypes: The coastal and offshore forms in the western North Atlantic (Waring *et al.,* 2016). The offshore form is distributed primarily along the outer continental shelf and continental slope in the Northwest Atlantic Ocean from Georges Bank to the Florida Keys and is the only type that may be present in the survey area as the survey area is north of the northern extent of the range of the Western North Atlantic Northern Migratory Coastal Stock. The current abundance estimate for the western north Atlantic stock is 77,532 (Hayes *et al.,* 2017). The main threat to this species is interactions with fisheries.

Harbor Porpoise

In the Lease Area, only the Gulf of Maine/Bay of Fundy stock may be present. This stock is found in U.S. and Canadian Atlantic waters and is concentrated in the northern Gulf of Maine and southern Bay of Fundy region, generally in waters less than 150 m deep (Waring *et al.,* 2016). They are seen from the coastline to deep waters (>1800 m; Westgate *et al.* 1998), although the majority of the population is found over the continental shelf (Waring *et al.,* 2016). Average group size for this stock in the Bay of Fundy is approximately four individuals (Palka 2007). The current abundance estimate for this stock is 79,883 (Hayes *et al.,* 2017). The main threat to this species is interactions with fisheries, with documented take in the U.S. northeast sink gillnet, mid-Atlantic gillnet, and northeast bottom trawl fisheries and in the Canadian herring weir fisheries (Waring *et al.,* 2016).

Harbor Seal

The harbor seal is found in all nearshore waters of the North Atlantic and North Pacific Oceans and adjoining seas above about 30° N (Burns, 2009). In the western North Atlantic, they are distributed from the eastern Canadian Arctic and Greenland south to southern New England and New York, and occasionally to the Carolinas (Waring *et al.,* 2016). Haulout and pupping sites are located off Manomet, MA and the Isles of Shoals, ME, but generally do not occur in areas in southern New England (Waring *et al.,* 2016). The current abundance estimate for this stock is 75,834 (Hayes *et al.,* 2017). The main

threat to this species is interactions with fisheries.

Gray Seal

There are three major populations of gray seals found in the world; eastern Canada (western North Atlantic stock), northwestern Europe and the Baltic Sea. The gray seals that occur in the Project Area belong to the western North Atlantic stock, which ranges from New Jersey to Labrador. Current population trends show that gray seal abundance is likely increasing in the U.S. Atlantic EEZ (Waring *et al.,* 2016). Although the rate of increase is unknown, surveys conducted since their arrival in the 1980s indicate a steady increase in abundance in both Maine and Massachusetts (Waring *et al.,* 2016). It is believed that recolonization by Canadian gray seals is the source of the U.S. population (Waring *et al.,* 2016).

Marine Mammal Hearing

Hearing is the most important sensory modality for marine mammals underwater, and exposure to anthropogenic sound can have deleterious effects. To appropriately assess the potential effects of exposure to sound, it is necessary to understand the frequency ranges marine mammals are able to hear. Current data indicate that not all marine mammal species have equal hearing capabilities (*e.g.,* Richardson *et al.,* 1995; Wartzok and Ketten, 1999; Au and Hastings, 2008). To reflect this, Southall *et al.* (2007) recommended that marine mammals be divided into functional hearing groups based on directly measured or estimated hearing ranges on the basis of available behavioral response data, audiograms derived using auditory evoked potential techniques, anatomical modeling, and other data. Note that no direct measurements of hearing ability have been successfully completed for mysticetes (*i.e.,* low-frequency cetaceans). Subsequently, NMFS (2016) described generalized hearing ranges for these marine mammal hearing groups. Generalized hearing ranges were chosen based on the approximately 65 dB threshold from the normalized composite audiograms, with the exception for lower limits for low-frequency cetaceans where the lower bound was deemed to be biologically implausible and the lower bound from Southall *et al.* (2007) retained. The functional groups and the associated frequencies are indicated below (note that these frequency ranges correspond to the range for the composite group, with the entire range not necessarily reflecting the capabilities of every species within that group):

- Low-frequency cetaceans (mysticetes): generalized hearing is estimated to occur between approximately 7 Hertz (Hz) and 35 kilohertz (kHz);
- Mid-frequency cetaceans (larger toothed whales, beaked whales, and most delphinids): generalized hearing is estimated to occur between approximately 150 Hz and 160 kHz;
- High-frequency cetaceans (porpoises, river dolphins, and members of the genera Kogia and Cephalorhynchus; including two members of the genus Lagenorhynchus, on the basis of recent echolocation data and genetic data): generalized hearing is estimated to occur between approximately 275 Hz and 160 kHz.
- Pinnipeds in water; Phocidae (true seals): generalized hearing is estimated to occur between approximately 50 Hz to 86 kH;

The pinniped functional hearing group was modified from Southall *et al.* (2007) on the basis of data indicating that phocid species have consistently demonstrated an extended frequency range of hearing compared to otariids, especially in the higher frequency range (Hemilä *et al.,* 2006; Kastelein *et al.,* 2009; Reichmuth and Holt, 2013).

For more detail concerning these groups and associated frequency ranges, please see NMFS (2016) for a review of available information. Eleven marine mammal species (nine cetacean and two pinniped (both phocid) species) have the reasonable potential to co-occur with the proposed survey activities. Please refer to Table 2. Of the cetacean species that may be present, five are classified as low-frequency cetaceans (*i.e.,* all mysticete species), three are classified as mid-frequency cetaceans (*i.e.,* all delphinid species and the sperm whale), and one is classified as a high-frequency cetacean (*i.e.,* harbor porpoise).

Potential Effects of Specified Activities on Marine Mammals and Their Habitat

This section includes a summary and discussion of the ways that components of the specified activity may impact marine mammals and their habitat. The ''Estimated Take'' section later in this document includes a quantitative analysis of the number of individuals that are expected to be taken by this activity. The ''Negligible Impact Analysis and Determination'' section considers the content of this section, the ''Estimated Take'' section, and the ''Proposed Mitigation'' section, to draw conclusions regarding the likely impacts of these activities on the reproductive success or survivorship of individuals and how those impacts on individuals are likely to impact marine mammal species or stocks.

Background on Sound

Sound is a physical phenomenon consisting of minute vibrations that travel through a medium, such as air or water, and is generally characterized by several variables. Frequency describes the sound's pitch and is measured in Hz or kHz, while sound level describes the sound's intensity and is measured in decibels (dB). Sound level increases or decreases exponentially with each dB of change. The logarithmic nature of the scale means that each 10-dB increase is a 10-fold increase in acoustic power (and a 20-dB increase is then a 100-fold increase in power). A 10-fold increase in acoustic power does not mean that the sound is perceived as being 10 times louder, however. Sound levels are compared to a reference sound pressure (micro-Pascal) to identify the medium. For air and water, these reference pressures are ''re: 20 micro Pascals (μPa)'' and ''re: 1 μPa,'' respectively. Root mean square (RMS) is the quadratic mean sound pressure over the duration of an impulse. RMS is calculated by squaring all of the sound amplitudes, averaging the squares, and then taking the square root of the average (Urick 1975). RMS accounts for both positive and negative values; squaring the pressures makes all values positive so that they may be accounted for in the summation of pressure levels. This measurement is often used in the context of discussing behavioral effects, in part because behavioral effects, which often result from auditory cues, may be better expressed through averaged units rather than by peak pressures.

When sound travels (propagates) from its source, its loudness decreases as the distance traveled by the sound increases. Thus, the loudness of a sound at its source is higher than the loudness of that same sound one km away. Acousticians often refer to the loudness of a sound at its source (typically referenced to one meter from the source) as the source level and the loudness of sound elsewhere as the received level (*i.e.,* typically the receiver). For example, a humpback whale 3 km from a device that has a source level of 230 dB may only be exposed to sound that is 160 dB loud, depending on how the sound travels through water (*e.g.,* spherical spreading (6 dB reduction with doubling of distance) was used in this example). As a result, it is important to understand the difference between source levels and received levels when discussing the loudness of

sound in the ocean or its impacts on the marine environment.

As sound travels from a source, its propagation in water is influenced by various physical characteristics, including water temperature, depth, salinity, and surface and bottom properties that cause refraction, reflection, absorption, and scattering of sound waves. Oceans are not homogeneous and the contribution of each of these individual factors is extremely complex and interrelated. The physical characteristics that determine the sound's speed through the water will change with depth, season, geographic location, and with time of day (as a result, in actual active sonar operations, crews will measure oceanic conditions, such as sea water temperature and depth, to calibrate models that determine the path the sonar signal will take as it travels through the ocean and how strong the sound signal will be at a given range along a particular transmission path). As sound travels through the ocean, the intensity associated with the wavefront diminishes, or attenuates. This decrease in intensity is referred to as propagation loss, also commonly called transmission loss.

Acoustic Impacts

Geophysical surveys may temporarily impact marine mammals in the area due to elevated in-water sound levels. Marine mammals are continually exposed to many sources of sound. Naturally occurring sounds such as lightning, rain, sub-sea earthquakes, and biological sounds (*e.g.,* snapping shrimp, whale songs) are widespread throughout the world's oceans. Marine mammals produce sounds in various contexts and use sound for various biological functions including, but not limited to: (1) Social interactions; (2) foraging; (3) orientation; and (4) predator detection. Interference with producing or receiving these sounds may result in adverse impacts. Audible distance, or received levels of sound depend on the nature of the sound source, ambient noise conditions, and the sensitivity of the receptor to the sound (Richardson *et al.,* 1995). Type and significance of marine mammal reactions to sound are likely dependent on a variety of factors including, but not limited to, (1) the behavioral state of the animal (*e.g.,* feeding, traveling, etc.); (2) frequency of the sound; (3) distance between the animal and the source; and (4) the level of the sound relative to ambient conditions (Southall *et al.,* 2007).

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. Current data indicate that not all marine mammal species have equal hearing capabilities (Richardson *et al.,* 1995; Wartzok and Ketten, 1999; Au and Hastings, 2008).

Animals are less sensitive to sounds at the outer edges of their functional hearing range and are more sensitive to a range of frequencies within the middle of their functional hearing range. For mid-frequency cetaceans, functional hearing estimates occur between approximately 150 Hz and 160 kHz with best hearing estimated to occur between approximately 10 to less than 100 kHz (Finneran *et al.,* 2005 and 2009, Natchtigall *et al.,* 2005 and 2008; Yuen *et al.,* 2005; Popov *et al.,* 2011; and Schlundt *et al.,* 2011).

Hearing Impairment

Marine mammals may experience temporary or permanent hearing impairment when exposed to loud sounds. Hearing impairment is classified by temporary threshold shift (TTS) and permanent threshold shift (PTS). PTS is considered auditory injury (Southall *et al.,* 2007) and occurs in a specific frequency range and amount. Irreparable damage to the inner or outer cochlear hair cells may cause PTS; however, other mechanisms are also involved, such as exceeding the elastic limits of certain tissues and membranes in the middle and inner ears and resultant changes in the chemical composition of the inner ear fluids (Southall *et al.,* 2007). There are no empirical data for onset of PTS in any marine mammal; therefore, PTS-onset must be estimated from TTS-onset measurements and from the rate of TTS growth with increasing exposure levels above the level eliciting TTS-onset. PTS is presumed to be likely if the hearing threshold is reduced by ≥40 dB (that is, 40 dB of TTS).

Temporary Threshold Shift (TTS)

TTS is the mildest form of hearing impairment that can occur during exposure to a loud sound (Kryter 1985). While experiencing TTS, the hearing threshold rises and a sound must be stronger in order to be heard. At least in terrestrial mammals, TTS can last from minutes or hours to (in cases of strong TTS) days, can be limited to a particular frequency range, and can occur to varying degrees (*i.e.,* a loss of a certain number of dBs of sensitivity). For sound exposures at or somewhat above the TTS threshold, hearing sensitivity in both terrestrial and marine mammals recovers rapidly after exposure to the noise ends.

Marine mammal hearing plays a critical role in communication with conspecifics and in interpretation of environmental cues for purposes such as predator avoidance and prey capture. Depending on the degree (elevation of threshold in dB), duration (*i.e.,* recovery time), and frequency range of TTS and the context in which it is experienced, TTS can have effects on marine mammals ranging from discountable to serious. For example, a marine mammal may be able to readily compensate for a brief, relatively small amount of TTS in a non-critical frequency range that takes place during a time when the animals is traveling through the open ocean, where ambient noise is lower and there are not as many competing sounds present. Alternatively, a larger amount and longer duration of TTS sustained during a time when communication is critical for successful mother/calf interactions could have more serious impacts if it were in the same frequency band as the necessary vocalizations and of a severity that it impeded communication. The fact that animals exposed to levels and durations of sound that would be expected to result in this physiological response would also be expected to have behavioral responses of a comparatively more severe or sustained nature is also notable and potentially of more importance than the simple existence of a TTS.

Currently, TTS data only exist for four species of cetaceans (bottlenose dolphin, beluga whale (*Delphinapterus leucas*), harbor porpoise, and Yangtze finless porpoise (*Neophocaena phocaenoides*)) and three species of pinnipeds (northern elephant seal (*Mirounga angustirostris*), harbor seal, and California sea lion (*Zalophus californianus*)) exposed to a limited number of sound sources (*i.e.,* mostly tones and octave-band noise) in laboratory settings (*e.g.,* Finneran *et al.,* 2002 and 2010; Nachtigall *et al.,* 2004; Kastak *et al.,* 2005; Lucke *et al.,* 2009; Mooney *et al.,* 2009; Popov *et al.,* 2011; Finneran and Schlundt, 2010). In general, harbor seals (Kastak *et al.,* 2005; Kastelein *et al.,* 2012a) and harbor porpoises (Lucke *et al.,* 2009; Kastelein *et al.,* 2012b) have a lower TTS onset than other measured pinniped or cetacean species. However, even for these animals, which are better able to hear higher frequencies and may be more sensitive to higher frequencies, exposures on the order of approximately 170 dB rms or higher for brief transient signals are likely required for even temporary (recoverable) changes in

hearing sensitivity that would likely not be categorized as physiologically damaging (Lucke *et al.,* 2009). Additionally, the existing marine mammal TTS data come from a limited number of individuals within these species. There are no data available on noise-induced hearing loss for mysticetes. For summaries of data on TTS in marine mammals or for further discussion of TTS onset thresholds, please see Finneran (2016).

Scientific literature highlights the inherent complexity of predicting TTS onset in marine mammals, as well as the importance of considering exposure duration when assessing potential impacts (Mooney *et al.,* 2009a, 2009b; Kastak *et al.,* 2007). Generally, with sound exposures of equal energy, quieter sounds (lower sound pressure levels (SPL)) of longer duration were found to induce TTS onset more than louder sounds (higher SPL) of shorter duration (more similar to sub-bottom profilers). For intermittent sounds, less threshold shift will occur than from a continuous exposure with the same energy (some recovery will occur between intermittent exposures) (Kryter *et al.,* 1966; Ward 1997). For sound exposures at or somewhat above the TTS-onset threshold, hearing sensitivity recovers rapidly after exposure to the sound ends; intermittent exposures recover faster in comparison with continuous exposures of the same duration (Finneran *et al.,* 2010). NMFS considers TTS as Level B harassment that is mediated by physiological effects on the auditory system.

Animals in the Lease Area during the HRG survey are unlikely to incur TTS hearing impairment due to the characteristics of the sound sources, which include low source levels (208 to 221 dB re 1 μPa-m) and generally very short pulses and duration of the sound. Even for high-frequency cetacean species (*e.g.,* harbor porpoises), which may have increased sensitivity to TTS (Lucke *et al.,* 2009; Kastelein *et al.,* 2012b), individuals would have to make a very close approach and also remain very close to vessels operating these sources in order to receive multiple exposures at relatively high levels, as would be necessary to cause TTS. Intermittent exposures—as would occur due to the brief, transient signals produced by these sources—require a higher cumulative SEL to induce TTS than would continuous exposures of the same duration (*i.e.,* intermittent exposure results in lower levels of TTS) (Mooney *et al.,* 2009a; Finneran *et al.,* 2010). Moreover, most marine mammals would more likely avoid a loud sound source rather than swim in such close proximity as to result in TTS. Kremser *et al.* (2005) noted that the probability of a cetacean swimming through the area of exposure when a sub-bottom profiler emits a pulse is small—because if the animal was in the area, it would have to pass the transducer at close range in order to be subjected to sound levels that could cause TTS and would likely exhibit avoidance behavior to the area near the transducer rather than swim through at such a close range. Further, the restricted beam shape of the sub-bottom profiler and other HRG survey equipment makes it unlikely that an animal would be exposed more than briefly during the passage of the vessel. Boebel *et al.* (2005) concluded similarly for single and multibeam echosounders and, more recently, Lurton (2016) conducted a modeling exercise and concluded similarly that likely potential for acoustic injury from these types of systems is negligible but that behavioral response cannot be ruled out. Animals may avoid the area around the survey vessels, thereby reducing exposure. Any disturbance to marine mammals is likely to be in the form of temporary avoidance or alteration of opportunistic foraging behavior near the survey location.

Masking

Masking is the obscuring of sounds of interest to an animal by other sounds, typically at similar frequencies. Marine mammals are highly dependent on sound, and their ability to recognize sound signals amid other sound is important in communication and detection of both predators and prey (Tyack 2000). Background ambient sound may interfere with or mask the ability of an animal to detect a sound signal even when that signal is above its absolute hearing threshold. Even in the absence of anthropogenic sound, the marine environment is often loud. Natural ambient sound includes contributions from wind, waves, precipitation, other animals, and (at frequencies above 30 kHz) thermal sound resulting from molecular agitation (Richardson *et al.,* 1995).

Background sound may also include anthropogenic sound, and masking of natural sounds can result when human activities produce high levels of background sound. Conversely, if the background level of underwater sound is high (*e.g.,* on a day with strong wind and high waves), an anthropogenic sound source would not be detectable as far away as would be possible under quieter conditions and would itself be masked. Ambient sound is highly variable on continental shelves (Myrberg 1978; Desharnais *et al.,* 1999). This results in a high degree of variability in the range at which marine mammals can detect anthropogenic sounds.

Although masking is a phenomenon which may occur naturally, the introduction of loud anthropogenic sounds into the marine environment at frequencies important to marine mammals increases the severity and frequency of occurrence of masking. For example, if a baleen whale is exposed to continuous low-frequency sound from an industrial source, this would reduce the size of the area around that whale within which it can hear the calls of another whale. The components of background noise that are similar in frequency to the signal in question primarily determine the degree of masking of that signal. In general, little is known about the degree to which marine mammals rely upon detection of sounds from conspecifics, predators, prey, or other natural sources. In the absence of specific information about the importance of detecting these natural sounds, it is not possible to predict the impact of masking on marine mammals (Richardson *et al.,* 1995). In general, masking effects are expected to be less severe when sounds are transient than when they are continuous. Masking is typically of greater concern for those marine mammals that utilize low-frequency communications, such as baleen whales, because of how far low-frequency sounds propagate.

Marine mammal communications would not likely be masked appreciably by the sub-bottom profiler signals given the directionality of the signal and the brief period when an individual mammal is likely to be within its beam.

Non-Auditory Physical Effects (Stress)

Classic stress responses begin when an animal's central nervous system perceives a potential threat to its homeostasis. That perception triggers stress responses regardless of whether a stimulus actually threatens the animal; the mere perception of a threat is sufficient to trigger a stress response (Moberg 2000; Seyle 1950). Once an animal's central nervous system perceives a threat, it mounts a biological response or defense that consists of a combination of the four general biological defense responses: behavioral responses, autonomic nervous system responses, neuroendocrine responses, or immune responses.

In the case of many stressors, an animal's first and sometimes most economical (in terms of biotic costs) response is behavioral avoidance of the potential stressor or avoidance of continued exposure to a stressor. An

animal's second line of defense to stressors involves the sympathetic part of the autonomic nervous system and the classical ''fight or flight'' response which includes the cardiovascular system, the gastrointestinal system, the exocrine glands, and the adrenal medulla to produce changes in heart rate, blood pressure, and gastrointestinal activity that humans commonly associate with ''stress.'' These responses have a relatively short duration and may or may not have significant long-term effect on an animal's welfare.

An animal's third line of defense to stressors involves its neuroendocrine systems; the system that has received the most study has been the hypothalamus-pituitary-adrenal system (also known as the HPA axis in mammals). Unlike stress responses associated with the autonomic nervous system, virtually all neuro-endocrine functions that are affected by stress—including immune competence, reproduction, metabolism, and behavior—are regulated by pituitary hormones. Stress-induced changes in the secretion of pituitary hormones have been implicated in failed reproduction (Moberg 1987; Rivier 1995), altered metabolism (Elasser *et al.,* 2000), reduced immune competence (Blecha 2000), and behavioral disturbance. Increases in the circulation of glucocorticosteroids (cortisol, corticosterone, and aldosterone in marine mammals; see Romano *et al.,* 2004) have been equated with stress for many years.

The primary distinction between stress (which is adaptive and does not normally place an animal at risk) and distress is the biotic cost of the response. During a stress response, an animal uses glycogen stores that can be quickly replenished once the stress is alleviated. In such circumstances, the cost of the stress response would not pose a risk to the animal's welfare. However, when an animal does not have sufficient energy reserves to satisfy the energetic costs of a stress response, energy resources must be diverted from other biotic function, which impairs those functions that experience the diversion. For example, when mounting a stress response diverts energy away from growth in young animals, those animals may experience stunted growth. When mounting a stress response diverts energy from a fetus, an animal's reproductive success and its fitness will suffer. In these cases, the animals will have entered a pre-pathological or pathological state which is called ''distress'' (Seyle 1950) or ''allostatic loading'' (McEwen and Wingfield 2003). This pathological state will last until the animal replenishes its biotic reserves sufficient to restore normal function. Note that these examples involved a long-term (days or weeks) stress response exposure to stimuli.

Relationships between these physiological mechanisms, animal behavior, and the costs of stress responses have also been documented fairly well through controlled experiments; because this physiology exists in every vertebrate that has been studied, it is not surprising that stress responses and their costs have been documented in both laboratory and free-living animals (for examples see, Holberton *et al.,* 1996; Hood *et al.,* 1998; Jessop *et al.,* 2003; Krausman *et al.,* 2004; Lankford *et al.,* 2005; Reneerkens *et al.,* 2002; Thompson and Hamer, 2000). Information has also been collected on the physiological responses of marine mammals to exposure to anthropogenic sounds (Fair and Becker 2000; Romano *et al.,* 2002). For example, Rolland *et al.* (2012) found that noise reduction from reduced ship traffic in the Bay of Fundy was associated with decreased stress in North Atlantic right whales.

Studies of other marine animals and terrestrial animals would also lead us to expect some marine mammals to experience physiological stress responses and, perhaps, physiological responses that would be classified as ''distress'' upon exposure to high frequency, mid-frequency and low-frequency sounds. For example, Jansen (1998) reported on the relationship between acoustic exposures and physiological responses that are indicative of stress responses in humans (for example, elevated respiration and increased heart rates). Jones (1998) reported on reductions in human performance when faced with acute, repetitive exposures to acoustic disturbance. Trimper *et al.* (1998) reported on the physiological stress responses of osprey to low-level aircraft noise while Krausman *et al.* (2004) reported on the auditory and physiology stress responses of endangered Sonoran pronghorn to military overflights. Smith *et al.* (2004a, 2004b), for example, identified noise-induced physiological transient stress responses in hearing-specialist fish (*i.e.,* goldfish) that accompanied short- and long-term hearing losses. Welch and Welch (1970) reported physiological and behavioral stress responses that accompanied damage to the inner ears of fish and several mammals.

Hearing is one of the primary senses marine mammals use to gather information about their environment and to communicate with conspecifics. Although empirical information on the relationship between sensory impairment (TTS, PTS, and acoustic masking) on marine mammals remains limited, it seems reasonable to assume that reducing an animal's ability to gather information about its environment and to communicate with other members of its species would be stressful for animals that use hearing as their primary sensory mechanism. Therefore, we assume that acoustic exposures sufficient to trigger onset PTS or TTS would be accompanied by physiological stress responses because terrestrial animals exhibit those responses under similar conditions (NRC 2003). More importantly, marine mammals might experience stress responses at received levels lower than those necessary to trigger onset TTS. Based on empirical studies of the time required to recover from stress responses (Moberg 2000), we also assume that stress responses are likely to persist beyond the time interval required for animals to recover from TTS and might result in pathological and pre-pathological states that would be as significant as behavioral responses to TTS.

In general, there are few data on the potential for strong, anthropogenic underwater sounds to cause non-auditory physical effects in marine mammals. The available data do not allow identification of a specific exposure level above which non-auditory effects can be expected (Southall *et al.,* 2007). There is no definitive evidence that any of these effects occur even for marine mammals in close proximity to an anthropogenic sound source. In addition, marine mammals that show behavioral avoidance of survey vessels and related sound sources are unlikely to incur non-auditory impairment or other physical effects. NMFS does not expect that the generally short-term, intermittent, and transitory HRG and geotechnical activities would create conditions of long-term, continuous noise and chronic acoustic exposure leading to long-term physiological stress responses in marine mammals.

Behavioral Disturbance

Behavioral disturbance may include a variety of effects, including subtle changes in behavior (*e.g.,* minor or brief avoidance of an area or changes in vocalizations), more conspicuous changes in similar behavioral activities, and more sustained and/or potentially severe reactions, such as displacement from or abandonment of high-quality habitat. Behavioral responses to sound are highly variable and context-specific

and any reactions depend on numerous intrinsic and extrinsic factors (*e.g.,* species, state of maturity, experience, current activity, reproductive state, auditory sensitivity, time of day), as well as the interplay between factors (*e.g.,* Richardson *et al.,* 1995; Wartzok *et al.,* 2003; Southall *et al.,* 2007; Weilgart, 2007; Archer *et al.,* 2010). Behavioral reactions can vary not only among individuals but also within an individual, depending on previous experience with a sound source, context, and numerous other factors (Ellison *et al.,* 2012), and can vary depending on characteristics associated with the sound source (*e.g.,* whether it is moving or stationary, number of sources, distance from the source). Please see Appendices B–C of Southall *et al.* (2007) for a review of studies involving marine mammal behavioral responses to sound.

Habituation can occur when an animal's response to a stimulus wanes with repeated exposure, usually in the absence of unpleasant associated events (Wartzok *et al.,* 2003). Animals are most likely to habituate to sounds that are predictable and unvarying. It is important to note that habituation is appropriately considered as a ''progressive reduction in response to stimuli that are perceived as neither aversive nor beneficial,'' rather than as, more generally, moderation in response to human disturbance (Bejder *et al.,* 2009). The opposite process is sensitization, when an unpleasant experience leads to subsequent responses, often in the form of avoidance, at a lower level of exposure. As noted, behavioral state may affect the type of response. For example, animals that are resting may show greater behavioral change in response to disturbing sound levels than animals that are highly motivated to remain in an area for feeding (Richardson *et al.,* 1995; NRC 2003; Wartzok *et al.,* 2003). Controlled experiments with captive marine mammals have shown pronounced behavioral reactions, including avoidance of loud sound sources (Ridgway *et al.,* 1997; Finneran *et al.,* 2003). Observed responses of wild marine mammals to loud, pulsed sound sources (typically seismic airguns or acoustic harassment devices) have been varied but often consist of avoidance behavior or other behavioral changes suggesting discomfort (Morton and Symonds, 2002; see also Richardson *et al.,* 1995; Nowacek *et al.,* 2007).

Available studies show wide variation in response to underwater sound; therefore, it is difficult to predict specifically how any given sound in a particular instance might affect marine mammals perceiving the signal. If a marine mammal does react briefly to an underwater sound by changing its behavior or moving a small distance, the impacts of the change are unlikely to be significant to the individual, let alone the stock or population. However, if a sound source displaces marine mammals from an important feeding or breeding area for a prolonged period, impacts on individuals and populations could be significant (*e.g.,* Lusseau and Bejder, 2007; Weilgart 2007; NRC 2005). However, there are broad categories of potential response, which we describe in greater detail here, that include alteration of dive behavior, alteration of foraging behavior, effects to breathing, interference with or alteration of vocalization, avoidance, and flight.

Changes in dive behavior can vary widely and may consist of increased or decreased dive times and surface intervals as well as changes in the rates of ascent and descent during a dive (*e.g.,* Frankel and Clark 2000; Costa *et al.,* 2003; Ng and Leung 2003; Nowacek *et al.,* 2004; Goldbogen *et al.,* 2013a,b). Variations in dive behavior may reflect interruptions in biologically significant activities (*e.g.,* foraging) or they may be of little biological significance. The impact of an alteration to dive behavior resulting from an acoustic exposure depends on what the animal is doing at the time of the exposure and the type and magnitude of the response.

Disruption of feeding behavior can be difficult to correlate with anthropogenic sound exposure, so it is usually inferred by observed displacement from known foraging areas, the appearance of secondary indicators (*e.g.,* bubble nets or sediment plumes), or changes in dive behavior. As for other types of behavioral response, the frequency, duration, and temporal pattern of signal presentation, as well as differences in species sensitivity, are likely contributing factors to differences in response in any given circumstance (*e.g.,* Croll *et al.,* 2001; Nowacek *et al.;* 2004; Madsen *et al.,* 2006; Yazvenko *et al.,* 2007). A determination of whether foraging disruptions incur fitness consequences would require information on or estimates of the energetic requirements of the affected individuals and the relationship between prey availability, foraging effort and success, and the life history stage of the animal.

Variations in respiration naturally vary with different behaviors and alterations to breathing rate as a function of acoustic exposure can be expected to co-occur with other behavioral reactions, such as a flight response or an alteration in diving. However, respiration rates in and of themselves may be representative of annoyance or an acute stress response. Various studies have shown that respiration rates may either be unaffected or could increase, depending on the species and signal characteristics, again highlighting the importance in understanding species differences in the tolerance of underwater noise when determining the potential for impacts resulting from anthropogenic sound exposure (*e.g.,* Kastelein *et al.,* 2001, 2005b, 2006; Gailey *et al.,* 2007).

Marine mammals vocalize for different purposes and across multiple modes, such as whistling, echolocation click production, calling, and singing. Changes in vocalization behavior in response to anthropogenic noise can occur for any of these modes and may result from a need to compete with an increase in background noise or may reflect increased vigilance or a startle response. For example, in the presence of potentially masking signals, humpback whales and killer whales have been observed to increase the length of their songs (Miller *et al.,* 2000; Fristrup *et al.,* 2003; Foote *et al.,* 2004), while right whales have been observed to shift the frequency content of their calls upward while reducing the rate of calling in areas of increased anthropogenic noise (Parks *et al.,* 2007b). In some cases, animals may cease sound production during production of aversive signals (Bowles *et al.,* 1994).

Avoidance is the displacement of an individual from an area or migration path as a result of the presence of a sound or other stressors, and is one of the most obvious manifestations of disturbance in marine mammals (Richardson *et al.,* 1995). For example, gray whales are known to change direction—deflecting from customary migratory paths—in order to avoid noise from seismic surveys (Malme *et al.,* 1984). Avoidance may be short-term, with animals returning to the area once the noise has ceased (*e.g.,* Bowles *et al.,* 1994; Goold 1996; Stone *et al.,* 2000; Morton and Symonds, 2002; Gailey *et al.,* 2007). Longer-term displacement is possible, however, which may lead to changes in abundance or distribution patterns of the affected species in the affected region if habituation to the presence of the sound does not occur (*e.g.,* Blackwell *et al.,* 2004; Bejder *et al.,* 2006; Teilmann *et al.,* 2006).

A flight response is a dramatic change in normal movement to a directed and rapid movement away from the perceived location of a sound source. The flight response differs from other avoidance responses in the intensity of

the response (*e.g.,* directed movement, rate of travel). Relatively little information on flight responses of marine mammals to anthropogenic signals exist, although observations of flight responses to the presence of predators have occurred (Connor and Heithaus, 1996). The result of a flight response could range from brief, temporary exertion and displacement from the area where the signal provokes flight to, in extreme cases, marine mammal strandings (Evans and England, 2001). However, it should be noted that response to a perceived predator does not necessarily invoke flight (Ford and Reeves, 2008) and whether individuals are solitary or in groups may influence the response.

Behavioral disturbance can also impact marine mammals in more subtle ways. Increased vigilance may result in costs related to diversion of focus and attention (*i.e.,* when a response consists of increased vigilance, it may come at the cost of decreased attention to other critical behaviors such as foraging or resting). These effects have generally not been demonstrated for marine mammals, but studies involving fish and terrestrial animals have shown that increased vigilance may substantially reduce feeding rates (*e.g.,* Beauchamp and Livoreil, 1997; Fritz *et al.,* 2002; Purser and Radford, 2011). In addition, chronic disturbance can cause population declines through reduction of fitness (*e.g.,* decline in body condition) and subsequent reduction in reproductive success, survival, or both (*e.g.,* Harrington and Veitch, 1992; Daan *et al.,* 1996; Bradshaw *et al.,* 1998). However, Ridgway *et al.* (2006) reported that increased vigilance in bottlenose dolphins exposed to sound over a five-day period did not cause any sleep deprivation or stress effects.

Many animals perform vital functions, such as feeding, resting, traveling, and socializing, on a diel cycle (24-hour cycle). Disruption of such functions resulting from reactions to stressors such as sound exposure are more likely to be significant if they last more than one diel cycle or recur on subsequent days (Southall *et al.,* 2007). Consequently, a behavioral response lasting less than one day and not recurring on subsequent days is not considered particularly severe unless it could directly affect reproduction or survival (Southall *et al.,* 2007). Note that there is a difference between multi-day substantive behavioral reactions and multi-day anthropogenic activities. For example, just because an activity lasts for multiple days does not necessarily mean that individual animals are either exposed to activity-related stressors for multiple days or, further, exposed in a manner resulting in sustained multi-day substantive behavioral responses.

Marine mammals are likely to avoid the HRG survey activity, especially the naturally shy harbor porpoise, while the harbor seals might be attracted to them out of curiosity. However, because the sub-bottom profilers and other HRG survey equipment operate from a moving vessel, and the maximum radius to the Level B harassment threshold is relatively small, the area and time that this equipment would be affecting a given location is very small. Further, once an area has been surveyed, it is not likely that it will be surveyed again, thereby reducing the likelihood of repeated HRG-related impacts within the survey area.

We have also considered the potential for severe behavioral responses such as stranding and associated indirect injury or mortality from Statoil's use of HRG survey equipment, on the basis of a 2008 mass stranding of approximately 100 melon-headed whales in a Madagascar lagoon system. An investigation of the event indicated that use of a high-frequency mapping system (12-kHz multibeam echosounder) was the most plausible and likely initial behavioral trigger of the event, while providing the caveat that there is no unequivocal and easily identifiable single cause (Southall *et al.,* 2013). The investigatory panel's conclusion was based on (1) very close temporal and spatial association and directed movement of the survey with the stranding event; (2) the unusual nature of such an event coupled with previously documented apparent behavioral sensitivity of the species to other sound types (Southall *et al.,* 2006; Brownell *et al.,* 2009); and (3) the fact that all other possible factors considered were determined to be unlikely causes. Specifically, regarding survey patterns prior to the event and in relation to bathymetry, the vessel transited in a north-south direction on the shelf break parallel to the shore, ensonifying large areas of deep-water habitat prior to operating intermittently in a concentrated area offshore from the stranding site; this may have trapped the animals between the sound source and the shore, thus driving them towards the lagoon system. The investigatory panel systematically excluded or deemed highly unlikely nearly all potential reasons for these animals leaving their typical pelagic habitat for an area extremely atypical for the species (*i.e.,* a shallow lagoon system). Notably, this was the first time that such a system has been associated with a stranding event. The panel also noted several site- and situation-specific secondary factors that may have contributed to the avoidance responses that led to the eventual entrapment and mortality of the whales. Specifically, shoreward-directed surface currents and elevated chlorophyll levels in the area preceding the event may have played a role (Southall *et al.,* 2013). The report also notes that prior use of a similar system in the general area may have sensitized the animals and also concluded that, for odontocete cetaceans that hear well in higher frequency ranges where ambient noise is typically quite low, high-power active sonars operating in this range may be more easily audible and have potential effects over larger areas than low frequency systems that have more typically been considered in terms of anthropogenic noise impacts. It is, however, important to note that the relatively lower output frequency, higher output power, and complex nature of the system implicated in this event, in context of the other factors noted here, likely produced a fairly unusual set of circumstances that indicate that such events would likely remain rare and are not necessarily relevant to use of lower-power, higher-frequency systems more commonly used for HRG survey applications. The risk of similar events recurring may be very low, given the extensive use of active acoustic systems used for scientific and navigational purposes worldwide on a daily basis and the lack of direct evidence of such responses previously reported.

Tolerance

Numerous studies have shown that underwater sounds from industrial activities are often readily detectable by marine mammals in the water at distances of many km. However, other studies have shown that marine mammals at distances more than a few km away often show no apparent response to industrial activities of various types (Miller *et al.,* 2005). This is often true even in cases when the sounds must be readily audible to the animals based on measured received levels and the hearing sensitivity of that mammal group. Although various baleen whales, toothed whales, and (less frequently) pinnipeds have been shown to react behaviorally to underwater sound from sources such as airgun pulses or vessels under some conditions, at other times, mammals of all three types have shown no overt reactions (*e.g.,* Malme *et al.,* 1986; Richardson *et al.,* 1995; Madsen and Mohl 2000; Croll *et al.,* 2001; Jacobs and Terhune 2002; Madsen *et al.,* 2002;

Miller *et al.,* 2005). In general, pinnipeds seem to be more tolerant of exposure to some types of underwater sound than are baleen whales. Richardson *et al.* (1995) found that vessel sound does not seem to affect pinnipeds that are already in the water. Richardson *et al.* (1995) went on to explain that seals on haul-outs sometimes respond strongly to the presence of vessels and at other times appear to show considerable tolerance of vessels, and Brueggeman *et al.* (1992) observed ringed seals (*Pusa hispida*) hauled out on ice pans displaying short-term escape reactions when a ship approached within 0.16–0.31 miles (0.25–0.5 km). Due to the relatively high vessel traffic in the Lease Area it is possible that marine mammals are habituated to noise (*e.g.,* DP thrusters) from project vessels in the area.

Vessel Strike

Ship strikes of marine mammals can cause major wounds, which may lead to the death of the animal. An animal at the surface could be struck directly by a vessel, a surfacing animal could hit the bottom of a vessel, or a vessel's propeller could injure an animal just below the surface. The severity of injuries typically depends on the size and speed of the vessel (Knowlton and Kraus 2001; Laist *et al.,* 2001; Vanderlaan and Taggart 2007).

The most vulnerable marine mammals are those that spend extended periods of time at the surface in order to restore oxygen levels within their tissues after deep dives (*e.g.,* the sperm whale). In addition, some baleen whales, such as the North Atlantic right whale, seem generally unresponsive to vessel sound, making them more susceptible to vessel collisions (Nowacek *et al.,* 2004). These species are primarily large, slow moving whales. Smaller marine mammals (*e.g.,* bottlenose dolphin) move quickly through the water column and are often seen riding the bow wave of large ships. Marine mammal responses to vessels may include avoidance and changes in dive pattern (NRC 2003).

An examination of all known ship strikes from all shipping sources (civilian and military) indicates vessel speed is a principal factor in whether a vessel strike results in death (Knowlton and Kraus 2001; Laist *et al.,* 2001; Jensen and Silber 2003; Vanderlaan and Taggart 2007). In assessing records with known vessel speeds, Laist *et al.* (2001) found a direct relationship between the occurrence of a whale strike and the speed of the vessel involved in the collision. The authors concluded that most deaths occurred when a vessel was traveling in excess of 24.1 km/h (14.9 mph; 13 knots (kn)). Given the slow vessel speeds and predictable course necessary for data acquisition, ship strike is unlikely to occur during the geophysical and geotechnical surveys. Marine mammals would be able to easily avoid the survey vessel due to the slow vessel speed. Further, Statoil would implement measures (*e.g.,* protected species monitoring, vessel speed restrictions and separation distances; see *Proposed Mitigation Measures*) set forth in the BOEM lease to reduce the risk of a vessel strike to marine mammal species in the survey area.

Marine Mammal Habitat

There are no feeding areas, rookeries or mating grounds known to be biologically important to marine mammals within the proposed project area. The area is part of an important migratory area for North Atlantic right whales; this important migratory area is comprised of the waters of the continental shelf offshore the East Coast of the U.S. and extends from Florida through Massachusetts. Given the limited spatial extent of the proposed survey and the large spatial extent of the migratory area, we do not expect North Atlantic right whale migration to be negatively impacted by the proposed survey. There is no designated critical habitat for any ESA-listed marine mammals in the proposed survey area. NMFS' regulations at 50 CFR part 224.105 designated the nearshore waters of the Mid-Atlantic Bight as the Mid-Atlantic U.S. Seasonal Management Area (SMA) for right whales in 2008. Mandatory vessel speed restrictions (less than 10 kn) are in place in that SMA from November 1 through April 30 to reduce the threat of collisions between ships and right whales around their migratory route and calving grounds.

Bottom disturbance associated with the HRG survey activities may include grab sampling to validate the seabed classification obtained from the multibeam echosounder/sidescan sonar data. This will typically be accomplished using a Mini-Harmon Grab with 0.1 m^2 sample area or the slightly larger Harmon Grab with a 0.2 m^2 sample area. The HRG survey equipment will not contact the seafloor and does not represent a source of pollution. We are not aware of any available literature on impacts to marine mammal prey from HRG survey equipment. However, as the HRG survey equipment introduces noise to the marine environment, there is the potential for it to result in avoidance of the area around the HRG survey activities on the part of marine mammal prey. Any avoidance of the area on the part of marine mammal prey would be expected to be short term and temporary.

Because of the temporary nature of the disturbance, the availability of similar habitat and resources (*e.g.,* prey species) in the surrounding area, and the lack of important or unique marine mammal habitat, the impacts to marine mammals and the food sources that they utilize are not expected to cause significant or long-term consequences for individual marine mammals or their populations. Impacts on marine mammal habitat from the proposed activities will be temporary, insignificant, and discountable.

Estimated Take

This section provides an estimate of the number of incidental takes proposed for authorization through this IHA, which will inform both NMFS' consideration of ''small numbers'' and the negligible impact determination.

Harassment is the only type of take expected to result from these activities. 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).

Authorized takes would be by Level B harassment, as use of the HRG equipment has the potential to result in disruption of behavioral patterns for individual marine mammals. NMFS has determined take by Level A harassment is not an expected outcome of the proposed activity and thus we do not propose to authorize the take of any marine mammals by Level A harassment. This is discussed in greater detail below. As described previously, no mortality or serious injury is anticipated or proposed to be authorized for this activity. Below we describe how the take is estimated for this project.

Described in the most basic way, we estimate take by considering: (1) Acoustic thresholds above which NMFS believes the best available science indicates marine mammals will be behaviorally harassed or incur some degree of permanent hearing impairment; (2) the area or volume of water that will be ensonified above these levels in a day; (3) the density or occurrence of marine mammals within

these ensonified areas; and, (4) and the number of days of activities. Below, we describe these components in more detail and present the proposed take estimate.

Acoustic Thresholds

NMFS uses acoustic thresholds that identify the received level of underwater sound above which exposed marine mammals would be reasonably expected to be behaviorally harassed (equated to Level B harassment) or to incur PTS of some degree (equated to Level A harassment).

Level B harassment—Though significantly driven by received level, the onset of behavioral disturbance from anthropogenic noise exposure is also informed to varying degrees by other factors related to the sound source (*e.g.,* frequency, predictability, duty cycle); the environment (*e.g.,* bathymetry); and the receiving animals (hearing, motivation, experience, demography, behavioral context); therefore can be difficult to predict (Southall *et al.,* 2007, Ellison *et al.,* 2011). NMFS uses a generalized acoustic threshold based on received level to estimate the onset of Level B (behavioral) harassment. NMFS predicts that marine mammals may be behaviorally harassed when exposed to underwater anthropogenic noise above received levels 160 dB re 1 μPa (rms) for non-explosive impulsive (*e.g.,* seismic HRG equipment) or intermittent (*e.g.,* scientific sonar) sources. Statoil's proposed activity includes the use of impulsive sources. Therefore, the 160 dB re 1 μPa (rms) criteria is applicable for analysis of Level B harassment.

Level A harassment—NMFS' Technical Guidance for Assessing the Effects of Anthropogenic Sound on Marine Mammal Hearing (NMFS 2016) identifies dual criteria to assess auditory injury (Level A harassment) to five different marine mammal groups (based on hearing sensitivity) as a result of exposure to noise from two different types of sources (impulsive or non-impulsive). The Technical Guidance identifies the received levels, or thresholds, above which individual marine mammals are predicted to experience changes in their hearing sensitivity for all underwater anthropogenic sound sources, reflects the best available science, and better predicts the potential for auditory injury than does NMFS' historical criteria.

These thresholds were developed by compiling and synthesizing the best available science and soliciting input multiple times from both the public and peer reviewers to inform the final product, and are provided in Table 3 below. The references, analysis, and methodology used in the development of the thresholds are described in NMFS 2016 Technical Guidance, which may be accessed at: *www.nmfs.noaa.gov/pr/acoustics/guidelines.htm.* As described above, Statoil's proposed activity includes the use of intermittent and impulsive sources

TABLE 3—THRESHOLDS IDENTIFYING THE ONSET OF PERMANENT THRESHOLD SHIFT IN MARINE MAMMALS

Hearing group	PTS onset thresholds	
	Impulsive *	Non-impulsive
Low-Frequency (LF) Cetaceans	$L_{pk,flat}$: 219 dB; $L_{E,LF,24h}$: 183 dB	$L_{E,LF,24h}$: 199 dB
Mid-Frequency (MF) Cetaceans	$L_{pk,flat}$: 230 dB; $L_{E,MF,24h}$: 185 dB	$L_{E,MF,24h}$: 198 dB
High-Frequency (HF) Cetaceans	$L_{pk,flat}$: 202 dB; $L_{E,HF,24h}$: 155 dB	$L_{E,HF,24h}$: 173 dB
Phocid Pinnipeds (PW) (Underwater)	$L_{pk,flat}$: 218 dB; $L_{E,PW,24h}$: 185 dB	$L_{E,PW,24h}$: 201 dB
Otariid Pinnipeds (OW) (Underwater)	$L_{pk,flat}$: 232 dB; $L_{E,OW,24h}$: 203 dB	$L_{E,OW,24h}$: 219 dB

Note: * Dual metric acoustic thresholds for impulsive sounds: Use whichever results in the largest isopleth for calculating PTS onset. If a non-impulsive sound has the potential of exceeding the peak sound pressure level thresholds associated with impulsive sounds, these thresholds should also be considered.

Note: Peak sound pressure (Lpk) has a reference value of 1 μPa, and cumulative sound exposure level (LE) has a reference value of 1μPa2s. In this Table, thresholds are abbreviated to reflect American National Standards Institute standards (ANSI 2013). However, peak sound pressure is defined by ANSI as incorporating frequency weighting, which is not the intent for this Technical Guidance. Hence, the subscript "flat" is being included to indicate peak sound pressure should be flat weighted or unweighted within the generalized hearing range. The subscript associated with cumulative sound exposure level thresholds indicates the designated marine mammal auditory weighting function (LF, MF, and HF cetaceans, and PW and OW pinnipeds) and that the recommended accumulation period is 24 hours. The cumulative sound exposure level thresholds could be exceeded in a multitude of ways (*i.e.,* varying exposure levels and durations, duty cycle). When possible, it is valuable for action proponents to indicate the conditions under which these acoustic thresholds will be exceeded.

Ensonified Area

Here, we describe operational and environmental parameters of the activity that will feed into estimating the area ensonified above the acoustic thresholds.

The proposed survey would entail the use of HRG survey equipment. The distance to the isopleth corresponding to the threshold for Level B harassment was calculated for all HRG survey equipment with the potential to result in harassment of marine mammals (*i.e.,* the USBL and the sub-bottom profilers; Table 1) based on source characteristics as described in Crocker and Fratantonio (2016) using the practical transmission loss (TL) equation: $TL = 15\log_{10}r$. Of the HRG survey equipment planned for use that has the potential to result in harassment of marine mammals, acoustic modeling indicated the Sig ELC 820 Sparker would be expected to produce sound that would propagate the furthest in the water (Table 4); therefore, for the purposes of the take calculation, it was assumed the Sig ELC 820 Sparker would be active during the entirety of the survey. Thus the distance to the isopleth corresponding to the threshold for Level B harassment for the Sig ELC 820 Sparker (1,166 m; Table 4) was used as the basis of the Level B take calculation for all marine mammals.

TABLE 4—PREDICTED RADIAL DISTANCES (m) FROM HRG SOURCES TO ISOPLETHS CORRESPONDING TO LEVEL B HARASSMENT THRESHOLD

HRG system	HRG survey equipment	Modeled distance to threshold (160 dB re 1 μPa)
Subsea Positioning/USBL	Sonardyne Ranger 2 USBL	74
Shallow penetration sub-bottom profiler	EdgeTech 512i	18
Medium penetration sub-bottom profiler	SIG ELC 820 Sparker	1,166

Predicted distances to Level A harassment isopleths, which vary based on marine mammal functional hearing groups (Table 5), were also calculated by Statoil. The updated acoustic thresholds for impulsive sounds (such as HRG survey equipment) contained in the Technical Guidance (NMFS, 2016) were presented as dual metric acoustic thresholds using both SEL_{cum} and peak sound pressure level metrics. As dual metrics, NMFS considers onset of PTS (Level A harassment) to have occurred when either one of the two metrics is exceeded (*i.e.,* metric resulting in the largest isopleth). The SEL_{cum} metric considers both level and duration of exposure, as well as auditory weighting functions by marine mammal hearing group. In recognition of the fact that calculating Level A harassment ensonified areas could be more technically challenging to predict due to the duration component and the use of weighting functions in the new SEL_{cum} thresholds, NMFS developed an optional User Spreadsheet that includes tools to help predict a simple isopleth that can be used in conjunction with marine mammal density or occurrence to facilitate the estimation of take numbers. Statoil used the NMFS optional User Spreadsheet to calculate distances to Level A harassment isopleths based on SEL_{cum} (shown in Appendix A of the IHA application) and used the practical spreading loss model (similar to the method used to calculate Level B isopleths as described above) to calculate distances to Level A harassment isopleths based on peak pressure. Modeled distances to isopleths corresponding to Level A harassment thresholds for the Sig ELC 820 Sparker are shown in Table 5.

TABLE 5—MODELED RADIAL DISTANCES (m) TO ISOPLETHS CORRESPONDING TO LEVEL A HARASSMENT THRESHOLDS

Functional hearing group (Level A harassment thresholds)	SEL_{cum}[1]	Peak SPL_{flat}
Low frequency cetaceans ($L_{pk,flat}$: 219 dB; $L_{E,LF,24h}$: 183 dB)	9.8	n/a
Mid frequency cetaceans ($L_{pk,flat}$: 230 dB; $L_{E,MF,24h}$: 185 dB)	0	n/a
High frequency cetaceans ($L_{pk,flat}$: 202 dB; $L_{E,HF,24h}$: 155 dB)	3.6	7.3
Phocid Pinnipeds (Underwater)($L_{pk,flat}$: 218 dB; $L_{E,HF,24h}$: 185 dB)	2.6	n/a

[1] Distances to isopleths based on SEL_{cum} were calculated in the NMFS optional User Spreadsheet based on the following inputs: Source level of 206 dB rms, source velocity of 2.06 meters per second, pulse duration of 0.008 seconds, repetition rate of 0.25 seconds, and weighting factor adjustment of 1.4 kHz. Isopleths shown for SEL_{cum} are different than those shown in the IHA application as one of the inputs used by the applicant was incorrect which resulted in outputs that were not accurate: The applicant entered an incorrect repetition rate of 4 seconds rather than the correct repetition rate of 0.25 seconds. NMFS therefore used the NMFS optional User Spreadsheet to calculate isopleths for SEL_{cum} for the Sig ELC 820 Sparker using the correct repetition rate.

In this case, due to the very small estimated distances to Level A harassment thresholds for all marine mammal functional hearing groups, based on both SEL_{cum} and peak SPL (Table 5), and in consideration of the proposed mitigation measures, including marine mammal exclusion zones that greatly exceed the largest modeled isopleths to Level A harassment thresholds (see the Proposed Mitigation section for more detail) NMFS has determined that the likelihood of Level A take of marine mammals occurring as a result of the proposed survey is so low as to be discountable.

We note that because of some of the assumptions included in the methods used, isopleths produced may be overestimates to some degree. The acoustic sources proposed for use in Statoil's survey do not radiate sound equally in all directions but were designed instead to focus acoustic energy directly toward the sea floor. Therefore, the acoustic energy produced by these sources is not received equally in all directions around the source but is instead concentrated along some narrower plane depending on the beamwidth of the source. However, the calculated distances to isopleths do not account for this directionality of the sound source and are therefore conservative. For mobile sources, such as the proposed survey, the User Spreadsheet predicts the closest distance at which a stationary animal would not incur PTS if the sound source traveled by the animal in a straight line at a constant speed.

Marine Mammal Occurrence

In this section we provide the information about the presence, density, or group dynamics of marine mammals that will inform the take calculations.

The best available scientific information was considered in conducting marine mammal exposure estimates (the basis for estimating take). For cetacean species, densities calculated by Roberts *et al.* (2016) were used. The density data presented by Roberts *et al.* (2016) incorporates aerial and shipboard line-transect survey data from NMFS and from other organizations collected over the period 1992–2014. Roberts *et al.* (2016) modeled density from 8 physiographic and 16 dynamic oceanographic and biological covariates, and controlled for the influence of sea state, group size, availability bias, and perception bias on the probability of making a sighting. In general, NMFS considers the models produced by Roberts *et al.* (2016) to be the best available source of data regarding cetacean density in the Atlantic Ocean. More information, including the model results and

supplementary information for each model, is available online at: *seamap.env.duke.edu/models/Duke-EC-GOM-2015/.*

For the purposes of the take calculations, density data from Roberts *et al.* (2016) were mapped within the boundary of the survey area for each survey segment (*i.e.,* the Lease Area survey segment and the cable route area survey segment; See Figure 1 in the IHA application) using a geographic information system. Monthly density data for all cetacean species potentially taken by the proposed survey was available via Roberts *et al.* (2016). Monthly mean density within the survey area, as provided in Roberts *et al.* (2016), were averaged by season (*i.e.,* Winter (December, January, February), Spring (March, April, May), Summer (June, July, August), Fall (September, October, November)) to provide seasonal density estimates. For the Lease Area survey segment, the highest average seasonal density as reported by Roberts *et al.* (2016) was used based on the planned survey dates of March through July. For the cable route area survey segment, the average spring seasonal densities within the maximum survey area were used, given the planned start date and duration of the survey within the cable route area.

Systematic, offshore, at-sea survey data for pinnipeds are more limited than those for cetaceans. The best available information concerning pinniped densities in the proposed survey area is the U.S. Navy's Navy Operating Area (OPAREA) Density Estimates (NODEs) (DoN, 2007). These density models utilized vessel-based and aerial survey data collected by NMFS from 1998–2005 during broad-scale abundance studies. Modeling methodology is detailed in DoN (2007). The NODEs density estimates do not include density data for gray seals. For the purposes of this IHA, gray seal density in the project area was assumed to be the same as harbor seal density. Mid-Atlantic OPAREA Density Estimates (DoN, 2007) as reported for the spring and summer season were used to estimate pinniped densities for the purposes of the take calculations.

Take Calculation and Estimation

Here we describe how the information provided above is brought together to produce a quantitative take estimate.

In order to estimate the number of marine mammals predicted to be exposed to sound levels that would result in harassment, radial distances to predicted isopleths corresponding to harassment thresholds are calculated, as described above. Those distances are then used to calculate the area(s) around the HRG survey equipment predicted to be ensonified to sound levels that exceed harassment thresholds. The area estimated to be ensonified to relevant thresholds in a single day of the survey is then calculated, based on areas predicted to be ensonified around the HRG survey equipment and estimated trackline distance traveled per day by the survey vessel. The estimated daily vessel track line distance was determined using the estimated average speed of the vessel (4 kn) multiplied by 24 (to account for the 24 hour operational period of the survey). Using the maximum distance to the Level B harassment threshold of 1,166 m (Table 4) and estimated daily track line distance of approximately 177.8 km (110.5 mi), it was estimated that an area of 418.9 km^2 (161.7 mi^2) per day would be ensonified to the Level B harassment threshold (Table 6).

TABLE 6—ESTIMATED TRACK LINE DISTANCE PER DAY (KM) AND AREA (KM^2) ESTIMATED TO BE ENSONIFIED TO LEVEL B HARASSMENT THRESHOLD PER DAY

Estimated track line distance per day (km)	Estimated area ensonified to Level B harassment threshold per day (km^2)
177.8	418.9

The number of marine mammals expected to be incidentally taken per day is then calculated by estimating the number of each species predicted to occur within the daily ensonified area, using estimated marine mammal densities as described above. In this case, estimated marine mammal density values varied between the Lease Area and cable route corridor survey areas, therefore the estimated number of each species taken per survey day was calculated separately for the Lease Area survey area and cable route corridor survey area. Estimated numbers of each species taken per day are then multiplied by the number of survey days to generate an estimate of the total number of each species expected to be taken over the duration of the survey. In this case, as the estimated number of each species taken per day varied depending on survey area (Lease Area and cable route corridor), the number of each species taken per day in each respective survey area was multiplied by the number of survey days anticipated in each survey area (*i.e.,* 123 survey days in the Lease Area portion of the survey and 19 survey days in the cable route corridor portion of the survey) to get a total number of takes per species in each respective survey area. Total take numbers for each respective survey area (Lease Area and cable route corridor) were then rounded. These numbers were then summed to get a total number of each species expected to be taken over the duration of all surveys (Table 9).

As described above, due to the very small estimated distances to Level A harassment thresholds (based on both SEL_{cum} and peak SPL; Table 5), and in consideration of the proposed mitigation measures, the likelihood of the proposed survey resulting in take in the form of Level A harassment is considered so low as to be discountable, therefore we do not propose to authorize take of any marine mammals by Level A harassment. Proposed take numbers are shown in Tables 7, 8 and 9. Take numbers proposed for authorization (Tables 7, 8 and 9) are slightly different than those requested in the IHA application (Table 7 in the IHA application) due to slight differences in take calculation methods.

TABLE 7—NUMBERS OF POTENTIAL INCIDENTAL TAKE OF MARINE MAMMALS PROPOSED FOR AUTHORIZATION IN CABLE ROUTE CORRIDOR PORTION OF SURVEY

Species	Density (#/1,000 km^2)	Proposed Level A takes	Proposed Level B takes	Total proposed takes
North Atlantic right whale	0.04	0	3	3
Humpback whale	0.02	0	2	2
Fin whale	0.1	0	8	8
Sperm whale	0.01	0	1	1
Minke whale	0.03	0	2	2
Bottlenose dolphin	9.65	0	768	768

TABLE 7—NUMBERS OF POTENTIAL INCIDENTAL TAKE OF MARINE MAMMALS PROPOSED FOR AUTHORIZATION IN CABLE ROUTE CORRIDOR PORTION OF SURVEY—Continued

Species	Density (#/1,000 km^2)	Proposed Level A takes	Proposed Level B takes	Total proposed takes
Short-beaked common dolphin	1.42	0	113	113
Atlantic white-sided dolphin	0.32	0	25	25
Harbor porpoise	1.91	0	152	152
Harbor seal	4.87	0	388	388
Gray seal	4.87	0	388	388

TABLE 8—NUMBERS OF POTENTIAL INCIDENTAL TAKE OF MARINE MAMMALS PROPOSED FOR AUTHORIZATION IN LEASE AREA PORTION OF SURVEY

Species	Density (#/1,000 km^2)	Proposed Level A takes	Proposed Level B takes	Total proposed takes
North Atlantic right whale	0.03	0	15	15
Humpback whale	0.04	0	21	21
Fin whale	0.17	0	88	88
Sperm whale	0.01	0	5	5
Minke whale	0.07	0	36	36
Bottlenose dolphin	1.53	0	788	788
Short-beaked common dolphin	3.06	0	1,577	1,577
Atlantic white-sided dolphin	0.78	0	402	402
Harbor porpoise	4.09	0	2,107	2,107
Harbor seal	4.87	0	2,509	2,509
Gray seal	4.87	0	2,509	2,509

TABLE 9—TOTAL NUMBERS OF POTENTIAL INCIDENTAL TAKE OF MARINE MAMMALS PROPOSED FOR AUTHORIZATION AND PROPOSED TAKES AS A PERCENTAGE OF POPULATION

Species	Proposed Level A takes	Proposed Level B takes	Total proposed takes	Total proposed takes as a percentage of population
North Atlantic right whale	0	18	18	4.1
Humpback whale	0	23	23	2.8
Fin whale	0	96	96	5.9
Sperm whale	0	6	6	0.3
Minke whale	0	38	38	1.5
Bottlenose dolphin	0	1,556	1,556	2.0
Short-beaked common dolphin	0	1,690	1,690	2.4
Atlantic white-sided dolphin	0	427	427	0.9
Harbor porpoise	0	2,259	2,259	2.8
Harbor seal	0	2,897	2,897	3.8
Gray seal	0	2,897	2,897	0.6

Proposed Mitigation

In order to issue an IHA 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 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 (latter not applicable for this action). NMFS regulations require applicants for incidental take authorizations to include information about the availability and feasibility (economic and technological) of equipment, methods, and manner of conducting such activity or other means of effecting the least practicable adverse impact upon the affected species or stocks and their habitat (50 CFR 216.104(a)(11)).

In evaluating how mitigation may or may not be appropriate to ensure the least practicable adverse impact on species or stocks and their habitat, as well as subsistence uses where applicable, we carefully consider two primary factors:

(1) The manner in which, and the degree to which, the successful implementation of the measure(s) is expected to reduce impacts to marine mammals, marine mammal species or stocks, and their habitat. This considers the nature of the potential adverse impact being mitigated (likelihood, scope, range). It further considers the likelihood that the measure will be effective if implemented (probability of accomplishing the mitigating result if implemented as planned) the likelihood of effective implementation (probability implemented as planned), and;

(2) The practicability of the measures for applicant implementation, which may consider such things as relative cost and impact on operations.

Proposed Mitigation Measures

With NMFS' input during the application process, and as per the BOEM Lease, Statoil is proposing the following mitigation measures during the proposed marine site characterization surveys.

Marine Mammal Exclusion and Watch Zones

As required in the BOEM lease, marine mammal exclusion zones (EZ) will be established around the HRG survey equipment and monitored by protected species observers (PSO) during HRG surveys as follows:

- 50 m EZ for pinnipeds and delphinids (except harbor porpoises);
- 100 m EZ for large whales including sperm whales and mysticetes (except North Atlantic right whales) and harbor porpoises;
- 500 m EZ for North Atlantic right whales.

In addition, PSOs will visually monitor to the extent of the Level B zone (1,166 m), or as far as possible if the extent of the Level B zone is not fully visible.

Statoil intends to submit a sound source verification report showing sound levels associated with HRG survey equipment. If results of the sound source verification report indicate that actual distances to isopleths corresponding to harassment thresholds are larger than the EZs and/or Level B monitoring zones, NMFS may modify the zone(s) accordingly. If results of source verification indicate that actual distances to isopleths corresponding to harassment thresholds are less than the EZs and/or Level B monitoring zones, Statoil has indicated an intention to request modification of the zone(s), as appropriate. NMFS would review any such request and may modify the zone(s) depending on review of the report on source verification. Any such modification may be superseded by EZs required by BOEM.

Visual Monitoring

As per the BOEM lease, visual and acoustic monitoring of the established exclusion and monitoring zones will be performed by qualified and NMFS-approved PSOs. It will be the responsibility of the Lead PSO on duty to communicate the presence of marine mammals as well as to communicate and enforce the action(s) that are necessary to ensure mitigation and monitoring requirements are implemented as appropriate. PSOs will be equipped with binoculars and have the ability to estimate distances to marine mammals located in proximity to the vessel and/or exclusion zone using range finders. Reticulated binoculars will also be available to PSOs for use as appropriate based on conditions and visibility to support the siting and monitoring of marine species. Digital single-lens reflex camera equipment will be used to record sightings and verify species identification. During surveys conducted at night, night-vision equipment and infrared technology will be available for PSO use, and passive acoustic monitoring (PAM; described below) will be used.

Pre-Clearance of the Exclusion Zone

For all HRG survey activities, Statoil would implement a 30-minute pre-clearance period of the relevant EZs prior to the initiation of HRG survey equipment (as required by BOEM). During this period the EZs would be monitored by PSOs, using the appropriate visual technology for a 30-minute period. HRG survey equipment would not be initiated if marine mammals are observed within or approaching the relevant EZs during this pre-clearance period. If a marine mammal were observed within or approaching the relevant EZ during the pre-clearance period, ramp-up would not begin until the animal(s) has been observed exiting the EZ or until an additional time period has elapsed with no further sighting of the animal (15 minutes for small delphinoid cetaceans and pinnipeds and 30 minutes for all other species). This pre-clearance requirement would include small delphinoids that approach the vessel (*e.g.,* bow ride). PSOs would also continue to monitor the zone for 30 minutes after survey equipment is shut down or survey activity has concluded.

Passive Acoustic Monitoring

As required in the BOEM lease, PAM would be required during HRG surveys conducted at night. In addition, PAM systems would be employed during daylight hours as needed to support system calibration and PSO and PAM team coordination, as well as in support of efforts to evaluate the effectiveness of the various mitigation techniques (*i.e.,* visual observations during day and night, compared to the PAM detections/operations). PAM operators will also be on call as necessary during daytime operations should visual observations become impaired. BOEM's lease stipulations require the use of PAM during nighttime operations. However, these requirements do not require that any mitigation action be taken upon acoustic detection of marine mammals. Given the range of species that could occur in the survey area, the PAM system will consist of an array of hydrophones with both broadband (sampling mid-range frequencies of 2 kHz to 200 kHz) and at least one low-frequency hydrophone (sampling range frequencies of 75 Hz to 30 kHz). The PAM operator would monitor the hydrophone signals in real time both aurally (using headphones) and visually (via the monitor screen displays). PAM operator would communicate detections to the Lead PSO on duty who will ensure the implementation of the appropriate mitigation procedures. A mitigation and monitoring communications flow diagram has been included as Appendix C of the IHA application.

Ramp-Up of Survey Equipment

As required in the BOEM lease, where technically feasible, a ramp-up procedure would be used for HRG survey equipment capable of adjusting energy levels at the start or re-start of HRG survey activities. The ramp-up procedure would be used at the beginning of HRG survey activities in order to provide additional protection to marine mammals near the survey area by allowing them to vacate the area prior to the commencement of survey equipment use at full energy. A ramp-up would begin with the power of the smallest acoustic equipment at its lowest practical power output appropriate for the survey. When technically feasible the power would then be gradually turned up and other acoustic sources added in way such that the source level would increase gradually.

Shutdown Procedures

As required in the BOEM lease, if a marine mammal is observed within or approaching the relevant EZ (as described above) an immediate shutdown of the survey equipment is required. Subsequent restart of the survey equipment may only occur after the animal(s) has either been observed exiting the relevant EZ or until an additional time period has elapsed with no further sighting of the animal (15 minutes for delphinoid cetaceans and pinnipeds and 30 minutes for all other species). HRG survey equipment may be allowed to continue operating if small delphinids voluntarily approach the vessel (*e.g.,* to bow ride) when HRG survey equipment is operating.

As required in the BOEM lease, if the HRG equipment shuts down for reasons other than mitigation (*i.e.,* mechanical or electronic failure) resulting in the cessation of the survey equipment for a period greater than 20 minutes, a 30

minute pre-clearance period (as described above) would precede the restart of the HRG survey equipment. If the pause is less than less than 20 minutes, the equipment may be restarted as soon as practicable at its full operational level only if visual surveys were continued diligently throughout the silent period and the EZs remained clear of marine mammals during that entire period. If visual surveys were not continued diligently during the pause of 20 minutes or less, a 30-minute pre-clearance period (as described above) would precede the re-start of the HRG survey equipment. Following a shutdown, HRG survey equipment may be restarted following pre-clearance of the zones as described above.

Vessel Strike Avoidance

Statoil will ensure that vessel operators and crew maintain a vigilant watch for cetaceans and pinnipeds by slowing down or stopping the vessel to avoid striking marine mammals. Survey vessel crew members responsible for navigation duties will receive site-specific training on marine mammal sighting/reporting and vessel strike avoidance measures. Vessel strike avoidance measures will include, but are not limited to, the following, as required in the BOEM lease, except under circumstances when complying with these requirements would put the safety of the vessel or crew at risk:

- All vessel operators and crew will maintain vigilant watch for cetaceans and pinnipeds, and slow down or stop their vessel to avoid striking these protected species;
- All vessel operators will comply with 10 knot (18.5 km/hr) or less speed restrictions in any SMA per NOAA guidance. This applies to all vessels operating at any time of year;
- All vessel operators will reduce vessel speed to 10 knots (18.5 km/hr) or less when any large whale, any mother/calf pairs, pods, or large assemblages of non-delphinoid cetaceans are observed near (within 100 m [330 ft]) an underway vessel;
- All survey vessels will maintain a separation distance of 500 m (1640 ft) or greater from any sighted North Atlantic right whale;
- If underway, vessels must steer a course away from any sighted North Atlantic right whale at 10 knots (18.5 km/hr) or less until the 500 m (1640 ft) minimum separation distance has been established. If a North Atlantic right whale is sighted in a vessel's path, or within 100 m (330 ft) to an underway vessel, the underway vessel must reduce speed and shift the engine to neutral. Engines will not be engaged until the North Atlantic right whale has moved outside of the vessel's path and beyond 100 m. If stationary, the vessel must not engage engines until the North Atlantic right whale has moved beyond 100 m;
- All vessels will maintain a separation distance of 100 m (330 ft) or greater from any sighted non-delphinoid cetacean. If sighted, the vessel underway must reduce speed and shift the engine to neutral, and must not engage the engines until the non-delphinoid cetacean has moved outside of the vessel's path and beyond 100 m. If a survey vessel is stationary, the vessel will not engage engines until the non-delphinoid cetacean has moved out of the vessel's path and beyond 100 m;
- All vessels will maintain a separation distance of 50 m (164 ft) or greater from any sighted delphinoid cetacean. Any vessel underway remain parallel to a sighted delphinoid cetacean's course whenever possible, and avoid excessive speed or abrupt changes in direction. Any vessel underway reduces vessel speed to 10 knots (18.5 km/hr) or less when pods (including mother/calf pairs) or large assemblages of delphinoid cetaceans are observed. Vessels may not adjust course and speed until the delphinoid cetaceans have moved beyond 50 m and/or the abeam of the underway vessel;
- All vessels underway will not divert or alter course in order to approach any whale, delphinoid cetacean, or pinniped. Any vessel underway will avoid excessive speed or abrupt changes in direction to avoid injury to the sighted cetacean or pinniped; and
- All vessels will maintain a separation distance of 50 m (164 ft) or greater from any sighted pinniped.

The training program would be provided to NMFS for review and approval prior to the start of surveys. Confirmation of the training and understanding of the requirements will be documented on a training course log sheet. Signing the log sheet will certify that the crew members understand and will comply with the necessary requirements throughout the survey event.

Seasonal Operating Requirements

Between watch shifts, members of the monitoring team will consult NMFS' North Atlantic right whale reporting systems for the presence of North Atlantic right whales throughout survey operations. However, the proposed survey activities will occur outside of the SMA located off the coasts of New Jersey and New York. Members of the monitoring team will monitor the NMFS North Atlantic right whale reporting systems for the establishment of a Dynamic Management Area (DMA). If NMFS should establish a DMA in the survey area, within 24 hours of the establishment of the DMA Statoil will work with NMFS to shut down and/or alter the survey activities to avoid the DMA.

The proposed mitigation measures are designed to avoid the already low potential for injury in addition to some Level B harassment, and to minimize the potential for vessel strikes. There are no known marine mammal feeding areas, rookeries, or mating grounds in the survey area that would otherwise potentially warrant increased mitigation measures for marine mammals or their habitat (or both). The proposed survey would occur in an area that has been identified as a biologically important area for migration for North Atlantic right whales. However, given the small spatial extent of the survey area relative to the substantially larger spatial extent of the right whale migratory area, the survey is not expected to appreciably reduce migratory habitat nor to negatively impact the migration of North Atlantic right whales, thus mitigation to address the proposed survey's occurrence in North Atlantic right whale migratory habitat is not warranted. Further, we believe the proposed mitigation measures are practicable for the applicant to implement.

Based on our evaluation of the applicant's proposed measures, NMFS has preliminarily determined that the proposed mitigation measures provide the means of effecting the least practicable impact on the affected species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance.

Proposed Monitoring and Reporting

In order to issue an IHA 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 authorizations 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 proposed action area. Effective reporting is critical both to compliance as well as ensuring that the most value is obtained from the required monitoring.

Monitoring and reporting requirements prescribed by NMFS should contribute to improved understanding of one or more of the following:

- Occurrence of marine mammal species or stocks in the area in which take is anticipated (*e.g.,* presence, abundance, distribution, density);
- Nature, scope, or context of likely marine mammal exposure to potential stressors/impacts (individual or cumulative, acute or chronic), through better understanding of: (1) Action or environment (*e.g.,* source characterization, propagation, ambient noise); (2) affected species (*e.g.,* life history, dive patterns); (3) co-occurrence of marine mammal species with the action; or (4) biological or behavioral context of exposure (*e.g.,* age, calving or feeding areas);
- Individual marine mammal responses (behavioral or physiological) to acoustic stressors (acute, chronic, or cumulative), other stressors, or cumulative impacts from multiple stressors;
- How anticipated responses to stressors impact either: (1) Long-term fitness and survival of individual marine mammals; or (2) populations, species, or stocks;
- Effects on marine mammal habitat (*e.g.,* marine mammal prey species, acoustic habitat, or other important physical components of marine mammal habitat); and
- Mitigation and monitoring effectiveness.

Proposed Monitoring Measures

As described above, visual monitoring of the EZs and monitoring zone will be performed by qualified and NMFS-approved PSOs. Observer qualifications will include direct field experience on a marine mammal observation vessel and/or aerial surveys and completion of a PSO and/or PAM training program, as appropriate. As proposed by the applicant and required by BOEM, an observer team comprising a minimum of four NMFS-approved PSOs and a minimum of two certified PAM operator(s), operating in shifts, will be employed by Statoil during the proposed surveys. PSOs and PAM operators will work in shifts such that no one monitor will work more than 4 consecutive hours without a 2 hour break or longer than 12 hours during any 24-hour period. During daylight hours the PSOs will rotate in shifts of one on and three off, while during nighttime operations PSOs will work in pairs (per BOEM's requirements?). The PAM operators will also be on call as necessary during daytime operations should visual observations become impaired. Each PSO will monitor 360 degrees of the field of vision. Statoil will provide resumes of all proposed PSOs and PAM operators (including alternates) to NMFS for review and approval at least 45 days prior to the start of survey operations.

Also as described above, PSOs will be equipped with binoculars and have the ability to estimate distances to marine mammals located in proximity to the vessel and/or exclusion zone using range finders. Reticulated binoculars will also be available to PSOs for use as appropriate based on conditions and visibility to support the siting and monitoring of marine species. Digital single-lens reflex camera equipment will be used to record sightings and verify species identification. During night operations, PAM, night-vision equipment, and infrared technology will be used to increase the ability to detect marine mammals. Position data will be recorded using hand-held or vessel global positioning system (GPS) units for each sighting. Observations will take place from the highest available vantage point on the survey vessel. General 360-degree scanning will occur during the monitoring periods, and target scanning by the PSO will occur when alerted of a marine mammal presence.

Data on all PAM/PSO observations will be recorded based on standard PSO collection requirements. This will include dates and locations of survey operations; time of observation, location and weather; details of the sightings (*e.g.,* species, age classification [if known], numbers, behavior); and details of any observed ''taking'' (behavioral disturbances). The data sheet will be provided to NMFS for review and approval prior to the start of survey activities. In addition, prior to initiation of survey work, all crew members will undergo environmental training, a component of which will focus on the procedures for sighting and protection of marine mammals. A briefing will also be conducted between the survey supervisors and crews, the PSOs, and Statoil. The purpose of the briefing will be to establish responsibilities of each party, define the chains of command, discuss communication procedures, provide an overview of monitoring purposes, and review operational procedures.

Acoustic Field Verification—As described above, field verification of sound levels associated with survey equipment will be conducted. Results of the field verification may be used to request modification of the EZs and monitoring zones. The details of the applicant's plan for field verification of sound levels are provided as Appendix B to the IHA application.

Proposed Reporting Measures

Statoil will provide the following reports as necessary during survey activities:

- The Applicant will contact NMFS within 24 hours of the commencement of survey activities and again within 24 hours of the completion of the activity.
- *Notification of Injured or Dead Marine Mammals*—In the unanticipated event that the specified HRG and geotechnical activities lead to an injury of a marine mammal (Level A harassment) or mortality (*e.g.,* ship-strike, gear interaction, and/or entanglement), Statoil would immediately cease the specified activities and report the incident to the Chief of the Permits and Conservation Division, Office of Protected Resources and the NMFS Greater Atlantic Stranding Coordinator. The report would include the following information:
  - Time, date, and location (latitude/longitude) of the incident;
  - Name and type of vessel involved;
  - 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 all marine mammal observations in the 24 hours preceding the incident;
  - Species identification or description of the animal(s) involved;
  - Fate of the animal(s); and
  - Photographs or video footage of the animal(s) (if equipment is available).

Activities would not resume until NMFS is able to review the circumstances of the event. NMFS would work with Statoil to minimize reoccurrence of such an event in the future. Statoil would not resume activities until notified by NMFS.

In the event that Statoil discovers an injured or dead marine mammal and 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), Statoil would immediately report the incident to the Chief of the Permits and Conservation Division, Office of Protected Resources and the NMFS Greater Atlantic Stranding Coordinator. The report would include the same information identified in the paragraph above. Activities would be able to continue while NMFS reviews the

circumstances of the incident. NMFS would work with Statoil to determine if modifications in the activities are appropriate.

In the event that Statoil discovers an injured or dead marine mammal and determines that the injury or death is not associated with or related to the activities authorized in the IHA (*e.g.,* previously wounded animal, carcass with moderate to advanced decomposition, or scavenger damage), Statoil would report the incident to the Chief of the Permits and Conservation Division, Office of Protected Resources, and the NMFS Greater Atlantic Regional Stranding Coordinator, within 24 hours of the discovery. Statoil would provide photographs or video footage (if available) or other documentation of the stranded animal sighting to NMFS. Statoil may continue its operations under such a case.

- Within 90 days after completion of survey activities, a final technical report will be provided to NMFS that fully documents the methods and monitoring protocols, summarizes the data recorded during monitoring, estimates the number of marine mammals estimated to have been taken during survey activities, and provides an interpretation of the results and effectiveness of all mitigation and monitoring. Any recommendations made by NMFS must be addressed in the final report prior to acceptance by NMFS.

Negligible Impact Analysis and Determination

NMFS has defined negligible impact 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. 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 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 harassment, NMFS considers other factors, such as the likely nature of any responses (*e.g.,* intensity, duration), the context of any responses (*e.g.,* critical reproductive time or location, migration), as well as effects on habitat, and the likely effectiveness of the mitigation. We also assess the number, intensity, and context of estimated takes by evaluating this information relative to population status. Consistent with the 1989 preamble for NMFS's implementing regulations (54 FR 40338; September 29, 1989), the impacts from other past and ongoing anthropogenic activities are incorporated into this analysis via their impacts on the environmental baseline (*e.g.,* as reflected in the regulatory status of the species, population size and growth rate where known, ongoing sources of human-caused mortality, or ambient noise levels).

To avoid repetition, our analysis applies to all the species listed in Table 9, given that NMFS expects the anticipated effects of the proposed survey to be similar in nature.

NMFS does not anticipate that serious injury or mortality would occur as a result of Statoil's proposed survey, even in the absence of proposed mitigation. Thus the proposed authorization does not authorize any serious injury or mortality. As discussed in the *Potential Effects* section, non-auditory physical effects and vessel strike are not expected to occur.

We expect that all potential takes would be in the form of short-term Level B behavioral harassment in the form of temporary avoidance of the area or decreased foraging (if such activity were occurring), reactions that are considered to be of low severity and with no lasting biological consequences (*e.g.,* Southall *et al.,* 2007).

Potential impacts to marine mammal habitat were discussed previously in this document (see *Potential Effects of the Specified Activity on Marine Mammals and their Habitat*). Marine mammal habitat may be impacted by elevated sound levels, but these impacts would be temporary. In addition to being temporary and short in overall duration, the acoustic footprint of the proposed survey is small relative to the overall distribution of the animals in the area and their use of the area. Feeding behavior is not likely to be significantly impacted, as no areas of biological significance for marine mammal feeding are known to exist in the survey area. Prey species are mobile and are broadly distributed throughout the project area; therefore, marine mammals that may be temporarily displaced during survey activities are expected to be able to resume foraging once they have moved away from areas with disturbing levels of underwater noise. Because of the temporary nature of the disturbance, the availability of similar habitat and resources in the surrounding area, and the lack of important or unique marine mammal feeding habitat, the impacts to marine mammals and the food sources that they utilize are not expected to cause significant or long-term consequences for individual marine mammals or their populations. In addition, there are no rookeries or mating or calving areas known to be biologically important to marine mammals within the proposed project area. The proposed survey area is within a biologically important migratory area for North Atlantic right whales (effective March-April and November-December) that extends from Massachusetts to Florida (LaBrecque, *et al.,* 2015). Off the coast of New York, this biologically important migratory area extends from the coast to the shelf break. Due to the fact that that the proposed survey is temporary and short in overall duration, and the fact that the spatial acoustic footprint of the proposed survey is very small relative to the spatial extent of the available migratory habitat in the area, right whale migration is not expected to be impacted by the proposed survey.

The proposed mitigation measures are expected to reduce the number and/or severity of takes by (1) giving animals the opportunity to move away from the sound source before HRG survey equipment reaches full energy; (2) preventing animals from being exposed to sound levels that may otherwise result in injury. Additional vessel strike avoidance requirements will further mitigate potential impacts to marine mammals during vessel transit to and within the survey area.

NMFS concludes that exposures to marine mammal species and stocks due to Statoil's proposed survey would result in only short-term (temporary and short in duration) effects to individuals exposed. Marine mammals may temporarily avoid the immediate area, but are not expected to permanently abandon the area. Major shifts in habitat use, distribution, or foraging success are not expected. NMFS does not anticipate the proposed take estimates to impact annual rates of recruitment or survival.

In summary and as described above, the following factors primarily support our preliminary determination that the impacts resulting from this activity are not expected to adversely affect the species or stock through effects on annual rates of recruitment or survival:

- No mortality, serious injury, or Level A harassment is anticipated or authorized;
- The anticipated impacts of the proposed activity on marine mammals would be temporary behavioral changes due to avoidance of the area around the survey vessel;
- The availability of alternate areas of similar habitat value for marine mammals to temporarily vacate the survey area during the proposed survey to avoid exposure to sounds from the activity;

• The proposed project area does not contain areas of significance for feeding, mating or calving;

• Effects on species that serve as prey species for marine mammals from the proposed survey are not expected;

• The proposed mitigation measures, including visual and acoustic monitoring and shutdowns, are expected to minimize potential impacts to marine mammals.

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 proposed monitoring and mitigation measures, NMFS preliminarily finds that the total marine mammal take from the proposed activity will have a negligible impact on all affected marine mammal species or stocks.

Small Numbers

As noted above, only small numbers of incidental take may be authorized under Section 101(a)(5)(D) of the MMPA for specified activities other than military readiness activities. The MMPA does not define small numbers and so, in practice, where estimated numbers are available, NMFS compares the number of individuals taken to the most appropriate estimation of abundance of the relevant species or stock in our determination of whether an authorization is limited to small numbers of marine mammals. Additionally, other qualitative factors may be considered in the analysis, such as the temporal or spatial scale of the activities.

The numbers of marine mammals that we propose for authorization to be taken, for all species and stocks, would be considered small relative to the relevant stocks or populations (less than 6 percent of each species and stock). See Table 9. Based on the analysis contained herein of the proposed activity (including the proposed mitigation and monitoring measures) and the anticipated take of marine mammals, NMFS preliminarily finds that small numbers of marine mammals will be taken relative to the population size of the affected species or stocks.

Unmitigable Adverse Impact Analysis and Determination

There are no relevant subsistence uses of the affected marine mammal stocks or species implicated 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

Section 7(a)(2) of the Endangered Species Act of 1973 (16 U.S.C. 1531 *et seq.*) requires that each Federal agency insure that any action it authorizes, funds, or carries out 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. To ensure ESA compliance for the issuance of IHAs, NMFS consults internally, in this case with the NMFS Greater Atlantic Regional Fisheries Office (GARFO), whenever we propose to authorize take for endangered or threatened species.

The NMFS Office of Protected Resources is proposing to authorize the incidental take of three species of marine mammals which are listed under the ESA: The North Atlantic right, fin, and sperm whale. BOEM consulted with NMFS GARFO under section 7 of the ESA on commercial wind lease issuance and site assessment activities on the Atlantic Outer Continental Shelf in Massachusetts, Rhode Island, New York and New Jersey Wind Energy Areas. NMFS GARFO issued a Biological Opinion concluding that these activities may adversely affect but are not likely to jeopardize the continued existence of the North Atlantic right, fin, and sperm whale. The Biological Opinion can be found online at: *www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-take-authorizations-other-energy-activities-renewable.* NMFS will conclude the ESA section 7 consultation prior to reaching a determination regarding the proposed issuance of the authorization. If the IHA is issued, the Biological Opinion may be amended to include an incidental take statement for these marine mammal species, as appropriate.

Proposed Authorization

As a result of these preliminary determinations, NMFS proposes to issue an IHA to Statoil for conducting marine site assessment surveys offshore New York and along potential submarine cable routes from the date of issuance for a period of one year, provided the previously mentioned mitigation, monitoring, and reporting requirements are incorporated. This section contains a draft of the IHA itself. The wording contained in this section is proposed for inclusion in the IHA (if issued).

1. This IHA is valid for a period of one year from the date of issuance.

2. This IHA is valid only for marine site characterization survey activity, as specified in the IHA application, in the Atlantic Ocean.

3. General Conditions.

(a) A copy of this IHA must be in the possession of Statoil Wind U.S. LLC (Statoil), the vessel operator and other relevant personnel, the lead PSO, and any other relevant designees of Statoil operating under the authority of this IHA.

(b) The species authorized for taking are listed in Table 9. The taking, by Level B harassment only, is limited to the species and numbers listed in Table 9. Any taking of species not listed in Table 9, or exceeding the authorized amounts listed in Table 9, is prohibited and may result in the modification, suspension, or revocation of this IHA.

(c) The taking by injury, serious injury or death of any species of marine mammal is prohibited and may result in the modification, suspension, or revocation of this IHA.

(d) Statoil shall ensure that the vessel operator and other relevant vessel personnel are briefed on all responsibilities, communication procedures, marine mammal monitoring protocols, operational procedures, and IHA requirements prior to the start of survey activity, and when relevant new personnel join the survey operations.

4. Mitigation Requirements—the holder of this Authorization is required to implement the following mitigation measures:

(a) Statoil shall use at least four (4) NMFS-approved protected species observers (PSOs) during HRG surveys. The PSOs must have no tasks other than to conduct observational effort, record observational data, and communicate with and instruct relevant vessel crew with regard to the presence of marine mammals and mitigation requirements. PSO resumes shall be provided to NMFS for approval prior to commencement of the survey.

(b) Visual monitoring must begin no less than 30 minutes prior to initiation of survey equipment and must continue until 30 minutes after use of survey equipment ceases.

(c) Exclusion Zones and Watch Zone—PSOs shall establish and monitor marine mammal Exclusion Zones and Watch Zones. The Watch Zone shall represent the extent of the Level B harassment zone (1,166 m) or, as far as possible if the extent of the Level B zone is not fully visible. The Exclusion Zones are as follows:

(i) a 50 m Exclusion Zone for pinnipeds and delphinids (except harbor porpoises);

(ii) a 100 m Exclusion Zone for large whales including sperm whales and

mysticetes (except North Atlantic right whales) and harbor porpoises;

(iii) a 500 m Exclusion Zone for North Atlantic right whales.

(d) Shutdown requirements—If a marine mammal is observed within, entering, or approaching the relevant Exclusion Zones as described under 4(c) while geophysical survey equipment is operational, the geophysical survey equipment must be immediately shut down.

(i) Any PSO on duty has the authority to call for shutdown of survey equipment. When there is certainty regarding the need for mitigation action on the basis of visual detection, the relevant PSO(s) must call for such action immediately.

(ii) When a shutdown is called for by a PSO, the shutdown must occur and any dispute resolved only following shutdown.

(iii) The shutdown requirement is waived for small delphinoids that approach the vessel (*e.g.,* bow ride).

(iv) Upon implementation of a shutdown, survey equipment may be reactivated when all marine mammals have been confirmed by visual observation to have exited the relevant Exclusion Zone or an additional time period has elapsed with no further sighting of the animal that triggered the shutdown (15 minutes for small delphinoid cetaceans and pinnipeds and 30 minutes for all other species).

(v) If geophysical equipment shuts down for reasons other than mitigation (*i.e.,* mechanical or electronic failure) resulting in the cessation of the survey equipment for a period of less than 20 minutes, the equipment may be restarted as soon as practicable if visual surveys were continued diligently throughout the silent period and the relevant Exclusion Zones are confirmed by PSOs to have remained clear of marine mammals during the entire 20 minute period. If visual surveys were not continued diligently during the pause of 20 minutes or less, a 30 minute pre-clearance period shall precede the restart of the geophysical survey equipment as described in 4(e). If the period of shutdown for reasons other than mitigation is greater than 20 minutes, a pre-clearance period shall precede the restart of the geophysical survey equipment as described in 4(e).

(e) Pre-clearance observation—30 minutes of pre-clearance observation shall be conducted prior to initiation of geophysical survey equipment. geophysical survey equipment shall not be initiated if marine mammals are observed within or approaching the relevant Exclusion Zones as described under 4(d) during the pre-clearance period. If a marine mammal is observed within or approaching the relevant Exclusion Zone during the pre-clearance period, geophysical survey equipment shall not be initiated until the animal(s) is confirmed by visual observation to have exited the relevant Exclusion Zone or until an additional time period has elapsed with no further sighting of the animal (15 minutes for small delphinoid cetaceans and pinnipeds and 30 minutes for all other species).

(f) Ramp-up—when technically feasible, survey equipment shall be ramped up at the start or re-start of survey activities. Ramp-up will begin with the power of the smallest acoustic equipment at its lowest practical power output appropriate for the survey. When technically feasible the power will then be gradually turned up and other acoustic sources added in way such that the source level would increase gradually.

(g) Vessel Strike Avoidance—Vessel operator and crew must maintain a vigilant watch for all marine mammals and slow down or stop the vessel or alter course, as appropriate, to avoid striking any marine mammal, unless such action represents a human safety concern. Survey vessel crew members responsible for navigation duties shall receive site-specific training on marine mammal sighting/reporting and vessel strike avoidance measures. Vessel strike avoidance measures shall include the following, except under circumstances when complying with these requirements would put the safety of the vessel or crew at risk:

(i) The vessel operator and crew shall maintain vigilant watch for cetaceans and pinnipeds, and slow down or stop the vessel to avoid striking marine mammals;

(ii) The vessel operator will reduce vessel speed to 10 knots (18.5 km/hr) or less when any large whale, any mother/calf pairs, whale or dolphin pods, or larger assemblages of non-delphinoid cetaceans are observed near (within 100 m (330 ft)) an underway vessel;

(iii) The survey vessel will maintain a separation distance of 500 m (1640 ft) or greater from any sighted North Atlantic right whale;

(iv) If underway, the vessel must steer a course away from any sighted North Atlantic right whale at 10 knots (18.5 km/hr) or less until the 500 m (1640 ft) minimum separation distance has been established. If a North Atlantic right whale is sighted in a vessel's path, or within 100 m (330 ft) to an underway vessel, the underway vessel must reduce speed and shift the engine to neutral. Engines will not be engaged until the North Atlantic right whale has moved outside of the vessel's path and beyond 100 m. If stationary, the vessel must not engage engines until the North Atlantic right whale has moved beyond 100 m;

(v) The vessel will maintain a separation distance of 100 m (330 ft) or greater from any sighted non-delphinoid cetacean. If sighted, the vessel underway must reduce speed and shift the engine to neutral, and must not engage the engines until the non-delphinoid cetacean has moved outside of the vessel's path and beyond 100 m. If a survey vessel is stationary, the vessel will not engage engines until the non-delphinoid cetacean has moved out of the vessel's path and beyond 100 m;

(vi) The vessel will maintain a separation distance of 50 m (164 ft) or greater from any sighted delphinoid cetacean. Any vessel underway remain parallel to a sighted delphinoid cetacean's course whenever possible, and avoid excessive speed or abrupt changes in direction. Any vessel underway reduces vessel speed to 10 knots (18.5 km/hr) or less when pods (including mother/calf pairs) or large assemblages of delphinoid cetaceans are observed. Vessels may not adjust course and speed until the delphinoid cetaceans have moved beyond 50 m and/or the abeam of the underway vessel;

(vii) All vessels underway will not divert or alter course in order to approach any whale, delphinoid cetacean, or pinniped. Any vessel underway will avoid excessive speed or abrupt changes in direction to avoid injury to the sighted cetacean or pinniped; and

(viii) All vessels will maintain a separation distance of 50 m (164 ft) or greater from any sighted pinniped.

(ix) The vessel operator will comply with 10 knot (18.5 km/hr) or less speed restrictions in any Seasonal Management Area per NMFS guidance.

(x) If NMFS should establish a Dynamic Management Area (DMA) in the area of the survey, within 24 hours of the establishment of the DMA Statoil shall work with NMFS to shut down and/or alter survey activities to avoid the DMA as appropriate.

5. Monitoring Requirements—The Holder of this Authorization is required to conduct marine mammal visual monitoring and passive acoustic monitoring (PAM) during geophysical survey activity. Monitoring shall be conducted in accordance with the following requirements:

(a) A minimum of four NMFS-approved PSOs and a minimum of two certified (PAM) operator(s), operating in shifts, shall be employed by Statoil during geophysical surveys.

(b) Observations shall take place from the highest available vantage point on the survey vessel. General 360-degree scanning shall occur during the monitoring periods, and target scanning by PSOs will occur when alerted of a marine mammal presence.

(c) PSOs shall be equipped with binoculars and have the ability to estimate distances to marine mammals located in proximity to the vessel and/or Exclusion Zones using range finders. Reticulated binoculars will also be available to PSOs for use as appropriate based on conditions and visibility to support the sighting and monitoring of marine species. Digital single-lens reflex camera equipment will be used to record sightings and verify species identification.

(d) PAM shall be used during nighttime geophysical survey operations. The PAM system shall consist of an array of hydrophones with both broadband (sampling mid-range frequencies of 2 kHz to 200 kHz) and at least one low-frequency hydrophone (sampling range frequencies of 75 Hz to 30 kHz). PAM operators shall communicate detections or vocalizations to the Lead PSO on duty who shall ensure the implementation of the appropriate mitigation measure.

(e) During night surveys, night-vision equipment and infrared technology shall be used in addition to PAM. Specifications for night-vision and infrared equipment shall be provided to NMFS for review and acceptance prior to start of surveys.

(f) PSOs and PAM operators shall work in shifts such that no one monitor will work more than 4 consecutive hours without a 2 hour break or longer than 12 hours during any 24-hour period. During daylight hours the PSOs shall rotate in shifts of 1 on and 3 off, and while during nighttime operations PSOs shall work in pairs.

(g) PAM operators shall also be on call as necessary during daytime operations should visual observations become impaired.

(h) Position data shall be recorded using hand-held or vessel global positioning system (GPS) units for each sighting.

(i) A briefing shall be conducted between survey supervisors and crews, PSOs, and Statoil to establish responsibilities of each party, define chains of command, discuss communication procedures, provide an overview of monitoring purposes, and review operational procedures.

(j) Statoil shall provide resumes of all proposed PSOs and PAM operators (including alternates) to NMFS for review and approval at least 45 days prior to the start of survey operations.

(k) PSO Qualifications shall include direct field experience on a marine mammal observation vessel and/or aerial surveys.

(a) Data on all PAM/PSO observations shall be recorded based on standard PSO collection requirements. PSOs must use standardized data forms, whether hard copy or electronic. The following information shall be reported:

(i) PSO names and affiliations.

(ii) Dates of departures and returns to port with port name.

(iii) Dates and times (Greenwich Mean Time) of survey effort and times corresponding with PSO effort.

(iv) Vessel location (latitude/longitude) when survey effort begins and ends; vessel location at beginning and end of visual PSO duty shifts.

(v) Vessel heading and speed at beginning and end of visual PSO duty shifts and upon any line change.

(vi) Environmental conditions while on visual survey (at beginning and end of PSO shift and whenever conditions change significantly), including wind speed and direction, Beaufort sea state, Beaufort wind force, swell height, weather conditions, cloud cover, sun glare, and overall visibility to the horizon.

(vii) Factors that may be contributing to impaired observations during each PSO shift change or as needed as environmental conditions change (*e.g.,* vessel traffic, equipment malfunctions).

(viii) Survey activity information, such as acoustic source power output while in operation, number and volume of airguns operating in the array, tow depth of the array, and any other notes of significance (*i.e.,* pre-ramp-up survey, ramp-up, shutdown, testing, shooting, ramp-up completion, end of operations, streamers, etc.).

(ix) If a marine mammal is sighted, the following information should be recorded:

(A) Watch status (sighting made by PSO on/off effort, opportunistic, crew, alternate vessel/platform);

(B) PSO who sighted the animal;

(C) Time of sighting;

(D) Vessel location at time of sighting;

(E) Water depth;

(F) Direction of vessel's travel (compass direction);

(G) Direction of animal's travel relative to the vessel;

(H) Pace of the animal;

(I) Estimated distance to the animal and its heading relative to vessel at initial sighting;

(J) Identification of the animal (*e.g.,* genus/species, lowest possible taxonomic level, or unidentified); also note the composition of the group if there is a mix of species;

(K) Estimated number of animals (high/low/best);

(L) Estimated number of animals by cohort (adults, yearlings, juveniles, calves, group composition, etc.);

(M) Description (as many distinguishing features as possible of each individual seen, including length, shape, color, pattern, scars or markings, shape and size of dorsal fin, shape of head, and blow characteristics);

(N) Detailed behavior observations (*e.g.,* number of blows, number of surfaces, breaching, spyhopping, diving, feeding, traveling; as explicit and detailed as possible; note any observed changes in behavior);

(O) Animal's closest point of approach and/or closest distance from the center point of the acoustic source;

(P) Platform activity at time of sighting (*e.g.,* deploying, recovering, testing, data acquisition, other); and

(Q) Description of any actions implemented in response to the sighting (*e.g.,* delays, shutdown, ramp-up, speed or course alteration, etc.) and time and location of the action.

6. Reporting—a technical report shall be provided to NMFS within 90 days after completion of survey activities that fully documents the methods and monitoring protocols, summarizes the data recorded during monitoring, estimates the number of marine mammals that may have been taken during survey activities, describes the effectiveness of the various mitigation techniques (*i.e.* visual observations during day and night compared to PAM detections/operations) and provides an interpretation of the results and effectiveness of all monitoring tasks. Any recommendations made by NMFS shall be addressed in the final report prior to acceptance by NMFS.

(a) Reporting injured or dead marine mammals:

(i) In the event that the specified activity clearly causes the take of a marine mammal in a manner not prohibited by this IHA (if issued), such as serious injury or mortality, Statoil shall immediately cease the specified activities and immediately report the incident to NMFS. The report must include the following information:

(A) Time, date, and location (latitude/longitude) of the incident;

(B) Vessel's speed during and leading up to the incident;

(C) Description of the incident;

(D) Status of all sound source use in the 24 hours preceding the incident;

(E) Water depth;

(F) Environmental conditions (*e.g.,* wind speed and direction, Beaufort sea state, cloud cover, and visibility);

(G) Description of all marine mammal observations in the 24 hours preceding the incident;

(H) Species identification or description of the animal(s) involved;

(I) Fate of the animal(s); and

(J) Photographs or video footage of the animal(s).

Activities shall not resume until NMFS is able to review the circumstances of the prohibited take. NMFS will work with Statoil to determine what measures are necessary to minimize the likelihood of further prohibited take and ensure MMPA compliance. Statoil may not resume their activities until notified by NMFS.

(ii) In the event that Statoil 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 (*e.g.,* in less than a moderate state of decomposition), Statoil shall immediately report the incident to NMFS. The report must include the same information identified in condition 6(b)(i) of this IHA. Activities may continue while NMFS reviews the circumstances of the incident. NMFS will work with Statoil to determine whether additional mitigation measures or modifications to the activities are appropriate.

(iii) In the event that Statoil 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 specified activities (*e.g.,* previously wounded animal, carcass with moderate to advanced decomposition, or scavenger damage), Statoil shall report the incident to NMFS within 24 hours of the discovery. Statoil shall provide photographs or video footage or other documentation of the sighting to NMFS.

7. This Authorization may be modified, suspended or withdrawn if the holder fails to abide by the conditions prescribed herein, or if NMFS determines the authorized taking is having more than a negligible impact on the species or stock of affected marine mammals.

Request for Public Comments

We request comment on our analyses, the draft authorization, and any other aspect of this Notice of Proposed IHA for the proposed marine site characterization surveys. Please include with your comments any supporting data or literature citations to help inform our final decision on the request for MMPA authorization.

On a case-by-case basis, NMFS may issue a one-year renewal IHA without additional notice when (1) another year of identical or nearly identical activities as described in the Specified Activities section is planned, or (2) the activities would not be completed by the time the IHA expires and renewal would allow completion of the activities beyond that described in the Dates and Duration section, provided all of the following conditions are met:

- A request for renewal is received no later than 60 days prior to expiration of the current IHA.
- The request for renewal must include the following:

(1) An explanation that the activities to be conducted beyond the initial dates either are identical to the previously analyzed activities or include changes so minor (*e.g.,* reduction in pile size) that the changes do not affect the previous analyses, take estimates, or mitigation and monitoring requirements.

(2) A preliminary monitoring report showing the results of the required monitoring to date and an explanation showing that the monitoring results do not indicate impacts of a scale or nature not previously analyzed or authorized.

- Upon review of the request for renewal, the status of the affected species or stocks, and any other pertinent information, NMFS determines that there are no more than minor changes in the activities, the mitigation and monitoring measures remain the same and appropriate, and the original findings remain valid.

Dated: February 16, 2018.

Donna S. Wieting,

Director, Office of Protected Resources, National Marine Fisheries Service.

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XF882

Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to Astoria Waterfront Bridge Replacement Project

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

ACTION: Notice; proposed incidental harassment authorization; request for comments.

SUMMARY: NMFS has received a request from the City of Astoria for authorization to take marine mammals incidental to pile driving and construction work during the Waterfront Bridge Replacement Project in Astoria, Oregon. Pursuant to the Marine Mammal Protection Act (MMPA), NMFS is requesting comments on its proposal to issue an incidental harassment authorization (IHA) to incidentally take marine mammals during the specified activities.

DATES: Comments and information must be received no later than March 26, 2018.

ADDRESSES: Comments 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.Fowler@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 received electronically, 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 online at *https://www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-take-authorizations-construction-activities* without change. All personal identifying information (*e.g.,* name, address) voluntarily submitted by the commenter may be publicly accessible. Do not submit confidential business information or otherwise sensitive or protected information.

FOR FURTHER INFORMATION CONTACT: Amy Fowler, Office of Protected Resources, NMFS, (301) 427–8401. Electronic copies of the application and supporting documents, as well as a list of the references cited in this document, may be obtained online at: *https://www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-take-authorizations-construction-activities.* In case of problems accessing these documents, please call the contact listed above.

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 (as delegated to NMFS) 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) 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 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.''

The MMPA states that the term ''take'' means to harass, hunt, capture, kill or attempt to harass, hunt, capture, or kill any marine mammal. 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).

National Environmental Policy Act

To comply with the National Environmental Policy Act of 1969 (NEPA; 42 U.S.C. 4321 *et seq.*) and NOAA Administrative Order (NAO) 216–6A, NMFS must review our proposed action (*i.e.,* the issuance of an incidental harassment authorization) with respect to potential impacts on the human environment.

This action is consistent with categories of activities identified in CE B4 of the Companion Manual for NOAA Administrative Order 216–6A, which do not individually or cumulatively have the potential for significant impacts on the quality of the human environment and for which we have not identified any extraordinary circumstances that would preclude this categorical exclusion. Accordingly, NMFS has preliminarily determined that the issuance of the proposed IHA qualifies to be categorically excluded from further NEPA review.

We will review all comments submitted in response to this notice prior to concluding our NEPA process or making a final decision on the IHA request.

Summary of Request

On October 17, 2017, NMFS received a request from the City of Astoria (City) for an IHA to take marine mammals incidental to replacement of bridges in downtown Astoria along the Columbia River. The application was considered adequate and complete on January 17, 2018. The City's request is for take of California sea lions (*Zalophus californianus*), Steller sea lions (*Eumetopias jubatus*), and harbor seals (*Phoca vitulina richardii*) by Level B harassment only. Neither the City nor NMFS expect mortality to result from this activity and, therefore, an IHA is appropriate.

Description of Proposed Activity

Overview

The City is seeking an IHA for the first year of a two-year project to remove and replace piles supporting six waterfront bridges in Astoria, Oregon. Phase I of the project, which would occur under this IHA, involves the removal and replacement of three bridges connecting 7th, 9th, and 11th Streets to waterfront piers. The bridges are currently supported by decayed timber piles and concrete footings that will be removed and replaced with steel piles. Roadway construction, timber pile removal, and steel pile driving are expected to result in Level B auditory harassment of California sea lions, harbor seals, and Steller sea lions.

The proposed project would occur along the Lower Columbia River. The action area is not expected to exceed 1,600 meters (m) beyond each bridge site. Construction for Phase I of the project, removing and replacing the 7th, 9th, and 11th Street bridge crossings, is expected to occur between October 2018 and April 2019.

Dates and Duration

Project work is expected to begin in October 2018 with roadway and rail superstructure removal. Timber pile removal and steel pile installation will occur within the Oregon Department of Fish and Wildlife (ODFW) prescribed in-water work period (IWWP) for the Lower Columbia River (November 1 through February 28). Timber pile and concrete foundation removal will be initiated at the onset of the IWWP. These activities will likely occur over the entire IWWP, or 80 work days. Vibratory timber pile removal is expected to take approximately 26 days and impact hammer pile installation will take approximately 42 days. The remaining 12 days in the IWWP will be used to remove all concrete footings and a concrete retaining wall. The contractor will likely remove existing structures concurrent with construction of new foundations. Pile removal and installation will occur over an eight hour period each day.

Additional above-water construction may be completed between March 2019 and August 2019. Rail superstructure construction is expected to occur over 13 work days between March 1 and April 11. Construction of approach superstructure and roadway improvements will be conducted between April and August 2019. An offsite storm water facility will be constructed during the summer of 2019.

Specific Geographic Region

The project site is located in the Baker Bay-Columbia River subwatershed. This section of the Columbia River represents the most saline portion of the river's estuarine environment. Tidal influence extends 146 miles upriver to the Bonneville Dam. The Columbia River is over nine miles wide in the area around Astoria and contains multiple islands, buoys, and sandbars that marine mammals utilize to haul out. The upland portions of the region of activity have been highly altered by human activities, with substantial shoreline development and remnants of historical development. This includes thousands of timber piles, overwater buildings, a railroad trestle, and vehicular bridges. The downtown Astoria waterfront is a busy area for pedestrians, vehicles, and boats. In addition to onshore development, the Lower Columbia River is utilized by various types of vessels, including cargo ships, dredging vessels, fishing vessels, trawlers, pollution control vessels, and search and rescue vessels, among others.

The remainder of the region of activity is located within the river channel within the intertidal and subtidal zones. The substrate in this area is primarily made up of historical rip rap and other rocks/cobbles. All in-water construction will occur in the intertidal and subtidal zones. Some piles may be removed and installed completely in the dry while others may remain inundated in water over 75 percent of the time. Section 1 of the application describes the tidal conditions of each crossing in detail.

Detailed Description of Specific Activity

Phase I of the project involves the removal and replacement of three bridges connecting 7th, 9th, and 11th Streets to waterfront piers. Each bridge has pedestrian and vehicle access. A railroad trestle runs parallel to the shoreline between the bridges along the waterfront. Demolition of the existing bridge crossings will require the removal of bridge decks and other aboveground components for the rail trestle and roadway approaches. Demolition of the superstructures will likely be accomplished using standard roadway and bridge construction equipment. The existing bridge crossings are primarily founded on a timber substructure. All timber elements supporting the roadway approach and trestle crossing will be removed. Most of the structures are below the Mean High Water (MHW) elevation; the remaining timber elements are below the Mean Higher-High Water (MHHW) or the Highest Measured Tide (HMT) elevation, with only a few piles being removed landward of the HMT elevation. Each bridge contains 85 timber structures to be removed. Most timber piles are 12 inches (in) diameter but some may be up to 14 in. The contractor will use a vibratory hammer or direct pull to remove the timber piles. In addition to timber structures, each bridge is supported by concrete footings ranging in size from 16 in by 16 in to 12 feet (ft) by 3 ft. Seven concrete structures will be removed from the 7th Street crossing, four from the 9th Street crossing, and eight from the 11th Street crossing (Table 1). A concrete retaining wall at the 9th Street crossing will also be removed to facilitate construction of the new roadway approach. The wall is located below the HMT elevation and is frequently exposed to surface flows. The contractor will use a concrete saw to cut the retaining wall into manageable pieces.

Abutment wingwalls will be constructed at the 9th Street crossing to help contain the roadway approach fill. The wingwalls will be cast-in-place concrete retaining walls. The eastern retaining wall will be located above the HMT and the western wall will be above the MHHW. As a result, the work will be completed in the dry; however, the contractor will install measures when necessary to isolate the work area.

Most of the piles to be installed are within 40 ft of the existing abutments, so the piles will be installed from a crane staged on the south side of the bridges. However, piling at the 9th Street crossing is up to 60 ft from the south abutment. The size and length of the piling as well as the weight of the pile hammer and leads places additional demand on the supporting crane. As a result, the contractor will construct temporary shoring consisting of two bents comprised of five 16-in piles each for a total of ten piles. Both bents will be located within two ft of the MLW elevation. Therefore, all piles are likely to be inundated by water levels greater than 2 ft deep at least 75 percent of the time during installation and extraction. Construction of the work platform will be initiated following removal of the superstructures, retaining wall, and approach fill at the 9th Street crossing. Due to the soft soils, it is anticipated that each pile installed will advance predominately under its own weight with a limited number of impact hammer strikes prior to reaching the bedrock surface. To finish pile installation, the contractor will be required to use an impact hammer to secure the piles into the bedrock and verify the required bearing resistances. All temporary pilings will be installed and removed during the ODFW prescribed IWWP and will remain in place for only one construction season.

A total of 74 24-in diameter permanent steel piles are expected to be driven for Phase I of this project (21 at the 7th Street crossing, 25 at the 9th Street crossing, and 28 at the 11th Street crossing, Table 1). As with the temporary shoring, it is expected that the permanent piles will advance under their own weight with a limited number of hammer strikes before reaching the bedrock surface.

TABLE 1—STRUCTURES TO BE REMOVED AND INSTALLED

Structure	Timber piles to be removed	Concrete footings to be removed	Steel piles to be installed
7th Street	85	7	21
9th Street	85	4	25
11th Street	85	8	28
Temporary shoring (9th St. only)	.....	.....	10

The IWWP prescribed by ODFW includes 80 work days. Construction work is assumed to occur over an eight hour period each day. It is assumed that the contractor will drive the first 40 ft of piling for each pile location (each pile location consists of two 40-foot pile sections) over the first few days of pile driving, then splice on the additional 40 ft of piling at each location over the next few days. After the first 40-ft pile section is driven, a backer bar is tack welded on to the first pile section, then the second pile section is aligned with a crane, and welded on. Once all of the piles are spliced, the contractor will resume pile driving activities to set each pile to the desired depth. It is estimated that the contractor can install four 40-foot piles a day at an estimated 250 strikes per pile. With a total of 84 piles to be driven (74 permanent and 10 temporary), given the rate of four 40-ft piles per day, impact pile driving will take 42 days with a total of 1000 strikes per day (Table 2). This would leave 38 work days for the removal of existing timber piling and concrete substructures. The contractor will attempt to extract the existing piles via direct pull or vibratory hammer. Vibratory removal of timber piles will take approximately 30 minutes per pile. A total of 255 timber piles are anticipated to be extracted. At an average of 10 piles removed per day, existing timber pile removal is expected to take 26 days (Table 2) which leaves 12 days remaining in the work period to cover the removal of all concrete footings and the 9th Street retaining wall. It is anticipated that the contractor will be removing existing substructure elements concurrent with the construction of the new foundations.

TABLE 2—PILE DRIVING ESTIMATES PER DAY

	Number	Method	Piles per day	Number of days [1]	Number of strikes per day
Timber Piles to be Removed	255	Vibratory Hammer and Direct Pull	10	26	N/A
24″ Steel Piles to be Installed	74	Impact Hammer	4	37	1000
16″ Steel Piles to be Installed	10	Impact Hammer	4	5	1000

[1] It is assumed that the contractor will drive the first 40 ft of piling on one day, then splice on the additional 40 ft of piling and resume pile driving on another day, totaling two days required to drive all 80 ft of pile, hence double the amount of days than piles.

The construction activities that could potentially result in acoustic and visual disturbance to pinnipeds within the action area include rail and roadway superstructure and concrete foundation removal activities, temporary work platform construction, piling installation, wingwall construction, and construction of the new rail and roadway superstructures. Most of these activities will require work in water during the IWWP (November 1 through February 28). Sound from pile removal and installation will likely extend out into the river channel where California sea lions, Steller sea lions, and harbor seals may be transiting. Work occurring in-air includes the removal of bridge decks and other aboveground components for the rail trestle crossings and roadway approaches as well as construction of the new rail superstructures and roadway improvements, which occurs directly above the river banks where hauled out California sea lions may be located. California sea lions may be harassed by the presence of construction equipment during above-water construction.

Proposed mitigation, monitoring, and reporting measures are described in detail later in this document (please see ''Proposed Mitigation'' and ''Proposed Monitoring and Reporting'').

Description of Marine Mammals in the Area of Specified Activities

Sections 3 and 4 of the application summarize available information regarding status and trends, distribution and habitat preferences, and behavior and life history, of the potentially affected species. Additional information regarding population trends and threats may be found in NMFS's Stock Assessment Reports (SAR; *https://www.fisheries.noaa.gov/topic/population-assessments/marine-mammals*) and more general information about these species (*e.g.,* physical and behavioral descriptions) may be found on NMFS's website (*https://www.fisheries.noaa.gov/find-species*).

Table 3 lists all species with expected potential for occurrence in Astoria and summarizes information related to the population or stock, including regulatory status under the MMPA and ESA and potential biological removal (PBR), where known. For taxonomy, we follow Committee on Taxonomy (2016). PBR is defined by the MMPA as the maximum number of animals, not including natural mortalities, that may be removed from a marine mammal stock while allowing that stock to reach or maintain its optimum sustainable population (as described in NMFS's SARs). While no mortality is anticipated or authorized here, PBR and annual serious injury and mortality from anthropogenic sources are included here as gross indicators of the status of the species and other threats.

Marine mammal abundance estimates presented in this document represent the total number of individuals that make up a given stock or the total number estimated within a particular study or survey area. NMFS's stock abundance estimates for most species represent the total estimate of individuals within the geographic area, if known, that comprises that stock. For some species, this geographic area may extend beyond U.S. waters. All managed stocks in this region are assessed in NMFS's U.S. 2016 SARs (*e.g.,* Caretta *et al.* 2017). All values presented in Table 3 are the most recent available at the time of publication and are available in the 2016 SARs (Caretta *et al.* 2017, Muto *et al.,* 2017).

TABLE 3—MARINE MAMMALS POTENTIALLY PRESENT IN THE VICINITY OF ASTORIA

Common name	Scientific name	Stock	ESA/MMPA status; strategic (Y/N) [1]	Stock abundance (CV, N_{min}, most recent abundance survey) [2]	PBR	Annual M/SI [3]	Relative occurrence near Astoria
Order Carnivora—Superfamily Pinnipedia							
Family Otariidae (eared seals and sea lions)							
California sea lion	*Zalophus californianus.*	U.S	-; N	296,750 (N/A, 153,337, 2011).	9,200	389	Likely.
Steller sea lion	*Eumetopias jubatus*	Eastern U.S	-; N	41,638 (N/A, 41,638, 2015).	2,498	108	Likely.
Family Phocidae (earless seals)							
Pacific harbor seal	*Phoca vitulina richardii.*	Oregon/Washington Coast.	-; N	Unknown (0.12, 24,732, 1999).	undet.	10.6	Likely.

[1] Endangered Species Act (ESA) status: Endangered (E), Threatened (T)/MMPA status: Depleted (D). A dash (-) indicates that the species is not listed under the ESA or designated as depleted under the MMPA. Under the MMPA, a strategic stock is one for which the level of direct human-caused mortality exceeds PBR or which is determined to be declining and likely to be listed under the ESA within the foreseeable future. Any species or stock listed under the ESA is automatically designated under the MMPA as depleted and as a strategic stock.

[2] NMFS marine mammal stock assessment reports online at: *www.nmfs.noaa.gov/pr/sars/.* CV is coefficient of variation; N_{min} is the minimum estimate of stock abundance. In some cases, CV is not applicable. For certain stocks, abundance estimates are actual counts of animals and there is no associated CV.

[3] These values, found in NMFS's SARs, represent annual levels of human-caused mortality plus serious injury from all sources combined (*e.g.,* commercial fisheries, ship strike). Annual M/SI often cannot be determined precisely and is in some cases presented as a minimum value or range. A CV associated with estimated mortality due to commercial fisheries is presented in some cases.

All species that could potentially occur in the proposed survey areas are included in Table 3. As described below, all three species temporally and spatially co-occur with the activity to the degree that take is reasonably likely to occur, and we have proposed authorizing it.

California Sea Lion

California sea lions (*Zalophus californianus*) are distributed along the North Pacific waters from central Mexico to southeast Alaska, with breeding areas restricted primarily to island areas off southern California (the Channel Islands), Baja California, and in the Gulf of California (Wright *et al.,* 2010). California sea lions are dark brown with broad fore flippers and a long, narrow snout. There are five genetically distinct geographic populations. The population seen in Oregon is the Pacific Temperate stock, which are commonly seen in Oregon from September through May (ODFW 2015). The approximate growth rate for this species is 5.4 percent annually (Caretta *et al.,* 2004). Threats to this species include incidental catch and entanglement in fishing gear, such as gillnets; biotoxins, as a result of harmful algal blooms; and gunshot wounds and other human-caused injuries, as California sea lions are sometimes viewed as a nuisance by commercial fishermen (NOAA 2016).

Almost all California sea lions in the Pacific Northwest are sub-adult or adult males (NOAA 2008). California sea lions feed in both the Columbia River and adjacent nearshore marine areas. Their population is lowest in Oregon in the summer months, from May to September, as they migrate south to the Channel Islands in California to breed. California sea lions have been observed near several crossings within the Project site; however, this is not their main haul out. Their main haul out is the East Mooring Basin, which is located over one mile upstream, outside of the Region of Activity. Construction activities are proposed between October and April, which includes the tail end of peak usage of the lower river by California sea lions. Counts of California sea lions are highest in September but taper off until March when the sea lions travel south past Oregon toward their breeding sites (Brown *et al.,* 2015). Recent years have shown an increase in the record numbers of California sea lions at the East Mooring Basin with a 2015 spring record of 2,340 individuals (up from 1,420 in 2014), though in past years, typical spring counts were closer to 100–300 individuals (Profita 2015). Changes in climate, food sources, and a growing population approaching 300,000 are all cited as possible reasons for these increases. Counts of California sea lions at the South Jetty haulout at the mouth of the Columbia River (10 miles downstream of project site) date back to 1995 (ODFW 2007) but more reliable monthly counts from Washington Department of Fish and Wildlife (WDFW) are available from 2000–2014 (WDFW 2014).

Harbor Seal

The Pacific harbor seal (*Phoca vitulina richardii*) is the most widespread and abundant resident pinniped in Oregon. They are generally blue-gray with light and dark speckling; they lack external ear flaps and have short forelimbs. Harbor seals are generally non-migratory and occur on both the U.S. east and west coasts. On the west coast they range from Alaska to Baja California, Mexico (ODFW 2015).

The Oregon/Washington Coast stock abundance was estimated in 1999 to be 24,732. However, the data used to establish that abundance was eight years old at the time and no more recent stock abundance estimates exist (Caretta *et al.,* 2017). The 1999 abundance estimate will be used for the purposes of this analysis. The Oregon/Washington Coast stock of Pacific harbor seals is not listed under the ESA nor are they considered depleted or strategic under the MMPA.

Harbor seals utilize specific shoreline locations on a regular basis as haulouts including beaches, rocks, floats, and buoys. They must rest at haulout locations to regulate body temperature, interact with one another, and sleep (NOAA 2016). Harbor seals are present throughout the year at the mouth of the Columbia River and adjacent nearshore marine areas. Harbor seals are an infrequent visitor at the Astoria Mooring Basin, but they are known to transit through the Region of Activity. Their closest haulout and pupping area is Desdemona Sands which is downstream of the Astoria-Megler Bridge and outside the Region of Activity. Pupping occurs from Mid-April to July, outside of the proposed project work period (Susan Riemer, pers. comm., 2016). Due to their year-round occurrence in the Columbia River, harbor seals are likely to be found transiting the area during in-water construction.

Steller Sea Lion

The Steller sea lion (*Eumetopias jubatus*) range extends along the Pacific Rim, from northern Japan to central California. For management purposes, Steller sea lions inhabiting U.S. waters have been divided into two DPS: The Western U.S. and the Eastern U.S. The population known to occur within the Lower Columbia River is the Eastern DPS. The Western U.S. stock of Steller sea lions are listed as endangered under the ESA and depleted and strategic under the MMPA. The Eastern U.S. stock (including those living in Oregon) was de-listed in 2013 following a population growth from 18,000 in 1979 to 70,000 in 2010 (an estimated annual growth of 4.18 percent) (NOAA 2013). The current abundance estimate for the Eastern U.S. stock is 41,638 (Muto *et al.,* 2017). Threats to Steller sea lions include: Boat/ship strikes, contaminants/pollutants, habitat degradation, illegal hunting/shooting, offshore oil and gas exploration, and interactions (direct and indirect) with fisheries (NOAA 2016). Critical habitat was designated for Steller sea lions on August 27, 1993 (58 FR 45269), but is not present within the Region of Activity. Critical habitat is associated with specific breeding and haulout sites in Alaska, California, and Oregon (NOAA 2016).

Steller sea lions are present year-round at the mouth of the Columbia River, with the primary haulout point on the top South Jetty (approximately 10 miles downstream of the action area) and they are at their peak in the lower river from September through March. The South Jetty haulout is the only artificial structure Steller sea lions regularly use along the Oregon coast. Steller sea lions feed in both the Columbia River and adjacent nearshore marine areas. Due to their year-round presence and peak of presence during the winter months, Steller sea lions are likely to be transiting the area during in-water construction activities.

Potential Effects of Specified Activities on Marine Mammals and Their Habitat

This section includes a summary and discussion of the ways that components of the specified activity may impact marine mammals and their habitat. The *Estimated Take by Incidental Harassment* section later in this document includes a quantitative analysis of the number of individuals that are expected to be taken by this activity. The *Negligible Impact Analysis and Determination* section considers the content of this section, the *Estimated Take by Incidental Harassment* section, and the *Proposed Mitigation* section, to draw conclusions regarding the likely impacts of these activities on the reproductive success or survivorship of individuals and how those impacts on individuals are likely to impact marine mammal species or stocks.

Description of Sound Sources

Sound travels in waves, the basic components of which are frequency, wavelength, velocity, and amplitude. Frequency is the number of pressure waves that pass by a reference point per unit of time and is measured in hertz (Hz) or cycles per second. Wavelength is the distance between two peaks of a sound wave; lower frequency sounds have longer wavelengths than higher frequency sounds. Amplitude is the height of the sound pressure wave or the 'loudness' of a sound and is typically measured using the decibel (dB) scale. A dB is the ratio between a measured pressure (with sound) and a reference pressure (sound at a constant pressure, established by scientific standards). It is a logarithmic unit that accounts for large variations in amplitude; therefore, relatively small changes in dB ratings correspond to large changes in sound pressure. When referring to sound pressure levels (SPLs; the sound force per unit area), sound is referenced in the context of underwater sound pressure to 1 microPascal (μPa). One Pascal is the pressure resulting from a force of one Newton exerted over an area of one square meter. The source level (SL) represents the sound level at a distance of 1 m from the source (referenced to 1 μPa). The received level is the sound level at the listener's position. Note that all underwater sound levels in the document are referenced to a pressure of 1 μPa and all airborne sound levels in this document are referenced to a pressure of 20 μPa.

Root mean square (rms) is the quadratic mean sound pressure over the duration of an impulse. Rms is calculated by squaring all of the sound amplitudes, averaging the squares, and then taking the square root of the average (Urick 1983). Rms accounts for both positive and negative values; squaring the pressures makes all values positive so that they may be accounted for in the summation of pressure levels (Hastings and Popper, 2005). This measurement is often used in the context of discussing behavioral effects, in part because behavioral effects, which often result from auditory cues, may be better expressed through averaged units than by peak pressures.

When underwater objects vibrate or activity occurs, sound-pressure waves are created. These waves alternately compress and decompress the water as the sound wave travels. Underwater sound waves radiate in all directions away from the source (similar to ripples on the surface of a pond), except in cases where the source is directional. The compressions and decompressions associated with sound waves are detected as changes in pressure by aquatic life and man-made sound receptors such as hydrophones.

Even in the absence of sound from the specified activity, the underwater environment is typically loud due to ambient sound. Ambient sound is defined as environmental background sound levels lacking a single source or point (Richardson *et al.,* 1995), and the sound level of a region is defined by the total acoustical energy being generated by known and unknown sources. These sources may include physical (*e.g.,* waves, earthquakes, ice, atmospheric sound), biological (*e.g.,* sounds produced by marine mammals, fish, and invertebrates), and anthropogenic sound (*e.g.,* vessels, dredging, aircraft, construction). A number of sources contributed to ambient sound, including the following (Richardson *et al.,* 1995):

- Wind and waves: The complex interactions between wind and water surface, including processes such as breaking waves and wave-induced bubble oscillations and cavitation, are a main source of naturally occurring ambient noise for frequencies between 200 Hz and 50 kilohertz (kHz) (Mitson, 1995). In general, ambient sound levels tend to increase with increasing wind speed and wave height. Surf noise becomes important near shore, with measurements collected at a distance of 8.5 km from shore showing an increase of 10 dB in the 100 to 700 Hz band during heavy surf conditions.
- Precipitation: Sound from rain and hail impacting the water surface can become an important component of total noise frequencies above 500 Hz, and possibly down to 100 Hz during quiet times.
- Biological: Marine mammals can contribute significantly to ambient noise levels, as can some fish and shrimp. The frequency band for biological contributions is from approximately 12 Hz to over 100 kHz.
- Anthropogenic: Sources of ambient noise related to human activity include transportation (surface vessels and aircraft), dredging and construction, oil and gas drilling and production, seismic surveys, sonar, explosions, and ocean acoustic studies. Shipping noise typically dominates the total ambient noise for frequencies between 20 and 300 Hz. In general, the frequencies of anthropogenic sounds are below 1 kHz and, if higher frequency sound levels are created, they attenuate rapidly (Richardson *et al.,* 1995). Sound from identifiable anthropogenic sources other than the activity of interest (*e.g.,* a passing vessel) is sometimes termed background sound, as opposed to ambient sound. Representative levels of anthropogenic sound are displayed in Table 4.

TABLE 4—REPRESENTATIVE SOUND LEVELS OF ANTHROPOGENIC SOURCES

Sound source	Underwater sound level	Reference
Vibratory removal of 12-in timber pile	150 dB rms at 16 m	Laughlin 2011a.
Impact driving of 24-in steel pipe pile	184 dB rms at 10 m	WSDOT 2016; Reyff 2007.
Concrete saw	93 dB rms at 20 m[1]	Hanan and Associates 2014.

[1] Airborne sound only (dB rms re 20 μPa).

The sum of the various natural and anthropogenic sound sources at any given location and time—which comprise ''ambient'' or ''background'' sound—depends not only on the source levels (as determined by current weather conditions and levels of biological and shipping activity) but also on the ability of sound to propagate

through the environment. In turn, sound propagation is dependent on the spatially and temporally varying properties of the water column and sea floor, and is frequency-dependent. As a result of the dependence on a large number of varying factors, ambient sound levels can be expected to vary widely over both coarse and fine spatial and temporal scales. Sound levels at a given frequency and location can vary by 10–20 dB from day to day (Richardson *et al.,* 1995). The result is that, depending on the source type and its intensity, sound from the specified activity may be a negligible addition to the local environment or could form a distinctive signal that may affect marine mammals.

In-water construction activities associated with the Project include impact pile driving and vibratory pile removal. The sounds produced by these activities fall into one of two general sound types: pulsed and non-pulsed (defined in the following). The distinction between these two sound types is important because they have differing potential to cause physical effects, particularly with regard to hearing (*e.g.,* Ward 1997 in Southall *et al.,* 2007). Please see Southall *et al.,* (2007) for an in-depth discussion of these concepts.

Pulsed sound sources (*e.g.,* impact pile driving) product signals that are brief (typically considered to be less than one second), broadband, atonal transients (ANSI 1986; Harris 1998; NIOSH 1998; ISO 2003; ANSI 2005) and occur either as isolated events or repeated in some succession. Pulsed sounds are all characterized by a relatively rapid rise from ambient pressure to a maximal pressure value followed by a rapid decay period that may include a period of diminishing, oscillating maximal and minimal pressures, and generally have an increased capacity to induce physical injury as compared with sounds that lack these features.

Non-pulsed sounds can be tonal, narrowband or broadband, brief or prolonged, and may be wither continuous or non-continuous (ANSI 1995; NIOSH 1998). Some of these non-pulsed sounds can be transient signals of short duration without the essential properties of pulses (*e.g.,* rapid rise time). Examples of non-pulsed sounds include those produced by vessels, aircraft, machinery operations such as drilling or dredging, vibratory pile driving, and active sonar systems (such as those used by the U.S. Navy). The duration of such sounds, as received at a distance, can be greatly extended in a highly reverberant environment.

Impact hammers operate by repeatedly dropping a heavy piston onto a pile to drive the pile into the substrate. Sound generated by impact hammers is characterized by rapid rise times and high peak levels, a potentially injurious combination (Hastings and Popper 2005). Vibratory hammers install piles by vibrating them and allowing the weight of the hammer to push them into the sediment. Vibratory hammers produce significantly less sound than impact hammers. Peak SPLs may be 180 dB or greater, but are generally 10 to 20 dB lower than SPLs generated during impact pile driving of the same-sized pile (Oestman *et al.,* 2005).

Marine Mammal Hearing

Hearing is the most important sensory modality for marine mammals underwater, and exposure to anthropogenic sound can have deleterious effects. To appropriately assess the potential effects of exposure to sound, it is necessary to understand the frequency ranges marine mammals are able to hear. Current data indicate that not all marine mammal species have equal hearing capabilities (*e.g.,* Richardson *et al.,* 1995; Wartzok and Ketten, 1999; Au and Hastings, 2008). To reflect this, Southall *et al.* (2007) recommended that marine mammals be divided into functional hearing groups based on directly measured or estimated hearing ranges on the basis of available behavioral response data, audiograms derived using auditory evoked potential techniques, anatomical modeling, and other data. Note that no direct measurements of hearing ability have been successfully completed for mysticetes (*i.e.,* low-frequency cetaceans). Subsequently, NMFS (2016) described generalized hearing ranges for these marine mammal hearing groups. Generalized hearing ranges were chosen based on the approximately 65 dB threshold from the normalized composite audiograms, with the exception for lower limits for low-frequency cetaceans where the lower bound was deemed to be biologically implausible and the lower bound from Southall *et al.* (2007) retained. The functional groups and the associated frequencies are indicated below in Table 5 (note that these frequency ranges correspond to the range for the composite group, with the entire range not necessarily reflecting the capabilities of every species within that group).

TABLE 5—MARINE MAMMAL HEARING GROUPS AND THEIR GENERALIZED HEARING RANGE

Hearing group	Generalized hearing range *
Low-frequency (LF) cetaceans (baleen whales)	7 Hz to 35 kHz.
Mid-frequency (MF) cetaceans (dolphins, toothed whales, beaked whales, bottlenose whales)	150 Hz to 160 kHz.
High-frequency (HF) cetaceans (true porpoises, *Kogia,* river dolphins, cephalorhynchid, *Lagenorhynchus cruciger* and *L. australis*).	275 Hz to 160 kHz.
Phocid pinnipeds (PW) (underwater) (true seals)	50 Hz to 86 kHz.
Otariid pinnipeds (OW) (underwater) (sea lions and fur seals)	60 Hz to 39 kHz.

* Represents the generalized hearing range for the entire group as a composite (*i.e.,* all species within the group), where individual species' hearing ranges are typically not as broad. Generalized hearing range chosen based on ~65 dB threshold from normalized composite audiogram, with the exception for lower limits for LF cetaceans (Southall *et al.,* 2007) and PW pinniped (approximation).

The pinniped functional hearing group was modified from Southall *et al.* (2007) on the basis of data indicating that phocid species have consistently demonstrated an extended frequency range of hearing compared to otariids, especially in the higher frequency range (Hemilä *et al.,* 2006; Kastelein *et al.,* 2009; Reichmuth and Holt, 2013).

For more detail concerning these groups and associated frequency ranges, please see NMFS (2016) for a review of available information. As mentioned previously in this document, three marine mammal species (zero cetacean and three pinniped (two otariid and one phocid) species) have the reasonable potential to co-occur with the proposed activities (Table 3). Harbor seals are classified as members of the phocid pinnipeds in water functional hearing group, while Steller and California sea lions are grouped under the otariid

pinnipeds in water functional hearing group. A species' functional hearing group is a consideration when we analyze the effects of exposure to sound on marine mammals.

Acoustic Impacts

Please refer to the information given previously (*Description of Sound Sources*) regarding sound, characteristics of sound types, and metrics used in this document. Anthropogenic sounds cover a broad range of frequencies and sound levels and can have a range of highly variable impacts on marine life, from none or minor to potentially severe responses, depending on received levels, duration of exposure, behavioral context, and various other factors. The potential effects of underwater sound form active acoustic sources can potentially result in one or more of the following: Temporary or permanent hearing impairment, non-auditory physical or physiological effects, behavioral disturbance, stress, and masking (Richardson *et al.,* 1995; Gordon *et al.,* 2004; Nowacek *et al.,* 2007; Southall *et al.,* 2007; Gotz *et al.,* 2009). The effects of pile driving on marine mammals are dependent on several factors, including the size, type, and depth of the animal; the depth, intensity, and duration of the pile driving sound; the depth of the water column; the substrate of the habitat; the standoff distance between the pile and the animal; and the sound propagation properties of the environment. Impacts to marine mammals from pile driving activities are expected to result primarily from acoustic pathways. As such, the degree of effect is intrinsically related to the received level and duration of the sound exposure, which are in turn influenced by the distance between the animal and the source. The further away from the source, the less intense the exposure should be. The substrate and depth of the habitat affect the sound propagation properties of the environment. Shallow environments are typically more structurally complex, which leads to rapid sound attenuation. In addition, substrates that are soft (*e.g.,* sand) would absorb or attenuate the sound more readily than hard substrates (*e.g.,* rock) which may reflect the acoustic wave. Soft porous substrates would also likely require less time to drive the pile, and possibly less forceful equipment, which would ultimately decrease the intensity of the acoustic source.

In the absence of mitigation, impacts to marine species would be expected to result from physiological and behavioral responses to both the type and strength of the acoustic signature (Viada *et al.,* 2008). The type and severity of behavioral impacts are more difficult to define due to limited studies addressing the behavioral effects of impulse sounds on marine mammals. Potential effects from impulse sound sources can range in severity from effects such as behavioral disturbance or tactile perception to physical discomfort, slight injury of the internal organs and the auditory system, or mortality (Yelverton *et al.,* 1973).

Hearing Impairment and Other Physical Effects—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 not recoverable, or temporary (TTS), in which the animal's hearing threshold would recover over time (Southall *et al.,* 2007). Marine mammals depend on acoustic cues for vital biological functions (*e.g.,* orientation, communication, foraging, avoiding predators); thus, TTS may result in reduced fitness in survival and reproduction. However, this depends on the frequency and duration of TTS, as well as the biological context in which it occurs. TTS of limited duration, occurring in a frequency range that does not coincide with that used for recognition of important acoustic cues, would have little to no effect on an animal's fitness. Repeated sound exposure that leads to TTS could cause PTS. PTS constitutes injury, but TTS does not (Southall *et al.,* 2007). The following subsections discuss in somewhat more detail the possibilities of TTS, PTS, and non-auditory physical effects.

Temporary Threshold Shift—TTS is the mildest form of hearing impairment that can occur during exposure to a strong sound (Kryter 1985). While experiencing TTS, the hearing threshold rises, and a sound must be stronger in order to be heard. In terrestrial mammals, TTS can last from minutes or hours to days (in cases of strong TTS). For sound exposures at or somewhat above the TTS threshold, hearing sensitivity in both terrestrial and marine mammals recovers rapidly after exposure to the sound ends. Few data on sound levels necessary to elicit mild TTS have been obtained for marine mammals, and none of the published data concern TTS elicited by exposure to multiple pulses of sound. Available data on TTS in marine mammals are summarized in Southall *et al.* (2007).

Permanent Threshold Shift—When PTS occurs, there is physical damage to the sound receptors in the ear. In severe cases, there can be total or partial deafness, while in other cases the animal has an impaired ability to hear sounds in specific frequency ranges (Kryter 1985). There is no specific evidence that exposure to pulses of sound can call PTS in any marine mammal. However, given the possibility that mammals close to a sound source might incur TTS, there has been further speculation about the possibility that some individuals might incur PTS. Single or occasional occurrences of mild TTS are not indicative of permanent auditory damage but repeated (or in some cases) single exposures to a level well above that causing TTS onset might elicit PTS.

Relationships between TTS and PTS thresholds have not been studied in marine mammals—PTS data exists only for a single harbor seal (Kastak *et al.,* 2008)—but are assumed to be similar to those in humans and other terrestrial mammals. PTS might occur at a received sound level at least several decibels above that inducing mild TTS if the animal were exposed to strong sound pulses with rapid rise time. Based on data from terrestrial mammals, a precautionary assumption is that the PTS threshold for impulse sounds (such as pile driving pulses received close to the source) is at least 6 dB higher than the TTS threshold on a peak-pressure basis and PTS cumulative sound exposure level threshold are 15 to 20 dB higher than TTS cumulative sound exposure level thresholds (Southall *et al.,* 2007). Given the higher level of sound or longer exposure duration necessary to cause PTS as compared with TTS, it is considerably less likely that PTS could occur. The City will enforce a Level A exclusion zone to prevent PTS for all activities (see Proposed Mitigation section below).

Non-auditory Physiological Effects—Non-auditory physiological effects or injuries that might theoretically occur in marine mammals exposed to strong underwater sound include stress, neurological effects, bubble formation, resonance effects, and other types of organ or tissue damage (Cox *et al.,* 2006; Southall *et al.,* 2007). Studies examining such effects are limited. In general, little is known about the potential for pile driving to cause auditory impairment or other physical effects in marine mammals. Available data suggest that such effects, if they occur at all, would presumably be limited to short distances from the sound source and to activities that extend over a prolonged period. The available data do not allow

identification of a specific exposure level above which non-auditory effects can be expected (Southall *et al.,* 2007) or any meaningful quantitative predictions of the numbers (if any) of marine mammals that might be affected in those ways. However, the proposed activities do not involve the use of devices such as explosives or mid-frequency active sonar that are associated with these types of effects. Therefore, non-auditory physiological impacts to marine mammals are considered unlikely.

Disturbance Reactions

Disturbance includes a variety of effects, including subtle changes in behavior, more conspicuous changes in activities, and displacement. Behavioral responses to sound are highly variable and context-specific and reactions, if any, depend on species, state of maturity, experience, current activity, reproductive state, auditory sensitivity, time of day, and many other factors (Richardson *et al.,* 1995; Wartzok *et al.,* 2003; Southall *et al.,* 2007).

Habituation can occur when an animal's response to a stimulus wanes with repeated exposure, usually in the absence of unpleasant associated events (Wartzok *et al.,* 2003). Animals are most likely to habituate to sounds that are predictable and unvarying. The opposite process is sensitization, when an unpleasant experience leads to subsequent responses, often in the form of avoidance, at a lower level of exposure. Behavioral state may affect the type of response as well. For example, animals that are resting may show greater behavioral change in response to disturbing sound levels than animals that are highly motivated to remain in an area for feeding (Richardson *et al.,* 1995; NRC 2003; Wartzok *et al.,* 2003).

Controlled experiments with captive marine mammals showed pronounced behavioral reactions, including avoidance of loud sound sources (Ridgeway *et al.,* 1997; Finneran *et al.,* 2003). Responses to continuous sound, such as vibratory pile installation, have not been documented as well as responses to pulsed sounds.

With vibratory pile driving (and removal, as in this project), it is likely that the onset of pile driving could result in temporary, short term changes in an animal's typical behavior and/or avoidance of the affected area. These behavioral changes may include (Richardson *et al.,* 1995): Changing durations of surfacing and dives; 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; avoidance of areas where sound sources are located; and/or flight responses (*e.g.,* pinnipeds flushing into the water from haul-outs or rookeries). Pinnipeds may also increase their haul-out time, possibly to avoid in-water disturbance (Thorson and Reyff, 2006).

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 could be expected to be biologically significant if the change affects growth, survival, or reproduction. Significant behavioral modifications that could potentially lead to effects on growth, survival, or reproduction include:

- Drastic changes in diving/surfacing patterns;
- Habitat abandonment due to loss of desirable acoustic environment; and
- Cessation of feeding or social interaction.

The onset of behavioral disturbances from anthropogenic sound depends on both external factors (characteristics of sound sources and their paths) and the specific characteristics of the receiving animals (hearing, motivation, experience, demography) and is difficult to predict (Southall *et al.,* 2007).

Auditory Masking

Natural and artificial sounds can disrupt behavior by masking, or interfering with, a marine mammal's ability to hear other sounds. Masking occurs when the receipt of a sound is interfered with by another coincident sound at similar frequencies and at similar or higher levels. Chronic exposure to excessive, though not high-intensity, sound could cause masking at particular frequencies for marine mammals which utilize sound for vital biological functions. 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. If the coincident (masking) sound were man-made, it could potentially be harassing if it disrupted hearing-related behavior. It is important to distinguish TTS and PTS, which persist after the sound exposure, from masking, which occurs only during the sound exposure. Because masking (without resulting in TS) is not associated with abnormal physiological function, it is not considered a physiological effect, but rather a potential behavioral effect.

The frequency range of the potentially masking sound is important in determining any potential behavioral impacts. Because sound generated from in-water vibratory pile driving is mostly concentrated at low frequency ranges, it may have less effect on high frequency echolocation sounds by odontocetes, which may hunt harbor seals. However, lower frequency man-made sounds are more likely to affect detection of communication calls and other potentially important natural sounds such as surf and prey sound. It may also affect communication signals when they occur near the sound 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).

Masking affects both senders and receivers of acoustic signals and can potentially have long-term chronic effects on marine mammals at the population level as well as the individual level. Low-frequency ambient sound levels have increased by as much as 20 dB (more than three times in terms of SPL) in the world's ocean from pre-industrial periods, with most of the increase from distant commercial shipping (Hildebrand 2009). All anthropogenic sound sources, but especially chronic and lower-frequency signals (*e.g.,* from vessel traffic), contribute to elevated ambient sound levels, thus intensifying masking.

Vibratory pile removal is relatively short-term, with rapid oscillations occurring for approximately 30 minutes per pile. It is possible that the vibratory pile removal resulting from this proposed action may mask acoustic signals important to the behavior and survival of marine mammal species, but the short-term duration and limited affected area would result in insignificant impacts from masking. Any masking event that could possibly rise to Level B harassment under the MMPA would occur concurrently within the zones of behavioral harassment already estimated for vibratory pile driving, and which have already been taken into account in the exposure analysis.

Acoustic Effects, Airborne—Marine mammals, specifically California sea lions, that occur in the project area could be exposed to airborne sounds associated with pile driving and other construction activities (*e.g.,* concrete removal) that have the potential to cause harassment, depending on their distance

from pile driving activities. Airborne construction sounds may be an issue for pinnipeds either hauled-out or looking with heads above water in the project area. Most likely, airborne sound would cause behavioral responses similar to those discussed above in relation to underwater sound. For instance, anthropogenic sound could cause hauled-out pinnipeds to exhibit changes in their normal behavior, such as reduction in vocalizations, or cause them to temporarily abandon their habitat and move further from the source. Studies by Blackwell *et al.* (2002) and Moulton *et al.* (2005) indicate a tolerance or lack of response to unweighted airborne sounds as high as 112 dB peak and 96 dB rms.

Visual Disturbance—While three species of pinnipeds occur in the project area, only California sea lions are known to haul out in the vicinity of the bridges. California sea lions hauled out on the riverbanks below the bridge crossings and rail trestle may be visually disturbed by the increased presence of humans and construction equipment. Much of the work will occur above the riverbanks but some work will occur on the shore (*e.g.,* concrete footing removal) in the vicinity of California sea lions. Sea lions may flush from their haul out site if construction equipment (*e.g.,* excavator, crane, concrete saw) or personnel are present. General construction work associated with the demolition and installation of roadway and railway superstructures has the potential to visually disturb California sea lions.

Anticipated Effects on Habitat

The primary potential effects to marine mammal habitat are associated with elevated sound levels produced by construction activities (*e.g.,* pile driving, concrete removal) in the area. However, other potential impacts to the surrounding habitat from physical disturbance are also possible.

Potential Pile Driving Effects on Prey—Construction activities would produce continuous (*i.e.,* vibratory pile driving) and impulsive (*i.e.,* impact pile driving) sounds. Fish react to sounds that are especially strong and/or intermittent low-frequency sounds. Short duration, sharp sounds can cause overt or subtle changes in fish behavior and local distribution. Hastings and Popper (2005) identified several studies that suggest fish may relocate to avoid certain areas of sound energy. Additional studies have documented effects of pile driving on fish, although several are based on studies in support of large, multiyear bridge construction projects (*e.g.,* Scholik and Yan, 2001, 2002; Popper and Hastings, 2009). Sound pulses at received levels of 160 dB may cause subtle changes in fish behavior. SPLs of 180 dB may cause noticeable changes in behavior (Pearson *et al.,* 1992; Skalski *et al.,* 1992). SPLs of sufficient strength have been known to cause injury to fish and fish mortality. The most likely impact to fish from pile driving activities at the project area would be temporary behavioral avoidance of the area. The duration of fish avoidance of this area after pile driving stops is unknown, but a rapid return to normal recruitment, distribution, and behavior is anticipated. In general, impacts to marine mammal prey species are expected to be minor and temporary due to the short timeframe for the project.

Effects to Foraging Habitat—Pile installation and removal may temporarily increase turbidity resulting from suspended sediments. Any increases would be temporary, localized, and minimal. The City of Astoria must comply with state water quality standards during these operations by limiting the extent of turbidity to the immediate project area. In general, turbidity associated with pile installation is localized to about a 25-ft (7.62 m) radius around the pile (Everitt *et al.,* 1980). Natural tidal currents and flow patterns in the Columbia River routinely disturb sediments. High volume tidal events can result in hydraulic forces that re-suspend benthic sediments, temporarily elevating turbidity locally. Any temporary increase as a result of the proposed action is not anticipated to measurably exceed levels caused by these normal, natural periods.

In summary, given the short daily duration of sound associated with individual pile driving and removal events and the relatively small areas being affected, the proposed activities are not likely to have a permanent adverse effect on any fish habitat, or populations of fish species. Thus, any impacts to marine mammal habitat are not expected to cause significant or long-term consequences for individual marine mammals or their populations.

Estimated Take

This section provides an estimate of the number of incidental takes proposed for authorization through this IHA, which will inform both NMFS' consideration of whether the number of takes is ''small'' and the negligible impact determination.

Harassment is the only type of take expected to result from these activities. Except with respect to certain activities not pertinent here, section 3(18) of 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).

Authorized takes would be by Level B harassment only, for individual marine mammals resulting from exposure to pile driving and construction activities. Based on the nature of the activity and the anticipated effectiveness of the mitigation measures (*i.e.,* shutdown—discussed in detail below in Proposed Mitigation section), Level A harassment is neither anticipated nor proposed to be authorized.

As described previously, no mortality is anticipated or proposed to be authorized for this activity. Below we describe how the take is estimated.

Described in the most basic way, we estimate take by considering: (1) Acoustic thresholds above which NMFS believes the best available science indicates marine mammals will be behaviorally harassed or incur some degree of permanent hearing impairment; (2) the area or volume of water that will be ensonified above these levels in a day; (3) the density or occurrence of marine mammals within these ensonified areas; and, (4) and the number of days of activities. Below, we describe these components in more detail and present the proposed take estimate.

Acoustic Thresholds

Using the best available science, NMFS has developed acoustic thresholds that identify the received level of underwater sound above which exposed marine mammals would be reasonably expected to be behaviorally harassed (equated to Level B harassment) or to incur PTS of some degree (equated to Level A harassment). Thresholds have also been developed identifying the received level of in-air sound above which exposed pinnipeds would likely be behaviorally harassed.

Level B Harassment for non-explosive sources—Though significantly driven by received level, the onset of behavioral disturbance from anthropogenic noise exposure is also informed to varying degrees by other factors related to the source (*e.g.,* frequency, predictability, duty cycle), the environment (*e.g.,* bathymetry), and the receiving animals (hearing, motivation, experience, demography, behavioral context) and

can be difficult to predict (Southall *et al.,* 2007, Ellison et al., 2011). Based on what the available science indicates and the practical need to use a threshold based on a factor that is both predictable and measurable for most activities, NMFS uses a generalized acoustic threshold based on received level to estimate the onset of behavioral harassment. NMFS predicts that marine mammals are likely to be behaviorally harassed in a manner we consider Level B harassment when exposed to underwater anthropogenic noise above received levels of 120 dB re 1 μPa (rms) for continuous (*e.g.* vibratory pile-driving, drilling) and above 160 dB re 1 μPa (rms) for non-explosive impulsive (*e.g.,* seismic airguns) or intermittent (*e.g.,* scientific sonar) sources. For in-air sounds, NMFS predicts that pinnipeds exposed above received levels of 100 dB re 20 μPa (rms) will be behaviorally harassed.

The City's proposed activities include the use of continuous (vibratory pile driving) and impulsive (impact pile driving) sources, and therefore the 120 and 160 dB re 1 μPa (rms) are applicable.

Level A harassment for non-explosive sources—NMFS' Technical Guidance for Assessing the Effects of Anthropogenic Sound on Marine Mammal Hearing (Technical Guidance, 2016) identifies dual criteria to assess auditory injury (Level A harassment) to five different marine mammal groups (based on hearing sensitivity) as a result of exposure to noise from two different types of sources (impulsive or non-impulsive). The City's proposed activities include the use of impulsive (impact pile driving) and non-impulsive (vibratory pile driving) sources.

These thresholds were developed by compiling and synthesizing the best available science and soliciting input multiple times from both the public and peer reviewers to inform the final product, and are provided in Table 6 below. The references, analysis, and methodology used in the development of the thresholds are described in NMFS 2016 Technical Guidance, which may be accessed at: *https://www.fisheries.noaa.gov/resource/document/underwater-acoustic-thresholds-onset-permanent-and-temporary-threshold-shifts.*

TABLE 6—THRESHOLDS IDENTIFYING THE ONSET OF PERMANENT THRESHOLD SHIFT

Hearing group	PTS onset thresholds	
	Impulsive	Non-impulsive
Low-Frequency (LF) Cetaceans	$L_{pk,flat}$: 219 dB; $L_{E,LF,24h}$: 183 dB	$L_{E,LF,24h}$: 199 dB.
Mid-Frequency (MF) Cetaceans	$L_{pk,flat}$: 230 dB; $L_{E,MF,24h}$: 185 dB	$L_{E,MF,24h}$: 198 dB.
High-Frequency (HF) Cetaceans	$L_{pk,flat}$: 202 dB; $L_{E,HF,24h}$: 155 dB	$L_{E,HF,24h}$: 173 dB.
Phocid Pinnipeds (PW) (Underwater)	$L_{pk,flat}$: 218 dB; $L_{E,PW,24h}$: 185 dB	$L_{E,PW,24h}$: 201 dB.
Otariid Pinnipeds (OW) (Underwater)	$L_{pk,flat}$: 232 dB; $L_{E,OW,24h}$: 203 dB	$L_{E,OW,24h}$: 219 dB.

* Dual metric acoustic thresholds for impulsive sounds: Use whichever results in the largest isopleth for calculating PTS onset. If a non-impulsive sound has the potential of exceeding the peak sound pressure level thresholds associated with impulsive sounds, these thresholds should also be considered.

Note: Peak sound pressure (Lpk) has a reference value of 1 μPa, and cumulative sound exposure level (LE) has a reference value of 1μPa2s. In this Table, thresholds are abbreviated to reflect American National Standards Institute standards (ANSI 2013). However, peak sound pressure is defined by ANSI as incorporating frequency weighting, which is not the intent for this Technical Guidance. Hence, the subscript ''flat'' is being included to indicate peak sound pressure should be flat weighted or unweighted within the generalized hearing range. The subscript associated with cumulative sound exposure level thresholds indicates the designated marine mammal auditory weighting function (LF, MF, and HF cetaceans, and PW and OW pinnipeds) and that the recommended accumulation period is 24 hours. The cumulative sound exposure level thresholds could be exceeded in a multitude of ways (*i.e.,* varying exposure levels and durations, duty cycle). When possible, it is valuable for action proponents to indicate the conditions under which these acoustic thresholds will be exceeded.

Ensonified Area

Here, we describe operational and environmental parameters of the activity that will feed into identifying the area ensonified above the acoustic thresholds.

Level B Harassment

In-Air Disturbance during General Construction Activities—Level B behavioral disturbance may occur incidental to the use of construction equipment during general construction that is proposed in the dry, above water, or inland within close proximity to the river banks. These construction activities are associated with the removal and construction of the rail superstructures, and the removal of the existing concrete foundations and the 9th Street retaining wall. Possible equipment includes an excavator, crane, dump truck, and chain saw. It is estimated that the sound levels during these activities will range from 78 to 93 dB RMS at 20 m from the sound source, with the loudest airborne noise produced by the use of a concrete saw (Hanan & Associates, 2014). These noise levels are based on acoustic data collected during the City of San Diego Lifeguard Station Demolition and Construction Monitoring project. Using the Spherical Spreading Loss Model (20logR), a maximum sound source level of 93 dB RMS at 20 m, sound levels in-air would attenuate below the 90dB RMS Level B harassment threshold for harbor seals at 28 m, and below the 100 dB RMS threshold for all other pinnipeds at 9 m. Harbor seals are only present in the main river channel and are not expected to occur within 28 m of the activity and are therefore not expected to be harassed by in-air sound. Additionally, the city is proposing a 10 m shutdown zone for all general construction work to prevent injury from physical interaction with equipment. The City would therefore shut down equipment before hauled out sea lions could be acoustically harassed by the sound produced. No Level B harassment is expected to occur due to increased sounds from railway and roadway construction. However, sea lions may be disturbed by the presence of construction equipment and increased human presence during above-water construction.

Although some piles may potentially be driven or removed in the dry due to tidal conditions, the City is assuming all pile driving and removal will occur in water. The Level B zone of influence for in-water pile driving and removal is greater than the airborne zone of influence so no airborne harassment is requested from pile driving or removal. All harassment due to pile driving and removal is assumed to be in-water.

In-Water Disturbance during Vibratory Pile Removal—Level B behavioral disturbance may occur incidental to the use of a vibratory hammer due to propagation of underwater noise during the removal of the existing timber substructures. An

estimated 255 timber piles will need to be removed to facilitate construction of the three new crossings. It is anticipated that the contractor will need to utilize a vibratory hammer during extraction. Removal via vibratory hammer will result in the greatest amount of underwater noise during construction and will be the farthest reaching extent of aquatic impacts during pile removal activities. We note that some pile removal will occur in the dry (depending on tidal stage); however, we are conservatively assuming all work would occur in-water since it is not feasible to determine how many piles would be removed in the dry. When piles are removed at lower tidal stages, we do not anticipate sound to propagate as far or, in the case of no water, at all.

Washington State Department of Transportation (WSDOT) monitored underwater noise during the removal of three 12-in timber dolphin piles at Port Townsend (Laughlin, 2011a). Most of the timber piles to be removed in this project are 12-in but some may be up to 14-in. Average noise levels during vibratory removal of the wood piles were measured at 150 dB RMS at 16 m from the source. The Practical Spreading Loss Model (15logR) was used to calculate the in-water Level B Zone of Influence (ZOI) during vibratory pile removal. Using a measurement of 150dB at 16 m, a 1,600 m Level B ZOI (120 dB RMS threshold) is expected for vibratory pile removal activities. Based on the contours of the shoreline and 1,600 m ZOI, a total of 4.5 square kilometers (km^2) is expected to be ensonified due to vibratory pile removal (see Figure 10 in application) (Table 7).

In-Water Disturbance during Impact Pile Driving—Level B behavioral disturbance may occur incidental to the use of an impact hammer due to the propagation of underwater noise during the installation of permanent and temporary steel piles. The City proposes to install a total of 74 24-in and 10 16-in steel piles. The City used the sound source levels from 24-in piles only to estimate the ZOI due to pile driving as the sound source levels from 24-in piles are greater than those of 16-in piles. The City will use the ZOI created by installation of 24-in piles during the installation of 16-in piles to be conservative.

Based on the most recent WSDOT data, the unmitigated sound pressure level associated with impact pile driving 24-in steel piles is 194 dB RMS at 10 m (WSDOT, 2016). The contractor will be required to use a bubble curtain device during impact pile driving in compliance with the Federal Aid Highway Program (FAHP) Programmatic Biological Opinion which will be utilized for ESA coverage for listed salmonids. Use of a bubble curtain device was assumed to decrease initial sound levels by 10 dB (Reyff 2007), resulting in an initial SPL of 184 dB RMS at 10 m from the source. Using the values from WSDOT in the Practical Spreading Loss Model (15logR), the distance to the 160 dB behavioral disturbance threshold is calculated to be 398 m from the pile when a noise attenuation device is used (Table 7) as opposed to 1,848 m when a device is not used. The use of a noise attenuation device would shrink the distance at which noise exceeds the thresholds by approximately 80 percent, resulting in a significantly smaller area of potential impact. With a 398 m ZOI, a total of 0.40 km^2 is expected to be ensonified by impact pile driving (Figure 11 in application).

TABLE 7—INPUTS AND RESULTING DISTANCES TO LEVEL B HARASSMENT ISOPLETHS

Activity	SL (distance measured) [1]	Threshold level	Propagation loss coefficient	Level B isopleth (m)	Level B area (km^2)
Vibratory pile driving/removal	150 dB (16 m)	120 dB re 1 μPa	15	1,600	4.5
Impact pile driving (24-in piles)	184 dB (10 m)	160 dB re 1 μPa	15	398	0.4
General Construction (in-air)	93 dB (20 m)	100 dB re 20 μPa	20	9 m	n/a

Level A Harassment

When NMFS Technical Guidance (2016) was published, in recognition of the fact that ensonified area/volume could be more technically challenging to predict because of the duration component in the new thresholds, we developed a User Spreadsheet that includes tools to help predict a simple isopleth that can be used in conjunction with marine mammal density or occurrence to help predict takes. We note that because of some of the assumptions included in the methods used for these tools, we anticipate that isopleths produced are typically going to be overestimates of some degree, which will result in some degree of overestimate of Level A take. However, these tools offer the best way to predict appropriate isopleths when more sophisticated 3D modeling methods are not available, and NMFS continues to develop ways to quantitatively refine these tools, and will qualitatively address the output where appropriate. For stationary sources (such as impact and vibratory pile driving), NMFS User Spreadsheet predicts the closest distance at which, if a marine mammal remained at that distance the whole duration of the activity, it would not incur PTS. Inputs used in the User Spreadsheet, and the resulting isopleths are reported below.

TABLE 8—PTS ISOPLETH DATA FOR VIBRATORY PILE REMOVAL

Source Level (RMS SPL)	150
Activity Duration (hours) within 24-hr period	8
Activity Duration (seconds)	28,800
10 Log (Duration)	44.59
Propagation (xLogR)	15
Distance of source level measurement (m)	16

TABLE 9—RESULTING PTS ISOPLETHS FOR VIBRATORY PILE DRIVING

	Phocid pinnipeds	Otariid pinnipeds
SEL_{cum} Threshold	210	219
PTS Isopleth to Threshold (meters)	4.9	0.3

TABLE 10—PTS ISOPLETH DATA FOR IMPACT PILE DRIVING

Source Level (Single Strike/shot SEL)	168
(a) Number of strikes in 1 h OR (b) Number of strikes per pile	250
(a) Activity Duration (h) within 24-h period OR (b) Number of piles per day	4
Propagation (xLogR)	15
Distance of single strike SEL measurement (meters)	10

TABLE 11—RESULTING PTS ISOPLETHS FOR IMPACT PILE DRIVING

	Phocid pinnipeds	Otariid pinnipeds
SEL_{cum-} Threshold	185	203

TABLE 11—RESULTING PTS ISOPLETHS FOR IMPACT PILE DRIVING—Continued

	Phocid pinnipeds	Otariid pinnipeds
PTS Isopleth to Threshold (m)	53.4	3.9

The resulting small PTS isopleths assume an animal would remain stationary at that distance for the duration of the activity. Given the extended durations and due to the relatively small distances to PTS onset from each activity, and the mitigation measures (See ''Proposed Mitigation'') proposed by the City, Level A take is neither expected nor authorized.

Marine Mammal Occurrence

In this section we provide the information about the presence, density, or group dynamics of marine mammals that will inform the take calculations.

The City used species counts from 2000–2014 taken by WDFW from the South Jetty at the mouth of the Columbia River to determine the number of pinnipeds that may be in the vicinity of the project. Although the South Jetty is over 10 miles away from the project site, WDFW monthly counts are the best available data for potential marine mammal occurrence near the project site. Numbers of California sea lions hauled out at the South Jetty ranged from 1 to 1,214, with a general trend of lower numbers in the summer and winter, and peak counts in the fall and spring. Monthly counts of Steller sea lions ranged from 177 to 1,663, with the highest numbers occurring in late fall and winter. Counts of harbor seals were not conducted every month, but the numbers of harbor seals at the South Jetty ranged from one to 57 seals.

Take Calculation and Estimation

Here we describe how the information provided above is brought together to produce a quantitative take estimate.

Although three species of pinniped occur in the vicinity of the project, they do not occur in equal numbers. Harbor seals and Steller sea lions are only known to occur out in the river channel and would only be harassed if they are transiting through the Zone of Influence (1,600 m for vibratory pile removal, 398 m for impact pile driving). Harbor seals and Steller sea lions would only be harassed during the in-water work period (November through February). California sea lions are the most commonly seen in the area, and are known to haul out on the riverbanks and structures near the bridges. California sea lions may be harassed by underwater sound resulting from vibratory pile removal and impact pile driving (at the distances listed above) as well as airborne sound resulting from roadway and railway demolition and construction. Using the highest sound source (concrete saw, 93 dB_{RMS} re: 20 μPa at 20 m), the isopleth to Level B harassment from airborne noise (100 dB re: 20 μPa) is 9 m. The City is proposing a 10 m shutdown zone during all railway and roadway above-water construction to prevent injury from physical interaction with equipment (see ''Proposed Mitigation''). The City would therefore shut down equipment before sea lions would be acoustically harassed by the sound produced and no Level B acoustic harassment would occur. However, the City anticipates that California sea lions hauled out on the banks of the river in the vicinity of the construction work may be visually disturbed by the presence of construction equipment and may flush, resulting in Level B take. Therefore, the City is requesting take of California sea lions during the above-water work period (October 2018 and March–April 2019).

While harbor seals and Steller sea lions would only be harassed during the in-water work period (November through February), California sea lions may be harassed over the entire duration of the project (October through April). To determine the estimated pinniped exposure and take, average monthly counts for each species from the South Jetty haulout (Table 12) were multiplied by the duration (months) of their expected exposure (Table 13).

TABLE 12—AVERAGE COUNTS OF PINNIPEDS AT SOUTH JETTY HAULOUT

Month	Monthly average number of California sea lions	Monthly average numbers of harbor seals	Monthly average number of Steller sea lions
October	508	N/A	N/A
November	1,214	24	1,663
December	725	57	1,112
January	10	24	249
February	28	1	259
March	17	N/A	N/A
April	99	N/A	N/A
Average over course of project	372	27	821

For example, California sea lion take was estimated by multiplying the average monthly count at the South Jetty haulout from October through April (372) by the number of months of project activity (7) for a total of 2,604.

TABLE 13—ESTIMATED PINNIPED EXPOSURE AND TAKE

	Average count per month	In-air months	In-water months	Total months of impacts	Total take	Percent of stock
California Sea Lion	[1] 372	3	4	7	2,604	0.88
Steller Sea Lion	[2] 821	0	4	4	3,284	7.9
Harbor Seal	[2] 27	0	4	4	108	0.44

[1] Average monthly counts from October through April at the South Jetty (WDFW 2014).
[2] Average monthly counts from November through February at the South Jetty (WDFW 2014).

Proposed Mitigation

In order to issue an IHA 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 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 (latter not applicable for this action). NMFS regulations require applicants for incidental take authorizations to include information about the availability and feasibility (economic and technological) of equipment, methods, and manner of conducting such activity or other means of effecting the least practicable adverse impact upon the affected species or stocks and their habitat (50 CFR 216.104(a)(11)).

In evaluating how mitigation may or may not be appropriate to ensure the least practicable adverse impact on species or stocks and their habitat, as well as subsistence uses where applicable, we carefully consider two primary factors:

(1) The manner in which, and the degree to which, the successful implementation of the measure(s) is expected to reduce impacts to marine mammals, marine mammal species or stocks, and their habitat. This considers the nature of the potential adverse impact being mitigated (likelihood, scope, range). It further considers the likelihood that the measure will be effective if implemented (probability of accomplishing the mitigating result if implemented as planned) the likelihood of effective implementation (probability implemented as planned); and

(2) The practicability of the measures for applicant implementation, which may consider such things as cost, impact on operations, and, in the case of a military readiness activity, personnel safety, practicality of implementation, and impact on the effectiveness of the military readiness activity.

Mitigation for Marine Mammals and Their Habitat

General Construction Measures—All construction activities will be performed in accordance with the current Oregon Department of Transportation (ODOT) Standard Specifications for Construction, the Contract Plans, and the Project Special Provisions. In addition, the following general construction measures will be adhered to.

- All work below the HMT will be completed during the ODFW prescribed IWWP of November 1 through February 28.
- All work shall be performed according to the requirements and conditions of the regulatory permits issued by federal, state, and local governments. Seasonal restrictions, *i.e.,* work windows, will be applied to the Project to avoid or minimize potential impacts to listed or proposed species based on agreement with, and the regulatory permits issued by Department of State Lands, and USACE in consultation with NMFS. The City will comply with all stipulations from the FAHP Biological Opinion for salmonids (*i.e.,* using air bubble curtains).
- The City will have an inspector onsite during construction. The role of the inspector is to ensure compliance with the construction contract and other permits and regulations. The onsite inspector will also perform marine mammal monitoring duties when protected species observers (PSOs) are not onsite (See Proposed Monitoring section).
- To ensure no contaminants enter the water, mobile heavy equipment will be stored in a staging area at least 150 ft from the river or in an isolated hard zone. Equipment will be inspected daily for fluid leaks before leaving the staging area. Stationary equipment operated within 150 ft of the river will be maintained and protected to prevent leaks and spills. Erosion and sediment control BMPs will be installed prior to initiating and construction activities.
- The contractor will be responsible for the preparation of a Pollution Control Plan (PCP). The PCP will designate a professional on-call spill response teams, and identify all contractor activities, hazardous substances used, and wastes generated. The PCP will describe how hazardous substances and wastes will be stored, used, contained, monitored, disposed of, and documented.

Pile Removal and Installation BMPs—The following mitigation measures will be implemented to minimize disturbance during pile removal and installation activities.

- An air bubble system shall be employed during impact installation unless the piles are driven on dry areas.
- The contractor will implement a soft-start procedure for impact pile driving activities. The objective of a soft-start is to provide a warning and/or give animals in close proximity to pile driving a chance to leave the area prior to an impact driver operating at full capacity, thereby exposing fewer animals to loud underwater and airborne sounds. A soft-start procedure will be used at the beginning of each day that pile installation activities are conducted (*i.e.,* for impact driving, an initial set of three strikes would be made by the hammer at 40 percent energy, followed by a one minute wait period, then two subsequent three-strike sets at 40 percent energy, with one minute waiting periods, before initiating continuous driving).
- Monitoring of marine mammals shall take place starting 30 minutes before construction begins until 30 minutes after construction ends (See *Proposed Monitoring*).
- Before commencement of vibratory pile removal activities, the City will establish a 15 m Level A Exclusion Zone.
- Before commencement of impact pile driving activities, the City will establish a 53.4 m Level A Exclusion Zone.
- Before commencement of above water construction activities, the City will establish a 10 m Level A Exclusion Zone to prevent injury from physical interaction with construction equipment.
- The City shall shut down operations if a marine mammal is sighted within or approaching the Level A Exclusion Zone until the marine mammal is sighted moving away from the exclusion zone, or if not sighted for 15 minutes after the shutdown. The City will also shut down to prevent Level B takes when the take of a pinniped species is approaching the authorized take limits.
- If the exclusion zone is obscured by poor lighting conditions, pile driving will not be initiated until the entire zone is visible.
- In-water work will only commence once observers have declared the Exclusion Zone clear of marine mammals.

Based on our evaluation of the applicant's proposed measures, NMFS has preliminarily determined that the proposed mitigation measures provide the means effecting the least practicable impact on the affected species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance.

Proposed Monitoring and Reporting

In order to issue an IHA 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 authorizations 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 proposed action area. Effective reporting is critical both to compliance as well as ensuring that the most value is obtained from the required monitoring.

Monitoring and reporting requirements prescribed by NMFS should contribute to improved understanding of one or more of the following:

- Occurrence of marine mammal species or stocks in the area in which take is anticipated (*e.g.,* presence, abundance, distribution, density).
- Nature, scope, or context of likely marine mammal exposure to potential stressors/impacts (individual or cumulative, acute or chronic), through better understanding of: (1) Action or environment (*e.g.,* source characterization, propagation, ambient noise); (2) affected species (*e.g.,* life history, dive patterns); (3) co-occurrence of marine mammal species with the action; or (4) biological or behavioral context of exposure (*e.g.,* age, calving or feeding areas).
- Individual marine mammal responses (behavioral or physiological) to acoustic stressors (acute, chronic, or cumulative), other stressors, or cumulative impacts from multiple stressors.
- How anticipated responses to stressors impact either: (1) Long-term fitness and survival of individual marine mammals; or (2) populations, species, or stocks.
- Effects on marine mammal habitat (*e.g.,* marine mammal prey species, acoustic habitat, or other important physical components of marine mammal habitat).
- Mitigation and monitoring effectiveness.

Proposed Monitoring

(1) Protected Species Observers: The City will employ qualified PSOs to monitor the extent of the Region of Activity for marine mammals. Qualifications for marine mammal observers include:

a. Visual acuity in both eyes (correction is permissible) sufficient for discerning moving targets at the water's surface with ability to estimate target size and distance. Use of binoculars is necessary to correctly identify the target.

b. Advanced education (at least some college level course work) in biological science, wildlife management, mammalogy, or related fields (bachelor's degree or higher is preferred but not required).

c. Experience or training in the field identification of marine mammals (cetaceans and pinnipeds).

d. Sufficient training, orientation, or experience with the construction operation to provide for personal safety during observations.

e. Ability to communicate orally, by radio or in person, with project personnel to provide real time information on marine mammals observed in the area as necessary.

f. Experience and ability to conduct field observations and collect data according to assigned protocols (this may include academic experience).

g. Writing skills sufficient to prepare a report of observations that would include such information as the number and type of marine mammals observed; the behavior of marine mammals in the project area; dates and times when observations were conducted; dates and times when in-water construction activities were conducted; and dates and times when marine mammals were present at or within the defined Region of Activity.

(2) Monitoring Schedule: PSOs shall be present onsite during IWW construction activities as follows:

a. During vibratory pile removal activities:

i. Two NMFS qualified observers will be onsite the first day of removal at each bridge, one NMFS qualified observer will be onsite every third day thereafter.

ii. One NMFS qualified observer will be stationed at the best practicable land-based vantage point to observe the downstream portion of the disturbance zone, and the other positioned at the best practicable land-based vantage point to monitor the upstream portion of the disturbance zone.

iii. When PSOs are not onsite, the contractor's onsite inspector will be trained in species identification and monitoring protocol, and will be onsite during all pile removal activities to ensure that no species enter the 15 m Exclusion Zone.

b. During pile driving activities:

i. Two NMFS qualified observers will be onsite the first two days of pile driving at each bridge, and every third day thereafter.

ii. One NMFS observer will be stationed at the best practicable land-based vantage point to observe the downstream portion of the disturbance and exclusion zones, and the other positioned at the best practicable land-based vantage point to monitor the upstream portion of the disturbance and exclusion zones.

iii. When PSOs are not onsite, the contractor's onsite inspector will be trained in species identification and monitoring protocol, and will be onsite during all pile driving activities to ensure that no species enter the Exclusion Zone.

c. During substructure demolition activities (not including pile driving/removal) and superstructure demolition and construction activities:

i. One NMFS qualified observer will be onsite once a week to monitor the Exclusion Zone within 10 m of the construction site.

ii. When PSO is not on-site, the contractor's inspector will be trained in species identification and monitoring protocol, and will be onsite during all construction activities to ensure that no species enter the 10 m Exclusion Zone during superstructure demolition and construction activities.

(3) Monitoring Protocols: PSOs shall monitor marine mammal presence within the Level A Exclusion Zone and Level B ZOIs per the following protocols:

a. A range finder or hand-held global positioning system device will be used by PSOs to ensure that the defined Exclusion Zones are fully monitored and the Level B ZOIs monitored to the best extent practicable.

b. A 30-minute pre-construction marine mammal monitoring period will be required before the first pile driving or pile removal of the day. A 30-minute post-construction marine mammal monitoring period will be required after the last pile driving or pile removal of the day. If the contractor's personnel take a break between subsequent pile driving or pile removal for more than 30 minutes, then additional pre-construction marine mammal monitoring will be required before the next start-up of pile driving or pile removal.

c. If marine mammals are observed, the following information will be documented:

i. Species of observed marine mammals;

ii. Number of observed marine mammal individuals;

iii. Life stages of marine mammals observed;

iv. Behavioral habits, including feeding, of observed marine mammals, in both presence and absence of activities;

v. Location within the Region of Activity; and

vi. Animals' reaction (if any) to pile driving activities or other construction-related stressors including:

1. Impacts to the long-term fitness of the individual animal, if any

2. Long-term impacts to the population, species, or stock (*e.g.,*

through effects on annual rates of recruitment or survival), if any

vii. Overall effectiveness of mitigation measures

d. During vibratory pule removal and impact driving, qualified PSOs will monitor the Level B ZOIs from the best practicable land-based vantage point to observe the downstream and upstream portions of the disturbance zone according to the above schedule.

e. PSOs shall use binoculars to monitor the Region of Activity.

Reporting

(1) The City shall provide NMFS with a draft monitoring report within 90 days of the conclusion of the construction work. This report shall detail the monitoring protocol, summarize the data recorded during monitoring, and estimate the number of marine mammals that may have been harassed.

(2) If comments are received from the NMFS West Coast Regional Administrator or NMFS Office of Protected Resources on the draft report, a final report shall be submitted to NMFS within 30 days thereafter. If no comments are received from NMFS, the draft report will be considered to be the final report.

(3) In the unanticipated event that the construction activities clearly cause the take of a marine mammal in a manner prohibited by the NMFS authorization, such as an injury, serious injury, or mortality (*e.g.,* gear interaction), the City shall immediately cease all operations and immediately report the incident to the Chief, Permits and Conservation Division, Office of Protected Resources, and the West Coast Regional Stranding Coordinators. The report must include the following information:

a. Time, date, and location (latitude/longitude) of the incident;

b. Description of the incident;

c. Status of all sound source use in the 24 hours preceding the incident;

d. Environmental conditions (*e.g.,* wind speed and direction, Beaufort sea state, cloud cover, visibility, and water depth);

e. Description of marine mammal observations in the 24 hours preceding the incident;

f. Species identification or description of the animal(s) involved, including life stage and the fate of the animal(s); and

g. Photographs or video footage of the animal(s) (if equipment is available).

Activities shall not resume until NMFS is able to review the circumstances of the prohibited take. NMFS shall work with the City to determine what is necessary to minimize the likelihood of further prohibited take and ensure MMPA compliance. Activities may not be resumed until notified by NMFS via letter, email, or telephone.

(4) In the event that the City discovers an injured or dead marine mammal, and the lead PSO determines that the cause of injury or death is unknown and the death is relatively recent (*i.e.,* in less than a moderate state of decay as described in the next paragraph), the City will immediately report the incident to the Chief, Permits and Conservation Division, Office of Protected Resources, NMFS, and the West Coast Regional Stranding Coordinators. The report must contain the same information identified above. Activities may continue while NMFS reviews the circumstances of the incident. NMFS will work with the City to determine whether modifications in the activities are appropriate.

(5) In the event that the City 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 in the IHA (*e.g.,* previously wounded animal, carcass with moderate to advanced decomposition, or scavenger damage), the City shall report the incident to the Chief, Permits and Conservation Division, Office of Protected Resources, NMFS, and the West Coast Regional Stranding Coordinators, within 24 hours of the discovery. The City shall provide photographs or video footage (if available) or other documentation of the stranded animal sighting to NMFS and the Marine Mammal Stranding Network. The City can continue its operations under such a case.

Negligible Impact Analysis and Determination

NMFS has defined negligible impact 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'' (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 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 harassment, NMFS considers other factors, such as the likely nature of any responses (*e.g.,* intensity, duration), the context of any responses (*e.g.,* critical reproductive time or location, migration), as well as effects on habitat, and the likely effectiveness of the mitigation. We also assess the number, intensity, and context of estimated takes by evaluating this information relative to population status. Consistent with the 1989 preamble for NMFS's implementing regulations (54 FR 40338; September 29, 1989), the impacts from other past and ongoing anthropogenic activities are incorporated into this analysis via their impacts on the environmental baseline (*e.g.,* as reflected in the regulatory status of the species, population size and growth rate where known, ongoing sources of human-caused mortality, or ambient noise levels).

To avoid repetition, the discussion of our analyses applies to all three species proposed to be taken by this project (California sea lion, Steller sea lion, and harbor seal), given that the anticipated effects of this activity on these different marine mammal stocks are expected to be similar. There is little information about the nature or severity of the impacts, or the size, status, or structure of any of these species or stocks that would lead to a different analysis for this activity.

Authorized takes are expected to be limited to short-term Level B harassment. Marine mammals present in the vicinity of the action area and taken by Level B harassment would most likely show overt brief disturbance (startle reaction, flushing) and avoidance of the area from elevated noise levels during pile removal and installation and railway superstructure construction. The project is not expected to have a significant adverse effect on affected marine mammal habitat, as discussed in detail in the ''Anticipated Effects on Marine Mammal Habitat'' section. There is no critical habitat in the vicinity of the project and the project activities would not permanently modify existing marine mammal habitat. The impacts to marine mammal habitat from the proposed construction actions are expected to be temporary and include increased human activity and noise levels, minimal impacts to water quality, and negligible changes in prey availability near the individual bridge sites. Pinnipeds in the vicinity are likely habituated to high levels of human activity as the Astoria waterfront is a highly developed area. The project may benefit marine mammal habitat by removing several hundred treated timber piles from the Columbia River.

Impacts to exposed pinnipeds are expected to be minor and temporary. The area likely impacted by the construction is relatively small compared to the available habitat in the river. For California and Steller sea

lions, sub-adult and adult males could be harassed during construction activities. For harbor seals, sub-adult and adult males and/or females could be harassed during construction activities. The project occurs outside of known pupping periods for all species, and there are no known rookeries within the region of activity. No pups or breeding adults are expected to be affected by the project activities.

In summary and as described above, the following factors primarily support our preliminary determination that the impacts resulting from this activity are not expected to adversely affect the species or stock through effects on annual rates of recruitment or survival:

- No mortality is anticipated or authorized;
- No injury or serious injury is anticipated or authorized;
- In-water work is limited to a four-month period, and likely only 80 days within that time;
- No permanent effects to marine mammal habitat or prey is expected;
- Marine mammals are currently exposed to high human use area and are likely habituated to disturbance;
- Any impacts from the project are expected to result in short-term, mild behavioral reactions such as avoidance or flushing;
- There are no known important feeding, pupping, or other areas of biological significance in the project area; and
- The project affects only a small percentage of each stock of marine mammal affected, and only in a limited portion of their overall range.

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 proposed monitoring and mitigation measures, NMFS preliminarily finds that the total marine mammal take from the proposed activity will have a negligible impact on all affected marine mammal species or stocks.

Small Numbers

As noted above, only small numbers of incidental take may be authorized under section 101(a)(5)(D) of the MMPA for specified activities other than military readiness activities. The MMPA does not define small numbers and so, in practice, where estimated numbers are available, NMFS compares the number of individuals taken to the most appropriate estimation of abundance of the relevant species or stock in our determination of whether an authorization is limited to small numbers of marine mammals. Additionally, other qualitative factors may be considered in the analysis, such as the temporal or spatial scale of the activities.

The number of each species proposed to be taken as a result of this project is less than 10 percent of the total stock. In fact, the numbers of California sea lions and harbor seals is less than one percent of their respective stock abundance estimates. Additionally, the number of takes requested is based on the number of estimated exposures, not necessarily the number of individuals exposed. Pinnipeds may remain in the general area of the project sites and the same individuals may be harassed multiple times over multiple days, rather than numerous individuals harassed once.

Based on the analysis contained herein of the proposed activity (including the proposed mitigation and monitoring measures) and the anticipated take of marine mammals, NMFS preliminarily finds that small numbers of marine mammals will be taken relative to the population size of the affected species or stocks.

Unmitigable Adverse Impact Analysis and Determination

There are no relevant subsistence uses of the affected marine mammal stocks or species implicated by this action. Therefore, NMFS has preliminarily 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)

Section 7(a)(2) of the Endangered Species Act of 1973 (ESA: 16 U.S.C. 1531 *et seq.*) requires that each Federal agency insure that any action it authorizes, funds, or carries out 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. To ensure ESA compliance for the issuance of IHAs, NMFS consults internally, in this case with the NMFS West Coast Region Protected Resources Division Office, whenever we propose to authorize take for endangered or threatened species.

No incidental take of ESA-listed species is proposed for authorization or expected to result from this activity. Therefore, NMFS has determined that formal consultation under section 7 of the ESA is not required for this action.

Proposed Authorization

As a result of these preliminary determinations, NMFS proposes to issue an IHA to the City of Astoria for conducting waterfront bridge removal and replacement in Astoria, OR from October 1, 2018 to September 30, 2019, provided the previously mentioned mitigation, monitoring, and reporting requirements are incorporated. This section contains a draft of the IHA itself. The wording contained in this section is proposed for inclusion in the IHA (if issued).

Incidental Harassment Authorization

The City of Astoria (City) is hereby authorized under section 101(a)(5)(D) of the Marine Mammal Protection Act (MMPA; 16 U.S.C. 1371(a)(5)(D)) to harass marine mammals incidental to the Waterfront Bridges Replacement Project in Astoria, Oregon, when adhering to the following terms and conditions.

1. This Incidental Harassment Authorization (IHA) is valid from October 1, 2018 to September 30, 2019.

2. This IHA is valid only for construction activities associated with the Waterfront Bridges Replacement Project in Astoria, Oregon.

3. *General Conditions:*

(a) A copy of this IHA must be in the possession of the City, its designees, and work crew personnel operating under the authority of this IHA.

(b) The species authorized for taking are the California sea lion (*Zalophus californianus*), Steller sea lion (*Eumetopias jubatus*), and Pacific harbor seal (*Phoca vitulina richardii*).

(c) The taking, by Level B harassment only, is limited to the species listed in condition 3(b). The authorized take numbers are shown below and in Table 1:

i. 2,604 California sea lions

ii. 3,284 Steller sea lions

iii. 108 Pacific harbor seals

(d) The taking by injury (Level A harassment), serious injury, or death of any of the species listed in condition 3(b) of the Authorization or any taking of any other species of marine mammal is prohibited and may result in the modification, suspension, or revocation of this IHA.

(e) The City shall conduct briefings between construction supervisors and crews, marine mammal monitoring team, acoustical monitoring team, and City staff prior to the start of all construction work, and when new personnel join the work, in order to explain responsibilities, communication procedures, marine mammal monitoring protocol, and operational procedures.

4. Mitigation Measures

The holder of this Authorization is required to implement the following mitigation measures:

(a) General Construction Measures

i. All construction activities shall be performed in accordance with the current ODOT Standard Specifications for Construction, the Contract Plans, and the Project Special Provisions. In addition, the following general construction measures will be adhered to:

a. All work shall be performed according to the requirements and conditions of the regulatory permits issued by federal, state, and local governments. Seasonal restrictions, *i.e.,* work windows, shall be applied to the Project to avoid or minimize potential impacts to listed or proposed species based on agreement with, and the regulatory permits issued by Department of State Lands, and USACE in consultation with NMFS. The City shall comply with all stipulations from the FAHP Biological Opinion for salmonids (*i.e.,* using air bubble curtains).

b. The City shall have an inspector onsite during construction. The role of the inspector is to ensure compliance with the construction contract and other permits and regulations. The onsite inspector shall also perform marine mammal monitoring duties when protected species observers (PSOs) are not onsite (See Proposed Monitoring section).

c. To ensure no contaminants enter the water, mobile heavy equipment shall be stored in a staging area at least 150 ft from the river or in an isolated hard zone. Equipment shall be inspected daily for fluid leaks before leaving the staging area. Stationary equipment operated within 150 ft of the river shall be maintained and protected to prevent leaks and spills. Erosion and sediment control BMPs shall be installed prior to initiating and construction activities.

d. All work below the Highest Mean Tide (HMT) shall be completed during the ODFW prescribed IWWP of November 1 through February 28.

e. The contractor shall be responsible for the preparation of a Pollution Control Plan (PCP). The PCP shall designate a professional on-call spill response team, and identify all contractor activities, hazardous substances used, and wastes generated. The PCP shall describe how hazardous substances and wastes will be stored, used, contained, monitored, disposed of, and documented.

(b) Pile Removal and Installation

i. The following mitigation measures shall be implemented to minimize disturbance during pile removal and installation activities:

a. An air bubble system shall be employed during impact installation unless the piles are driven on dry areas.

b. The contractor shall implement a soft-start procedure for impact pile driving activities. The objective of a soft-start is to provide a warning and/or give animals in close proximity to pile driving a chance to leave the area prior to an impact driver operation at full capacity, thereby exposing fewer animals to loud underwater and airborne sounds. A soft-start procedure will be used at the beginning of each day that pile installation activities are conducted. For impact driving, an initial set of three strikes would be made by the hammer at 40 percent energy, followed by a one minute wait period, the two subsequent three-strike sets at 40 percent energy, with one minute waiting periods, before initiating continuous driving.

c. Monitoring of marine mammals shall take place starting 30 minutes before construction begins until 30 minutes after construction ends.

d. Before commencement of non-pulse (vibratory) pile removal activities, the contractor shall establish a 15 m Level A Exclusion Zone (Table 2).

e. Before commencement of impact pile driving activities, the contractor shall establish a 53.4 m Level A Exclusion Zone (Table 2).

f. Before commencement of above-water construction activities, the contractor shall establish a 10 m Level A Exclusion Zone (Table 2).

g. Prior to initiating in-water pile driving, pile removal, and concrete removal activities, the contractor will establish Level B ZOIs (Table 2):

1. The Level B ZOI for all pile removal activities shall be established out to a distance of 1,600 m from the pile.

2. The Level B ZOI for all pile driving activities shall be established out to a distance of 398 m from the pile.

3. The Level B ZOI during rail superstructure demolition and construction shall be established out to a distance of 28 m from the construction area.

4. If a marine mammal enters the Level B ZOI, but does not enter the Level A Exclusion Zone, a ''take'' shall be recorded and the work shall be allowed to proceed without cessation. Marine mammal behavior will be monitored and documented.

5. The City shall shut down operations if a marine mammal is sighted within or approaching the Level A Exclusion Zone until the marine mammal is sighted moving away from the exclusion zone, or if not sighted for 15 minutes after the shutdown. The City shall also shut down to prevent Level B takes when the take of a pinnipeds species is approaching the authorized take limits.

h. If the exclusion zone is obscured by poor lighting conditions, pile driving shall not be initiated until the entire zone is visible.

i. In-water work shall only commence once observers have declared the Exclusion Zone clear of marine mammals.

j. A monitoring plan shall be implemented as described below. This plan includes Exclusion Zones and specific procedures in the event a marine mammal is encountered.

5. Monitoring

The holder of this Authorization is required to conduct marine mammal monitoring during construction activities.

(a) Protected Species Observers: The contractor shall employ qualified Protected Species Observers (PSOs) to monitor the extent of the Region of Activity for marine mammals. Qualifications for marine mammal observers include:

i. Visual acuity in both eyes (correction is permissible) sufficient for discerning moving targets at the water's surface with ability to estimate target size and distance. Use of binoculars is necessary to correctly identify the target.

ii. Advanced education (at least some college level coursework) in biological science, wildlife management, mammalogy, or related fields (bachelor's degree or higher is preferred but not required).

iii. Experience or training in the field of identification of marine mammals (cetaceans and pinnipeds).

iv. Sufficient training, orientation, or experience with the construction operation to provide for personal safety during observations.

v. Ability to communicate orally, by radio or in person, with project personnel to provide real time information on marine mammals observed in the area as necessary.

vi. Experience and ability to conduct field observations and collect data according to assigned protocols (this may include academic experience).

vii. Writing skills sufficient to prepare a report of observations that would include such information as the number and type of marine mammals observed; the behavior of marine mammals in the project area; dates and times when

observations were conducted; dates and times when in-water construction activities were conducted; and dates and times when marine mammals were present at or within the defined Region of Activity.

ii. Monitoring Schedule: PSOs shall be present onsite during in-water construction activities as follows:

i. During vibratory pile removal activities:

a. Two NMFS qualified observers shall be onsite the first day of removal at each bridge, one NMFS qualified observer shall be onsite every third day thereafter.

b. One PSO observer shall be stationed at the best practicable land-based vantage point to observe the downstream portion of the disturbance zone, and the other positioned at the best practicable land-based vantage point to monitor the upstream portion of the disturbance zone.

c. When PSOs are not onsite, the contractor's onsite inspector shall be trained in species identification and monitoring protocol, and shall be onsite during all pile removal activities to ensure than no species enter the 15 m Exclusion Zone.

ii. During pile driving activities:

a. Two NMFS qualified observers shall be onsite the first two days of pile driving at each bridge, and every third day thereafter.

b. One PSO shall be stationed at the best practicable land-based vantage point to observe the downstream portion of the disturbance and exclusion zones, and the other positioned at the best practicable land-based vantage point to monitor the upstream portion of the disturbance and exclusion zones.

c. When PSOs are not onsite, contractor's onsite inspector shall be trained in species identification and monitoring protocol, and shall be onsite during all pile driving activities to ensure that no species enter the 53.4 m exclusion zone.

iii. During substructure demolition activities (not including pile removal) and superstructure demolition and construction activities:

a. One PSO shall be onsite once a week to monitor the Exclusion Zone within 10 m of the construction site.

b. When the PSO is not onsite, contractor's inspector shall be trained in species identification and monitoring protocol, and shall be onsite during all construction activities to ensure that no species enter the 10 m Exclusion Zone during superstructure demolition and construction activities.

iii. Monitoring Protocols: PSOs shall monitor marine mammal presence within the Level A Exclusion Zone and Level B ZOIs per the following protocols:

i. A range finder or hand-held global positioning system device shall be used by PSOs to ensure that the defined Exclusion Zones are fully monitored and the Level B ZOIs monitored to the best extent practicable.

ii. A 30-minute pre-construction marine mammal monitoring period shall be required before the first pile driving or pile removal of the day. A 30-minute post-construction marine mammal monitoring period shall be required after the last pile driving or pile removal of the day. If the contractor's personnel take a break between subsequent pile driving or pile removal for more than 30 minutes, then additional pre-construction marine mammal monitoring shall be required before the next start-up of pile driving or pile removal.

iii. If marine mammals are observed, the following information shall be documented:

a. Species of observed marine mammals;

b. Number of observed marine mammal individuals;

c. Life stages of marine mammals observed;

d. Behavioral habits, including feeding, of observed marine mammals, in both presence and absence of activities;

e. Location within the Region of Activity; and

f. Animals' reaction (if any) to pile driving activities or other construction-related stressors including:

1. Impacts to the long-term fitness of the individual animal, if any

2. Long-term impacts to the population, species, or stock (*e.g.,* through effects on annual rates of recruitment or survival), if any

g. Overall effectiveness of mitigation measures.

iv. During vibratory rule removal and impact driving, qualified PSOs shall monitor the Level B ZOIs from the best practicable land-based vantage point to observe the downstream and upstream portions of the disturbance zone according to the above schedule.

v. PSOs shall use binoculars to monitor the Region of Activity.

6. Reporting

The holder of this Authorization is required to:

(a) Submit a draft report on all monitoring conducted under the IHA within 90 calendar days of the completion of construction work. This report must contain the informational elements described in the Monitoring Plan, at minimum, and shall also include:

i. Detailed information about any implementation of shutdowns, including the distance of animals to the pile and description of specific actions that ensued and resulting behavior of the animal, if any.

(b) If comments are received from the NMFS West Coast Regional Administrator or NMFS Office of Protected Resources on the draft report, a final report shall be submitted to NMFS within 30 days thereafter. If no comments are received from NMFS, the draft report will be considered to be the final report.

(c) Reporting injured or dead marine mammals:

i. In the unanticipated event that the specified activity clearly causes the take of a marine mammal in a manner prohibited by this IHA, such as an injury (Level A harassment), serious injury, or mortality, the City shall immediately cease the specified activities and report the incident to the Office of Protected Resources (301–427–8401), NMFS, and the West Coast Regional Stranding Coordinator (206–526–4747), NMFS. The report must include the following information:

i. Time and date of the incident;

ii. Description of the incident;

iii. Environmental conditions (*e.g.,* wind speed and direction, Beaufort sea state, cloud cover, and visibility);

iv. Description of all marine mammal observations and active sound source use in the 24 hours preceding the incident;

v. Species identification or description of the animal(s) involved;

vi. Fate of the animal(s); and

vii. Photographs or video footage of the animal(s).

Activities shall not resume until NMFS is able to review the circumstances of the prohibited take. NMFS will work with the City to determine what measures are necessary to minimize the likelihood of further prohibited take and ensure MMPA compliance. The City may not resume their activities until notified by NMFS.

ii. In the event that the City discovers an injured or dead marine mammal, and the lead observer determines that the cause of the injury or death is unknown and the death is relatively recent (*e.g.,* in less than a moderate state of decomposition), the City shall immediately report the incident to the Office of Protected Resources, NMFS, and the West Coast Regional Stranding Coordinator, NMFS.

The report must include the same information identified in 6(b)(i) of this IHA. Activities may continue while NMFS reviews the circumstances of the incident. NMFS will work with the City

to determine whether additional mitigation measures or modifications to the activities are appropriate.

iii. In the event that the City discovers an injured or dead marine mammal, and the lead observer determines that the injury or death is not associated with or related to the activities authorized in the IHA (*e.g.,* previously wounded animal, carcass with moderate to advanced decomposition, or scavenger damage), the City shall report the incident to the Office of Protected Resources, NMFS, and the West Coast Regional Stranding Coordinator, NMFS, within 24 hours of the discovery. The City shall provide photographs or video footage or other documentation of the stranded animal sighting to NMFS.

This Authorization may be modified, suspended or withdrawn if the holder fails to abide by the conditions prescribed herein, or if NMFS determines the authorized taking is having more than a negligible impact on the species or stock of affected marine mammals.

TABLE 1—AUTHORIZED TAKE NUMBERS, BY SPECIES

Species	Authorized take
Harbor seal (*Phoca vitulina*)	108
California sea lion (*Zalophus californianus*)	2,604
Steller sea lion (*Eumetopias jubatus*)	3,284

TABLE 2—MINIMUM RADIAL DISTANCE TO SHUTDOWN ZONES

Activity	Level B Zone of Influence	Level A Exclusion Zone
Vibratory pile removal	1,600 m	15 m.
Impact pile driving	398 m	53.4 m.
Roadway and railway demolition and construction	28 m (harbor seals) 9 m (sea lions)	10 m.

Request for Public Comments

We request comment on our analyses, the proposed authorization, and any other aspect of this Notice of Proposed IHA for the proposed bridge replacement project. We also request comment on the potential for renewal of this proposed IHA as described in the paragraph below. Please include with your comments any supporting data or literature citations to help inform our final decision on the request for MMPA authorization.

On a case-by-case basis, NMFS may issue a second one-year IHA without additional notice when (1) another year of identical or nearly identical activities as described in the Specified Activities section is planned or (2) the activities would not be completed by the time the IHA expires and a second IHA would allow for completion of the activities beyond that described in the Dates and Duration section, provided all of the following conditions are met:

- A request for renewal is received no later than 60 days prior to expiration of the current IHA.
- The request for renewal must include the following:

(1) An explanation that the activities to be conducted beyond the initial dates either are identical to the previously analyzed activities or include changes so minor (*e.g.,* reduction in pile size) that the changes do not affect the previous analyses, take estimates, or mitigation and monitoring requirements.

(2) A preliminary monitoring report showing the results of the required monitoring to date and an explanation showing that the monitoring results do not indicate impacts of a scale or nature not previously analyzed or authorized.

- Upon review of the request for renewal, the status of the affected species or stocks, and any other pertinent information, NMFS determines that there are no more than minor changes in the activities, the mitigation and monitoring measures remain the same and appropriate, and the original findings remain valid.

Dated: February 16, 2018.

Donna S. Wieting,

Director, Office of Protected Resources, National Marine Fisheries Service.

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XG012

Taking and Importing Marine Mammals; Taking Marine Mammals Incidental to Gull and Climate Monitoring/Research in Glacier Bay National Park, Alaska

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 National Park Service (NPS) for authorization to take small numbers of marine mammals incidental to glaucous-winged gull and climate monitoring/research in Glacier Bay National Park (GLBA NP), Alaska over the course of five years from the date of issuance. Pursuant to regulations implementing the Marine Mammal Protection Act (MMPA), NMFS is announcing receipt of the NPS' 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 the NPS' application and request.

DATES: Comments and information must be received no later than March 26, 2018.

ADDRESSES: Comments on the applications 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.molineaux@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 received electronically, 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 online at *https://www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-take-authorizations-research-*

and-other-activities without change. All personal identifying information (*e.g.,* name, address) voluntarily submitted by the commenter may be publicly accessible. Do not submit confidential business information or otherwise sensitive or protected information.

FOR FURTHER INFORMATION CONTACT: Jonathan Molineaux, Office of Protected Resources, NMFS, (301) 427–8401. An electronic copy of the NPS's application may be obtained online at: *https://www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-take-authorizations-research-and-other-activities.* In case of problems accessing these documents, please call the contact listed above.

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 (as delegated to NMFS) 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) 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 incidental take authorization 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.

The MMPA states that the term ''take'' means to harass, hunt, capture, kill or attempt to harass, hunt, capture, or kill any marine mammal.

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 February 6, 2018, NMFS received an adequate and complete application from the NPS requesting authorization for take of marine mammals incidental to glaucous-winged gull and climate monitoring research activities in GLBA NP, Alaska. The requested regulations would be valid for five years, from March 2019 through December 2023. The NPS plans to conduct necessary work, including gull and climate monitoring to assist in informing future native egg harvests and fill crucial climate data gaps. The proposed action may incidentally expose marine mammals occurring in the vicinity to either acoustic disturbance from motorboat sounds or visual disturbance from the presence of observers, thereby resulting in incidental take, by Level B harassment only. Therefore, the NPS requests authorization to incidentally take eastern pacific harbor seals.

Specified Activities

The purpose for the monitoring activities are as follows. Gull monitoring studies are mandated by a Record of Decision of a Legislative Environmental Impact Statement (LEIS) (NPS 2010) which states that NPS must initiate a monitoring program for glaucous-winged gulls (*Larus glaucescens*) to inform future native egg harvest by the Hoonah Tlingit in Glacier Bay, Alaska. Installation of a new weather station on Lone Island is being planned as one of several installations intended to fill coverage gaps among existing weather stations in GLBA NP (NPS 2015a). These new stations will be operated as the foundation of a new long-term climate-monitoring program for GLBA NP. The maximum number of days the NPS will conduct annual monitoring activities that require a Letter of Authorization will be 24 days during each of the five years of work. This consists of four possible yearly climate monitoring visits to Lone Island during the months of October to April and five possible annual gull monitoring visits each to Boulder Island, Geikie Rock, Lone Island and Flapjack Island during the months of May to September. Eastern Pacific harbor (*Phoca vitulina richardii*) seals are the only marine mammals expected to be taken by the activities as the NPS will maintain a distance of 100 meters from all Steller sea lions.

Information Solicited

Interested persons may submit information, suggestions, and comments concerning the NPS' 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 the NPS, if appropriate.

Dated: February 15, 2018.

Donna Wieting,

Director, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2018–03578 Filed 2–21–18; 8:45 am]

BILLING CODE 3510–22–P

COURT SERVICES AND OFFENDER SUPERVISION AGENCY FOR THE DISTRICT OF COLUMBIA

Publication of Fiscal Year 2016 Service Contract Inventory

AGENCY: Court Services and Offender Supervision Agency for the District of Columbia (CSOSA).

ACTION: Notice of public availability of FY 2016 Service Contract Inventory.

SUMMARY: In accordance with Section 743 of Division C of the FY2010 Consolidated Appropriations Act, the Court Services and Offender Supervision Agency hereby advises the public of the availability of the FY 2016 Service Contract Inventory. This inventory provides information on service contract actions over $25,000 that were made in FY 2016. The information is organized by function to show how contracted resources are distributed throughout the agency. This inventory has been developed in accordance with guidance issued on November 5, 2010 and December 19, 2011 by the Office of Management and Budget's Office of Federal Procurement Policy (OFPP). CSOSA's FY 2016 Service Contract Inventory is available on its website at: *http://www.csosa.gov/about/mandated-reports.aspx.*

FOR FURTHER INFORMATION CONTACT:

Inventory Information: Reggie James, Associate Director, Court Services and Offender Supervision Agency, Office of Administration, 800 North Capitol Street NW, Washington, DC 20004, at (202) 220–5707, or *reggie.james@csosa.gov.*

Notice Information: Rochelle Durant, Program Analyst, Court Services and Offender Supervision Agency, 633 Indiana Avenue NW, Washington, DC 20004, (202) 220–5304, or *rochelle.durant@csosa.gov.*

Dated: February 15, 2018.

Rochelle Durant,

Program Analyst, Court Services and Offender Supervision Agency for the District of Columbia.

[FR Doc. 2018–03616 Filed 2–21–18; 8:45 am]

BILLING CODE 3129–04–P

DEPARTMENT OF EDUCATION

[Docket No. ED–2018–ICCD–0020]

Agency Information Collection Activities; Comment Request; Migrant Student Information Exchange User Application Form

AGENCY: Office of Elementary and Secondary Education (OESE), Department of Education (ED).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, ED is proposing an extension of an existing information collection.

DATES: Interested persons are invited to submit comments on or before April 23, 2018.

ADDRESSES: To access and review all the documents related to the information collection listed in this notice, please use *http://www.regulations.gov* by searching the Docket ID number ED–2018–ICCD–0020. Comments submitted in response to this notice should be submitted electronically through the Federal eRulemaking Portal at *http://www.regulations.gov* by selecting the Docket ID number or via postal mail, commercial delivery, or hand delivery. *Please note that comments submitted by fax or email and those submitted after the comment period will not be accepted.* Written requests for information or comments submitted by postal mail or delivery should be addressed to the Director of the Information Collection Clearance Division, U.S. Department of Education, 400 Maryland Avenue SW, LBJ, Room 216–42, Washington, DC 20202–4537.

FOR FURTHER INFORMATION CONTACT: For specific questions related to collection activities, please contact Maria Hishikawa, 202–260–1473.

SUPPLEMENTARY INFORMATION: The Department of Education (ED), in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)), provides the general public and Federal agencies with an opportunity to comment on proposed, revised, and continuing collections of information. This helps the Department assess the impact of its information collection requirements and minimize the public's reporting burden. It also helps the public understand the Department's information collection requirements and provide the requested data in the desired format. ED is soliciting comments on the proposed information collection request (ICR) that is described below. The Department of Education is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology. Please note that written comments received in response to this notice will be considered public records.

Title of Collection: Migrant Student Information Exchange User Application Form.

OMB Control Number: 1810–0686.

Type of Review: An extension of an existing information collection.

Respondents/Affected Public: State, Local, and Tribal Governments.

Total Estimated Number of Annual Responses: 420.

Total Estimated Number of Annual Burden Hours: 210.

Abstract: The Department requests to extend the collection of the existing MSIX User Application. State educational agencies (SEAs) with MEPs will collect the information from state and local education officials who desire access to the MSIX system. The collection instrument verifies the applicant's need for MSIX data and authorizes the user's access to that data. The burden hours associated with the data collection are required to meet the statutory mandate in Sec. 1308(b) of Elementary and Secondary Education Act (ESEA), as amended by the Every Student Succeeds Act, which is to facilitate the electronic exchange by the SEAs of a set of minimum data elements to address the educational and related needs of migratory children.

Dated: February 15, 2018.

Tomakie Washington,

Acting Director, Information Collection Clearance Division, Office of the Chief Privacy Officer, Office of Management.

[FR Doc. 2018–03561 Filed 2–21–18; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

[Docket No. ED–2018–ICCD–0019]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Comment Request; Program for International Student Assessment (PISA 2018) Main Study

AGENCY: National Center for Education Statistics (NCES), Department of Education (ED).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, ED is proposing a revision of an existing information collection.

DATES: Interested persons are invited to submit comments on or before March 26, 2018.

ADDRESSES: To access and review all the documents related to the information collection listed in this notice, please use *http://www.regulations.gov* by searching the Docket ID number ED–2018–ICCD–0019. Comments submitted in response to this notice should be submitted electronically through the Federal eRulemaking Portal at *http://www.regulations.gov* by selecting the Docket ID number or via postal mail, commercial delivery, or hand delivery. *Please note that comments submitted by fax or email and those submitted after the comment period will not be accepted.* Written requests for information or comments submitted by postal mail or delivery should be addressed to the Director of the Information Collection Clearance Division, U.S. Department of Education, 400 Maryland Avenue SW, LBJ, Room 216–32, Washington, DC 20202–4537.

FOR FURTHER INFORMATION CONTACT: For specific questions related to collection activities, please contact Kashka Kubzdela, 202–502–7411.

SUPPLEMENTARY INFORMATION: The Department of Education (ED), in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)), provides the general public and Federal agencies with an opportunity to comment on proposed, revised, and continuing collections of information. This helps the Department assess the impact of its information collection requirements and minimize the public's reporting burden. It also helps the public understand the Department's information collection requirements and provide the requested data in the desired format. ED is soliciting comments on the proposed information collection request (ICR) that is described below. The Department of

Education is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology. Please note that written comments received in response to this notice will be considered public records.

Title of Collection: Program for International Student Assessment (PISA 2018) Main Study.

OMB Control Number: 1850–0755.

Type of Review: A revision of an existing information collection.

Respondents/Affected Public: Individuals or Households.

Total Estimated Number of Annual Responses: 57,878.

Total Estimated Number of Annual Burden Hours: 22,604.

Abstract: The Program for International Student Assessments (PISA) is an international assessment of 15-year-olds which focuses on assessing students' reading, mathematics, and science literacy. PISA was first administered in 2000 and is conducted every three years. The United States has participated in all of the previous cycles, and is participating in 2018 in order to track trends and to compare the performance of U.S. students with that of students in other education systems. PISA 2018 is sponsored by the Organization for Economic Cooperation and Development (OECD). In the United States, PISA is conducted by the National Center for Education Statistics (NCES), within the U.S. Department of Education. In each administration of PISA, one of the subject areas (reading, mathematics, or science literacy) is the major domain and has the broadest content coverage, while the other two subjects are the minor domains. PISA emphasizes functional skills that students have acquired as they near the end of mandatory schooling (aged 15 years), and students' knowledge and skills gained both in and out of school environments. PISA 2018 will focus on reading literacy as the major domain. Mathematics and science literacy will also be assessed as minor domains, with additional assessment of financial literacy. In addition to the cognitive assessments described above, PISA 2018 will include questionnaires administered to assessed students, school principals, and teachers. The PISA 2018 Recruitment and Field Test were approved in September 2016 with the latest change request approved in September 2017 (1850–0755 v.18–20). The PISA 2018 field test was conducted in March–May 2017. The PISA 2018 main study recruitment began in October 2017 and data collection will be conducted October–November 2018. This request provides the final plans, burden, and materials for PISA 2018 main study.

Dated: February 15, 2018.

Stephanie Valentine,

Acting Director, Information Collection Clearance Division, Office of the Chief Privacy Officer, Office of Management.

[FR Doc. 2018–03564 Filed 2–21–18; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Office of Postsecondary Education; Solicitation of Third-Party Comments Concerning the Performance of Accrediting Agencies

AGENCY: Office of Postsecondary Education, Department of Education.

ACTION: Call for written third-party comments; extension of comment period.

SUMMARY: On January 24, 2018, we published in the **Federal Register** a notice of a call for written third-party comments. That notice provided information to members of the public on submitting written comments with respect to accrediting agencies currently undergoing review for purposes of recognition by the Secretary of Education. That notice established a comment period beginning on January 24, 2018, and closing on February 16, 2018. Pursuant to a recent court order, we are extending the public comment period until March 1, 2018, for the submission of comments on the application of the Accrediting Council for Independent Colleges and Schools (ACICS) for initial recognition and the compliance report submitted by the American Bar Association (ABA).

DATES: The comment period for the notice published January 24, 2018 (83 FR 3335), is extended. We must receive your comments on or before March 1, 2018.

ADDRESSES: Written comments about the initial application for recognition of ACICS or the ABA compliance report must be received by March 1, 2018, in the *ThirdPartyComments@ed.gov* mailbox and include the subject line ''Written Comments: (agency name).''

FOR FURTHER INFORMATION CONTACT: Herman Bounds, Director, Accreditation Group, Office of Postsecondary Education, U.S. Department of Education, 400 Maryland Avenue SW, Room 270–01, Washington, DC 20202, telephone: (202) 453–7615, or email: *herman.bounds@ed.gov.*

If you use a telecommunications device for the deaf or a text telephone, call the Federal Relay Service, toll free, at 1–800–877–8339.

SUPPLEMENTARY INFORMATION:

Background: On January 24, 2018, we published in the **Federal Register** (83 FR 3335) a notice of a call for written third-party comments with respect to accrediting agencies currently undergoing review for purposes of recognition by the Secretary of Education. Under that notice, the public comment period closes on February 16, 2018. On February 15, 2018, the U.S. District Court for the Southern District of New York ordered the Department of Education to extend the comment period to March 1, 2018, for comments on the initial application for recognition of ACICS and the compliance report submitted by the ABA. (See *The Century Foundation* v. *Betsy Devos,* case number 18–cv–1128).

Accessible Format: Individuals with disabilities can obtain this document in an accessible format (*e.g.,* braille, large print, audiotape, or compact disc) on request to the contact person listed under **FOR FURTHER INFORMATION CONTACT**.

Electronic Access to This Document: The official version of this document is the document published in the **Federal Register**. Free internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available via the Federal Digital System at: *www.gpo.gov/fdsys.* At this site you can view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Portable Document Format (PDF). To use PDF, you must have Adobe Acrobat Reader, which is available free at this 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: February 16, 2018.

Frank T. Brogan,

Principal Deputy Assistant Secretary and delegated the duties of the Assistant Secretary, Office of Planning, Evaluation and Policy Development Delegated the duties of the Assistant Secretary, Office of Postsecondary Education.

[FR Doc. 2018–03686 Filed 2–16–18; 4:15 pm]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Notice of Technical Conference

	Docket Nos.
Participation of Distributed Energy Resource Aggregations in Markets Operated by Regional Transmission Organizations and Independent System Operators.	RM18–9–000
Distributed Energy Resources—Technical Considerations for the Bulk Power System.	AD18–10–000

Take notice that Federal Energy Regulatory Commission (Commission) staff will hold a technical conference to discuss the participation of distributed energy resource (DER) aggregations in Regional Transmission Organization (RTO) and Independent System Operator (ISO) markets, and to more broadly discuss the potential effects of distributed energy resources on the bulk power system. The technical conference will take place on April 10 and 11, 2018 at the Commission's offices at 888 First Street NE, Washington DC beginning at 9:30 a.m. and ending at 4:30 p.m. (Eastern Time). Commissioners will lead the second panel of the technical conference. Commission staff will lead the other six panels, and Commissioners may attend.

The technical conference will address two broad set of issues related to DERs. First, the technical conference will gather additional information to help the Commission determine what action to take on the distributed energy resource aggregation reforms proposed in its Notice of Proposed Rulemaking on Electric Storage Participation in Markets Operated by Regional Transmission Organizations and Independent System Operators (NOPR).[1] In the NOPR, the Commission proposed to require each RTO/ISO to define DER aggregators as a type of market participant that can participate in the RTO/ISO markets under the participation model that best accommodates the physical and operational characteristics of its DER aggregation.[2] As discussed in the Final Rule issued concurrently with this Notice, the Commission is taking no further action in Docket No. RM16–23–000 regarding the proposed DER aggregation reforms.[3] Instead, the Commission will continue to explore the proposed distributed energy resource aggregation reforms under Docket No. RM18–9–000. All comments previously filed in response to the NOPR in Docket No. RM16–23–000 will be incorporated by reference into Docket No. RM18–9–000, and any further comments regarding the proposed distributed energy resource aggregation reforms, including discussion of those reforms during this technical conference, should be filed henceforth in Docket No. RM18–9–000.[4] Second, the technical conference will explore issues related to the potential effects of DERs on the bulk power system.

Attached to this Notice is a description of the seven panels that will be conducted at the technical conference.

Further details of this conference will be provided in a supplemental notice.

Those wishing to participate in this conference should submit a nomination form online by 5:00 p.m. on March 15, 2018 at: *https://www.ferc.gov/whats-new/registration/04-10-18-speaker-form.asp.*

All interested persons may attend the conference, and registration is not required. However, in-person attendees are encouraged to register on-line by April 3, 2018 at: *https://www.ferc.gov/whats-new/registration/04-10-18-form.asp.* In-person attendees should allow time to pass through building security procedures before the 9:30 a.m. start time of the technical conference.

The Commission will transcribe and webcast this conference. Transcripts will be available immediately for a fee from Ace Reporting (202–347–3700). A link to the webcast of this event will be available in the Commission Calendar of Events at *www.ferc.gov.* The Capitol Connection provides technical support for the webcasts and offers the option of listening to the conference via phone-bridge for a fee. For additional information, visit *www.CapitolConnection.org* or call (703) 993–3100.

Commission conferences are accessible under section 508 of the Rehabilitation Act of 1973. For accessibility accommodations please send an email to *accessibility@ferc.gov* or call toll free 1–866–208–3372 (voice) or 202–208–8659 (TTY), or send a fax to 202–208–2106 with the required accommodations.

For more information about this technical conference, please contact David Kathan at (202) 502–6404, *david.kathan@ferc.gov,* or Louise Nutter at (202) 502–8175, *louise.nutter@ferc.gov.* For information related to logistics, please contact Sarah McKinley at (202) 502–8368, *sarah.mckinley@ferc.gov.*

Dated: February 15, 2018.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

Distributed Energy Resources Technical Conference

Docket Nos. RM18–9–000 and AD18–10–000

April 10 and 11, 2018

Tuesday, April 10, 2018

The purpose of this technical conference is to gather additional information to help the Commission determine what action to take on the distributed energy resource (DER) aggregation reforms proposed in the Commission's Notice of Proposed Rulemaking on Electric Storage Participation in Markets Operated by Regional Transmission Organizations and Independent System Operators (NOPR), and to explore issues related to the potential effects of DERs on the bulk power system. Panels 1 and 3 on the first day focus on specific NOPR proposals that relate to DER participation and compensation. Panel 2 will provide a forum for Commissioners to discuss DER aggregation with a panel of state and local regulators. During the second day of the technical conference, operational issues associated with DER data, modeling, and coordination will be examined.

Panel 1: Economic Dispatch, Pricing, and Settlement of DER Aggregations

The objective of this panel is to discuss the integration of DER aggregations into the modeling, clearing, dispatch, and settlement mechanisms of RTOs and ISOs as considered in the NOPR. The NOPR proposed to require each RTO/ISO to revise its tariff to

[1] See *Electric Storage Participation in Markets Operated by Regional Transmission Organizations and Independent System Operators,* FERC Stats. & Regs. ¶ 32,718 (2016) (NOPR).

[2] *Id.* P 1.

[3] See *Electric Storage Participation in Markets Operated by Regional Transmission Organizations and Independent System Operators,* Final Rule, 162 FERC 61,127, Notice of Proposed Rulemaking, FERC Stats. & Regs. ¶ 32,718.

[4] Further comments regarding the proposed distributed energy resource aggregation reforms should no longer be filed in Docket No. RM16–23–000.

remove barriers to the participation of DER aggregations in its markets by, among other measures, establishing locational requirements for DER aggregations that are as geographically broad as technically feasible.[1] The NOPR also addressed the use of distribution factors [2] and bidding parameters [3] for DER aggregations. In consideration of comments received in response to the NOPR, staff seeks additional information about how DER aggregations could locate across more than one pricing node. Staff would also like additional information about bidding parameters or other potential mechanisms needed to represent the physical and operational characteristics of DER aggregations in RTO/ISO markets. In particular, Commission staff expects to explore the following questions:

- Acknowledging that some RTOs/ISOs already allow aggregations across multiple pricing nodes, what approaches are available to ensure that the dispatch of a multi-node DER aggregation does not exacerbate a transmission constraint?
- Because transmission constraints change over time, would the ability of a multi-node DER aggregation to participate in an RTO/ISO market need to be revisited as system topology changes?
- Do multi-node DER aggregations present any special considerations for the reliability of the transmission system that do not arise from other market participants? How could these concerns be resolved?
- What types of modifications would need to be made to the modeling and dispatch software, communications platforms, and automation tools necessary to enable reliable and efficient system dispatch for multi-node DER aggregations? How long would it take for these changes to be implemented?
- If the Commission requires the RTOs/ISOs to allow multi-node DER aggregations to participate in their markets, how should a DER aggregation located across multiple pricing nodes be settled for the services that it provides? One approach to settling a multi-node DER aggregation could be to pay it the weighted average locational marginal price (LMP) across the nodes at which it is located. What are the advantages and disadvantages of this approach? Are there other approaches that should be considered?
- The NOPR considered the use of ''distribution factors'' to account for the expected response of DER aggregations from multiple nodes. Are there other characteristics of DER aggregations that may not be accommodated by existing bidding parameters in the RTOs/ISOs? If so, what are they? Would new bidding parameters be necessary? If so, what are they?

Panel 2: Discussion of Operational Implications of DER Aggregation With State and Local Regulators

This panel will provide a forum for Commissioners to discuss the NOPR's DER aggregation proposals with state and local regulators. The discussion will provide an opportunity for state and local regulators to provide their perspectives and concerns about the operational effects that DER participation in the wholesale market could have on facilities they regulate. In particular, Commissioners expect to explore the following questions:

- What are the potential positive or negative operational impacts (*e.g.,* safety, reliability, and dispatch) that DER participation in the wholesale market could have on facilities regulated by state and local authorities? How should the costs associated with monitoring and addressing such potential impacts on the distribution grid caused by the NOPR proposal be addressed, and fairly allocated? Are existing retail rate structures able to allocate costs to DER aggregations that utilize the distribution systems, and if not, what modifications or coordination are feasible?
- Do state and local authorities have operational concerns with a DER aggregation participating in both wholesale and retail markets? If so, what, if any, coordination protocols between states or local regulators and regional markets would be required to facilitate DER aggregations' participation in both retail and wholesale markets? Could the use of appropriate metering and telemetry address the ability to distinguish between markets and services, and prevent double compensation for the same services? What is the role of state and local regulators in monitoring and regulating the potential for such double compensation? How should regional flexibility be accommodated?
- What entities should be included in the coordination processes used to facilitate the participation of DER aggregations in Regional Transmission Organization (RTO) and Independent System Operator (ISO) markets? Should state and local regulatory authorities play an active role in these coordination processes? Is there a need to modify existing RTO/ISO protocols or develop new protocols to accommodate state participation in this coordination? What should be the role of state and local regulators in the NOPR's proposed distribution utility review of DER aggregation registrations?
- Does the proposed use of market participation agreements address state and local regulator concerns about the role of distribution utilities in the coordination and registration of DERs in aggregations? Are the proposed provisions in the market participation agreements that require that DER aggregators attest that they are compliant with the tariffs and operation procedures of distribution utilities and state and local regulators sufficient to address such concerns?
- What are the proper protections and policies to ensure that DER aggregations participating in wholesale markets will not negatively affect efficient outcomes in the distribution system?

Panel 3: Participation of DERs in RTO/ISO Markets

DERs can both sell services into the RTO/ISO markets and participate in retail compensation programs. To ensure that that there is no duplication of compensation for the same service, in the NOPR the Commission proposed that individual DERs participating in one or more retail compensation programs, such as net metering or another RTO/ISO market participation program, will not be eligible to participate in the RTO/ISO markets as part of a DER aggregation.[4] This panel will explore potential solutions to challenges associated with DER aggregations that provide multiple services, including ways to avoid duplication of compensation for their services in the RTO/ISO markets, potential ways for the RTOs/ISOs to place appropriate restrictions on the services they can provide, and procedures to ensure that DERs are not accounted for in ways that affect efficient outcomes in the RTO/ISO markets. In particular, Commission staff expects to explore the following questions:

- Given the variety of wholesale and retail services, is it possible to

[1] NOPR at P 139.

[2] The Commission proposed to require each RTO/ISO to revise its tariff to include the requirement that DER aggregators (1) provide default distribution factors when they register their DER aggregation and (2) update those distribution factors if necessary when they submit offers to sell or bids to buy into the organized wholesale electric markets. *Id.* P 143.

[3] The Commission sought comment on whether bidding parameters in addition to those already incorporated into existing participation models may be necessary to adequately characterize the physical or operational characteristics of DER aggregations. *Id.* P 144.

[4] *Id.* P 134.

universally characterize a set of wholesale and retail services as the ''same service''? If so, how could the Commission prohibit a DER from providing the same service to the wholesale market as it provides in a retail compensation program?

• In Order No. 719, the Commission stated that ''[a]n RTO or ISO may place appropriate restrictions on any customer's participation in an [aggregation of retail customers]-aggregated demand response bid to avoid counting the same demand response resource more than once.'' [5] How have the RTOs/ISOs effectuated this requirement or otherwise ensured that demand response participating in their markets is not being double counted? What would be the advantages and disadvantages of taking this approach for DER aggregations instead of the approach proposed in the NOPR for preventing double compensation for the same service?

• What other options besides the NOPR's proposed limits on dual participation exist to address issues associated with the participation of DERs or DER aggregations in one or more retail compensation programs or another wholesale market participation program at the same time as it participates in a wholesale DER aggregation? Is there a way to coordinate DER participation in multiple markets or compensation programs? Is a possible solution having a targeted prohibition, such as the limitation placed on net-metered resources in CAISO? [6] Are there other means?

Wednesday, April 11, 2018

Panel 4: Collection and Availability of Data on DER Installations

To plan and operate the bulk power system, it is important for transmission planners, transmission operators, and distribution utilities to collect and share validated data across the transmission-distribution interface. In September 2017, the North American Electric Reliability Corporation (NERC) published a Reliability Guideline on DER modeling (Guideline) that specified the minimum DER information needed by transmission planners and planning coordinators to assist in modeling and assessments.[7] The Guideline references the importance of static data (such as the capacity, capabilities, and location of a DER installation) for the entities involved in the planning of the bulk power system. This panel will focus on understanding the need for bulk power system planners and operators to have access to accurate data to plan and operate the bulk power system, explore the types of data that are needed, and assess the current state of DER data collection. The panel will also address regional DER penetration levels and any potential effects of inaccurate long-term DER forecasting. A Commission Staff DER Technical Report is being issued concurrently with this Notice to provide a common foundation for the topics raised in this panel. For this panel, Commission staff expects to explore the following questions:

• What type of information do bulk power system planners and operators need regarding DER installations within their footprint to plan and operate the bulk power system? Would it be sufficient for distribution utilities to provide aggregate information about the penetration of DERs below certain points on the transmission-distribution interface? If greater granularity is needed, what level of detail would be sufficient? Is validation of the submitted data possible using data available?

• What, if any, data on DER installations is currently collected, and by whom is it collected? Do procedures and appropriate agreements exist to share this data with affected bulk power system entities (*i.e.,* those entities responsible for the reliable operation of the bulk power system or for modeling and planning for a reliable bulk power system)? Is there variation by entity or region?

• At various DER penetration levels, what planning and operations impacts do you observe? Do balancing authorities with significant growth in DERs experience the need to address bulk power system reliability and operational considerations at certain DER penetration levels? What are they? Is the MW level of DER penetration the most important factor in whether DERs cause planning and operational impacts, or do certain characteristics of installed DERs affect the system operator's analysis? Is the point at which DER penetration causes bulk power system reliability and operational impacts the point at which it becomes necessary for distribution utilities to provide information on DERs to the bulk power system operator, or is there some other threshold that could trigger a need for sharing this information? How much might the answer to these questions vary on a regional basis, and what factors may contribute to this variance?

• How are long-term projections for DER penetrations developed? Are these projections currently included in related forecasting efforts? Do system operators study the potential effects of future DER growth to assess changing infrastructure and planning needs at different penetration levels?

• What are the effects on the bulk power system if long-term forecasts of DER growth are inaccurate? Are these effects within current planning horizons? Are changes in the expected growth of DERs incorporated into ongoing planning efforts?

• How are DERs incorporated into production cost modeling studies? Do current tools allow for assessment of forecasting variations and their effects?

• Noting that participation in the RTO/ISO markets by DER aggregators may provide more information to the RTOs/ISOs about DERs than would otherwise be available, should any specific information about DER aggregations or the individual DERs in them be required from aggregators to ensure proper planning and operation of the bulk power system?

• Do the RTOs/ISOs need any directly metered data about the operations of DER aggregations to ensure proper planning and operation of the bulk power system?

Panel 5: Incorporating DERs in Modeling, Planning and Operations Studies

Bulk power system planners and operators must select methods to feasibly model DERs at the bulk power system level with sufficient granularity to ensure accurate results. The chosen methodology for grouping DERs at the bulk power system level could affect planners' ability to predict system behavior following events, or to identify a need for different operating procedures under changing system conditions. Further, the operation of DERs can affect both bulk power systems and distribution facilities in unintended ways, suggesting that new tools to model the transmission and distribution interface may be needed. Staff is also aware of ongoing work in this area, for example efforts at NERC, national labs and other groups, to evaluate options for studies in these areas, which could also inform future work. This panel will focus on the incorporation of DERs into different types of planning and operational studies, including options for modeling

[5] *Wholesale Competition in Regions with Organized Electric Markets,* Order No. 719, FERC Stats. & Regs. ¶ 31,281, at P 158 (2008), *order on reh'g,* Order No. 719–A, FERC Stats. & Regs. ¶ 31,292 (2009), *order on reh'g,* Order No. 719–B, 129 FERC ¶ 61,252 (2009).

[6] *See* CAISO Tariff, § 4.17.3(d).

[7] *See* NERC Distributed Energy Resource Modeling Reliability Guideline, at 5 (Sept. 2017), available at *http://www.nerc.com/comm/PC_Reliability_Guidelines_DL/Reliability_Guideline_-_DER_Modeling_Parameters_-_2017-08-18_-_FINAL.pdf.*

DERs and the methodology for the inclusion of DERs in larger regional models. The Commission Staff DER Technical Report issued concurrently with this Notice is intended to provide a common foundation for the topics raised in this panel. For this panel, Commission staff expects to explore the following questions:

- What are current and best practices for modeling DERs in different types of planning, operations, and production cost studies? Are options available for modeling the interactions between the transmission and distribution systems?
- To what extent are capabilities and performance of DERs currently modeled? Do current modeling tools provide features needed to model these capabilities?
- What methods, such as net load, composite load models, detailed models or others, are currently used in power flow and dynamic models to represent groups of DERs at the bulk power system level? Would more detailed models of DERs at the bulk power system level provide better visibility and enable more accurate assessment of their impacts on system conditions? Does the appropriate method for grouping DERs vary by penetration level?
- Do current contingency studies include the outage of DER facilities, and if they are considered, how is the contingency size chosen? At what penetration levels or under what system conditions could including DER outages be beneficial? Are DERs accounted for in calculations for Under Frequency Load Shedding and related studies?
- What methods are used to calculate capacity needed for balancing supply and demand with large amount of solar DER (ramping and frequency control) and determining which resources can provide an appropriate response?

Panel 6: Coordination of DER Aggregations Participating in RTO/ISO Markets

In the NOPR, the Commission proposed to require each RTO/ISO to revise its tariff to provide for coordination among itself, a DER aggregator, and the relevant distribution utility or utilities when a DER aggregator registers a new DER aggregation or modifies an existing DER aggregation.[8] The Commission proposed that this coordination would provide the relevant distribution utility or utilities with the opportunity to review the list of individual resources that are located on their distribution system that enroll in a DER aggregation before those resources may participate in RTO/ISO electric markets. This panel will examine the potential ways for RTOs/ISOs, distribution utilities, retail regulatory authorities, and DER aggregators to coordinate the integration of a DER aggregation into the RTO/ISO markets. In addition, because the use of grid architecture[9] can help identify the relationships among the entities involved in coordinating the integration of DER aggregations, this panel will also examine the potential architectural designs for the initial coordination processes from the point of view of the RTO/ISO markets. In particular, Commission staff expects to explore the following questions:

- If the Commission adopts its proposal to require the RTO/ISO to allow a distribution utility to review the list of individual resources that are located on their distribution system that enroll in a DER aggregation before those resources may participate in RTO/ISO electric markets, is it appropriate for distribution utilities to have a role in determining when the individual DERs may begin participation? Should the RTO/ISO tariff provide the distribution utility with the ability to provide either binding or non-binding input to the RTO/ISO? Should the RTO/ISO provide the distribution utility with a specific period of time in which to consult before DERs may begin participation? Should the Commission require the RTO/ISO to receive explicit consent from the distribution utility before a DER is included in a DER aggregation? Are there other approaches to coordinate with the distribution utility? What are the advantages and disadvantages of these approaches?
- Are new processes and protocols needed to ensure coordination among DER aggregators, distribution utilities, and RTOs/ISOs during registration of a new DER aggregations? How can the Commission ensure that any new processes and protocols occur in a way that provides adequate transparency to the interested parties and also occurs on a timely basis?
- Should there be a coordination agreement in place prior to the participation of DER aggregation in RTO/ISO markets? Who should be parties to this coordination agreement? How would the coordination agreement be enforced?
- What is the best approach for involving retail regulatory authorities in the registration of DER aggregations in the RTO/ISO markets?
- What types of grid architecture could support the integration of DER aggregations into the RTO/ISO markets? Knowing that a variety of grid architectures are being explored in various regions, does it make sense for the Commission to consider specific architectural requirements for RTOs/ISOs for the effective integration and coordination of DER aggregations?

Panel 7: Ongoing Operational Coordination

This panel will focus primarily on the operational considerations associated with both individual DERs and DER aggregations and with the interactions and communications between DERs, DER aggregators, distribution utilities, and transmission operators. In the NOPR, the Commission acknowledged that ongoing coordination between the RTO/ISO, a DER aggregator, and the relevant distribution utility or utilities may be necessary to ensure that the DER aggregator is dispatching individual resources in a DER aggregation consistent with the limitations of the distribution system.[10] The Commission proposed that each RTO/ISO revise its tariff to establish a process for ongoing coordination, including operational coordination, among itself, the DER aggregator, and the distribution utility to maximize the availability of the DER aggregation consistent with the safe and reliable operation of the distribution system. To help effectuate this proposal, the Commission also proposed to require each RTO/ISO to revise its tariff to require the DER aggregator to report to the RTO/ISO any changes to its offered quantity and related distribution factors that result from distribution line faults or outages. The Commission also sought comment on the level of detail necessary in the RTO/ISO tariffs to establish a framework for ongoing coordination between the RTO/ISO, a DER aggregator, and the relevant distribution utility or utilities. To further explore these issues, Commission staff expects to explore the following questions:

- What real-time data acquisition and communication technologies are currently in use to provide bulk power system operators with visibility into the distribution system? Are they adequate to convey the information necessary for

[8] NOPR at P 154.

[9] As an aid to thinking about the electric power grid, Pacific Northwest National Laboratory and others have coined the term ''grid architecture,'' which they define as the application of network theory and control theory to a conceptual model of the electric power grid that defines its structure, behavior, and essential limits. *See, e.g., https://gridarchitecture.pnnl.gov/*. Expanding upon this concept, some thinkers have begun discussing different types of ''grid architecture,'' which presumably differ in structure, behavior or essential limits from current norms.

[10] NOPR at P 155.

transmission and distribution operators to assess distribution system conditions in real time? Are new systems or approaches needed? Does DER aggregation require separate or additional capabilities and infrastructure for communication and control?

• What processes/protocols do distribution utilities, transmission operators, and DERs or DER aggregators use to coordinate with each other? Are these processes/protocols capable of providing needed real-time communications and coordination? What new processes, resources, and efforts will be required to achieve effective real-time coordination?

• What are the minimum set of specific RTO/ISO operational protocols, performance standards, and market rules that should be adopted now to ensure operational coordination for DER aggregation participating in the RTO/ISO markets? What additional protocols may be important for the future? Should the Commission adopt more prescriptive requirements with respect to coordination than those proposed in the NOPR? If so, what should the Commission require?

• Should distribution utilities be able to override RTO/ISO decisions regarding day-ahead and real-time dispatch of DER aggregations to resolve local distribution reliability issues? If so, should DER aggregations nonetheless be subject to non-deliverability penalties under such circumstances?

• Is it possible for DERs or DER aggregations participating in the RTO/ISO markets to also be used to improve distribution system operations and reliability? If so, please provide examples of how this could be accomplished.

• Can real-time dispatch of aggregated DERs address distribution constraints? If not, can tools be developed to accomplish this?

• Should individual DERs be required to have communications capabilities to comply with control center obligations? What level of communications security should be employed for these communications?

• How might recent and expected technical advancements be used to enhance the coordination of DER aggregations, for example, integrating Energy Management Systems (EMS) and Distribution Management Systems (DMS) for efficient operational coordination?

[FR Doc. 2018–03649 Filed 2–21–18; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket Nos. EL17–70–000; QF17–935–001; QF17–936–001]

Zeeland Farm Services, Inc.; Notice of Amended Petition for Declaratory Order

Take notice that on February 14, 2018, pursuant to Rule 215 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (Commission),[1] and section 292.203(d)(2) of the Commission's regulations,[2] Zeeland Farm Services, Inc. (Zeeland or Petitioner) submitted an amendment to its petition for declaratory order, filed on May 3, 2017, requesting that the Commission grant Zeeland limited waiver from the FERC Form 556 filing requirement [3] for two qualifying small power production facilities, as more fully explained in the petition.

Any person desiring to intervene or to protest in this proceeding must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214) on or before 5:00 p.m. Eastern time on the specified comment date. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. Anyone filing a motion to intervene or protest must serve a copy of that document on the Petitioner.

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.

[1] 18 CFR 385.215 (2017).

[2] 18 CFR 292.203(d)(2).

[3] 18 CFR 292.203(a)(3).

The filings in the above proceeding are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the website 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.

Comment Date: 5:00 p.m. Eastern time on March 7, 2018.

Dated: February 15, 2018.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2018–03647 Filed 2–21–18; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 2804–035]

Goose River Hydro, Inc.; Notice of Application Tendered for Filing With the Commission and Soliciting Additional Study Requests

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection.

a. *Type of Application:* New minor license

b. *Project No.:* P–2804–035

c. *Date filed:* February 2, 2018

d. *Applicant:* Goose River Hydro, Inc.

e. *Name of Project:* Goose River Hydroelectric Project

f. *Location:* On the Goose River, near Belfast, Waldo County, Maine. No federal or tribal lands would be occupied by project works or located within the project boundary.

g. *Filed Pursuant to:* Federal Power Act 16 U.S.C. 791(a)–825(r).

h. *Applicant Contact:* Nicholas Cabral, Goose River Hydro Inc., 67 Swan Lake Ave., Belfast, ME 04095, (207)–604–4394, *gooseriverhydro@gmail.com.*

i. *FERC Contact:* Julia Kolberg, 888 1st St. NE, Washington, DC 20426, (202) 502–8261, *Julia.kolberg@ferc.gov.*

j. *Cooperating agencies:* Federal, state, local, and tribal agencies with jurisdiction and/or special expertise with respect to environmental issues that wish to cooperate in the preparation of the environmental document should follow the instructions for filing such requests

described in item l below. Cooperating agencies should note the Commission's policy that agencies that cooperate in the preparation of the environmental document cannot also intervene. *See,* 94 FERC ¶ 61,076 (2001).

k. Pursuant to section 4.32(b)(7) of 18 CFR of the Commission's regulations, if any resource agency, Indian Tribe, or person believes that an additional scientific study should be conducted in order to form an adequate factual basis for a complete analysis of the application on its merit, the resource agency, Indian Tribe, or person must file a request for a study with the Commission not later than 60 days from the date of filing of the application, and serve a copy of the request on the applicant.

l. Deadline for filing additional study requests and requests for cooperating agency status: April 3, 2018.

The Commission strongly encourages electronic filing. Please file additional study requests and requests for cooperating agency status using the Commission's eFiling system at *http://www.ferc.gov/docs-filing/efiling.asp.* For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov,* (866) 208–3676 (toll free), or (202) 502–8659 (TTY). In lieu of electronic filing, please send a paper copy to: Secretary, Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426. The first page of any filing should include docket number P–2804–033.

m. The application is not ready for environmental analysis at this time.

n. The project consists of the following existing facilities:

Swan Lake Dam

(1) A 14-foot-high, 250-foot-long rock masonry gravity dam impounding Swan Lake with a surface area of approximately 1,364 acres at an elevation of 201 feet above sea level; (2) a concrete inlet structure; (3) three manually operated butterfly gates that regulate flow through the inlet structure; (4) two culverts the convey flow under Route 141; and (5) appurtenant facilities.

Mason's Dam

(1) A 15-foot-high, 86-foot-long rock masonry dam impounding a reservoir with a storage capacity of approximately 1,621 acre-feet at an elevation of 188 feet above sea level; (2) a concrete inlet structure; (3) a manually operated gate regulating flow from the inlet structure to the penstock; (4) a 350-foot-long steel penstock; (5) a 266-square-foot concrete powerhouse containing two Kaplan turbines and generating units with a licensed capacity of 75 kW; (6) a 300-foot-long, 12-kilovolt (kV) transmission line and (7) appurtenant facilities.

Kelley Dam

(1) A 15-foot-high, 135-foot-long masonry gravity dam impounding a reservoir with a storage capacity of approximately 200 acre-feet at an elevation of approximately 159 feet above sea level; and (2) three manually operated gates.

Mill Dam

(1) A 6-foot-tall, 70-foot-wide masonry dam impounding a reservoir with a storage capacity of approximately 7 acre-feet at an elevation of approximately 128 feet above sea level; (2) a concrete inlet structure; (3) a trash sluice with wooden stop logs; (4) a 3-foot-diameter, 110-foot-long plastic penstock; (5) a powerhouse containing a Francis-type turbine and generator unit with a licensed capacity of 94 kW; and (6) an approximately 100-foot-long, 12-kV transmission line.

CMP Dam

(1) A 21-foot-high, 231-foot-long buttress dam impounding a reservoir with a storage capacity of approximately 72 acre-feet at an elevation of approximately 109 feet above sea level; (2) a 5-foot-diameter, 1,200-foot-long steel penstock; (3) a 300-square-foot concrete and timber powerhouse with a Kaplan-type turbine and generator unit with a licensed capacity of 200 kW; and (4) an approximately 500-foot-long, 12-kV transmission line.

o. A copy of the application is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's website at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, contact FERC Online Support. A copy is also available for inspection and reproduction at the address in item h above.

You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via email of new filings and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

p. Procedural schedule: The application will be processed according to the following preliminary schedule. Revisions to the schedule will be made as appropriate.

Issue Deficiency Letter—March 2018
Issue Notice of Acceptance—July 2018
Issue Scoping Document for comments—August 2018
Comments on Scoping Document—October 2018
Issue notice of ready for environmental analysis—November 2018
Commission issues EA—April 2019
Comments on EA—May 2019

Dated: February 14, 2018.

Kimberly D. Bose,

Secretary.

[FR Doc. 2018–03556 Filed 2–21–18; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER18–1–002.
Applicants: California Independent System Operator Corporation
Description: Compliance filing: 2018–02–14 Petition for Limited Tariff Waiver to Delay Implementation RSI 1b & 2 to be effective N/A.
Filed Date: 2/14/18.
Accession Number: 20180214–5133.
Comments Due: 5 p.m. ET 2/21/18.

Docket Numbers: ER18–499–001.
Applicants: Southwestern Electric Power Company.
Description: Tariff Amendment: SWEPCO–HOPE PSA RS#125 A&R Windcatcher—Deferral to be effective 1/1/2018.
Filed Date: 2/15/18.
Accession Number: 20180215–5000.
Comments Due: 5 p.m. ET 3/8/18.

Docket Numbers: ER18–500–001.
Applicants: Southwestern Electric Power Company.
Description: Tariff Amendment: SWEPCO-Bentonville PSA RS#126 A&R Windcatcher Deferral Filing to be effective 1/1/2018.
Filed Date: 2/14/18.
Accession Number: 20180214–5166.
Comments Due: 5 p.m. ET 3/7/18.

Docket Numbers: ER18–858–000.
Applicants: PJM Interconnection, L.L.C.
Description: § 205(d) Rate Filing: Amendment to ISA, Service Agreement No. 4189; Queue No. Z2–012 to be effective 6/10/2015.
Filed Date: 2/15/18.
Accession Number: 20180215–5041.
Comments Due: 5 p.m. ET 3/8/18.

Docket Numbers: ER18–859–000.
Applicants: Pacific Gas and Electric Company.
Description: Request for a One-Time Tariff Waiver Pacific Gas and Electric Company.

Filed Date: 2/14/18.
Accession Number: 20180214–5176.
Comments Due: 5 p.m. ET 3/7/18.

Docket Numbers: ER18–860–000.
Applicants: East River Electric Power Cooperative, Inc.
Description: Request for Limited Waiver of Tariff Provisions of East River Electric Power Cooperative, Inc.
Filed Date: 2/14/18.
Accession Number: 20180214–5181.
Comments Due: 5 p.m. ET 3/7/18.

Take notice that the Commission received the following qualifying facility filings:

Docket Numbers: QF17–935–000*: QF18–936–000.*
Applicants: Zeeland Farm Services, Inc.
Description: Refund report of Zeeland Farm Services, Inc.
Filed Date: 2/14/18.
Accession Number: 20180214–5170.
Comments Due: 5 p.m. ET 3/7/18.

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: February 15, 2018.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2018–03645 Filed 2–21–18; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. PR18–30–000]

The City of Alexandria, Louisiana v. EnLink LIG, LLC; Notice of Complaint

Take notice that on February 13, 2018, pursuant to Rules 206 and 212 of the Federal Energy Regulatory Commission's (FERC or Commission) Rules of Practice and Procedure, 18 CFR 385.206, and .212 (2017), and the Commission's regulations governing transportation service provided under section 311 of the Natural Gas Policy Act of 1978, 18 CFR part 284, the City of Alexandria, Louisiana (Complainant) filed a formal complaint against EnLink LIG, LLC (EnLink or Respondent) requesting relief from EnLink's alleged violations of its FERC filed Statement of Operating Conditions, all as more fully explained in the complaint.

Complainant certifies that copies of complaint were served on the contact of EnLink as listed on the Commission's list of Corporate Officials, the Office of the General Counsel for the Louisiana Public Service Commission, and the Louisiana Department of Natural Resources.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. The Respondent's answer and all interventions, or protests must be filed on or before the comment date. The Respondent's answer, motions to intervene, and protests must be served on the Complainant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 5 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE, Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov,* using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the website 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.

Comment Date: 5:00 p.m. Eastern Time on February 20, 2018.

Dated: February 14, 2018.

Kimberly D. Bose,

Secretary.

[FR Doc. 2018–03557 Filed 2–21–18; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP18–81–000]

Northern Natural Gas Company; Notice of Request Under Blanket Authorization

Take notice that on February 5, 2018, Northern Natural Gas Company (Northern), 111 South 103rd Street, Omaha, Nebraska 68124–1000, filed in Docket No. CP18–81–000 a prior notice request pursuant to sections 157.205, 157.208 and 157.216 of the Commission's regulations under the Natural Gas Act (NGA), and Northern's blanket certificate issued in Docket No. CP82–401–000, to construct its Marquette Branch Line Expansion Project (Project). The Project consists of: (i) Construction of the new East Wakefield compressor station consisting of two 1,590-horsepower natural gas-fired turbine compressor units in Gogebic County, Michigan; (ii) construction of a new regulator station near West Ishpeming in Marquette County, Michigan; (iii) uprating the maximum allowable operating pressure (MAOP) of a 12.2-mile segment of Northern's existing 12- and 16-inch-diameter Marquette branch line in Marquette County, Michigan; and (iv) abandonment of short segments of pipeline to accommodate station tie-ins in Gogebic and Marquette Counties, Michigan. The Project will allow Northern to deliver 24,610 dekatherms per day of incremental service to Upper Michigan Energy Resources Corporation. Northern estimates the cost of the Project to be approximately $22,124,718, all as more fully set forth in the application which is on file with the Commission and open to public inspection. The filing may also be viewed on the web at *http://www.ferc.gov* using the eLibrary link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll free at (866) 208–3676, or TTY, contact (202) 502–8659.

Any questions concerning this application may be directed to Michael T. Loeffler, Senior Director, Certificates and External Affairs, Northern Natural Gas Company, PO Box 3330, Omaha, Nebraska 68103–0330, by telephone at (402) 398–7103, by facsimile at (402) 398–7190, or by email at *mike.loeffler@nngco.com.*

Any person or the Commission's staff may, within 60 days after issuance of

the instant notice by the Commission, file pursuant to Rule 214 of the Commission's Procedural Rules (18 CFR 385.214) a motion to intervene or notice of intervention and pursuant to section 157.205 of the regulations under the NGA (18 CFR 157.205), a protest to the request. If no protest is filed within the time allowed therefore, the proposed activity shall be deemed to be authorized effective the day after the time allowed for filing a protest. If a protest is filed and not withdrawn within 30 days after the allowed time for filing a protest, the instant request shall be treated as an application for authorization pursuant to section 7 of the NGA.

Pursuant to section 157.9 of the Commission's rules (18 CFR 157.9), within 90 days of this Notice, the Commission staff will either: complete its environmental assessment (EA) and place it into the Commission's public record (eLibrary) for this proceeding; or issue a Notice of Schedule for Environmental Review. If a Notice of Schedule for Environmental Review is issued, it will indicate, among other milestones, the anticipated date for the Commission staff's issuance of the EA for this proposal. The filing of the EA in the Commission's public record for this proceeding or the issuance of a Notice of Schedule for Environmental Review will serve to notify federal and state agencies of the timing for the completion of all necessary reviews, and the subsequent need to complete all federal authorizations within 90 days of the date of issuance of the Commission staff's EA.

Persons who wish to comment only on the environmental review of this project should submit an original and two copies of their comments to the Secretary of the Commission. Environmental commenters will be placed on the Commission's environmental mailing list, will receive copies of the environmental documents, and will be notified of meetings associated with the Commission's environmental review process. Environmental commenters will not be required to serve copies of filed documents on all other parties. However, the non-party commenters, will not receive copies of all documents filed by other parties or issued by the Commission (except for the mailing of environmental documents issued by the Commission) and will not have the right to seek court review of the Commission's final order.

The Commission strongly encourages electronic filings of comments, protests and interventions in lieu of paper using the eFiling link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and seven copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426.

Dated: February 15, 2018.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2018–03646 Filed 2–21–18; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OAR–2016–0347; FRL–9974–80–OAR]

RIN 2060–AT35

Response to June 1, 2016 Clean Air Act Section 126(b) Petition From Connecticut

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of proposed action on petition.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to deny a section 126(b) petition submitted by the state of Connecticut pursuant to the Clean Air Act (CAA or Act) on June 1, 2016. The petition requested that EPA make a finding that emissions from Brunner Island Steam Electric Station (Brunner Island), located in York County, Pennsylvania, are significantly contributing to nonattainment and interfering with maintenance of the 2008 ozone national ambient air quality standards (NAAQS) in Connecticut in violation of the good neighbor provision under the CAA. The EPA proposes to deny the petition because Connecticut has not met its burden to demonstrate that the source emits or would emit in violation of the good neighbor provision such that it will significantly contribute to nonattainment or interfere with maintenance of the 2008 ozone NAAQS in Connecticut. The EPA is further proposing to deny the petition based on the conclusion that the Brunner Island facility does not currently emit nor is it expected to emit pollution in violation of the good neighbor provision for the 2008 ozone NAAQS.

DATES: *Comments.* Comments must be received on or before March 26, 2018. *Public Hearing.* The EPA is holding a public hearing on the EPA's response to the June 1, 2016, CAA section 126(b) petition from Connecticut on Friday, February 23, 2018. Additional information for this public hearing is available in a separate **Federal Register** notice published on February 14, 2018 (83 FR 6490).

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–HQ–OAR–2016–0347, at *http://www.regulations.gov.* Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from *Regulations.gov*. The EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.,* on the Web, Cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *http://www2.epa.gov/dockets/commenting-epa-dockets.*

FOR FURTHER INFORMATION CONTACT: Questions concerning this proposed notice should be directed to Mr. Lev Gabrilovich, U.S. Environmental Protection Agency, Office of Air Quality Planning and Standards, Air Quality Policy Division, Mail Code C539–01, Research Triangle Park, NC 27711, telephone (919) 541–1496; email at *gabrilovich.lev@epa.gov.*

SUPPLEMENTARY INFORMATION:

The information in this document is organized as follows:

I. General Information
II. Background and Legal Authority
A. Ozone and Public Health
B. Clean Air Act Sections 110 and 126
C. The EPA's Historical Approach to Addressing Interstate Transport of Ozone under the Good Neighbor Provision
D. The June 2016 CAA Section 126(b) Petition from Connecticut
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I. General Information

Throughout this document wherever ''we,'' ''us,'' or ''our'' is used, we mean the U.S. EPA. Where can I get a copy of this document and other related information?

The EPA has established a docket for this action under Docket ID No. EPA–HQ–OAR–2016–0347 (available at *http://www.regulations.gov*). The EPA has made available information related to the proposed action and the public hearing at website: *https://www.epa.gov/ozone-pollution/connecticut-126-petition.*

II. Background and Legal Authority

A. Ozone and Public Health

Ground-level ozone is not emitted directly into the air, but is a secondary air pollutant created by chemical reactions between oxides of nitrogen (NO_X) and volatile organic compounds (VOCs) in the presence of sunlight. For a discussion of ozone-formation chemistry, interstate transport issues, and health effects, *see* the Cross-State Air Pollution Rule Update for the 2008 Ozone NAAQS. 81 FR 74504, 74513–4.

B. Clean Air Act Sections 110 and 126

The statutory authority for this action is provided by the CAA sections 126 and 110(a)(2)(D)(i). Section 126(b) of the CAA provides, among other things, that any state or political subdivision may petition the Administrator of the EPA to find that any major source or group of stationary sources in an upwind state emits or would emit any air pollutant in violation of the prohibition of CAA section 110(a)(2)(D)(i),[1] which we describe later in detail. Findings by the Administrator, pursuant to this section, that a source or group of sources emits air pollutants in violation of the CAA section 110(a)(2)(D)(i) prohibition are commonly referred to as section CAA 126(b) findings. Similarly, petitions submitted pursuant to this section are commonly referred to as CAA section 126(b) petitions.

CAA section 126(c) explains the impact of a CAA section 126(b) finding and establishes the conditions under which continued operation of a source subject to such a finding may be permitted. Specifically, CAA section 126(c) provides that it would be a violation of section 126 of the Act and of the applicable state implementation plan (SIP): (1) For any major proposed new or modified source subject to a CAA section 126(b) finding to be constructed or operate in violation of the prohibition of CAA section 110(a)(2)(D)(i); or (2) for any major existing source for which such a finding has been made to operate more than three months after the date of the finding. The statute, however, also gives the Administrator discretion to permit the continued operation of a source beyond 3 months if the source complies with emission limitations and compliance schedules provided by the EPA to bring about compliance with the requirements contained in CAA sections 110(a)(2)(D)(i) and 126 as expeditiously as practicable but no later than 3 years from the date of the finding. *Id.*

Section 126(b) of the CAA provides a mechanism for states and other political subdivisions to seek abatement of pollution in other states that may be affecting their air quality; however, it does not identify specific criteria or a specific methodology for the Administrator to apply when deciding whether to make a section 126(b) finding or deny a petition. Therefore, the EPA has discretion to identify relevant criteria and develop a reasonable methodology for determining whether a section 126(b) finding should be made. *See, e.g., Chevron, U.S.A., Inc.* v. *NRDC,* 467 U.S. 837, 842–43 (1984); *Smiley* v. *Citibank,* 517 U.S. 735, 744–45 (1996). As an initial matter, the EPA's historic approach to evaluating CAA section 126(b) petitions looks first to see whether a petition identifies or establishes a technical basis for the requested section 126(b) finding. The EPA first evaluates the technical analysis in the petition to see if that analysis, standing alone, is sufficient to support a section 126(b) finding. The EPA focuses on the analysis in the petition because the statute does not require the EPA to conduct an independent technical analysis to evaluate claims made in section 126(b) petitions. The petitioner thus bears the burden of establishing, as an initial matter, a technical basis for the specific finding requested. The EPA has no obligation to prepare an analysis to supplement a petition that fails, on its face, to include an initial technical demonstration. Such a petition, or a petition that fails to identify the specific finding requested, could be found insufficient.

Nonetheless, the EPA may decide to conduct independent analyses when helpful in evaluating the basis for a potential section 126(b) finding or developing a remedy if a finding is made. As explained later, given the EPA's concerns with the technical information submitted as part of Connecticut's CAA section 126(b) petition, and the fact that the EPA has previously issued a rulemaking defining and at least partially addressing the same environmental concern that the petition seeks to address, the EPA determined that it was appropriate to conduct independent analysis to determine whether it should grant or deny the petition. Such analysis, however, is not required by the statute and may not be necessary or appropriate in other circumstances.

Section 110(a)(2)(D)(i) of the CAA, often referred to as the ''good neighbor'' or ''interstate transport'' provision of the Act, requires states to prohibit certain emissions from in-state sources if such emissions impact the air quality in downwind states. Specifically, CAA sections 110(a)(1) and 110(a)(2)(D)(i)(I) requires all states, within 3 years of promulgation of a new or revised NAAQS, to submit SIPs that contain adequate provisions prohibiting any source or other type of emissions activity within the state from emitting any air pollutant in amounts which will contribute significantly to nonattainment in, or interfere with maintenance by, any other state with respect to any such national primary or secondary ambient air quality standard. As described further in section II.C, the EPA has developed a number of regional rulemakings to address CAA section 110(a)(2)(D)(i)(I) for the ozone NAAQS. The EPA's most recent rulemaking, the Cross-State Air Pollution Rule Update (CSAPR Update), was promulgated to address interstate transport under section 110(a)(2)(D)(i)(I) for the 2008 ozone NAAQS. 81 FR 74504 (October 26, 2016).

Considering both section 110(a)(2)(D)(i) and section 126, the EPA has consistently acknowledged that Congress created these provisions as two independent statutory tools to address the problem of interstate pollution transport. *See, e.g.,* 76 FR 69052, 69054 (November 7, 2011).[2] Congress provided both provisions without indicating any preference for one over the other, suggesting it viewed either approach as a legitimate means to produce the desired result. While the two provisions unquestionably may be applied independently, they are also closely linked in that a violation of the prohibition in CAA section

[1] The text of CAA section 126 codified in the U.S. Code cross-references section 110(a)(2)(D)(ii) instead of section 110(a)(2)(D)(i). The courts have confirmed that this is a scrivener's error and the correct cross-reference is to CAA section 110(a)(2)(D)(i), *See Appalachian Power Co.* v. *EPA,* 249 F.3d 1032, 1040–44 (DC Cir. 2001).

[2] Courts have also upheld the EPA's position that CAA sections 110(a)(2)(D)(i) and section 126 are two independent statutory tools to address the same problem of interstate transport. *See GenOn REMA, LLC* v. *EPA,* 722 F.3d 513, 520–23 (3d Cir. 2013); *Appalachian Power Co.* v. *EPA,* 249 F.3d at 1047.

110(a)(2)(D)(i) is a condition precedent for action under CAA section 126(b) and, critically, that significant contribution and interference with maintenance are construed identically for purposes of both provisions (since the identical terms are naturally interpreted as meaning the same thing in the two linked provisions). *See Appalachian Power Co. v EPA,* 249 F. 3d at 1049–50. Thus, in interpreting the phrase ''emits or would emit in violation of the prohibition of section [110(a)(2)(D)(i)],'' if the EPA or a state has adopted provisions that eliminate the significant contribution to nonattainment or interference with maintenance in downwind states, then there simply is no violation of the CAA section 110(a)(2)(D)(i)(I) prohibition. Put another way, requiring additional reductions would result in eliminating emissions that do not contribute significantly to nonattainment or interfere with maintenance of the NAAQS, an action beyond the scope of the prohibition in CAA section 110(a)(2)(D)(i)(I) and therefore beyond the scope of EPA's authority to make the requested finding under CAA section 126(b). *See EPA* v. *EME Homer City Generation, L.P.,* 134 S. Ct. 1584, 1604 n.18, 1608–09 (2014) (holding the EPA may not require sources in upwind states to reduce emissions by more than necessary to eliminate significant contribution to nonattainment or interference with maintenance of the NAAQS in downwind states under the good neighbor provision).

Thus, it follows that if a state already has a SIP that the EPA approved as adequate to meet the requirements of CAA section 110(a)(2)(D)(i)(I), the EPA would not find that a source in that state was emitting in violation of the prohibition of CAA section 110(a)(2)(D)(i)(I) absent new information demonstrating that the SIP is now insufficient to address the prohibition. Similarly, if a state had failed to adopt an approvable SIP meeting the requirements of CAA section 110(a)(2)(D)(i)(I) and the EPA consequently promulgated a federal implementation plan (FIP) that fully addressed the deficiency, the FIP would eliminate emissions that significantly contribute to nonattainment or interfere with maintenance in a downwind state, and, hence, absent new information to the contrary, sources in the upwind state would not emit in violation of the section 110(a)(2)(D)(i)(I) prohibition.[3]

C. The EPA's Historical Approach To Addressing Interstate Transport of Ozone Under the Good Neighbor Provision

Given that ozone formation, atmospheric residence, and transport occur on a regional scale (*i.e.,* hundreds of miles) over much of the eastern U.S., the EPA has historically addressed interstate transport of ozone pursuant to the good neighbor provision through a series of regional rulemakings focused on the reduction of NO_X emissions, routinely finding that downwind states' problems attaining and maintaining the ozone NAAQS result in part from the contribution of pollution from multiple upwind sources located in different upwind states. For example, the EPA noted in the NO_X SIP Call that ''[t]he fact that virtually every nonattainment problem is caused by numerous sources over a wide geographic area is a factor suggesting that the solution to the problem is the implementation over a wide area of controls on many sources, each of which may have a small or unmeasurable ambient impact by itself.'' 63 FR 57356, 57377 (October 27, 1998).

The EPA has promulgated four regional interstate transport rulemakings that have addressed the good neighbor provision with respect to various ozone NAAQS. The EPA's first such rulemaking, the NO_X SIP Call, addressed interstate transport with respect to the 1979 ozone NAAQS and was finalized on October 27, 1998. 63 FR 57356. The NO_X SIP Call promulgated statewide emission budgets and required upwind states to adopt SIPs which would decrease NO_X emissions by amounts that would significantly contribute to nonattainment of the ozone NAAQS in downwind states. The EPA also promulgated a model rule for a regional allowance trading program called the NO_X Budget Trading Program that states could adopt in their SIPs as a mechanism to achieve some or all of the required emission reductions. Id. All of the jurisdictions covered by the NO_X SIP Call ultimately chose to adopt the NO_X Budget Trading Program into their SIPs.[4]

In coordination with the NO_X SIP Call rulemaking under CAA section 110(a)(2)(D)(i)(I), the EPA also addressed several pending CAA section 126(b) petitions submitted by eight northeastern states regarding the same air quality issues (*i.e.,* interstate ozone transport for the 1979 ozone NAAQS) addressed by the NO_X SIP Call. These CAA section 126(b) petitions asked the EPA to find that ozone emissions from numerous sources located in 22 states, and the District of Columbia, had adverse air quality impacts on the petitioning downwind states. Based on technical determinations made in the NO_X SIP Call regarding upwind state impacts on downwind air quality, the EPA in May 1999 made technical determinations regarding the claims in the petitions, but did not at that time make the CAA section 126(b) findings requested by the petitions. 64 FR 28250. In making these technical determinations, the EPA concluded that the NO_X SIP Call would itself fully address and remediate the claims raised in these petitions, and that the EPA would therefore not need to take separate action to remedy any potential violations of the CAA section 110(a)(2)(D)(i) prohibition. 64 FR 28252 (May 25, 1999). However, more than 2 years after the petitions were submitted, subsequent litigation over the NO_X SIP Call led the EPA to ''de-link'' the CAA section 126(b) petition response from the NO_X SIP Call, and the EPA made final CAA section 126(b) findings for 12 states and the District of Columbia, finding sources in the states emitted in violation of the prohibition in the good neighbor provision with respect to the 1979 ozone NAAQS based on the affirmative technical determinations made in the May 1999 rulemaking. In order to remedy the violation under CAA section 126(c), the EPA promulgated requirements for affected sources in the upwind states to participate in a regional allowance trading program whose requirements were designed to be interchangeable with the requirements of the optional NO_X Budget Trading Program model rule provided under the NO_X SIP Call. 65 FR 2674 (January 18, 2000).

The EPA next promulgated the Clean Air Interstate Rule (CAIR) to address interstate transport under the good neighbor provision with respect to the 1997 ozone NAAQS, as well as the 1997 $PM_{2.5}$ NAAQS. The EPA adopted the same framework to quantifying the level of states' significant contribution to

[3] Note however, a SIP or FIP implementing section 110(a)(2)(D)(i)(I) only means that a state's emissions are adequately prohibited for the particular set of facts analyzed under approval of a SIP or promulgation of a FIP. For example, if a petitioner produces new data or information showing a different level of contribution or other facts not considered when the SIP or FIP was promulgated, compliance with a SIP or FIP may not be determinative regarding whether the upwind sources would emit in violation of the prohibition of section 110(a)(2)(D)(i)(I). *See* 64 FR 28250, 28274 n.15 (May 25, 1999); 71 FR 25328, 25336 n.6 (April 28, 2006); *Appalachian Power,* 249 F.3d at 1067 (later developments can be the basis for another CAA section 126 petition).

[4] The NO_X Budget Trading Program operated from 2003 through 2008. Beginning in 2009, it was effectively replaced by the ozone season NO_X Budget Trading program under the Clean Air Interstate Rule (CAIR).

downwind nonattainment in CAIR as it used in the NO_X SIP Call, based on the determination in the NO_X SIP Call that downwind ozone nonattainment is due to the impact of emissions from numerous upwind sources and states. 70 FR 25162, 25172 (May 12, 2005). Regarding the contribution to downwind pollution from upwind states, the EPA explained that ''[t]ypically, two or more States contribute transported pollution to a single downwind area, so that the 'collective contribution' is much larger than the contribution of any single State.'' Id. at 25186. CAIR included two distinct regulatory processes—a regulation to define significant contribution (*i.e.,* the emission reduction obligation) under the good neighbor provision and provide for submission of SIPs eliminating that contribution, 70 FR 25162 (May 12, 2005), and a regulation to promulgate, where necessary, FIPs imposing emission limitations, 71 FR 25328 (April 28, 2006). The FIPs required electric generating units (EGUs) in affected states to participate in regional allowance trading programs, which replaced the previous NO_X Budget Trading Program.

In conjunction with the second CAIR regulation promulgating FIPs, the EPA acted on a CAA section 126(b) petition received from the state of North Carolina on March 19, 2004, seeking a finding that large EGUs located in 13 states were significantly contributing to nonattainment and/or interfering with maintenance of the 1997 ozone and 1997 $PM_{2.5}$ NAAQS in North Carolina. Citing the analyses conducted to support the promulgation of CAIR, the EPA denied the CAA section 126(b) petition in full based on a determination either that the named states were not adversely impacting downwind air quality in violation of the good neighbor provision, or that such impacts were fully remedied by implementation of the emission reductions required by the CAIR FIPs. 71 FR 25328, 25330 (April 28, 2006) (discussing the EPA's basis for denial in part because the EPA promulgated FIPs concurrently with the CAA section 126(b) response requiring elimination of the interstate transport problems within petitioning states).

CAIR was remanded to the EPA by the D.C. Circuit in July 2008 with the instruction that the EPA replace the rule ''from the ground up.'' *North Carolina* v. *EPA,* 531 F.3d 896, 929 (D.C. Cir. 2008). Accordingly, the EPA was required to redo its analysis and ensure that implementation of the good neighbor provision would be consistent with the D.C. Circuit's instructions in *North Carolina.*

On August 8, 2011, the EPA promulgated the Cross-State Air Pollution Rule (CSAPR) to replace CAIR. 76 FR 48208 (August 8, 2011). CSAPR addressed the same ozone and $PM_{2.5}$ NAAQS as CAIR and, in addition, addressed interstate transport for the 2006 $PM_{2.5}$ NAAQS by requiring 28 states to reduce SO_2 emissions, annual NO_X emissions, and/or ozone season NO_X emissions that would significantly contribute to other states' nonattainment or interfere with other states' abilities to maintain these air quality standards. Consistent with prior determinations made in the NO_X SIP Call and CAIR, the EPA continued to find that multiple upwind states contributed to downwind ozone nonattainment. Specifically, the EPA found ''that the total 'collective contribution' from upwind sources represents a large portion of $PM_{2.5}$ and ozone at downwind locations and that the total amount of transport is composed of the individual contribution from numerous upwind states.'' Id. at 48237. Accordingly, the EPA conducted a regional analysis, calculated emission budgets for affected states, and required EGUs in these states to participate in new regional allowance trading programs in order to reduce statewide emission levels. CSAPR was subject to nearly 4 years of litigation in which the Supreme Court upheld EPA's approach to calculating emission reduction obligations and apportioning upwind state responsibility under the good neighbor provision, but also held that the EPA was precluded from requiring more emission reductions than necessary to address downwind air quality problems. *EPA* v. *EME Homer City Generation, L.P.,* 134 S. Ct. at 1607–1609.

Most recently, the EPA promulgated the CSAPR Update to address the good neighbor provision requirements for the 2008 ozone NAAQS. 81 FR 74504 (October 26, 2016). The final CSAPR Update built upon previous efforts to address the collective contributions of ozone pollution from states in the eastern U.S. to downwind air quality problems, including the NO_X SIP Call, CAIR, and the original CSAPR. The CSAPR Update finalized EGU NO_X ozone season emission budgets for affected states that were developed using uniform control stringency available at a marginal cost of $1,400 per ton of NO_X reduced. This level of control stringency represented the potential for operating and optimizing existing selective catalytic reduction (SCRs) controls; installing state-of-the-art NO_X combustion controls; and shifting generation to existing units with lower NO_X emission rates within the same state.

The CSAPR Update finalized enforceable measures necessary to achieve the emission reductions in each state by requiring power plants in covered states to participate in the CSAPR NO_X Ozone Season Group 2 allowance trading program. The CSAPR Update's trading programs and the EPA's prior emission trading programs (*e.g.,* the NO_X Budget Trading Program associated with the NO_X SIP Call) provide a proven, cost-effective implementation framework for achieving emission reductions. In addition to providing environmental certainty (*i.e.,* a cap on regional and statewide emissions), these programs also provide regulated sources with flexibility when choosing compliance strategies. This implementation approach was shaped by previous rulemakings and reflects the evolution of these programs in response to court decisions and practical experience gained by states, industry, and the EPA.

While some aspects of these rulemakings have been challenged in court—and some aspects of these challenges have been upheld—each of these rulemakings essentially followed the same four-step framework to quantify and implement emission reductions necessary to address the interstate transport requirements of the good neighbor provision. These steps are:

(1) Identifying downwind air quality problems relative to the ozone NAAQS. The EPA has identified downwind areas with air quality problems considering monitored ozone data where appropriate and air quality modeling projections to a future compliance year. In CSAPR and the CSAPR Update, the agency identified not only those areas expected to be in nonattainment with the ozone NAAQS, but also those areas that may struggle to maintain the NAAQS, despite clean monitored data or projected attainment;

(2) determining which upwind states are ''linked'' to these identified downwind air quality problems and warrant further analysis to determine whether their emissions violate the good neighbor provision. In CSAPR and the CSAPR Update, the EPA identified such upwind states as those modeled to contribute at or above a threshold equivalent to one percent of the applicable NAAQS. Upwind states linked to one of these downwind nonattainment or maintenance areas were then evaluated to determine what level of emissions reductions, if any, should be required of each state;

(3) for states linked to downwind air quality problems, identifying upwind emissions on a statewide basis that significantly contribute to nonattainment or interfere with maintenance of a standard. In all four of the EPA's prior rulemakings, the EPA apportioned emission reduction responsibility among multiple upwind states linked to downwind air quality problems using cost-based and air quality-based criteria to quantify the amount of a linked upwind state's emissions that significantly contribute to nonattainment or interfere with maintenance in another state; and

(4) for states that are found to have emissions that significantly contribute to nonattainment or interfere with maintenance of the NAAQS downwind, implementing the necessary emission reductions within the state. The EPA has done this by requiring affected sources in upwind states to participate in allowance trading programs to achieve the necessary emission reductions.

In finalizing the CSAPR Update, the EPA determined the rule may only be a partial resolution of the good neighbor obligation and that the emission reductions required by the rule ''may not be all that is needed'' to address transported emissions. 81 FR 74521–522 (October 26, 2016). The EPA noted that the information available at that time indicated that downwind air quality problems remained after implementation of the CSAPR Update to which upwind states continued to be linked at or above the one percent threshold. However, the EPA could not determine whether, at step three of the four-step framework, the EPA had quantified all emission reductions that may be considered highly cost effective because the rule did not evaluate non-EGU ozone season NO_X reductions and further EGU control strategies that are achievable on longer timeframes after 2017 (*e.g.,* the implementation of new post-combustion controls).

Of particular relevance to this proposal, the EPA determined in the CSAPR Update that emissions from Pennsylvania were linked to both nonattainment and maintenance concerns for the 2008 ozone NAAQS in Connecticut based on projections to 2017. 81 FR 74538, 74539. The EPA found there were cost-effective emission reductions that could be achieved within Pennsylvania, quantified an emission budget for the state, and required EGUs located within the state, including the source identified in Connecticut's petition, to comply with EPA's trading program under the CSAPR Update. These emission budgets were imposed in order to achieve necessary emission reductions and mitigate upwind states', including Pennsylvania's, impact on downwind states' air quality.

D. The June 2016 CAA Section 126(b) Petition From Connecticut

On March 12, 2008, the EPA promulgated a revision to the ozone NAAQS, lowering both the primary and secondary standards to 75 ppb.[5] Subsequently, on June 1, 2016, the state of Connecticut, through the Connecticut Department of Energy and Environmental Protection (Connecticut), submitted a CAA section 126(b) petition alleging that emissions from Brunner Island significantly contribute to nonattainment and/or interfere with maintenance of the 2008 ozone NAAQS in Connecticut.[6] In particular, the petition contends that emissions from Brunner Island significantly contribute to nonattainment and interfere with maintenance of the 2008 ozone NAAQS at six out of 12 ozone monitors in Connecticut. In support of this assertion, the petition contends that emissions from Brunner Island contribute levels equal to or greater than one percent of the 2008 ozone NAAQS to downwind nonattainment and maintenance receptors. The petition further contends that Brunner Island is able to reduce emissions at a reasonable cost using readily available control options. The petition therefore concludes that, consistent with EPA's past approaches to addressing interstate transport of ozone, NO_X emissions from Brunner Island significantly contribute to nonattainment and interfere with maintenance of the 2008 ozone NAAQS in Connecticut. The petition requests that the EPA direct the operators of Brunner Island to reduce NO_X emissions to eliminate this impact.

The petition cites several sources of data for its contention that Brunner is impacting air quality in Connecticut. First, the petition notes that 10 out of 12 air quality monitors in Connecticut were violating the 2008 ozone NAAQS based on 2012–2014 data and preliminary 2013–2015 data available at the time the petition was submitted.[7] The petition further cites to modeling conducted by the EPA to support development of the CSAPR Update to claim that four ozone monitors in Connecticut were projected to have nonattainment or maintenance concerns in 2017.[8]

To support the conclusion that Brunner Island impacts air quality at some of these monitoring sites, Connecticut provides a technical memorandum from Sonoma Technologies, Inc., outlining the results of modeling that analyzed the impact of NO_X emissions from Brunner Island on Connecticut. According to the petition, this modeling shows that emissions from Brunner Island contributed an amount greater than one percent of the 2008 ozone NAAQS at six monitoring sites in Connecticut based on emissions from the facility during the 2011 ozone season, and is therefore linked to Connecticut's air quality problems.

Connecticut further alleges that Brunner Island has cost-effective and readily available control technologies that can reduce its NO_X emissions. The petition first notes that Brunner Island currently has no NO_X post-combustion controls installed at any of the units but that the facility was planning to add the capability to use natural gas fuel at all three of its units by the summer of 2017, and argues that a federally enforceable mechanism to ensure Brunner Island uses natural gas fuel would eliminate Brunner Island's significant contribution to ozone levels in Connecticut. The petition states that current federal and state rules will not require Brunner Island to operate on natural gas, install post-combustion controls, or otherwise limit NO_X emissions beyond previously allowable permit levels. The petition summarizes four potential ways by which Brunner Island could reduce its NO_X emissions: Replacing coal combustion with natural gas fuel, modifying its boiler furnace burners and combustion systems to operate at lower flame temperatures, installing selective noncatalytic reduction (SNCR) controls, and installing SCR controls.

The petition further discusses the EPA's then-proposed CSAPR Update. Connecticut suggests that the then-proposed CSAPR Update could not be relied upon to control emissions from Brunner Island because: (1) It was not final at the time the petition was submitted and was therefore uncertain; and (2) the proposed rule would not require Brunner Island to reduce its

[5] *See* National Ambient Air Quality Standards for Ozone, Final Rule, 73 FR 16436 (March 27, 2008).

[6] Petition of the State of Connecticut Pursuant to Section 126 of the Clean Air Act, submitted June 1, 2016. The petition is available in the docket for this action.

[7] Of the 12 monitors in Connecticut, 7 are violating the 2008 ozone NAAQS based on 2014–2016 data. *See* ozone design value table available *at https://www.epa.gov/air-trends/air-quality-design-values#report.*

[8] The petition referred to modeling conducted for purposes of the proposed CSAPR Update in 2015. *See* 80 FR 75706, 75725–726 (December 3, 2015). The EPA conducted updated modeling to support the final rulemaking, which also identified four projected nonattainment and maintenance receptors in 2017. 81 FR 74533.

emissions below the threshold of one percent of the NAAQS. The petition notes that the modeling to support the proposed rule shows four Connecticut monitors with nonattainment and maintenance problems after implementation of the proposed emission budgets. Finally, the petition suggests that the fact that EGUs may trade allowances within and between states could result in emission levels in excess of the state's budget, and thus suggest the rule will likely not affect Brunner Island's emissions. In particular, the petition suggests that this aspect of the CSAPR Update will not reduce emissions from Brunner Island on high electric demand days or days with the highest ozone levels.

Based on the technical support provided in its petition, Connecticut requests that the EPA make a CAA section 126(b) finding and require that Brunner Island comply with emissions limitations and compliance schedules to eliminate its significant contribution to nonattainment and interference with maintenance in Connecticut.

Section 126(b) of the Act requires the EPA to either make a finding or deny a petition within 60 days of receipt of the petition and after holding a public hearing. However, any action taken by the EPA under CAA section 126(b) is also subject to the procedural requirements of CAA section 307(d). *See* CAA section 307(d)(1)(N). One of these requirements is that the EPA conduct notice-and-comment rulemaking, including issuance of a notice of proposed action, a period for public comment, and a public hearing before making a final determination whether to make the requested finding. In light of the time required for notice-and-comment rulemaking, CAA section 307(d)(10) provides for a time extension, under certain circumstances, for rulemakings subject to the section 307(d) procedural requirements. In accordance with section 307(d)(10), the EPA determined that the 60-day period for action on Connecticut's petition would be insufficient for the EPA to complete the necessary technical review, develop an adequate proposal, and allow time for notice and comment, including an opportunity for public hearing. Therefore, on July 25, 2016, the EPA published a final rule extending the deadline for the EPA to take final action on Connecticut's CAA section 126(b) petition to January 25, 2017.[9]

On April 25, 2017, a coalition of public health, conservation, and environmental organizations submitted letters urging the EPA to immediately grant the pending CAA section 126(b) petitions in front of the agency, including Connecticut's, arguing that the petitions' proposed remedies would also provide critical air quality benefits to the communities surrounding the affected power plants in Indiana, Kentucky, Ohio, Pennsylvania, and West Virginia, as well as other downwind states, including New Jersey, New York, Maine, Massachusetts, and Rhode Island.[10] On April 28, 2017, Talen Energy Corp., the owner and operator of Brunner Island, submitted a letter urging the EPA to deny Connecticut's CAA section 126(b) petition due to alleged deficiencies in the petition. The EPA acknowledges receipt of these letters, and has made them available in the docket for this action. However, the EPA is not in this action responding directly to these letters. Rather, the EPA encourages interested parties to review this proposal and then submit relevant comments during the public comment period.

On May 16, 2017, the state of Connecticut filed suit in the U.S. District Court for the District of Connecticut alleging that the EPA failed to take timely action on Connecticut's CAA section 126(b) petition.[11] On February 7, 2018, the court issued an order requiring the EPA to hold a public hearing on the petition within 30 days and to take final action within 60 days of the court's order. *See* Ruling on Motions for Summary Judgment and Motion Concerning Remedy, *State of Connecticut* v. *EPA,* No. 3:17–cv–00796 (D. Conn. February 7, 2018).

E. The Brunner Island Facility

Brunner Island is a 1,411 megawatt facility with three tangentially-fired steam boiler EGUs, each equipped with low NO_X burner technology with closed-coupled/separated over fire air (LNC3) combustion controls, located in York County in southeastern Pennsylvania.[12] The units were constructed starting in 1961 through 1969. For over 50 years, all three units at Brunner Island have historically burned coal. Brunner Island recently installed a natural gas connection pipeline allowing natural gas to be combusted to serve Brunner Island's electric generators.[13] Following installation of this pipeline, Brunner Island primarily combusted natural gas as fuel during the 2017 ozone season.[14] Using primarily natural gas as fuel during the 2017 ozone season reduced Brunner Island's actual ozone season NO_X emissions to 877 tons in 2017 from 3,765 tons in 2016 and reduced the facility's ozone season NO_X emission rate to 0.090 pounds per millions of British thermal units (lbs/mmBtu) in 2017 from 0.370 lbs/mmBtu in 2016.[15]

III. The EPA's Proposed Decision on Connecticut's CAA Section 126(b) Petition

A. The EPA's Approach for Granting or Denying CAA Section 126(b) Petitions Regarding the 2008 8-Hour Ozone NAAQS

As described in section II.B of this notice, as an initial matter in reviewing CAA section 126(b) petitions, the EPA evaluates the technical analysis in the petition to see if that analysis, standing alone, is sufficient to support a CAA section 126(b) finding. In this regard, the agency notes that certain elements of the analysis provided in the petition appear to be deficient and thereby the conclusions that the petition draws are not fully supported by Connecticut's technical assessment. For example, in the context of interstate pollution transport, in existing EPA analyses, the agency focuses its analysis on contributions to high ozone days at the downwind receptor. The analysis and metrics provided by the petitioner provide some information on the

[9] 81 FR 48348 (July 25, 2016).

[10] The EPA has received five CAA section 126(b) petitions from two other states (Delaware and Maryland) regarding the 2008 and 2015 ozone NAAQS, each claiming that one or more specific power plant EGUs in upwind states emit or would emit in violation of the good neighbor provision. However, the EPA notes that this rulemaking only addresses Connecticut's CAA section 126 petition regarding Brunner Island in Pennsylvania and the EPA is not requesting proposing action or requesting comment on the other five petitions.

[11] Two citizen groups, Sierra Club and Connecticut Fund for the Environment, intervened in this case on behalf of the state of Connecticut.

[12] For tangentially-fired boiler types, LNC3 is state of the art (*See* sections 3.9.2 and 5.2.1 on pages 3–25 and 5–5 of the Integrated Planning Model (IPM) 5.13 documentation for details about combustion controls. The IPM documentation is available at *https://www.epa.gov/airmarkets/power-sector-modeling-platform-v513.*

[13] The Connecticut CAA section 126(b) petition and the April 28, 2017, letter from Talen Energy Corp. indicate that Brunner Island has taken necessary steps to construct a natural gas pipeline and enable the combustion of natural gas. On June 7, 2016, an article by S&P Global indicated that Talen Energy Corp. is in the process of converting the Brunner Island plant to co-fire with natural gas. These documents are available in the docket for this action.

[14] Hourly emission rates reported to the EPA and fuel usage reported to Environmental Impact Assessment demonstrate Brunner Island predominately used natural gas during the ozone season. The emissions data for 2017 are publicly available at *https://www.epa.gov/ampd* and the fuel usage data are available at *https://www.eia.gov/electricity/data/eia923/.*

[15] These data are publicly available at *https://www.epa.gov/ampd. See* Air Markets Program Data in the docket for this proposal.

frequency and magnitude of ozone impacts. However, the information is unclear as to the modeled and/or measured ozone levels on those days.[16] We also note that, the Connecticut petition relied on emissions data from 2011, which may not be representative of current and/or future NO_X emissions and ozone levels in Connecticut, Pennsylvania, and the rest of the region.[17]

Nonetheless, the EPA's primary approach for reviewing the petition involves EPA's independent technical analyses to help evaluate the basis for a potential CAA section 126(b) finding. As described in sections II.A and II.C of this notice, ozone is a regional pollutant and previous EPA analyses and regulatory actions have evaluated the regional interstate ozone transport problem using a four-step regional analytic framework.

The EPA applied this four-step framework in the promulgation of the CSAPR Update under CAA section 110(a)(2)(D)(i)(I) to at least partially address interstate transport with respect to the 2008 ozone NAAQS. The CSAPR Update was promulgated in 2016 and finalized EGU NO_X ozone season emission budgets to address the good neighbor provision for the 2008 ozone NAAQS. While CAA section 126(b) differs from CAA section 110(a)(2)(D)(i)(I) in that CAA section 126(b) gives states the ability to petition the EPA regarding compliance with the good neighbor provision by a single source or group of sources, CAA section 126(b) specifically cross-references the substantive prohibitions of the good neighbor provision. To that end, CAA sections 110(a)(2)(D)(i)(I) and 126(b) both represent mechanisms to address the same functional prohibition of emissions activity from upwind states that will contribute significantly to nonattainment or interfere with maintenance of the NAAQS in a downwind state.

Given the specific cross-reference in CAA section 126(b) to the substantive prohibition in CAA section 110(a)(2)(D)(i)(I), as discussed in section II.B of this notice in more detail, the EPA believes any prior findings made under the good neighbor provision are informative—if not determinative—for a CAA section 126(b) action, and thus the EPA's four-step approach under CAA section 110(a)(2)(D)(i)(I) is also appropriate for evaluating under CAA section 126(b) whether a source or group of sources will significantly contribute to nonattainment or interfere with maintenance of the 2008 8-hour ozone NAAQS in a petitioning state. Because the EPA interprets significant contribution to nonattainment and interference with maintenance to mean the same thing under both provisions, the EPA's decision whether to grant or deny a CAA section 126(b) petition regarding the 2008 8-hour ozone NAAQS depends on whether there is a downwind air quality problem in the petitioning state (*i.e.,* step one of the four-step framework); whether the upwind state where the source subject to the petition is located is linked to the downwind air quality problem (*i.e.,* step two); and, if such a linkage exists, whether there are additional feasible and cost-effective emission reductions achievable at the source(s) named in the CAA section 126(b) petition (*i.e.,* step three).

B. The EPA's Proposal To Deny Connecticut's CAA Section 126(b) Petition

As described earlier in section II.C of this notice, the EPA has determined that a state may contribute significantly to nonattainment or interfere with maintenance of the 2008 ozone NAAQS where emissions from the state impact a downwind air quality problem (nonattainment or maintenance receptor) at a level exceeding a one percent contribution threshold, and where the sources in the state can implement emission reductions through highly cost-effective control measures. *See EPA* v. *EME Homer City Generation, L.P.,* 134 S. Ct. at 1606–07.

The EPA has already conducted such an analysis for the 2008 ozone NAAQS with respect to Pennsylvania's impact on receptors in Connecticut. As the petitioners note, the EPA determined that, based on 2017 modeling projections, Pennsylvania was linked to four air quality monitors in Connecticut expected to have nonattainment or maintenance concerns. However, contrary to the assertions made in Connecticut's petition, the one percent threshold used in step two in the CSAPR Update did not alone represent emissions that were considered to ''contribute significantly'' or ''interfere with maintenance'' of the NAAQS. The conclusion that a state's emissions met or exceeded this threshold only indicated that further analysis was appropriate to determine whether any of the upwind state's emissions met the statutory criteria of significantly contributing to nonattainment or interfering with maintenance. As discussed in more detail in section II.C, this further analysis in step three considers cost, technical feasibility and air quality factors to determine whether any emissions deemed to contribute to the downwind air quality factor must be controlled pursuant to the good neighbor provision. Thus, while the EPA's modeling conducted for the CSAPR Update did link emissions from Pennsylvania to nonattainment and maintenance receptors in Connecticut in 2017, this does not conclude the determination as to whether Brunner Island is operating in violation of the good neighbor provision with respect to the 2008 ozone NAAQS.

Similarly, and for the same reasons, the impact of a single source on downwind air quality is not necessarily determinative of whether that source emits or would emit in violation of the good neighbor provision. Thus, the modeling summary provided by Connecticut regarding Brunner Island's potential impact on Connecticut monitors does not indicate whether in step three of the EPA's framework there are feasible and highly cost-effective emission reductions available at Brunner Island such that EPA could determine that this facility emits or would emit in violation of the good neighbor provision.

With respect to the question of whether there are feasible and highly cost-effective NO_X emission reductions available at Brunner Island, CAA section 126(b) indicates that a petitioner must demonstrate that a major source or group of stationary sources ''emits or would emit'' any air pollutant in violation of the prohibition of CAA section 110(a)(2)(D)(i)(I). Congress did not specify the intended meaning for these terms in either CAA section 126(b) itself or the legislative history for this provision. Therefore, in the context of this response to Connecticut's CAA section 126(b) petition regarding Brunner Island for the 2008 ozone NAAQS, the EPA reasonably and appropriately proposes to interpret these ambiguous terms in a particular way given the facility's existing operating conditions, as further described later in this section, and consistent with EPA's historical approach to evaluating interstate ozone pollution transport under the good neighbor provision. Specifically, the

[16] Table two in the Sonoma Technologies, Inc. technical memorandum that supports Connecticut's petition indicates that the ''maximum number of days any one monitor [in Connecticut] had a significant ozone contribution'' was two.

[17] The Connecticut petition relies on air quality modeling that uses 2011 emissions data. As an example of how emissions have changed between 2011 and a recent historical year, the EPA notes that Pennsylvania's 2017 EGU NO_X ozone season emissions were 79 percent below 2011 levels. Brunner Island is located in Pennsylvania, which as a facility reduced its ozone season NO_X emissions by 88 percent in 2017 relative to 2011 levels (*https://www.epa.gov/ampd*).

EPA is proposing to interpret the phrase ''emits or would emit'' in this context to mean, first, that a source may ''emit'' in violation of the good neighbor provision if, based on current emission levels, the upwind state contributes to downwind air quality problems and the source may be further controlled through implementation of highly cost-effective controls; and, second, that a source ''would emit'' in violation of the good neighbor provision if, based on reasonably anticipated future emission levels (accounting for existing conditions), the upwind state contributes to downwind air quality problems and the source could be further controlled through implementation of highly cost-effective controls. This interpretation is consistent with EPA's historic approach to addressing ozone transport under the good neighbor provision wherein EPA's ozone transport air quality and NO_X reduction potential analyses have used future emission projections that were derived considering recent and projected emission levels. Accordingly, the EPA believes it is reasonable to interpret the CAA section 126(b) requirements for ozone transport in a consistent manner. Consistent with this interpretation, the EPA has therefore evaluated whether Brunner Island emits or would emit in violation of the good neighbor provision based on both current and future anticipated emission levels.

As described in more detail later in this section, Brunner Island primarily burned natural gas with a low NO_X emission rate in the 2017 ozone season and the EPA expects the facility to continue operating primarily by burning natural gas in future ozone seasons. As such, the EPA does not find at this time that there are additional feasible and highly cost-effective NO_X emission reductions available at Brunner Island. The EPA is therefore proposing to determine, based on this context, that Brunner Island does not and would not ''emit'' in violation of the good neighbor provision with respect to the 2008 ozone NAAQS.

Connecticut's CAA section 126(b) petition first proposes that the operation of natural gas is an available cost-effective emission reduction measure that could be implemented at Brunner Island. As noted previously, Brunner Island completed construction of a natural gas pipeline connection prior to the beginning of the 2017 ozone season (*i.e.,* by May 1, 2017). Brunner Island operated primarily using natural gas as fuel for the 2017 ozone season. As a result, Brunner Island's actual ozone season NO_X emissions declined from 3,765 tons in 2016 to 877 tons in 2017, and the facility's ozone season NO_X emission rate declined from 0.370 lbs/mmBtu in 2016 to 0.090 lbs/mmBtu in 2017. Thus, Brunner Island has already implemented the emission reductions consistent with what Connecticut asserted would qualify as a cost-effective strategy for reducing NO_X emissions. Connecticut's section 126(b) petition does not demonstrate that, at this current level of emissions, Brunner Island ''emits'' in violation of the good neighbor provision.

The EPA also believes that Brunner Island will likely continue to primarily use natural gas as fuel during future ozone seasons for several reasons. First, compliance with the CSAPR Update provides an economic incentive to cost-effectively reduce NO_X emissions. Specifically, Brunner Island's participation in the CSAPR NO_X ozone season Group 2 allowance trading program provides an economic incentive to produce electricity in ways that lower ozone-season NO_X, such as by burning natural gas relative to burning coal at this particular power plant. Under the CSAPR Update, each ton of NO_X emitted by a covered EGU has an economic value—a direct cost in the case that a power plant must purchase an allowance to cover that ton of emissions for CSAPR Update compliance or an opportunity cost in the case that a power plant must use an allowance that is in its account for compliance and thereby foregoes the opportunity to sell that allowance on the market. The EPA notes that Brunner Island's 2017 emissions would have been approximately 2,714 tons more than its actual 2017 emissions if it had operated as a coal-fired generator, as it did in 2016.[18] This reduction in NO_X emissions that is attributable to primarily burning natural gas has an economic value in the CSAPR allowance trading market.

Second, there are continuing fuel-market based economic incentives suggesting that Brunner Island will primarily burn natural gas during the ozone season. Brunner Island elected to add the capability to primarily utilize natural gas by way of a large capital investment in a new natural gas pipeline capacity connection. Brunner Island's operators would have planned for and constructed this project during the recent period of relatively low natural gas prices. In the years preceding the completion of this natural gas pipeline connection project, average annual natural gas prices ranged from $2.52/mmBtu to $4.37/mmBtu (*i.e.,* between 2009 and 2016).[19] The capital expenditure to construct a natural gas pipeline connection suggests that natural gas prices within this range make it economic (*i.e.,* cheaper) for Brunner Island to burn natural gas to generate electricity relative to burning coal. As such, future natural gas prices in this same range suggest that Brunner Island will continue to primarily burn natural gas during future ozone seasons. The EPA and other independent analysts expect future natural gas prices to remain low and within this 2009 to 2016 range due both to supply and distribution pipeline build-out. For example, the Energy Information Administration's (EIA) 2018 Annual Energy Outlook (AEO) natural gas price projections for Henry Hub spot price range from $3.06/mmBtu in 2018 to $3.83/mmBtu in 2023.[20] Moreover, the AEO short-term energy outlook and New York Mercantile Exchange futures further support the estimates of a continued low-cost natural gas supply.[21] These independent analyses of fuel price data and projections lead to the EPA's expectation that fuel-market economics will continue to support Brunner Island's primarily burning natural gas during future ozone seasons through at least 2023. Taken together with projected continued broader downward trends in NO_X emissions resulting in improved air quality in Connecticut, the EPA expects that Connecticut's ozone nonattainment and maintenance problems will be resolved in the future and that Brunner Island will likely continue to primarily burn natural gas during the ozone season until that time.

The context in which Brunner Island installed natural gas-firing capability and burned natural gas is consistent

[18] This estimated emissions difference was calculated as the difference between 2017 reported NO_X emissions and a counterfactual 2017 NO_X emissions estimate using 2017 operations (*i.e.,* heat input), multiplied by the 2016 NO_X emission rate reflecting coal-fired generation.

[19] In the 2018 reference case Annual Energy Outlook (AEO) released February 6, 2018, created by the U.S. Energy Information Administration (EIA), natural gas prices for the power sector for 2018 through 2023. Available at *https://www.eia.gov/outlooks/aeo/data/browser/#/?id=13-AEO2018&cases=ref2018&sourcekey=0.*

[20] Projected delivered natural gas prices for the power sector in the Middle Atlantic region, where Brunner Island is located, ranged between $3.56 in 2018 and $3.99/mmBtu in 2023. The projected delivered coal prices for the Middle Atlantic remain relatively constant, ranging from $2.51 to $2.56/mmBtu. *https://www.eia.gov/outlooks/aeo/data/browser/#/?id=3-AEO2018&region=1-2&cases=ref2018&start=2016&end=2023&f=A&linechart=ref2018-d121317a.3-3-AEO2018.1-2&map=ref2018-d121317a.4-3-AEO2018.1-2&sourcekey=0* and *http://tonto.eia.gov/dnav/ng/hist/rngwhhda.htm.*

[21] AEO short-term energy outlook available at *https://www.eia.gov/outlooks/steo/report/natgas.php.*

with observed recent trends in natural gas utilization within the power sector, suggesting that Brunner Island's economic situation in which it primarily burns gas as fuel during the ozone season is not unique or limited. Comparing total heat input from 2014 with 2017 for all units that utilize natural gas and report to the EPA's Clean Air Markets Division, historical data showed an increased use of natural gas of 14 percent.[22] This overall increase results from both an increase in capacity from the construction of additional units and an increased gas-fired utilization capacity factor. The available heat input capacity increased six percent while average capacity factor based on heat input increased by eight percent (23 percent to 25 percent).

Accordingly, based on this information demonstrating that Brunner Island can be expected to continue to primarily operate using natural gas fuel in the future, the EPA cannot conclude that the facility ''would emit'' in violation of the good neighbor provision with respect to the 2008 ozone NAAQS. The EPA notes that Connecticut's petition relied on emission data from 2011 to attempt to demonstrate that Brunner Island is significantly contributing to nonattainment or interfering with maintenance. In light of recent changes in Brunner Island's operations, the EPA does not believe this information provides a current, reasonable estimate of how much NO_X pollution Brunner Island emits or would emit currently or in the future.[23]

We do not agree with the petition to the extent that it asserts that the ability to buy and bank allowances in the CSAPR Update's ozone season NO_X allowance trading program will incentivize Brunner Island to increase its emissions. Connecticut fails to support its contention and thus does not meet the demonstration burden imposed on CAA section 126(b) petition. Moreover, Brunner Island's 2017 emission levels demonstrate that, contrary to Connecticut's assertions, Brunner Island reduced emissions while operating in the context of the CSAPR Update allowance trading program. This is also true for EGUs in Pennsylvania more broadly, which had collective emissions of 13,646 tons, well below the Pennsylvania budget of 17,952 tons. The petition also fails to support its contention that Brunner Island's participation in the allowance trading program will result in increased emissions on days with either high electricity demand or days with the highest ozone levels.

Finally, to the extent that Connecticut identifies other control strategies that could potentially be implemented at Brunner Island in order to reduce NO_X emissions, including modifications to combustion controls or implementation of post-combustion controls like SCRs and SNCRs, the petition does not include any information or analysis regarding the costs of such controls nor does it demonstrate that such controls are highly cost effective considering potential downwind air quality impacts. As noted previously, in the CSAPR Update, the EPA quantified upwind states' obligations under the good neighbor provision based on emission reductions available at a marginal cost of $1,400/ton of NO_X reduced. EPA's analysis showed that additional NO_X reductions at EGUs, including installation of new SCRs and SNCRs at EGUs that lacked post-combustion controls, would be more expensive.[24] The cost of such new post-combustion controls at Brunner Island would likely be even more expensive considering current and anticipated emissions rates.

Under the EPA's approach to quantifying those amounts of emissions that significantly contribute to nonattainment or interfere with maintenance, the dollar-per-ton cost of reducing emissions is balanced against two air quality factors: The amount of NO_X emission reductions available using a particular control strategy and the downwind reductions in ozone at identified receptors that would result from the emission reductions. Connecticut has not attempted to evaluate what reductions in ozone would accrue from these additional control strategies and thus has not demonstrated that the additional costs associated with these controls would be justified by the downwind reductions in ozone. Indeed, the petition includes no analysis of how downwind air quality would be impacted by the emission reductions it contends are necessary under the good neighbor provision. This element is not only key to EPA's interpretation of the good neighbor provision as it applies step three to ozone pollution transport, but necessary to ensure that upwind emissions are not reduced by more than necessary to improve downwind air quality, consistent with the Supreme Court's holding in *EPA* v. *EME Homer City Generation, L.P.,* 134 S. Ct. at 1604 n.18, 1608–09. Recent EPA analyses that projects emission levels to a future year indicates that no air quality monitors in Connecticut are projected to have nonattainment or maintenance problems with respect to the 2008 ozone NAAQS by 2023.[25] While this modeling is not necessarily determinative of whether Brunner Island emits or would emit in violation of the good neighbor provision before 2023, it does suggest that, by that date, it may no longer be necessary to further reduce emissions from any state to ensure attainment of the 2008 ozone NAAQS in Connecticut.

Based on the information discussed in this notice, the EPA proposes to deny the petition because Connecticut has not met its burden to demonstrate that Brunner Island emits or would emit in violation of the good neighbor provision with respect to the 2008 ozone NAAQS.[26] The EPA also proposes to find, based on its own analysis, that there are no additional cost-effective measures available at the source, and thus Brunner Island does not emit nor would it emit in violation of the good neighbor provision with respect to the 2008 ozone NAAQS. These proposed determinations are based on the fact that Brunner Island combusted primarily natural gas in the 2017 ozone season, resulting in a low NO_X emission rate for this facility, as well as the expectation that future operation will be consistent with 2017 operations. The EPA requests comment on its proposed denial of Connecticut's section 126(b) petition, including the bases for the decision described herein.

[22] From 8.4 billion mmBtu to 9.6 billion mmBtu. *See* EPA's Clean Air Markets Division data at *https://ampd.epa.gov/ampd/.*

[23] As noted above, Pennsylvania's 2017 EGU NO_X ozone season emissions were 79 percent below 2011 levels. Brunner Island is located in Pennsylvania, which as a facility reduced its ozone season NO_X emissions by 88 percent in 2017 relative to 2011 levels. Data regarding Brunner Island emissions available at *https://www.epa.gov/ampd.*

[24] *See* EGU NO_X Mitigation Strategies Final Rule Technical Support Document available at *https://www.regulations.gov,* Docket ID No. EPA–HQ–OAR–2015–0500–0554.

[25] *See* Supplemental Information on the Interstate Transport State Implementation Plan Submissions for the 2008 Ozone National Ambient Air Quality Standards under Clean Air Act Section 110(a)(2)(D)(i)(I) (October 2017), available in the docket for this proposed action. The EPA is not making any final determination regarding future downwind air quality in this action, and is therefore not requesting comment on the air quality modeling presented in the October 2017 memorandum.

[26] As previously discussed, the petition correctly identifies that Pennsylvania is linked to downwind air quality problems in Connecticut, and has been included in the CSAPR Update with respect to its downwind impacts on Connecticut's attainment of the 2008 ozone NAAQS. While this action proposes to determine that no further controls are necessary to ensure that Brunner Island does not and would not ''emit'' in violation of the good neighbor provision for the 2008 ozone NAAQS with respect to Connecticut, this proposal does not make any broader determination as to the good neighbor obligation for Pennsylvania.

IV. Statutory Authority

42 U.S.C. 7410, 7426, 7601.

Dated: February 15, 2018.

E. Scott Pruitt,

Administrator.

[FR Doc. 2018–03679 Filed 2–21–18; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OW–2014–0350; FRL–9973–50–OW]

Proposed Information Collection Request; Comment Request; National Fish Program (Formerly Referred to as the National Listing of Fish Advisories) (Renewal)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The Environmental Protection Agency is planning to submit an information collection request (ICR), National Fish Program (formerly referred to as the National Listing of Fish Advisories), (EPA ICR Number 1959.06, OMB Control Number 2040–0226) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act. Before doing so, EPA is soliciting public comments on specific aspects of the proposed information collection as described below. This is a proposed extension of the ICR, which is currently approved through July 31, 2018. An Agency may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

DATES: Comments must be submitted on or before April 23, 2018.

ADDRESSES: Submit your comments, referencing Docket ID No. EPA–HQ–OW–2014–0350, online using *www.regulations.gov* (our preferred method), by email to *OW-Docket@epa.gov,* or by mail to: EPA Docket Center, Environmental Protection Agency, Mail Code 28221T, 1200 Pennsylvania Ave. NW, Washington, DC 20460.

EPA's policy is that all comments received will be included in the public docket without change including any personal information provided, unless the comment includes profanity, threats, information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute.

FOR FURTHER INFORMATION CONTACT: CDR Samantha Fontenelle, Office of Science and Technology, Standards and Health Protection Division, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460; telephone number: (202) 566–2083; fax number: (202) 566–0409; email address: *fontenelle.samantha@epa.gov.*

SUPPLEMENTARY INFORMATION:

Supporting documents which explain in detail the information that the EPA will be collecting are available in the public docket for this ICR. The docket can be viewed online at *www.regulations.gov* or in person at the EPA Docket Center, WJC West, Room 3334, 1301 Constitution Ave. NW, Washington, DC. The telephone number for the Docket Center is 202–566–1744. For additional information about EPA's public docket, visit *http://www.epa.gov/dockets.*

Pursuant to section 3506(c)(2)(A) of the PRA, EPA is soliciting comments and information to enable it to: (i) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the Agency, including whether the information will have practical utility; (ii) evaluate the accuracy of the Agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (iii) enhance the quality, utility, and clarity of the information to be collected; and (iv) minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses. EPA will consider the comments received and amend the ICR as appropriate. The final ICR package will then be submitted to OMB for review and approval. At that time, EPA will issue another **Federal Register** notice to announce the submission of the ICR to OMB and the opportunity to submit additional comments to OMB.

Abstract: There is a continuing need to maintain the overall quality and availability of public information concerning fish advisories. Primary responsibility for these activities lies with state and tribes. In 1993, EPA began compiling information on fish advisories provided by the states in its biannual 305(b) Water Quality Inventory Reports. In 1994, EPA's Office of Water began conducting a voluntary annual Fish Program Survey to obtain the most up-to-date information on fish advisories. This information is collected under the authority of section 104 of the Clean Water Act, which provides for the collection of information to be used to protect human health and the environment. The advisory information collected identifies the waterbody under advisory, the fish or shellfish species and size ranges included in the advisory, the chemical contaminants and residue levels causing the advisory to be issued, the waterbody type (river, lake, estuary, coastal waters), and the target populations to whom the advisory is directed. The results of the survey are shared with states, territories, tribes, other federal agencies, and the public through and online database. The responses to the survey are voluntary and the information requested is part of the state public record associated with the advisories. No confidential business information is requested.

Form Numbers: None.

Respondents/Affected Entities: Entities potentially affected by this action are Administrators of Public Health and Environmental Quality Programs in state and tribal governments (NAICS 92312/SIC 9431 and NAICS 92411/SIC 9511).

Respondent's Obligation To Respond: Voluntary (Clean Water Act, Section 104).

Estimated Number of Respondents: Up to 100.

Frequency of Response: Annual.

Total Estimated Burden: 2,468 labor hours (per year). Burden is defined at 5 CFR 1320.03(b).

Total Estimated Cost: $108,950.72 (per year), includes no capital or startup costs and annualized operation & maintenance costs.

Changes in Estimates: There is a 31 percent increase to the respondent burden from the currently approved ICR. The increase is due to revised hourly burden estimates based on input from three states; and the addition to two new activities to increase communication, engagement, information sharing and support between EPA and the states, territories and tribes.

Dated: January 23, 2018.

Deborah G. Nagle,

Acting Director, Office of Science and Technology.

[FR Doc. 2018–03676 Filed 2–21–18; 8:45 am]

BILLING CODE 6560–50–P

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Agency Information Collection Activities: Notice of Submission for OMB Review; Comment Request

AGENCY: Equal Employment Opportunity Commission.

ACTION: Notice of information collection—Uniform Guidelines on Employee Selection Procedures—Extension Without Change.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, the Equal Employment Opportunity Commission gives notice of its intent to submit to the Office of Management and Budget (OMB) a request for renewal of the information collection described below.

DATES: Written comments on this notice must be submitted on or before April 23, 2018.

ADDRESSES: Comments should be sent to Bernadette Wilson, Executive Officer, Executive Secretariat, Equal Employment Opportunity Commission, 131 M Street NE, Washington, DC 20507. As a convenience to commenters, the Executive Secretariat will accept comments totaling six or fewer pages by facsimile (''FAX'') machine. This limitation is necessary to assure access to the equipment. The telephone number of the fax receiver is (202) 663–4114. (This is not a toll-free number). Receipt of FAX transmittals will not be acknowledged, except that the sender may request confirmation of receipt by calling the Executive Secretariat staff at (202) 663–4070 (voice) or (202) 663–4074 (TTD). (These are not toll-free telephone numbers.) Instead of sending written comments to EEOC, you may submit comments and attachments electronically at *http://www.regulations.gov,* which is the Federal eRulemaking Portal. Follow the instructions online for submitting comments. All comments received through this portal will be posted without change, including any personal information you provide, except as noted below. The EEOC reserves the right to refrain from posting comments, including those that contain obscene, indecent, or profane language; that contain threats or defamatory statements; that contain hate speech directed at race, color, sex, national origin, age, religion, disability, or genetic information; or that promote or endorse services or products. All comments received, including any personal information provided, also will be available for public inspection during normal business hours by appointment only at the EEOC Headquarters Library, 131 M Street NE, Washington, DC 20507. Upon request, individuals who require assistance viewing comments will be provided appropriate aids such as readers or print magnifiers. To schedule an appointment, contact EEOC Library staff at (202) 663–4630 (voice) or (202) 663–4641 (TTY). (These are not toll-free numbers.)

FOR FURTHER INFORMATION CONTACT: Kathleen Oram, Acting Assistant Legal Counsel, at (202) 663–4681 (voice) or (202) 663–7026 (TDD).

SUPPLEMENTARY INFORMATION:

Introduction

The Equal Employment Opportunity Commission (EEOC or Commission) gives notice of its intent to submit the recordkeeping requirements contained in the Uniform Guidelines on Employee Selection Procedures (UGESP or Uniform Guidelines) [1] to the Office of Management and Budget (OMB) for a three-year extension without change under the Paperwork Reduction Act of 1995 (PRA).

Request for Comments

Pursuant to the Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35, and OMB regulation 5 CFR 1320.8(d)(1), the EEOC invites public comments that will enable the agency to:

(1) Evaluate whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate 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) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, to be collected; *e.g.,* permitting electronic submission of responses.

Overview of Current Information Collection

Collection Title: Recordkeeping Requirements of the Uniform Guidelines on Employee Selection Procedures, 29 CFR part 1607, 41 CFR part 60–3, 28 CFR part 50, 5 CFR part 300.

OMB Number: 3046–0017.

Type of Respondent: Businesses or other institutions; Federal Government; State or local governments and farms.

North American Industry Classification System (NAICS) Code: Multiple.

Standard Industrial Classification Code (SIC): Multiple.

Description of Affected Public: Any employer, Government contractor, labor organization, or employment agency covered by the Federal equal employment opportunity laws.

Respondents: 961,709.

Responses: [2] 961,709.

Recordkeeping Hours: 7,825,132 per year.

Number of Forms: None.

Form Number: None.

Frequency of Report: None.

Abstract: The Uniform Guidelines provide fundamental guidance for all Title VII-covered employers about the use of employment selection procedures. The records addressed by UGESP are used by respondents to ensure that they are complying with Title VII and Executive Order 11246; by the Federal agencies that enforce Title VII and Executive Order 11246 to investigate, conciliate, and litigate charges of employment discrimination; and by complainants to establish violations of Federal equal employment opportunity laws. While there is no data available to quantify these benefits, the collection of accurate applicant flow data enhances each employer's ability to address any deficiencies in recruitment and selection processes, including detecting barriers to equal employment opportunity.

Burden Statement: There are no reporting requirements associated with UGESP. The burden being estimated is the cost of collecting and storing a job applicant's gender, race, and ethnicity data.

The only paperwork burden derives from this recordkeeping. Only employers covered under Title VII and Executive Order 11246 are subject to UGESP. For the purposes of burden calculation, employers with 15 or more employees are counted. The number of such employers is estimated at 961,709 which combines estimates from private employment,[2] the public sector,[3]

[1] 29 CFR, part 1607, 41 CFR part 60–3, 28 CFR part 50, 5 CFR part 300.

[2] Source: U.S. Small Business Administration: Statistics of U.S. Business, Release Date 1/2017. (*https://www.sba.gov/advocacy/firm-size-data*). Select U.S. Static Data, U.S. Data.

[3] Source of original data: 2012 Census of Governments: Employment. Individual Government Data File (*https://www2.census.gov/govs/apes/12ind_all_tabs.xls*), Local Downloadable Data zip file 12ind_all_tabs.xls. The number of government entities was adjusted to only include those with 15 or more employees.

colleges and universities,[4] and referral unions.[5]

This burden assessment is based on an estimate of the number of job applications submitted to all Title VII-covered employers in one year, including paper-based and electronic applications. The total number of job applications submitted every year to covered employers is estimated to be 1,878,031,768, based on a National Organizations Survey[6] average of approximately 35 applications[7] for every hire and a Bureau of Labor Statistics data estimate of 62,719,000 annual hires.[8] This figure also includes 146,506 applicants for union membership reported on the EEO–3 form for 2016.

The employer burden associated with collecting and storing applicant demographic data is based on the following assumptions: Applicants would need to be asked to provide three pieces of information—sex, race/ethnicity, and an identification number (a total of approximately 13 keystrokes); the employer would need to transfer information received to a database either manually or electronically; and the employer would need to store the 13 characters of information for each applicant. Recordkeeping costs and burden are assumed to be the time cost associated with entering 13 keystrokes.

Assuming that the required recordkeeping takes 30 seconds per record, and assuming a total of 1,878,031,768 paper and electronic applications per year (as calculated above), the total UGESP burden hours for all employers would be 7,825,132. Based on a wage rate of $15.21 per hour for the individuals entering the data, the collection and storage of applicant demographic data would come to approximately $119,020,258 per year for all Title VII-covered employers. We expect that the foregoing assumptions are over-inclusive, because many employers have electronic job application processes that should be able to capture applicant flow data automatically.

However, the average burden per employer is relatively small. As stated above, we estimate that UGESP applies to 961,709 employers. Therefore, the cost per covered employer is less than $124 each ($119,020,258 divided by 961,709 is equal to $123.76). Additionally, UGESP allows for simplified recordkeeping for employers with more than 15 but less than 100 employees.[9]

For the Commission.

Dated: February 15, 2018.

Victoria A. Lipnic,

Acting Chair.

[FR Doc. 2018–03643 Filed 2–21–18; 8:45 am]

BILLING CODE 6570–01–P

[4] Source: U.S. Department of Education, National Center for Education Statistics, IPEDS, Fall 2015. Number and percentage distribution of Title IV institutions, by control of institution, level of institution, and region: United States and other U.S. jurisdictions, academic year 2015–1 (*http://nces.ed.gov/pubsearch/pubsinfo.asp?pubid=2016122rev*).

[5] EEO–3 Reports filed by referral unions in 2016 with EEOC.

[6] The National Organizations Survey is a survey of business organizations across the United States in which the unit of analysis is the actual workplace (*http://www.icpsr.umich.edu/icpsrweb/ICPSR/studies/04074*).

[7] The number of applications provided by NOS is 35.225 and therefore calculations will not result in the same total amount due to rounding.

[8] Bureau of Labor Statistics Job Openings and Labor Turnover Survey, 2016 annual level data (Not seasonally adjusted), (*http://www.bls.gov/jlt/data.htm*) is the source of the original data. The BLS figure (62,719,000) has been adjusted to only include hires by firms with 15 or more employees.

[9] *See* 29 CFR 1607.15A(1): *Simplified recordkeeping for users with less than 100 employees.* In order to minimize recordkeeping burdens on employers who employ one hundred (100) or fewer employees, and other users not required to file EEO–1, *et seq.,* reports, such users may satisfy the requirements of this section 15 if they maintain and have available records showing, for each year: (a) The number of persons hired, promoted, and terminated for each job, by sex, and where appropriate by race and national origin; (b) the number of applicants for hire and promotion by sex and where appropriate by race and national origin; and (c) the selection procedures utilized (either standardized or not standardized).

FEDERAL COMMUNICATIONS COMMISSION

Privacy Act of 1974; System of Records.

AGENCY: Federal Communications Commission.

ACTION: Notice of a modified system of records.

SUMMARY: The Federal Communications Commission (FCC or Commission or Agency) has modified an existing system of records, FCC/OGC–3, Adjudication of Internal Complaints against Employees, subject to the *Privacy Act of 1974,* as amended. This action is necessary to meet the requirements of the Privacy Act to publish in the **Federal Register** notice of the existence and character of records maintained by the Agency. The Office of the General Counsel (OGC) uses the personally identifiable information (PII) in this system for purposes that include, but are not limited to settlement negotiations with opposing parties and to prepare for litigation before an administrative body or a court of appropriate jurisdiction.

DATES: This action will become effective on February 22, 2018. The routine uses in this action will become effective on March 26, 2018 unless comments are received that require a contrary determination.

ADDRESSES: Send comments to Leslie F. Smith, Privacy Manager, Information Technology (IT), Room 1–C216, Federal Communications Commission, 445 12th Street SW, Washington, DC 20554, or to *Leslie.Smith@fcc.gov*.

FOR FURTHER INFORMATION CONTACT: Leslie F. Smith, (202) 418–0217, or *Leslie.Smith@fcc.gov* (and to obtain a copy of the Narrative Statement and the Supplementary Document, which includes details of the proposed alterations to this system of records).

SUPPLEMENTARY INFORMATION: This notice serves to update and amend FCC/OGC–3, Adjudication of Internal Complaints against Employees, as a result of an increased use of electronic information technology. The substantive changes and modifications to the previously published version of the FCC/OGC–3 system of records include:

1. Updating the language in the Security Classification to follow with OMB guidance.

2. Minor changes to the Purposes, Categories of Individuals, and Categories of Records to be consistent the language and phrasing now used in the FCC's SORNs.

3. Deletion of two routine uses: (2) Public Access since releases under the FOIA are covered by 5 U.S.C. 552a(b)(2), so a separate routine use for them is not needed; and (6) Employment, Clearances, Licensing, Contract, Grant, or other Benefits Decisions by other than the agency, and its replacement with a new routine use: (5) For Certain Disclosures to Other Agencies to make information available to another Federal agency.

4. Updating language and/or renumbering seven routine uses: (1) Adjudication and Litigation; (2) Law Enforcement and Investigation; (3) Congressional Inquiries; (4) Government-wide Program Management and Oversight; (6) Employment, Clearances, Licensing, Contract, Grant, or other Benefits Decisions by the FCC; and (7) Labor Relations.

5. Adding three other new routine uses: (8) Breach Notification to address the Commission's real or suspected data breach situations; (9) Assistance to Federal Agencies and Entities for assistance with other Federal agencies' data breach situations; and (10) For Non-Federal Personnel to allow contractors performing or working on a contract for the Federal Government

access to information. Routine Uses (8) and (9) are required by OMB Memorandum m–17–12.

The system of records is also updated to reflect various administrative changes related to the system managers and system addresses; policy and practices for storage, retrieval, and retention and disposal of the records; administrative, technical, and physical safeguards; and updated notification, records access, and contesting records procedures.

System Name and Number

FCC/OGC–3, Adjudication of Internal Complaints against Employees.

SECURITY CLASSIFICATION:

No information in this system is classified.

SYSTEM LOCATION:

Office of General Counsel (OGC), Federal Communications Commission (FCC), 445 12th Street SW, Washington, DC 20554.

SYSTEM MANAGER(S) AND ADDRESS:

Office of General Counsel (OGC), Federal Communications Commission (FCC), 445 12th Street SW, Washington, DC 20554.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

5 U.S.C. 301.

PURPOSE(S) OF THE SYSTEM:

Staff attorneys in the Office of General Counsel (OGC) use these records for purposes including, but not limited to settlement negotiations with opposing parties and to prepare for litigation before an administrative body or a court of appropriate jurisdiction.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Any FCC employee who files or is the subject of a complaint investigation involving internal personnel actions or activities, which include but are not limited to discrimination, grievance, political activity, separation, or adverse action.

CATEGORIES OF RECORDS IN THE SYSTEM:

Information in this system of records involves internal personnel disputes that have reached the litigation stage, and may include but are not limited to correspondence, memoranda, transcripts of hearings, briefs, pleadings, investigative reports, and decisions of hearing examiners and Commissioners.

RECORD SOURCE CATEGORIES:

The sources for the information in this system of records include but are not limited to:

(a) Individuals filing such claims; the individuals who are the subjects of such claims;

(b) Attorneys or representatives of the claimants and the subjects of the claims;

(c) Communication between FCC organizational units; and

(d) Investigative materials and related documentation and decisions involved in but not limited to appeals, amendments, and litigation concerning such claims.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act, all or a portion of the records or information contained in this system may be disclosed to authorized entities, as is determined to be relevant and necessary, outside the FCC as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows. In each of these cases, the FCC will determine whether disclosure of the records is compatible with the purpose(s) for which the records were collected:

1. Adjudication and Litigation—To disclose information to the Department of Justice (DOJ), or other administrative body before which the FCC is authorized to appear, when: (a) The FCC or any component thereof; (b) any employee of the FCC in his or her official capacity; (c) any employee of the FCC in his or her individual capacity where DOJ or the FCC has agreed to represent the employee; or (d) the United States is a party to litigation or has an interest in such litigation, and the use of such records by DOJ or the FCC is deemed by the FCC to be relevant and necessary to the litigation.

2. Law Enforcement and Investigation—To disclose pertinent information to the appropriate Federal, State, or local agency responsible for investigating, prosecuting, enforcing, or implementing a statute, rule, regulation, or order, where the FCC becomes aware of an indication of a violation or potential violation of civil or criminal law or regulation.

3. Congressional Inquiries—To provide information to a congressional office from the record of an individual in response to an inquiry from that congressional office made at the request of that individual.

4. Government-wide Program Management and Oversight—To disclose information to the National Archives and Records Administration (NARA) for use in its records management inspections; to the Government Accountability Office (GAO) for oversight purposes; to the Department of Justice (DOJ) to obtain that department's advice regarding disclosure obligations under the Freedom of Information Act (FOIA); or to the Office of Management and Budget (OMB) to obtain that office's advice regarding obligations under the Privacy Act.

5. For Certain Disclosures to Other Federal Agencies—To disclose information to a Federal agency, in response to its request in connection with the hiring or retention of an employee, the issuance of a security clearance, the conducting of a suitability or security investigation of an individual, the classifying of jobs, the letting of a contract, or the issuance of a license, grant, or other benefit by the requesting agency, to the extent that the information is relevant and necessary to the requesting agency's decision on the matter.

6. Employment, Clearances, Licensing, Contract, Grant, or other Benefits Decisions by the Agency—To disclose information to a Federal, State, local, foreign, tribal, or other public agency or authority maintaining civil, criminal, or other relevant enforcement records, or other pertinent records, or to another public authority or professional organization, if necessary to obtain information relevant to an investigation concerning the hiring or retention of an employee or other personnel action, the issuance or retention of a security clearance, the classifying of jobs, the letting of a contract, or the issuance or retention of a license, grant, or other benefit by the Commission, to the extent that the information is relevant and necessary to the requesting agency's decisions on the matter.

7. Labor Relations—To disclose information to officials of labor organizations recognized under 5 U.S.C. Chapter 71 upon receipt of a formal request and in accord with the conditions of 5 U.S.C. 7114 when relevant and necessary to their duties of exclusive representation concerning personnel policies, practices, and matters affecting working conditions.

8. Breach Notification—To appropriate agencies, entities, and persons when: (a) The Commission suspects or has confirmed that there has been a breach of the system of records; (b) the Commission has determined that as a result of the suspected or confirmed breach there is a risk of harm to individuals, the Commission (including its information systems, programs, and operations), the Federal Government, or national security; and (c) the disclosure made to such agencies, entities, and persons is reasonably necessary to assist

in connection with the Commission's efforts to respond to the suspected or confirmed breach or to prevent, minimize, or remedy such harm.

9. Assistance to Federal Agencies and Entities—To another Federal agency or Federal entity, when the Commission determines that information from this system is reasonably necessary to assist the recipient agency or entity in: (a) Responding to a suspected or confirmed breach or (b) preventing, minimizing, or remedying the risk of harm to individuals, the recipient agency or entity (including its information systems, program, and operations), the Federal Government, or national security, resulting from a suspected or confirmed breach.

10. For Non-Federal Personnel—To disclose information to contractors performing or working on a contract for the Federal Government.

REPORTING TO A CONSUMER REPORTING AGENCY:

In addition to the routine uses cited above, the Commission may share information from this system of records with a consumer reporting agency regarding an individual who has not paid a valid and overdue debt owed to the Commission, following the procedures set out in the *Debt Collection Act,* 31 U.S.C. 3711(e).

POLICIES AND PRACTICES FOR STORING OF RECORDS:

Information in this system includes both paper and electronic records. The paper records, documents, and files are maintained in file cabinets that are located in OGC and in the bureaus and offices (B/Os) of the FCC staff who provide the responses to such claims. The electronic records, files, and data are stored in the FCC's computer network.

POLICIES AND PRACTICES FOR RETRIEVAL OF RECORDS:

Records are retrieved by the name of the subject individual in the investigation.

POLICIES AND PRACTICES FOR RETENTION AND DISPOSAL OF RECORDS:

Records are retained and disposed of in accordance with the agency records control schedules NC1–173–84–05, Item 3 and N1–173–91–001, Item 6, both of which have been approved by the National Archives and Records Administration (NARA).

ADMINISTRATIVE, TECHNICAL, AND PHYSICAL SAFEGUARDS:

The file cabinets containing paper records in this system are maintained in file cabinets in ''non-public'' rooms in the OGC and B/O suites. The OGC and B/O file cabinets are locked at the end of the business day. Access to these office suites is through card-coded main doors. Only authorized OGC and B/O supervisors and staff who are responsible for responding to these claims, have access to these paper records.

The electronic records, files, and data are housed in the FCC's computer network. Access to the electronic files is restricted to OGC and B/O staff who are responsible for responding to such claims, and to the IT staff and contractors who maintain the FCC's computer network. Other FCC employees and contractors may be granted access on a ''need-to-know'' basis. The FCC's computer network databases are protected by the FCC's IT privacy safeguards, a comprehensive and dynamic set of IT safety and security protocols and features that are designed to meet all Federal IT privacy standards, including those required by the National Institute of Standards and Technology (NIST) and the *Federal Information Security Modernization Act of 2014* (FISMA).

NOTIFICATION PROCESS:

Individuals wishing to determine whether this system of records contains information about them may do so by writing to Leslie F. Smith, Privacy Manager, Information Technology, Federal Communications Commission, 445 12th Street SW, Washington, DC 20554, or email *Leslie.Smith@fcc.gov.*

Individuals must furnish reasonable identification by showing any two of the following: Social security card; driver's license; employee identification card; Medicare card; birth certificate; bank credit card; or other positive means of identification, or by signing an identity statement stipulating that knowingly or willfully seeking or obtaining access to records about another person under false pretenses is punishable by a fine of up to $5,000.

Individuals requesting access must also comply with the FCC's Privacy Act regulations regarding verification of identity and access to records (47 CFR part 0, subpart E).

RECORD ACCESS PROCEDURE:

Individuals wishing to request access to and/or amendment of records about them should follow the Notification Procedure above.

CONTESTING RECORD PROCEDURE:

Individuals wishing to request an amendment of records about them should follow the Notification Procedure above.

EXEMPTIONS PROMULGATED FOR THE SYSTEM:

None.

HISTORY:

The FCC last gave full notice of this system of records, FCC/OGC–3, Adjudication of Internal Complaints against Employees, by publication in the **Federal Register** on April 5, 2006 (71 FR 17234, 17243).

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. 2018–03653 Filed 2–21–18; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

[OMB 3060–0686]

Information Collection Being Submitted to the Office of Management and Budget

AGENCY: Federal Communications Commission.

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork burdens, and as required by the Paperwork Reduction Act (PRA) of 1995, the Federal Communications Commission (Commission) invites the general public and other Federal agencies to take this opportunity to comment on the following information collection. Comments are requested concerning: Whether the collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; the accuracy of the Commission's burden estimate; ways to enhance the quality, utility, and clarity of the information collected; ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology; and ways to further reduce the information collection burden on small business concerns with fewer than 25 employees.

The Commission may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the PRA that does not display a valid Office of Management and Budget (OMB) control number.

DATES: Written PRA comments should be submitted on or before March 23, 2018.

ADDRESSES: Direct all PRA comments to Nicholas A. Fraser, OMB, via email *Nicholas_A._Fraser@omb.eop.gov;* and to Cathy Williams, FCC, via email *PRA@fcc.gov* and to *Cathy.Williams@fcc.gov.* Include in the comments the Title as shown in the **SUPPLEMENTARY INFORMATION** section below.

FOR FURTHER INFORMATION CONTACT: For additional information about the information collection, contact Cathy Williams at (202) 418–2918.

SUPPLEMENTARY INFORMATION:

To view a copy of this information collection request (ICR) submitted to OMB: (1) Go to the web page *http://www.reginfo.gov/public/do/PRAMain,* (2) look for the section of the web page called ''Currently Under Review,'' (3) click on the downward-pointing arrow in the ''Select Agency'' box below the ''Currently Under Review'' heading, (4) select ''Federal Communications Commission'' from the list of agencies presented in the ''Select Agency'' box, (5) click the ''Submit'' button to the right of the ''Select Agency'' box, (6) when the list of Commission ICRs currently under review appears, look for the Title of this ICR and then click on the ICR Reference Number. A copy of the Commission's submission to OMB will be displayed.

OMB Control No.: 3060–0686.

Title: International Section 214 Process and Tariff Requirements—47 CFR 63.10, 63.11, 63.13, 63.18, 63.19, 63.21, 63.22, 63.24, 63.25 and 1.1311.

Form No.: International Section 214—New Authorization; International Section 214 Authorization—Transfer of Control/Assignment; International Section 214—Special Temporary Authority and International Section 214—Foreign Carrier Affiliation Notification.

Type of Review: Revision of a currently approved information collection.

Respondents: Business or other for-profit.

Number of Respondents: 528 respondents; 792 responses.

Estimated Time per Response: 1–20 hours.

Frequency of Response: On occasion reporting requirement, Quarterly reporting requirement, Recordkeeping requirement and third party disclosure requirement.

Obligation to Respond: Required to obtain or retain benefits. The Commission's statutory authority for this information collection under sections 1, 4(i), 4(j), 10, 11, 201–205, 208, 211, 214, 218, 219, 220, 303(r), 309, 310, 403 and 571 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154(i), 154(j), 154(j), 160, 161, 201–205, 208, 211, 214, 218, 219, 220, 303(r), 309, 310, 403 and 571.

Total Annual Burden: 3,152 hours.

Annual Cost Burden: $752,400.

Privacy Act Impact Assessment: No impact(s).

Nature and Extent of Confidentiality: The Commission has not granted assurances of confidentiality to those parties submitting the information, except for the list or routes required under 47 CFR 63.22(h) which the Commission will treat as not routinely available for public inspection. In all the other cases where a respondent believes information requires confidentiality, the respondent can request confidential treatment under Section 0.459 of the Commission's rules, 47 CFR 0.459.

Needs and Uses: The Federal Communications Commission (''Commission'') is requesting that the Office of Management and Budget (OMB) approve a revision of OMB Control No. 3060–0686 titled, ''International Section 214 Authorization Process and Tariff Requirements—47 CFR Sections 63.10, 63.11, 63.13, 63.18, 63.19, 63.21, 63.24, 63.25 and 1.1311.'' The purpose of this revision is to obtain OMB approval for the reporting requirements under newly adopted 47 CFR 63.22(h), which requires facilities-based international service providers electronically to submit, and maintain, a list of routes on which they have direct termination arrangements with a foreign carrier. In addition, this list maybe used to initiate targeted data collections regarding those routes. Finally, we remove from this collection the requirements related to 47 U.S.C. 310(b) which are now included in the collection under OMB Control No. 3060–1163.

The current title of OMB Control No. 3060–0686 is ''International Section 214 Process and Tariff Requirements—47 CFR Sections 63.10, 63.11, 63.13, 63.18, 63.19, 63.21, 63.24, 63.25 and 1.1311''. The Commission would like to change the title to ''International Section 214 Process and Tariff Requirements—47 CFR Sections 63.10, 63.11, 63.13, 63.18, 63.19, 63.21, 63.22, 63.24, 63.25 and 1.1311'' to reflect the addition of 47 CFR 63.22(h) to the information collection.

The information will be used by the Commission staff in carrying out its duties under the Communications Act. The information collections pertaining to Part 63 are necessary largely to determine the qualifications of applicants to provide common carrier international telecommunications service under section 214 of the Communications Act, 47 U.S.C. 214, including applicants that are, or are affiliated with, foreign carriers, and to determine whether and under what conditions the authorizations are in the public interest, convenience, and necessity. The information collections are also necessary to maintain effective oversight of U.S. international carriers generally.

The frequency of filing applications pursuant to Sections 214 will be determined largely by the applicant seeking to provide U.S international common carrier service under section 214 of the Communications Act, 47 U.S.C. 214. Carriers will also determine largely the frequency of filing under the other rules included in this collection, with the exception of the quarterly reports required of certain carriers under 47 CFR 63.10(c) and the list of routes for which a facilities-based international service provider must make a one-time filing and update as necessary under 47 CFR 63.22(h). If the collections are not conducted or are conducted less frequently, applicants will not obtain the authorizations necessary to provide telecommunications services, and the Commission will be unable to carry out its mandate under the Communications Act of 1934. In addition, without the information collections, the United States would jeopardize its ability to fulfill the U.S. obligations as negotiated under the World Telecommunications Organization (WTO) Basic Telecom Agreement because these collections are imperative to detecting and deterring anticompetitive conduct. They are also necessary to preserve the Executive Branch agencies' and the Commission's ability to review foreign investments for national security, law enforcement, foreign policy, and trade concerns. Regarding 47 CFR 63.11, carriers determine largely when to notify the Commission of planned investments by or in foreign carriers. If the information is not collected by the Commission, we will not be able to prevent carriers that control bottleneck facilities in foreign countries from using those bottlenecks to discriminate against unaffiliated U.S. carriers.

Federal Communications Commission.

Marlene H. Dortch,

Secretary, Office of the Secretary.

[FR Doc. 2018–03546 Filed 2–21–18; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

[CC Docket No. 92–237; DA 18–112]

Next Meeting of the North American Numbering Council

AGENCY: Federal Communications Commission.

ACTION: Notice.

SUMMARY: In this document, the Commission released a public notice announcing the meeting of the North American Numbering Council (NANC). At this meeting, the NANC Working Groups will report on their progress in developing recommendations for the NANC's consideration. In addition, the NANC will continue its discussions on how to modernize and foster more efficient number administration in the United States. The NANC meeting is open to the public. The FCC will accommodate as many attendees as possible; however, admittance will be limited to seating availability. The Commission will also provide audio coverage of the meeting. Other reasonable accommodations for people with disabilities are available upon request. Request for such accommodations should be submitted via email to *fcc504@fcc.gov* or by calling the Consumer and governmental Affairs Bureau @ (202) 418–0530 (voice) (202) 418–0432 (TTY). Such requests should include a detailed description of the accommodation needed. In addition, please allow at least five days advance notice for accommodation requests; last minute requests will be accepted but may not be possible to accommodate.

Members of the public may submit comments to the NANC in the FCC's Electronic Comment Filing System, ECFS, at *www.fcc.gov/ecfs.* Comments to the NANC should be filed in cc Docket No. 92–237.

More information about the NANC is available at *https://www.fcc.gov/about-fcc/advisory-committees/general/north-american-numbering-council.* You may also contact Marilyn Jones, DFO of the NANC, at *Marilyn.jones@fcc.gov.,* or (202) 418–2357, Michelle Sclater, Alternate DFO, at *michelle.sclater@fcc.gov,* or (202) 418- 0388; or Carmell Weathers, special assistant to the DFO, at *carmell.weathers@fcc.gov,* or (202) 418–2325.

DATES: Friday, March 16, 2018, 9:30 a.m.

ADDRESSES: Requests to make an oral statement or provide written comments to the NANC should be sent to Carmell Weathers, Competition Policy Division, Wireline Competition Bureau, Federal Communications Commission, Portals II, 445 12th Street SW, Room 5–C162, Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: Carmell Weathers at (202) 418–2325 or *Carmell.Weathers@fcc.gov.* The fax number is: (202) 418–1413. The TTY number is: (202) 418–0484.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's document in CC Docket No. 92–237, DA 18–112 released February 6, 2018. The complete text in this document is available for public inspection and copying during normal business hours in the FCC Reference Information Center, Portals II, 445 12th Street SW, Room CY–A257, Washington, DC 20554. The document may also be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc., 445 12th Street SW, Room CY–B402, Washington, DC 20554, telephone (800) 378–3160 or (202) 863–2893, facsimile (202) 863–2898, or via the internet at *http://www.bcpiweb.com.* It is available on the Commission's website at *http://www.fcc.gov.*

*The Agenda may be modified at the discretion of the NANC Chairman with the approval of the Designated Federal Officer (DFO).

Federal Communications Commission.

Marilyn Jones,

Senior Counsel for Number Administration, Wireline Competition Bureau.

[FR Doc. 2018–03652 Filed 2–21–18; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL RESERVE SYSTEM

Proposed Agency Information Collection Activities; Comment Request

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Notice, request for comment.

SUMMARY: The Board of Governors of the Federal Reserve System (Board) invites comment on a proposal to extend for three years, without revision, the Quarterly Report of Assets and Liabilities of Large Foreign Offices of U.S. Banks (FR 2502q; OMB No. 7100–0079).

DATES: Comments must be submitted on or before April 23, 2018.

ADDRESSES: You may submit comments, identified by *FR 2502q,* by any of the following methods:

- *Agency Website: http://www.federalreserve.gov.* Follow the instructions for submitting comments at *http://www.federalreserve.gov/apps/foia/proposedregs.aspx.*
- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Email: regs.comments@federalreserve.gov.* Include OMB number in the subject line of the message.
- *Fax:* (202) 452–3819 or (202) 452–3102.
- *Mail:* Ann E. Misback, Secretary, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue NW, Washington, DC 20551.

All public comments are available from the Board's website at *http://www.federalreserve.gov/apps/foia/proposedregs.aspx* as submitted, unless modified for technical reasons. Accordingly, your comments will not be edited to remove any identifying or contact information. Public comments may also be viewed electronically or in paper form in Room 3515, 1801 K Street (between 18th and 19th Streets NW) Washington, DC 20006 between 9:00 a.m. and 5:00 p.m. on weekdays.

Additionally, commenters may send a copy of their comments to the OMB Desk Officer—Shagufta Ahmed—Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Room 10235, 725 17th Street NW, Washington, DC 20503 or by fax to (202) 395–6974.

FOR FURTHER INFORMATION CONTACT: A copy of the PRA OMB submission, including the proposed reporting form and instructions, supporting statement, and other documentation will be placed into OMB's public docket files, once approved. These documents will also be made available on the Federal Reserve Board's public website at: *http://www.federalreserve.gov/apps/reportforms/review.aspx* or may be requested from the agency clearance officer, whose name appears below.

Federal Reserve Board Clearance Officer—Nuha Elmaghrabi—Office of the Chief Data Officer, Board of Governors of the Federal Reserve System, Washington, DC 20551 (202) 452–3829. Telecommunications Device for the Deaf (TDD) users may contact (202) 263–4869, Board of Governors of the Federal Reserve System, Washington, DC 20551.

SUPPLEMENTARY INFORMATION: On June 15, 1984, the Office of Management and Budget (OMB) delegated to the Board authority under the Paperwork Reduction Act (PRA) to approve of and assign OMB control numbers to collection of information requests and requirements conducted or sponsored by the Board. In exercising this delegated authority, the Board is

directed to take every reasonable step to solicit comment. In determining whether to approve a collection of information, the Board will consider all comments received from the public and other agencies.

Request for Comment on Information Collection Proposal

The Board invites public comment on the following information collection, which is being reviewed under authority delegated by the OMB under the PRA. Comments are invited on the following:

a. Whether the proposed collection of information is necessary for the proper performance of the Federal Reserve's functions; including whether the information has practical utility;

b. The accuracy of the Federal Reserve's estimate of the burden of the proposed information collection, including the validity of the methodology and assumptions used;

c. Ways to enhance the quality, utility, and clarity of the information to be collected;

d. Ways to minimize the burden of information collection on respondents, including through the use of automated collection techniques or other forms of information technology; and

e. Estimates of capital or startup costs and costs of operation, maintenance, and purchase of services to provide information.

At the end of the comment period, the comments and recommendations received will be analyzed to determine the extent to which the Federal Reserve should modify the proposal prior to giving final approval.

Proposal to approve under OMB delegated authority the extension for three years, without revision, of the following report:

Report title: Quarterly Report of Assets and Liabilities of Large Foreign Offices of U.S. Banks.

Agency form number: FR 2502q.

OMB control number: 7100–0079.

Frequency: Quarterly.

Respondents: U.S. commercial banks, bank holding companies, including financial holding companies, and banking Edge and agreement corporations (U.S. banks) for their large branches and banking subsidiaries that are located in the United Kingdom or the Caribbean.

Estimated number of respondents: 27.

Estimated average hours per response: 1.

Estimated annual burden hours: 108.

General description of report: The FR 2502q collects, for each reporting office, claims on and liabilities to residents of the United States and of all countries as of each quarter-end. Additional details are collected about positions vis-à-vis U.S. residents. Positions vis-à-vis other non-U.S. offices of the parent bank and positions arising from derivatives contracts are also broken out. The data are used in constructing a piece of the Financial Accounts of the United States that are compiled by the Board and in preparing the U.S. International Transactions Accounts and the International Investment Position that are compiled by the Bureau for Economic Analysis (BEA), an agency of the Department of Commerce.

Legal authorization and confidentiality: The Board is authorized to collect the information in the 2502q from (1) bank holding companies pursuant to section 5 of the Bank Holding Company Act (12 U.S.C. 1844(c)), which authorizes the Board to require a bank holding company and any subsidiary to submit reports, (2) Edge and agreement corporations pursuant to sections 25(7) and 25A(17) of the Federal Reserve Act (''FRA'') (12 U.S.C. 604a and 625), which authorize the Board to require Edge and agreement corporations to make reports to the Board, and (3) depository institutions pursuant to section 11(a)(2) of the FRA (12 U.S.C. 248(a)(2)), which authorizes the Board to require reports from each member bank as it may deem necessary and authorizes the Board to prescribe reports of liabilities and assets from insured depository institutions to enable the Board to discharge its responsibility to monitor and control monetary and credit aggregates. The FR 2502q report is mandatory. The information from this collection would not be accorded confidential treatment because release of the information is not likely to result in substantial harm to the competitive position of the respondents. If confidential treatment is requested by a respondent, the Board will review the request to determine if confidential treatment is appropriate.

Board of Governors of the Federal Reserve System, February 15, 2018.

Ann E. Misback,

Secretary of the Board.

[FR Doc. 2018–03549 Filed 2–21–18; 8:45 am]

BILLING CODE 6210–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

[CFDA Number 93.676]

Announcement of Intent To Issue One OPDIV-Initiated Supplement to BCFS Health and Human Services Under the Standing Announcement for Residential (Shelter) Services for Unaccompanied Children, HHS–2017–ACF–ORR–ZU–1132

AGENCY: Unaccompanied Alien Children's (UAC) Program, Office of Refugee Resettlement (ORR), Administration for Children and Families (ACF), U.S. Department of Health and Human Services (HHS).

ACTION: Notice of intent to issue one OPDIV-Initiated Supplement to BCFS Health and Human Services, San Antonio, TX under the UAC Program.

SUMMARY: ACF, ORR, announces the issuance of one OPDIV-Initiated Supplement to BCFS Health and Human Services, San Antonio, TX in the amount of $15,000,000.

ORR has been identifying additional capacity to provide shelter for potential increases in apprehensions of Unaccompanied Children at the U.S. Southern Border. Planning for increased shelter capacity is a prudent step to ensure that ORR is able to meet its responsibility, by law, to provide shelter for Unaccompanied Alien Children referred to its care by the Department of Homeland Security (DHS).

To ensure sufficient capacity to provide shelter to unaccompanied children referred to HHS, BCFS proposed to provide ORR with 450 beds in an expedited manner.

DATES: Supplemental award funds will support activities for sixty days after activation.

FOR FURTHER INFORMATION CONTACT: Jallyn Sualog, Director, Division of Children's Services, Office of Refugee Resettlement, 330 Street SW, Washington, DC 20447. Phone: 202–401–4997. Email: *DCSProgram@acf.hhs.gov.*

SUPPLEMENTARY INFORMATION: ORR is continuously monitoring its capacity to shelter the unaccompanied children referred to HHS, as well as the information received from interagency partners, to inform any future decisions or actions.

ORR has specific requirements for the provision of services. Award recipients must have the infrastructure, licensing, experience, and appropriate level of

trained staff to meet those requirements. The expansion of the existing program and its services through this supplemental award is a key strategy for ORR to be prepared to meet its responsibility to provide shelter for Unaccompanied Children referred to its care by DHS and so that the U.S. Border Patrol can continue its vital national security mission to prevent illegal migration, trafficking, and protect the borders of the United States.

Statutory Authority: This program is authorized by—

(A) Section 462 of the Homeland Security Act of 2002, which in March 2003, transferred responsibility for the care and custody of Unaccompanied Alien Children from the Commissioner of the former Immigration and Naturalization Service (INS) to the Director of ORR of the Department of Health and Human Services (HHS).

(B) The Flores Settlement Agreement, Case No. CV85–4544RJK (C. D. Cal. 1996), as well as the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (Pub.L. 110–457), which authorizes post release services under certain conditions to eligible children. All programs must comply with the Flores Settlement Agreement, Case No. CV85–4544–RJK (C.D. Cal. 1996), pertinent regulations and ORR policies and procedures.

Elizabeth Leo,

Grants Policy Specialist, Division of Grants Policy, Office of Administration.

[FR Doc. 2018–03583 Filed 2–21–18; 8:45 am]

BILLING CODE 4184–45–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2018–N–0140]

Peripheral and Central Nervous System Drugs Advisory Committee; Notice of Meeting; Establishment of a Public Docket; Request for Comments

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice, establishment of a public docket; request for comments.

SUMMARY: The Food and Drug Administration (FDA) announces a forthcoming public advisory committee meeting of the Peripheral and Central Nervous System Drugs Advisory Committee. The general function of the committee is to provide advice and recommendations to FDA on regulatory issues. The meeting will be open to the public. FDA is establishing a docket for public comment on this document.

DATES: The meeting will be held on April 19, 2018, from 8 a.m. to 12:30 p.m.

ADDRESSES: FDA White Oak Campus, 10903 New Hampshire Ave., Bldg. 31 Conference Center, the Great Room (Rm. 1503), Silver Spring, MD 20993–0002. Answers to commonly asked questions including information regarding special accommodations due to a disability, visitor parking, and transportation may be accessed at: *https://www.fda.gov/AdvisoryCommittees/AboutAdvisoryCommittees/ucm408555.htm.*

FDA is establishing a docket for public comment on this meeting. The docket number is FDA–2018–N–0140. The docket will close on April 18, 2018. Submit either electronic or written comments on this public meeting by April 18, 2018. Please note that late, untimely filed comments will not be considered. Electronic comments must be submitted on or before April 18, 2018. The *https://www.regulations.gov* electronic filing system will accept comments until midnight Eastern Time at the end of April 18, 2018. Comments received by mail/hand delivery/courier (for written/paper submissions) will be considered timely if they are postmarked or the delivery service acceptance receipt is on or before that date.

Comments received on or before April 5, 2018, will be provided to the committee. Comments received after that date will be taken into consideration by FDA.

You may submit comments as follows:

Electronic Submissions

Submit electronic comments in the following way:

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

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

Written/Paper Submissions

Submit written/paper submissions as follows:

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

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

Instructions: All submissions received must include the Docket No. FDA–2018–N–0140 for ''Peripheral and Central Nervous System Drugs Advisory Committee; Notice of Meeting; Establishment of a Public Docket; Request for Comments.'' Received comments, those filed in a timely manner (see **ADDRESSES**), will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *https://www.regulations.gov* or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday.

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

more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *https://www.gpo.gov/fdsys/pkg/FR-2015-09-18/pdf/2015-23389.pdf.*

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

FOR FURTHER INFORMATION CONTACT: Moon Hee V. Choi, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 31, Rm. 2417, Silver Spring, MD 20993–0002, 301–796–9001, Fax: 301–847–8533, email: *PCNS@fda.hhs.gov,* or FDA Advisory Committee Information Line, 1–800–741–8138 (301–443–0572 in the Washington, DC area). A notice in the **Federal Register** about last minute modifications that impact a previously announced advisory committee meeting cannot always be published quickly enough to provide timely notice. Therefore, you should always check the FDA's website at *https://www.fda.gov/AdvisoryCommittees/default.htm* and scroll down to the appropriate advisory committee meeting link, or call the advisory committee information line to learn about possible modifications before coming to the meeting.

SUPPLEMENTARY INFORMATION:

Agenda: The committee will discuss new drug application (NDA) 210365, cannabidiol oral solution, sponsored by GW Pharmaceuticals, for the adjunctive treatment of seizures associated with Lennox-Gastaut syndrome or Dravet syndrome in patients 2 years of age and older.

FDA intends to make background material available to the public no later than 2 business days before the meeting. If FDA is unable to post the background material on its website prior to the meeting, the background material will be made publicly available at the location of the advisory committee meeting, and the background material will be posted on FDA's website after the meeting. Background material is available at *https://www.fda.gov/AdvisoryCommittees/Calendar/default.htm.* Scroll down to the appropriate advisory committee meeting link.

Procedure: Interested persons may present data, information, or views, orally or in writing, on issues pending before the committee. All electronic and written submissions submitted to the docket (see **ADDRESSES**) on or before April 5, 2018, will be provided to the committee. Oral presentations from the public will be scheduled between approximately 10:30 a.m. and 11:30 a.m. Those individuals interested in making formal oral presentations should notify the contact person and submit a brief statement of the general nature of the evidence or arguments they wish to present, the names and addresses of proposed participants, and an indication of the approximate time requested to make their presentation on or before March 28, 2018. Time allotted for each presentation may be limited. If the number of registrants requesting to speak is greater than can be reasonably accommodated during the scheduled open public hearing session, FDA may conduct a lottery to determine the speakers for the scheduled open public hearing session. The contact person will notify interested persons regarding their request to speak by March 29, 2018.

Persons attending FDA's advisory committee meetings are advised that FDA is not responsible for providing access to electrical outlets.

For press inquiries, please contact the Office of Media Affairs at *fdaoma@fda.hhs.gov* or 301–796–4540.

FDA welcomes the attendance of the public at its advisory committee meetings and will make every effort to accommodate persons with disabilities. If you require accommodations due to a disability, please contact Moon Hee V. Choi (see **FOR FURTHER INFORMATION CONTACT**) at least 7 days in advance of the meeting.

FDA is committed to the orderly conduct of its advisory committee meetings. Please visit our website at *https://www.fda.gov/AdvisoryCommittees/AboutAdvisoryCommittees/ucm111462.htm* for procedures on public conduct during advisory committee meetings.

Notice of this meeting is given under the Federal Advisory Committee Act (5 U.S.C. app. 2).

Dated: February 15, 2018.

Leslie Kux,

Associate Commissioner for Policy.

[FR Doc. 2018–03603 Filed 2–21–18; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2014–N–1048]

Agency Information Collection Activities; Proposed Collection; Comment Request; Medical Device Labeling Regulations

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA or Agency) is announcing an opportunity for public comment on the proposed collection of certain information by the Agency. Under the Paperwork Reduction Act of 1995 (PRA), Federal Agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, and to allow 60 days for public comment in response to the notice. This notice solicits comments on Medical Device Labeling Regulations.

DATES: Submit either electronic or written comments on the collection of information by April 23, 2018.

ADDRESSES: You may submit comments as follows. Please note that late, untimely filed comments will not be considered. Electronic comments must be submitted on or before April 23, 2018. The *https://www.regulations.gov* electronic filing system will accept comments until midnight Eastern Time at the end of April 23, 2018. Comments received by mail/hand delivery/courier (for written/paper submissions) will be considered timely if they are postmarked or the delivery service acceptance receipt is on or before that date.

Electronic Submissions

Submit electronic comments in the following way:

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

that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on *https://www.regulations.gov.*

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

Written/Paper Submissions

Submit written/paper submissions as follows:

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

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

Instructions: All submissions received must include the Docket No. FDA–2014–N–1048 for ''Agency Information Collection Activities; Proposed Collection; Comment Request; Medical Device Labeling Regulations.'' Received comments, those filed in a timely manner (see **ADDRESSES**), will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *https://www.regulations.gov* or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday.

• Confidential Submissions—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *https://www.regulations.gov.* Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *https://www.gpo.gov/fdsys/pkg/FR-2015-09-18/pdf/2015-23389.pdf.*

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

FOR FURTHER INFORMATION CONTACT: Amber Sanford, Office of Operations, Food and Drug Administration, Three White Flint North, 10A–12M, 11601 Landsdown St., North Bethesda, MD 20852, 301–796–8867, *PRAStaff@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION: Under the PRA (44 U.S.C. 3501–3520), Federal Agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. ''Collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes Agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3506(c)(2)(A)) requires Federal Agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, FDA is publishing notice of the proposed collection of information set forth in this document.

With respect to the following collection of information, FDA invites comments on these topics: (1) Whether the proposed collection of information is necessary for the proper performance of FDA's functions, including whether the information will have practical utility; (2) the accuracy of FDA's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques, when appropriate, and other forms of information technology.

Medical Device Labeling Regulations—21 CFR parts 800, 801, and 809

OMB Control Number 0910–0485—Extension

Section 502 of the Federal Food, Drug, and Cosmetic Act (FD&C Act) (21 U.S.C. 352), among other things, establishes requirements for the label or labeling of a medical device so that it is not misbranded and subject to a regulatory action. Certain provisions under section 502 of the FD&C Act require manufacturers, importers, and distributors of medical devices to disclose information about themselves or the devices on the labels or labeling for the devices.

Section 502(b) of the FD&C Act requires that for packaged devices, the label must bear the name and place of business of the manufacturer, packer, or distributor; and an accurate statement of the quantity of the contents. Section 502(f) of the FD&C Act requires that the labeling for a device must contain adequate directions for use. FDA may, however, grant an exemption if the Agency determines that the adequate directions for use labeling requirements are not necessary for the particular case as it relates to protection of the public health.

FDA regulations under parts 800, 801, and 809 (21 CFR parts 800, 801, and 809) require disclosure of specific information by manufacturers, importers, and distributors of medical devices about themselves or the devices, on the label or labeling for the devices, to health professionals and consumers. Most of the regulations under parts 800, 801, and 809 are derived from requirements of section 502 of the FD&C Act. Section 502 provides, in part, that a device shall be misbranded if, among other things, its label or labeling fails to bear certain required information concerning the device, is false or misleading in any particular way, or fails to contain adequate directions for use.

Recordkeeping Burden

Section 801.150(a)(2) establishes recordkeeping requirements for manufacturers of devices to retain a copy of the agreement containing the specifications for the processing, labeling, or repacking of the device for 2 years after the final shipment or delivery of the device. Section 801.150(a)(2) also requires that the subject respondents make copies of this

agreement available for inspection at any reasonable hour to any officer or employee of the Department of Health and Human Services (HHS) who requests them.

Section 801.410(e) requires copies of invoices, shipping documents, and records of sale or distribution of all impact resistant lenses, including finished eyeglasses and sunglasses, be maintained for 3 years by the retailer and made available upon request by any officer or employee of FDA or by any other officer or employee acting on behalf of the Secretary of HHS.

Section 801.410(f) requires that the results of impact tests and description of the test method and apparatus be retained for a period of 3 years.

Section 801.421(d) establishes requirements for hearing aid dispensers to retain copies of all physician statements or any waivers of medical evaluation for 3 years after dispensing the hearing aid.

Section 801.430(f) requires manufacturers of menstrual tampons to devise and follow an ongoing sampling plan for measuring the absorbency of menstrual tampons. In addition, manufacturers must use the method and testing parameters described in § 801.430(f).

Section 801.435(g) requires latex condom manufacturers to document and provide, upon request, an appropriate justification for the application of the testing data from one product on any variation of that product to support expiration dating in the user labeling.

Third-Party Disclosure Burden

Sections 800.10(a)(3) and 800.12(c) require that the label for contact lens cleaning solutions bear a prominent statement alerting consumers of the tamper-resistant feature. Further, § 800.12 requires that packaged contact lens cleaning solutions contain a tamper-resistant feature to prevent malicious adulteration.

Section 800.10(b)(2) requires that the labeling for liquid ophthalmic preparations packed in multiple-dose containers provide information on the duration of use and the necessary warning information to afford adequate protection from contamination during use.

Section 801.1 requires that the label for a device in package form contain the name and place of business of the manufacturer, packer, or distributor.

Section 801.5 requires that labeling for a device include information on intended use as defined under § 801.4 and provide adequate directions to assure safe use by the lay consumers.

Section 801.61 requires that the principal display panel of an over-the-counter (OTC) device in package form must bear a statement of the identity of the device. The statement of identity of the device must include the common name of the device followed by an accurate statement of the principal intended actions of the device. Section 801.62 requires that the label for an OTC device in package form shall bear a declaration of the net quantity of contents. The label must express the net quantity in terms of weight, measure, numerical count, or a combination of numerical count and weight, measure, or size.

Section 801.109 establishes labeling requirements for prescription devices, in which the label for the device must describe the application or use of the device and contain a cautionary statement restricting the device for sale by, or on the order of, an appropriate professional.

Section 801.110 establishes labeling requirements for a prescription device delivered to the ultimate purchaser or user, by a licensed practitioner. The device must be accompanied by labeling bearing the name and address of the licensed practitioner, directions for use, and cautionary statements, if any, provided by the order.

Section 801.150(e) requires a written agreement between firms involved in the assembling or packaging of a nonsterile device containing labeling that identifies the final finished device as sterile and then shipping such device in interstate commerce prior to sterilization. In addition, § 801.150(e) requires that each pallet, carton, or other designated unit be conspicuously marked to show its nonsterile nature when introduced into interstate commerce and while being held prior to sterilization. When both requirements are met, FDA will take no regulatory action against the device as being misbranded or adulterated.

Section 801.405(b)(1) provides for labeling requirements for articles, including repair kits, re-liners, pads, and cushions, intended for use in temporary repairs and refitting of dentures for lay persons. Section 801.405(b)(1) also requires that the labeling contain the word ''emergency'' preceding and modifying each indication-for-use statement for denture repair kits, and the word ''temporary'' preceding and modifying each indication-for-use statement for re-liners, pads, and cushions.

Section 801.405(c) provides for labeling requirements that contain essentially the same information described under § 801.405(b)(1). The information is intended to enable a lay person to understand the limitations of using OTC denture repair kits and denture re-liners, pads, and cushions.

Section 801.420(c)(1) requires that manufacturers or distributors of hearing aids develop a user instructional brochure to be provided by the dispenser of the hearing aid to prospective users. The brochure must contain detailed information on the use and maintenance of the hearing aid.

Section 801.420(c)(4) establishes requirements that the user instructional brochure or separate labeling provide for technical data elements useful for selecting, fitting, and checking the performance of a hearing aid. In addition, § 801.420(c)(4) provides for testing requirements to determine that the required data elements must be conducted in accordance with the American National Standards Institute (ANSI) ''Specification of Hearing Aid Characteristics,'' ANSI S3.22–2003 (Revision of ANSI S3.22–1996), which is incorporated by reference in accordance with 5 U.S.C. 552(a) and 1 CFR part 51.

Section 801.421(b) establishes requirements for the hearing aid dispenser to provide prospective users with a copy of the user instructional brochure along with an opportunity to review content, either orally or by the predominant method of communication used during the sale.

Section 801.421(c) establishes requirements for the hearing aid dispenser to provide a copy of the user instructional brochure to the prospective purchaser of any hearing aid upon request, or, if the brochure is unavailable, provide the name and address of the manufacturer or distributor from which it may be obtained.

Section 801.430(d) establishes labeling requirements for menstrual tampons to provide information on signs, risk factors, and ways to reduce the risk of Toxic Shock Syndrome (TSS).

Section 801.430(e)(2) requires menstrual tampon package labels to provide information on the ranges of absorbency and absorbency term based on testing required under § 801.430(f) and an explanation of selecting absorbencies that reduce the risk of contracting TSS.

Section 801.435(b), (c), and (h) establishes requirements for condom labeling to bear an expiration date that is supported by testing that demonstrates the integrity of three random lots of the product.

Section 809.10(a) and (b) establishes requirements that a label for an in vitro

diagnostic (IVD) device and the accompanying labeling (package insert) must contain information identifying its intended use, instructions for use, lot or control number, and source.

Section 809.10(d) provides that the labeling requirements for general purpose laboratory reagents may be exempt from the requirements of § 809.10(a) and (b) if the labeling contains information to include, identifying its intended use, instructions for use, lot or control number, and source.

Section 809.10(e) provides that the labeling for ''Analyte Specific Reagents'' (ASRs) shall provide information to include, identifying the quantity, proportion, or concentration of each reagent ingredient, instructions for use, lot or control number, and source.

Section 809.10(f) provides that the labeling for OTC test sample collection systems for drugs of abuse shall include, among other things, information on the intended use, specimen collection instructions, identification system, and information about use of the test results.

Section 809.30(d) requires that advertising and promotional materials for ASRs include the identity and purity of the ASR and the identity of the analyte.

Section 1040.20(d) (21 CFR 1040.20) provides that manufacturers of sunlamp products and ultraviolet lamps are subject to the labeling regulations under part 801.

The burden estimates are based on FDA's current registration and listing data and shipment information.

FDA estimates the burden of this collection of information as follows:

TABLE 1—ESTIMATED ANNUAL RECORDKEEPING BURDEN [1]

Activity/21 CFR section	Number of recordkeepers	Number of records per recordkeeper	Total annual records	Average burden per recordkeeping	Total hours
Processing, labeling, or repacking agreement—801.150(a)(2).	6,331	887	5,615,597	.5 (30 minutes)	2,807,799
Impact resistant lenses; invoices, shipping documents, and records of sale or distribution—801.410(e) and (f).	1,119	47,050	52,648,950	0.0008 (.05 minutes)	42,119
Hearing aid records—801.421(d)	10,000	160	1,600,000	.25 (15 minutes)	400,000
Menstrual tampons, sampling plan for measuring absorbency—801.430(f).	16	11	176	80	14,080
Latex condoms; justification for the application of testing data to the variation of the tested product—801.435(g).	51	3.65	186	1	186
Total					3,264,184

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

TABLE 2—ESTIMATED ANNUAL THIRD-PARTY DISCLOSURE BURDEN [1]

Activity/21 CFR section	Number of respondents	Number of disclosures per respondent	Total annual disclosures	Average burden per disclosure	Total hours
Contact lens cleaning solution labeling—800.10(a)(3) and 800.12(c).	25	8	200	1	200
Liquid ophthalmic preparation labeling—800.10(b)(2).	25	8	200	1	200
Manufacturer, packer, or distributor information—801.1.	18,137	7	126,959	1	126,959
Adequate directions for use—801.5	8,526	6	51,156	22.35	1,143,337
Statement of identify—801.61	8,526	6	51,156	1	51,156
Declaration of net quantity of contents—801.62	8,526	6	51,156	1	51,156
Prescription device labeling—801.109	9,681	6	58,086	17.77	1,032,188
Retail exemption for prescription devices—801.110	30,000	667	20,010,000	.25 (15 minutes)	5,002,500
Processing, labeling, or repacking; non-sterile devices—801.150(e).	453	34	15,402	4	61,608
Labeling of articles intended for lay use in the repairing and/or refitting of dentures—801.405(b)(1).	35	1	35	4	140
Dentures; information regarding temporary and emergency use—801.405(c).	35	1	35	4	140
Labeling requirements for hearing aids—801.420(c)(1).	124	12	1,488	40	59,520
Technical Data for hearing aids—801.420(c)(4)	124	12	1,488	80	119,040
Hearing aids, opportunity to review User Instructional Brochure—801.421(b).	10,000	160	1,600,000	.30 (20 minutes)	480,000
Hearing aids, availability of User Instructional Brochure—801.421(c).	10,000	5	50,000	.17 (10 minutes)	8,500
User labeling for menstrual tampons—801.430(d)	16	8	128	2	256

TABLE 2—ESTIMATED ANNUAL THIRD-PARTY DISCLOSURE BURDEN [1]—Continued

Activity/21 CFR section	Number of respondents	Number of disclosures per respondent	Total annual disclosures	Average burden per disclosure	Total hours
Menstrual tampons, ranges of absorbency—801.430(e)(2).	16	8	128	2	256
User labeling for latex condoms—801.435(b), (c), and (h).	51	6	306	100	30,600
Labeling for IVDs—809.10(a) and (b)	1,700	6	10,200	80	816,000
Labeling for general purpose laboratory reagents—809.10(d)(1).	300	2	600	40	24,000
Labeling for analyte specific reagents—809.10(e)	300	25	7,500	1	7,500
Labeling for OTC test sample collection systems for drugs of abuse testing—809.10(f).	20	1	20	100	2,000
Advertising and promotional materials for ASRs—809.30(d).	300	25	7,500	1	7,500
Labeling of sunlamp products—1040.20(d)	19	1	19	10	190
Total					9,024,946

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

The number of recordkeepers/respondents and records/disclosures has been adjusted to reflect updated Agency data. These adjustments result in an increase of 1,598,48 hours since the last OMB approval.

Dated: February 14, 2018.

Leslie Kux,

Associate Commissioner for Policy.

[FR Doc. 2018–03608 Filed 2–21–18; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket Nos. FDA–2015–E–4674, FDA–2015–E–4696, FDA–2015–E–4700, FDA–2015–E–4703, and FDA–2015–E–4704]

Determination of Regulatory Review Period for Purposes of Patent Extension; ESBRIET

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA or the Agency) has determined the regulatory review period for ESBRIET and is publishing this notice of that determination as required by law. FDA has made the determination because of the submission of applications to the Director of the U.S. Patent and Trademark Office (USPTO), Department of Commerce, for the extension of a patent which claims that human drug product.

DATES: Anyone with knowledge that any of the dates as published (in the **SUPPLEMENTARY INFORMATION** section) are incorrect may submit either electronic or written comments and ask for a redetermination by April 23, 2018. Furthermore, any interested person may petition FDA for a determination regarding whether the applicant for extension acted with due diligence during the regulatory review period by August 21, 2018. See ''Petitions'' in the **SUPPLEMENTARY INFORMATION** section for more information.

ADDRESSES: You may submit comments as follows. Please note that late, untimely filed comments will not be considered. Electronic comments must be submitted on or before April 23, 2018. The *https://www.regulations.gov* electronic filing system will accept comments until midnight Eastern Time at the end of April 23, 2018. Comments received by mail/hand delivery/courier (for written/paper submissions) will be considered timely if they are postmarked or the delivery service acceptance receipt is on or before that date.

Electronic Submissions

Submit electronic comments in the following way:

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

Written/Paper Submissions

Submit written/paper submissions as follows:

- *Mail/Hand delivery/Courier (for written/paper submissions):* Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.
- For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in ''Instructions.''

Instructions: All submissions received must include the Docket Nos. FDA–2015–E–4674, FDA–2015–E–4696, FDA–2015–E–4700, FDA–2015–E–4703, and FDA–2015–E–4704 for ''Determination of Regulatory Review Period for Purposes of Patent Extension; ESBRIET.'' Received comments, those filed in a timely manner (see **ADDRESSES**), will be placed in the dockets and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *https://www.regulations.gov* or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday.

• Confidential Submissions—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *https://www.regulations.gov.* Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with § 10.20 (21 CFR 10.20) and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *https://www.gpo.gov/fdsys/pkg/FR-2015-09-18/pdf/2015-23389.pdf.*

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

FOR FURTHER INFORMATION CONTACT:

Beverly Friedman, Office of Regulatory Policy, Food and Drug Administration, 10903 New Hampshire Ave, Bldg. 51, Rm. 6250, Silver Spring, MD 20993, 301–796–3600.

SUPPLEMENTARY INFORMATION:

I. Background

The Drug Price Competition and Patent Term Restoration Act of 1984 (Pub. L. 98–417) and the Generic Animal Drug and Patent Term Restoration Act (Pub. L. 100–670) generally provide that a patent may be extended for a period of up to 5 years so long as the patented item (human drug product, animal drug product, medical device, food additive, or color additive) was subject to regulatory review by FDA before the item was marketed. Under these acts, a product's regulatory review period forms the basis for determining the amount of extension an applicant may receive.

A regulatory review period consists of two periods of time: A testing phase and an approval phase. For human drug products, the testing phase begins when the exemption to permit the clinical investigations of the drug becomes effective and runs until the approval phase begins. The approval phase starts with the initial submission of an application to market the human drug product and continues until FDA grants permission to market the drug product. Although only a portion of a regulatory review period may count toward the actual amount of extension that the Director of USPTO may award (for example, half the testing phase must be subtracted as well as any time that may have occurred before the patent was issued), FDA's determination of the length of a regulatory review period for a human drug product will include all of the testing phase and approval phase as specified in 35 U.S.C. 156(g)(1)(B).

FDA has approved for marketing the human drug product ESBRIET (pirfenidone). ESBRIET is indicated for the treatment of idiopathic pulmonary fibrosis. Subsequent to this approval, the USPTO received patent term restoration applications for ESBRIET (U.S. Patent Nos. 7,767,225; 7,767,700; 7,988,994; 8,383,150; and 8,420,674) from InterMune Inc., and the USPTO requested FDA's assistance in determining the patents' eligibility for patent term restoration. In a letter dated January 20, 2016, FDA advised the USPTO that this human drug product had undergone a regulatory review period and that the approval of ESBRIET represented the first permitted commercial marketing or use of the product. Thereafter, the USPTO requested that FDA determine the product's regulatory review period.

II. Determination of Regulatory Review Period

FDA has determined that the applicable regulatory review period for ESBRIET is 14,993 days. Of this time, 13,186 days occurred during the testing phase of the regulatory review period, while 1,807 days occurred during the approval phase. These periods of time were derived from the following dates:

1. *The date an exemption under section 505(i) of the Federal Food, Drug, and Cosmetic Act (the FD&C Act) (21 U.S.C. 355(i)) became effective:* September 29, 1973. The applicant claims August 1, 1973, as the date the investigational new drug application (IND) became effective. However, FDA records indicate that the IND effective date was September 29, 1973, which was 30 days after FDA receipt of the IND.

2. *The date the application was initially submitted with respect to the human drug product under section 505(b) of the FD&C Act:* November 4, 2009. FDA has verified the applicant's claim that the new drug application (NDA) for ESBRIET (NDA 22–535) was initially submitted on November 4, 2009.

3. *The date the application was approved:* October 15, 2014. FDA has verified the applicant's claim that NDA 22–535 was approved on October 15, 2014.

This determination of the regulatory review period establishes the maximum potential length of a patent extension. However, the USPTO applies several statutory limitations in its calculations of the actual period for patent extension. In its applications for patent extension, this applicant seeks 596 days or 754 days of patent term extension.

III. Petitions

Anyone with knowledge that any of the dates as published are incorrect may submit either electronic or written comments and ask for a redetermination (see **DATES**). Furthermore, as specified in § 60.30 (21 CFR 60.30), any interested person may petition FDA for a determination regarding whether the applicant for extension acted with due diligence during the regulatory review period. To meet its burden, the petition must comply with all the requirements of § 60.30, including but not limited to: Must be timely (see **DATES**), must be filed in accordance with § 10.20, must contain sufficient facts to merit an FDA investigation, and must certify that a true and complete copy of the petition has been served upon the patent applicant. (See H. Rept. 857, part 1, 98th Cong., 2d sess., pp. 41–42, 1984.) Petitions should be in the format specified in 21 CFR 10.30.

Submit petitions electronically to *https://www.regulations.gov* at Docket Nos. FDA–2013–S–0610. Submit written petitions (two copies are required) to the Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

Dated: February 14, 2018.

Leslie Kux,

Associate Commissioner for Policy.

[FR Doc. 2018–03612 Filed 2–21–18; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2014–E–0940]

Determination of Regulatory Review Period for Purposes of Patent Extension; LYMPHOSEEK

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA or the Agency) has determined the regulatory review period for LYMPHOSEEK and is publishing this notice of that determination as required by law. FDA has made the determination because of the submission of an application to the Director of the U.S. Patent and Trademark Office (USPTO), Department of Commerce, for the extension of a patent which claims that human drug product.

DATES: Anyone with knowledge that any of the dates as published (in the **SUPPLEMENTARY INFORMATION** section) are incorrect may submit either electronic or written comments and ask for a redetermination by April 23, 2018. Furthermore, any interested person may petition FDA for a determination regarding whether the applicant for extension acted with due diligence during the regulatory review period by August 21, 2018. See ''Petitions'' in the **SUPPLEMENTARY INFORMATION** section for more information.

ADDRESSES: You may submit comments as follows. Please note that late, untimely filed comments will not be considered. Electronic comments must be submitted on or before April 23, 2018. The *https://www.regulations.gov* electronic filing system will accept comments until midnight Eastern Time at the end of April 23, 2018. Comments received by mail/hand delivery/courier (for written/paper submissions) will be considered timely if they are postmarked or the delivery service acceptance receipt is on or before that date.

Electronic Submissions

Submit electronic comments in the following way:

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

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

Written/Paper Submissions

Submit written/paper submissions as follows:

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

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

Instructions: All submissions received must include the Docket No. FDA–2014–E–0940 for ''Determination of Regulatory Review Period for Purposes of Patent Extension; LYMPHOSEEK.'' Received comments, those filed in a timely manner (see **ADDRESSES**), will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *https://www.regulations.gov* or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday.

• Confidential Submissions—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *https://www.regulations.gov.* Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with § 10.20 (21 CFR 10.20) and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *https://www.gpo.gov/fdsys/pkg/FR-2015-09-18/pdf/2015-23389.pdf.*

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

FOR FURTHER INFORMATION CONTACT: Beverly Friedman, Office of Regulatory Policy, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, Rm. 6250, Silver Spring, MD 20993, 301–796–3600.

SUPPLEMENTARY INFORMATION:

I. Background

The Drug Price Competition and Patent Term Restoration Act of 1984 (Pub. L. 98–417) and the Generic Animal Drug and Patent Term Restoration Act (Pub. L. 100–670) generally provide that a patent may be extended for a period of up to 5 years so long as the patented item (human drug product, animal drug product, medical device, food additive, or color additive) was subject to regulatory review by FDA before the item was marketed. Under these acts, a product's regulatory review period forms the basis for determining the amount of extension an applicant may receive.

A regulatory review period consists of two periods of time: A testing phase and an approval phase. For human drug products, the testing phase begins when the exemption to permit the clinical investigations of the drug becomes effective and runs until the approval phase begins. The approval phase starts with the initial submission of an application to market the human drug product and continues until FDA grants permission to market the drug product. Although only a portion of a regulatory review period may count toward the

actual amount of extension that the Director of USPTO may award (for example, half the testing phase must be subtracted as well as any time that may have occurred before the patent was issued), FDA's determination of the length of a regulatory review period for a human drug product will include all of the testing phase and approval phase as specified in 35 U.S.C. 156(g)(1)(B).

FDA has approved for marketing the human drug product LYMPHOSEEK (technetium (Tc 99m) tilmanocept). LYMPHOSEEK is indicated for lymphatic mapping with a hand-held gamma counter to assist in the localization of lymph nodes draining a primary tumor site in patients with breast cancer or melanoma. Subsequent to this approval, the USPTO received a patent term restoration application for LYMPHOSEEK (U.S. Patent No. 6,409,990) from Navidea Biopharmaceuticals, Inc., and the USPTO requested FDA's assistance in determining this patent's eligibility for patent term restoration. In a letter dated November 4, 2015, FDA advised the USPTO that this human drug product had undergone a regulatory review period and that the approval of LYMPHOSEEK represented the first permitted commercial marketing or use of the product. Thereafter, the USPTO requested that FDA determine the product's regulatory review period.

II. Determination of Regulatory Review Period

FDA has determined that the applicable regulatory review period for LYMPHOSEEK is 4,398 days. Of this time, 3,816 days occurred during the testing phase of the regulatory review period, while 582 days occurred during the approval phase. These periods of time were derived from the following dates:

1. *The date an exemption under section 505(i) of the Federal Food, Drug, and Cosmetic Act (the FD&C Act) (21 U.S.C. 355(i)) became effective:* February 28, 2001. FDA has verified the applicant's claim that the date the investigational new drug application became effective was on February 28, 2001.

2. *The date the application was initially submitted with respect to the human drug product under section 505(b) of the FD&C Act:* August 10, 2011. FDA has verified the applicant's claim that the new drug application (NDA) for LYMPHOSEEK (NDA 202207) was initially submitted on August 10, 2011.

3. *The date the application was approved:* March 13, 2013. FDA has verified the applicant's claim that NDA 202207 was approved on March 13, 2013.

This determination of the regulatory review period establishes the maximum potential length of a patent extension. However, the USPTO applies several statutory limitations in its calculations of the actual period for patent extension. In its application for patent extension, this applicant seeks 1,826 days of patent term extension.

III. Petitions

Anyone with knowledge that any of the dates as published are incorrect may submit either electronic or written comments and under 21 CFR 60.24, ask for a redetermination (see **DATES**). Furthermore, as specified in § 60.30 (21 CFR 60.30), any interested person may petition FDA for a determination regarding whether the applicant for extension acted with due diligence during the regulatory review period. To meet its burden, the petition must comply with all the requirements of § 60.30, including but not limited to: must be timely (see **DATES**), must be filed in accordance with § 10.20, must contain sufficient facts to merit an FDA investigation, and must certify that a true and complete copy of the petition has been served upon the patent applicant. (See H. Rept. 857, part 1, 98th Cong., 2d sess., pp. 41–42, 1984.) Petitions should be in the format specified in 21 CFR 10.30.

Submit petitions electronically to *https://www.regulations.gov* at Docket No. FDA–2013–S–0610. Submit written petitions (two copies are required) to the Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

Dated: February 15, 2018.

Leslie Kux,

Associate Commissioner for Policy.

[FR Doc. 2018–03610 Filed 2–21–18; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2018–N–0341]

Agency Information Collection Activities; Proposed Collection; Comment Request; New Animal Drugs for Investigational Use

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA, Agency, or we) is announcing an opportunity for public comment on the proposed collection of certain information by the Agency. Under the Paperwork Reduction Act of 1995 (PRA), Federal Agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, and to allow 60 days for public comment in response to the notice. This notice solicits comments on the reporting and recordkeeping requirements of our regulations concerning new animal drugs for investigational use.

DATES: Submit either electronic or written comments on the collection of information by April 23, 2018.

ADDRESSES: You may submit comments as follows. Please note that late, untimely filed comments will not be considered. Electronic comments must be submitted on or before April 23, 2018. The *https://www.regulations.gov* electronic filing system will accept comments until midnight Eastern Time at the end of April 23, 2018. Comments received by mail/hand delivery/courier (for written/paper submissions) will be considered timely if they are postmarked or the delivery service acceptance receipt is on or before that date.

Electronic Submissions

Submit electronic comments in the following way:

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

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

Written/Paper Submissions

Submit written/paper submissions as follows:

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

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

Instructions: All submissions received must include the Docket No. FDA–2018–N–0341 for ''New Animal Drugs for Investigational Use.'' Received comments, those filed in a timely manner (see **ADDRESSES**), will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *https://www.regulations.gov* or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday.

• Confidential Submissions—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *https://www.regulations.gov.* Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *https://www.gpo.gov/fdsys/pkg/FR-2015-09-18/pdf/2015-23389.pdf.*

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

FOR FURTHER INFORMATION CONTACT: Ila S. Mizrachi, Office of Operations, Food and Drug Administration, Three White Flint North, 10A–12M, 11601 Landsdown St., North Bethesda, MD 20852, 301–796–7726, *PRAStaff@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION: Under the PRA (44 U.S.C. 3501–3520), Federal Agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. ''Collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes Agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3506(c)(2)(A)) requires Federal Agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, FDA is publishing notice of the proposed collection of information set forth in this document.

With respect to the following collection of information, FDA invites comments on these topics: (1) Whether the proposed collection of information is necessary for the proper performance of FDA's functions, including whether the information will have practical utility; (2) the accuracy of FDA's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques, when appropriate, and other forms of information technology.

New Animal Drugs for Investigational Use—21 CFR Part 511

OMB Control Number 0910–0117—Extension

FDA has the authority under the Federal Food, Drug, and Cosmetic Act (FD&C Act) to approve new animal drugs. A new animal drug application (NADA) cannot be approved until, among other things, the new animal drug has been demonstrated to be safe and effective for its intended use(s). In order to properly test a new animal drug for an intended use, appropriate scientific investigations must be conducted. Under specific circumstances, section 512(j) of the FD&C Act (21 U.S.C. 360b(j)) permits the use of an investigational new animal drug to generate data to support an NADA approval. Section 512(j) of the FD&C Act authorizes us to issue regulations relating to the investigational use of new animal drugs.

Our regulations in part 511 (21 CFR part 511) set forth the conditions for investigational use of new animal drugs and require reporting and recordkeeping. The information collected is necessary to protect the public health. We use the information to determine that investigational animal drugs are distributed only to qualified investigators, adequate drug accountability records are maintained, and edible food products from treated food-producing animals are safe for human consumption. We also use the information collected to monitor the validity of the studies submitted to us to support new animal drug approval.

Reporting: Our regulations require that certain information be submitted to us in a ''Notice of Claimed Investigational Exemption for a New Animal Drug'' (NCIE) to qualify for the exemption and to control shipment of the new animal drug and prevent potential abuse. The NCIE must contain, among other things, the following specific information: (1) Identity of the new animal drug, (2) labeling, (3) statement of compliance of any non-clinical laboratory studies with good laboratory practices, (4) name and address of each clinical investigator, (5) the approximate number of animals to be treated or amount of new animal drug(s) to be shipped, and (6) information regarding the use of edible tissues from investigational animals (§ 511.1(b)(4) (21 CFR 511.1(b)(4)). If the new animal drug is to be used in food-producing animals, *e.g.,* cattle, swine, chickens, fish, etc., certain data must be submitted to us to obtain authorization for the use of edible food products from treated food-producing animals (§ 511.1(b)(5)). We require sponsors upon request to submit information with respect to the investigation to determine whether there are grounds for terminating the exemption (§ 511.1(b)(6)). We require sponsors to report findings that may suggest significant hazards pertinent to the safety of the new animal drug (§ 511.1(b)(8)(ii)). We also require

reporting by importers of investigational new animal drugs for clinical investigational use in animals (§ 511.1(b)(9)). The information provided by the sponsor in the NCIE is needed to ensure that the proposed investigational use of the new animal drug is safe and that any edible food will not be distributed without proper authorization from FDA. Information contained in an NCIE submission is monitored under our Bio-Research Monitoring Program. This program permits us to monitor the validity of the studies and to ensure the proper use of the drugs is maintained by the investigators.

Recordkeeping: If the new animal drug is only for tests in vitro or in laboratory research animals, the person distributing the new animal drug must maintain records showing the name and post office address of the expert or expert organization to whom it is shipped and the date, quantity, and batch or code mark of each shipment and delivery for a period of 2 years after such shipment or delivery (§ 511.1(a)(3) and (b)(3)). We require complete records of the investigation, including records of the receipt and disposition of each shipment or delivery of the investigational new animal drug (§ 511.1(b)(7)). We also require records of all reports received by a sponsor from investigators to be retained for 2 years after the termination of an investigational exemption or approval of a new animal drug application (§ 511.1(b)(8)(i)).

Description of Respondents: Respondents to this collection of information are persons who use new animal drugs for investigational purposes. Investigational new animal drugs are used primarily by drug industry firms, academic institutions, and the government. Investigators may include individuals from these entities, as well as research firms and members of the medical professions.

FDA estimates the burden of this collection of information as follows:

TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN [1]

21 CFR Section/activity	Number of respondents	Number of responses per respondent	Total annual responses	Average burden per response	Total hours
511.1(b)(4); submission of NCIE	104	15.38	1,600	1	1,600
511.1(b)(5); submission of data to obtain authorization for the use of edible food products	104	0.30	31	8	248
511.1(b)(6); submission of any additional information upon request of FDA	104	0.02	2	1	2
511.1(b)(8)(ii); reporting of findings that may suggest significant hazards pertinent to the safety of the new animal drug	104	0.14	15	2	30
511.1(b)(9); reporting by importers of investigational new animal drugs for clinical investigational use in animals	104	0.14	15	8	120
Total			1,663		2,000

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

TABLE 2—ESTIMATED ANNUAL RECORDKEEPING BURDEN [1]

21 CFR Section/activity	Number of recordkeepers	Number of records per recordkeeper	Total annual records	Average burden per recordkeeping	Total hours
511.1(a)(3); maintain records showing the name and post office address of the expert or expert organization to whom the new animal drug is shipped and the date, quantity, and batch or code mark of each shipment and delivery for a period of 2 years after such shipment or delivery	104	2.5	260	1	260
511.1(b)(3); maintain records showing the name and post office address of the expert or expert organization to whom the new animal drug or feed containing same is shipped and the date, quantity, and batch or code mark of each shipment and delivery for a period of 2 years after such shipment or delivery	104	15.38	1,600	1	1,600
511.1(b)(7); maintain records of the investigation, including records of the receipt and disposition of each shipment or delivery of the investigational new animal drug	104	15.38	1,600	3.5	5,600
511.1(b)(8)(i); maintain records of all reports received by a sponsor from investigators	104	15.38	1,600	3.5	5,600
Total			5,060		13,060

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

The estimate of the time required for reporting requirements, record preparation, and maintenance for this collection of information is based on our informal communication with industry. Based on the number of sponsors subject to animal drug user fees, we estimate that there are 104 respondents. We use this estimate consistently throughout the table and calculate the ''number of responses per respondent'' by dividing the total annual responses by number of respondents. Additional information needed to make a final calculation of the total burden hours

(*i.e.,* the number of respondents, the number of recordkeepers, the number of NCIEs received, etc.) is derived from our records. The burden for this information collection has changed since the last OMB approval. We estimate an overall increase in burden that we attribute to an increase in the number of annual responses and records.

Dated: February 15, 2018.

Leslie Kux,

Associate Commissioner for Policy.

[FR Doc. 2018–03609 Filed 2–21–18; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2018–N–0508]

Parke-Davis, Subsidiary of Pfizer, Inc. et al.; Withdraw of Approval of 38 New Drug Applications and 43 Abbreviated New Drug Applications

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA or Agency) is withdrawing approval of 38 new drug applications (NDAs) and 43 abbreviated new drug applications (ANDAs) from multiple applicants. The holders of the applications notified the Agency in writing that the drug products were no longer marketed and requested that the approval of the applications be withdrawn.

DATES: Approval is withdrawn as of March 26, 2018.

FOR FURTHER INFORMATION CONTACT: Florine P. Purdie, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, Rm. 6248, Silver Spring, MD 20993–0002, 301–796–3601.

SUPPLEMENTARY INFORMATION: The holders of the applications listed in the table have informed FDA that these drug products are no longer marketed and have requested that FDA withdraw approval of the applications under the process in § 314.150(c) (21 CFR 314.150(c)). The applicants have also, by their requests, waived their opportunity for a hearing. Withdrawal of approval of an application or abbreviated application under § 314.150(c) is without prejudice to refiling.

TABLE 1

Application No.	Drug	Applicant
NDA 010151	Dilantin (phenytoin sodium) Injection USP, 50 milligrams (mg)/milliliter (mL).	Parke-Davis, Subsidiary of Pfizer, Inc., 235 East 42nd St., New York, NY 10017.
NDA 011903	Zolyse (chymotrypsin) for Ophthalmic Solution, 750 units/vial	Alcon Laboratories, Inc., 6201 S. Freeway, TC–45, Fort Worth, TX 76134–2099.
NDA 012125	Carbocaine (mepivacaine hydrochloride (HCl)) Injection USP, 3%.	Hospira Inc., 8401 W. 102nd St., Pleasant Prairie, WI 53158.
	Carbocaine with Neo-Cobefrin (mepivacaine HCl; levonordefrin) Injection USP, 2%; 0.05 mg/mL.	
NDA 012516	Sansert (methysergide maleate) Tablets, 2 mg	Novartis Pharmaceuticals Corp., One Health Pl., East Hanover, NJ 07936–1080.
NDA 016774	Serentil (mesoridazine besylate) Tablets, Equivalent to (EQ) 10 mg base, 25 mg base, 50 mg base, and 100 mg base.	Do.
NDA 016775	Serentil (mesoridazine besylate) Injection, EQ 25 mg base/mL.	Do.
NDA 016793	Cytosar-U (cytarabine) for Injection USP, 100 mg/vial, 500 mg/vial, 1 gram (g)/vial, and 2 g/vial.	Teva Pharmaceuticals USA, Inc., 425 Privet Rd., Horsham, PA 19044.
NDA 016997	Serentil (mesoridazine besylate) Oral Concentrate, EQ 25 mg base/mL.	Novartis Pharmaceuticals Corp.
NDA 017364	Aquatensen (methyclothiazide) Tablets USP, 5 mg	Meda Pharmaceuticals, Inc., 265 Davidson Ave., Suite 400, Somerset, NJ 08873.
NDA 017575	DTIC-Dome (dacarbazine) for Injection, 100 mg/vial and 200 mg/vial.	Bayer Healthcare Pharmaceuticals, Inc., 100 Bayer Blvd., Whippany, NJ 07981.
NDA 017717	Gyne-Lotrimin (clotrimazole) Vaginal Tablets, 100 mg	Bayer HealthCare, LLC, 100 Bayer Blvd., P.O. Box 915, Whippany, NJ 07981–0915.
NDA 017869	Funduscein-25 (fluorescein sodium) Injection, 25%	Novartis Pharmaceuticals Corp.
NDA 017993	Hydergine (ergoloid mesylates) Tablets, 0.5 mg and 1 mg	Do.
NDA 018052	Gyne-Lotrimin (clotrimazole) Vaginal Cream, 1%	Bayer HealthCare, LLC.
NDA 018128	Ovcon-50 (norethindrone and ethinyl estradiol) Tablets USP (21-Day Regimen), 1 mg and 0.05 mg.	Warner Chilcott Co., LLC, c/o Warner Chilcott (US), LLC, 100 Enterprise Dr., Rockaway, NJ 07866.
NDA 018397	Chlor-Trimeton (chlorpheniramine maleate and pseudoephedrine sulfate) Extended-Release Tablets, 8 mg and 120 mg.	Bayer HealthCare, LLC.
NDA 018418	Hydergine (ergoloid mesylates) Oral Solution, 1 mg/mL	Novartis Pharmaceuticals Corp.
NDA 018439	Multi-Vitamins Concentrate for Infusion, Injection	Watson Laboratories, Inc., Subsidiary of Teva Pharmaceuticals USA, Inc., 425 Privet Rd., Horsham, PA 19044.
NDA 018471	Ocuclear (oxymetazoline HCl) Ophthalmic Solution, 0.025%	Bayer HealthCare, LLC.
NDA 018517	Metronidazole Tablets USP, 250 mg and 500 mg	IVAX Pharmaceuticals, Inc., Subsidiary of Teva Pharmaceuticals USA, Inc., 425 Privet Rd., Horsham, PA 19044.
NDA 018969	Liposyn III 10% (soybean oil) Injection, 10%	Hospira, Inc.
NDA 020045	Shade UVAGuard (avobenzone, octinoxate, oxybenzone) Lotion, 3%/7.5%/3%.	Bayer HealthCare, LLC.
NDA 020289	Gyne-Lotrimin Combination Pack (clotrimazole) Vaginal Cream and Vaginal Tablets, 1% and 100 mg.	Do.

TABLE 1—Continued

Application No.	Drug	Applicant
NDA 020421	Femstat-3 (butoconazole nitrate) Vaginal Cream, 2%	Do.
NDA 020499	Actron (ketoprofen) Tablets, 12.5 mg	Do.
NDA 020525	Gyne-Lotrimin 3 (clotrimazole) Vaginal Tablets, 200 mg	Do.
NDA 020526	Gyne-Lotrimin 3 Combination Pack (clotrimazole) Vaginal Cream and Vaginal Tablets, 1% and 200 mg.	Do.
NDA 020574	Gyne-Lotrimin 3 (clotrimazole) Vaginal Cream, 2%	Do.
NDA 020619	Betoptic Pilo (betaxolol HCl; pilocarpine HCl) Ophthalmic Suspension, EQ 0.25% base; 1.75%.	Alcon Laboratories, Inc.
NDA 020665	Diovan (valsartan) Capsules, 80 mg and 160 mg	Novartis Pharmaceuticals Corp.
NDA 020807	Refludan (lepirudin recombinant) for Injection, 50 mg/vial	Bayer HealthCare Pharmaceuticals, Inc.
NDA 020888	Lotrimin AF (clotrimazole) Cream, 1%	Bayer HealthCare, LLC.
NDA 020889	Lotrimin AF (clotrimazole) Lotion, 1%	Do.
NDA 020890	Lotrimin AF (clotrimazole) Topical Solution, 1%	Do.
NDA 021257	Travatan (travoprost) Ophthalmic Solution, 0.004%	Alcon Pharmaceuticals, Ltd., 6201 S. Freeway, TC–45, Fort Worth, TX 76134.
NDA 021711	Ablavar (gadofosveset trisodium) Injection, 2440 mg/10 mL and 3660 mg/15 mL.	Lantheus Medical Imaging, Inc., 331 Treble Cove Rd., Building 300–2, North Billerica, MA 01862.
NDA 050081	Poly-Pred (neomycin sulfate; polymyxin B sulfate; prednisolone acetate) Ophthalmic Suspension, EQ 0.35% base; 10,000 units/mL; 0.5%.	Allergan, Inc., 2525 Dupont Dr., P.O. Box 19534, Irvine, CA 92623–9534.
ANDA 061758	Penicillin V Potassium for Oral Solution USP, EQ 125 mg base/5 mL and EQ 250 mg base/5 mL.	Purepac Pharm., Subsidiary of Teva Pharmaceuticals USA, Inc., 425 Privet Rd., Horsham, PA 19044.
ANDA 061980	Ampicillin Trihydrate for Oral Suspension, EQ 125 mg base/5 mL and EQ 250 mg base/5 mL.	Do.
ANDA 063116	Tobramycin Sulfate Injection USP, EQ 40 mg base/mL (Pharmacy Bulk Package).	Hospira, Inc.
ANDA 065057	Cefaclor Extended-Release Tablets, EQ 500 mg base	World Gen, LLC, 120 Route 17 North, Suite 127, Paramus, NJ 07652.
ANDA 071295	Atropine Injection, EQ 2 mg sulfate/0.7 mL	AbbVie, Inc., Dept. PA77/Bldg. AP30, 1 N. Waukegan Rd., North Chicago, IL 60064.
ANDA 071536	Metoclopramide Tablets USP, EQ 5 mg base and EQ 10 mg base.	Sun Pharmaceutical Industries, Inc., 2 Independence Way, Princeton, NJ 08540.
ANDA 071541	N.E.E. 1/35 21-day (norethindrone and ethinyl estradiol) Tablets USP, 1 mg/0.035 mg.	LPI Holdings, Inc., 5000 Plaza on the Lake, No. 270, Austin, TX 78746.
ANDA 071542	N.E.E. 1/35 28-day (norethindrone and ethinyl estradiol) Tablets USP, 1 mg/0.035 mg.	Do.
ANDA 071545	Norcept-E 1/35 21-day (norethindrone and ethinyl estradiol) Tablets USP, 1 mg/0.035 mg.	Janssen Pharmaceuticals, Inc., 1000 U.S. Highway 202, P.O. Box 300, Raritan, NJ 08869–0602.
ANDA 071546	Norcept-E 1/35 28-day (norethindrone and ethinyl estradiol) Tablets USP, 1 mg/0.035 mg.	Do.
ANDA 071690	Metoprolol Tartrate Tablets USP, 50 mg	Watson Laboratories, Inc., Subsidiary of Teva Pharmaceuticals USA, Inc.
ANDA 071691	Metoprolol Tartrate Tablets USP, 100 mg	Do.
ANDA 074633	Atracurium Besylate Injection, 10 mg/mL (Single-dose Vials)	Hospira, Inc.
ANDA 074639	Atracurium Besylate Injection, 10 mg/mL (Abboject Syringe)	Do.
ANDA 074929	Etodolac Capsules USP, 300 mg	ECI Pharmaceuticals, LLC, 5311 NW 35th Terrace, Fort Lauderdale, FL 33309.
ANDA 075870	Famotidine Injection, 10 mg/mL	Hospira, Inc.
ANDA 076058	Midazolam HCl Syrup, EQ 2 mg base/mL	Sun Pharmaceutical Industries, Ltd., c/o Sun Pharmaceutical Industries, Inc., 2 Independence Way, Princeton, NJ 08540.
ANDA 083140	Hydrocortisone Tablets, 20 mg	Nexgen Pharma, Inc., 46 Corporate Park, Suite 200, Irvine, CA 92606.
ANDA 083633	Isoniazid Tablets, 300 mg	Sun Pharmaceutical Industries, Inc.
ANDA 083634	Diphenhydramine HCl Capsules, 25 mg	Nexgen Pharma, Inc.
ANDA 084050	Isoniazid Tablets, 100 mg	Do.
ANDA 084220	Meprobamate Tablets, 200 mg	Do.
ANDA 084238	Pentobarbital Sodium Tablets, 100 mg	Do.
ANDA 084487	Phentermine HCl Capsules USP, 30 mg	Upsher-Smith Laboratories, LLC, 301 South Cherokee St., Denver, CO 80223.
ANDA 084589	Meprobamate Tablets, 400 mg	Nexgen Pharma, Inc.
ANDA 084915	Folic Acid Tablets, 1 mg	Do.
ANDA 085499	Potassium Chloride for Injection Concentrate USP, 2 milliequivalents/mL.	Baxter Healthcare Corp., 1620 Waukegan Rd., McGaw Park, IL 60085.
ANDA 085985	Dimenhydrinate Tablets, 50 mg	Nexgen Pharma, Inc.
ANDA 086020	Phendimetrazine Tartrate Tablets, 35 mg	Do.
ANDA 086187	Brompheniramine Maleate Tablets, 4 mg	Do.
ANDA 086392	Meclizine HCl Tablets, 25 mg (Chewable)	Do.
ANDA 086835	Polaramine (dexchlorpheniramine maleate) Tablets, 2 mg	Merck Sharp & Dohme Corp., Subsidiary of Merck & Co., Inc.
ANDA 086837	Polaramine (dexchlorpheniramine maleate) Syrup, 2 mg/5 mL.	Do.

TABLE 1—Continued

Application No.	Drug	Applicant
ANDA 087766	Thioridazine HCl Oral Concentrate, 30 mg/mL	Alpharma US Pharms., Subsidiary of Teva Pharmaceuticals USA, Inc., 425 Privet Rd., Horsham, PA 19044.
ANDA 087858	Isoetharine Mesylate Metered Dose Inhaler, 0.34 mg/inhalation.	Do.
ANDA 088430	Phentermine HCl Capsules USP, 30 mg	Upsher-Smith Laboratories, LLC.
ANDA 089381	Hydroxyzine HCl Tablets USP, 10 mg	Sun Pharmaceutical Industries, Inc.
ANDA 089382	Hydroxyzine HCl Tablets USP, 25 mg	Do.
ANDA 089383	Hydroxyzine HCl Tablets USP, 50 mg	Do.
ANDA 089481	Acetaminophen and Codeine Phosphate Tablets USP, 300 mg/15 mg.	American Therapeutics, Inc., 89 Carlough Rd., Bohemia, NY 11716.
ANDA 089482	Acetaminophen and Codeine Phosphate Tablets USP, 300 mg/30 mg.	Do.
ANDA 089489	Diphenhydramine HCl Capsules, 50 mg	Sun Pharmaceutical Industries, Inc.
ANDA 091258	Furosemide Tablets USP, 20 mg, 40 mg, and 80 mg	Do.
NDA 208056	Dexilant Solutab (dexlansoprazole) Delayed-Release Orally Disintegrating Tablets, 30 mg.	Takeda Pharmaceuticals U.S.A., Inc., One Takeda Pkwy., Deerfield, IL 60015.

Therefore, approval of the applications listed in the table, and all amendments and supplements thereto, is hereby withdrawn as of March 26, 2018. Introduction or delivery for introduction into interstate commerce of products without approved new drug applications violates section 301(a) and (d) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 331(a) and (d)). Drug products that are listed in the table that are in inventory on March 26, 2018 may continue to be dispensed until the inventories have been depleted or the drug products have reached their expiration dates or otherwise become violative, whichever occurs first.

Dated: February 15, 2018.

Leslie Kux,

Associate Commissioner for Policy.

[FR Doc. 2018–03607 Filed 2–21–18; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2018–N–0405]

Agency Information Collection Activities; Proposed Collection; Comment Request; Medical Device Recall Authority

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA or Agency) is announcing an opportunity for public comment on the proposed collection of certain information by the Agency. Under the Paperwork Reduction Act of 1995 (PRA), Federal Agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, and to allow 60 days for public comment in response to the notice. This notice solicits comments on information collection related to Medical Device Recall Authority.

DATES: Submit either electronic or written comments on the collection of information by April 23, 2018.

ADDRESSES: You may submit comments as follows. Please note that late, untimely filed comments will not be considered. Electronic comments must be submitted on or before April 23, 2018. The *https://www.regulations.gov* electronic filing system will accept comments until midnight Eastern Time at the end of April 23, 2018. Comments received by mail/hand delivery/courier (for written/paper submissions) will be considered timely if they are postmarked or the delivery service acceptance receipt is on or before that date.

Electronic Submissions

Submit electronic comments in the following way:

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

Written/Paper Submissions

Submit written/paper submissions as follows:

- *Mail/Hand delivery/Courier (for written/paper submissions):* Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.
- For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in ''Instructions.''

Instructions: All submissions received must include the Docket No. FDA–2018–N–0405 for ''Medical Device Recall Authority.'' Received comments, those filed in a timely manner (see **ADDRESSES**), will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *https://www.regulations.gov* or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday.

- Confidential Submissions—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS

CONFIDENTIAL INFORMATION.'' The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *https://www.regulations.gov.* Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *https://www.gpo.gov/fdsys/pkg/FR-2015-09-18/pdf/2015-23389.pdf.*

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

FOR FURTHER INFORMATION CONTACT: Amber Sanford, Office of Operations, Food and Drug Administration, Three White Flint North, 10A-12M, 11601 Landsdown St., North Bethesda, MD 20852, 301–796–8867, *PRAStaff@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION: Under the PRA (44 U.S.C. 3501–3520), Federal Agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. ''Collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes Agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3506(c)(2)(A)) requires Federal Agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, FDA is publishing notice of the proposed collection of information set forth in this document.

With respect to the following collection of information, FDA invites comments on these topics: (1) Whether the proposed collection of information is necessary for the proper performance of FDA's functions, including whether the information will have practical utility; (2) the accuracy of FDA's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques, when appropriate, and other forms of information technology.

Medical Device Recall Authority—21 CFR Part 810

OMB Control Number 0910–0432—Extension

This collection of information implements section 518(e) of the Federal Food, Drug, and Cosmetic Act (FD&C Act) (21 U.S.C. 360h(e)) and part 810 (21 CFR part 810), mandatory medical device recall authority provisions. Section 518(e) of the FD&C Act provides FDA with the authority to issue an order requiring an appropriate person, including manufacturers, importers, distributors, and retailers of a device, if FDA finds that there is reasonable probability that the device intended for human use would cause serious adverse health consequences or death, to: (1) Immediately cease distribution of such device and (2) immediately notify health professionals and device-user facilities of the order and to instruct such professionals and facilities to cease use of such device.

FDA will then provide the person named in the cease distribution and notification order with the opportunity for an informal hearing on whether the order should be amended to require a mandatory recall of the device.

If, after providing the opportunity for an informal hearing, FDA determines that such an order is necessary, the Agency may amend the order to require a mandatory recall.

FDA issued part 810 to implement the provisions of section 518 of the FD&C Act. The information collected under the mandatory recall authority provisions will be used by FDA to implement mandatory recalls.

TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN [1]

Collection activity/21 CFR section	Number of respondents	Number of responses per respondent	Total annual responses	Average burden per response	Total hours
Collections Specified in the Order—810.10(d)	2	1	2	8	16
Request for Regulatory Hearing—810.11(a)	1	1	1	8	8
Written Request for Review—810.12(a)-(b)	1	1	1	8	8
Mandatory Recall Strategy—810.14	2	1	2	16	32
Periodic Status Reports—810.16(a)-(b)	2	12	24	40	960
Termination Request—810.17(a)	2	1	2	8	16
Total Hours					1,040

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

TABLE 2—ESTIMATED ANNUAL RECORDKEEPING BURDEN [1]

Collection activity/21 CFR section	Number of recordkeepers	Number of records per recordkeeper	Total annual records	Average burden per recordkeeping	Total hours
Documentation of Notifications to Recipients—810.15(b)	2	1	1	8	8

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

TABLE 3—ESTIMATED ANNUAL THIRD-PARTY DISCLOSURE BURDEN [1]

Collection activity/21 CFR section	Number of respondents	Number of disclosures per respondent	Total annual disclosures	Average burden per disclosure	Total hours
Notification to Recipients—810.15(a)–(c)	2	1	2	12	24
Notification to Recipients; Follow-up—810.15(d)	2	1	2	4	8
Notification of Consignees by Recipients—810.15(e)	10	1	10	1	10
Total					42

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

The burden estimate has not changed for information collection related to section 518(e) of the FD&C Act and part 810 since the last OMB approval.

Dated: February 14, 2018.

Leslie Kux,

Associate Commissioner for Policy.

[FR Doc. 2018–03605 Filed 2–21–18; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2014–N–2029]

Agency Information Collection Activities; Proposed Collection; Comment Request; Administrative Practices and Procedures; Formal Evidentiary Public Hearing

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA or Agency) is announcing an opportunity for public comment on the proposed collection of certain information by the Agency. Under the Paperwork Reduction Act of 1995 (PRA), Federal Agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, and to allow 60 days for public comment in response to the notice. This notice solicits comments on administrative practices and procedures; formal evidentiary public hearing.

DATES: Submit either electronic or written comments on the collection of information by April 23, 2018.

ADDRESSES: You may submit comments as follows. Please note that late, untimely filed comments will not be considered. Electronic comments must be submitted on or before April 23, 2018. The *https://www.regulations.gov* electronic filing system will accept comments until midnight Eastern Time at the end of April 23, 2018. Comments received by mail/hand delivery/courier (for written/paper submissions) will be considered timely if they are postmarked or the delivery service acceptance receipt is on or before that date.

Electronic Submissions

Submit electronic comments in the following way:

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

Written/Paper Submissions

Submit written/paper submissions as follows:

- *Mail/Hand delivery/Courier (for written/paper submissions):* Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.
- For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in ''Instructions.''

Instructions: All submissions received must include the Docket No. FDA–2014–N–2029 for ''Administrative Practices and Procedures; Formal Evidentiary Public Hearing.'' Received comments, those filed in a timely manner (see **ADDRESSES**), will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *https://www.regulations.gov* or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday.

- Confidential Submissions—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *https://www.regulations.gov.* Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *https://www.gpo.gov/fdsys/pkg/FR-2015-09-18/pdf/2015-23389.pdf.*

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to *https://www.regulations.gov* and insert the

docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT: Amber Sanford, Office of Operations, Food and Drug Administration, Three White Flint North, 10A–12M, 11601 Landsdown St., North Bethesda, MD 20852, 301–796–8867, *PRAStaff@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION: Under the PRA (44 U.S.C. 3501–3520), Federal Agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. ''Collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes Agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3506(c)(2)(A)) requires Federal Agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, FDA is publishing notice of the proposed collection of information set forth in this document.

With respect to the following collection of information, FDA invites comments on these topics: (1) Whether the proposed collection of information is necessary for the proper performance of FDA's functions, including whether the information will have practical utility; (2) the accuracy of FDA's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques, when appropriate, and other forms of information technology.

Administrative Practices and Procedures (21 CFR 10.30, 10.33, 10.35, and 10.85); Formal Evidentiary Public Hearing (21 CFR 12.22 and 12.45)

(OMB Control Number 0910–0191)—Extension

The Administrative Procedures Act (5 U.S.C. 553(e)) provides that every Agency shall give an interested person the right to petition for issuance, amendment, or repeal of a rule. Section 10.30 (21 CFR 10.30) sets forth the format and procedures by which an interested person may submit to FDA, in accordance with § 10.20 (21 CFR 10.20), a citizen petition requesting the Commissioner of Food and Drugs (the Commissioner) to issue, amend, or revoke a regulation or order, or to take or refrain from taking any other form of administrative action.

The Commissioner may grant or deny such a petition, in whole or in part, and may grant such other relief or take other action as the petition warrants. Respondents are individuals or households, State or local governments, and not-for-profit institutions or groups.

Section 10.33 (21 CFR 10.33), issued under section 701(a) of the Federal, Food, Drug, and Cosmetic Act (FD&C Act) (21 U.S.C. 371(a)), sets forth the format and procedures by which an interested person may request reconsideration of part or all of a decision of the Commissioner on a petition submitted under 21 CFR 10.25 (Initiation of administrative proceedings). A petition for reconsideration must contain a full statement in a well-organized format of the factual and legal grounds upon which the petition relies. The grounds must demonstrate that relevant information and views contained in the administrative record were not previously or not adequately considered by the Commissioner. The respondent must submit a petition no later than 30 days after the decision involved. However, the Commissioner may, for good cause, permit a petition to be filed after 30 days. An interested person who wishes to rely on information or views not included in the administrative record shall submit them with a new petition to modify the decision. FDA uses the information provided in the request to determine whether to grant the petition for reconsideration. Respondents to this collection of information are individuals of households, State or local governments, not-for-profit institutions, and businesses or other for-profit institutions who are requesting from the Commissioner of FDA a reconsideration of a matter.

Section 10.35 (21 CFR 10.35), issued under section 701(a) of the FD&C Act, sets forth the format and procedures by which an interested person may request, in accordance with § 10.20, the Commissioner to stay the effective date of any administrative action.

Such a petition must do the following: (1) Identify the decision involved; (2) state the action requested, including the length of time for which a stay is requested; and (3) include a statement of the factual and legal grounds on which the interested person relies in seeking the stay. FDA uses the information provided in the request to determine whether to grant the petition for stay of action.

Respondents to this information collection are interested persons who choose to file a petition for an administrative stay of action.

Section 10.85 (21 CFR 10.85), issued under section 701(a) of the FD&C Act, sets forth the format and procedures by which an interested person may request, in accordance with § 10.20, an advisory opinion from the Commissioner on a matter of general applicability. When making a request, the petitioner must provide a concise statement of the issues and questions on which an opinion is requested, and a full statement of the facts and legal points relevant to the request. Respondents to this collection of information are interested persons seeking an advisory opinion from the Commissioner.

FDA has developed a method for electronic submission of citizen petitions. The Agency still allows for non-electronic submissions; however, electronic submissions of a citizen petition to a specific electronic docket presents a simpler and more straightforward approach. FDA has created a single docket on *https://www.regulations.gov,* the U.S. Government's consolidated docket website for Federal Agencies, for the initial electronic submission of all citizen petitions. The advantage to this change is that it ensures efficiency and ease in communication, quicker interaction between citizen petitioners and FDA, and easier access to FDA to seek input through the citizen petition process.

The regulations in 21 CFR 12.22, issued under section 701(e)(2) of the FD&C Act, set forth the instructions for filing objections and requests for a hearing on a regulation or order under § 12.20(d) (21 CFR 12.20(d)). Objections and requests must be submitted within the time specified in § 12.20(e). Each objection, for which a hearing has been requested, must be separately numbered and specify the provision of the regulation or the proposed order. In addition, each objection must include a detailed description and analysis of the factual information and any other document, with some exceptions, supporting the objection. Failure to include this information constitutes a waiver of the right to a hearing on that objection. FDA uses the description and analysis to determine whether a hearing request is justified. The description and

analysis may be used only for the purpose of determining whether a hearing has been justified under 21 CFR 12.24 and does not limit the evidence that may be presented if a hearing is granted.

Respondents to this information collection are those parties that may be adversely affected by an order or regulation.

Section 12.45 (21 CFR 12.45), issued under section 701 of the FD&C Act, sets forth the format and procedures for any interested person to file a petition to participate in a formal evidentiary hearing, either personally or through a representative. Section 12.45 requires that any person filing a notice of participation state their specific interest in the proceedings, including the specific issues of fact about which the person desires to be heard. This section also requires that the notice include a statement that the person will present testimony at the hearing and will comply with specific requirements in 21 CFR 12.85, or, in the case of a hearing before a Public Board of Inquiry, concerning disclosure of data and information by participants (21 CFR 13.25). In accordance with § 12.45(e) the presiding officer may omit a participant's appearance.

The presiding officer and other participants will use the collected information in a hearing to identify specific interests to be presented. This preliminary information serves to expedite the prehearing conference and commits participation.

The respondents are individuals or households, State or local governments, not-for-profit institutions and businesses, or other for-profit groups and institutions.

FDA estimates the burden of this collection of information as follows:

TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN [1]

21 CFR section	Number of respondents	Number of responses per respondent	Total annual responses	Average burden per response	Total hours
10.30—Citizen petition	220	1	220	24	5,280
10.33—Administrative reconsideration of action	6	1	6	10	60
10.35—Administrative stay of action	6	1	5	10	50
10.85—Requests for Advisory opinions	4	1	4	16	64
12.22—Filing objections and requests for a hearing on a regulation or order	5	1	5	20	100
12.45—Notice of participation	5	1	5	3	15
Total					5,569

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

The burden estimates for this collection of information are based on Agency records and experience over the past 3 years. The increase in burden hours is due to an increase in the number of respondents under several provisions.

Dated: February 14, 2018.

Leslie Kux,

Associate Commissioner for Policy.

[FR Doc. 2018–03604 Filed 2–21–18; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2018–N–0467]

Joint Meeting of the Blood Products Advisory Committee and the Microbiology Devices Panel of the Medical Devices Advisory Committee; Notice of Meeting

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) announces a forthcoming joint public advisory committee meeting of the Blood Products Advisory Committee and the Microbiology Devices Panel of the Medical Devices Advisory Committee. The Committee will function as a medical device panel to provide advice and recommendations to the Agency on classification of devices. The Committee will also provide advice and recommendations to the FDA on research programs in the Office of Blood Research and Review. At least one portion of the meeting will be closed to the public.

DATES: The meeting will be held on March 21, 2018, from 8 a.m. to 5:15 p.m. and March 22, 2018, from 8 a.m. to 5 p.m.

ADDRESSES: FDA White Oak Campus, 10903 New Hampshire Ave., Building 31 Conference Center, the Great Room (Rm. 1503, sections B&C), Silver Spring, MD 20993–0002. Answers to commonly asked questions including information regarding special accommodations due to a disability, visitor parking, and transportation may be accessed at: *https://www.fda.gov/AdvisoryCommittees/AboutAdvisoryCommittees/ucm408555.htm.*

FOR FURTHER INFORMATION CONTACT: Bryan Emery or Joanne Lipkind, Division of Scientific Advisors and Consultants, Center for Biologics Evaluation and Research (CBER), Food and Drug Administration, 10903 New Hampshire Ave., Silver Spring, MD 20993–0002, Bldg. 71, Rm. 6132, at 240–402–8054, *bryan.emery@fda.hhs.gov* and Rm. 6270 at 240–402–8106, *joanne.lipkind@fda.hhs.gov* respectively, or FDA Advisory Committee Information Line, 1–800–741–8138 (301–443–0572 in the Washington, DC area). A notice in the **Federal Register** about last minute modifications that impact a previously announced advisory committee meeting cannot always be published quickly enough to provide timely notice. Therefore, you should always check the Agency's website at *https://www.fda.gov/AdvisoryCommittees/default.htm* and scroll down to the appropriate advisory committee meeting link, or call the advisory committee information line to learn about possible modifications before coming to the meeting. For those unable to attend in person, the meeting will also be available via webcast. The webcast will be available at the following link for both days: *https://collaboration.fda.gov/bpacmdac2018/.*

SUPPLEMENTARY INFORMATION:

Agenda: During the morning session on March 21, 2018, the Joint Committee

will discuss and make recommendations regarding the device reclassification from Class III to Class II of nucleic acid and serology-based point-of-care and laboratory-based in vitro diagnostic devices indicated for use as aids in the diagnosis of human immunodeficiency virus (HIV) infection. In the afternoon session, the Committee will hear an overview of the research presentations on the research programs of the Laboratory of Emerging Pathogens, the Laboratory of Bacterial and Transmissible Spongiform Encephalopathy Agents, and the Laboratory of Molecular Virology in the Division of Emerging Transfusion-Transmitted Diseases, Office of Blood Research and Review Center for Biologics Evaluation and Research. After the open session, the meeting will be closed to the public to permit discussion where disclosure would constitute an unwarranted invasion of personal privacy in accordance with 5 U.S.C 552b(c)(6).

On March 22, 2018, the Joint Committee will discuss and make recommendations regarding the reclassification from Class III to Class II of nucleic acid and serology-based in vitro diagnostic devices indicated for use as aids in diagnosis of hepatitis C virus (HCV) infection and/or for use as aids in the management of HCV infected patients.

All the devices that will be discussed by the Committee during the 2-day meeting are post-amendment devices that currently are classified into Class III under section 513(f)(1) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 360c(f)(1)).

FDA intends to make background material available to the public no later than 2 business days before the meeting. If FDA is unable to post the background material on its website prior to the meeting, the background material will be made publicly available at the location of the advisory committee meeting, and the background material will be posted on FDA's website after the meeting. Background material is available at *https://www.fda.gov/AdvisoryCommittees/Calendar/default.htm.* Scroll down to the appropriate advisory committee meeting link.

Procedure: Interested persons may present data, information, or views, orally or in writing, on issues pending before the committee. Written submissions may be made to the contact person on or before March 14, 2018. Oral presentations from the public will be scheduled between approximately 12:25 p.m. to 1:25 p.m. and from 4:25 p.m. to 4:40 p.m. on March 21, 2018, and between approximately 11:15 a.m. to 12:15 p.m. on March 22, 2018. Those individuals interested in making formal oral presentations should notify the contact person and submit a brief statement of the general nature of the evidence or arguments they wish to present, the names and addresses of proposed participants, and an indication of the approximate time requested to make their presentation on or before March 6, 2018. Time allotted for each presentation may be limited. If the number of registrants requesting to speak is greater than can be reasonably accommodated during the scheduled open public hearing session, FDA may conduct a lottery to determine the speakers for the scheduled open public hearing session. The contact person will notify interested persons regarding their request to speak by March 7, 2018.

Persons attending FDA's advisory committee meetings are advised that the Agency is not responsible for providing access to electrical outlets.

FDA welcomes the attendance of the public at its advisory committee meetings and will make every effort to accommodate persons with disabilities. If you require accommodations due to a disability, please contact Bryan Emery at least 7 days in advance of the meeting (See, **FOR FURTHER INFORMATION CONTACT**).

Closed Committee Deliberations: On March 21, 2018, between 4:40 p.m. and 5:15 p.m., the meeting will be closed to permit discussion where disclosure would constitute a clearly unwarranted invasion of personal privacy (5 U.S.C. 552b(c)(6)). The recommendations of the advisory committee regarding the progress of the investigator's research will, along with other information, be used in making decisions regarding pay adjustments of service fellows or promotion of individual scientists who are permanent CBER staff.

FDA is committed to the orderly conduct of its advisory committee meetings. Please visit our website at *https://www.fda.gov/AdvisoryCommittees/AboutAdvisoryCommittees/ucm111462.htm* for procedures on public conduct during advisory committee meetings.

Notice of this meeting is given under the Federal Advisory Committee Act (5 U.S.C. app.)

Dated: February 15, 2018.

Leslie Kux,

Associate Commissioner for Policy.

[FR Doc. 2018–03614 Filed 2–21–18; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2012–N–0115]

Agency Information Collection Activities; Proposed Collection; Comment Request; Guidance for Industry and Food and Drug Administration Staff—Class II Special Controls Guidance Document: Automated Blood Cell Separator Device Operating by Centrifugal or Filtration Principle

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA or Agency) is announcing an opportunity for public comment on the proposed collection of certain information by the Agency. Under the Paperwork Reduction Act of 1995 (PRA), Federal Agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, and to allow 60 days for public comment in response to the notice. This notice solicits comments on the collection of information concerning class II special controls for an automated blood cell separator device operating by centrifugal or filtration separation principle.

DATES: Submit either electronic or written comments on the collection of information by April 23, 2018.

ADDRESSES: You may submit comments as follows. Please note that late, untimely filed comments will not be considered. Electronic comments must be submitted on or before April 23, 2018. The *https://www.regulations.gov* electronic filing system will accept comments until midnight Eastern Time at the end of April 23, 2018. Comments received by mail/hand delivery/courier (for written/paper submissions) will be considered timely if they are postmarked or the delivery service acceptance receipt is on or before that date.

Electronic Submissions

Submit electronic comments in the following way:

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *https://www.regulations.gov* will be posted to

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

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

Written/Paper Submissions

Submit written/paper submissions as follows:

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

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

Instructions: All submissions received must include the Docket No. FDA–2012–N–0115 for ''Guidance for Industry and FDA Staff—Class II Special Controls Guidance Document: Automated Blood Cell Separator Device Operating by Centrifugal or Filtration Separation Principle.'' Received comments, those filed in a timely manner (see **ADDRESSES**), will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *https://www.regulations.gov* or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday.

• Confidential Submissions—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *https://www.regulations.gov.* Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *https://www.gpo.gov/fdsys/pkg/FR-2015-09-18/pdf/2015-23389.pdf.*

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

FOR FURTHER INFORMATION CONTACT: Ila S. Mizrachi, Office of Operations, Food and Drug Administration, Three White Flint North, 10A–12M, 11601 Landsdown St., North Bethesda, MD 20852, 301–796–7726, *PRAStaff@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION: Under the PRA (44 U.S.C. 3501–3520), Federal Agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. ''Collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes Agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3506(c)(2)(A)) requires Federal Agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, FDA is publishing notice of the proposed collection of information set forth in this document.

With respect to the following collection of information, FDA invites comments on these topics: (1) Whether the proposed collection of information is necessary for the proper performance of FDA's functions, including whether the information will have practical utility; (2) the accuracy of FDA's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques, when appropriate, and other forms of information technology.

Guidance for Industry and FDA Staff—Class II Special Controls Guidance Document: Automated Blood Cell Separator Device Operating by Centrifugal or Filtration Separation Principle, OMB Control Number 0910–0594—Extension

Under the Safe Medical Devices Act of 1990 (Pub. L. 101–629), FDA may establish special controls, including performance standards, postmarket surveillance, patient registries, guidelines, and other appropriate actions it believes necessary to provide reasonable assurance of the safety and effectiveness of the device. The special control guidance serves as the special control for the automated blood cell separator device operating by centrifugal or filtration separation principle intended for the routine collection of blood and blood components (§ 864.9245 (21 CFR 864.9245)).

For currently marketed products not approved under the premarket approval process, the manufacturer should file with FDA for 3 consecutive years an annual report on the anniversary date of the device reclassification from class III to class II or on the anniversary date of the 510(k) of the Federal Food, Drug, and Cosmetic Act (FD&C Act) (21 U.S.C. 360(k)) clearance. Any subsequent change to the device requiring the submission of a premarket notification in accordance with section 510(k) of the FD&C Act should be included in the annual report. Also, a manufacturer of a device determined to be substantially equivalent to the centrifugal or filtration-based automated cell separator device intended for the routine collection of blood and blood components should comply with the same general and special controls.

The annual report should include, at a minimum, a summary of anticipated and unanticipated adverse events that have occurred and that are not required to be reported by manufacturers under Medical Device Reporting (MDR) (part

803 (21 CFR part 803)). The reporting of adverse device events summarized in an annual report will alert FDA to trends or clusters of events that might be a safety issue otherwise unreported under the MDR regulation. The report should also include any subsequent change to the preamendments class III device requiring a 30-day notice in accordance with 21 CFR 814.39(f).

Reclassification of this device from class III to class II relieves manufacturers of the burden of complying with the premarket approval requirements of section 515 of the FD&C Act (21 U.S.C. 360e) and may permit small potential competitors to enter the marketplace by reducing the burden. Although the special control guidance recommends that manufacturers of these devices file with FDA an annual report for 3 consecutive years, this would be less burdensome than the current postapproval requirements under 21 CFR part 814, subpart E, including the submission of periodic reports under 21 CFR 814.84.

Collecting or transfusing facilities, the intended users of the device, and the device manufacturers have certain responsibilities under the Federal regulations. For example, collecting or transfusing facilities are required to maintain records of any reports of complaints of adverse reactions (21 CFR 606.170), while the device manufacturer is responsible for conducting an investigation of each event that is reasonably known to the manufacturer and evaluating the cause of the event (§ 803.50(b) (21 CFR 803.50(b)). In addition, manufacturers of medical devices are required to submit to FDA individual adverse event reports of death, serious injury, and malfunctions (§ 803.50).

In the special control guidance document, FDA recommends that manufacturers include in their three annual reports a summary of adverse reactions maintained by the collecting or transfusing facility or similar reports of adverse events collected.

FDA estimates the burden of this collection of information as follows:

TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN [1]

Reporting activity	Number of respondents	Number of responses per respondent	Total annual responses	Average burden per response	Total hours
Annual Report	3	1	3	5	15

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

Based on FDA records, there are approximately three manufacturers of automated blood cell separator devices. We estimate that the manufacturers will spend approximately 5 hours preparing and submitting the annual report. The total burden hours are reduced from previous collections due to a decrease in the number of manufacturers.

Other burden hours required for § 864.9245 are reported and approved under OMB control number 0910–0120 (premarket notification submission 510(k), 21 CFR part 807, subpart E), and OMB control number 0910–0437 (MDR, part 803).

Dated: February 15, 2018.

Leslie Kux,

Associate Commissioner for Policy.

[FR Doc. 2018–03613 Filed 2–21–18; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2015–E–4020]

Determination of Regulatory Review Period for Purposes of Patent Extension; OFEV

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA or the Agency) has determined the regulatory review period for OFEV and is publishing this notice of that determination as required by law. FDA has made the determination because of the submission of an application to the Director of the U.S. Patent and Trademark Office (USPTO), Department of Commerce, for the extension of a patent which claims that human drug product.

DATES: Anyone with knowledge that any of the dates as published (in the **SUPPLEMENTARY INFORMATION** section) are incorrect may submit either electronic or written comments and ask for a redetermination by April 23, 2018. Late, untimely filed comments will not be considered. Electronic comments must be submitted on or before April 23, 2018. The *https://www.regulations.gov* electronic filing system will accept comments until midnight Eastern Time at the end of April 23, 2018. Comments received by mail/hand delivery/courier (for written/paper submissions) will be considered timely if they are postmarked or the delivery service acceptance receipt is on or before that date. Furthermore, any interested person may petition FDA for a determination regarding whether the applicant for extension acted with due diligence during the regulatory review period by August 21, 2018. See ''Petitions'' in the **SUPPLEMENTARY INFORMATION** section for more information.

ADDRESSES: You may submit comments as follows:

Electronic Submissions

Submit electronic comments in the following way:

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

Written/Paper Submissions

Submit written/paper submissions as follows:

- *Mail/Hand delivery/Courier (for written/paper submissions):* Dockets Management Staff (HFA–305), Food and

Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

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

Instructions: All submissions received must include the Docket No. FDA–2015–E–4020 for ''Determination of Regulatory Review Period for Purposes of Patent Extension; OFEV.'' Received comments, those filed in a timely manner (see **ADDRESSES**), will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *https://www.regulations.gov* or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday.

• Confidential Submissions—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *https://www.regulations.gov.* Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with § 10.20 (21 CFR 10.20) and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *https://www.gpo.gov/fdsys/pkg/FR-2015-09-18/pdf/2015-23389.pdf.*

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

FOR FURTHER INFORMATION CONTACT: Beverly Friedman, Office of Regulatory Policy, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, Rm. 6250, Silver Spring, MD 20993, 301–796–3600.

SUPPLEMENTARY INFORMATION:

I. Background

The Drug Price Competition and Patent Term Restoration Act of 1984 (Pub. L. 98–417) and the Generic Animal Drug and Patent Term Restoration Act (Pub. L. 100–670) generally provide that a patent may be extended for a period of up to 5 years so long as the patented item (human drug product, animal drug product, medical device, food additive, or color additive) was subject to regulatory review by FDA before the item was marketed. Under these acts, a product's regulatory review period forms the basis for determining the amount of extension an applicant may receive.

A regulatory review period consists of two periods of time: A testing phase and an approval phase. For human drug products, the testing phase begins when the exemption to permit the clinical investigations of the drug becomes effective and runs until the approval phase begins. The approval phase starts with the initial submission of an application to market the human drug product and continues until FDA grants permission to market the drug product. Although only a portion of a regulatory review period may count toward the actual amount of extension that the Director of USPTO may award (for example, half the testing phase must be subtracted as well as any time that may have occurred before the patent was issued), FDA's determination of the length of a regulatory review period for a human drug product will include all of the testing phase and approval phase as specified in 35 U.S.C. 156(g)(1)(B).

FDA has approved for marketing the human drug product OFEV (nintedanib esylate). OFEV is indicated for treatment of idiopathic pulmonary fibrosis. Subsequent to this approval, the USPTO received a patent term restoration application for OFEV (U.S. Patent No. 6,762,180) from Boehringer Ingelheim Pharma Gmbh & Co. KG, and the USPTO requested FDA's assistance in determining this patent's eligibility for patent term restoration. In a letter dated December 17, 2015, FDA advised the USPTO that this human drug product had undergone a regulatory review period and that the approval of OFEV represented the first permitted commercial marketing or use of the product. Thereafter, the USPTO requested that FDA determine the product's regulatory review period.

II. Determination of Regulatory Review Period

FDA has determined that the applicable regulatory review period for OFEV is 3,480 days. Of this time, 3,313 days occurred during the testing phase of the regulatory review period, while 167 days occurred during the approval phase. These periods of time were derived from the following dates:

1. *The date an exemption under section 505(i) of the Federal Food, Drug, and Cosmetic Act (the FD&C Act) (21 U.S.C. 355(i)) became effective:* April 7, 2005. The applicant claims April 8, 2005, as the date the investigational new drug application (IND) became effective. However, FDA records indicate that the IND effective date was April 7, 2005, which was 30 days after FDA receipt of the IND.

2. *The date the application was initially submitted with respect to the human drug product under section 505(b) of the FD&C Act:* May 2, 2014. FDA has verified the applicant's claim that the new drug application (NDA) for OFEV (NDA 205832) was initially submitted on May 2, 2014.

3. *The date the application was approved:* October 15, 2014. FDA has verified the applicant's claim that NDA 205832 was approved on October 15, 2014.

This determination of the regulatory review period establishes the maximum potential length of a patent extension. However, the USPTO applies several statutory limitations in its calculations of the actual period for patent extension. In its application for patent extension, this applicant seeks 1,822 days of patent term extension.

III. Petitions

Anyone with knowledge that any of the dates as published are incorrect may submit either electronic or written comments and, under 21 CFR 60.24 ask for a redetermination (see DATES). Furthermore, as specified in § 60.30 (21 CFR 60.30), any interested person may petition FDA for a determination regarding whether the applicant for extension acted with due diligence during the regulatory review period. To meet its burden, the petition must comply with all the requirements of § 60.30, including but not limited to: must be timely (see DATES), must be filed in accordance with § 10.20, must contain sufficient facts to merit an FDA investigation, and must certify that a true and complete copy of the petition

has been served upon the patent applicant. (See H. Rept. 857, part 1, 98th Cong., 2d sess., pp. 41–42, 1984.) Petitions should be in the format specified in 21 CFR 10.30.

Submit petitions electronically to *https://www.regulations.gov* at Docket No. FDA–2013–S–0610. Submit written petitions (two copies are required) to the Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

Dated: February 15, 2018.

Leslie Kux,

Associate Commissioner for Policy.

[FR Doc. 2018–03606 Filed 2–21–18; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications,the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Biochemistry and Biophysics of Biological Macromolecules Fellowship Applications.

Date: March 1, 2018.

Time: 11:00 a.m. to 4:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Mike Radtke, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4176, MSC 7806, Bethesda, MD 20892, 301–435–1728, radtkem@csr.nih.gov.

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846-93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: February 16, 2018.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2018–03666 Filed 2–21–18; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Aging; Notice of Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of a meeting of the Board of Scientific Counselors, NIA. The meeting will be open to the public as indicated below, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting.

The meeting will be closed to the public as indicated below in accordance with the provisions set forth in section 552b(c)(6), Title 5 U.S.C., as amended for the review, discussion, and evaluation of individual intramural programs and projects conducted by the NATIONAL INSTITUTE ON AGING, including consideration of personnel qualifications and performance, and the competence of individual investigators, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Board of Scientific Counselors, NIA

Date: April 10, 2018

Closed: 8:00 a.m. to 8:20 a.m.

Agenda: To review and evaluate personal qualifications and performance, and competence of individual investigators.

Place: National Institute on Aging, Biomedical Research Center, 3rd Floor Conference Room 03C227, 251 Bayview Boulevard, Baltimore, MD 21224.

Open: 8:20 a.m. to 11:50 a.m.

Agenda: Committee discussion, individual presentations, laboratory overview.

Place: National Institute on Aging, Biomedical Research Center, 3rd Floor Conference Room 03C227, 251 Bayview Boulevard, Baltimore, MD 21224.

Closed: 11:50 a.m. to 12:10 p.m.

Agenda: To review and evaluate personal qualifications and performance, and competence of individual investigators.

Place: National Institute on Aging, Biomedical Research Center, 3rd Floor Conference Room 03C227, 251 Bayview Boulevard, Baltimore, MD 21224.

Closed: 12:10 p.m. to 2:20 p.m.

Agenda: To review and evaluate personal qualifications and performance, and competence of individual investigators.

Place: National Institute on Aging, Biomedical Research Center, 3rd Floor Conference Room 03C227, 251 Bayview Boulevard, Baltimore, MD 21224.

Closed: 2:20 p.m. to 3:45 p.m.

Agenda: To review and evaluate personal qualifications and performance, and competence of individual investigators.

Place: National Institute on Aging, Biomedical Research Center, 3rd Floor Conference Room 03C227, 251 Bayview Boulevard, Baltimore, MD 21224.

Closed: 3:45 p.m. to 5:20 p.m.

Agenda: To review and evaluate personal qualifications and performance, and competence of individual investigators.

Place: National Institute on Aging, Biomedical Research Center, 3rd Floor Conference Room 03C227, 251 Bayview Boulevard, Baltimore, MD 21224.

Closed: 5:20 p.m. to 6:20 p.m.

Agenda: To review and evaluate personal qualifications and performance, and competence of individual investigators.

Place: National Institute on Aging, Biomedical Research Center, 3rd Floor Conference Room 03C227, 251 Bayview Boulevard, Baltimore, MD 21224.

Contact Person: Luigi Ferrucci, Ph.D., MD, Scientific Director, National Institute on Aging, 251 Bayview Boulevard, Suite 100, Room 4C225, Baltimore, MD 21224, 410–558–8110, *LF27Z@NIH.GOV.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.866, Aging Research, National Institutes of Health, HHS)

Dated: February 15, 2018.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2018–03558 Filed 2–21–18; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Mental Health; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which

would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Mental Health Special Emphasis Panel; Clinical Trials to Test the Effectiveness of Treatment, Preventive, and Services Interventions (R01).

Date: March 16, 2018.

Time: 8:00 a.m. to 12:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Hotel Palomar, 2121 P Street NW, Washington, DC 20037.

Contact Person: Karen Gavin-Evans, Ph.D., Scientific Review Officer, Division of Extramural Activities, National Institute of Mental Health, NIH Neuroscience Center, 6001 Executive Boulevard, Room 6153, MSC 9606, Bethesda, MD 20892, 301–451–2356, *gavinevanskm@mail.nih.gov*.

Name of Committee: National Institute of Mental Health Special Emphasis Panel; Pilot Effectiveness Trials for Treatment, Preventive and Services Interventions (R34).

Date: March 16, 2018.

Time: 12:00 p.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Hotel Palomar, 2121 P Street NW, Washington, DC 20037.

Contact Person: Karen Gavin-Evans, Ph.D., Scientific Review Officer, Division of Extramural Activities, National Institute of Mental Health, NIH Neuroscience Center, 6001 Executive Boulevard, Room 6153, MSC 9606, Bethesda, MD 20892, 301–451–2356, *gavinevanskm@mail.nih.gov*.

Name of Committee: National Institute of Mental Health Special Emphasis Panel; BICCN: Specialized Collaboratories on Human, Non-Human Primate, and Mouse Brain Cell Atlases (U01).

Date: March 16, 2018.

Time: 12:00 p.m. to 3:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852 (Virtual Meeting).

Contact Person: David W. Miller, Ph.D., Scientific Review Officer, Division of Extramural Activities, National Institute of Mental Health, NIH Neuroscience Center, 6001 Executive Blvd., Room 6140, MSC 9608, Bethesda, MD 20892–9608, 301–443–9734, *millerda@mail.nih.gov*.

(Catalogue of Federal Domestic Assistance Program No. 93.242, Mental Health Research Grants, National Institutes of Health, HHS)

Dated: February 16, 2018.

Melanie J Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2018–03668 Filed 2–21–18; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Mental Health; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Mental Health Special Emphasis Panel; NIMH Pathway to Independence Awards (K99/R00) & Dissertation Awards (R36).

Date: March 19, 2018.

Time: 11:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852 (Virtual Meeting).

Contact Person: David W. Miller, Ph.D., Scientific Review Officer Division of Extramural Activities, National Institute of Mental Health, NIH, Neuroscience Center, 6001 Executive Blvd., Room 6140, MSC 9608, Bethesda, MD 20892–9608, 301–443–9734, *millerda@mail.nih.gov.*

Name of Committee: National Institute of Mental Health Special Emphasis Panel; BRAIN Initiative: Foundations of Non-Invasive Functional Human Brain Imaging and Recording.

Date: March 20, 2018.

Time: 12:00 p.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852 (Virtual Meeting).

Contact Person: Vinod Charles, Ph.D., Scientific Review Officer Division of Extramural Activities, National Institute of Mental Health, NIH, Neuroscience Center, 6001 Executive Blvd., Room 6151, MSC 9606, Bethesda, MD 20892–9606, 301–443–1606, *charlesvi@mail.nih.gov*.

(Catalogue of Federal Domestic Assistance Program No. 93.242, Mental Health Research Grants, National Institutes of Health, HHS)

Dated: February 16, 2018.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2018–03669 Filed 2–21–18; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of General Medical Sciences; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of General Medical Sciences Special Emphasis Panel; Review of NIH Pathway to Independence (PI) Award Applications.

Date: April 4, 2018.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Embassy Suites Chevy Chase, 4300 Military Road NW, Washington, DC 20015.

Contact Person: Rebecca H. Johnson, Scientific Review Officer, Office of Scientific Review, National Institute of General Medical Sciences, National Institutes of Health, Natcher Building, Room 3AN18C, Bethesda, MD 20892, 301–594–2771, *johnsonrh@nigms.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.375, Minority Biomedical Research Support; 93.821, Cell Biology and Biophysics Research; 93.859, Pharmacology, Physiology, and Biological Chemistry Research; 93.862, Genetics and Developmental Biology Research; 93.88, Minority Access to Research Careers; 93.96, Special Minority Initiatives; 93.859, Biomedical Research and Research Training, National Institutes of Health, HHS)

Dated: February 16, 2018.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2018–03667 Filed 2–21–18; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Predictive Models for Acute Oral Systemic Toxicity; Notice of Meeting; Registration Information

AGENCY: National Institutes of Health, HHS.

ACTION: Notice.

SUMMARY: The Interagency Coordinating Committee on the Validation of Alternative Methods (ICCVAM) announces the workshop ''Predictive Models for Acute Oral System Toxicity.'' Workshop attendees will discuss development of in silico models for acute oral system toxicity and the next steps to encourage appropriate use of these models in regulatory contexts. Interested persons may attend in person or view the meeting remotely by webcast. Registration is requested to attend in person and required to view the webcast. Information about the workshop and registration links are available at *http://ntp.niehs.nih.gov/go/atwksp-2018.*

DATES:

Meeting: April 11–12, 2018; from 9:00 a.m. to approximately 5:00 p.m. Eastern Daylight Time (EDT) on April 11 and from 8:30 a.m. to approximately 3:00 p.m. EDT on April 12, 2018.

Registration for Onsite Meeting: Deadline is April 6, 2018.

Registration for Webcast: Deadline is April 12, 2018.

ADDRESSES:

Meeting Location: Natcher Conference Center, National Institutes of Health, Bethesda, MD 20984.

Meeting web page: Registration links and other information are available at *http://ntp.niehs.nih.gov/go/atwksp-2018.*

FOR FURTHER INFORMATION CONTACT: Dr. Nicole Kleinstreuer, Deputy Director, NTP Interagency Center for the Evaluation of Alternative Toxicological Methods (NICEATM), at telephone: (984) 287–3150 or email: *nicole.kleinstreuer@nih.gov.*

SUPPLEMENTARY INFORMATION:

Background: The development of test methods that reduce or replace animal use for acute toxicity tests required by regulatory authorities is one of ICCVAM's high priority activities. To this end, the ICCVAM Acute Toxicity Workgroup, with support from NICEATM, sponsored a global project to develop in silico models of acute oral systemic toxicity that predict five specific endpoints identified by regulatory agencies. These endpoints included identification of ''very toxic'' chemicals (LD50 less than 50 mg/kg), ''nontoxic'' chemicals (LD50 greater than or equal to 2000 mg/kg), and point estimates for LD50s, and categorization of toxicity hazard using the U.S. Environmental Protection Agency's and United Nations Globally Harmonized System of Classification and Labelling's classification schemes. NICEATM invited scientists to develop and submit in silico models that predict any or all of these endpoints. This workshop will provide an opportunity for project participants to present their submitted models. Workshop participants will also discuss development of a consensus model for predicting acute oral toxicity as well as next steps needed to encourage appropriate use of these models in regulatory contexts.

Workshop and Registration: The workshop is open to the public, free of charge, with attendance limited only by space available. Webcast viewing will be offered for all plenary presentation sessions. Links to registration and additional information about the workshop are available at *http://ntp.niehs.nih.gov/go/atwksp-2018.* Individuals planning to attend the workshop in person should register by April 6, 2018. Walk-in registration will be available only as space permits. Registration is required to view the webcast and will be open through the end of the workshop. The URL for the webcast will be provided in the email confirming registration.

Security information for visitors to NIH is available at *https://www.nih.gov/about-nih/visitor-information.* Individuals with disabilities who need accommodation to participate in this event should contact Dr. Elizabeth Maull at telephone: (984) 287–3157 or email: *maull@niehs.nih.gov.* TTY users should contact the Federal TTY Relay Service at (800) 877–8339. Requests should be made at least five business days in advance of the event.

Background Information on ICCVAM and NICEATM: ICCVAM is an interagency committee composed of representatives from 16 federal regulatory and research agencies that require, use, generate, or disseminate toxicological and safety testing information. ICCVAM conducts technical evaluations of new, revised, and alternative safety testing methods and integrated testing strategies with regulatory applicability. ICCVAM also promotes the scientific validation and regulatory acceptance of testing methods that more accurately assess the safety and hazards of chemicals and products and replace, reduce, or refine animal use. The ICCVAM Authorization Act of 2000 (42 U.S.C. 285*l*–3) establishes ICCVAM as a permanent interagency committee of NIEHS and provides the authority for ICCVAM involvement in activities relevant to the development of alternative test methods. Additional information about ICCVAM can be found at *http://ntp.niehs.nih.gov/go/iccvam.*

NICEATM administers ICCVAM, provides scientific and operational support for ICCVAM-related activities, and conducts and publishes analyses and evaluations of data from new, revised, and alternative testing approaches. NICEATM and ICCVAM work collaboratively to evaluate new and improved testing approaches applicable to the needs of U.S. federal agencies.

NICEATM and ICCVAM welcome the public nomination of new, revised, and alternative test methods and strategies for validation studies and technical evaluations.

Additional information about NICEATM can be found at *http://ntp.niehs.nih.gov/go/niceatm.*

Dated: February 9, 2018.

Brian R. Berridge,

Associate Director, National Toxicology Program.

[FR Doc. 2018–03559 Filed 2–21–18; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

Accreditation and Approval of Saybolt LP (LaPlace, LA) as a Commercial Laboratory

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

ACTION: Notice of accreditation and approval of Saybolt LP (LaPlace, LA), as a commercial laboratory.

SUMMARY: Notice is hereby given, pursuant to CBP regulations, that Saybolt LP (LaPlace, LA), has been accredited to test petroleum and certain petroleum products for customs purposes for the next three years as of April 7, 2017.

DATES: Saybolt LP (LaPlace, LA) was approved and accredited as a commercial gauger and laboratory as of April 7, 2017. The next triennial inspection date will be scheduled for April 2020.

FOR FURTHER INFORMATION CONTACT: Christopher J. Mocella, Laboratories and Scientific Services Directorate, U.S. Customs and Border Protection, 1300 Pennsylvania Avenue NW, Suite 1500N, Washington, DC 20229, tel. 202–344–1060.

SUPPLEMENTARY INFORMATION: Notice is hereby given pursuant to 19 CFR 151.12 that Saybolt LP, 109 Woodland Dr., LaPlace, LA 70068, has been accredited to test petroleum and certain petroleum

products for customs purposes, in accordance with the provisions of 19 CFR 151.12.

Saybolt LP (LaPlace, LA) is accredited for the following laboratory analysis procedures and methods for petroleum and certain petroleum products set forth by the U.S. Customs and Border Protection Laboratory Methods (CBPL) and American Society for Testing and Materials (ASTM):

CBPL No.	ASTM	Title
27–03	D4006	Standard Test Method for Water in Crude Oil by Distillation.
27–04	D95	Standard Test Method for Water in Petroleum Products and Bituminous Materials by Distillation.
27–05	D4928	Standard Test Method for Water in Crude Oils by Coulometric Karl Fischer Titration.
27–06	D473	Standard Test Method for Sediment in Crude Oils and Fuel Oils by the Extraction Method.
27–08	D86	Standard Test Method for Distillation of Petroleum Products.
27–11	D445	Standard Test Method for Kinematic Viscosity of Transparent and Opaque Liquids.
27–13	D4294	Standard Test Method for Sulfur in Petroleum and Petroleum Products by Energy-Dispersive X-ray Fluorescence Spectrometry.
27–46	D5002	Standard Test Method for Density and Relative Density of Crude Oils by Digital Density Analyzer.
27–48	D4052	Standard Test Method for Density and Relative Density of Liquids by Digital Density Meter.
27–50	D93	Standard Test Methods for Flash-Point by Pensky-Martens Closed Cup Tester.
27–54	D1796	Standard Test Method for Water and Sediment in Fuel Oils by the Centrifuge Method.
27–58	D5191	Standard Test Method For Vapor Pressure of Petroleum Products (Mini Method).

Anyone wishing to employ this entity to conduct laboratory analyses should request and receive written assurances from the entity that it is accredited by the U.S. Customs and Border Protection to conduct the specific test service requested. Alternatively, inquiries regarding the specific test service this entity is accredited or approved to perform may be directed to the U.S. Customs and Border Protection by calling (202) 344–1060. The inquiry may also be sent to *CBPGaugersLabs@cbp.dhs.gov.* Please reference the website listed below for a complete listing of CBP approved gaugers and accredited laboratories. *http://www.cbp.gov/about/labs-scientific/commercial-gaugers-and-laboratories.*

Dated: February 14, 2018.

James D. Sweet,

Acting Executive Director, Laboratories and Scientific Services.

[FR Doc. 2018–03601 Filed 2–21–18; 8:45 am]

BILLING CODE 9111–14–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

Accreditation and Approval of Saybolt LP (Clarksville, IN) as a Commercial Gauger

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

ACTION: Notice of accreditation and approval of Saybolt LP (Clarksville, IN), as a commercial gauger.

SUMMARY: Notice is hereby given, pursuant to CBP regulations, that Saybolt LP (Clarksville, IN), has been approved to gauge petroleum and certain petroleum products for customs purposes for the next three years as of July 18, 2017.

DATES: Saybolt LP (Clarksville, IN) was approved and accredited as a commercial gauger and laboratory as of July 18, 2017. The next triennial inspection date will be scheduled for July 2020.

FOR FURTHER INFORMATION CONTACT: Christopher J. Mocella, Laboratories and Scientific Services Directorate, U.S. Customs and Border Protection, 1300 Pennsylvania Avenue NW, Suite 1500N, Washington, DC 20229, tel. 202–344–1060.

SUPPLEMENTARY INFORMATION: Notice is hereby given pursuant to 19 CFR 151.13, that Saybolt LP, 905C Eastern Blvd., Clarksville, IN 47129, has been approved to gauge petroleum and certain petroleum products for customs purposes in accordance with the provisions of 19 CFR 151.13. Saybolt LP (Clarksville, IN) is approved for the following gauging procedures for petroleum and certain petroleum products from the American Petroleum Institute (API):

API chapters	Title
2	Tank Calibration.
3	Tank Gauging.
4	Proving Systems.
5	Metering.
6	Metering Assemblies.
7	Temperature Determination.
8	Sampling.
9	Density Determinations.
11	Physical Properties.
12	Calculations.
14	Natural Gas Fluids Measurement.
17	Maritime Measurement.

Anyone wishing to employ this entity to conduct gauger services should request and receive written assurances from the entity that it is approved by the U.S. Customs and Border Protection to conduct the specific gauger service requested. Alternatively, inquiries regarding the specific gauger service this entity is approved to perform may be directed to the U.S. Customs and Border Protection by calling (202) 344–1060. The inquiry may also be sent to *CBPGaugersLabs@cbp.dhs.gov.* Please reference the website listed below for a complete listing of CBP approved gaugers and accredited laboratories. *http://www.cbp.gov/about/labs-scientific/commercial-gaugers-and-laboratories.*

Dated: February 14, 2018.

James D. Sweet,

Acting Executive Director, Laboratories and Scientific Services.

[FR Doc. 2018–03602 Filed 2–21–18; 8:45 am]

BILLING CODE 9111–14–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID FEMA–2018–0009; OMB No. 1660–NEW]

Agency Information Collection Activities: Proposed Collection; Comment Request; Transcript Request Form

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice and request for comments.

SUMMARY: The Federal Emergency Management Agency, as part of its continuing effort to reduce paperwork

and respondent burden, invites the general public to take this opportunity to comment on a new information collection. In accordance with the Paperwork Reduction Act of 1995, this notice seeks comments concerning the student transcript requests for FEMA courses and programs that are delivered on-campus at FEMA's National Emergency Training Center (NETC) and its training facilities throughout the Nation, in coordination with State and local training officials and organizations and local colleges and universities.

DATES: Comments must be submitted on or before April 23, 2018.

ADDRESSES: To avoid duplicate submissions to the docket, please use only one of the following means to submit comments:

(1) *Online.* Submit comments at *www.regulations.gov* under Docket ID FEMA–2018–0009. Follow the instructions for submitting comments.

(2) *Mail.* Submit written comments to Docket Manager, Office of Chief Counsel, DHS/FEMA, 500 C Street SW, 8NE, Washington, DC 20472–3100.

All submissions received must include the agency name and Docket ID. Regardless of the method used for submitting comments or material, all submissions will be posted, without change, to the Federal eRulemaking Portal at *http://www.regulations.gov,* and will include any personal information you provide. Therefore, submitting this information makes it public. You may wish to read the Privacy Act notice that is available via the link in the footer of *www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Clarence (Smiley) White, Chief, Operations and Support Branch, United States Fire Administration, 301–447–1055 or by email at *Smiley.White@fema.dhs.gov.* You may contact the Records Management Division for copies of the proposed collection of information at email address: *FEMA-Information-Collections-Management@fema.dhs.gov.*

SUPPLEMENTARY INFORMATION: FEMA offers courses and programs that are delivered by the National Fire Academy (NFA) and the Emergency Management Institute (EMI) at the National Emergency Training Center (NETC) in Emmitsburg, MD, the Center for Domestic Preparedness (CDP) in Anniston, AL, and throughout the Nation in coordination with State and local training officials and local colleges and universities to carry out the authorities listed below:

1. Section 7 of Public Law 93–498, Federal Fire Prevention and Control Act, as amended, established the National Fire Academy (NFA) to advance the professional development of fire service personnel and of other persons engaged in fire prevention and control activities.

2. Section 611(f) of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act) as amended, 42 U.S.C. 5121–5207, authorizes the Director to conduct or arrange, by contract or otherwise, for the training programs for the instruction of emergency preparedness officials and other persons in the organization, operation, and techniques of emergency preparedness; conduct or operate schools or classes, including the payment of travel expenses, in accordance with subchapter I of chapter 57 of title 5, United States Code, and the Standardized Government Travel Regulations, and per diem allowances, in lieu of subsistence for trainees in attendance or the furnishing of subsistence and quarters for trainees and instructors on terms prescribed by the Director; and provide instructors and training aids as deemed necessary. This training is conducted through the Emergency Management Institute (EMI).

To facilitate meeting these requirements, FEMA collects information necessary to apply and be accepted for courses and for the student stipend reimbursement program for these courses. There are several organizations within the Federal Emergency Management Agency that deliver training and education in support of the FEMA mission.

Collection of Information

Title: Transcript Request Form.

Type of Information Collection: New information collection.

OMB Number: 1660–NEW.

FEMA Forms: FEMA Form 064–0–0–12, Transcript Request Form.

Abstract: FEMA provides training to advance the professional development of personnel engaged in fire prevention and control and emergency management activities through its Center for Domestic Preparedness (CDP), Emergency Management Institute (EMI), National Fire Academy (NFA), National Training and Education Division, National Domestic Preparedness Consortium, and Rural Domestic Preparedness Consortium. FEMA collects information from students who have completed courses at the National Fire Academy (NFA) and the Emergency Management Institute (EMI) for the purpose of fulfilling the student's request to provide a copy of their transcript for their personal records and/or for transmittal to an institution of higher education that delivers training and education also in support of the FEMA mission.

Affected Public: Individuals or households; Business or other for-profit; Not-for-profit institutions; State, Local or Tribal Government.

Estimated Number of Respondents: 4,500.

Estimated Number of Responses: 4,500.

Estimated Total Annual Burden Hours: 225 hours.

Estimated Total Annual Respondent Cost: $7,978.50.

Estimated Respondents' Operation and Maintenance Costs: $0.

Estimated Respondents' Capital and Start-Up Costs: $0.

Estimated Total Annual Cost to the Federal Government: $28,899.24.

Comments

Comments may be submitted as indicated in the **ADDRESSES** caption above. Comments are solicited to (a) evaluate whether the proposed data collection is necessary for the proper performance of the agency, including whether the information shall have practical utility; (b) evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (c) enhance the quality, utility, and clarity of the information to be collected; and (d) minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Dated: February 14, 2018.

William H. Holzerland,

Senior Director for Information Management, Office of the Chief Administrative Officer, Mission Support, Federal Emergency Management Agency, Department of Homeland Security.

[FR Doc. 2018–03577 Filed 2–21–18; 8:45 am]

BILLING CODE 9111–45–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID FEMA–2018–0002; Internal Agency Docket No. FEMA–B–1802]

Proposed Flood Hazard Determinations

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: Comments are requested on proposed flood hazard determinations, which may include additions or modifications of any Base Flood Elevation (BFE), base flood depth, Special Flood Hazard Area (SFHA) boundary or zone designation, or regulatory floodway on the Flood Insurance Rate Maps (FIRMs), and where applicable, in the supporting Flood Insurance Study (FIS) reports for the communities listed in the table below. The purpose of this notice is to seek general information and comment regarding the preliminary FIRM, and where applicable, the FIS report that the Federal Emergency Management Agency (FEMA) has provided to the affected communities. The FIRM and FIS report are the basis of the floodplain management measures that the community is required either to adopt or to show evidence of having in effect in order to qualify or remain qualified for participation in the National Flood Insurance Program (NFIP). In addition, the FIRM and FIS report, once effective, will be used by insurance agents and others to calculate appropriate flood insurance premium rates for new buildings and the contents of those buildings.

DATES: Comments are to be submitted on or before May 23, 2018.

ADDRESSES: The Preliminary FIRM, and where applicable, the FIS report for each community are available for inspection at both the online location *https://www.fema.gov/preliminaryfloodhazarddata* and the respective Community Map Repository address listed in the tables below. Additionally, the current effective FIRM and FIS report for each community are accessible online through the FEMA Map Service Center at *https://msc.fema.gov* for comparison.

You may submit comments, identified by Docket No. FEMA–B–1802, to Rick Sacbibit, Chief, Engineering Services Branch, Federal Insurance and Mitigation Administration, FEMA, 400 C Street SW, Washington, DC 20472, (202) 646–7659, or (email) *patrick.sacbibit@fema.dhs.gov.*

FOR FURTHER INFORMATION CONTACT: Rick Sacbibit, Chief, Engineering Services Branch, Federal Insurance and Mitigation Administration, FEMA, 400 C Street SW, Washington, DC 20472, (202) 646–7659, or (email) *patrick.sacbibit@fema.dhs.gov;* or visit the FEMA Map Information eXchange (FMIX) online at *https://www.floodmaps.fema.gov/fhm/fmx_main.html.*

SUPPLEMENTARY INFORMATION: FEMA proposes to make flood hazard determinations for each community listed below, in accordance with section 110 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4104, and 44 CFR 67.4(a).

These proposed flood hazard determinations, together with the floodplain management criteria required by 44 CFR 60.3, are the minimum that are required. They should not be construed to mean that the community must change any existing ordinances that are more stringent in their floodplain management requirements. The community may at any time enact stricter requirements of its own or pursuant to policies established by other Federal, State, or regional entities. These flood hazard determinations are used to meet the floodplain management requirements of the NFIP and also are used to calculate the appropriate flood insurance premium rates for new buildings built after the FIRM and FIS report become effective.

The communities affected by the flood hazard determinations are provided in the tables below. Any request for reconsideration of the revised flood hazard information shown on the Preliminary FIRM and FIS report that satisfies the data requirements outlined in 44 CFR 67.6(b) is considered an appeal. Comments unrelated to the flood hazard determinations also will be considered before the FIRM and FIS report become effective.

Use of a Scientific Resolution Panel (SRP) is available to communities in support of the appeal resolution process. SRPs are independent panels of experts in hydrology, hydraulics, and other pertinent sciences established to review conflicting scientific and technical data and provide recommendations for resolution. Use of the SRP only may be exercised after FEMA and local communities have been engaged in a collaborative consultation process for at least 60 days without a mutually acceptable resolution of an appeal. Additional information regarding the SRP process can be found online at *https://www.floodsrp.org/pdfs/srp_overview.pdf.*

The watersheds and/or communities affected are listed in the tables below. The Preliminary FIRM, and where applicable, FIS report for each community are available for inspection at both the online location *https://www.fema.gov/preliminaryfloodhazarddata* and the respective Community Map Repository address listed in the tables. For communities with multiple ongoing Preliminary studies, the studies can be identified by the unique project number and Preliminary FIRM date listed in the tables. Additionally, the current effective FIRM and FIS report for each community are accessible online through the FEMA Map Service Center at *https://msc.fema.gov* for comparison.

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

Dated: January 25, 2018.

Roy E. Wright,

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

Community	Community map repository address
Columbia County, Georgia and Incorporated Areas	
Project: 16–04–5708S Preliminary Date: June 14, 2017	
City of Grovetown	City Hall, 103 Old Wrightsboro Road, Grovetown, GA 30813.
City of Harlem	City Hall, 320 North Louisville Street, Harlem, GA 30814.
Unincorporated Areas of Columbia County	Columbia County Environmental Services Department, Engineering Services Division, 630 Ronald Reagan Drive, Building A, East Wing, Evans, GA 30809.

Community	Community map repository address
Tulsa County, Oklahoma and Incorporated Areas	
Project: 14–06–4647S Preliminary Date: October 19, 2017	
City of Tulsa	Stormwater Design Office, 2317 South Jackson Street, Suite 302, Tulsa, OK 74103.
Lackawanna County, Pennsylvania (All Jurisdictions)	
Project: 07–03–0433S Preliminary Dates: July 27, 2011 and August 31, 2017	
Borough of Archbald	Municipal Building, 400 Church Street, Archbald, PA 18403.
Borough of Blakely	Blakely Borough Building, 1439 Main Street, Peckville, PA 18452.
Borough of Clarks Green	Borough Building, 104 North Abington Road, Clarks Green, PA 18411.
Borough of Clarks Summit	Municipal Building, 304 South State Street, Clarks Summit, PA 18411.
Borough of Dalton	Municipal Building, 105 West Main Street, Dalton, PA 18414.
Borough of Dickson City	Municipal Building, 901 Enterprise Street, Dickson City, PA 18519.
Borough of Dunmore	Municipal Building, 400 South Blakely Street, Dunmore, PA 18512.
Borough of Jermyn	Municipal Building, 440 Jefferson Avenue, Jermyn, PA 18433.
Borough of Jessup	Municipal Building, 395 Lane Street, Jessup, PA 18434.
Borough of Mayfield	Municipal Building, 739 Penn Avenue, Mayfield, PA 18433.
Borough of Moosic	Municipal Building, 715 Main Street, Moosic, PA 18507.
Borough of Moscow	Municipal Building, 123 Van Brunt Street, Moscow, PA 18444.
Borough of Old Forge	Municipal Building, 310 South Main Street, Old Forge, PA 18518.
Borough of Olyphant	Municipal Building, 113 Willow Avenue, Olyphant, PA 18447.
Borough of Taylor	Municipal Building, 122 Union Street, Taylor, PA 18517.
Borough of Throop	Municipal Building, 436 Sanderson Street, Throop, PA 18512.
Borough of Vandling	Borough Building, 449 Hillside Street, Vandling, PA 18421.
City of Carbondale	City Hall, 1 North Main Street, Carbondale, PA 18407.
City of Scranton	Municipal Building, 340 North Washington Avenue, Scranton, PA 18503.
Township of Benton	Benton Township Maintenance Building, 2019 State Route 107, Fleetville, PA 18420.
Township of Carbondale	Carbondale Township Municipal Building, 103 School Street, Childs, PA 18407.
Township of Clifton	Municipal Building, 361 State Route 435, Clifton Township, PA 18424.
Township of Covington	Township Municipal Office, 20 Moffat Drive, Covington Township, PA 18444.
Township of Elmhurst	Municipal Building, 112 Municipal Lane, Elmhurst Township, PA 18444.
Township of Fell	Fell Township Building, 1 Veterans Drive, Simpson, PA 18407.
Township of Glenburn	Glenburn Township Municipal Building, 54 Waterford Road, Dalton, PA 18414.
Township of Greenfield	Township Volunteer Fire Company, 424 State Route 106, Greenfield Township, PA 18407.
Township of Jefferson	Township Municipal Building, 487 Cortez Road, Jefferson Township, PA 18436.
Township of La Plume	La Plume Community Map Repository, 2080 Hickory Ridge Road, Factoryville, PA 18419.
Township of Madison	Municipal Building, 3200 Madisonville Road, Madison Township, PA 18444.
Township of Newton	Newton Township Hall, 1528 Newton-Ransom Boulevard, Clarks Summit, PA 18411.
Township of North Abington	Township Hall, 138 Sullivan Road, North Abington Township, PA 18414.
Township of Ransom	Ransom Township Municipal Building, 2435 Hickory Lane, Clarks Summit, PA 18411.
Township of Roaring Brook	Municipal Building, 430 Blue Shutters Road, Roaring Brook Township, PA 18444.
Township of Scott	Joey Terry Civic Center, 1038 Montdale Road, Scott Township, PA 18447.
Township of South Abington	Municipal Building, 104 Shady Lane Road, South Abington Township, PA 18411.
Township of Spring Brook	Municipal Building, 966 State Route 307, Spring Brook Township, PA 18444.
Township of Thornhurst	Township Building, 356 Old River Road, Thornhurst, PA 18424.
Township of Waverly	Municipal Building, 1 Lake Henry Drive, Waverly, PA 18471.
Township of West Abington	West Abington Township Building, 2545 Bald Mountain Road, Clarks Summit, PA 18411.

[FR Doc. 2018–03574 Filed 2–21–18; 8:45 am]
BILLING CODE 9110–12–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID FEMA–2007–0008]

National Advisory Council

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Committee management; request for applicants for appointment to the national advisory council.

SUMMARY: The Federal Emergency Management Agency (FEMA) is requesting that qualified individuals who are interested in serving on the FEMA National Advisory Council (NAC) apply for appointment as identified in this notice. Pursuant to the *Post-Katrina Emergency Management Reform Act of 2006* (PKEMRA), the NAC advises the FEMA Administrator on all aspects of emergency management to incorporate input from and ensure coordination with state, local, tribal, and territorial governments, and the non-governmental and private sectors on the development and revision of national plans and strategies, the administration of and assessment of FEMA's grant programs, and the development and evaluation of risk assessment methodologies. The NAC consists of up to 35 members, all of whom are experts and leaders in their respective fields. FEMA seeks to appoint individuals to eight (8) discipline-specific positions on the NAC and up to two (2) members as Administrator Selections. If other positions open during the application and selection period, FEMA may select qualified candidates from the pool of applications.

DATES: FEMA will accept applications until 11:59 p.m. EDT on March 18, 2018.

ADDRESSES: The preferred method for application package submission is by email:

- *Email: FEMA-NAC@fema.dhs.gov.* Save materials in one file using the naming convention, ''Last Name_First Name_NAC Application'' and attach to the email.

You may also submit your application package by U.S. mail:

- *U.S. Mail:* Office of the National Advisory Council, Federal Emergency Management Agency, 500 C Street SW, Washington, DC 20472–3184.

Use only one method to submit your application. The Office of the National Advisory Council will send you an email that confirms receipt of your application and will notify you of the final status of your application once FEMA selects new members.

FOR FURTHER INFORMATION CONTACT: Deana Platt, Designated Federal Officer, Office of the National Advisory Council, Federal Emergency Management Agency, 500 C Street SW, Washington, DC 20472–3184; telephone (202) 646–2700; and email *FEMA-NAC@fema.dhs.gov.* For more information on the NAC, including membership application instructions, visit *http://www.fema.gov/national-advisory-council.*

SUPPLEMENTARY INFORMATION: The NAC is an advisory committee established in accordance with the provisions of the *Federal Advisory Committee Act* (FACA), 5 U.S.C. Appendix. As required by PKEMRA, the Secretary of Homeland Security established the NAC to ensure effective and ongoing coordination of Federal preparedness, protection, response, recovery, and mitigation for natural disasters, acts of terrorism, and other man-made disasters. FEMA is requesting that individuals who are interested in and qualified to serve on the NAC apply for appointment to an open position in one of the following discipline areas: Elected Local Government Official (Representative), Elected State Government Official (Representative), Emergency Management (Representative), Emergency Response Providers (Representative), Communications Expert (Special Government Employee (SGE)), Cybersecurity Expert (SGE), and In-Patient Medical Provider (SGE). The Administrator may appoint up to two (2) additional candidates to serve as FEMA Administrator Selections (as SGE appointments). You are encouraged to visit *https://www.fema.gov/membership-applications* for further information on expertise required to fill these positions. Appointments will be for three-year terms that start in September 2018.

The NAC Charter contains more information and can be found at: *https://www.fema.gov/media-library/assets/documents/35316.*

If you are interested, qualified, and want FEMA to consider appointing you to fill an open position on the NAC, please submit an application package to the Office of the NAC as listed in the **ADDRESSES** section of this notice. Current NAC members whose terms are ending should notify the Office of the NAC of their interest in reappointment in lieu of submitting a new application, and if desired, provide updated application materials for consideration. There is no application form; however, each application package MUST include the following information:

- Cover letter, addressed to the Office of the NAC, that includes or indicates: Current position title and employer or organization you represent, home and work addresses, and preferred telephone number and email address; the discipline area position(s) for which you are qualified; why you are interested in serving on the NAC; and how you heard about the solicitation for NAC members;
- Resume or Curriculum Vitae (CV); and
- One Letter of Recommendation addressed to the Office of the NAC.

Your application package must be eight (8) pages or less. Information contained in your application package should clearly indicate your qualifications to serve on the NAC and fill one of the current open positions. FEMA will not consider incomplete applications. FEMA will review the information contained in application packages and make selections based on: (1) Leadership attributes, (2) emergency management experience, (3) expert knowledge in discipline area, and (4) ability to meet NAC member expectations. FEMA will also consider overall NAC composition, including geographic diversity and mix of officials, emergency managers, and emergency response providers from state, local, and tribal governments, when selecting members.

Appointees may be designated as a SGE as defined in section 202(a) of title 18, United States Code, or as a Representative member. SGEs speak as experts in their field and Representative members speak for the stakeholder group they represent. Candidates selected for appointment as SGEs are required to complete a Confidential Financial Disclosure Form (Office of Government Ethics (OGE) Form 450) each year. You can find this form at the Office of Government Ethics website (*http://www.oge.gov*). However, please do not submit this form with your application.

The NAC generally meets in person twice per year. FEMA does not pay NAC members for their time, but may reimburse travel expenses such as airfare, per diem to include hotel stays, and other transportation costs within federal travel guidelines when pre-approved by the Designated Federal Officer. NAC members must serve on one of the three NAC Subcommittees, which meet regularly by teleconference. FEMA estimates the total time

commitment for subcommittee participation to be 1–2 hours per week (more for NAC leadership).

DHS does not discriminate on the basis of race, color, religion, sex, national origin, political affiliation, sexual orientation, gender identity, marital status, disability and genetic information, age, membership in an employee organization, or other non-merit factor. DHS strives to achieve a widely diverse candidate pool for all of its recruitment actions. Current DHS and FEMA employees, including FEMA Reservists, are not eligible for membership. Federally registered lobbyists may apply for positions designated as Representative appointments but are not eligible for positions that are designated as SGE appointments.

Dated: February 13, 2018.

Brock Long,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2018–03576 Filed 2–21–18; 8:45 am]

BILLING CODE 9111–48–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID FEMA–2018–0002]

Changes in Flood Hazard Determinations

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Final notice.

SUMMARY: New or modified Base (1-percent annual chance) Flood Elevations (BFEs), base flood depths, Special Flood Hazard Area (SFHA) boundaries or zone designations, and/or regulatory floodways (hereinafter referred to as flood hazard determinations) as shown on the indicated Letter of Map Revision (LOMR) for each of the communities listed in the table below are finalized. Each LOMR revises the Flood Insurance Rate Maps (FIRMs), and in some cases the Flood Insurance Study (FIS) reports, currently in effect for the listed communities. The flood hazard determinations modified by each LOMR will be used to calculate flood insurance premium rates for new buildings and their contents.

DATES: Each LOMR was finalized as in the table below.

ADDRESSES: Each LOMR is available for inspection at both the respective Community Map Repository address listed in the table below and online through the FEMA Map Service Center at *https://msc.fema.gov.*

FOR FURTHER INFORMATION CONTACT: Rick Sacbibit, Chief, Engineering Services Branch, Federal Insurance and Mitigation Administration, FEMA, 400 C Street SW, Washington, DC 20472, (202) 646–7659, or (email) *patrick.sacbibit@fema.dhs.gov;* or visit the FEMA Map Information eXchange (FMIX) online at *https://www.floodmaps.fema.gov/fhm/fmx_main.html.*

SUPPLEMENTARY INFORMATION: The Federal Emergency Management Agency (FEMA) makes the final flood hazard determinations as shown in the LOMRs for each community listed in the table below. Notice of these modified flood hazard determinations has been published in newspapers of local circulation and 90 days have elapsed since that publication. The Deputy Associate Administrator for Insurance and Mitigation has resolved any appeals resulting from this notification.

The modified flood hazard determinations are made pursuant to section 206 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4105, and are in accordance with the National Flood Insurance Act of 1968, 42 U.S.C. 4001 *et seq.,* and with 44 CFR part 65.

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

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

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

This new or modified flood hazard determinations are used to meet the floodplain management requirements of the NFIP and also are used to calculate the appropriate flood insurance premium rates for new buildings, and for the contents in those buildings. The changes in flood hazard determinations are in accordance with 44 CFR 65.4.

Interested lessees and owners of real property are encouraged to review the final flood hazard information available at the address cited below for each community or online through the FEMA Map Service Center at *https://msc.fema.gov.*

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

Dated: January 25, 2018.

Roy E. Wright,

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

State and county	Location and case No.	Chief executive officer of community	Community map repository	Date of modification	Community No.
Colorado:					
Douglas (FEMA Docket No.: B–1758).	Town of Castle Rock (17–08–0108P).	The Honorable Jennifer Green, Mayor, Town of Castle Rock, 100 North Wilcox Street, Castle Rock, CO 80104.	Water Department, 175 Kellogg Court, Castle Rock, CO 80109.	Dec. 29, 2017	080050
Weld (FEMA Docket No.: B–1758).	Unincorporated areas of Weld County (17–08–1017X).	The Honorable Julie Cozad, Chair, Weld County Board of Commissioners, P.O. Box 758, Greeley, CO 80632.	Weld County Commissioner's Office, 915 10th Street, Greeley, CO 80632.	Dec. 22, 2017	080266
Connecticut: New Haven (FEMA Docket No.: B–1762)	City of Meriden (17–01–0418P).	Mr. Guy Scaife, Manager, City of Meriden, 142 East Main Street, Meriden, CT 06450.	Department of Public Works, Engineering Division, 142 East Main Street, Meriden, CT 06450.	Jan. 3, 2018	090081
Florida:					

State and county	Location and case No.	Chief executive officer of community	Community map repository	Date of modification	Community No.
Charlotte (FEMA Docket No.: B–1762).	Unincorporated areas of Charlotte County (17–04–4506P).	The Honorable Bill Truex, Chairman, Charlotte County Board of Commissioners, 18500 Murdock Circle, Suite 536, Port Charlotte, FL 33948.	Charlotte County Community Development Department, 18400 Murdock Circle, Port Charlotte, FL 33948.	Dec. 29, 2017	120061
Charlotte (FEMA Docket No.: B–1758).	Unincorporated areas of Charlotte County (17–04–5277P).	The Honorable Bill Truex, Chairman, Charlotte County Board of, Commissioners, 18500 Murdock Circle, Port Charlotte, FL 33948.	Charlotte County Community Development Department, 18400 Murdock Circle, Port Charlotte, FL 33948.	Dec. 28, 2017	120061
Collier (FEMA Docket No.: 1758).	Unincorporated areas of Collier County (17–04–5062P).	The Honorable Penny Taylor, Chair, Collier County Board of Commissioners, 3299 Tamiami Trail East, Suite 303, Naples, FL 34112.	Collier County Administrative Building, 3301 Tamiami Trail East, Building F, 1st Floor, Naples, FL 34112.	Dec. 14, 2017	120067
Lafayette (FEMA Docket No.: 1758).	Unincorporated areas of Lafayette County (17–04–4985P).	The Honorable Ernest Jones, Chairman, Lafayette County Board of Commissioners, P.O. Box 88, Mayo, FL 32066.	Lafayette County Building Department, 120 West Main Street, Mayo, FL 32066.	Dec. 15, 2017	120131
Lee (FEMA Docket No.: B–1758).	Town of Fort Myers Beach (17–04–5861P).	The Honorable Dennis C. Boback, Mayor, Town of Fort Myers Beach, 2525 Estero Boulevard, Fort Myers Beach, FL 33931.	Community Development Department, 2525 Estero Boulevard, Fort Myers Beach, FL 33931.	Dec. 26, 2017	120673
Manatee (FEMA Docket No.: B–1758).	Unincorporated areas of Manatee County (16–04–8547P).	The Honorable Betsy Benac, Chair, Manatee County Board of Commissioners, P.O. Box 1000, Bradenton, FL 34206.	Manatee County Building and Development Services Department, 1112 Manatee Avenue West, Bradenton, FL 34205.	Dec. 22, 2017	120153
Miami-Dade (FEMA Docket No.: B–1758).	City of North Miami (17–04–4598P).	The Honorable Smith Joseph, Mayor, City of North Miami, 776 Northeast 125th Street, 2nd Floor, North Miami, FL 33161.	Building Department, 12340 Northeast 8th Avenue, North Miami, FL 33161.	Dec. 8, 2017	120655
Monroe (FEMA Docket No.: B–1762).	Unincorporated areas of Monroe County (17–04–5313P).	The Honorable George Neugent, Mayor, Monroe County Board of Commissioners, 25 Ships Way, Big Pine Key, FL 33043.	Monroe County Building Department, 2798 Overseas Highway, Suite 300, Marathon, FL 33040.	Jan. 2, 2018	125129
Monroe (FEMA Docket No.: B–1762).	Unincorporated areas of Monroe County (17–04–5430P).	The Honorable George Neugent, Mayor, Monroe County Board of Commissioners, 25 Ships Way, Big Pine Key, FL 33043.	Monroe County Building Department, 2798 Overseas Highway, Suite 300, Marathon, FL 33040.	Jan. 4, 2018	125129
Monroe (FEMA Docket No.: B–1762).	Unincorporated areas of Monroe County (17–04–5774P).	The Honorable George Neugent, Mayor, Monroe County Board of Commissioners, 25 Ships Way, Big Pine Key, FL 33043.	Monroe County Building Department, 2798 Overseas Highway, Suite 300, Marathon, FL 33040.	Jan. 5, 2018	125129
Pinellas (FEMA Docket No.: B–1758).	City of St. Pete Beach (17–04–2937P).	The Honorable Alan Johnson, Mayor, City of St. Pete Beach, 155 Corey Avenue, St. Pete Beach, FL 33706.	Building Services Department, 155 Corey Avenue, St. Pete Beach, FL 33706.	Dec. 26, 2017	125149
Pinellas (FEMA Docket No.: B–1758).	Town of Indian Shores (17–04–1784P).	The Honorable Patrick Soranno, Mayor, Town of Indian Shores, 19305 Gulf Boulevard, Indian Shores, FL 33785.	Building Department, 19305 Gulf Boulevard, Indian Shores, FL 33785.	Dec. 26, 2017	125118
Polk (FEMA Docket No.: B–1762).	Unincorporated areas of Polk County (17–04–0850P).	The Honorable Melony M. Bell, Chair, Polk County Board of Commissioners, P.O. Box 9005, Drawer BC01, Bartow, FL 33831.	Polk County Land Development Division, 330 West Church Street, Bartow, FL 33830.	Jan. 4, 2018	120261
Georgia:					
Cobb (FEMA Docket No.: B–1748).	City of Kennesaw (17–04–0127P).	The Honorable Derek Easterling, Mayor, City of Kennesaw, 2529 J.O. Stephenson Street, Kennesaw, GA 30144.	Stormwater Division, 3080 Moon Station Road, Kennesaw, GA 30144.	Dec. 4, 2017	130055
Cobb (FEMA Docket No.: B–1748).	Unincorporated areas of Cobb County (17–04–0127P).	The Honorable Mike Boyce, Chairman, Cobb County Board of Commissioners, 100 Cherokee Street, Marietta, GA 30090.	Cobb County Stormwater Management Division, 680 South Cobb Drive, Marietta, GA 30060.	Dec. 4, 2017	130052
Douglas (FEMA Docket No.: B–1758).	Unincorporated areas of Douglas County (17–04–5176P).	The Honorable Romona Jackson Jones, Chair, Douglas County Board of Commissioners, 8700 Hospital Drive, 3rd Floor, Douglasville, GA 30134.	Douglas County Engineering Division, 8700 Hospital Drive, 1st Floor, Douglasville, GA 30134.	Dec. 28, 2017	130306
Iowa: Woodbury (FEMA Docket No.: B–1758)	City of Sioux City (17–07–0805P).	The Honorable Bob Scott, Mayor, City of Sioux City, P.O. Box 447, Sioux City, IA 51102.	Planning Division, 405 6th Street, Room 308, Sioux City, IA 51102.	Dec. 8, 2017	190298
Maryland: Independent City (FEMA Docket No.: B–1758)	City of Baltimore (17–03–1132P).	The Honorable Catherine E. Pugh, Mayor, City of Baltimore, 100 North Holliday Street, Baltimore, MD 21202.	Planning Department, 417 East Fayette Street, 8th floor, Baltimore, MD 21202.	Dec. 18, 2017	240087
Massachusetts:					
Barnstable (FEMA Docket No.: B–1758).	Town of Provincetown (17–01–0821P).	Mr. David Panagore, Manager, Town of Provincetown, 260 Commercial Street, Provincetown, MA 02657.	Town Hall, 260 Commercial Street, Provincetown, MA 02657.	Dec. 15, 2017	255218

State and county	Location and case No.	Chief executive officer of community	Community map repository	Date of modification	Community No.
Plymouth (FEMA Docket No.: B–1758).	Town of Hingham (17–01–0559P).	The Honorable Mary Power, Chair, Town of Hingham Board of Selectmen, 210 Central Street, Hingham, MA 02043.	Conservation Department, 210 Central Street, Hingham, MA 02043.	Dec. 13, 2017	250268
Plymouth (FEMA Docket No.: B–1758).	Town of Hull (17–01–0559P).	The Honorable Kevin Richardson, Chairman, Town of Hull Board of Selectmen, 253 Atlantic Avenue, Hull, MA 02045.	Building Department, 253 Atlantic Avenue, Hull, MA 02045.	Dec. 13, 2017	250269
Plymouth (FEMA Docket No.: B–1758).	Town of Wareham (17–01–1783P).	Mr. Derek Sullivan, Administrator, Town of Wareham, 54 Marion Road, Wareham, MA 02571.	Town Hall, 54 Marion Road, Wareham, MA 02571.	Dec. 8, 2017	255223
Nebraska:					
Dakota (FEMA Docket No.: B–1758).	City of South Sioux City (17–07–0805P).	The Honorable Rod Koch, Mayor, City of South Sioux City, 1615 1st Avenue, South Sioux City, NE 68776.	Inspection Services Department, 1615 1st Avenue, South Sioux City, NE 68776.	Dec. 8, 2017	310054
Dakota (FEMA Docket No.: B–1758).	Unincorporated areas of Dakota County (17–07–0805P).	The Honorable Scott Love, Chairman, Dakota County Board of Commissioners, P.O. Box 338, Dakota City, NE 68731.	Dakota County Planning and Zoning Department, 1863 North Bluff Road, Hubbard, NE 68741.	Dec. 8, 2017	310429
New York:					
Rockland (FEMA Docket No.: B–1740).	Town of Ramapo (17–02–0104P).	The Honorable Christopher P. St. Lawrence, Supervisor, Town of Ramapo, 237 State Route 59, Suffern, NY 10901.	Town Hall, 237 State Route 59, Suffern, NY 10901.	Dec. 7, 2017	365340
Rockland (FEMA Docket No.: B–1740).	Village of Spring Valley (17–02–0104P).	The Honorable Demeza Delhomme, Mayor, Village of Spring Valley, 200 North Main Street, Spring Valley, NY 10977.	Village Hall, 200 North Main Street, Spring Valley, NY 10977.	Dec. 7, 2017	365344
North Carolina:					
Alamance (FEMA Docket No.: B–1770).	Unincorporated areas of Alamance County (16–04–8173P).	The Honorable Eddie Boswell, Chairman, Alamance County Board of Commissioners, 124 West Elm Street, Graham, NC 27253.	Alamance County Planning Department, 215 N. Graham-Hopedale Road, Burlington, NC 27217.	Nov. 20, 2017	370001
Surry (FEMA Docket No.: B–1758).	Unincorporated areas of Surry County (17–04–4112P).	The Honorable Eddie Harris, Chairman, Surry County Board of Commissioners, 118 Hamby Road, Dobson, NC 27017.	Surry County Planning and Development, Department, 122 Hamby Road, Dobson, NC 27017.	Dec. 1, 2017	370364
Surry (FEMA Docket No.: B–1758).	Unincorporated Areas of Surry County (17–04–4113P).	The Honorable Eddie Harris, Chairman, Surry County Board of Commissioners, 118 Hamby Road, Dobson, NC 27017.	Surry County Planning and Development Department, 122 Hamby Road, Dobson, NC 27017.	Jan. 4, 2018	370364
Wake (FEMA Docket No.: B–1758).	City of Raleigh (16–04–2709P).	The Honorable Nancy McFarlane, Mayor, City of Raleigh, P.O. Box 590, Raleigh, NC 27602.	Stormwater Management Division, 1 Exchange Plaza, Suite 304, Raleigh, NC 27601.	Dec. 7, 2017	370243
Pennsylvania:					
Bucks (FEMA Docket No.: B–1758).	Township of Buckingham (17–03–0837P).	The Honorable Maggie Rash, Chair, Township of Buckingham, Board of Supervisors, P.O. Box 413, Buckingham, PA 18912.	Township Building, 4613 Hughesian Drive, Buckingham, PA 18912.	Jan. 4, 2018	420985
Centre (FEMA Docket No.: B–1758).	Borough of Bellefonte (17–03–0534P).	The Honorable Gay D. Dunne, President, Borough of Bellefonte Council, 236 West Lamb Street, Bellefonte, PA 16823.	Borough Hall, 236 West Lamb Street, Bellefonte, PA 16823.	Dec. 5, 2017	420257
South Carolina:					
Charleston (FEMA Docket No.: B–1758).	Town of Mount Pleasant (17–04–5432P).	The Honorable Linda Page, Mayor, Town of Mount Pleasant, 100 Ann Edwards Lane, Mount Pleasant, SC 29464.	Planning Department, 100 Ann Edwards Lane, Mount Pleasant, SC 29464.	Dec. 20, 2017	455417
Charleston (FEMA Docket No.: B–1758).	Unincorporated areas of Charleston County (17–04–5432P).	The Honorable A. Victor Rawl, Chairman, Charleston County Council, 4045 Bridge View Drive, Suite B254, North Charleston, SC 29405.	Building Inspection Services Department, 4045 Bridgeview Drive, Suite A311, North Charleston, SC 29405.	Dec. 20, 2017	455413
Tennessee: Shelby (FEMA Docket No.: B–1758)	City of Memphis (17–04–2464P).	The Honorable Jim Strickland, Mayor, City of Memphis, 125 North Main Street, Room 700, Memphis, TN 38103.	Engineering Division, 125 North Main Street, Room 677, Memphis, TN 38103.	Dec. 27, 2017	470177
Texas:					
Bexar (FEMA Docket No.: B–1758).	City of San Antonio (17–06–2618P).	The Honorable Ron Nirenberg, Mayor, City of San Antonio, P.O. Box 839966, San Antonio, TX 78283.	Transportation and Capital Improvements Department, Stormwater Division, 1901 South Alamo Street, 2nd Floor, San Antonio, TX 78204.	Dec. 14, 2017	480045
Bexar (FEMA Docket No.: B–1762).	City of San Antonio (17–06–3073P).	The Honorable Ron Nirenberg, Mayor, City of San Antonio, P.O. Box 839966, San Antonio, TX 78283.	Transportation and Capital Improvements Department, Storm Water Division, 1901 South Alamo Street, 2nd Floor, San Antonio, TX 78204.	Jan. 5, 2018	480045

State and county	Location and case No.	Chief executive officer of community	Community map repository	Date of modification	Community No.
Collin (FEMA Docket No.: B–1758).	City of Celina (17–06–1207P).	The Honorable Sean Terry, Mayor, City of Celina, 142 North Ohio Street, Celina, TX 75009.	City Hall, 142 North Ohio Street, Celina, TX 75009.	Jan. 2, 2018	480133
Collin (FEMA Docket No.: B–1758).	City of Celina (17–06–2118P).	The Honorable Sean Terry, Mayor, City of Celina, 142 North Ohio Street, Celina, TX 75009.	City Hall, 142 North Ohio Street, Celina, TX 75009.	Dec. 18, 2017	480133
Collin (FEMA Docket No.: B–1762).	City of Wylie (17–06–1285P).	The Honorable Eric Hogue, Mayor, City of Wylie, 300 Country Club Road, Building 100, Wylie, TX 75098.	City Hall, 300 Country Club Road, Building 100, Wylie, TX 75098.	Jan. 4, 2018	480759
Collin (FEMA Docket No.: B–1762).	Unincorporated areas of Collin County (17–06–1140P).	The Honorable Keith Self, Collin County Judge, 2300 Bloomdale Road, Suite 4192, McKinney, TX 75071.	Collin County Engineering Department, 4690 Community Avenue, Suite 200, McKinney, TX 75071.	Dec. 11, 2017	480130
Dallas (FEMA Docket No.: B–1762).	City of Dallas (17–06–1022P).	The Honorable Michael Rawlings, Mayor, City of Dallas, 1500 Marilla Street, Suite 5EN, Dallas, TX 75201.	Engineering Department, 320 East Jefferson Boulevard, Room 200, Dallas, TX 75201.	Dec. 4, 2017	480171
Dallas (FEMA Docket No.: B–1762).	City of Garland (17–06–0906P).	The Honorable Douglas Athas, Mayor, City of Garland, 200 North 5th Street, Garland, TX 75040.	Municipal Building, 800 Main Street, Garland, TX 75040.	Dec. 18, 2017	485471
Dallas (FEMA Docket No.: B–1762).	City of Sachse (17–06–0906P).	The Honorable Mike Felix, Mayor, City of Sachse, 3815 Sachse Road, Building B, Sachse, TX 75048.	Public Works Department, 3815 Sachse Road, Building B, Sachse, TX 75048.	Dec. 18, 2017	480186
Harris (FEMA Docket No.: B–1748).	City of Baytown (17–06–2837P).	The Honorable Stephen DonCarlos, Mayor, City of Baytown, 2401 Market Street, Baytown, TX 77520.	Engineering Department, 2123 Market Street, Baytown, TX 77520.	Dec. 8, 2017	485456
Harris (FEMA Docket No.: B–1758).	Unincorporated areas of Harris County (17–06–3378P).	The Honorable Edward M. Emmett, Harris County Judge, 1001 Preston Street, Suite 911, Houston, TX 77002.	Harris County Permit Office, 10555 Northwest Freeway, Suite 120, Houston, TX 77092.	Dec. 11, 2017	480287
Kendall (FEMA Docket No.: B–1762).	City of Boerne (17–06–1075P).	Mr. Ronald Bowman, Manager, City of Boerne, 402 East Blanco Road, Boerne, TX 78006.	Code Enforcement Division, 402 East Blanco Road, Boerne, TX 78006.	Dec. 26, 2017	480418
Kendall (FEMA Docket No.: B–1762).	Unincorporated areas of Kendall County (17–06–1075P).	The Honorable Darrel L. Lux, Kendall County Judge, 201 East San Antonio Avenue, Suite 122, Boerne, TX 78006.	Kendall County Engineering Department, 201 East San Antonio Avenue, Suite 101, Boerne, TX 78006.	Dec. 26, 2017	480417
Lubbock (FEMA Docket No.: B–1758).	City of Lubbock (17–06–2588P).	The Honorable Dan Pope, Mayor, City of Lubbock, P.O. Box 2000, Lubbock, TX 79457.	Public Works Department, 1625 13th Street, Room 107, Lubbock, TX 79401.	Dec. 18, 2017	480452
Lubbock (FEMA Docket No.: B–1758).	City of Lubbock (17–06–2768P).	The Honorable Dan Pope, Mayor, City of Lubbock, P.O. Box 2000, Lubbock, TX 79457.	Public Works Department, 1625 13th Street, Room 107, Lubbock, TX 79401.	Dec. 18, 2017	480452
Montgomery (FEMA Docket No.: B–1758).	City of Conroe (17–06–2714X).	The Honorable Toby Powell, Mayor, City of Conroe, P.O. Box 3066, Conroe, TX 77305.	Public Works Department, 401 Sergeant Ed Holcomb Boulevard South, Conroe, TX 77304.	Dec. 1, 2017	480484
Tarrant (FEMA Docket No.: B–1758).	City of Fort Worth (17–06–0577P).	The Honorable Betsy Price, Mayor, City of Fort Worth, 1000 Throckmorton Street, Fort Worth, TX 76102.	Transportation and Public Works Department, 1000 Throckmorton Street, Fort Worth, TX 76102.	Dec. 11, 2017	480596
Tarrant (FEMA Docket No.: B–1758).	City of Fort Worth (17–06–1457P).	The Honorable Betsy Price, Mayor, City of Fort Worth, 1000 Throckmorton Street, Fort Worth, TX 76102.	Transportation and Public Works Department, 1000 Throckmorton Street, Fort Worth, TX 76102.	Dec. 18, 2017	480596
Tarrant (FEMA Docket No.: B–1762).	City of Fort Worth (17–06–2042P).	The Honorable Betsy Price, Mayor, City of Fort Worth, 200 Texas Street, Fort Worth, TX 76102.	Transportation and Public Works Department, 200 Texas Street, Fort Worth, TX 76102.	Jan. 4, 2018	480596
Tarrant (FEMA Docket No.: B–1758).	City of North Richland Hills (17–06–0350P).	The Honorable Oscar Trevino, Jr., Mayor, City of North Richland Hills, 4301 City Point Drive, North Richland Hills, TX 76180.	Administration and Engineering Department, 4301 City Point Drive, North Richland Hills, TX 76180.	Dec. 11, 2017	480607

[FR Doc. 2018–03573 Filed 2–21–18; 8:45 am]

BILLING CODE 9110–12–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID FEMA–2018–0002]

Final Flood Hazard Determinations

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Final notice.

SUMMARY: Flood hazard determinations, which may include additions or modifications of Base Flood Elevations (BFEs), base flood depths, Special Flood Hazard Area (SFHA) boundaries or zone designations, or regulatory floodways on the Flood Insurance Rate Maps (FIRMs) and where applicable, in the supporting Flood Insurance Study (FIS) reports

have been made final for the communities listed in the table below.

The FIRM and FIS report are the basis of the floodplain management measures that a community is required either to adopt or to show evidence of having in effect in order to qualify or remain qualified for participation in the Federal Emergency Management Agency's (FEMA's) National Flood Insurance Program (NFIP). In addition, the FIRM and FIS report are used by insurance agents and others to calculate appropriate flood insurance premium rates for buildings and the contents of those buildings.

DATES: The date of June 6, 2018 has been established for the FIRM and, where applicable, the supporting FIS report showing the new or modified flood hazard information for each community.

ADDRESSES: The FIRM, and if applicable, the FIS report containing the final flood hazard information for each community is available for inspection at the respective Community Map Repository address listed in the tables below and will be available online through the FEMA Map Service Center at *https://msc.fema.gov* by the date indicated above.

FOR FURTHER INFORMATION CONTACT: Rick Sacbibit, Chief, Engineering Services Branch, Federal Insurance and Mitigation Administration, FEMA, 400 C Street SW, Washington, DC 20472, (202) 646–7659, or (email) *patrick.sacbibit@fema.dhs.gov;* or visit the FEMA Map Information eXchange (FMIX) online at *https://www.floodmaps.fema.gov/fhm/fmx_main.html.*

SUPPLEMENTARY INFORMATION: The Federal Emergency Management Agency (FEMA) makes the final determinations listed below for the new or modified flood hazard information for each community listed. Notification of these changes has been published in newspapers of local circulation and 90 days have elapsed since that publication. The Deputy Associate Administrator for Insurance and Mitigation has resolved any appeals resulting from this notification.

This final notice is issued in accordance with section 110 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4104, and 44 CFR part 67. FEMA has developed criteria for floodplain management in floodprone areas in accordance with 44 CFR part 60.

Interested lessees and owners of real property are encouraged to review the new or revised FIRM and FIS report available at the address cited below for each community or online through the FEMA Map Service Center at *https://msc.fema.gov.*

The flood hazard determinations are made final in the watersheds and/or communities listed in the table below.

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

Dated: January 25, 2018.

Roy E. Wright,

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

Community	Community map repository address
Mason County, Illinois and Incorporated Areas Docket No.: FEMA–B–1602	
Unincorporated Areas of Mason County	Mason County Courthouse, County Zoning Office, 125 North Plum Street, Havana, IL 62644.
Sandusky County, Ohio and Incorporated Areas Docket No.: FEMA–B–1604	
City of Fremont	323 South Front Street, Fremont, OH 43420.
Unincorporated Areas of Sandusky County	2511 Countyside Drive, Suite C, Fremont, OH 43420.

[FR Doc. 2018–03575 Filed 2–21–18; 8:45 am]

BILLING CODE 9110–12–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

[OMB Control Number 1615–0034]

Agency Information Collection Activities; Revision of a Currently Approved Collection: Notice of Appeal of Decision Under Section 210 or 245A

AGENCY: U.S. Citizenship and Immigration Services, Department of Homeland Security.

ACTION: 30-Day notice.

SUMMARY: The Department of Homeland Security (DHS), U.S. Citizenship and Immigration Services (USCIS) will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995. The purpose of this notice is to allow an additional 30 days for public comments.

DATES: The purpose of this notice is to allow an additional 30 days for public comments. Comments are encouraged and will be accepted until March 26, 2018. This process is conducted in accordance with 5 CFR 1320.10.

ADDRESSES: Written comments and/or suggestions regarding the item(s) contained in this notice, especially regarding the estimated public burden and associated response time, must be directed to the OMB USCIS Desk Officer via email at *dhsdeskofficer@omb.eop.gov.* All submissions received must include the agency name and the OMB Control Number 1615–0034 in the subject line.

You may wish to consider limiting the amount of personal information that you provide in any voluntary submission you make. For additional information please read the Privacy Act notice that is available via the link in the footer of *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: USCIS, Office of Policy and Strategy, Regulatory Coordination Division, Samantha Deshommes, Chief, 20 Massachusetts Avenue NW, Washington, DC 20529–2140, Telephone number (202) 272–8377 (This is not a toll-free number; comments are not accepted via telephone message.). Please note contact information provided here is solely for questions regarding this notice. It is not for individual case status inquiries. Applicants seeking information about the status of their individual cases can check Case Status Online, available at the USCIS website at *http://www.uscis.gov,* or call the USCIS National Customer Service Center at (800) 375–5283; TTY (800) 767–1833.

SUPPLEMENTARY INFORMATION:

Comments

The information collection notice was previously published in the **Federal Register** on November 13, 2017, at 82 FR 53515, allowing for a 60-day public comment period. USCIS did receive two comments in connection with the 60-day notice.

You may access the information collection instrument with instructions, or additional information by visiting the Federal eRulemaking Portal site at: *http://www.regulations.gov* and enter USCIS–2007–0014 in the search box. Written comments and suggestions from the public and affected agencies should address one or more of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Overview of This Information Collection

(1) *Type of Information Collection Request:* Revision of a Currently Approved Collection.

(2) *Title of the Form/Collection:* Notice of Appeal of Decision Under Section 210 or 245A.

(3) *Agency form number, if any, and the applicable component of the DHS sponsoring the collection:* I–694; USCIS.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* Individuals or households. USCIS uses the information provided on Form I–694 in considering the appeal from a finding that an applicant is ineligible for legalization under section 210 and 245A of the Act or is ineligible for a related waiver of inadmissibility.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* The estimated total number of respondents for the information collection I–694 is 15 and the estimated hour burden per response is 1.5 hours.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total estimated annual hour burden associated with this collection is 22.5 hours.

(7) *An estimate of the total public burden (in cost) associated with the collection:* The estimated total annual cost burden associated with this collection of information is $1,893.75.

Dated: February 15, 2018.

Samantha Deshommes,

Chief, Regulatory Coordination Division, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, Department of Homeland Security.

[FR Doc. 2018–03580 Filed 2–21–18; 8:45 am]

BILLING CODE 9111–97–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–7001–N–06]

30-Day Notice of Proposed Information Collection: Public Housing Agencies Service Areas Solicitation of Comments: Withdrawal

AGENCY: Office of the Chief Information Officer, HUD.

ACTION: Notice.

SUMMARY: On February 13, 2018, HUD inadvertently published a 30-day notice of proposed information collection entitled Public Housing Agencies Service Areas Solicitation of Comments. HUD will republish the notice in the **Federal Register** at a later date. This notice withdraws the notice published on February 13, 2018.

FOR FURTHER INFORMATION CONTACT: Colette Pollard, Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 7th Street SW, Washington, DC 20410; email Colette Pollard at *Colette.Pollard@hud.gov* or telephone 202–402–3400. Persons with hearing or speech impairments may access this number through TTY by calling the toll-free Federal Relay Service at (800) 877–8339. This is not a toll-free number. Copies of available documents submitted to OMB may be obtained from Ms. Pollard.

Dated: February 16, 2018.

Colette Pollard,

Department Report Management Officer, Office of the Chief Information Officer.

[FR Doc. 2018–03661 Filed 2–21–18; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLORV00000.L10200000.DF0000. LXSSH1050000.18X.HAG 18–0042]

Notice of Public Meeting for the Southeast Oregon Resource Advisory Council

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of public meeting.

SUMMARY: In accordance with the Federal Land Policy and Management Act of 1976, and the Federal Advisory Committee Act of 1972, the U.S. Department of the Interior, Bureau of Land Management's (BLM) Southeast Oregon Resource Advisory Council (RAC) will meet as indicated below.

DATES: The Southeast Oregon RAC will hold a public meeting on Thursday, March 15, 2018, from 8 a.m. to 5 p.m. Pacific Daylight Time, and Friday, March 16, 2018, from 8 a.m. to 12:00 p.m. Pacific Daylight Time. A public comment period will be available from 10:45 a.m. to 11:15 a.m. on Friday, March 16, 2018.

ADDRESSES: The meetings will be held at the Harney County Chamber of Commerce, 484 N. Broadway, Burns, OR 97720.

FOR FURTHER INFORMATION CONTACT: Larisa Bogardus, Public Affairs Officer, 1301 S G Street, Lakeview, Oregon 97630; 541–947–6237; *lbogardus@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 15-member Southeast Oregon RAC is chartered and appointed by the Secretary of the Interior. The members' diverse perspectives are represented in commodity, conservation, and general interests. The RAC provides advice to BLM resource managers regarding management plans and proposed resource actions on public lands in southeast Oregon. All meetings are open to the public.

Agenda items for this meeting include election of 2018 officers; recommendations of management approaches for areas identified by BLM as lands with wilderness characteristics as part of the Vale and Lakeview Districts' respective resource

management plan amendment(s) process; national wild horse and burro issues; sage-grouse causal factor analysis; the state sage-grouse resource management plan amendment; tribal consultation; a multi-state fuel breaks project; potential field trips for 2018; and the RAC charter and roles. The final agenda will be posted online at *http://www.blm.gov/or/rac/seorrac.php* on or before March 8, 2018.

Before including your address, phone number, email address, or other personal identifying information in your comments, please 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: 43 CFR 1784.4–2.

Don Gonzalez,

Vale District Manager.

[FR Doc. 2018–03642 Filed 2–21–18; 8:45 am]

BILLING CODE 4310–33–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NAGPRA–NPS0024980; PPWOCRADN0–PCU00RP14.R50000]

Notice of Intent To Repatriate Cultural Items: New Jersey State Museum, Trenton, NJ

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: The New Jersey State Museum, in consultation with the appropriate Indian Tribes or Native Hawaiian organizations, has determined that the cultural items listed in this notice meet the definition of unassociated funerary objects. Lineal descendants or representatives of any Indian Tribe or Native Hawaiian organization not identified in this notice that wish to claim these cultural items should submit a written request to the New Jersey State Museum. If no additional claimants come forward, transfer of control of the cultural items to the lineal descendants, Indian Tribes, or Native Hawaiian organizations stated in this notice may proceed.

DATES: Lineal descendants or representatives of any Indian Tribe or Native Hawaiian organization not identified in this notice that wish to claim these cultural items should submit a written request with information in support of the claim to the New Jersey State Museum at the address in this notice by March 26, 2018.

ADDRESSES: Dr. Gregory D. Lattanzi, Bureau of Archaeology & Ethnology, New Jersey State Museum, 205 West State Street, Trenton, NJ 08625, telephone (609) 984–9327, email *gregory.lattanzi@sos.nj.gov.*

SUPPLEMENTARY INFORMATION: Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3005, of the intent to repatriate cultural items under the control of the New Jersey State Museum, Trenton, NJ that meet the definition of unassociated funerary objects under 25 U.S.C. 3001.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003(d)(3). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the Native American cultural items. The National Park Service is not responsible for the determinations in this notice.

History and Description of the Cultural Items

In the 1930s, 5 cultural items were removed from Kyle Mound in Muscogee County, GA. Kyle Mound, consisting of a mound and associated cemetery, has been a known collecting site for artifacts, including funerary objects, since the 1880s. A hand-written label found with one of the artifacts, suggests that Mr. F.W. Miller sold part of the Kyle Mound to Charles A. Philhower. The note states ''Bought from Mr. Miller in East Orange found by him on the Chattahoochee River between Alabama and Georgia—Pyle (sp. Kyle) Mound south of Columbus C.A.P. (Charles A. Philhower).'' Philhower's entire archeological and ethnographic collection was transferred to the New Jersey State Museum from the Rutgers University Archives and Library. The 5 unassociated funerary objects are 2 ceramic bowls, 1 stone bowl, 1 necklace of blue and white beads, and 1 necklace of an assortment of different colored beads.

On an unknown date, 11 cultural items were removed from unknown locations in the state of Georgia. The circumstances of their removal are unclear as no documentation exists on the location within the state of Georgia. Where information exists, it is listed in the following sentences. The 11 unassociated funerary objects are 1 amber necklace from a grave, trade beads (1 necklace) from a grave, 6 necklaces of blue and white beads from a grave, 1 pearl necklace from a grave, and 2 necklaces of shell and beads from a grave.

A videoconference was held on July 14, 2016 between representatives of the New Jersey State Museum and the Eastern Band of Cherokee Indians, The Muscogee (Creek) Nation, and United Keetoowah Band of Cherokee Indians in Oklahoma. Through this consultation, it was determined that the cultural affiliation of the objects with the Cherokee could reasonably be ascertained. The United Keetoowah Band of Cherokee Indians in Oklahoma has taken the lead role in the repatriation process.

Determinations Made by the New Jersey State Museum

Officials of the New Jersey State Museum have determined that:

- Pursuant to 25 U.S.C. 3001(3)(B), the 16 cultural items described above are reasonably believed to have been placed with or near individual human remains at the time of death or later as part of the death rite or ceremony and are believed, by a preponderance of the evidence, to have been removed from a specific burial site of a Native American individual.
- Pursuant to 25 U.S.C. 3001(2), there is a relationship of shared group identity that can be reasonably traced between the unassociated funerary objects and the United Keetoowah Band of Cherokee Indians in Oklahoma.

Additional Requestors and Disposition

Lineal descendants or representatives of any Indian Tribe or Native Hawaiian organization not identified in this notice that wish to claim these cultural items should submit a written request with information in support of the claim to Dr. Gregory D. Lattanzi, Bureau of Archaeology & Ethnology, New Jersey State Museum, 205 West State Street, Trenton, NJ 08625, telephone (609) 984–9327, email *gregory.lattanzi@sos.nj.gov,* by March 26, 2018. After that date, if no additional claimants have come forward, transfer of control of the 16 objects to United Keetoowah Band of Cherokee Indians of Oklahoma may proceed.

The New Jersey State Museum is responsible for notifying the Eastern Band of Cherokee Indians, The Muscogee (Creek) Nation, and United Keetoowah Band of Cherokee Indians in Oklahoma that this notice has been published.

Dated: February 2, 2018.

Melanie O'Brien,

Manager, National NAGPRA Program.

[FR Doc. 2018–03633 Filed 2–21–18; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NAGPRA–NPS0024993; PPWOCRADN0–PCU00RP14.R50000]

Notice of Intent To Repatriate Cultural Items: Field Museum of Natural History, Chicago, IL

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: The Field Museum of Natural History, in consultation with the appropriate Indian Tribes or Native Hawaiian organizations, has determined that the cultural items listed in this notice meet the definition of sacred objects. Lineal descendants or representatives of any Indian Tribe or Native Hawaiian organization not identified in this notice that wish to claim these cultural items should submit a written request to the Field Museum of Natural History. If no additional claimants come forward, transfer of control of the cultural items to the lineal descendants, Indian Tribes, or Native Hawaiian organizations stated in this notice may proceed.

DATES: Lineal descendants or representatives of any Indian Tribe or Native Hawaiian organization not identified in this notice that wish to claim these cultural items should submit a written request with information in support of the claim to the Field Museum of Natural History at the address in this notice by March 26, 2018.

ADDRESSES: Helen Robbins, Field Museum of Natural History, 1400 South Lake Shore Drive, Chicago, IL 60605, telephone (312) 665–7317, email *hrobbins@fieldmuseum.org.*

SUPPLEMENTARY INFORMATION: Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3005, of the intent to repatriate cultural items under the control of the Field Museum of Natural History, Chicago, IL, that meet the definition of sacred objects under 25 U.S.C. 3001.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003(d)(3). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the Native American cultural items. The National Park Service is not responsible for the determinations in this notice.

History and Description of the Cultural Item(s)

In the summer of 1900, one cultural item was removed from an unknown location in Humboldt County, CA. Museum records indicate that these objects are Wiyot in origin and were collected by Stewart Culin for The Field Museum as part of an expedition co-sponsored by the Museum. Mr. Culin collected objects from what he described as an Indian Rancheria on the Mad River, about a mile away from Blue Lake in the summer of 1900. The one cultural item is a set of ''doctor's feathers'' that were collected from a Wiyot man named Dick, whose father had been a doctor. The set of doctor's feathers was accessioned by the Field Museum in 1900 and is represented by catalog number 60069. There are seven bundles of condor feathers, which have had their edges trimmed. Some bundles have additional smaller feathers, such as those from a northern flicker, and abalone shells. The feathers would have been used by a doctor in either a healing ceremony or as part of a religious ceremony, including the World Renewal Ceremony. These feathers are imbued and are necessary today for the revitalization and present day practice of Wiyot traditional religion. The Wiyot are culturally affiliated with the area from which the sacred objects were removed. This is supported by archival records and reports, museum records, Department of the Interior sources, academic sources, and correspondence with Wiyot representatives.

Determinations Made by the Field Museum of Natural History

Officials of the Field Museum of Natural History have determined that:

- Pursuant to 25 U.S.C. 3001(3)(C), the one cultural item described above is a specific ceremonial object needed by traditional Native American religious leaders for the practice of traditional Native American religions by their present-day adherents.
- Pursuant to 25 U.S.C. 3001(2), there is a relationship of shared group identity that can be reasonably traced between the sacred object and the Wiyot Tribe, California (previously listed as the Table Bluff Reservation—Wiyot Tribe).

Additional Requestors and Disposition

Lineal descendants or representatives of any Indian Tribe or Native Hawaiian organization not identified in this notice that wish to claim these cultural items should submit a written request with information in support of the claim to Helen Robbins, Field Museum of Natural History, 1400 South Lake Shore Drive, Chicago, IL 60605, telephone (312) 665–7317, email *hrobbins@fieldmuseum.org,* by March 26, 2018. After that date, if no additional claimants have come forward, transfer of control of the sacred object to the Wiyot Tribe, California (previously listed as the Table Bluff Reservation—Wiyot Tribe) may proceed.

The Field Museum of Natural History is responsible for notifying the Bear River Band of the Rohnerville Rancheria, California; Blue Lake Rancheria, California; Cher-Ae Heights Indian Community of the Trinidad Rancheria, California; and Wiyot Tribe, California (previously listed as the Table Bluff Reservation—Wiyot Tribe) that this notice has been published.

Dated: February 2, 2018.

Melanie O'Brien,

Manager, National NAGPRA Program.

[FR Doc. 2018–03639 Filed 2–21–18; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NAGPRA–NPS0024979; PPWOCRADN0–PCU00RP14.R50000]

Notice of Inventory Completion: History Colorado, Formerly Colorado Historical Society, Denver, CO

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: History Colorado has completed an inventory of human remains, in consultation with the appropriate Indian Tribes or Native Hawaiian organizations, and has determined that there is no cultural affiliation between the human remains and any present-day Indian Tribes or Native Hawaiian organizations. Representatives of any Indian Tribe or Native Hawaiian organization not identified in this notice that wish to request transfer of control of these human remains should submit a written request to History Colorado. If no additional requestors come forward, transfer of control of the human remains to the Indian Tribes or Native Hawaiian organizations stated in this notice may proceed.

DATES: Representatives of any Indian Tribe or Native Hawaiian organization not identified in this notice that wish to request transfer of control of these

human remains should submit a written request with information in support of the request to History Colorado at the address in this notice by March 26, 2018.

ADDRESSES: Sheila Goff, History Colorado, Denver, CO 80203, telephone (303) 866–4531, email *sheila.goff@state.co.us.*

SUPPLEMENTARY INFORMATION: Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3003, of the completion of an inventory of human remains under the control of History Colorado, Denver, CO. The human remains were removed from an unknown location in South Dakota.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003(d)(3) and 43 CFR 10.11(d). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the Native American human remains. The National Park Service is not responsible for the determinations in this notice.

Consultation

A detailed assessment of the human remains was made by History Colorado professional staff in consultation with representatives of the Cheyenne River Sioux Tribe of the Cheyenne River Reservation, South Dakota; Flandreau Santee Sioux Tribe of South Dakota; Iowa Tribe of Kansas and Nebraska; Iowa Tribe of Oklahoma; Lower Brule Sioux Tribe of the Lower Brule Reservation, South Dakota; Lower Sioux Indian Community in the State of Minnesota; Oglala Sioux Tribe (previously listed as the Oglala Sioux Tribe of the Pine Ridge Reservation, South Dakota); Otoe-Missouria Tribe of Indians, Oklahoma; Ponca Tribe of Indians of Oklahoma; Ponca Tribe of Nebraska; Prairie Island Indian Community in the State of Minnesota; Rosebud Sioux Tribe of the Rosebud Indian Reservation, South Dakota; Sac & Fox Nation, Oklahoma; Sac & Fox Tribe of the Mississippi in Iowa; Santee Sioux Nation, Nebraska; Sisseton-Wahpeton Oyate of the Lake Traverse Reservation, South Dakota; Spirit Lake Tribe, North Dakota; Standing Rock Sioux Tribe of North & South Dakota; Three Affiliated Tribes of the Fort Berthold Reservation, North Dakota; Upper Sioux Community, Minnesota; and the Yankton Sioux Tribe of South Dakota. The Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation, Montana; Crow Creek Sioux Tribe of the Crow Creek Reservation, South Dakota; Omaha Tribe of Nebraska; and the Sac & Fox Nation of Missouri in Kansas and Nebraska were invited to consult, but did not participate (hereafter referred to as ''The Invited and Consulted Tribes'').

History and Description of the Remains

At some time before 1996, human remains representing, at minimum, one individual were removed from an unknown location in South Dakota and delivered to the Colorado Office of Archaeology and Historic Preservation in 1996. The human remains are of an adult female. No known individual was identified. No associated funerary objects are present.

History Colorado has no evidence that at the time of the excavation and removal of these human remains the land from which the human remains were removed was the tribal land of any Indian Tribe or Native Hawaiian organization. Between February 2015 and November 2017, History Colorado contacted The Invited and Consulted Tribes, who are recognized as aboriginal to the area from which these Native American human remains were removed, requesting telephonic consultation. The Cheyenne River Sioux Tribe of the Cheyenne River Reservation, South Dakota, have agreed to accept control of the human remains and the Indian Tribes who participated in consultations concurred.

Determinations Made by the History Colorado

Officials of History Colorado have determined that:

- Pursuant to 25 U.S.C. 3001(9), the human remains described in this notice are Native American based on osteological analysis conducted at Metropolitan State University of Denver.
- Pursuant to 25 U.S.C. 3001(9), the human remains described in this notice represent the physical remains of one individual of Native American ancestry.
- Pursuant to 25 U.S.C. 3001(2), a relationship of shared group identity cannot be reasonably traced between the Native American human remains and any present-day Indian Tribe.
- According to final judgments of the Indian Claims Commission or the Court of Federal Claims, the land from which the Native American human remains were removed is the aboriginal land of The Invited and Consulted Tribes.
- Treaties, Acts of Congress, or Executive Orders, indicate that the land from which the Native American human remains were removed is the aboriginal land of The Invited and Consulted Tribes.
- Pursuant to 43 CFR 10.11(c)(1), the disposition of the human remains may be to The Invited and Consulted Tribes.

Additional Requestors and Disposition

Representatives of any Indian Tribe or Native Hawaiian organization not identified in this notice that wish to request transfer of control of these human remains should submit a written request with information in support of the request to Sheila Goff, History Colorado, Denver, CO 80203, telephone (303) 866–4531, email *sheila.goff@state.co.us,* by March 26, 2018. After that date, if no additional requestors have come forward, transfer of control of the human remains to The Invited and Consulted Tribes may proceed.

History Colorado is responsible for notifying The Invited and Consulted Tribes that this notice has been published.

Dated: February 2, 2018.

Melanie O'Brien,

Manager, National NAGPRA Program.

[FR Doc. 2018–03632 Filed 2–21–18; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NAGPRA–NPS0024981; PPWOCRADN0–PCU00RP14.R50000]

Notice of Inventory Completion: U.S. Fish and Wildlife Service, Alaska Region, Anchorage, AK

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: The U.S. Fish and Wildlife Service, Alaska Region (Alaska Region USFWS) has completed an inventory of human remains and associated funerary objects, in consultation with the appropriate Indian Tribes or Native Hawaiian organizations, and has determined that there is a cultural affiliation between the human remains and present-day Indian Tribes or Native Hawaiian organizations. Lineal descendants or representatives of any Indian Tribe or Native Hawaiian organization not identified in this notice that wish to request transfer of control of these human remains and associated funerary objects should submit a written request to the Alaska Region USFWS. If no additional requestors come forward, transfer of control of the human remains and associated funerary objects to the lineal descendants, Indian Tribes, or Native Hawaiian organizations stated in this notice may proceed.

DATES: Lineal descendants or representatives of any Indian Tribe or

Native Hawaiian organization not identified in this notice that wish to request transfer of control of these human remains and associated funerary objects should submit a written request with information in support of the request to the Alaska Region USFWS at the address in this notice by March 26, 2018.

ADDRESSES: Edward DeCleva, Regional Historic Preservation Officer, U.S. Fish and Wildlife Service, Alaska Region, 1011 East Tudor Road MS–235, Anchorage, AK 99503, telephone (907) 786–3399, email *edward_decleva@fws.gov.*

SUPPLEMENTARY INFORMATION: Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3003, of the completion of an inventory of human remains and associated funerary objects under the control of the Alaska Region USFWS, Anchorage, AK. The human remains and associated funerary objects were removed from Amchitka Island and Adak Island, Aleutians West Census Area, AK.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003(d)(3). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the Native American human remains and associated funerary objects. The National Park Service is not responsible for the determinations in this notice.

Consultation

A detailed assessment of the human remains was made by the Alaska Region USFWS professional staff in consultation with representatives of the Native Village of Atka, the Atxam Corporation, and the Aleut Corporation.

History and Description of the Remains

In 1944, human remains representing, at minimum, one individual were removed from an unknown site on Amchitka Island, Aleutians West Census Area, AK, by Fred Swearingen, who made surface collections from the midden site. The human remains were transferred to the University of Washington, Burke Museum in 1945, and then to the Alaska Region USFWS headquarters in 2016. The human remains include 21 vertebrae, three ribs, sternum, sacrum, one patella, and hand and foot bones, and represent one adult male. No known individual was identified. The one associated funerary object is an unmodified mammal bone.

There are no diagnostics artifacts or radiocarbon dates associated with the human remains. The consensus among anthropologists is that midden sites began to appear around 3,000 years ago. The human remains were found on the surface of the midden and likely date to the Late Prehistoric period, possibly no earlier than 500—1000 years B.P.

On April 15th, 1944, human remains representing, at minimum, one individual were removed from Adak Island, Aleutians West Census Area, AK, by Harley Goodrich while operating a bulldozer. The human remains include one cranium, discovered at a depth of approximately 25 feet. The human remains were transferred to the University of Washington, Burke Museum on August 1, 1944. A physical anthropologist at the Burke Museum determined that the human remains are from an adult female. No known individuals were identified. No known funerary objects were present.

The present-day Aleut cultural affiliation with prehistoric Aleut populations is evident in the human remains. The context and physical traits are consistent with those expected for pre-contact Aleut populations.

Determinations Made by the Alaska Region USFWS

Officials of the Alaska Region USFWS have determined that:

- Pursuant to 25 U.S.C. 3001(9), the human remains described in this notice represent the physical remains of two individuals of Native American ancestry.
- Pursuant to 25 U.S.C. 3001(3)(A), the one object described in this notice is reasonably believed to have been placed with or near individual human remains at the time of death or later as part of the death rite or ceremony.
- Pursuant to 25 U.S.C. 3001(2), there is a relationship of shared group identity that can be reasonably traced between the Native American human remains and the Native Village of Atka.

Additional Requestors and Disposition

Lineal descendants or representatives of any Indian Tribe or Native Hawaiian organization not identified in this notice that wish to request transfer of control of these human remains and associated funerary objects should submit a written request with information in support of the request to Edward DeCleva, Regional Historic Preservation Officer, U.S. Fish and Wildlife Service, Alaska Region, 1011 East Tudor Road MS–235, Anchorage, AK 99503, telephone (907) 786–3399, email *edward_decleva@fws.gov,* by March 26, 2018. After that date, if no additional requestors have come forward, transfer of control of the human remains and associated funerary objects to the Native Village of Atka may proceed.

The Alaska Region USFWS is responsible for notifying the Native Village of Atka, the Atxam Corporation, and the Aleut Corporation that this notice has been published.

Dated: February 2, 2018.

Melanie O'Brien,

Manager, National NAGPRA Program.

[FR Doc. 2018–03634 Filed 2–21–18; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NAGPRA–NPS0024982; PPWOCRADN0–PCU00RP14.R50000]

Notice of Intent To Repatriate Cultural Items: United States Army Corps of Engineers, Tulsa District, Tulsa, OK

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: The United States Army Corps of Engineers, Tulsa District, in consultation with the appropriate Indian tribes or Native Hawaiian organizations, has determined that the cultural items listed in this notice meet the definition of unassociated funerary objects. Lineal descendants or representatives of any Indian tribe or Native Hawaiian organization not identified in this notice that wish to claim these cultural items should submit a written request to the United States Army Corps of Engineers, Tulsa District. If no additional claimants come forward, transfer of control of the cultural items to the lineal descendants, Indian tribes, or Native Hawaiian organizations stated in this notice may proceed.

DATES: Lineal descendants or representatives of any Indian tribe or Native Hawaiian organization not identified in this notice that wish to claim these cultural items should submit a written request with information in support of the claim to the United States Army Corps of Engineers, Tulsa District, at the address in this notice by March 26, 2018.

ADDRESSES: Michelle Horn, CESWT–ODR–N, US Army Corps of Engineers, Tulsa District, 2488 East 81st Street, Tulsa, OK 74137–4290, telephone (918) 669–7642, email *Michelle.C.Horn@usace.army.mil.*

SUPPLEMENTARY INFORMATION: Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3005, of the intent to repatriate cultural

items under the control of the United States Army Corps of Engineers, Tulsa District, Tulsa, OK, that meet the definition of unassociated funerary objects under 25 U.S.C. 3001.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003(d)(3). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the Native American cultural items. The National Park Service is not responsible for the determinations in this notice.

History and Description of the Cultural Item(s)

In 1971, human remains and funerary objects were exposed during a work project at site 34JN30, Lake Texoma, Johnson County, OK, and removed by University of Oklahoma staff. No known individuals were identified. Two hand painted semi-porcelain tea cup fragments (re-fit into one object) were located with human tibiae fragments and interpreted as representing a burial. The tibiae fragments were not located in the collection during a NAGPRA inventory in 1995, nor during a re-inventory in 2004, and may not have been collected at the time of excavation. The one unassociated funerary object consists of the two teacup fragments re-fit into a whole object.

The burial was located within the region historically occupied by The Chickasaw Nation. Two other burials were recovered at 34JN30 and were repatriated to The Chickasaw Nation in accordance with NAGPRA in 2013 (78 FR 27995–27996, 05/13/2013). Those burials conformed to the burial practices of the Chickasaw as seen in ethnographic data, including the placement of grave goods on top of the burial with sheets of bark. The third burial, represented by the tibiae fragments and broken teacup, was located 25 feet from the other two and can reasonably be assumed to be associated with the same site. The temporal placement of this site in the mid-1800s was based on the archaeological seriation of historic artifacts from the burials and larger site assemblage.

Determinations Made by the United States Army Corps of Engineers, Tulsa District

Officials of the United States Army Corps of Engineers, Tulsa District, have determined that:

- Pursuant to 25 U.S.C. 3001(3)(B), the one cultural item described above is reasonably believed to have been placed with or near individual human remains at the time of death or later as part of the death rite or ceremony and are believed, by a preponderance of the evidence, to have been removed from a specific burial site of a Native American individual.
- Pursuant to 25 U.S.C. 3001(2), there is a relationship of shared group identity that can be reasonably traced between the unassociated funerary object and The Chickasaw Nation.

Additional Requestors and Disposition

Lineal descendants or representatives of any Indian tribe or Native Hawaiian organization not identified in this notice that wish to claim these cultural items should submit a written request with information in support of the claim to Michelle Horn, CESWT–ODR–N, US Army Corps of Engineers, Tulsa District, 2488 East 81st Street, Tulsa, OK 74137–4290, telephone (918) 669–7642, email *Michelle.C.Horn@usace.army.mil,* by March 26, 2018. After that date, if no additional claimants have come forward, transfer of control of the unassociated funerary object to The Chickasaw Nation may proceed.

The United States Army Corps of Engineers, Tulsa District, is responsible for notifying The Chickasaw Nation that this notice has been published.

Dated: February 2, 2018.

Melanie O'Brien,

Manager, National NAGPRA Program.

[FR Doc. 2018–03635 Filed 2–21–18; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NAGPRA–NPS0024983; PPWOCRADN0–PCU00RP14.R50000]

Notice of Inventory Completion: U.S. Fish and Wildlife Service, Alaska Region, Anchorage, AK

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: The U.S. Fish and Wildlife Service, Alaska Region (Alaska Region USFWS) has completed an inventory of human remains and associated funerary objects, in consultation with the appropriate Indian tribes or Native Hawaiian organizations, and has determined that there is a cultural affiliation between the human remains and present-day Indian tribes or Native Hawaiian organizations. Lineal descendants or representatives of any Indian tribe or Native Hawaiian organization not identified in this notice that wish to request transfer of control of these human remains and associated funerary objects should submit a written request to the Alaska Region USFWS. If no additional requestors come forward, transfer of control of the human remains and associated funerary objects to the lineal descendants, Indian tribes, or Native Hawaiian organizations stated in this notice may proceed.

DATES: Lineal descendants or representatives of any Indian tribe or Native Hawaiian organization not identified in this notice that wish to request transfer of control of these human remains and associated funerary objects should submit a written request with information in support of the request to the Alaska Region USFWS at the address in this notice by March 26, 2018.

ADDRESSES: Edward DeCleva, Regional Historic Preservation Officer, U.S. Fish and Wildlife Service, Alaska Region, 1011 East Tudor Road MS–235, Anchorage, AK 99503, telephone (907) 786–3399, email *edward_decleva@fws.gov.*

SUPPLEMENTARY INFORMATION: Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3003, of the completion of an inventory of human remains and associated funerary objects under the control of the Alaska Region USFWS, Anchorage, AK. The human remains and associated funerary objects were removed from multiple sites on Kodiak Island, AK.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003(d)(3). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the Native American human remains and associated funerary objects. The National Park Service is not responsible for the determinations in this notice.

Consultation

A detailed assessment of the human remains was made by the Alaska Region USFWS professional staff in consultation with representatives of the Alutiiq Museum and Archaeological Repository, acting as agent for the Alutiiq Tribe of Old Harbor (previously listed as Native Village of Old Harbor and Village of Old Harbor); Kaguyak Village; Native Village of Afognak; Native Village of Akhiok; Native Village of Larsen Bay; Native Village of Ouzinkie; Native Village of Port Lions; Sun'aq Tribe of Kodiak (previously listed as the Shoonaq' Tribe of Kodiak); and Tangirnaq Native Village (formerly Lesnoi Village (aka Woody Island)).

History and Description of the Remains

In 1977 and 1978, human remains representing, at minimum, 2 individuals were removed from 49–KOD–171 on Chief Cove, Spiridon Bay on Kodiak Island, AK. Some of these human remains were identified as human in 1977, during faunal analysis and additional elements were identified during the 2010 review of unmodified faunal material. No known individuals were identified. No associated funerary objects are present.

In 1977, human remains representing, at minimum, 7 individuals were removed from 49–KOD–172 on Chief Cove Island, Spiridon Bay, on Kodiak Island, AK. Some of these human remains were identified as human in 1977 during faunal analysis and additional elements were identified during the 2010 review of unmodified faunal material. No known individuals were identified. No associated funerary objects are present.

In 1977, human remains representing, at minimum, 3 individuals were removed from 49–KOD–221 along Uganik Passage on Kodiak Island, AK. No known individuals were identified. No associated funerary objects are present.

In 1977, human remains representing, at minimum, 1 individual were removed from 49–KOD–223 on Uganik Island, in the Kodiak Island Borough, AK. No known individuals were identified. No associated funerary objects are present.

In 1977 or 1978, human remains representing, at minimum, 5 individuals were removed from 49–KOD–224 on the southwest side of Uganik Island, in the Kodiak Island Borough, AK. These human remains were probably removed during the 1978 archeological excavation lead by U.S. Fish and Wildlife Service archeologist Michael Nowak. No known individuals were identified. No associated funerary objects are present.

In 1978, human remains representing, at minimum, 1 individual were removed from 49–KOD–249 on the southwest side of Uganik Island, in the Kodiak Island Borough, AK. No known individuals were identified. No associated funerary objects are present.

In 1978, human remains representing, at minimum, 4 individuals were removed from 49–KOD–257 on the southwest coast of Uganik Island, in the Kodiak Island Borough, AK. No known individuals were identified. The one associated funerary object is a lot of shell, rock, and faunal remains.

In 1978, human remains representing, at minimum, 1 individual were removed from 49–KOD–260 on the northeast shore of East Arm Uganik Bay, in the Kodiak Island Borough, AK. No known individuals were identified. No associated funerary objects are present.

In 1978, human remains representing, at minimum, 1 individual were removed from 49–KOD–280 on the west shore of South Arm Uganik Bay, in the Kodiak Island Borough, AK. No known individuals were identified. No associated funerary objects are present.

The human remains from the above sites were removed during an archeological survey led by Alaska Region USFWS archeologist Michael Nowak and were transferred to the University of Alaska Fairbanks, Museum of the North (UAMN). Portions of the collection were subsequently transferred to other institutions for study and curation. On October 28, 2016, the entire collection was once again consolidated at the UAMN.

Stratigraphic observations, cultural materials, and carbon dates indicate that the sites contain deposits spanning at least 2,000 years, from both the Late Kachemak and Koniag traditions. Archeological data indicate that modern Alutiiq peoples evolved from these archeologically documented societies. As such, the human remains from the above sites are likely Native American and most closely culturally affiliated with the modern Kodiak Alutiiq people.

Determinations Made by the Alaska Region USFWS

Officials of the Alaska Region USFWS have determined that:

- Pursuant to 25 U.S.C. 3001(9), the human remains described in this notice represent the physical remains of 25 individuals of Native American ancestry.
- Pursuant to 25 U.S.C. 3001(3)(A), the 1 associated funerary object described in this notice is reasonably believed to have been placed with or near individual human remains at the time of death or later as part of the death rite or ceremony.
- Pursuant to 25 U.S.C. 3001(2), there is a relationship of shared group identity that can be reasonably traced between the Native American human remains and associated funerary objects and the Native Village of Larsen Bay.

Additional Requestors and Disposition

Lineal descendants or representatives of any Indian tribe or Native Hawaiian organization not identified in this notice that wish to request transfer of control of these human remains and associated funerary objects should submit a written request with information in support of the request to Edward DeCleva, Regional Historic Preservation Officer, U.S. Fish and Wildlife Service, Alaska Region, 1011 East Tudor Road MS–235, Anchorage, AK 99503, telephone (907) 786–3399, email *edward_decleva@fws.gov,* by March 26, 2018. After that date, if no additional requestors have come forward, transfer of control of the human remains and associated funerary objects to the Native Village of Larsen Bay may proceed.

The Alaska Region USFWS is responsible for notifying the Alutiiq Tribe of Old Harbor (previously listed as Native Village of Old Harbor and Village of Old Harbor), Kaguyak Village, Native Village of Afognak, Native Village of Akhiok, Native Village of Larsen Bay, Native Village of Ouzinkie, Native Village of Port Lions, Sun'aq Tribe of Kodiak (previously listed as the Shoonaq' Tribe of Kodiak), Tangirnaq Native Village (formerly Lesnoi Village (aka Woody Island)) that this notice has been published.

Dated: February 2, 2018.

Melanie O'Brien,

Manager, National NAGPRA Program.

[FR Doc. 2018–03636 Filed 2–21–18; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NAGPRA–NPS0024991; PPWOCRADN0–PCU00RP14.R50000]

Notice of Intent To Repatriate Cultural Items: New York State Museum, Albany, NY

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: The New York State Museum, in consultation with the appropriate Indian Tribes or Native Hawaiian organizations, has determined that the cultural item listed in this notice meets the definition of a sacred object. Lineal descendants or representatives of any Indian Tribe or Native Hawaiian organization not identified in this notice that wish to claim these cultural items should submit a written request to the New York State Museum. If no additional claimants come forward, transfer of control of the cultural items to the lineal descendants, Indian Tribes, or Native Hawaiian organizations stated in this notice may proceed.

DATES: Lineal descendants or representatives of any Indian Tribe or Native Hawaiian organization not identified in this notice that wish to claim these cultural items should submit a written request with information in support of the claim to

the New York State Museum at the address in this notice by March 26, 2018.

ADDRESSES: Lisa Anderson, New York State Museum, 3049 Cultural Education Center, Albany, NY 12230, telephone (518) 486–2020, email *lisa.anderson@nysed.gov.*

SUPPLEMENTARY INFORMATION: Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3005, of the intent to repatriate a cultural item under the control of the New York State Museum, Albany, NY, that meets the definition of a sacred object under 25 U.S.C. 3001.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003(d)(3). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the Native American cultural items. The National Park Service is not responsible for the determinations in this notice.

History and Description of the Cultural Item(s)

In 1956, the museum acquired one cultural item as part of a larger collection purchased from the Albert G. Heath Collection at the Logan Museum of Anthropology at Beloit College in Beloit, WI. The cultural item was originally purchased by Mr. Heath from Joe Kishigobenesse, an Ottawa, who resided in Emmet County, MI.

The sacred object is a water drum identified by representatives of the Little Traverse Bay Bands of Odawa Indians, Michigan, as a Grandfather Drum used by the Midewiwin medicine society. Traditional religious leaders of the Little Traverse Bay Bands of Odawa Indians, Michigan, have identified the drum as necessary for the practice of traditional Native American religions by present-day adherents. Museum documentation, supported by oral and written evidence presented during consultation, indicates the drum is culturally affiliated with the Little Traverse Bay Bands of Odawa Indians, Michigan.

Determinations Made by the New York State Museum

Officials of the New York State Museum have determined that:

- Pursuant to 25 U.S.C. 3001(3)(C), the one cultural item described above is a specific ceremonial object needed by traditional Native American religious leaders for the practice of traditional Native American religions by their present-day adherents.
- Pursuant to 25 U.S.C. 3001(2), there is a relationship of shared group identity that can be reasonably traced between the sacred object and the Little Traverse Bay Bands of Odawa Indians, Michigan.

Additional Requestors and Disposition

Lineal descendants or representatives of any Indian Tribe or Native Hawaiian organization not identified in this notice that wish to claim this cultural item should submit a written request with information in support of the claim to Lisa Anderson, New York State Museum, 3049 Cultural Education Center, Albany, NY 12230, telephone (518) 486–2020, email *lisa.anderson@nysed.gov,* by March 26, 2018. After that date, if no additional claimants have come forward, transfer of control of the sacred object to Little Traverse Bay Bands of Odawa Indians, Michigan, may proceed.

The New York State Museum is responsible for notifying the Little Traverse Bay Bands of Odawa Indians, Michigan, that this notice has been published.

Dated: February 2, 2018.

Melanie O'Brien,

Manager, National NAGPRA Program.

[FR Doc. 2018–03638 Filed 2–21–18; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NAGPRA–NPS0024977; PPWOCRADN0–PCU00RP14.R50000]

Notice of Intent To Repatriate Cultural Items: Mount Holyoke College Art Museum, South Hadley, MA

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: The Mount Holyoke College Art Museum, in consultation with the appropriate Indian Tribes or Native Hawaiian organizations, has determined that the cultural items listed in this notice meet the definition of sacred objects and/or objects of cultural patrimony. Lineal descendants or representatives of any Indian Tribe or Native Hawaiian organization not identified in this notice that wish to claim these cultural items should submit a written request to the Mount Holyoke College Art Museum. If no additional claimants come forward, transfer of control of the cultural items to the lineal descendants, Indian Tribes, or Native Hawaiian organizations stated in this notice may proceed.

DATES: Lineal descendants or representatives of any Indian Tribe or Native Hawaiian organization not identified in this notice that wish to claim these cultural items should submit a written request with information in support of the claim to the Mount Holyoke College Art Museum at the address in this notice by March 26, 2018.

ADDRESSES: Aaron F. Miller, NAGPRA Coordinator, Mount Holyoke College Art Museum, 50 College Street, South Hadley, MA 01075, telephone (413) 538–3394, email *afmiller@mtholyoke.edu.*

SUPPLEMENTARY INFORMATION: Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3005, of the intent to repatriate cultural items under the control of the Mount Holyoke College Art Museum that meet the definition of sacred objects and/or objects of cultural patrimony under 25 U.S.C. 3001.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003(d)(3). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the Native American cultural items. The National Park Service is not responsible for the determinations in this notice.

History and Description of the Cultural Items

At some time prior to 1892, one cultural item was removed from an unknown location and entered the Mount Holyoke College Art Museum collection. No additional information regarding the date or method of the accession of the cultural item (MH 3.F.A) is available. The sacred object/object of cultural patrimony is a handled earthenware vessel with white slip and red and black pigments.

At some time prior to 1886, one cultural item was removed from an unknown location and given to Mount Holyoke College Art Museum by Mary Pease. The cultural item (MH 4.F.A) is listed in the Seminary's *Book of Thanks* for that year and the *Catalogue of Cabinet of Articles.* No additional provenance or accession information is available. The sacred object/object of cultural patrimony is an earthenware vessel decorated with white slip and black pigment.

At an unknown date in the late 19th or early 20th century, one cultural item was removed from an unknown location and acquired by Joseph Allen Skinner through unknown methods. The

cultural item (MH SK K.106) was likely accessioned into the Joseph Allen Skinner Museum collection between the museum's opening in 1932 and Mr. Skinner's death in 1946. Mr. Skinner donated his museum collection to Mount Holyoke College, and today it is administered by the Mount Holyoke College Art Museum. The sacred object/object of cultural patrimony is a wood and hide drum.

At some time prior to 1936, one cultural item was removed from an unknown location. The cultural item (MH SK K.B.22) was accessioned into the Joseph Allen Skinner Museum collection on August 30, 1936. No additional information regarding the source or method of acquisition is available. The sacred object/object of cultural patrimony is a handled earthenware vessel with white slip and black pigment.

In January of 2017, representatives from the Pueblo of San Felipe, New Mexico, identified these four cultural items as culturally affiliated with San Felipe and as sacred objects/objects of cultural patrimony. Based on National NAGPRA definitions of sacred objects and objects of cultural patrimony and a general knowledge of these objects incorporating sacred imagery and being used in various types of ceremonies and/or funerary contexts, the claim for repatriation to the Pueblo of San Felipe has merit.

Determinations Made by the Mount Holyoke College Art Museum

Officials of the Mount Holyoke College Art Museum have determined that:

- Pursuant to 25 U.S.C. 3001(3)(C), the four cultural items described above are specific ceremonial objects needed by traditional Native American religious leaders for the practice of traditional Native American religions by their present-day adherents.
- Pursuant to 25 U.S.C. 3001(3)(D), the four cultural items described above have ongoing historical, traditional, or cultural importance central to the Native American group or culture itself, rather than property owned by an individual.
- Pursuant to 25 U.S.C. 3001(2), there is a relationship of shared group identity that can be reasonably traced between the sacred objects and objects of cultural patrimony and the Pueblo of San Felipe, New Mexico.

Additional Requestors and Disposition

Lineal descendants or representatives of any Indian Tribe or Native Hawaiian organization not identified in this notice that wish to claim these cultural items should submit a written request with information in support of the claim to Aaron F. Miller, NAGPRA Coordinator, Mount Holyoke College Art Museum, 50 College Street, South Hadley, MA 01075, telephone (413) 538–3394, email *afmiller@mtholyoke.edu,* by March 26, 2018. After that date, if no additional claimants have come forward, transfer of control of the sacred object and/or object of cultural patrimony to the Pueblo of San Felipe, New Mexico, may proceed.

The Mount Holyoke College Art Museum is responsible for notifying the Pueblo of San Felipe, New Mexico, that this notice has been published.

Dated: February 2, 2018.

Melanie O'Brien,

Manager, National NAGPRA Program.

[FR Doc. 2018–03630 Filed 2–21–18; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NAGPRA–NPS0024976; PPWOCRADN0–PCU00RP14.R50000]

Notice of Inventory Completion: U.S. Department of the Interior, Bureau of Land Management, Alaska State Office, Anchorage, AK

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: The U.S. Department of the Interior, Bureau of Land Management (BLM), Alaska State Office, has completed an inventory of human remains and associated funerary objects, in consultation with the appropriate Indian Tribes, and with the cooperation of the University of Alaska Museum of the North, and has determined that there is a cultural affiliation between the human remains and associated funerary objects and present-day Indian Tribes. Lineal descendants or representatives of any Indian Tribe not identified in this notice that wish to request transfer of control of these human remains and associated funerary objects should submit a written request to the BLM, Alaska State Office. If no additional requestors come forward, transfer of control of the human remains and associated funerary objects to the Indian Tribes stated in this notice may proceed.

DATES: Lineal descendants or representatives of any Indian Tribe not identified in this notice that wish to request transfer of control of these human remains and associated funerary objects should submit a written request with information in support of the request to the BLM, Alaska State Office, at the address in this notice by March 26, 2018.

ADDRESSES: Dr. Robert King, BLM-Alaska State NAGPRA Coordinator, 222 West 7th Avenue, Box 13, Anchorage, AK 99513–7599, telephone (907) 271–5510, email *r2king@blm.gov.*

SUPPLEMENTARY INFORMATION: Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3003, of the completion of an inventory of human remains and associated funerary objects under the control of the BLM and housed at the University of Alaska Museum of the North. The human remains and associated funerary objects were removed from the Sikoruk site (XHP–00002) in the North Slope Borough, AK, on land administered by the BLM.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003(d)(3). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the Native American human remains and associated funerary objects. The National Park Service is not responsible for the determinations in this notice.

Consultation

A detailed assessment of the human remains was made by the BLM, Alaska State Office, and the University of Alaska Museum of the North professional staff in consultation with representatives of Native Village of Barrow Inupiat Traditional Government, Native Village of Nuiqsut (aka Nooiksut), and Village of Anaktuvuk Pass.

History and Description of the Remains

In 1971, human remains representing, at minimum, 1 individual were removed from the Sikoruk site (XHP–00002) at Tukuto Lake in the North Slope Borough, AK, by Dr. Edwin S. Hall. The lands surrounding Tukuto Lake are within the National Petroleum Reserve-Alaska and are administrated by the BLM. In 2016, the human remains were transferred from Ohio History Connection in Columbus, OH, where they had been held since 1971, to the University of Alaska Museum of the North in Fairbanks, AK, which serves as the primary repository for the BLM, Alaska State Office. The human remains are a 75-percent complete skeleton of a young adult female, 20–34 years old, and their condition suggests they are a few hundred years old. No known individual was identified. The two

associated funerary objects are one left distal tarsal and one left foot phalange of a medium sized true seal (Family Phocidae).

Determinations Made by the Bureau of Land Management, Alaska State Office

Officials of the BLM, Alaska State Office, have determined that:

- Pursuant to 25 U.S.C. 3001(9), the human remains described in this notice represent the physical remains of one individual of Native American ancestry.
- Pursuant to 25 U.S.C. 3001(3)(A), the two objects described in this notice are reasonably believed to have been placed with or near individual human remains at the time of death or later as part of the death rite or ceremony.
- Pursuant to 25 U.S.C. 3001(2), there is a relationship of shared group identity that can be reasonably traced between the Native American human remains and Native Village of Barrow Inupiat Traditional Government, Native Village of Nuiqsut (aka Nooiksut), and Village of Anaktuvuk Pass.

Additional Requestors and Disposition

Lineal descendants or representatives of any Indian Tribe or Native Hawaiian organization not identified in this notice that wish to request transfer of control of these human remains and associated funerary objects should submit a written request with information in support of the request to Dr. Robert King, BLM-Alaska State NAGPRA Coordinator, 222 West 7th Avenue, Box 13, Anchorage, AK 99513–7599, telephone (907) 271–5510, email *r2king@blm.gov,* by March 26, 2018. After that date, if no additional requestors have come forward, transfer of control of the human remains and associated funerary objects to Native Village of Barrow Inupiat Traditional Government, Native Village of Nuiqsut (aka Nooiksut), and Village of Anaktuvuk Pass may proceed.

The BLM, Alaska State Office, is responsible for notifying tribal representatives of Native Village of Barrow Inupiat Traditional Government, Native Village of Nuiqsut (aka Nooiksut), and Village of Anaktuvuk Pass that this notice has been published.

Dated: February 2, 2018.

Melanie O'Brien,

Manager, National NAGPRA Program.

[FR Doc. 2018–03629 Filed 2–21–18; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NAGPRA–NPS0024989; PPWOCRADN0–PCU00RP14.R50000]

Notice of Intent To Repatriate Cultural Items: U.S. Department of the Interior, National Park Service, Kaloko-Honokōhau National Historical Park, HI

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: The U.S. Department of the Interior, National Park Service, Kaloko-Honokōhau National Historical Park, in consultation with the appropriate Indian Tribes or Native Hawaiian organizations, has determined that the cultural items listed in this notice meet the definition of unassociated funerary objects. Lineal descendants or representatives of any Indian Tribe or Native Hawaiian organization not identified in this notice that wish to claim these cultural items should submit a written request to Kaloko-Honokōhau National Historical Park. If no additional claimants come forward, transfer of control of the cultural items to the lineal descendants, Indian Tribes, or Native Hawaiian organizations stated in this notice may proceed.

DATES: Lineal descendants or representatives of any Indian Tribe or Native Hawaiian organization not identified in this notice that wish to claim these cultural items should submit a written request with information in support of the claim to Kaloko-Honokōhau National Historical Park at the address in this notice by March 26, 2018.

ADDRESSES: Barbara Alberti, Acting Superintendent, Kaloko-Honokōhau National Historical Park, 73–4786 Kanalani Street #14, Kailua-Kona, HI 96740, telephone (808) 329–6881 x1201, email *barbara_alberti@nps.gov.*

SUPPLEMENTARY INFORMATION: Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3005, of the intent to repatriate cultural items under the control of the U.S. Department of the Interior, National Park Service, Kaloko-Honokōhau National Historical Park, City, HI, that meet the definition of unassociated funerary objects under 25 U.S.C. 3001.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003(d)(3). The determinations in this notice are the sole responsibility of the Superintendent, Kaloko-Honokōhau National Historical Park.

History and Description of the Cultural Items

In 1971, 15 cultural items were removed from D13–26 in Hawaii County, HI, by the University of California, Santa Barbara during extensive archeological excavations under the direction of Robert Renger. D13–26 is located on lands which now comprise Kaloko-Honokōhau National Historical Park, but the park was not established as a unit of the National Park Service until November 10, 1978. The collections were entrusted to Robert Renger by the land owner at the conclusion of fieldwork. On October 29, 1990, Robert Renger donated the Kaloko archeological collection to Kaloko-Honokōhau National Historical Park. The 15 unassociated funerary objects are 2 echinoid files, 1 bone fishhook point, 1 basalt abrader, 3 metal nails, 3 glass fragments, 1 cylindrical object, and 4 metal fragments.

D13–26 is a low platform with a low rectangular alignment and a possible fire pit. One set of human remains was identified and left in place within the low rectangular alignment further described as a crypt. Three building/use stages are identifiable at the site: the construction of the platform, the additional use of the platform, and the construction of the crypt and rectangular alignment of stones. Artifacts present at the site are representative of both pre- and post-contact time periods.

Determinations Made by Kaloko-Honokōhau National Historical Park

Officials of Kaloko-Honokōhau National Historical Park have determined that:

- Pursuant to 25 U.S.C. 3001(3)(B), the 15 cultural items described above are reasonably believed to have been placed with or near individual human remains at the time of death or later as part of the death rite or ceremony and are believed, by a preponderance of the evidence, to have been removed from a specific burial site of a Native American individual.
- Pursuant to 25 U.S.C. 3001(2), there is a relationship of shared group identity that can be reasonably traced between the unassociated funerary objects and the 'ohana of Kuali'i, (Guye) Lee, (Reggie) Lee, Lui, Naboa, Nazara, Palacat-Nelson, and Vincent.

Additional Requestors and Disposition

Lineal descendants or representatives of any Indian Tribe or Native Hawaiian organization not identified in this notice that wish to claim these cultural items should submit a written request with

information in support of the claim to Barbara Alberti, Acting Superintendent, Kaloko-Honokōhau National Historical Park, 73–4786 Kanalani Street #14, Kailua-Kona, HI 96740, telephone (808) 329–6881 x1201, email *barbara_alberti@nps.gov,* by March 26, 2018. After that date, if no additional claimants have come forward, transfer of control of the unassociated funerary objects to the ʻohana of Kualiʻi, (Guye) Lee, (Reggie) Lee, Lui, Naboa, Nazara, Palacat-Nelson, and Vincent may proceed.

Kaloko-Honokōhau National Historical Park is responsible for notifying Makani Hou o Kaloko-Honokōhau, Na Hoa Pili o Kaloko-Honokōhau, the Office of Hawaiian Affairs, and the ʼohana of Aloua, Ayau, Ching, Cobb-Adams, DeAguiar, Haleamau, Haʻo, Harp, Keanaʻāina, Kualiʻi, (Guye) Lee, (Reggie) Lee, Lui, Naboa, Nazara, Pai, Palacat-Nelson, Punihaole, Reeves, Roy, Springer, and Vincent that this notice has been published.

Dated: February 2, 2018.

Melanie O'Brien,

Manager, National NAGPRA Program.

[FR Doc. 2018–03637 Filed 2–21–18; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NAGPRA–NPS0024864; PPWOCRADN0–PCU00RP14.R50000]

Notice of Inventory Completion: U.S. Department of the Interior, Bureau of Land Management, Alaska State Office, Anchorage, AK

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: The U.S. Department of the Interior, Bureau of Land Management (BLM), Alaska State Office, has completed an inventory of human remains, in consultation with the appropriate Indian Tribes, and has determined that there is a cultural affiliation between the human remains and present-day Indian Tribes. Lineal descendants or representatives of any Indian Tribe not identified in this notice that wish to request transfer of control of these human remains should submit a written request to the BLM, Alaska State Office. If no additional requestors come forward, transfer of control of the human remains to the Indian Tribes stated in this notice may proceed.

DATES: Lineal descendants or representatives of any Indian Tribe not identified in this notice that wish to request transfer of control of these human remains should submit a written request with information in support of the request to the BLM, Alaska State Office, at the address in this notice by March 26, 2018.

ADDRESSES: Dr. Robert King, BLM-Alaska State NAGPRA Coordinator, 222 West 7th Avenue, Box 13, Anchorage, AK 99513–7599, telephone (907) 271–5510, email *r2king@blm.gov.*

SUPPLEMENTARY INFORMATION: Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3003, of the completion of an inventory of human remains under the control of the BLM, and housed at the University of Alaska Museum of the North. The human remains were removed from the Crag Point Site (KOD–00044), Kodiak Island, AK, on land administered by the BLM.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003(d)(3). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the Native American human remains. The National Park Service is not responsible for the determinations in this notice.

Consultation

A detailed assessment of the human remains was made by the BLM, Alaska State Office, and the University of Alaska Museum of the North professional staff, with additional information provided by the Alutiiq Museum and Archaeological Repository, in consultation with representatives of Native Village of Ouzinkie, the past and present-day inhabitants of Kodiak Island.

History and Description of the Remains

In 1986, human remains representing, at minimum, 26 individuals were removed from the Crag Point archeological site (KOD–00044), located inside Crag Point, on the west side of the entrance to Anton Larsen Bay, on the north coast of Kodiak Island, AK, on land administered by the BLM. The site was extensively excavated by Richard W. Jordan, an archeologist with Bryn Mawr College, and human remains were accessioned by the University of Alaska Museum of the North (accession number UA86–202). These partial sets of human remains represent two adult males, 21–35 years old; one adult male, 25–35 years old; one adult male, 35–45 years old; one adult female 21–35 years old; one adult female over 50 years old; two adults of indeterminate sex and age; one juvenile of indeterminate sex, 1–3 years old; and 17 individuals of indeterminate sex and age. No known individuals were identified. No associated funerary objects are present.

The human remains are determined to be Native American based on the geographic location (Kodiak Island, AK), the condition of the human remains, and their morphology. Nine of the individuals were excavated from burials and the other 17 individuals were from three collections of ''scattered remains.'' Radiocarbon dating of organic materials contextually associated with the human remains date within the last 2,000 years. Archeological studies and oral traditions show a 7,500-year ancestry between present-day and past residents on Kodiak Island. Therefore, the human remains are determined to be directly related to Kodiak Alutiiq people represented by the Native Village of Ouzinkie.

Determinations Made by the Bureau of Land Management, Alaska State Office

Officials of the BLM, Alaska State Office, have determined that:

- Pursuant to 25 U.S.C. 3001(9), the human remains described in this notice represent the physical remains of 26 individuals of Native American ancestry.
- Pursuant to 25 U.S.C. 3001(2), there is a relationship of shared group identity that can be reasonably traced between the Native American human remains and the Native Village of Ouzinkie.

Additional Requestors and Disposition

Lineal descendants or representatives of any Indian Tribe not identified in this notice that wishes to request transfer of control of these human remains should submit a written request with information in support of the request to Dr. Robert King, BLM-Alaska State NAGPRA Coordinator, 222 West 7th Avenue, Box 13, Anchorage, AK 99513–7599, telephone (907) 271–5510, email *r2king@blm.gov,* by March 26, 2018. After that date, if no additional requestors have come forward, transfer of control of the human remains to Native Village of Ouzinkie may proceed.

The BLM, Alaska State Office, is responsible for notifying the Native Village of Ouzinkie that this notice has been published.

Dated: February 5, 2018.

Melanie O'Brien,

Manager, National NAGPRA Program.

[FR Doc. 2018–03628 Filed 2–21–18; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NAGPRA–NPS0024978; PPWOCRADN0–PCU00RP14.R50000]

Notice of Inventory Completion: University of North Carolina at Chapel Hill, Research Laboratories of Archaeology, Chapel Hill, NC

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: The University of North Carolina at Chapel Hill, Research Laboratories of Archaeology, has completed an inventory of human remains and associated funerary objects, in consultation with the appropriate Indian Tribes or Native Hawaiian organizations, and has determined that there is no cultural affiliation between the human remains and associated funerary objects and any present-day Indian Tribes or Native Hawaiian organizations. Representatives of any Indian Tribe or Native Hawaiian organization not identified in this notice that wish to request transfer of control of these human remains and associated funerary objects should submit a written request to the University of North Carolina at Chapel Hill, Research Laboratories of Archaeology. If no additional requestors come forward, transfer of control of the human remains and associated funerary objects to the Indian Tribes or Native Hawaiian organizations stated in this notice may proceed.

DATES: Representatives of any Indian Tribe or Native Hawaiian organization not identified in this notice that wish to request transfer of control of these human remains and associated funerary objects should submit a written request with information in support of the request to the University of North Carolina at Chapel Hill, Research Laboratories of Archaeology at the address in this notice by March 26, 2018.

ADDRESSES: Dr. C. Margaret Scarry, Research Laboratories of Archaeology, University of North Carolina, Campus Box 3120, Chapel Hill, NC 27599–3120, telephone (919) 962–6574, email *scarry@email.unc.edu.*

SUPPLEMENTARY INFORMATION: Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3003, of the completion of an inventory of human remains and associated funerary objects under the control of the University of North Carolina at Chapel Hill, Research Laboratories of Archaeology, Chapel Hill, NC. The human remains and associated funerary objects were removed from multiple counties in the states of Kentucky, North Carolina, and Tennessee.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003(d)(3) and 43 CFR 10.11(d). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the Native American human remains and associated funerary objects. The National Park Service is not responsible for the determinations in this notice.

Consultation

A detailed assessment of the human remains was made by the University of North Carolina at Chapel Hill, Research Laboratories of Archaeology, professional staff in consultation with representatives of the Cherokee Nation, Eastern Band of Cherokee Indians, and the United Keetoowah Band of Cherokee Indians in Oklahoma.

History and Description of the Remains

In 1980, human remains representing, at minimum, 1 individual were removed from the Indian Fort Mountain site (15Ma25) in Madison County, KY. The University of North Carolina at Chapel Hill, Research Laboratories of Archaeology (UNC–CH), and Berea College jointly sponsored test excavations at Indian Fort Mountain, a presumed Middle Woodland hilltop enclosure near Berea, Kentucky. These investigations were undertaken by UNC graduate student David Moore. One of the five archeological features excavated (Feature 1) was a thin lens of dark soil that contained 17 small fragments of human bone that were placed in two vials. Moore suggests that these bones may represent a secondary burial within the confines of the stone enclosure. The human remains were transported to UNC–CH for cleaning and storage. No known individual was identified. No associated funerary objects are present.

From 1963 to 1964, human remains representing, at minimum, 13 individuals were removed from the Cane Creek site (31Ml3) in Mitchell County, NC. The site was excavated by archeologists from UNC–CH in 1964, following a period of digging into the site by the landowner. This excavation identified and removed three human burials (designated Burials 1, 2, and 3) and associated artifacts. Forty additional human bone fragments were recovered from the site surface and from test units over the burials. The landowner donated to UNC–CH human bone from 6 additional burials that were dug in 1963. All burials have been assigned to the late Middle Woodland period (A.D. 700–1100) based on artifacts recovered from the site. No known individuals were identified. The 315 associated funerary objects from Burials 2 and 3 include one bone awl and 314 disk and shell beads.

In 1963, human remains representing, at minimum, 1 individual were removed from the Great Tellico site (40Mr75) in Monroe County, TN. Three human bone fragments were collected from the site's surface by UNC–CH archeologist Ed Dolan. The human remains were transported to UNC–CH for cleaning and storage. This site visit was part of a regional survey for a National Science Foundation-funded project to investigate the origins of the Cherokee. Dolan noted that the site had recently been torn up by relic hunters, so it is likely that the bone fragments are from looter-disturbed burials. These human remains likely date to either the Dallas phase (A.D. 1300–1600) or Overhill phase (after A.D. 1600). No known individual was identified. No associated funerary objects are present.

In 1965, human remains representing, at minimum, 1 individual were removed from the Toqua site (40Mr6) in Monroe County, TN. Four human bone fragments were collected by UNC–CH archeologists Brian Egloff and Jeff Reid from the spoil pile of a looter's pit that had been dug into the top of the mound. The human remains were transported to UNC–CH for cleaning and storage. This site visit was part of a regional survey for a National Science Foundation-funded project to investigate the origins of the Cherokee. These human remains likely date to the Dallas phase (A.D. 1300–1600). No known individual was identified. No associated funerary objects are present.

In 1963, human remains representing, at minimum, 3 individuals were removed from the Citico site (40Mr7) in Monroe County, TN. Four human bone fragments were collected from the site's surface by UNC–CH archeologist Ed Dolan. The human remains were transported to UNC–CH for cleaning and storage. This site visit was part of a regional survey for a National Science Foundation-funded project to investigate the origins of the Cherokee. Dolan noted that the site had recently been torn up by relic hunters, so it is likely that the bone fragments are from looter-disturbed burials. These human remains likely date to either the Dallas phase (A.D. 1300–1600) or Overhill phase (after A.D.–1600). No known individuals were identified. No associated funerary objects are present.

In 1935, human remains representing, at minimum, 3 individuals were removed from the R. H. Bell site (40Re1) in Roane County, TN. Four human bone fragments were surface collected from the village area of the site by Joffre Coe during a visit to T. M. N. Lewis' excavation there. The human remains were transported to the University of North Carolina at Chapel Hill and subsequently donated to the Research Laboratories of Archaeology (formerly Laboratory of Anthropology) after its creation in 1939. These human remains likely date to the Dallas phase (A.D. 1300–1600). No known individuals were identified. No associated funerary objects are present.

In 1964, human remains representing, at minimum, 1 individual were removed from the Fudd Campbell site (40Ce3) in Carter County, TN. One human bone fragment was collected from the site's surface by UNC–CH archeologists Bennie Keel and Brian Egloff. The human remains were transported to UNC–CH for cleaning and storage. This site visit was part of a regional survey for a National Science Foundation-funded project to investigate the origins of the Cherokee. Keel noted that the site was in the process of being destroyed by the Tennessee Archaeological Society, so it is likely that the bone fragment is from a disturbed burial. The archeological association of the human bone is unknown. No known individual was identified. No associated funerary objects are present.

In 1966, human remains representing, at minimum, 1 individual were removed from the Great Hiwassee site (40Pk3) in Polk County, TN. Two human bone fragments were collected from the site's surface by UNC–CH archeologist Brian Egloff. The human remains were transported to UNC–CH for cleaning and storage. This site visit was part of a regional survey for a National Science Foundation-funded project to investigate the origins of the Cherokee. Egloff noted that the site had recently been torn up by relic hunters, so it is likely that the bone fragments are from looter-disturbed burials. The archeological association of the human bone is unknown. No known individual was identified. No associated funerary objects are present.

Determinations Made by the University of North Carolina at Chapel Hill

Officials of the University of North Carolina at Chapel Hill have determined that:

- Pursuant to 25 U.S.C. 3001(9), the human remains described in this notice are Native American based on their physical association with Native American cultural remains and occurrence at Native American archeological sites.
- Pursuant to 25 U.S.C. 3001(9), the human remains described in this notice represent the physical remains of a minimum of 24 individuals of Native American ancestry.
- Pursuant to 25 U.S.C. 3001(3)(A), the 315 objects described in this notice are reasonably believed to have been placed with or near individual human remains at the time of death or later as part of the death rite or ceremony.
- Pursuant to 25 U.S.C. 3001(2), a relationship of shared group identity cannot be reasonably traced between the Native American human remains and associated funerary objects and any present-day Indian Tribe.
- According to final judgments of the Indian Claims Commission or the Court of Federal Claims, the land from which the Native American human remains and associated funerary objects were removed is the aboriginal land of the Cherokee Nation, Eastern Band of Cherokee Indians, and United Keetoowah Band of Cherokee Indians in Oklahoma.
- Treaties, Acts of Congress, or Executive Orders, indicate that the land from which the Native American human remains and associated funerary objects were removed is the aboriginal land of the Cherokee Nation, Eastern Band of Cherokee Indians, and United Keetoowah Band of Cherokee Indians in Oklahoma.
- Pursuant to 43 CFR 10.11(c)(1), the disposition of the human remains and associated funerary objects may be to the Cherokee Nation, Eastern Band of Cherokee Indians, and United Keetoowah Band of Cherokee Indians in Oklahoma.

Additional Requestors and Disposition

Representatives of any Indian Tribe or Native Hawaiian organization not identified in this notice that wish to request transfer of control of these human remains and associated funerary objects should submit a written request with information in support of the request to Dr. C. Margaret Scarry, Research Laboratories of Archaeology, University of North Carolina, Campus Box 3120, Chapel Hill, NC 27599–3120, telephone (919) 962–6574, email *scarry@email.unc.edu,* by March 26, 2018. After that date, if no additional requestors have come forward, transfer of control of the human remains and associated funerary objects to the Cherokee Nation, Eastern Band of Cherokee Indians, and United Keetoowah Band of Cherokee Indians in Oklahoma may proceed.

The University of North Carolina at Chapel Hill, Research Laboratories of Archaeology is responsible for notifying the Cherokee Nation, Eastern Band of Cherokee Indians, and United Keetoowah Band of Cherokee Indians in Oklahoma that this notice has been published.

Dated: February 2, 2018.

Melanie O'Brien,

Manager, National NAGPRA Program.

[FR Doc. 2018–03631 Filed 2–21–18; 8:45 am]

BILLING CODE 4312–52–P

INTERNATIONAL TRADE COMMISSION

[Investigation Nos. 701–TA–582 and 731–TA–1377 (Final)]

Ripe Olives From Spain; Scheduling of the Final Phase of Countervailing Duty and Antidumping Duty Investigations

AGENCY: United States International Trade Commission.

ACTION: Notice.

SUMMARY: The Commission hereby gives notice of the scheduling of the final phase of antidumping and countervailing duty investigation Nos. 701–TA–582 and 731–TA–1377 (Final) pursuant to the Tariff Act of 1930 (''the Act'') to determine whether an industry in the United States is materially injured or threatened with material injury, or the establishment of an industry in the United States is materially retarded, by reason of imports of ripe olives from Spain, provided for in subheadings 2005.70.02, 2005.70.04, 2005.70.50, 2005.70.60, 2005.70.70, and 2005.70.75 of the Harmonized Tariff Schedule of the United States, preliminarily determined by the Department of Commerce to be subsidized and sold at less-than-fair-value.[1]

[1] For purposes of these investigations, the Department of Commerce has defined the subject merchandise as follows:

''The products covered by this investigation are certain processed olives, usually referred to as 'ripe olives.' The subject merchandise includes all colors of olives; all shapes and sizes of olives, whether pitted or not pitted, and whether whole, sliced, chopped, minced, wedged, broken, or otherwise reduced in size; all types of packaging, whether for consumer (retail) or institutional (food service) sale, and whether canned or packaged in glass, metal, plastic, multi-layered airtight containers (including pouches), or otherwise; and all manners of preparation and preservation, whether low acid or acidified, stuffed or not stuffed, with or without flavoring and/or saline solution, and including in ambient, refrigerated, or frozen conditions.

Included are all ripe olives grown, processed in whole or in part, or packaged in Spain. Subject merchandise includes ripe olives that have been further processed in Spain or a third country,

DATES: January 26, 2018.

FOR FURTHER INFORMATION CONTACT: Jordan Harriman (202–205–2610), Office of Investigations, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436. Hearing-impaired persons can obtain information on this matter by contacting the Commission's TDD terminal on 202–205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000. General information concerning the Commission may also be obtained by accessing its internet server (*https://www.usitc.gov*). The public record for these investigations may be viewed on the Commission's electronic docket (EDIS) at *https://edis.usitc.gov.*

SUPPLEMENTARY INFORMATION:

Background.—The final phase of these investigations is being scheduled pursuant to sections 705(b) and 731(b) of the Tariff Act of 1930 (19 U.S.C. 1671d(b) and 1673d(b)), as a result of affirmative preliminary determinations by the Department of Commerce that certain benefits which constitute subsidies within the meaning of section 703 of the Act (19 U.S.C. 1671b) are being provided to manufacturers, producers, or exporters in Spain of ripe olives, and that such products are being sold in the United States at less than fair value within the meaning of section 733 of the Act (19 U.S.C. 1673b). The investigations were requested in petitions deemed filed on June 22, 2017, by the Coalition of Fair Trade in Ripe Olives, consisting of Bell-Carter Foods, Walnut Creek, CA, and Musco Family Olive Company, Tracy, CA.

For further information concerning the conduct of this phase of the investigations, hearing procedures, and rules of general application, consult the Commission's Rules of Practice and Procedure, part 201, subparts A and B (19 CFR part 201), and part 207, subparts A and C (19 CFR part 207).

Participation in the investigations and public service list.—Persons, including industrial users of the subject merchandise and, if the merchandise is sold at the retail level, representative consumer organizations, wishing to participate in the final phase of these investigations as parties must file an entry of appearance with the Secretary to the Commission, as provided in section 201.11 of the Commission's rules, no later than 21 days prior to the hearing date specified in this notice. A party that filed a notice of appearance during the preliminary phase of the investigations need not file an additional notice of appearance during this final phase. The Secretary will maintain a public service list containing the names and addresses of all persons, or their representatives, who are parties to the investigations.

Limited disclosure of business proprietary information (BPI) under an administrative protective order (APO) and BPI service list.—Pursuant to section 207.7(a) of the Commission's rules, the Secretary will make BPI gathered in the final phase of these investigations available to authorized applicants under the APO issued in the investigations, provided that the application is made no later than 21 days prior to the hearing date specified in this notice. Authorized applicants must represent interested parties, as defined by 19 U.S.C. 1677(9), who are parties to the investigations. A party granted access to BPI in the preliminary phase of the investigations need not reapply for such access. A separate service list will be maintained by the Secretary for those parties authorized to receive BPI under the APO.

Staff report.—The prehearing staff report in the final phase of these investigations will be placed in the nonpublic record on May 10, 2018, and a public version will be issued thereafter, pursuant to section 207.22 of the Commission's rules.

Hearing.—The Commission will hold a hearing in connection with the final phase of these investigations beginning at 9:30 a.m. on Thursday, May 24, 2018, at the U.S. International Trade Commission Building. Requests to appear at the hearing should be filed in writing with the Secretary to the Commission on or before May 18, 2018. A nonparty who has testimony that may aid the Commission's deliberations may request permission to present a short statement at the hearing. All parties and nonparties desiring to appear at the hearing and make oral presentations should participate in a prehearing conference to be held on May 21, 2018, at the U.S. International Trade Commission Building, if deemed necessary. Oral testimony and written materials to be submitted at the public hearing are governed by sections 201.6(b)(2), 201.13(f), and 207.24 of the Commission's rules. Parties must submit any request to present a portion of their hearing testimony *in camera* no later than 7 business days prior to the date of the hearing.

Written submissions.—Each party who is an interested party shall submit a prehearing brief to the Commission. Prehearing briefs must conform with the provisions of section 207.23 of the Commission's rules; the deadline for filing is May 17, 2018. Parties may also file written testimony in connection with their presentation at the hearing, as provided in section 207.24 of the Commission's rules, and posthearing briefs, which must conform with the provisions of section 207.25 of the Commission's rules. The deadline for filing posthearing briefs is June 1, 2018. In addition, any person who has not entered an appearance as a party to the investigations may submit a written statement of information pertinent to the subject of the investigations, including statements of support or opposition to the petition, on or before June 1, 2018. On July 2, 2018, the Commission will make available to parties all information on which they have not had an opportunity to comment. Parties may submit final comments on this information on or before July 6, 2018, but such final comments must not contain new factual information and must otherwise comply with section 207.30 of the Commission's rules. All written submissions must conform with the provisions of section 201.8 of the Commission's rules; any submissions that contain BPI must also conform with the requirements of sections 201.6, 207.3, and 207.7 of the Commission's rules. The Commission's *Handbook on E-Filing,* available on the Commission's website at *https://edis.usitc.gov,* elaborates upon the Commission's rules with respect to electronic filing.

Additional written submissions to the Commission, including requests pursuant to section 201.12 of the Commission's rules, shall not be accepted unless good cause is shown for accepting such submissions, or unless the submission is pursuant to a specific request by a Commissioner or Commission staff.

In accordance with sections 201.16(c) and 207.3 of the Commission's rules, each document filed by a party to the investigations must be served on all other parties to the investigations (as identified by either the public or BPI service list), and a certificate of service must be timely filed. The Secretary will not accept a document for filing without a certificate of service.

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including but not limited to curing, fermenting, rinsing, oxidizing, pitting, slicing, chopping, segmenting, wedging, stuffing, packaging, or heat treating, or any other processing that would not otherwise remove the merchandise from the scope of the investigation if performed in Spain.''

For a full description of Commerce's scope, see *Ripe Olives From Spain: Preliminary Affirmative Determination of Sales at Less Than Fair Value, Postponement of Final Determination, and Extension of Provisional Measures,* 83 FR 3677, January 26, 2018.

Authority: These investigations are being conducted under authority of title VII of the Tariff Act of 1930; this notice is published pursuant to section 207.21 of the Commission's rules.

By order of the Commission.

Issued: February 15, 2018.

Lisa R. Barton,

Secretary to the Commission.

[FR Doc. 2018–03591 Filed 2–21–18; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

Notice of Lodging of Proposed Consent Decree Under the Clean Water Act

On February 9, 2018, the Department of Justice lodged a proposed Consent Decree with the United States District Court for the Western District of Washington in the lawsuit entitled *United States of America* v. *Trident Seafoods Corporation,* Civil Action No. 2:18–cv–00210.

The Complaint initiating this matter seeks civil penalties and injunctive relief for alleged violations of the Clean Water Act (''CWA''), 33 U.S.C. Section 1319, against Trident Seafoods Corporation, the owners and/or operators of seafood processing facilities in Sand Point and Wrangell, Alaska.

Under the proposed Consent Decree, Defendant would be enjoined from discharging pollutants except as authorized by the NPDES permits, required to remediate the Sand Point seafood wastepile and to take specified steps to reduce foam discharges to ocean waters, and required to complete an independent evaluation of Trident's internal corporate environmental management system. The proposed Consent Decree also mandates compliance with the CWA and Trident's NPDES permits, and payment to the United States of a civil penalty for past violations.

The publication of this notice opens a period for public comment on the Consent Decree. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, and should refer to *United States of America* v. *Trident Seafoods Corporation,* D.J. Ref. No. 90–5–1–1–11200. All comments must be submitted no later than thirty (30) days after the publication date of this notice. Comments may be submitted either by email or by mail:

To submit comments:	*Send them to:*
By email ...	*pubcomment-ees.enrd@usdoj.gov.*
By mail	Assistant Attorney General, U.S. DOJ—ENRD, P.O. Box 7611, Washington, DC 20044–7611.

During the public comment period, the Consent Decree may be examined and downloaded at this Justice Department website: *https://www.justice.gov/enrd/consent-decrees.* We will provide a paper copy of the Consent Decree upon written request and payment of reproduction costs. Please mail your request and payment to:

Consent Decree Library, U.S. DOJ—ENRD, P.O. Box 7611, Washington, DC 20044–7611.

Please enclose a check or money order for $3.00 (25 cents per page reproduction cost) payable to the United States Treasury.

Susan M. Akers,

Assistant Section Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 2018–03664 Filed 2–21–18; 8:45 am]

BILLING CODE 4410–15–P

DEPARTMENT OF JUSTICE

Office of Justice Programs

[OJP (NIJ) Docket No. 1743]

Request for Public Comment on Proposed Specification Threat Levels and Associated Ammunition To Test Equipment Intended To Protect U.S. Law Enforcement Against Handguns and Rifles

AGENCY: National Institute of Justice, Justice.

ACTION: Notice.

SUMMARY: The National Institute of Justice (NIJ) seeks feedback from the public on a proposed specification of the threat levels and associated ammunition intended for use with voluntary NIJ Standards that specify a minimum performance requirement for U.S. law enforcement equipment intended to protect against handgun and rifle ammunition. This document defines ballistic threats identified by U.S. law enforcement as representative of prevalent threats in the United States.

DATES: Comments must be received by 5 p.m. Eastern Time on May 23, 2018.

HOW TO RESPOND AND WHAT TO INCLUDE: The draft document can be found here: *https://www.nij.gov/body-armor.* The draft document is available in both Word and pdf formats. To submit comments, NIJ encourages commenters to fill out the comment template and send it in an email to the contact listed below with ''Draft NIJ Specification of Threat Levels and Ammunition'' in the subject line. Please provide contact information with the submission of comments. All materials submitted are subject to public release under the Freedom of Information Act, and will be shared with U.S. Government staff or U.S. Government contractors for evaluation purposes to revise the draft document. Comments generally should not include any sensitive personal information or commercially confidential information. If you wish to voluntarily submit confidential commercial information, but do not want it to be publicly released, you must mark that information prominently as ''CONFIDENTIAL COMMERCIAL INFORMATION'' and NIJ will, to the extent permitted by law, withhold such information from public release.

FOR FURTHER INFORMATION CONTACT: Mark Greene, Policy and Standards Division Director, Office of Science and Technology, National Institute of Justice, 810 7th Street NW, Washington, DC 20531; telephone number: (202) 307–3384; email address: *mark.greene2@usdoj.gov.*

SUPPLEMENTARY INFORMATION: The proposed specification *Threat Levels and Associated Ammunition to Test Equipment Intended to Protect U.S. Law Enforcement Against Handguns and Rifles* is incorporated by reference into a proposed revision of NIJ Standard 0101.06, *Ballistic Resistance of Body Armor,* which can be found at *https://www.nij.gov/body-armor.* NIJ anticipates publishing the final version of the proposed specification document in late 2018. For more information on NIJ's voluntary standards, please visit *https://www.nij.gov/standards.* For more information on body armor, please visit *https://www.nij.gov/body-armor* and *https://www.policearmor.org.*

David B. Muhlhausen,

Director, National Institute of Justice.

[FR Doc. 2018–03672 Filed 2–21–18; 8:45 am]

BILLING CODE 4410–18–P

DEPARTMENT OF JUSTICE

Office of Justice Programs

[OJP (NIJ) Docket No. 1744]

Request for Public Comment on Proposed Revision of NIJ Standard 0101.06, Ballistic Resistance of Body Armor

AGENCY: National Institute of Justice, Justice.

ACTION: Notice.

SUMMARY: The National Institute of Justice (NIJ) seeks feedback from the public on a proposed revision of NIJ Standard 0101.06, *Ballistic Resistance of Body Armor,* that specifies minimum performance requirements and test methods for the ballistic resistance of body armor used by U.S. law enforcement that is intended to protect the torso against handgun and rifle ammunition.

DATES: Comments must be received by 5 p.m. Eastern Time on May 23, 2018.

HOW TO RESPOND AND WHAT TO INCLUDE: The draft document can be found here: *https://www.nij.gov/body-armor.* The draft document is available in both Word and pdf formats. To submit comments, NIJ encourages commenters to fill out the comment template and send it in an email to the contact listed below with ''Draft NIJ Standard 0101.07, Ballistic Resistance of Body Armor'' in the subject line. Please provide contact information with the submission of comments. All materials submitted are subject to public release under the Freedom of Information Act, and will be shared with U.S. Government staff or U.S. Government contractors for evaluation purposes to revise the draft document. Comments should not include any sensitive personal information or commercially confidential information. If you wish to voluntarily submit confidential commercial information, but do not want it to be publicly released, you must mark that information prominently as ''CONFIDENTIAL COMMERCIAL INFORMATION'' and NIJ will, to the extent permitted by law, withhold such information from public release.

FOR FURTHER INFORMATION CONTACT: Mark Greene, Policy and Standards Division Director, Office of Science and Technology, National Institute of Justice, 810 7th Street NW, Washington, DC 20531; telephone number: (202) 307–3384; email address: *mark.greene2@usdoj.gov.*

SUPPLEMENTARY INFORMATION: This draft document is a proposed revision of NIJ Standard 0101.06, *Ballistic Resistance of Body Armor,* published in 2008 and found here: *https://www.ncjrs.gov/pdffiles1/nij/223054.pdf.* The final version of this draft document is anticipated to be published in late 2018 as NIJ Standard 0101.07, *Ballistic Resistance of Body Armor.* Its primary purpose will be for use by the NIJ Compliance Testing Program (CTP) for testing and evaluation of ballistic-resistant body armor for certification by NIJ. It will be used by both ballistics laboratories that test body armor and body armor manufacturers participating in the NIJ CTP. This standard will be included in the Personal Body Armor scope of accreditation used by the National Voluntary Laboratory Accreditation Program (NVLAP) to accredit ballistics laboratories.

The draft NIJ specification *Threat Levels and Associated Ammunition to Test Equipment Intended to Protect U.S. Law Enforcement Against Handguns and Rifles* referenced in Section 3 of the draft document here can be found at *https://www.nij.gov/body-armor.*

For more information on NIJ's voluntary standards, please visit *https://www.nij.gov/standards.* For more information on body armor, please visit *https://www.nij.gov/body-armor* and *https://www.policearmor.org.*

David B. Muhlhausen,

Director, National Institute of Justice.

[FR Doc. 2018–03674 Filed 2–21–18; 8:45 am]

BILLING CODE 4410–18–P

DEPARTMENT OF JUSTICE

Parole Commission

Sunshine Act Meeting

Record of Vote of Meeting Closure

(Pub. L. 94–409) (5 U.S.C. Sec. 552b)

I, J. Patricia Wilson Smoot, of the United States Parole Commission, was present at a meeting of said Commission, which started at approximately 12:00 a.m., on Tuesday, February 13, 2018 at the U.S. Parole Commission, 90 K Street NE, Third Floor, Washington, DC 20530. The purpose of the meeting was to discuss original jurisdiction cases pursuant to 28 CFR 2.25. and 28 CFR 2.68(i)(1) Three Commissioners were present, constituting a quorum when the vote to close the meeting was submitted.

Public announcement further describing the subject matter of the meeting and certifications of the General Counsel that this meeting may be closed by votes of the Commissioners present were submitted to the Commissioners prior to the conduct of any other business. Upon motion duly made, seconded, and carried, the following Commissioners voted that the meeting be closed: J. Patricia Wilson Smoot, Patricia K. Cushwa and Charles T. Massarone.

In Witness Whereof, I make this official record of the vote taken to close this meeting and authorize this record to be made available to the public.

Dated: February 13, 2018.

J. Patricia Wilson Smoot,

Chairperson, U.S. Parole Commission.

[FR Doc. 2018–03706 Filed 2–20–18; 11:15 am]

BILLING CODE 4410–31–P

DEPARTMENT OF LABOR

Advisory Committee on Veterans' Employment, Training and Employer Outreach (ACVETEO): Meeting

AGENCY: Veterans' Employment and Training Service (VETS), Department of Labor.

ACTION: Notice of open meeting.

SUMMARY: This notice sets forth the schedule and proposed agenda of a forthcoming meeting of the ACVETEO. The ACVETEO will discuss the DOL core programs and services that assist veterans seeking employment and raise employer awareness as to the advantages of hiring veterans. There will be an opportunity for individuals or organizations to address the committee. Any individual or organization that wishes to do so should contact Mr. Gregory Green at 202–693–4734.

Individuals who will need accommodations for a disability in order to attend the meeting (*e.g.,* interpreting services, assistive listening devices, and/or materials in alternative format) should notify the Advisory Committee no later than Tuesday, March 6, 2018 by contacting Mr. Gregory Green at 202–693–4734. Requests made after this date will be reviewed, but availability of the requested accommodations cannot be guaranteed. The meeting site is accessible to individuals with disabilities. This Notice also describes the functions of the ACVETEO. Notice of this meeting is required under Section 10(a) (2) of the Federal Advisory Committee Act. This document is intended to notify the general public.

DATES AND TIMES: Tuesday, March 13, 2018 beginning at 9:00 a.m. and ending at approximately 4:00 p.m. (EST).

ADDRESSES: The meeting will take place at the U.S. Department of Labor, Frances Perkins Building, 200 Constitution Avenue NW, Washington, DC 20210, Conference Room N–5437 A, B & C. Members of the public are encouraged to arrive early to allow for security clearance into the Frances Perkins Building.

Security Instructions: Meeting participants should use the visitor's entrance to access the Frances Perkins Building, one block north of Constitution Avenue at 3rd and C Streets NW. For security purposes meeting participants must:

1. Present a valid photo ID to receive a visitor badge.

2. Know the name of the event being attended: The meeting event is the Advisory Committee on Veterans' Employment, Training and Employer Outreach (ACVETEO).

3. Visitor badges are issued by the security officer at the Visitor Entrance located at 3rd and C Streets NW. When receiving a visitor badge, the security officer will retain the visitor's photo ID until the visitor badge is returned to the security desk.

4. Laptops and other electronic devices may be inspected and logged for identification purposes.

5. Due to limited parking options, Metro's Judiciary Square station is the easiest way to access the Frances Perkins Building.

Notice of Intent to Attend the Meeting: All meeting participants are being asked to submit a notice of intent to attend by Friday, March 2, 2018, via email to Mr. Gregory Green at *green.gregory.b@dol.gov,* subject line ''March 2018 ACVETEO Meeting.''

FOR FURTHER INFORMATION CONTACT: Mr. Gregory Green, Assistant Designated Federal Official for the ACVETEO, (202) 693–4734.

SUPPLEMENTARY INFORMATION: The ACVETEO is a Congressionally mandated advisory committee authorized under Title 38, U.S. Code, Section 4110 and subject to the Federal Advisory Committee Act, 5 U.S.C. App. 2, as amended. The ACVETEO is responsible for: Assessing employment and training needs of veterans; determining the extent to which the programs and activities of the U.S. Department of Labor meet these needs; assisting to conduct outreach to employers seeking to hire veterans; making recommendations to the Secretary, through the Assistant Secretary for VETS, with respect to outreach activities and employment and training needs of Veterans; and carrying out such other activities necessary to make required reports and recommendations. The ACVETEO meets at least quarterly.

Agenda

9:00 a.m. Welcome and remarks, Matt Miller, Deputy Assistant Secretary of Labor for Veterans' Employment and Training
9:10 a.m. Administrative Business, Mika Cross, Designated Federal Official
9:15 a.m. Discussion on Fiscal Year 2017 Report Recommendations, Ryan Gallucci, ACVETEO Chairman
10:00 a.m. Break
10:15 a.m. DOL VETS plan to answer the Fiscal Year 2017 Report Recommendations, Mika Cross, Designated Federal Officer
11:00 a.m. Break
11:15 a.m. Briefing on DOL/VETS Priorities, Matt Miller, Deputy Assistant Secretary of Labor for Veterans' Employment and Training
12:00 p.m. Lunch
1:00 p.m. BLS brief on the 2018 Employment Situation of Veterans
2:00 p.m. Break
2:15 p.m. Subcommittees discussion/development Fiscal Year 2018 work plan, Mika Cross, Designated Federal Official
3:30 p.m. Public Forum, Mika Cross, Designated Federal Official
4:00 p.m. Adjourn

Signed in Washington, DC, this 13th day of February 2018.

Matthew M. Miller,

Deputy Assistant Secretary for Policy, Veterans' Employment and Training Service.

[FR Doc. 2018–03551 Filed 2–21–18; 8:45 am]

BILLING CODE 4510–79–P

DEPARTMENT OF LABOR

Agency Information Collection Activities; Submission for OMB Review; Comment Request, Homeless Veterans Reintegration Program (HVRP) Impact Evaluation, New Collection

AGENCY: Office of the Assistant Secretary for Policy, Chief Evaluation Office, Department of Labor.

ACTION: Notice of Information Collection; request for comment.

SUMMARY: The Department of Labor (DOL), as part of its continuing effort to reduce paperwork and respondent burden, conducts a preclearance consultation program to provide the general public and federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA95). This program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents is properly assessed.

Currently, DOL is soliciting comments concerning the collection of survey data about the HVRP Impact Evaluation. A copy of the proposed Information Collection Request (ICR) can be obtained by contacting the office listed in the addressee section of this notice.

DATES: Written comments must be submitted to the office listed in the addressee's section below on or before April 23, 2018.

ADDRESSES: You may submit comments by either one of the following methods:

Email: ChiefEvaluationOffice@dol.gov; Mail or Courier: Christina Yancey, Chief Evaluation Office, OASP, U.S. Department of Labor, Room S–2312, 200 Constitution Avenue NW, Washington, DC 20210. *Instructions:* Please submit one copy of your comments by only one method. All submissions received must include the agency name and OMB Control Number identified above for this information collection. Comments, including any personal information provided, become a matter of public record. They will also be summarized and/or included in the request for OMB approval of the information collection request.

FOR FURTHER INFORMATION CONTACT: Christina Yancey by email at *ChiefEvaluationOffice@dol.gov*.

SUPPLEMENTARY INFORMATION:

I. *Background:* As the only federal program wholly focused on employment services for veterans experiencing homelessness, HVRP sits at the nexus of these three critical policy arenas: veterans, employment, and housing. Since 1987, HVRP has assisted veterans experiencing homelessness through competitive grants to state, local, and tribal governments; local Workforce Development Boards; private for-project and non-profit organizations; and community organizations. In the most recent Program Year (PY) 2017, DOL announced awards to 155 grantees to support an estimated 21,000 veterans. These are one-year grants; a new set of grantees will receive PY 2018 awards.

The HVRP Impact Evaluation is examining the effectiveness of the HVRP program, building evidence of HVRP's effects on participants' employment and earning-related outcomes. In addition, the evaluation will provide a better understanding of program models and variations, partnerships, and populations served. Goals of the specific data collection plan included in this Notice is to help DOL make informed decisions about what works best for whom and about effective ways to improve the service systems seeking to support veterans experiencing homelessness. The research questions to be answered by the planned data collection pertain to what impact the HVRP has on Veterans experiencing homelessness; how the HVRP impacts vary by individual, grantee, and community characteristics and how they vary by services and referrals available or received; how HVRPs are implemented; and how systems and

partnerships are developed and maintained.

This **Federal Register** Notice provides the opportunity to comment on three proposed data collection instruments that will be used in the evaluation:

* *Baseline Information Form.* All study-eligible program applicants, that is, those applicants who meet the program's definition of a homeless veteran, will be presented with a consent form prior to the collection of baseline information. Applicants who give their consent will be asked to complete the Baseline Information Form by providing information on their: (1) Demographics and background characteristics, (2) employment history, (3) service-related characteristics, (4) receipt of public assistance, and (5) contact information. It is expected to take the applicant an average of 10 minutes to complete the form.

* *Program readiness tool.* The program readiness tool will be administered as part of the baseline data collection process after applicant consent. The applicant will answer the simple tool's basic questions about the applicant's motivation and readiness for work. A web-based system will validate data entries and calculate a program readiness score. It is expected to take 5 minutes for the applicant to complete a program readiness tool.

* *Grantee Survey.* The grantee survey will be administered to all HVPR grantees (as of PY 2018) to collect the following information: (1) Key referral sources for participants, (2) key recruitment sources and challenges, (3) number and type of services, (4) list of services offered on-site and through referrals, (5) key partners and referral sources, (6) type and mode of communication, and (7) types of coordination and collaboration. The survey will be administered via web. It is expected to take the participants an average of 60 minutes to complete the survey.

II. *Desired Focus of Comments:* Currently, DOL is soliciting comments concerning the above data collection for the HVRP Evaluation. DOL is particularly interested in comments that do the following:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility.
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used.
- Enhance the quality, utility, and clarity of the information to be collected.
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology-for example, permitting electronic submission of responses.

III. *Current Actions:* At this time, DOL is requesting clearance for the Baseline Information Form, program readiness tool, and grantee survey. A future information collection request will include protocols for staff interviews, focus groups, and case studies; a partner survey; a front line staff survey; and a participant follow-up survey.

Type of Review: New information collection request.

OMC Control Number: 1290–0NEW

Affected Public: Veterans experiencing homelessness.

ESTIMATED BURDEN HOURS

Type of instrument	Total number respondents	Annual number of respondents	Annual number of responses per respondent	Average burden hour per response (hours)	Annual estimated burden hours
Veteran					
Background information form	[a] 1,440	480	1	0.17	80
Program Readiness Tool	[a] 1,440	480	1	0.08	40
Grantee Staff					
Grantee Survey	155	52	1	1	51.7
Total	3,035	1,012	.....	.....	171.7

[a] The Background Information Form and Program Readiness Tool will be collected from all study-eligible applicants who consented to participate in the study. The number of respondents is based on an 85% response rate (1,440).

Comments submitted in response to this request will be summarized and/or included in the request for Office of Management and Budget approval of the information collection request; they will also become a matter of public record.

Dated: February 13, 2018.

Molly Irwin,

Chief Evaluation Officer, U.S. Department of Labor.

[FR Doc. 2018–03553 Filed 2–21–18; 8:45 am]

BILLING CODE 4510–HX–P

DEPARTMENT OF LABOR

Mine Safety and Health Administration

Petition for Modification of Application of Existing Mandatory Safety Standard

AGENCY: Mine Safety and Health Administration, Labor.

ACTION: Notice.

SUMMARY: This notice is a summary of a petition for modification submitted to the Mine Safety and Health Administration (MSHA) by the parties listed below.

DATES: All comments on the petition must be received by MSHA's Office of Standards, Regulations, and Variances on or before March 26, 2018.

ADDRESSES: You may submit your comments, identified by ''docket number'' on the subject line, by any of the following methods:

1. *Electronic Mail: zzMSHA-comments@dol.gov.* Include the docket number of the petition in the subject line of the message.
2. *Facsimile:* 202–693–9441.
3. *Regular Mail or Hand Delivery:* MSHA, Office of Standards, Regulations, and Variances, 201 12th Street South, Suite 4E401, Arlington,

Virginia 22202–5452, Attention: Sheila McConnell, Director, Office of Standards, Regulations, and Variances. Persons delivering documents are required to check in at the receptionist's desk in Suite 4E401. Individuals may inspect copies of the petition and comments during normal business hours at the address listed above.

MSHA will consider only comments postmarked by the U.S. Postal Service or proof of delivery from another delivery service such as UPS or Federal Express on or before the deadline for comments.

FOR FURTHER INFORMATION CONTACT: Barbara Barron, Office of Standards, Regulations, and Variances at 202–693–9447 (Voice), *barron.barbara@dol.gov* (Email), or 202–693–9441 (Facsimile). [These are not toll-free numbers.]

SUPPLEMENTARY INFORMATION: Section 101(c) of the Federal Mine Safety and Health Act of 1977 and Title 30 of the Code of Federal Regulations Part 44 govern the application, processing, and disposition of petitions for modification.

I. Background

Section 101(c) of the Federal Mine Safety and Health Act of 1977 (Mine Act) allows the mine operator or representative of miners to file a petition to modify the application of any mandatory safety standard to a coal or other mine if the Secretary of Labor (Secretary) determines that:

1. An alternative method of achieving the result of such standard exists which will at all times guarantee no less than the same measure of protection afforded the miners of such mine by such standard; or

2. That the application of such standard to such mine will result in a diminution of safety to the miners in such mine.

In addition, the regulations at 30 CFR 44.10 and 44.11 establish the requirements and procedures for filing petitions for modification.

II. Petition for Modification

Docket Number: M–2018–002–M.

Petitioner: Central Plains Cement Company, 1801 Wewatta Street, Suite 1000, Denver, Colorado 80202.

Mine: Sugar Creek Mine, MSHA I.D. No. 23–02171, located in Jackson County, Missouri.

Regulation Affected: 30 CFR 49.6(a)(1) (Equipment and maintenance requirements).

Modification Request: The petitioner requests a modification of the existing standard to permit the maintenance of a minimum of six approved self-contained breathing apparatus at its mine rescue station in lieu of twelve self-contained breathing apparatus. The petitioner proposes to maintain a mine rescue station with a minimum of six approved self-contained breathing apparatus and all equipment identified in 30 CFR 49.6(a)(2) through (a)(9). This station would contain sufficient equipment to equip one mine rescue team.

The petitioner states that:

(1) Central Plains Cement is the operator of the Sugar Creek Mine, and controlled by Eagle Materials, Inc.

(2) Sugar Creek is an underground limestone mine, located at 2200 N. Courtney Road, Sugar Creek, Missouri 64050, in Jackson County, Missouri, Mine I.D. No. 23–02171. The active workings are accessed from the surface via a 700 foot vertical shaft. Sugar Creek is a room and pillar mine with multiple openings to active milling areas. (3) The petitioner has established a single mine rescue team for Sugar Creek. The mine rescue team consists of eight qualified and trained members.

(4) The petitioner has entered into an agreement with Martin Marietta Kansas City, LLC (''Martin Marietta'') whereby Martin Marietta agrees to provide mine rescue services by the Martin Marietta Materials, Kansas City Mine Rescue team as needed to Sugar Creek. Similarly, petitioner has agreed to provide rescue services by the Sugar Creek mine rescue team as needed to three Martin Marietta locations.

(5) The Sugar Creek mine rescue team will provide services to the Martin Marietta's Randolph Deep Mine (Randolph) located at 401 Randolph Road, Randolph, Missouri 64161, in Clay County, Missouri, Mine I.D. No. 23–02308; The Stamper Underground Mine (Stamper) is an underground limestone mine, located at 13500 Interurban Road, Kansas City, Missouri 64163, in Platte County, Missouri, Mine I.D. No. 23–02232; and its Parkville Quarry (Parkville) is an underground limestone mine, is located at 7600 NW 9 Hwy., Parkville, Missouri 64152, in Platte County, Missouri, Mine I.D. No. 23–01883.

(6) On January 2, 2018, Martin Marietta filed a Petition for Modification seeking approval for the identical modification of 30 CFR 49.6(a)(1) requested herein.

(7) The petitioner has a mine rescue station located at Sugar Creek. Prior to December 20, 2017, the Sugar Creek mine rescue station and Martin Marietta's Mine rescue station at Randolph each contained equipment sufficient only to supply one mine rescue team. As of December 20, 2018, Martin Marietta relocated certain mine rescue team equipment, including six self-contained breathing apparatus, gas monitors, cap lamps, and oxygen bottles, to the Sugar Creek mine rescue station to ensure that the combined mine rescue station at Sugar Creek is in compliance with 30 CFR 49.6(a). However, if MSHA grants the relief sought by this petition, Martin Marietta intends to return that mine rescue team equipment to Randolph.

(8) The proposed modification would provide at least the same measure of safety contemplated by the standard. Pursuant to the mine rescue services arrangement between Martin Marietta and petitioner, there will always be two mine rescue teams available whenever miners are underground and a minimum of twelve approved self-contained breathing apparatus available for a mine emergency. Both Stamper and Parkville are within thirty minutes or less of ground travel time from Randolph, and Randolph is located within fifteen minutes of ground travel time from Sugar Creek. When maintained in the individual mine rescue stations as petitioned for, the self-contained breathing apparatus could be used immediately or transported to another mine within a maximum forty-five minutes ground travel time.

(9) The petitioner seeks an alternative method of compliance with 30 CFR 49.6(a)(1) and proposes the following for the Sugar Creek mine rescue station:

(a) Self-Contained Breathing Apparatus: The mine rescue station will be equipped with a minimum of six self-contained breathing apparatus, each with a minimum of four hours capacity (approved by MSHA and NIOSH under 42 CFR part 84, subpart H), and any necessary equipment for testing such apparatus.

(b) The petitioner will maintain a mine rescue station provided with all equipment identified in 30 CFR 49.6(a)(2) through (a)(9).

The petitioner asserts that the proposed alternative method will at all times guarantee no less than the same measure of protection afforded the miners under the existing standard.

Sheila McConnell,

Director, Office of Standards, Regulations, and Variances.

[FR Doc. 2018–03555 Filed 2–21–18; 8:45 am]

BILLING CODE 4520–43–P

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

[Docket No. OSHA–2011–0196]

The Vinyl Chloride Standard; Extension of the Office of Management and Budget's (OMB) Approval of Information Collection (Paperwork) Requirements

AGENCY: Occupational Safety and Health Administration (OSHA), Labor.

ACTION: Request for public comments.

SUMMARY: OSHA solicits public comments concerning its proposal to extend the Office of Management and Budget's (OMB) approval of the information collection requirements specified in the Vinyl Chloride Standard.

DATES: Comments must be submitted (postmarked, sent, or received) by April 23, 2018.

ADDRESSES:

Electronically: You may submit comments and attachments electronically at *http://www.regulations.gov,* which is the Federal eRulemaking Portal. Follow the instructions online for submitting comments.

Facsimile: If your comments, including attachments, are not longer than 10 pages you may fax them to the OSHA Docket Office at (202) 693–1648.

Mail, hand delivery, express mail, messenger, or courier service: When using this method, you must submit a copy of your comments and attachments to the OSHA Docket Office, Docket No. OSHA–2011–0196, Occupational Safety and Health Administration, U.S. Department of Labor, Room N–3653, 200 Constitution Avenue NW, Washington, DC 20210. Deliveries (hand, express mail, messenger, and courier service) are accepted during the Docket Office's normal business hours, 10:00 a.m. to 3:00 p.m., ET.

Instructions: All submissions must include the Agency name and the OSHA docket number (OSHA–2011–0196) for the Information Collection Request (ICR). All comments, including any personal information you provide, are placed in the public docket without change, and may be made available online at *http://www.regulations.gov.* For further information on submitting comments, see the ''Public Participation'' heading in the section of this notice titled **SUPPLEMENTARY INFORMATION**.

Docket: To read or download comments or other material in the docket, go to *http://www.regulations.gov* or the OSHA Docket Office at the address above. All documents in the docket (including this **Federal Register** notice) are listed in the *http://www.regulations.gov* index; however, some information (*e.g.,* copyrighted material) is not publicly available to read or download from the website. All submissions, including copyrighted material, are available for inspection and copying at the OSHA Docket Office. You may also contact Theda Kenney at the address below to obtain a copy of the ICR.

FOR FURTHER INFORMATION CONTACT: Theda Kenney or Charles McCormick, Directorate of Standards and Guidance, OSHA, U.S. Department of Labor, telephone (202) 693–2222.

SUPPLEMENTARY INFORMATION:

I. Background

The Department of Labor, as part of its continuing effort to reduce paperwork and respondent (*i.e.,* employer) burden, conducts a preclearance consultation program to provide the public with an opportunity to comment on proposed and continuing information collection requirements in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)). This program ensures that information is in the desired format, reporting burden (time and costs) is minimal, collection instruments are clearly understood, and OSHA's estimate of the information collection burden is accurate. The Occupational Safety and Health Act of 1970 (the OSH Act) (29 U.S.C. 651 *et seq.*) authorizes information collection by employers as necessary or appropriate for enforcement of the Act or for developing information regarding the causes and prevention of occupational injuries, illnesses, and accidents (29 U.S.C. 657). The OSH Act also requires that OSHA obtain such information with minimum burden upon employers, especially those operating small businesses, and to reduce to the maximum extent feasible unnecessary duplication of efforts in obtaining information (29 U.S.C. 657).

The Standard specifies a number of paperwork requirements. The following is a brief description of the collection of information requirements contained in the Vinyl Chloride (VC) Standard.

(A) Exposure Monitoring (§ 1910.1017(d)) and (§ 1910.1017(n))

Paragraph 1910.1017(d)(2) requires employers to conduct exposure monitoring at least quarterly if the results show that worker exposures are above the permissible exposure limit (PEL), while those exposed at or above the Action Level (AL) must be monitored no less than semiannually. Paragraph (d)(3) requires that employers perform additional monitoring whenever there has been a change in VC production, process or control that may result in an increase in the release of VC.

(B) Written Compliance Plan (§§ 1910.1017(f)(2) and (f)(3))

Paragraph (f)(2) requires employers whose engineering and work practice controls cannot sufficiently reduce worker VC exposures to a level at or below the PEL to develop and implement a plan for doing so. Paragraph (f)(3) requires employers to develop this written plan and provide it upon request to OSHA for examination and copying. These plans must be updated annually.

(C) Respirator Program (§ 1910.1017(g)(2))

When respirators are required, the employer must establish a respiratory protection program in accordance with 1910.134, paragraphs (b) through (d) (except (d)(1)(iii) and (d)(3)(iii)(B)(1) and (2)) and (f) through (m). Paragraph 1910.134(c) requires the employer to develop and implement a written respiratory protection program with worksite-specific procedures and elements for required respirator use. The purpose of these requirements is to ensure that employers establish a standardized procedure for selecting, using, and maintaining respirators for each workplace where respirators will be used. Developing written procedures ensures that employers develop a respirator program that meets the needs of their workers.

(D) Emergency Plan (§ 1910.1017(i))

Employers must develop a written operational plan for dealing with emergencies; the plan must address the storage, handling, and use of VC as a liquid or compressed gas. In the event of an emergency, appropriate elements of the plan must be implemented. Emergency plans must maximize workers' personal protection and minimize the hazards of an emergency.

(E) Medical Surveillance (§ 1910.1017(k))

Paragraph (k) requires employers to develop a medical surveillance program for workers exposed to VC in excess of the action level. Examinations must be provided in accord with this paragraph at least annually. Employers must also obtain, and provide to each worker, a copy of a physician's statement

regarding the worker's suitability for continued exposure to VC, including use of protective equipment and respirators, if appropriate.

(F) Communication of VC Hazards (§ 1910.1017(l))

Under paragraph 1910.1017(l)(1), Hazard Communication, the employer shall ensure that at least the following hazards are addressed: Cancer; central nervous system effects; liver effects; blood effects; and flammability. Under paragraph 1910.1017(l)(1)(iii), the employer shall include vinyl chloride and polyvinyl chloride (PVC) in the program established to comply with the Hazard Communication Standard (HCS) (§ 1910.1200). The employer shall ensure that each employee has access to labels on containers of chemicals and substances associated with vinyl and polyvinyl chloride and to safety data sheets, and is trained in accordance with the provisions of HCS and paragraph (j) of this section.

(G) Recordkeeping (§ 1910.1017(m))

Employers must maintain worker exposure and medical records. Medical and monitoring records are maintained principally for worker access, but are designed to provide valuable information to both workers and employers. The medical and monitoring records required by this standard will aid workers and their physicians in determining whether or not treatment or other interventions are needed for VC exposure. The information also will enable employers to ensure that workers are not being overexposed; such information may alert the employer that steps must be taken to reduce VC exposures.

Exposure records must be maintained for at least 30 years, and medical records must be kept for the duration of employment plus 20 years, or for a total of 30 years, whichever is longer. Records must be kept for extended periods because of the long latency period associated with VC-related carcinogenesis (*i.e.,* cancer). Cancer often cannot be detected until 20 or more years after the first exposure to VC.

II. Special Issues for Comment

OSHA has a particular interest in comments on the following issues:

- Whether the proposed information collection requirements are necessary for the proper performance of the Agency's functions, including whether the information is useful;
- The accuracy of OSHA's estimate of the burden (time and costs) of the information collection requirements, including the validity of the methodology and assumptions used;
- The quality, utility, and clarity of the information collected; and
- Ways to minimize the burden on employers who must comply. For example, by using automated or other technological information collection and transmission techniques.

III. Proposed Actions

OSHA is requesting that OMB extend its approval of the information collection requirements contained in the Vinyl Chloride Standard. The Agency is requesting an adjustment decrease in burden hours from 535 to 428 hours, a total decrease of 107 burden hours. The reduction is a result of fewer VC and PVC establishments identified for this ICR. The currently approved ICR estimates a total of 24 establishments, and this proposed ICR estimates a total of 19 establishments. There is also a decrease in the cost under Item 13 from $43,320 to $34,279, a total decrease of $9,041. The cost decrease results from a decrease in the number of exposure monitoring samples and medical examinations.

Type of Review: Extension of a currently approved collection.

Title: Vinyl Chloride Standard (29 CFR part 1910.1017).

OMB Control Number: 1218–0010.

Affected Public: Business or other for-profits.

Number of Respondents: 19.

Frequency of Responses: On occasion.

Total Responses: 620.

Average Time per Response: Various.

Estimated Total Burden Hours: 428.

Estimated Cost (Operation and Maintenance): $0.

IV. Public Participation—Submission of Comments on This Notice and Internet Access to Comments and Submissions

You may submit comments in response to this document as follows: (1) Electronically at *http://www.regulations.gov,* which is the Federal eRulemaking Portal; (2) by facsimile (fax); or (3) by hard copy. All comments, attachments, and other material must identify the Agency name and the OSHA docket number (Docket No. OSHA–2011–0196) for the ICR. You may supplement electronic submissions by uploading document files electronically. If you wish to mail additional materials in reference to an electronic or facsimile submission, you must submit them to the OSHA Docket Office (see the section of this notice titled **ADDRESSES**). The additional materials must clearly identify your electronic comments by your name, date, and the docket number so the Agency can attach them to your comments.

Because of security procedures, the use of regular mail may cause a significant delay in the receipt of comments. For information about security procedures concerning the delivery of materials by hand, express delivery, messenger, or courier service, please contact the OSHA Docket Office at (202) 693–2350, (TTY (877) 889–5627).

Comments and submissions are posted without change at *http://www.regulations.gov.* Therefore, OSHA cautions commenters about submitting personal information such as social security numbers and dates of birth. Although all submissions are listed in the *http://www.regulations.gov* index, some information (*e.g.,* copyrighted material) is not publicly available to read or download from this website. All submissions, including copyrighted material, are available for inspection and copying at the OSHA Docket Office. Information on using the *http://www.regulations.gov* website to submit comments and access the docket is available at the website's ''User Tips'' link. Contact the OSHA Docket Office for information about materials not available from the website, and for assistance in using the internet to locate docket submissions.

V. Authority and Signature

Loren Sweatt, Deputy Assistant Secretary of Labor for Occupational Safety and Health, directed the preparation of this notice. The authority for this notice is the Paperwork Reduction Act of 1995 (44 U.S.C. 3506 *et seq.*) and Secretary of Labor's Order No. 1–2012 (77 FR 3912).

Signed at Washington, DC, on February 15, 2018.

Loren Sweatt,

Deputy Assistant Secretary of Labor for Occupational Safety and Health.

[FR Doc. 2018–03623 Filed 2–21–18; 8:45 am]

BILLING CODE 4510–26–P

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

[Docket No. OSHA–2017–0014]

Standard on Confined Spaces in Construction; Extension of the Office of Management and Budget's (OMB) Approval of Information Collection (Paperwork) Requirements

AGENCY: Occupational Safety and Health Administration (OSHA), Labor.

ACTION: Request for public comments.

SUMMARY: OSHA solicits public comments concerning its proposal to extend OMB approval of the information collection requirements specified in the Confined Spaces in Construction Standard.

DATES: Comments must be submitted (postmarked, sent, or received) by April 23, 2018.

ADDRESSES:

Electronically: You may submit comments and attachments electronically at *http://www.regulations.gov,* which is the Federal eRulemaking Portal. Follow the instructions online for submitting comments.

Facsimile: If your comments, including attachments, are not longer than 10 pages, you may fax them to the OSHA Docket Office at (202) 693–1648.

Mail, hand delivery, express mail, messenger, or courier service: When using this method, you must submit a copy of your comments and attachments to the OSHA Docket Office, Docket No. OSHA–2017–0014, U.S. Department of Labor, Occupational Safety and Health Administration, Room N–3653, 200 Constitution Avenue NW, Washington, DC 20210. Deliveries (hand, express mail, messenger, and courier service) are accepted during the Docket Office's normal business hours, 10:00 a.m. to 3:00 p.m., ET.

Instructions: All submissions must include the Agency name and OSHA docket number (OSHA–2017–0014) for the Information Collection Request (ICR). All comments, including any personal information you provide, are placed in the public docket without change, and may be made available online at *http://www.regulations.gov.* For further information on submitting comments, see the ''Public Participation'' heading in the section of this notice titled **SUPPLEMENTARY INFORMATION**.

Docket: To read or download comments or other material in the docket, go to *http://www.regulations.gov* or the OSHA Docket Office at the above address. All documents in the docket (including this **Federal Register** notice) are listed in the *http://www.regulations.gov* index; however, some information (*e.g.,* copyrighted material) is not publicly available to read or download through the website. All submissions, including copyrighted material, are available for inspection and copying at the OSHA Docket Office. You may also contact Theda Kenney at the number below to obtain a copy of the ICR.

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SUPPLEMENTARY INFORMATION:

I. Background

The Department of Labor, as part of its continuing effort to reduce paperwork and respondent (*i.e.,* employer) burden, conducts a preclearance consultation program to provide the public with an opportunity to comment on proposed and continuing information collection requirements in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)). This program ensures that information is in the desired format, reporting burden (time and costs) is minimal, collection instruments are clearly understood, and OSHA's estimate of the information collection burden is accurate. The Occupational Safety and Health Act of 1970 (the OSH Act) (29 U.S.C. 651 *et seq.*) authorizes information collection by employers as necessary or appropriate for enforcement of the OSH Act or for developing information regarding the causes and prevention of occupational injuries, illnesses, and accidents (29 U.S.C. 657). The OSH Act also requires OSHA to obtain such information with minimum burden upon employers, especially those operating small businesses, and to reduce to the maximum extent feasible unnecessary duplication of efforts in obtaining information (29 U.S.C. 657).

The Standard specifies several information collection requirements. The following sections describe who uses the information collected under each requirement, as well as how they use it. Employers and employees would use these information collection requirements when they identify a confined space at a construction worksite. The purpose of the information would permit employers and employees to systematically evaluate the dangers in confined spaces before entry is attempted, and to ensure that adequate measures have been implemented to make the spaces safe for entry. In addition, the information collection requirements of the Standard specify requirements for developing and maintaining a number of records and other documents. Further, OSHA compliance safety and health officers would need the information to determine, during an inspection, whether employers are complying with the requirements.

29 CFR 1926.1203—General Requirements

29 CFR 1926.1203(b)(1)—Informing Employees of Permit Required Confined Spaces Dangers

Paragraph 1203(b)(1) requires employers who identify a permit required confined space (PRCS) to post danger signs or take other equally effective means to inform employees of the existence and location of, and the danger posed by, permit spaces. The note following paragraph 1203(b)(1) provides an example of the content of the optional danger sign.

29 CFR 1926.1203(b)(2)—Informing Controlling Contractors and Employees' Authorized Representatives About PRCS Hazards

Paragraph 1203(b)(2) requires employers to inform, in a timely manner and in a manner other than posting, its employees' authorized representatives and the controlling contractor, of the hazards of confined spaces and the location of those spaces.

29 CFR 1926.1203(d)—Written Permit Space Program

Paragraph 1203(d) requires any employer that has employees who will enter a confined space to have and implement a written permit confined space program and to make the program available for inspection by employees and their representatives. Employers may write detailed permit space programs, while making the entry permits associated with the written programs less specific than the programs, provided the permits address the hazards of the particular space; conversely, the program may be less specific than the entry permit, in which case the employer must draft a detailed permit.

29 CFR 1926.1203(e)(1)(v) and 1926.1203(e)(2)(ix)—Alternate Procedure Documentation and Availability

Paragraph 1203(e)(1) sets forth the six conditions that an employer must meet before its employees can enter a permit space under the alternate procedures specified in paragraph (e)(2).

Paragraph 1203(e)(1)(v) requires employers to document the initial conditions before entry, including the determinations and supporting data required by paragraphs (e)(1)(i) through (e)(1)(iii) of the Standard (develop monitoring [1] and inspection data that

[1] In this context, the final rule uses ''monitoring'' to match the general industry language, and the

Continued

supports the demonstrations required by paragraphs (e)(1)(i) and (e)(1)(ii), *i.e.,* the elimination or isolation of physical hazards such that the only hazard in the space is an actual or potential hazardous atmosphere, and that continuous forced-air ventilation is sufficient to maintain the space safe for entry), and make this documentation available to employees who enter the spaces under the alternate procedures, or to their authorized representatives.

In addition, paragraph 1203(e)(2)(ix) requires the employer to verify that the permit space is safe for entry and that the employer took the measures required by paragraph 1203(e)(2) (the procedures that employers must follow for permit space entries made under paragraph 1203(e)(1)). The verification must be in the form of a certification that contains the date, the location of the space, and the signature of the certifying individual. The employer must make the alternate procedure documentation of paragraphs (e)(1)(v) and (e)(2)(ix) available to entrants or to their employees' authorized representatives before entry.

29 CFR 1926.1203(e)(2)(viii)—Written Approval for Job-Made Hoisting Systems

Paragraph 1203(e)(2)(vii) allows for the use of job-made hoisting systems if a registered professional engineer approves these systems for personnel hoisting prior to use in entry operations regulated by § 1926.1203(e). Unlike the proposed rule, the final rule requires an engineer's approval to be in writing to ensure that the specifications and limitations of use are conveyed accurately to the employees implementing the job-made hoist, and that the approval can be verified.

29 CFR 1926.1203(g)(3)—Certification of Former Permit Spaces as Non-Permit Spaces

Paragraph 1203(g)(3) requires an entry employer seeking to reclassify a space from permit to non-permit status to document the basis for determining that it eliminated all permit space hazards through a certification that contains the date, the location of the space, and the signature of the certifying individual. In addition, the employer must make the certification available to each employee entering the space or his or her authorized representative. A reevaluation aimed at reestablishing compliance with paragraph 1203(g) will involve the demonstrations, testing, inspection, and documentation required in paragraphs (g)(1) through (g)(3). The employer must substantiate all determinations so that employers, employees, and the Agency have the means necessary to evaluate those determinations and ensure compliance with the conditions that would enable the employer to conduct entry operations using the alternate procedures specified by § 1926.1203 following reclassification.

29 CFR 1926.1203(h)—Permit Space Entry Communication and Coordination

In paragraph (h), OSHA designates the controlling contractor, rather than the host employer, as the information hub for confined spaces information-sharing and coordination because the controlling contractor's function at a construction site makes it better situated than the host employer (assuming that the host employer is not also the controlling contractor) to contribute to and to facilitate a timely and accurate information exchange among all employers who have employees involved in confined space work. On a construction worksite, the controlling contractor has overall authority for the site and is best situated to receive and disseminate information about the previous and current work performed there.

29 CFR 1926.1203(h)(1)—Pre-Entry Duties of Host Employer

Paragraph 1203(h)(1) requires the host employer to share with the controlling contractor information that the host has about the location of known permit spaces, the hazards or potential hazards in each space or the reason it is a permit space, and any previous steps that it took, or that other employers took, to protect workers from the hazards in those spaces.

29 CFR 1926.1203(h)(2)—Pre-Entry Information-Sharing Duties of Controlling Contractors

OSHA requires controlling contractors to obtain the information specified in paragraph (h)(1) from the host employer (*i.e.,* the location of permit spaces, the known hazards in those spaces, and measures employed previously to protect employees in that space). Then, before permit space entry, it must relay that information to any entity entering the permit space and to any entity whose activities could foreseeably result in a hazard in the confined space. (See paragraph 1203(h)(2)(ii).) The controlling contractor must also share any other information that it has gathered about the permit space, such as information received from prior entrants

29 CFR 1926.1203(h)(2)(i)—Controlling Contractor Obtains Information From Host Employer

Paragraph 1203(h)(2)(i) requires the controlling contractor to obtain from the host employer, before permit space entry, available information regarding permit space hazards and previous entry operations.

29 CFR 1926.1203(h)(2)(ii)—Controlling Contractor Provides Information to Entities Entering a Permit Space and Other Entities at the Worksite

Paragraph 1203(h)(2)(ii)(A) and (B) require the controlling contractor, before entry operations begin, to share with the entrants, and any other entity at the worksite whose activities could foreseeably result in a hazard in the permit space, the information that the controlling contractor received from the host employer, as well as any additional information the controlling contractor has about the topics listed in paragraphs (h)(1)(i) through (iii) (*i.e.,* the location of permit spaces, the hazards in those spaces, and any previous efforts to address those hazards).

Paragraph 1203(h)(2)(ii)(C) requires the controlling contractor, before entry operations begin, to share with each specified entity any precautions or procedures that the host employer, controlling contractor, or any entry employer implemented earlier for the protection of employees working in permit spaces.

29 CFR 1203(h)(3)—Pre-Entry Information-Sharing Duties of Entry Employers

This provision sets forth the information-exchange requirements for entry employers.

29 CFR 1926.1203(h)(3)(i)

Paragraph (h)(3)(i) requires an entry employer to obtain information about the permit space entry operations from the controlling contractor, and works with paragraph 1203(h)(2), which requires the controlling contractor to share information about permit-space entry operations with the entry employer.

29 CFR 1926.1203(h)(3)(ii)

Paragraph (h)(3)(ii) requires an entry employer to inform the controlling contractor of the permit space program that the entry employer will follow, including information about any hazards likely to be confronted or created in each permit space. This exchange must take place prior to entry to ensure that the controlling contractor is informed of all the hazards in a timely manner and can take action, if needed,

term encompasses both the initial testing of atmosphere and the subsequent measurements.

to prevent an accident or injury before entry operations begin.

29 CFR 1926.1203(h)(4)—Coordination Duties of Controlling Contractors and Entry Employers

Paragraph 1203(h)(4) requires controlling contractors and entry employers to coordinate permit space entry operations in two circumstances: (1) When more than one entity performs entry operations at the same time, or (2) when permit space entry is performed at the same time that any activities that could foreseeably result in a hazard in the permit space are performed.

29 CFR 1926.1203(h)(5)—Post-Entry Duties of Controlling Contractors and Entry Employers

Paragraph 1203(h)(5)(i) requires the controlling contractor to debrief each entity that entered a permit space, at the end of entry operations, about the permit space program followed, and any hazards confronted or created in the permit space(s) during entry operations, and then, as required by paragraph 1203(h)(5)(iii), relay appropriate information to the host employer. Paragraph 1203(h)(5)(ii) requires the entry employer to share the same information with the controlling contractor in a timely manner.

29 CFR 1926.1203(i)—Absence of a Controlling Contractor

Paragraph 1203(i) provides that, in the event no employer meets the definition of a controlling contractor on a particular worksite, the host employer or other employer that arranges for permit space entry work must fulfill the information exchange and coordination duties of a controlling contractor.

29 CFR 1926.1204—Permit Required Confined Space Program

The Agency requires each employer with employees who will enter a permit space to have and implement a written permit space program at the construction site (with the exception of ventilation-only entries conducted in accordance with § 1926.1203(e)). Also see discussion of 29 CFR 1926.1203(d) and 29 CFR 1926.1212(a), requirements that pertain to the written program.

As required elements of the written program, OSHA considers all provisions of § 1926.1204 to be information collection requirements: *e.g.,* 1204(a) (implementation of the measures necessary to prevent unauthorized entry); 1204(b) (identification and evaluation of the hazards of PRCSs); 1204(c) (safe permit space entry operations); 1204(d) (equipment); 1204(e) (evaluation of PRCS conditions during entry operations); 1204(f) (attendant required); 1204(g) (attendant emergency procedures); 1204(h) (designation of entry operation duties); 1204(i) (summoning rescue and emergency services procedures); 1204(j) (system for cancellation of entry permits, including safe termination of entry operations); 1204(k) (entry operation coordination procedures); 1204(l) (entry operation conclusion procedures); 1204(m) (entry operation review); and 1204(n) (permit space program review). In addition, some provisions of § 1926.1204 constitute information collection requirements for reasons other than inclusion in the written program, as described below.

29 CFR 1926.1204(c), (g), (h), (i), (j), (k) and (l))—Development of Procedures

Paragraph 1926.1204(c) requires an employer to develop procedures needed to facilitate safe entry operations into permit spaces. The subparagraphs in 1204(c) provide specific elements of the required procedures that employers must include in the permit program: Identifying safe entry conditions that employers must meet to initiate and conduct the entry safely (paragraph (c)(1)); providing each authorized entrant with the opportunity to observe monitoring or testing (paragraph (c)(2)); isolating the PRCS (paragraph (c)(3)); purging, inerting, flushing, or ventilating the permit space (paragraph (c)(4)); ensuring that monitoring devices will detect an increase in atmospheric hazard levels in the event that the ventilation system malfunctions, and to do so in adequate time for employees to safely exit the space (paragraph (c)(5)); providing barriers to protect entrants from external hazards (paragraph (c)(6)); verifying that conditions are acceptable for entry and preventing employees from entering the permit space with a hazardous atmosphere unless demonstrating that personal protective equipment (PPE) will be effective for each employee (paragraph (c)(7)); and eliminating any conditions that could make it unsafe to remove an entrance cover (paragraph (c)(8)). Before entry is authorized, each entry employer must document the completion of these measures by preparing an entry permit, as required by paragraph 1926.1205(a).

Under paragraphs 1204 (g) through (l), entry employers are also required to develop procedures for: Having an attendant respond to emergencies affecting multiple permit spaces monitored (paragraph 1204(g)); specifying employees' name, confined space entry roles and duties (paragraph 1204(h)); summoning rescue and emergency services, rescuing entrants from permit spaces, providing necessary emergency services to rescued employees, preventing unauthorized personnel from attempting a rescue (paragraph 1204(i)); cancelling entry permits (paragraph 1204(j)); coordinating entry operations (paragraph 1204(k)); and for terminating an entry permit and entry operations (paragraph 1204(l)).

29 CFR 1926.1204(c)(3) and 1203(e)(1)(i)—Lockout/Tagout

Paragraphs 1204(c)(3) and 1203(e)(1)(i) (for PRCSs using alternate procedures) require tagging in accordance with the definition of ''isolate'' or ''isolation'' (see paragraph 1202), which requires employers to ''lockout or tagout . . . all sources of energy.''

29 CFR 1926.1204(e)(6)—Providing Testing and Monitoring Results to Employees

Paragraph 1204(e)(6) requires each entry employer to immediately provide the results of any testing conducted in accordance with paragraph 1204 to each authorized entrant or that employee's authorized representative.

29 CFR 1926.1204(m)—Review of Entry Operations and Revision of Procedures When Inadequate

Paragraph 1204(m) requires each entry employer to review its permit space program whenever the procedures are inadequate, and to revise those procedures when necessary.

29 CFR 1926.1204(n)—Annual Review of Written Program

Paragraph 1204(n) requires each entry employer to review its permit space program at least every year and make revisions to its procedures as necessary. This provision requires an employer to review cancelled permits within one year after each entry.

29 CFR 1926.1205—Permitting Process

An employer conducting a permit space entry must post an entry permit outside the permit space to document the employer's efforts to identify and control conditions in that permit space. Section 1205 sets forth the required process for establishing entry permits and § 1206 sets forth the required specific information that must be identified on the permit.

29 CFR 1926.1205(a)—Preparing an Entry Permit

Paragraph 1205(a) requires each entry employer to prepare, prior to entry into a PRCS, an entry permit containing all the information specified in

§ 1926.1204(c) (practices and procedures for ensuring safe entry).

29 CFR 1926.1205(b) and 1926.1210(b)—Signing the Permit

Paragraph 1205(b) requires the entry supervisor to sign the permit before entry begins. Similarly, paragraph 1926.1210(b) requires the entry supervisor to verify that the employer performed all tests specified by the entry permit, and that all procedures and equipment so specified are in place before he or she may sign the permit and allow entry. The paragraph also specifies that the entry supervisor must verify this information by checking that the corresponding entries made on the permit.

29 CFR 1926.1205(c)—Posting the Permit

Paragraph 1205(c) requires an employer to make the completed entry permit available to all authorized entrants, or their authorized representatives, at the time each employee enters the space, by posting it at the entry portal or by any other equally effective means, so that entrants can confirm that pre-entry preparations have been accomplished.

29 CFR 1926.1205(f)—Retaining the Permit

Paragraph 1205(f) requires the employer to retain each entry permit for at least 1 year to facilitate the review of the permit required by paragraph 1926.1204(n) of the Standard. Any problems encountered during an entry operation must be noted on the pertinent permit so that appropriate revisions to the permit space program can be made. Employers should list the problems encountered during entry resulting in the cancellation or suspension of a permit on the entry permit.

29 CFR 1926.1206—Entry Permit

An employer conducting a permit space entry must post an entry permit outside the permit space to document the employer's efforts to identify and control conditions in that permit space (see § 1926.1205(c)).

29 CFR 1926.1206(a)–(p) and 29 CFR 1926.1209(c)—Contents of the Permit

Paragraphs 1206(a)–(p) and 1926.1209(c) set forth the information which must be identified on the permit. Paragraph 1206(a) requires the employer to identify the permit space workers are planning to enter. Paragraph 1206(b) requires the employer to record the purpose of the entry. This information must be sufficiently specific, such as identifying specific tasks or jobs that employees are to perform within the space, to confirm that the employer considered performance of each specific construction activity in the hazard assessment of the PRCS. Paragraph 1206(c) requires the employer to record the date and authorized duration of the planned entry. Paragraph 1206(d) requires the employer to record the identity of the authorized entrants so that the attendant is capable of safely overseeing the entry operations. Employers can meet this requirement by referring in the entry permit to a system such as a roster or tracking system used to keep track of who is currently in the PRCS. Under paragraph 1206(e), when a permit program requires ventilation, OSHA requires employers to ensure that they have a monitoring system in place that will alert employees of increased atmospheric hazards in the event the ventilation system stops working. (See § 1926.1204(c)(5).) This provision requires the employer to record the means of detecting an increase in atmospheric-hazard levels if the ventilation system stops working. Paragraph 1206(f) requires the employer to record the names of each attendant required to be stationed outside each permit space for the duration of entry operations. Paragraph 1206(g) requires the employer to record the name of each employee currently serving as entry supervisor. Paragraph 1206(h) requires the employer to record the hazards associated with the planned confined space entry operations. This list must include all hazards, regardless of whether the employer protects the authorized entrants from the hazards by isolation, control, or PPE. Paragraph 1206(i) requires the employer to record the measures used to isolate or control the hazards prior to entry. Paragraph 1206(j) requires the employer to specify the acceptable entry conditions. Paragraph (j) also requires employers, when applicable, to provide the ventilation malfunction determinations made in paragraph (c)(5) of § 1926.1204. Paragraph 1206(k) requires the employer to record the dates, times, and results of the tests and monitoring performed prior to entry, and the names or initials of the individual/s who performed each test. Employers also must include the initial entry monitoring results on the entry permit; these results serve as a baseline for subsequent measurements. Paragraph 1206(l) requires the employer to identify the rescue and emergency services required by the Standard, and the means by which these services will be summoned when needed. In some cases, an employer must include pertinent information, such as communication equipment and emergency telephone numbers, on the permit to sufficiently identify the means by which the rescue services will be summoned. Paragraph 1206(m) requires the employer to record all the methods of communication used by authorized entrants and attendants during entry operations. Paragraph 1206(o) requires the employer to record any additional information needed to ensure safe confined space entry operations. Paragraph 1206(p) requires the employer to record information about any other permits, such as for hot work, issued for work inside the confined space. If the employer identifies additional permits, these additional permits may be, but are not required to be, attached to the entry permit.

29 CFR 1926.1207(d)—Training Records

Under paragraph 1207(d), employers must maintain training records. In addition, the employer record must contain the names of each employee trained, the trainer's name, and the dates of training, and the employer must make these records available for inspection by employees and their authorized representatives for the period of time that the employee is employed by the employer. This documentation can take any form that reasonably demonstrates the employee's completion of the training.

29 CFR 1926.1208—Duties of Authorized Entrants

29 CFR 1926.1208(c)/29 CFR 1926.1208(d)—Communicate With Attendant

Paragraph 1208(c) requires an employer to ensure that an authorized entrant communicates effectively with the attendant to facilitate the assessment of entrant status and timely evacuation as required by § 1209(f).

Paragraph 1208(d) requires an employer to ensure that an authorized entrant alerts the attendant whenever one of the following circumstances in paragraphs 1926.1208(d)(1)–(2) arises: (1) There is a warning sign or symptom of exposure to a dangerous situation; or (2) the entrant recognizes a prohibited condition. In some instances, a properly trained authorized entrant may be able to recognize and report his/her own symptoms, such as headache, dizziness, or slurred speech, and take the required action. In other cases, the authorized entrant, once the effects begin, may be unable to recognize or report them. In these latter cases, this provision requires that other, unimpaired, authorized entrants in the PRCS, who employers

must properly train to recognize signs, symptoms, and other hazard exposure effects in other authorized entrants, report these effects to the attendant.

29 CFR 1926.1209—Duties of Attendants

29 CFR 1926.1209(e)—Communicate With Authorized Entrants

Paragraph 1209(e) requires the attendant to communicate with authorized entrants as necessary to assess and keep track of the entrants' status and to notify entrants if evacuation under paragraph 1926.1209(f) of the Standard is necessary. Use of the word ''assess'' connotes an interactive duty in which the attendant may ask questions of the entrant, or ask the entrant to perform a task so that the attendant can evaluate the entrant's status.

29 CFR 1926.1209(f)—Order Evacuation

Paragraph 1926.1209(f) requires the attendant to assess the activities and conditions inside and outside the space to determine if it is safe for entrants to stay in the space. OSHA requires the attendant to evacuate the permit space under any of the four ''conditions'' listed in paragraphs 1926.1209(f)(1) through (f)(4): (1) The attendant notices a prohibited condition, (2) the attendant identifies the behavioral effects of hazard exposure in an authorized entrant, (3) there is a condition outside the space that could endanger the authorized entrants, or (4) the attendant cannot effectively and safely perform the duties required under § 1926.1209. If the attendant notices a condition or activity outside the space not addressed by the entry coordination procedures, then the attendant or entry supervisor could, directly or through the controlling contractor, seek to correct the condition or stop the activity (such as described in the example above). If the attendant cannot address the situation immediately, then the attendant must order the entrants to evacuate the permit space until the employer resolves the problem.

29 CFR 1926.1209(g)—Summon Rescue Services

Paragraph 1209(g) requires the attendant to call upon rescue and other emergency services as soon as he or she decides that authorized entrants may need assistance to escape from permit space hazards.

29 CFR 1926.1209(h)—Entry Employer Duties

Paragraph 1209(h) requires the attendant to take the actions specified in § 1926.1209(h)(1) through (h)(3) to prevent unauthorized persons from entering a permit space while entry is taking place.

29 CFR 1926.1209(h)(1)—Warn Non-Authorized Entrants To Stay Away

If someone other than an authorized entrant happens to approach the PRCS, paragraph 1209(h)(1) specifies that the attendant must make that individual aware that he/she must stay away from the PRCS. Some construction sites may be accessible to the public, so the attendant also would be responsible for warning members of the public who may attempt to enter a permit space at the site.

29 CFR 1926.1209(h)(2)—Advise Non-Authorized Entrants To Exit the PRCS Immediately

Paragraph (h)(2) requires the attendant, should an unauthorized person enter the PRCS, to advise him/her to exit the space immediately.

29 CFR 1926.1209(h)(3)—Notify the Entry Supervisor of Unauthorized Persons in the PRCS

Paragraph (h)(3) requires the attendant to notify the entry supervisor, along with the authorized entrants, of unauthorized persons who have entered the PRCS.

29 CFR 1926.1210—Duties of Entry Supervisors

Paragraph 1210(b) is described above in the discussion of paragraph 1205(a). Paragraph 1210(d) is described below in the discussion of paragraph 1211(c).

29 CFR 1926.1211—Rescue and Emergency Services

29 CFR 1926.1211(a)(1) and (a)(2)—Assess Prospective Rescue Service's Response Abilities

Paragraph 1211(a)(1) requires an employer to assess a prospective rescue service's ability to respond to a rescue summons in a timely manner. Paragraph 1211(a)(2) requires an employer to assess a prospective rescue service's ability to provide adequate and effective rescue services. In evaluating a prospective rescue provider's abilities, the employer also must consider the willingness of the service to become familiar with the particular hazards and circumstances faced during its permit space entries. Paragraphs (a)(4) and (a)(5) of § 1926.1211 require the employer to provide its designated rescuers with information about its confined spaces and access to those spaces to allow the rescuers to develop appropriate rescue plans and to perform rescue drills.

29 CFR 1926.1211(a)(4)—Communicate With Rescue Services

Paragraph 1211(a)(4) requires an employer to inform the designated rescue service of the known hazards associated with the permit space in the event that a rescue becomes necessary. To meet the requirements of this provision, the employer would have to inform the rescue service prior to issuing a permit that the employer selected the service to rescue its employees in the event of an emergency, and that the employer is relying on the rescue services to perform these rescues when necessary. Compliance with this paragraph, as well as with paragraphs (a)(1) and (a)(2) of this section, often requires the employer to provide this information to the rescue service immediately prior to each permit space entry. Similarly, if an entry involves hazards not usually encountered by the rescue service, or hazards or a configuration that would require the rescue service to use equipment that it does not always have available, then the employer would have to notify the rescue service of these hazards and conditions prior to beginning the entry operation.

29 CFR 1926.1211(a)(5)—Develop a Rescue Service Plan

Paragraph 1211(a)(5) requires an employer to provide the designated rescue team or service with access to all permit spaces from which the rescue may need to perform a rescue so that the rescue team or service, whether in-house or third party, can develop appropriate rescue plans.

29 CFR 1926.1210(d) and 29 CFR 1926.1211(c)—Confirm Rescue Service Availability

If an entry employer determines that it will use non-entry rescue, it must confirm, prior to entry, that emergency assistance *will be available* in the event that non-entry rescue fails. Likewise, paragraph 1210(d) requires the entry supervisor to verify that rescue services are available, and that the means for obtaining such services are operable.

29 CFR 1926.1211(d)—Provide Safety Data Sheet (SDS) to Treating Medical Facilities

Paragraph 1211(d) requires an employer to provide relevant information about a hazardous substance to a medical facility treating an entrant exposed to the hazardous substance if the substance is one for which the employer must keep a SDS or other similar information at the worksite.

29 CFR 1926.1212—Employee Participation

29 CFR 1926.1212(a)—Consult With Employees/Authorized Representatives on Development and Implementation of a Written Program

Paragraph 1212(a) requires employers to consult with affected employees and their authorized representatives in the development and implementation of the written permit space program required by § 1926.1203.

29 CFR 1926.1212(b)—Employee Access

Paragraph 1212(b) requires that affected employees and their authorized representatives have access to all information developed under this standard. Other sections of this standard already specifically require that employers make information available to employees and their representatives. These provisions include §§ 1926.1203(d) (written program); 1203(e)(1)(v) and (e)(2)(ix) (alternate procedure certification); 1203(g) (reclassification certification); 1204(e)(6) (monitoring and testing results); 1205(c) (completed permit); and 1207(d) (training records).

29 CFR 1926.1213—Disclosure

Paragraph 1213 requires an employer, who must retain documentation under the Standard, to make this information available to the Secretary of Labor, or a designee, upon request. The request from the Secretary or the Secretary's designee (for example, OSHA) may be either oral or written.

II. Special Issues for Comment

OSHA has a particular interest in comments on the following issues:

- Whether the proposed information collection requirements are necessary for the proper performance of the Agency's functions, including whether the information is useful;
- The accuracy of OSHA's estimate of the burden (time and costs) of the information collection requirements, including the validity of the methodology and assumptions used;
- The quality, utility, and clarity of the information collected; and
- Ways to minimize the burden on employers who must comply—for example, by using automated or other technological information collection and transmission techniques.

III. Proposed Actions

The Agency requests approval for an adjustment increase of 5,589 burden hours (from 654,514 to 660,103) associated with training records. This increase is offset by a requested decrease in burden hour time for a clerical employee to generate a training record for an existing employee (from 3 minutes to generate and maintain the record to 1 minute to maintain the record). The request seeks approval to maintain all other previously approved burden hours. The Agency also requests approval to maintain $1,017,859 in Item 13 costs for signs, tags and gas monitors.

Type of Review: Extension of a currently approved collection.

Title: Confined Spaces in Construction (29 CFR part 1926 subpart AA).

OMB Control Number: 1218–0258.

Affected Public: Business or other for-profits.

Number of Respondents: 30,066.

Frequency: Initially; Annually; On occasion.

Average Time per Response: Various.

Estimated Number of Responses: 4,093,825.

Estimated Total Burden Hours: 660,103.

Estimated Cost (Operation and Maintenance): $1,017,859.

IV. Public Participation—Submission of Comments on This Notice and Internet Access to Comments and Submissions

You may submit comments in response to this document as follows: (1) Electronically at *http://www.regulations.gov,* which is the Federal eRulemaking Portal; (2) by facsimile (fax); or (3) by hard copy. All comments, attachments, and other material must identify the Agency name and the OSHA docket number (Docket No. OSHA–2017–0014) for the ICR. You may supplement electronic submissions by uploading document files electronically. If you wish to mail additional materials in reference to an electronic or facsimile submission, you must submit them to the OSHA Docket Office (see the section of this notice titled **ADDRESSES**). The additional materials must clearly identify your electronic comments by your name, date, and the docket number so that the Agency can attach them to your comments.

Because of security procedures, the use of regular mail may cause a significant delay in the receipt of comments. For information about security procedures concerning the delivery of materials by hand, express delivery, messenger, or courier service, please contact the OSHA Docket Office at (202) 693–2350, (TTY (877) 889–5627).

Comments and submissions are posted without change at *http://www.regulations.gov.* Therefore, OSHA cautions commenters about submitting personal information such as social security numbers and dates of birth. Although all submissions are listed in the *http://www.regulations.gov* index, some information (*e.g.,* copyrighted material) is not publicly available to read or download through this website. All submissions, including copyrighted material, are available for inspection and copying at the OSHA Docket Office. Information on using the *http://www.regulations.gov* website to submit comments and access the docket is available at the website's ''User Tips'' link. Contact the OSHA Docket Office for information about materials not available through the website, and for assistance in using the internet to locate docket submissions.

V. Authority and Signature

Loren Sweatt, Deputy Assistant Secretary of Labor for Occupational Safety and Health, directed the preparation of this notice. The authority for this notice is the Paperwork Reduction Act of 1995 (44 U.S.C. 3506 *et seq.*) and Secretary of Labor's Order No. 1–2012 (77 FR 3912).

Signed at Washington, DC, on February 14, 2018.

Loren Sweatt,

Deputy Assistant Secretary of Labor for Occupational Safety and Health.

[FR Doc. 2018–03571 Filed 2–21–18; 8:45 am]

BILLING CODE 4510–26–P

NUCLEAR REGULATORY COMMISSION

Advisory Committee on Reactor Safeguards (ACRS); Meeting of the ACRS Subcommittee on Metallurgy and Reactor Fuels; Notice of Meeting

The ACRS Subcommittee on Metallurgy and Reactor Fuels will hold a meeting on February 23, 2018 at 11545 Rockville Pike, Room T–2B1, Rockville, Maryland 20852.

The entire meeting will be open to public attendance.

The agenda for the subject meeting shall be as follows:

Friday, February 23, 2018–8:30 a.m. Until 12:00 p.m.

The Subcommittee will review the draft project plan to license and regulate Accident Tolerant Fuel. The Subcommittee will hear presentations by and hold discussions with NRC staff and other interested persons regarding this matter. The Subcommittee will gather information, analyze relevant issues and facts, and formulate proposed positions and actions, as

appropriate, for deliberation by the Full Committee.

Members of the public desiring to provide oral statements and/or written comments should notify the Designated Federal Official (DFO), Kent Howard (Telephone 301–415–2989 or Email: *Kent.Howard*@nrc.gov) five days prior to the meeting, if possible, so that appropriate arrangements can be made. Thirty-five hard copies of each presentation or handout should be provided to the DFO thirty minutes before the meeting. In addition, one electronic copy of each presentation should be emailed to the DFO one day before the meeting. If an electronic copy cannot be provided within this timeframe, presenters should provide the DFO with a CD containing each presentation at least thirty minutes before the meeting. Electronic recordings will be permitted only during those portions of the meeting that are open to the public. Detailed procedures for the conduct of and participation in ACRS meetings were published in the **Federal Register** on October 4, 2017 (82 FR 46312).

Detailed meeting agendas and meeting transcripts are available on the NRC website at *http://www.nrc.gov/reading-rm/doc-collections/acrs.* Information regarding topics to be discussed, changes to the agenda, whether the meeting has been canceled or rescheduled, and the time allotted to present oral statements can be obtained from the website cited above or by contacting the identified DFO. Moreover, in view of the possibility that the schedule for ACRS meetings may be adjusted by the Chairman as necessary to facilitate the conduct of the meeting, persons planning to attend should check with these references if such rescheduling would result in a major inconvenience.

If attending this meeting, please enter through the One White Flint North building, 11555 Rockville Pike, Rockville, Maryland 20852. After registering with Security, please contact Mr. Theron Brown (Telephone 301–415–6702) to be escorted to the meeting room.

Dated: February 15, 2018.

Mark L. Banks,

Chief, Technical Support Branch, Advisory Committee on Reactor Safeguards.

[FR Doc. 2018–03560 Filed 2–21–18; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

Advisory Committee on Reactor Safeguards (Acrs) Meeting of the Acrs Subcommittee on Planning and Procedures; Notice of Meeting

The ACRS Subcommittee on Planning and Procedures will hold a meeting on March 8, 2018, 11545 Rockville Pike, Room T–2B3, Rockville, Maryland 20852.

The meeting will be open to public attendance.

The agenda for the subject meeting shall be as follows:

Thursday, March 8, 2018–12:15 p.m. until 1:15 p.m.

The Subcommittee will discuss proposed ACRS activities and related matters. The Subcommittee will gather information, analyze relevant issues and facts, and formulate proposed positions and actions, as appropriate, for deliberation by the Full Committee.

Members of the public desiring to provide oral statements and/or written comments should notify the Designated Federal Official (DFO), Quynh Nguyen (Telephone 301–415–5844 or Email: *Quynh.Nguyen@nrc.gov*) five days prior to the meeting, if possible, so that arrangements can be made. Thirty-five hard copies of each presentation or handout should be provided to the DFO thirty minutes before the meeting. In addition, one electronic copy of each presentation should be emailed to the DFO one day before the meeting. If an electronic copy cannot be provided within this timeframe, presenters should provide the DFO with a CD containing each presentation at least thirty minutes before the meeting. Electronic recordings will be permitted only during those portions of the meeting that are open to the public. Detailed procedures for the conduct of and participation in ACRS meetings were published in the **Federal Register** on October 4, 2017 (82 FR 46312).

Information regarding changes to the agenda, whether the meeting has been canceled or rescheduled, and the time allotted to present oral statements can be obtained by contacting the identified DFO. Moreover, in view of the possibility that the schedule for ACRS meetings may be adjusted by the Chairman as necessary to facilitate the conduct of the meeting, persons planning to attend should check with the DFO if such rescheduling would result in a major inconvenience.

If attending this meeting, please enter through the One White Flint North building, 11555 Rockville Pike, Rockville, Maryland 20852. After registering with Security, please contact Mr. Theron Brown at 301–415–6207 to be escorted to the meeting room.

Dated: February 15, 2018.

Mark L. Banks,

Chief, Technical Support Branch, Advisory Committee on Reactor Safeguards.

[FR Doc. 2018–03588 Filed 2–21–18; 8:45 am]

BILLING CODE 7590–01–P

POSTAL SERVICE

International Product Change—Global Expedited Package Services—Non-Published Rates

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add Global Expedited Package Services—Non-Published Rates 13 (GEPS–NPR 13) to the Competitive Products List.

DATES: *Date of notice:* February 22, 2018.

FOR FURTHER INFORMATION CONTACT: Kyle R. Coppin, 202–268–2368.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642, on February 15, 2018, it filed with the Postal Regulatory Commission a *Request of the United States Postal Service to add Global Expedited Package Services—Non-Published Rates 13 (GEPS–NPR 13) to the Competitive Products List and Notice of Filing GEPS–NPR 13 Model Contract and Application for Non-Public Treatment of Materials Filed Under Seal.* Documents are available at *www.prc.gov,* Docket Nos. MC2018–125 and CP2018–170.

Ruth B. Stevenson,

Attorney, Federal Compliance.

[FR Doc. 2018–03592 Filed 2–21–18; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail and First-Class Package Service Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service

Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* February 22, 2018.

FOR FURTHER INFORMATION CONTACT: Elizabeth A. Reed, 202–268–3179.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on February 13, 2018, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail & First-Class Package Service Contract 75 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2018–124, CP2018–169.

Elizabeth A. Reed,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2018–03563 Filed 2–21–18; 8:45 am]

BILLING CODE 7710–12–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–82719; File No. SR–MIAX–2018–05]

Self-Regulatory Organizations: Notice of Filing and Immediate Effectiveness of a Proposed Rule Change by Miami International Securities Exchange, LLC To Expand the Short Term Option Series Program

February 15, 2018.

Pursuant to the provisions of Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 19b–4 thereunder,[2] notice is hereby given that on February 12, 2018, Miami International Securities Exchange, LLC (''MIAX Options'' or the ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') a proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is filing a proposal to expand the Short Term Option Series Program to allow Monday expirations for options listed pursuant to the Short Term Option Series Program, including options on the SPDR S&P 500 ETF Trust (''SPY'').

The text of the proposed rule change is available on the Exchange's website at *http://www.miaxoptions.com/rule-filings/* at MIAX Options' principal office, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend MIAX Options Rule 100, Definitions, and Rule 404, Series of Option Contracts Open for Trading, Interpretations and Policies .02, to expand the Short Term Option Series Program (''Program'') to permit the listing and trading of options series with Monday expirations that are listed pursuant to the Program, including options on SPY. The Exchange is also proposing to make a number of non-substantive, organizational changes to MIAX Options Rule 100 and Rule 404, Interpretations and Policies .02, for purposes of clarification and uniformity.

Presently, MIAX Options Rule 100 defines a Short Term Options Series as ''a series in an option class that is approved for listing and trading on the Exchange in which the series is opened for trading pursuant to the Short Term Option Series Program provision of Rule 404, Interpretations and Policies .02.'' MIAX Options Rule 404, Interpretations and Policies .02, provides that a Short Term Option Series is a series in an option class that is approved for listing and trading on the Exchange in which the series is opened for trading on any Tuesday, Wednesday, Thursday or Friday that is a business day and that expires on the Wednesday or Friday of the next business week.[3] The Exchange is proposing to consolidate the rule text from Rule 404, Interpretations and Policies .02, with and into MIAX Options Rule 100. The Exchange notes that this rule text consolidation will not result in any substantive changes, but is purely for clarification and uniformity. Additionally, the Exchange is proposing to amend the definition in MIAX Options Rule 100, to permit the listing of options series that expire on Mondays, in connection with its proposal to expand the Program to permit the listing and trading of options series with Monday expirations that are listed pursuant to the Program.

The Exchange notes that this proposed rule change is substantially similar to the proposal by Nasdaq PHLX LLC (''Phlx'') which was recently approved by the Commission.[4]

Specifically, the Exchange is proposing that it may open for trading series of options on any Monday that is a business day and that expires on the Monday of the next business week. The Exchange is also proposing to list Monday expiration series on Fridays that precede the expiration Monday by one business week plus one business day. Since MIAX Options Rule 404, Interpretations and Policies .02, already provides for the listing of short term option series on Fridays, the Exchange is not modifying this provision in MIAX Options Rule 100, to allow for Friday listing of Monday expiration series. However, the Exchange is amending MIAX Options Rule 100 to clarify that, in the case of a series that is listed on a Friday and expires on a Monday, that series must be listed one business week and one business day prior to that expiration (*i.e.,* two Fridays prior to expiration).

As part of this proposal, the Exchange is also proposing to amend MIAX Options Rule 100 to address the expiration of Monday expiration series when the Monday is not a business day. In that case, the Rule will provide that the series shall expire on the first business day immediately following that Monday. This procedure differs from the expiration date of Wednesday expiration series that are scheduled to expire on a holiday. In that case, the Wednesday expiration series shall expire on the first business day immediately prior to that Wednesday, *e.g.,* Tuesday of that week.[5] However, the Exchange believes that it is preferable to require Monday expiration series in this scenario to expire on the Tuesday of that week rather than the previous business day, *e.g.,* the previous Friday, since the Tuesday is closer in time to the scheduled expiration date of

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Exchange Rule 404, Interpretations and Policies .02.

[4] *See* Securities Exchange Release No. 82611 (February 1, 2018), 83 FR 5473 (February 7, 2018) (SR–Phlx–2017–103) (Order approving proposed rule change).

[5] *See id.*

the series than the previous Friday, and therefore may be more representative of anticipated market conditions. The Exchange also notes that Cboe Exchange, Inc. (''Cboe'') uses the same procedure for options on the S&P 500 index (''SPX'') with Monday expirations that are listed pursuant to its Nonstandard Expirations Pilot Program and that are scheduled to expire on a holiday.[6]

The Exchange also proposes to make corresponding changes to MIAX Options Rule 404, Interpretations and Policies .02, which sets forth the requirements for SPY options that are listed pursuant to the Short Term Options Series Program, to permit Monday SPY expirations (''Monday SPY Expirations''). Accordingly, the Exchange proposes to amend Interpretations and Policies .02 to Rule 404, to state that, with respect to Monday SPY Expirations, the Exchange may open for trading on any Friday or Monday that is a business day, series of options on SPY to expire on any Monday of the month that is a business day and is not a Monday in which Quarterly Options Series expire, provided that Monday SPY Expirations that are listed on a Friday must be listed at least one business week and one business day prior to the expiration. As with the current rules for Wednesday SPY Expirations, the Exchange will also amend Interpretations and Policies .02 to state that it may list up to five consecutive Monday SPY Expirations at one time, and may have no more than a total of five Monday SPY Expirations (in addition to the maximum of five Short Term Option Series expirations for SPY expiring on Friday and five Wednesday SPY Expirations). The Exchange will also clarify that, as with Wednesday SPY Expirations, Monday SPY Expirations will be subject to the provisions of this Rule.

The interval between strike prices for the proposed Monday SPY Expirations will be the same as those for the current Short Term Option Series for Wednesday and Friday SPY Expirations. Specifically, the Monday SPY Expirations will have a $0.50 strike interval minimum. As is the case with other options series listed pursuant to the Short Term Option Series, the Monday SPY Expiration series will be P.M.-settled.

Currently, for each option class eligible for participation in the Program, the Exchange is limited to opening thirty (30) series for each expiration date for the specific class. The thirty (30) series restriction does not include series that are open by other securities exchanges under their respective short term option rules; the Exchange may list these additional series that are listed by other exchanges.[7] This thirty (30) series restriction shall apply to Monday SPY Expiration series as well. In addition, the Exchange will be able to list series that are listed by other exchanges, assuming they file similar rules with the Commission to list SPY options expiring on Mondays.

Finally, the Exchange is amending Interpretations and Policies .02(b) to Rule 404, which addresses the listing of Short Term Options Series that expire in the same week as monthly or quarterly options series. Currently, that rule states that no Short Term Option Series may expire in the same week in which monthly option series on the same class expire (with the exception of Wednesday SPY Expirations) or, in the case of Quarterly Options Series, on an expiration that coincides with an expiration of Quarterly Option Series on the same class. As with Wednesday SPY Expirations, the Exchange is proposing to permit Monday SPY Expirations to expire in the same week as monthly options series on the same class. The Exchange believes that it is reasonable to extend this exemption to Monday SPY Expirations because Monday SPY Expirations and standard monthly options will not expire on the same trading day, as standard monthly options expire on Fridays. Additionally, the Exchange believes that not listing Monday SPY Expirations for one week every month because there was a monthly SPY expiration on the Friday of that week would create investor confusion.

Relatedly, the Exchange is also amending Interpretations and Policies .02(b) to Rule 404 to clarify that Monday and Wednesday SPY Expirations may expire in the same week as monthly option series in the same class expire, but that no Short Term Option Series may expire on the same day as an expiration of Quarterly Option Series on the same class. This change will make that provision more consistent with the existing language in Interpretations and Policies .02 to Rule 404, which prohibits Wednesday SPY Expirations from expiring on a Wednesday in which Quarterly Options Series expire.

The Exchange does not believe that any market disruptions will be encountered with the introduction of P.M.-settled Monday expirations. The Exchange has the necessary capacity and surveillance programs in place to support and properly monitor trading in the proposed Monday expiration series, including Monday SPY Expirations. The Exchange currently trades P.M.-settled Short Term Option Series that expire almost every Wednesday and Friday, which provide market participants a tool to hedge special events and to reduce the premium cost of buying protection. The Exchange notes that it has been listing Wednesday expirations pursuant to MIAX Options Rule 100 and Rule 404 since 2016.[8] With the exception of Monday expiration series that are scheduled to expire on a holiday, the Exchange does not believe that there are any material differences between Monday expirations and Wednesday or Friday expirations for Short Term Option Series.

The Exchange seeks to introduce Monday expirations to, among other things, expand hedging tools available to market participants and to continue the reduction of the premium cost of buying protection. The Exchange believes that Monday expirations, similar to Wednesday and Friday expirations, will allow market participants to purchase an option based on their timing as needed and allow them to tailor their investment and hedging needs more effectively.

As noted above, Phlx recently received approval to list Monday expirations for SPY options pursuant to its Short Term Options program. In addition, other exchanges currently permit Monday expirations for other options. For example, Cboe lists options on the SPX with a Monday expiration as part of its Nonstandard Expirations Pilot Program.[9]

2. Statutory Basis

The Exchange believes that its proposed rule change is consistent with Section 6(b) of the Act[10] in general, and furthers the objectives of Section 6(b)(5) of the Act[11] in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of

[6] *See* Cboe Rule 24.9(e)(1) (''If the Exchange is not open for business on a respective Monday, the normally Monday expiring Weekly Expirations will expire on the following business day. If the Exchange is not open for business on a respective Wednesday or Friday, the normally Wednesday or Friday expiring Weekly Expirations will expire on the previous business day.'')

[7] *See* Exchange Rule 404, Interpretations and Policies .02(a).

[8] *See* Securities Exchange Act Release No. 78772 (September 6, 2016), 81 FR 62784 (September 12, 2016) (SR–MIAX–2016–31).

[9] *See* Cboe Rule 24.9(e)(1) (''The Exchange may open for trading Weekly Expirations on any broad-based index eligible for standard options trading to expire on any Monday, Wednesday, or Friday (other than the third Friday-of-the-month or days that coincide with an EOM expiration.'').

[10] 15 U.S.C. 78f(b).

[11] 15 U.S.C. 78f(b)(5).

trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, to remove impediments to and perfect the mechanisms of a free and open market and a national market system and, in general, to protect investors and the public interest.

In particular, the Exchange believes the Short Term Option Series Program has been successful to date and that Monday expirations, including Monday SPY Expirations, simply expand the ability of investors to hedge risk against market movements stemming from economic releases or market events that occur throughout the month in the same way that the Short Term Option Series Program has expanded the landscape of hedging. Similarly, the Exchange believes Monday expirations, including Monday SPY Expirations, should create greater trading and hedging opportunities and flexibility, and will provide customers with the ability to tailor their investment objectives more effectively. While other exchanges do not currently list Monday SPY Expirations, the Exchange notes that Cboe currently permits Monday expirations for other options with a weekly expiration, such as options on the SPX.[12] Additionally, Nasdaq PHLX LLC (''Phlx'') has recently received approval from the Commission to list Monday SPY Expirations for SPY options pursuant to its Short Term Options program.[13]

With the exception of Monday expiration series that are scheduled to expire on a holiday, the Exchange does not believe that there are any material differences between Monday expirations, including Monday SPY Expirations, and Wednesday or Friday expirations, including Wednesday and Friday SPY Expirations, for Short Term Option Series. The Exchange notes that it has been listing Wednesday expiration pursuant to MIAX Options Rule 100 and Rule 404 since 2016.[14] The Exchange believes that it is consistent with the Act to treat Monday expiration series that expire on a holiday differently than Wednesday or Friday expiration series, since the proposed treatment for Monday expiration series will result in an expiration date that is closer in time to the scheduled expiration date of the series, and therefore may be more representative of anticipated market conditions. The Exchange also notes that Cboe uses the same procedure for SPX options with Monday expirations that are listed pursuant to its Nonstandard Expirations Pilot Program and that are scheduled to expire on a holiday.

Given the similarities between Monday SPY Expiration series and Wednesday and Friday SPY Expiration series, the Exchange believes that applying the provisions in Interpretations and Policies .02 to Rule 404 that currently apply to Wednesday SPY Expirations, to Monday SPY Expirations, is justified. For example, the Exchange believes that allowing Monday SPY Expirations and monthly SPY expirations in the same week will benefit investors and minimize investor confusion by providing Monday SPY Expirations in a continuous and uniform manner. The Exchange also believes that it is appropriate to amend Interpretations and Policies .02(b) to Rule 404 to clarify that no Short Term Option Series may expire on the same day as an expiration of Quarterly Option Series on the same class. This change will make that provision more consistent with the existing language in Interpretations and Policies .02 to Rule 404 that prohibit Wednesday SPY Expirations from expiring on a Wednesday in which Quarterly Options Series expire.

Finally, the Exchange represents that it has an adequate surveillance program in place to detect manipulative trading in Monday expirations, including Monday SPY Expirations, in the same way that it monitors trading in the current Short Term Option Series. The Exchange also represents that it has the necessary systems capacity to support the new options series.

The Exchange believes the proposed rule text organizational changes promote just and equitable principles of trade and remove impediments to and perfect the mechanism of a free and open market and a national market system because the proposed rule text organizational change conforms its rules to the rules of other exchanges. As such, the proposed amendments would foster cooperation and coordination with persons engaged in facilitating transactions in securities and would remove impediments to and perfect the mechanism of a free and open market and a national exchange system. In particular, the Exchange believes that the proposed changes will provide greater clarity to Members and the public regarding the Exchange's Rules. It is in the public interest for rules to be accurate and concise so as to eliminate the potential for confusion.

B. Self-Regulatory Organization's Statement on Burden on Competition

MIAX Options does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange notes that having Monday expirations is not a novel proposal, as Cboe currently lists and trades short-term SPX options with a Monday expiration, and Phlx has recently received approval from the Commission to list Monday SPY expirations. The Exchange does not believe the proposal will impose any burden on intra-market competition, as all market participants will be treated in the same manner under this proposal. Additionally, the Exchange does not believe the proposal will impose any burden on inter-market competition, as nothing prevents the other options exchanges from proposing similar rules to list and trade short-term options series with Monday expirations.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act [15] and Rule 19b–4(f)(6) thereunder.[16]

A proposed rule change filed under Rule 19b–4(f)(6) normally does not become operative for 30 days from the date of filing. However, Rule 19b–4(f)(6)(iii) [17] permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposal may become operative

[12] *See supra* note 9.

[13] *See supra* note 4.

[14] *See supra* note 8.

[15] 15 U.S.C. 78s(b)(3)(A).

[16] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intention to file 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.

[17] 17 CFR 240.19b–4(f)(6)(iii).

immediately upon filing. The Commission notes that it recently approved Phlx's substantially similar proposal to list and trade Monday SPY Expirations.[18] The Exchange has stated that waiver of the operative delay will allow the Exchange to list and trade Monday SPY Expirations as soon as possible, and therefore, promote competition among the option exchanges.[19] For these reasons, the Commission believes that the proposed rule change presents no novel issues and that waiver of the 30-day operative delay is consistent with the protection of investors and the public interest, and will allow the Exchange to remain competitive with other exchanges. Therefore, the Commission hereby waives the 30-day operative delay and designates the proposal effective upon filing.[20]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form *(http://www.sec.gov/rules/sro.shtml)*; or
- Send an email *to rule-comments@sec.gov.* Please include File Number SR–MIAX–2018–05 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–MIAX–2018–05. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website *(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 website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–MIAX–2018–05 and should be submitted on or before March 15, 2018.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[21]

Eduardo A. Aleman,

Assistant Secretary.

[FR Doc. 2018–03565 Filed 2–21–18; 8:45 am]

BILLING CODE 8011–01–P

[18] *See supra* note 4.

[19] The Exchange also proposes a number of non-substantive changes to its rulebook. The Exchange stated these changes will help to provide clarity and therefore are in the public interest.

[20] For purposes only of waiving the 30-day operative delay, the Commission has also considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[21] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–82727; File No. SR–CHX–2016–20]

Self-Regulatory Organizations; Chicago Stock Exchange, Inc.; Order Setting Aside Action by Delegated Authority and Disapproving a Proposed Rule Change, as Modified by Amendments No. 1 and No. 2, Regarding the Acquisition of CHX Holdings, Inc. by North America Casin Holdings, Inc.

February 15, 2018.

I. Introduction

On December 2, 2016, the Chicago Stock Exchange, Inc. (''CHX'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'' or ''SEC''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Exchange Act'')[1] and Rule 19b–4 thereunder,[2] a proposed rule change in connection with the proposed acquisition (''Proposed Transaction'') of CHX Holdings, Inc. (''CHX Holdings'') by North America Casin Holdings, Inc. (''NA Casin Holdings''). The Division of Trading and Markets, for the Commission pursuant to delegated authority, approved the proposed rule change as modified by CHX in Amendment No. 1. Pursuant to Section 4A of the Exchange Act, and Commission Rules of Practice, we have reviewed the action by the Division of Trading and Markets pursuant to delegated authority. As discussed in more detail below, during the period of our review, CHX further modified the proposed rule change in Amendment No. 2.

In conducting a *de novo* review of the proposed rule change—through which CHX seeks to effect a change in ownership—the Commission is mindful of the important role national securities exchanges, such as CHX, play in the securities markets.[3] Not only do they operate trading markets, but registered national securities exchanges are also self-regulatory organizations (''SROs'') ''charged with a public trust to

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Exchange Act Release No. 40760 (December 8, 1998), 63 FR 70844, 70881 (December 22, 1998) (''the self-regulatory role of registered exchanges is fundamental to the enforcement of the federal securities laws.''); and Exchange Act Release No. 50699 (November 18, 2004), 69 FR 71126, 71132 (December 8, 2004) (''As operators of trading markets, front-line regulators of securities firms, and standard-setters for listed issuers, national securities exchanges . . . are critical to the integrity of the U.S. securities markets.'').

implement and enforce the federal securities laws and rules, as well as their own rules with respect to their members.'' [4]

To minimize the potential for any person who has an ownership or voting interest in a national securities exchange to direct its operation so as to cause the exchange to neglect or otherwise fail to fulfill its obligations under the Exchange Act, the rules of national securities exchanges generally include ownership and voting limitations.[5] The proposed rule change before us contains such limitations. But as described more fully below, the Commission's review of the information before it—including, but not limited to, the staff's experiences in gathering information to assess the proposed rule change—leads us to conclude that CHX has not met its burden to demonstrate that the proposed rule change is consistent with the Exchange Act.

The information before the Commission has highlighted unresolved questions about whether the proposed new ownership structure would comply with the ownership and voting limitations, as well as whether certain aspects of the Proposed Transaction undermine the purpose of those ownership and voting limitations. Nor has the Exchange shown that it would be able to effectively monitor or enforce compliance with these limitations upon consummation of the Proposed Transaction, as it would be required to do in its role as an SRO under the federal securities laws. And the review process has also raised questions about whether the proposed ownership structure will allow the Commission to exercise sufficient oversight of the Exchange.

Because of these concerns, whether viewed independently or in combination, we are unable to find that CHX has met its burden of demonstrating that the proposed rule change is consistent with the Exchange Act and the applicable rules and regulations thereunder. We therefore disapprove the proposed rule change.

II. Background

A. Procedural History

The proposed rule change was published for comment in the **Federal Register** on December 12, 2016.[6] On January 12, 2017, the Commission instituted proceedings under Section 19(b)(2)(B) of the Exchange Act [7] to determine whether to approve or disapprove the proposed rule change.[8] The Commission received 28 comments on the proposed rule change,[9] and three responses from the Exchange to certain comments.[10] On June 6, 2017, pursuant to Section 19(b)(2) of the Exchange Act,[11] the Commission designated a longer period for Commission action on proceedings to determine whether to approve or disapprove the proposed rule change.[12] On August 7, 2017, the Exchange filed Amendment No. 1 to the proposed rule change.[13] On August 9, 2017, the Division of Trading and Markets, for the Commission pursuant to delegated authority,[14] approved the proposed rule change, as modified by Amendment No. 1.[15]

Pursuant to Exchange Act Section 4A[16] and Commission Rule of Practice 431,[17] the Delegated Order has been stayed,[18] and the Commission has reviewed the delegated action. On August 18, 2017, the Commission issued a scheduling order (''Scheduling Order''), pursuant to Commission Rule

[4] Exchange Act Release No. 50699, 69 FR 71126, 71131. The Commission has long recognized the inherent potential for conflicts between an exchange's regulatory functions as an SRO and its responsibilities to promote the economic interests of its members and owners. *See, e.g.,* Exchange Act Release No. 50700 (November 18, 2004), 69 FR 71256, 71259 (December 8, 2004).

[5] *See, e.g.,* Exchange Act Release Nos. 79585 (December 16, 2016), 81 FR 93988 (December 22, 2016) (SR–BatsBZX–2016–68); 78119 (June 21, 2016), 81 FR 41611 (June 27, 2016) (SR–ISE–2016–11, SR–ISEGemini–2016–05, SR–ISEMercury–2016–10); 74270 (February 13, 2015), 80 FR 9286 (February 20, 2015) (SR–NSX–2014–017); 71449 (January 30, 2014), 79 FR 6961 (February 5, 2014) (SR–EDGA–2013–34; SR–EDGX–2013–43); 71375 (January 23, 2014), 79 FR 4771 (January 29, 2014) (SR–BATS–2013–059, SR–BYX–2013–039); 70210 (August 15, 2013), 78 FR 51758 (August 21, 2013) (SR–NYSE–2013–42, SR–NYSEMKT–2013–50 and SR–NYSEArca–2013–62); 62716 (August 13, 2010), 75 FR 51295 (August 19, 2010) (File No. 10–198); 61698 (March 12, 2010), 75 FR 13151 (March 18, 2010) (File Nos. 10–194 and 10–196) (''EDGX and EDGA Registrations''); 58375 (August 18, 2008), 73 FR 49498 (August 21, 2008) (File No. 10–182); 56955 (December 13, 2007), 72 FR 71979, 71982–84 (December 19, 2007) (SR–ISE–2007–101); 55293 (February 14, 2007), 72 FR 8033 (February 22, 2007) (SR–NYSE–2006–120) (''NYSE Euronext Approval Order''); 53382 (February 27, 2006), 71 FR 11251 (March 6, 2006) (SR–NYSE–2005–77); 53963 (June 8, 2006), 71 FR 34660 (June 15, 2006) (File No. SR–NSX–2006–03); 53128 (January 13, 2006), 71 FR 3550 (January 23, 2006) (File No. 10–131); 51149 (February 8, 2005), 70 FR 7531 (February 14, 2005) (SR–CHX–2004–26); and 49098 (January 16, 2004), 69 FR 3974 (January 27, 2004) (SR–Phlx–2003–73); *see also* Exchange Act Release No. 50699 (November 18, 2004) 69 FR 71126, 71143 (December 8, 2004) (proposing release explaining the purpose of ownership and voting limitations in the rules of national securities exchanges).

[6] *See* Exchange Act Release No. 79474 (December 6, 2016), 81 FR 89543 (''Notice'').

[7] 15 U.S.C. 78s(b)(2)(B).

[8] *See* Exchange Act Release No. 79781, 82 FR 6669 (January 19, 2017) (''OIP'').

[9] *See* letters from: (1) Representative Robert Pittenger, Representative Earl L. ''Buddy'' Carter, Representative Peter DeFazio, Representative Collin Peterson, and Representative David Joyce, dated December 22, 2016 (''Pittenger Letter 1''); (2) James N. Hill, dated December 23, 2016 (''Hill Letter 1''); (3) John Ciccarelli, dated January 2, 2017 (''Ciccarelli Letter''); (4) Anonymous, dated January 3, 2017 (''Anonymous Letter 1''); (5) David E. Kaplan, Executive Director, Global Investigative Journalism Network, dated January 4, 2017 (''GIJN Letter''); (6) Reddy Dandolu, Founder, Chief Executive Officer, Las Vegas Stock Exchange, dated February 4, 2017 (''Dandolu Letter''); (7) David Ferris, Senior Research Analyst, The Public Interest Review, dated February 16, 2017 (''Ferris Letter 1''); (8) Michael Brennan, Independent Market Commentator, dated February 17, 2017 (''Brennan Letter''); (9) Lawrence Bass, Individual Member, Alliance for American Manufacturing, dated February 20, 2017 (''Bass Letter''); (10) Steven Mayer, dated February 20, 2017 (''Mayer Letter''); (11) William Park, dated February 21, 2017 (''Park Letter''); (12) Jason Blake, Commentator, dated February 25, 2017; (13) John Meagher, Freelance Journalist, dated March 1, 2017; (14) Yong Xiao, Chief Executive Officer, North America Casin Holdings, Inc., dated March 1, 2017 (''NA Casin Holdings Letter 1''); (15) Steven Caban, dated March 1, 2017 (''Caban Letter''); (16) Harley Seyedin, President, American Chamber of Commerce in South China, dated March 2, 2017 (''Seyedin Letter''); (17) Salvatore Nobile, dated March 2, 2017 (''Nobile Letter''); (18) Olga Gouroudeva, dated March 3, 2017 (''Gouroudeva Letter 1''); (19) John R. Prufeta, dated March 3, 2017 (''John R. Prufeta Letter 1''); (20) Anthony J. Saliba, Saliba Ventures Holdings, LLC, dated March 3, 2017 (''Saliba Letter 1''); (21) Aileen Zhong, dated March 5, 2017 (''Zhong Letter 1''); (22) Duncan Karcher, dated March 5, 2017 (''Duncan Karcher Letter 1''); (23) Ira Gottlieb, Principal, Healthcare Practice, Mazars USA LLP, dated March 5, 2017 (''Gottlieb Letter''); (24) James N. Hill, dated March 6, 2017 (''Hill Letter 2''); (25) David Ferris, Senior Research Analyst, The Public Interest Review, dated March 6, 2017 (''Ferris Letter 2''); (26) Sean Casey, dated April 24, 2017; (27) Representative Robert Pittenger, Representative Chris Smith, Representative Peter DeFazio, Representative Ted Yoho, Representative Rosa DeLauro, Representative Steve King, Representative Walter Jones, Representative David Joyce, Representative Brian Babin, Representative Bill Posey, and Representative Tom Marino, dated July 10, 2017 (''Pittenger Letter 2''); and (28) Senator Joe Manchin, III, dated July 20, 2017 (''Manchin Letter''). All of the comments are available at: *https://www.sec.gov/comments/sr-chx-2016-20/chx201620.shtml.*

[10] *See* letters from John K. Kerin, President and Chief Executive Officer, CHX, dated January 5, 2017 (''CHX Response Letter 1''); Albert J. Kim, Vice President and Associate General Counsel, CHX, dated January 6, 2017 (''CHX Response Letter 2'') (responding specifically to the Ciccarelli Letter); and John K. Kerin, President and Chief Executive Officer, CHX, dated March 6, 2017 (''CHX Response Letter 3'').

[11] 15 U.S.C. 78s(b)(2).

[12] *See* Exchange Act Release No. 80864, 82 FR 26966 (June 12, 2017).

[13] Amendment No. 1 is available at: *https://www.sec.gov/comments/sr-chx-2016-20/chx201620.shtml. See also infra* note 15.

[14] 17 CFR 200.30–3(a)(12).

[15] *See* Exchange Act Release No. 81366, 82 FR 38734 (August 15, 2017) (''Delegated Order''). In the Delegated Order, the Commission also described and noticed the filing of Amendment No. 1 to the proposed rule change.

[16] 15 U.S.C. 78d–1.

[17] 17 CFR 201.431.

[18] *See* letter from Secretary of the Commission to Albert (A.J.) Kim, Vice President and Associate General Counsel, CHX, dated August 9, 2017 (providing notice of Commission review of delegated action and stay of order), available at *https://www.sec.gov/rules/sro/chx/2017/34-81366-letter-from-secretary.pdf.*

of Practice 431, allowing the filing of additional statements until September 17, 2017.[19] The Commission received 43 comment letters within that period, including two comment letters from the Exchange.[20] On November 6, 2017, the Exchange filed Amendment No. 2 to the proposed rule change.[21] Amendment No. 2 was published for comment in the **Federal Register** on November 20, 2017, and a new comment period ending on December 5, 2017 was established, with a deadline for the submission of rebuttals to comment of December 15, 2017.[22] After the Exchange filed Amendment No. 2, the Commission received an additional 21 comment letters on the proposed rule change, as modified by Amendments No. 1 and 2,[23] and three response letters from the Exchange.[24]

The Commission's Rules of Practice set forth procedures for reviewing actions made pursuant to delegated authority.[25] Pursuant to Rule 431(a) of the Rules of Practice, the Commission may affirm, reverse, modify, set aside, or remand for further proceedings, in whole or in part, the action made pursuant to delegated authority. Here, the Commission set aside the Delegated Order and conducted a *de novo* review of, and gave careful consideration to, the record, which includes, among other items: (1) CHX's proposal and all amendments thereto; (2) supplemental information submitted by CHX, both in the public record and pursuant to confidential treatment requests; (3) all comments received in connection with the proposed rule change; (4) all comments received in connection with the Scheduling Order; and (5) information derived from a recent staff examination of the Exchange.

B. Summary of the Proposal, as Modified by Amendments No. 1 and No. 2

Currently, the Exchange is a wholly owned subsidiary of CHX Holdings, and CHX Holdings is beneficially owned by 193 firms or individuals, including certain Participants or affiliates of Participants.[26] Pursuant to the terms of a Merger Agreement dated February 4, 2016, as amended on February 3, 2017, and August 29, 2017 (''Merger Agreement''), by and among NA Casin Holdings, Exchange Acquisition Corporation (''Merger Sub''), Chongqing Casin Enterprise Group Co., LTD. (''Chongqing Casin''), Richard G. Pane solely in his capacity as the

[19] *See* Exchange Act Release No. 81435, 82 FR 40187 (August 24, 2017).

[20] *See* letters from: (1) Frank Milton, dated August 15, 2017 (''Milton Letter''); (2) Richard R. Taylor, Head Trader, Taylor Trading, dated August 15, 2017 (''Richard R. Taylor Letter''); (3) Melanie Ayers, dated August 16, 2017 (''Ayers Letter''); (4) Walt H. Huskey, dated August 23, 2017 (''Huskey Letter''); (5) Darrell Simpson, dated August 23, 2017 (''Simpson Letter''); (6) Anonymous, dated August 24, 2017 (''Anonymous Letter 2''); (7) Edward L. Jones, dated August 24, 2017 (''Edward Jones Letter''); (8) John K. Kerin, President & Chief Executive Officer, CHX, dated August 25, 2017 (''CHX Response Letter 4''); (9) John Carney, dated August 28, 2017 (''Carney Letter''); (10) Michael Johnson, dated August 31, 2017 (''Michael Johnson Letter 1''); (11) Michael Johnson, Director Emeritus, Center for East Asian Political Economy, dated September 2, 2017 (''Michael Johnson Letter 2''); (12) Rick Helmer, dated September 4, 2017 (''Helmer Letter''); (13) Ruth Day, dated September 4, 2017 (''Day Letter''); (14) Catherine Jones, dated September 5, 2017 (''Catherine Jones Letter''); (15) Robert Denholm, dated September 6, 2017 (''Denholm Letter''); (16) Arthur Lee, Analyst, U.S. Strategic Defense Think Tank, dated September 6, 2017 (''Lee Letter''); (17) Olga Gouroudeva, dated September 7, 2017 (''Gouroudeva Letter 2''); (18) Timothy Watson, Investigator, DeepDive Background Research, dated September 8, 2017 (''Watson Letter''); (19) Vijay Vad, dated September 8, 2017 (''Vad Letter''); (20) Lyle Himebaugh, Managing Partner, Granite Group Advisors, dated September 8, 2017 (''Himebaugh Letter''); (21) Duncan Karcher, dated September 8, 2017 (''Duncan Karcher Letter 2''); (22) John Prufeta, Chief Executive Officer and Chairman, Medical Excellence International, LLC, dated September 11, 2017 (''John R. Prufeta Letter 2''); (23) Aileen Zhong, dated September 11, 2017 (''Zhong Letter 2''); (24) Robert Prufeta, Senior Vice President, Executive Search, Solomon Page Healthcare & Life Sciences, dated September 12, 2017 (''Robert Prufeta Letter''); (25) Stella Su, dated September 12, 2017 (''Su Letter''); (26) Tracy Xu, dated September 12, 2017 (''Xu Letter''); (27) John L. Prufeta, dated September 13, 2017 (''John L. Prufeta Letter''); (28) Thomas W. Alfano, Partner, Abrams Fensterman, dated September 13, 2017 (''Alfano Letter''); (29) Tara Prufeta, dated September 13, 2017 (''Tara Prufeta Letter''); (30) Rep. Randy Hultgren, Member of Congress, dated September 14, 2017 (''Hultgren Letter''); (31) Michael Johnson, Director Emeritus, Center for East Asian Political Economy, dated September 14, 2017 (''Michael Johnson Letter 3''); (32) Cheryl Karcher, dated September 15, 2017 (''Cheryl Karcher Letter''); (33) Stephen Johnson, Investigative Reporter, Money Network Media, dated September 15, 2017 (''Stephen Johnson Letter''); (34) Yong Xiao, Chief Executive Officer, North America Casin Holdings, Inc., dated September 15, 2017 (''NA Casin Holdings Letter 2''); (35) Manuel Pinho, dated September 15, 2017 (''Pinho Letter''); (36) Sandy Sapa, dated September 15, 2017 (''Sapa Letter''); (37) Bruce Rauner, Governor of the State of Illinois, dated September 15, 2017 (''Rauner Letter''); (38) Peter Strotz, Analyst, Center for Government Accountability, dated September 16, 2017 (''Strotz Letter''); (39) Susan Williams, Risk Analyst, Blue Stone Capital, dated September 17, 2017 (''Williams Letter''); (40) Representative Robert Pittenger, Representative Chris Smith, Representative Mo Brooks, Representative Rosa DeLauro, Representative Walter Jones, Representative Julia Brownley, Representative Doug LaMalfa, Representative Tom O'Halleran, Representative Peter DeFazio, Senator Joe Manchin, Senator Amy Klobuchar, Representative Steve King, Representative Marcy Kaptur, Representative Austin Scott, Representative David Joyce, Representative Glenn Grothman, Representative David Valadao, and Representative Mike Gallagher, dated September 26, 2017 (''Pittenger Letter 3''); (41) James G. Ongena, Executive Vice President & General Counsel, CHX, dated October 1, 2017 (''CHX Response Letter 5''); (42) Chris Monfort, dated October 5, 2017 (''Monfort Letter''); and (43) Anonymous, dated October 8, 2017 (''Anonymous Letter 3'').

[21] In Amendment No. 2, the Exchange modified the proposed rule change by: (1) Amending the proposed capitalization table for NA Casin Holdings due to the withdrawal of three proposed equity owners—Chongqing Jintian Industrial Co., Ltd., Chongqing Longshang Decoration Co., Ltd., and Xian Tong Enterprises, Inc.—from the investor group for the Proposed Transaction, *see infra* note 30; (2) amending the proposed NA Casin Holdings Certificate of Incorporation to: (i) require a supermajority vote for certain corporate actions related to change of control of NA Casin Holdings; (ii) reflect a recent name change of the registered agent from ''National Corporate Research'' to ''Cogency Global, Inc.''; and (iii) modify the term expiration years of the three classes of directors under Section (6) of Article V; (3) amending the put agreements for Raptor Holdco LLC (''Raptor'') and Saliba Ventures Holdings, LLC (''Saliba'') to, among other changes, reflect the increased ownership levels for Raptor and Saliba under the new capital structure; (4) providing a new put agreement for Penserra Securities LLC (new *Exhibit 5L*), which the Exchange states is substantively similar to the Raptor and Saliba put agreements; and (5) amending the language of the filing to update certain sections of the Form 19b-4 in order to conform that language with the above changes. Amendment No. 2 is available at: *https://www.sec.gov/comments/sr-chx-2016-20/chx201620.shtml.*

[22] *See* Exchange Act Release No. 82077 (November 14, 2017), 82 FR 55141 (''Amendment No. 2'').

[23] *See* letters from: (1) Samuel Garland, Regulatory Policy Group, dated November 9, 2017 (''Garland Letter''); (2) David Mcpherson, Market Transparency Think Tank, dated November 10, 2017 (''Mcpherson Letter''); (3) Daniel Azsai, dated November 12, 2017 (''Azsai Letter''); (4) Anonymous, dated November 12, 2017 (''Anonymous Letter 4''); (5) Richard Taylor, dated November 15, 2017 (''Richard Taylor Letter''); (6) Karl Montclair, dated November 20, 2017 (''Montclair Letter''); (7) Jeremy Johnson, Analyst, Citizens Alliance for Better Government, dated November 22, 2017 (''Jeremy Johnson Letter''); (8) Marc Gresack, dated November 21, 2017 (''Gresack Letter''); (9) Ruben May, dated November 21, 2017 (''May Letter''); (10) Claire Salters, dated November 22, 2017 (''Salters Letter''); (11) Gordon Faux, dated November 30, 2017 (''Faux Letter''); (12) Anthony Saliba, Saliba Ventures Holdings, LLC, dated December 1, 2017 (''Saliba Letter 2''); (13) Preston Briley, dated December 4, 2017 (''Briley Letter''); (14) G. Bleecher, dated December 4, 2017 (''Bleecher Letter''); (15) David Marden, dated December 4, 2017 (''Marden Letter''); (16) Yong Xiao, Chief Executive Officer, NA Casin Holdings, dated December 13, 2017 (''NA Casin Holdings Letter 3''); (17) Peter Strauss, Fraud Examiner, Fraud Detection Network, dated December 2, 2017 (''Strauss Letter''); (18) Steven Hart, Investigator, Center for Market Transparency, dated December 15, 2017 (''Hart Letter''); (19) James N. Hill, dated December 15, 2017 (''Hill Letter 3''); (20) Jon Horwitz, Market Structure Specialist, Compass Research Alert, dated December 15, 2017 (''Horwitz Letter''); and (21) Jason Friedman, Friedman Regulatory Transparency Group, dated December 15, 2017 (''Friedman Letter'').

[24] *See* letters from John K. Kerin, President and Chief Executive Officer, CHX, dated December 15, 2017 (''CHX Response Letter 6''); James G. Ongena, Executive Vice President and General Counsel, CHX, dated December 15, 2017 (''CHX Response Letter 7''); and James G. Ongena, Executive President and General Counsel, CHX, dated January 12, 2018 (''CHX Response Letter 8'').

[25] *See* 17 CFR 201.431.

[26] *See* Notice, *supra* note 6, at 89544. *See also* CHX Rules Article 1, Rule 1(s) (defining ''Participant'').

Stockholders Representative thereunder, and CHX Holdings, Merger Sub would merge into CHX Holdings, which would then become a wholly owned direct subsidiary of NA Casin Holdings.[27] Under the Merger Agreement, current CHX Holdings stockholders would have the right to receive cash in exchange for their shares.[28] The Exchange would continue to be a wholly owned subsidiary of CHX Holdings. Consummation of the Proposed Transaction is subject to the satisfaction of certain conditions precedent, including approval by the Commission of the proposed rule change.[29] The Exchange represents that, after the closing of the Proposed Transaction, all of the outstanding and issued shares of NA Casin Holdings would be held by the following firms and individuals (referred to collectively as the ''upstream owners'') in the following percentages:

Upstream Owners:[30]

- NA Casin Group, Inc. (''NA Casin Group''), a corporation incorporated under the laws of the State of Delaware and wholly owned by Chongqing Casin, a limited company organized under the laws of the People's Republic of China (''PRC'')—29%
- Castle YAC Enterprises, LLC (''Castle YAC''), a limited liability company organized under the laws of the State of New York, the sole member of which is Jay Lu,[31] a U.S. citizen and Vice President of NA Casin Group—11%
- Raptor, a limited liability company organized under the laws of the State of Delaware—25%
- Saliba, a limited liability company organized under the laws of the State of Illinois—24.5%
- Five members of the CHX Holdings management team, all U.S. citizens—collectively, 8.32%, with no one person attributed more than 5%
- Penserra, a limited liability company organized under the laws of the State of New York—2.18%[32]

After the closing of the Proposed Transaction, CHX would remain a national securities exchange, registered under Section 6 of the Exchange Act,[33] and an SRO, as defined in Section 3(a)(26) of the Exchange Act.[34] In addition, following the closing, the Exchange's affiliated routing broker, CHXBD, would remain a Delaware limited liability company of which CHX Holdings would remain the sole member.[35]

To effect the Proposed Transaction, the Exchange proposes to amend its certificate of incorporation and bylaws (''CHX Bylaws''),[36] the certificate of incorporation (''CHX Holdings Certificate'') and bylaws (''CHX Holdings Bylaws'') of CHX Holdings,[37] and the Exchange's rules.[38] The Exchange has also filed the following documents in connection with the Proposed Transaction: (1) The certificate of incorporation (''NA Casin Holdings Certificate'') and bylaws (''NA Casin Holdings Bylaws'') of NA Casin Holdings;[39] (2) text of a proposed resolution of CHX Holdings' board of directors to waive certain ownership and voting limitations to permit the Proposed Transaction;[40] (3) the proposed NA Casin Holdings Stockholders' Agreement,[41] which includes transfer-of-share provisions for the upstream owners that provide a right of first offer, a right to acquire interest upon change of control, and a right to purchase new securities; and (4) put agreements between Saliba, NA Casin Group, and NA Casin Holdings (''Saliba Put Agreement''),[42] Raptor, NA Casin Group, and NA Casin Holdings (''Raptor Put Agreement''),[43] and Penserra, NA Casin Group, and NA Casin Holdings (''Penserra Put Agreement,'' and collectively with the Saliba and Raptor Put Agreements, the ''Put Agreements'').[44] The Put Agreements would grant Saliba, Raptor, and Penserra, respectively, the right to compel NA Casin Holdings to purchase or arrange for an unspecified third party to purchase all or a portion of Saliba's, Raptor's, or Penserra's equity interest in NA Casin Holdings, respectively, during a 30-day window commencing two years after the close of the Proposed Transaction.[45]

[27] *See* Notice, *supra* note 6, at 89544; and Amendment No. 2, *supra* note 22, at 55143.

[28] *See id.*

[29] *See id.*

[30] *See* Amendment No. 2, *supra* note 22, at 55142.

[31] According to the Exchange, Jay Lu is associated with an affiliate of Chongqing Casin and is the son of Shengju Lu, the Chairman of Chongqing Casin. *See* Notice, *supra* note 6, at 89545, n.18. The Exchange represents that Castle YAC and NA Casin Group are related persons for the purpose of determining the ownership and voting concentration limits. *See* Amendment No. 2, *supra* note 22, at 55142.

[32] *See* Amendment No. 1, *supra* note 13, at 7 (explaining that Cheevers & Co., Inc., one of the original upstream owners, merged with Penserra, with Penserra as the surviving entity).

[33] 15 U.S.C. 78f.

[34] 15 U.S.C. 78c(a)(26).

[35] Prior to the change of proposed capital structure noticed in Amendment No. 2, the proposed capital structure for NA Casin Holdings following the close of the original proposed transaction would have been as follows: NA Casin Group, Inc.—20%; Chongqing Jintian Industrial Co., Ltd., a corporation incorporated under the laws of the PRC (''Chongqing Jintian'')—15%; Chongqing Longshang Decoration Co., Ltd., a corporation incorporated under the laws of the PRC (''Chongqing Longshang'')—14.5%; Castle YAC—19%; Raptor—11.75%; Saliba—11.75%; Xian Tong Enterprises, Inc., a corporation incorporated under the laws of the State of New York (''Xian Tong'')—6.94%; five members of the CHX Holdings management team, all U.S. citizens—0.88% (as equity incentives); and Penserra—0.18%. *See* Amendment No. 2, *supra* note 22, at 55142.

[36] *See* Exhibits 5C and 5D. All Exhibits to the proposed rule change are available at: *https://www.sec.gov/rules/sro/chx/chxarchive/chxarchive2016.shtml.*

[37] *See* Exhibits 5A and 5B.

[38] *See* Exhibit 5E. The current CHX Holdings Certificate and CHX Holdings Bylaws require that, for so long as CHX Holdings controls the Exchange, either directly or indirectly, any changes to the CHX Holdings Certificate or CHX Holdings Bylaws must be submitted to the board of directors of the Exchange and, if the Exchange's board determines that the change must be filed with, or filed with and approved by, the Commission under Section 19 of the Exchange Act and the rules thereunder, then the changes will not be effective until filed with, or filed with and approved by, the Commission. *See* Article THIRTEENTH of the current CHX Holdings Certificate; and Article VIII of the current CHX Holdings Bylaws. Section 19(b) of the Exchange Act and Rule 19b–4 thereunder require an SRO to file proposed rule changes with the Commission. Although CHX Holdings is not an SRO, those portions of its certificate of incorporation and bylaws that are stated policies, practices, or interpretations (as defined in Rule 19b–4 under the Exchange Act) of the Exchange are rules of the Exchange and must therefore be filed with the Commission pursuant to section 19(b)(4) of the Exchange Act and Rule 19b–4 thereunder. Accordingly, the Exchange filed the CHX Holdings Certificate and CHX Holdings Bylaws with the Commission.

[39] *See* Exhibits 5F and 5G. The proposed NA Casin Holdings Certificate and NA Casin Holdings Bylaws require that, for so long as NA Casin Holdings controls the Exchange, either directly or indirectly, any change to those documents must be submitted to the board of directors of the Exchange and, if the Exchange's board determines that the change must be filed with, or filed with and approved by, the Commission under Section 19 of the Exchange Act and the rules thereunder, then the changes will not be effective until filed with, or filed with and approved by, the Commission. *See* proposed NA Casin Holdings Certificate, Article X; proposed NA Casin Holdings Bylaws, Article 11. Although NA Casin Holdings is not an SRO, those portions of its certificate of incorporation and bylaws that are stated policies, practices, or interpretations (as defined in Rule 19b–4 under the Exchange Act) of the Exchange are rules of the Exchange and must therefore be filed with the Commission pursuant to section 19(b)(4) of the Exchange Act and Rule 19b–4 thereunder. Accordingly, the Exchange filed the NA Casin Holdings Certificate and NA Casin Holdings Bylaws with the Commission.

[40] *See* Exhibit 5H.

[41] *See* Exhibit 5I.

[42] *See* Exhibit 5J.

[43] *See* Exhibit 5K.

[44] *See* Exhibit 5L.

[45] The Put Agreements state that the price of shares sold pursuant to each Put Agreement would be an amount equal to the total number of shares that each stockholder determines to sell, multiplied by the sum of the average initial price per share, plus the amount of the preferred return, which is a certain percentage of the average price per share per year compounded annually through the date of the exercise of the put right, less any distributions previously paid by NA Casin Holdings to the holders of the shares.

The Exchange proposes several substantive and technical amendments to its corporate governance documents, rules, and the governing documents of CHX Holdings. Among other items, the proposed amendments revise provisions in the CHX Holdings Certificate relating to ownership and voting limitations. In addition, to govern the upstream owners, the Exchange proposes to establish in the NA Casin Holdings Certificate ownership and voting limitations that are identical to those contained in the proposed CHX Holdings documents. In particular, these provisions prohibit any Person,[46] either alone or with its Related Persons,[47] from beneficially owning shares of stock of CHX Holdings or NA Casin Holdings representing in the aggregate more than 40% of the then outstanding votes entitled to be cast on any matter unless specific procedures are followed prior to acquiring shares in excess of the ownership limitation.[48] In addition, no Participant, either alone or with its Related Persons, would be permitted at any time to beneficially own shares of stock of CHX Holdings or NA Casin Holdings representing in the aggregate more than 20% of the then outstanding votes entitled to be cast on any matter.[49] Further, no Person that is subject to any statutory disqualification as defined in Section 3(a)(39) of the Exchange Act would be permitted at any time to beneficially own, either alone or with its Related Persons, shares of stock of CHX Holdings or NA Casin Holdings representing in the aggregate more than 20% of the then outstanding votes entitled to be cast on any matter.[50] CHX also proposes cure provisions that would require CHX Holdings or NA Casin Holdings, as applicable, to call shares held in excess of these ownership limits, and to not register any shares transferred in violation of these ownership limits.[51] These restrictions are described herein as the ''ownership limitations.''

In addition, both the CHX Holdings Certificate and NA Casin Holdings Certificate contain voting restrictions that would preclude any stockholder, either alone or with its Related Persons, from voting more than 20% of the then outstanding shares entitled to be cast on any matter unless specific procedures are followed prior to voting in excess of the limitation.[52] Similarly, no Person, either alone or with its Related Persons, would be permitted to enter into an agreement, plan, or other arrangement that would result in an aggregate of more than 20% of the then outstanding votes entitled to be cast on a matter to be voted unless specific procedures are followed prior to entering into such an agreement, plan, or arrangement.[53] The certificates of incorporation would also require that CHX Holdings and NA Casin Holdings disregard any votes cast in excess of the voting limitations.[54] These restrictions are described herein as the ''voting limitations.''

Relevant to the ownership and voting limitations, the Exchange represents that there are two sets of Related Persons among the upstream owners: (1) Castle YAC and NA Casin Group and (2) the five members of the CHX Holdings management team.[55] Together, Castle YAC and NA Casin Group would hold a 40% ownership interest in NA Casin Holdings.[56] The five members of the CHX Holdings management team would collectively hold an 8.32% ownership interest.

The Exchange also has proposed revisions to the corporate governance documents of NA Casin Holdings and CHX Holdings to provide notice requirements with respect to changes in ownership that may affect the ownership and voting limitations. Specifically, the NA Casin Holdings Certificate and CHX Holdings Certificate will provide that: (1) Each Person involved in an acquisition for shares of stock of the corporation shall provide the corporation with written notice 14 days prior to the closing date of any acquisition that would result in a Person having voting rights or beneficial ownership, alone or together with its Related Persons, of record or beneficially, of five percent or more of the then outstanding shares of stock of the corporation entitled to vote on any matter; (2) NA Casin Holdings and CHX Holdings will be required to provide 10-day advance written notice to the Commission of any such changes in ownership; (3) any Person that, either alone or together with its Related Persons, has voting rights or beneficial ownership of, five percent or more of the outstanding voting shares of CHX Holdings or NA Casin Holdings (whether by acquisition or by change in the number of shares outstanding or otherwise), will be required, immediately upon acquiring knowledge of its ownership, to give the board of directors of CHX Holdings or NA Casin Holdings, as applicable, notice of such ownership; (4) any Person that, either alone or together with its Related Persons, of record or beneficially, has voting rights or beneficial ownership of five percent or more of NA Casin Holdings or CHX Holdings must promptly update the corporation if its ownership stake in or voting power regarding NA Casin Holdings or CHX Holdings increases or decreases by one

[46] The NA Casin Holdings Certificate and CHX Holdings Certificate define ''Person'' to mean ''a natural person, partnership (general or limited), corporation, limited liability company, trust or unincorporated organization, or a governmental entity or political subdivision thereof.'' *See* proposed CHX Holdings Certificate Article FOURTH, Section (b); proposed NA Casin Holdings Certificate Article IX, Section (4).

[47] CHX proposes to define the term ''Related Persons'' in the NA Casin Holdings Certificate and CHX Holdings Certificate to mean: (1) With respect to any Person, any executive officer (as such term is defined in Rule 3b–7 under the Exchange Act), director, general partner, manager or managing member, as applicable, and all ''affiliates'' and ''associates'' of such Person (as those terms are defined in Rule 12b–2 under the Exchange Act), and other Person(s) whose beneficial ownership of shares of stock of NA Casin Holdings or CHX Holdings, as applicable, with the power to vote on any matter would be aggregated with such first Person's beneficial ownership of such stock or deemed to be beneficially owned by such first Person pursuant to Rules 13d–3 and 13d–5 under the Exchange Act; and (2) in the case of any Participant, for so long as CHX remains a registered national securities exchange, such Person and any broker or dealer with which such Person is associated; and (3) any other Person(s) with which such Person has any agreement, an arrangement or understanding (whether or not in writing) to act together for the purpose of acquiring, voting, holding or disposing of shares of the stock of NA Casin Holdings or CHX Holdings, as applicable; and (4) in the case of a Person that is a natural person, any relative or spouse of such Person, or any relative of such spouse, who has the same home as such Person or who is a director or officer of NA Casin Holdings or CHX Holdings, as applicable, or any of its parents or subsidiaries. *See* proposed CHX Holdings Certificate Article FOURTH, Section (b); and proposed NA Casin Holdings Certificate Article IX, Section (4).

[48] *See* proposed CHX Holdings Certificate Article FOURTH, Section (c)(i); and proposed NA Casin Holdings Certificate Article IX, Section (9).

[49] *See* proposed CHX Holdings Certificate Article FOURTH, Section (c)(ii); proposed NA Casin Holdings Certificate Article IX, Section (10).

[50] *See* proposed CHX Holdings Certificate Article FOURTH, Section (d); and proposed NA Casin Holdings Certificate Article IX, Section (13).

[51] *See* proposed CHX Holdings Certificate Article FOURTH, Sections (c)(i)(C), (c)(ii)–(iii), and (d); proposed NA Casin Holdings Certificate Article IX, Sections (9)(iii), (10), (11), and (13).

[52] *See* proposed CHX Holdings Certificate Article FOURTH (b)(i); and proposed NA Casin Holdings Certificate Article IX, Section (5).

[53] *See* proposed CHX Holdings Certificate Article FOURTH (b)(i); and proposed NA Casin Holdings Certificate Article IX, Section (5).

[54] *See* proposed CHX Holdings Certificate Article FOURTH (b)(i); and proposed NA Casin Holdings Certificate Article IX, Section (5).

[55] *See* Amendment No. 2, *supra* note 22, at 55142. The Exchange represents that prior to the closing of the Proposed Transaction, these five members of the CHX Holdings management will enter into a voting agreement, which will require that, among other things, they vote as a block; the Exchange asserts that the terms of this voting agreement would render the members Related Persons. *See id.* at n.28.

[56] *See id.* As noted above, NA Casin Group would hold a 29% ownership interest and Castle YAC would hold an 11% ownership interest. *See supra* note 30 and accompanying text.

percent or more;[57] and (5) each Person having voting rights or beneficial ownership of stock of NA Casin Holdings or CHX Holdings will be required to provide prompt written notice to the corporation regarding any changes to its Related Person status with respect to other Persons that own voting shares of stock of the corporation.[58]

Furthermore, Article VIII of the NA Casin Holdings Certificate sets forth a supermajority vote requirement for certain corporate actions.[59] Specifically, Article VIII, Section (2) provides that except as otherwise prohibited by applicable law, the affirmative vote of the holders of at least 85% of the then outstanding NA Casin Holdings voting shares entitled to be cast on such matter is required for the following: (1) Any merger or consolidation of NA Casin Holdings or any subsidiary with any or any other corporation or other entity; (2) any sale, lease, exchange, mortgage, pledge, transfer or other disposition (in one transaction or a series of transactions) to or with any other corporation or other entity, of all or substantially all of the assets of NA Casin Holdings or any subsidiary; (3) the issuance or transfer by NA Casin Holdings or any subsidiary (in one transaction or a series of transactions) of any securities of NA Casin Holdings or any subsidiary that would result in any an individual, corporation, partnership, joint venture, limited liability company, governmental or regulatory body, unincorporated organization, trust, association or other entity: (i) Owning a majority of the shares of the common stock of NA Casin Holdings or (ii) owning a majority of the shares of voting stock of any subsidiary, unless the owner is NA Casin Holdings or a subsidiary; (4) the adoption of any plan or proposal for the liquidation or dissolution of NA Casin Holdings that is not the result of a transaction contemplated by the prior provisions; (5) any reclassification of securities (including any reverse stock split), recapitalization of NA Casin Holdings or any merger or consolidation of NA Casin Holdings with any of its subsidiaries or any other transaction which has the effect, directly or indirectly, of increasing the proportionate share of the outstanding shares of any class of equity or convertible securities of NA Casin Holdings or any subsidiary with the result that the owner or indirect owner of such shares becomes the holder of a majority of the shares of common stock of NA Casin Holdings; or (6) any agreement, contract, or other arrangement providing for any one or more of the previously listed actions.[60]

Additionally, CHX is amending the CHX Holdings Bylaws,[61] CHX Bylaws,[62] and NA Casin Holdings Bylaws,[63] to adopt provisions in each respective document to require that each of CHX Holdings, CHX, and NA Casin Holdings, as applicable, contemporaneously provide the Commission with any information it provides to any other U.S. governmental entity or U.S. authority pursuant to any agreement.

The proposed rule change also includes changes to CHX Holdings' and the Exchange's certificates of incorporation and bylaws addressing, among other items, board and committee composition and procedures, procedures regarding stockholder meetings, consent to U.S. federal court and Commission jurisdiction, and Commission access to corporate books and records related to the activities of the Exchange. The proposed rule change also adopts provisions in the new NA Casin Holdings Certificate and NA Casin Holdings Bylaws relating to these matters.

III. Discussion and Commission Findings

Under Section 19(b)(2)(C) of the Exchange Act, the Commission must approve the proposed rule change of an SRO if the Commission finds that the proposed rule change is consistent with the requirements of the Exchange Act and the applicable rules and regulations thereunder; if it does not make such a finding, the Commission must disapprove the proposed rule change.[64] Additionally, under Rule 700(b)(3) of the Commission's Rules of Practice, the ''burden to demonstrate that a proposed rule change is consistent with the Exchange Act and the rules and regulations issued thereunder . . . is on the self-regulatory organization that proposed the rule change.'' [65] The description of a proposed rule change, its purpose and operation, its effect, and a legal analysis of its consistency with applicable requirements must all be sufficiently detailed and specific to support an affirmative Commission finding.[66] Any failure of a self-regulatory organization to provide the information elicited by Form 19b–4 may result in the Commission not having a sufficient basis to make an affirmative finding that a proposed rule change is consistent with the Exchange Act and the rules and regulations issued thereunder that are applicable to the self-regulatory organization.[67]

Section 6(b)(1) of the Exchange Act requires a national securities exchange to be so organized and have the capacity to be able to carry out the purposes of the Exchange Act and to comply, and enforce compliance by its members, with the provisions of the Exchange Act and its own rules.[68] This encompasses not only a requirement that an exchange have the capacity to perform its functions as a self-regulatory organization, but also that it is so organized as to allow for sufficient Commission oversight.[69] Section 6(b)(5) of the Exchange Act requires that the rules of a national securities exchange be designed, in general, to protect investors and the public interest.[70]

In reviewing the proposed rule change, the Commission has analyzed information provided by the Exchange, both in its public filings and subject to confidential treatment requests, as well as information derived from a recent staff examination of the Exchange.[71] Based on the information before the Commission, for each of the reasons discussed below (whether viewed independently or in combination), we are unable to find that the Exchange has met its burden to show that the proposed rule change is consistent with the Exchange Act and the applicable

[57] *See* proposed NA Casin Holdings Certificate Article IX, Section (19)(i); proposed CHX Holdings Certificate Article Fourth(g)(i).

[58] *See* proposed NA Casin Holdings Certificate Article IX, Section (19)(ii); proposed CHX Holdings Certificate Article Fourth(g)(ii).

[59] *See* Amendment No. 2, *supra* note 22, at 55144.

[60] *See id.* Moreover, such affirmative vote shall be required notwithstanding the fact that no vote may be required, or that a lesser percentage may be permitted, by applicable law. *See id.*

[61] *See* proposed CHX Holdings Bylaws, Article XIII, Section 13.1.

[62] *See* proposed CHX Bylaws, Article XIII, Section 13.1.

[63] *See* proposed NA Casin Holdings Bylaws, Article 10, Section 10.1.3.

[64] *See* 15 U.S.C. 78s(b)(2)(C)(i).

[65] 17 CFR 201.700(b)(3).

[66] *Id.*

[67] *Id.*

[68] 15 U.S.C. 78f(b)(1).

[69] *Id.*

[70] 15 U.S.C. 78f(b)(5).

[71] The Commission has also carefully considered the issues raised by commenters in its analysis of the information before it, and a more detailed description of the comments received, as well as the Exchange's responses, is included in the Appendix. As noted in the OIP (*see* OIP, *supra* note 8, at 6671), questions have been raised about the identity and veracity of a commenter. *See* GIJN Letter, *supra* note 9; *see also* CHX Response Letter 2 regarding the submitter of the Ciccarelli Letter, *supra* note 10. Additionally, four comment letters have been submitted anonymously. *See* Anonymous Letter 1, *supra* note 9; Anonymous Letters 2 & 3, *supra* note 20; Anonymous Letter 4, *supra* note 23. Our analysis and conclusions, however, do not depend on the identity or affiliation of the author of the Ciccarelli Letter or the veracity of the assertions in such letter, or the identity of any particular commenter more generally. Rather, the Commission has considered the *substance* of the concerns raised by commenters in light of the information before it.

rules and regulations thereunder. Accordingly, we disapprove the proposed rule change.[72]

A. Procedural Matters

Section 19(b)(2)(D) of the Exchange Act requires the Commission to ''issue an order'' approving or disapproving a proposed rule change within 240 days.[73] The Delegated Order was issued within that time period.[74] We disagree with the Exchange's assertions that: (1) The stay of that order pending Commission review ''nullified'' its effectiveness, and (2) the approval of the Exchange's original proposed rule—since superseded by the Exchange's amended filing—remains in effect.

First, nothing about a stay vitiates the issuance of the underlying order. Moreover, at the time Congress enacted the time restrictions in Section 19(b)(2)(D) of the Exchange Act, it was known that the Commission could delegate authority to approve SRO rule filings pursuant to Exchange Act Section 4A, and that such delegated actions could be reviewed by the Commission, either at the request of a person aggrieved or on the Commission's own initiative.[75] To construe Section 19(b)(2)(D) as requiring Commission review of an order by delegated authority to be completed within 240 days would undermine both the specific deadlines set forth in the statute and the Commission's ability to delegate functions. It would also leave the Commission insufficient time to engage in the independent, thoughtful analysis required by both the Exchange Act and the Administrative Procedure Act in cases in which either the Commission orders, or an aggrieved party seeks, review.

Nor is such a construction necessary to fulfill Congress's purpose in enacting the statutory timelines. Congress intended to ''streamline'' the rule filing process[76] and to encourage the Commission ''to employ a more transparent and rapid process for consideration of rule changes.''[77] This purpose has been achieved. With rare exception, rule filings are determined, by delegated authority or otherwise, within 240 days.[78] Only a few delegated orders have been subject to Commission review.[79]

Finally, the proposed rule change now before the Commission differs from that addressed in the Delegated Order because the Exchange itself filed a material amendment to its original proposal after the Commission review of the delegated authority action began. The practical implications of the Exchange's assertion that the *original* proposed rule is in effect—either by operation of law due to a failure to effectively meet the statutory time restrictions or because the delegated order approving the original proposed rules governs—are unclear. The transaction contemplated by the Exchange's original proposal was never consummated, and the revised proposal currently before the Commission contemplates a materially different transaction. Indeed, the actions of the Exchange make it clear that there is no substance to this argument. The Exchange itself opted to amend materially its prior proposal rather than submitting a new proposed rule change to alter the proposed rules it now argues had already been approved.[80]

B. Discussion of Substantive Findings

1. The Proposed Transaction's Compliance With the Ownership and Voting Limitations

As discussed above, in order to minimize the potential for persons who have ownership or voting interests in a national securities exchange to direct its operation so as to cause the exchange to neglect or otherwise fail to fulfill its obligations under the Exchange Act, the rules of such exchanges include ownership and voting limitations, as well as mechanisms to monitor for compliance with those limits.[81] Here, the Exchange's proposed ownership and voting limitations—which would govern the proposed upstream owners—are contained in the NA Casin Holdings Certificate.[82] And proposed changes to the corporate governance documents and rules of CHX Holdings provide for ongoing information collection and monitoring to ensure future compliance with these limitations, pursuant to Section 6(b)(1) of the Exchange Act.

In its original filing, the Exchange represented that the Proposed Transaction complied with these

[72] In disapproving the proposed rule change, as modified by Amendments No. 1 and No. 2, the Commission has considered the proposed rule change's impact on efficiency, competition, and capital formation, *see* 15 U.S.C. 78c(f), and the points raised by the Exchange with regard to this consideration. The Exchange asserts that the Proposed Transaction would: (1) Result in substantial capital investment into the Exchange, which will better enable the Exchange to compete within the highly competitive U.S. securities market and better enable the Exchange to further the objectives of the Exchange Act (*see* Notice, *supra* note 6, at 89559); (2) enhance competition among the equity securities markets and provide new trading and capital formation opportunities for market participants and the investing public (*see* Notice, *supra* note 6, at 89558–59); and (3) enhance cooperation between market participants from the two largest economies in the world, encourage additional international trading and listings in the U.S., and enhance the ability of CHX to continue to provide innovative trading functionalities and to offer new capital formation opportunities for emerging growth companies (*see* CHX Response Letter 3, *supra* note 10, at 2–3). The Commission has considered the Exchange's assertions and the discussion of these issues in the comments. *See also* Appendix, *infra* note 142. We note that the basis of the Exchange's assertion that approving the Proposed Transaction would encourage additional international trading and listings is unclear and the Exchange has not provided any quantitative analysis to support this assertion. But even if the proposed rule change has the potential to promote efficiency, competition and/or capital formation, for the reasons discussed below, the Commission must disapprove the proposed rule change in light of its inability, on the current record, to find that it is consistent with the Exchange Act.

[73] *See* 15 U.S.C. 78s(b)(2)(D).

[74] *See supra* note 15.

[75] *See* 15 U.S.C. 78d–1 (enacted in 1987).

[76] H.R. Rep. No. 111–517, at 727 (2010) (Conf. Rep.).

[77] S. Rep. No. 111–176, at 106 (2010).

[78] During fiscal year 2017, 302 rule filings were either approved or disapproved pursuant to Section 19(b)(2). All of these were acted on, by delegated authority or otherwise, within the statutory time frame.

[79] Of the 302 rule filings that were either approved or disapproved in fiscal year 2017, four were brought before the Commission for review. Three of those were brought before the Commission on its own initiative, while one was subject to petitions for review filed by aggrieved persons.

[80] The Exchange also argues that the length of review is inconsistent with Rule 103(a) of the Commission's Rules of Practice and is inconsistent with Section 3(f) of the Exchange Act. Rule 103(a) provides that the Rules of Practice ''shall be construed and administered to secure the just, speedy, and inexpensive determination of every proceeding.'' We do not believe that the Commission's review violates this general principle in light of the material amendment made by the Exchange to the proposed rule change during the pendency of Commission review, the substantial comments received on the proposed rule change and amendments thereto, and, as discussed below, the fact that questions about the compliance of the proposed ownership structure with the Exchange's ownership voting limitations and the ability of the Exchange and the Commission to exercise sufficient oversight in the future remain outstanding. Moreover, the Exchange misconstrues Section 3(f), which does not focus on the efficiency of the *Commission review process.* Instead, it focuses on whether the *proposed rule* promotes efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f) (''Whenever pursuant to this title the Commission is engaged in . . . the review of a rule of a self-regulatory organization, and is required to consider or determine whether an action is necessary or appropriate in the public interest, the Commission shall also consider . . . whether *the action* will promote efficiency, competition, and capital formation.'') (emphasis added).

[81] *See supra* note 5 and accompanying text.

[82] *See* proposed NA Casin Holdings Certificate Article IX, Sections (5) (prohibiting any person, either alone or with its Related Persons from voting or causing the voting of shares of stock of the NA Casin Holdings representing in the aggregate more than 20% of the then outstanding votes entitled to be cast on any matter) and (9) (prohibiting any person, either alone or with its Related Persons, from beneficially owning shares of stock of NA Casin Holdings representing in the aggregate more than 40% of the then outstanding votes entitled to be cast on any matter). As explained *supra* note 39, those portions of NA Casin Holdings' certificate of incorporation and bylaws that are stated policies, practices, or interpretations of the Exchange are rules of the Exchange.

ownership and voting limitations, stating that the only Related Persons among the proposed upstream owners were Castle YAC and NA Casin Group, which would collectively hold a 39% interest in NA Casin Holdings. Commenters, however, asserted that NA Casin Group had undisclosed connections, financial and otherwise, to other proposed upstream owners such that it could exercise undue influence over the Exchange.[83] In an effort to clarify the relationships among the proposed investors in the consortium and to verify the source of funds used for the Proposed Transaction by the various entities involved—including whether NA Casin Group or related entities were providing, directly or indirectly, undisclosed funding for other proposed upstream owners' participation in the Proposed Transaction—Commission staff reviewed information derived from an ongoing examination of CHX and, beginning in July of 2017, requested additional documents and information from CHX.

CHX responded with documents and information, accompanied by a request for confidential treatment, that gave rise to additional questions. In a series of follow-up requests for information pertaining to the proposed upstream owners, Commission staff continued to seek additional information from CHX.[84] While CHX provided documents and information in response to the staff's successive requests, the information made available to the Commission was insufficient to verify the ultimate source of the funds certain of the proposed upstream owners were using to fund their part of the transaction. It also raised questions about potential undisclosed connections between purportedly unrelated members of the investor consortium.

For example, the information provided, as well as information derived from the Commission staff's own due diligence, indicated potential connections between Shengju Lu, his son Jay Lu (who controls Castle YAC), or Chongqing Casin (the entity Shengju Lu controls) on one hand and the funds used by one of the members of the original investor consortium, Xian Tong, on the other hand. It appeared from Commission staff research and a review of certain bank records and supporting documents provided by the Exchange that Xian Tong received funding from an individual and entities that may have familial and financial connections to Shengju Lu or Jay Lu (neither of whom, according to representations submitted by the Exchange, was a Related Person to Xian Tong).

As another example, the funds used by Chongqing Longshang and Chongqing Jintian to fund their respective shares of the Proposed Transaction were purportedly derived from payments owed to them under pre-existing business contracts. But the amount of each of those payments (which approximated the amount of their respective levels of investment in the Proposed Transaction), and the timing of their receipt of those payments, raised questions about whether they were, in fact, bona fide payments under those business contracts.

Shortly after Commission staff requested additional documents and information in an attempt to resolve questions about the source of funds used by these three entities and whether there were, in fact, undisclosed connections between those funds and other proposed investors, Chongqing Jintian, Chongqing Longshang, and Xian Tong withdrew from the Proposed Transaction.[85] CHX then stated that it was unable to provide certain documents and information the Commission staff requested regarding those proposed owners,[86] leaving various questions unanswered.

The significance of these unanswered questions to the Commission's review did not disappear with the withdrawal of the former proposed upstream owners. Although Xian Tong, Chongqing Longshang, and Chongqing Jintian are no longer parties to the Proposed Transaction, as described in Amendment No. 2, Shengju Lu and Chongqing Casin remain central to the Proposed Transaction. Together with Jay Lu's Castle YAC, they would control the largest block (40%) of the outstanding shares in NA Casin Holdings following consummation of the Proposed Transaction. If, in fact, Shengju Lu or Chongqing Casin had undisclosed relationships with, or provided undisclosed funding directly or indirectly to, the withdrawn investors, the representations made in connection with the initial rule filing and Amendment No. 1 would have been inaccurate. That potential (and unresolved) inaccuracy, in turn, would raise questions about the accuracy of the representations made regarding the current structure of the Proposed Transaction and its compliance with the ownership and voting limitations.[87] Thus, regardless of the reasons for the withdrawal of these three members of the original investment consortium, their withdrawal and CHX's inability to provide the information requested by Commission staff prior to that withdrawal leaves the Commission unable to resolve questions that bear on its assessment of the current structure of the Proposed Transaction.

These concerns about the possibility of, and the risks posed by, undisclosed relationships are exacerbated by the terms of the Put Agreements, which heighten the potential for circumvention of the ownership limitations.[88] Under those agreements, Raptor, Saliba, and Penserra can sell their shares to NA Casin Holdings, or an unspecified third-party purchaser, after 24 months for a guaranteed return on their investment. These entities—which would collectively receive 51.68% of NA Casin Holdings' outstanding shares in the Proposed Transaction—therefore appear to be taking only minimal economic risk, with the bulk of the economic risk appearing to be borne by the remaining investors, primarily Chongqing Casin and its related entities. Said another way, while their proposed ownership is described as including a substantial purchase of equity with a put option, in many ways, from an economic perspective, this portion of the Proposed Transaction resembles a loan arrangement with an option to convert the loan into equity (which, as described below, would be acquired at a discounted price vis-à-vis the price

[83] *See* Appendix, *infra* notes 112–117 and accompanying text.

[84] The staff orally requested information from CHX on July 27, 2017, and August 4, 2017, and provided CHX with a written document request on September 18, 2017.

[85] Commenters and the Exchange disagreed regarding the reason for these investors' withdrawal. *Compare, e.g.,* Appendix, *infra* notes 244–247 and accompanying text *with* notes 278–282 and accompanying text.

[86] While NA Casin Holdings and the Exchange contend that these investors provided all of the information requested by staff, this is not borne out by the confidential record before the Commission. *See* NA Casin Holdings Letter 2, *supra* note 20, at 2; and CHX Response Letter 7, *supra* note 24, at 2.

[87] In response to comments raising questions about potential undisclosed relationships between the original upstream owners, the Exchange pointed to opinions of counsel provided to the Commission regarding the proposed upstream owners as well as to the approval of the Proposed Transaction by the Committee for Foreign Investment in the United States (''CFIUS''). But the opinions of counsel proffered by the Exchange expressly relied upon, and assumed the accuracy and completeness of, certificates, letters and oral and written statements and representations provided by others, including the investors themselves. They are therefore insufficient to obviate the questions raised by the specific facts before us. Similarly, it is not clear from the record available to us that CFIUS's consideration of national security concerns included an analysis of the relationship between the proposed upstream owners in light of the Exchange's ownership and voting limitations.

[88] Commenters also raised this concern. *See, e.g.,* Appendix, *infra* notes 223–230, and accompanying text.

paid by other investors in the Proposed Transaction). This raises concerns, which the Exchange has not allayed, both about the economic realities of the Proposed Transaction and about whether the ownership group would as a practical matter be dominated by those entities that appear to be bearing the bulk of the risk of equity ownership.[89]

The Exchange states that concerns about circumvention of the ownership and voting limitations are mitigated by the fact that NA Casin Holdings cannot compel exercise of the puts. But regardless of who initiates any transactions triggered by the Put Agreements, the proposed investors who are parties to those agreements are guaranteed a return on a discounted investment. In other words, the Exchange's arguments regarding the voluntary nature of the Put Agreements do not fully take into account or explain the underlying and asymmetric economic relationship between the investors who have the benefit of puts and those who do not. The Exchange also asserts that the Put Agreements are similar to other such agreements that have been approved by the Commission.[90] But the economic substance of the prior agreements the Exchange cites as comparable is materially different from the substance present here. The Miami International Securities Exchange, LLC (''MIAX'') agreements do not provide for a guaranteed return on investors' initial purchase price.[91] Rather, they allow for a put option at a fixed percentage of fair market value at the time of the sale, which may not lead to the receipt of a premium on investment.[92] And, while there may be—as the Exchange asserts—reasonable business purposes for the premium guaranteed by the terms of the Put Agreements here, neither the Exchange nor the proposed upstream owners have sufficiently explained what those purposes are.[93]

Commission staff's inability to obtain sufficient documentation to verify the relationships between, and the source of funds used by, the original and subsequent proposed upstream owners leaves us unable to find that the Exchange has met its burden of showing that—upon consummation of the Proposed Transaction—the Exchange would be organized in compliance with its own rules and, accordingly, unable to find that the Exchange has met its burden of showing that the proposed rule change is consistent with Section 6(b)(1) of the Exchange Act.

2. Monitoring for Future Compliance With the Exchange's Own Rules

The fact that the Commission staff's extensive, iterative requests to the Exchange during the review process resulted in an insufficient basis for us to find that the Proposed Transaction complies with the ownership and voting limitations separately calls into question the Exchange's ability to ensure *ongoing* compliance with those limitations. If approved, the proposed rule change would require extensive information gathering and monitoring in order to ensure continuing compliance with the ownership and voting limitations. For example, the Exchange would be required to monitor compliance with:

- Voting limits on a person (individually or with its Related Persons) subject to any statutory disqualification;
- a requirement that CHX Holdings or NA Casin Holdings call shares held in excess of ownership limits;
- a prohibition on registering shares transferred in violation of ownership limits;
- procedural requirements to ensure compliance with the voting limitations; and
- a range of notice requirements relating to various changes in ownership or Related Person status.[94]

Similarly, if the Put Agreements are exercised, the Exchange would be required to ensure that any new investors satisfy the many restrictions on ownership (including on ownership by Related Persons).

The inability of the Exchange to obtain documents and information necessary for it and the Commission to resolve key questions regarding the funding of, and relationships between, upstream investors—notwithstanding its strong incentive to do so in light of the pending Commission review of the proposed rule change—raises significant doubts about the Exchange's ability to engage in this extensive monitoring following approval of the Proposed Transaction.[95] We therefore find that the Exchange has not provided a sufficient basis for us to conclude that it would be able to ensure compliance with the ownership and voting limitations following consummation of the Proposed Transaction.[96]

As a result, the Commission is unable to find on the current record that the Exchange has met its burden[97] of showing that the proposed rule change is consistent with the requirement under Section 6(b)(1) that the Exchange be so organized and have the capacity to comply with its own rules.

We are also not moved by the Exchange's suggestion that we should be comfortable with the proposed ownership arrangements, including the puts and the discount, and nonetheless approve the proposed rule change because we have broad oversight authority, will receive notice of the transfer of shares, and can take recourse to mitigate non-compliance with the

[89] Questions about the economic realities of the Proposed Transaction, as well as the appearance that certain investors may have an out-sized influence over the Exchange—in circumvention of the purpose of the ownership and voting limitations—are compounded by the pricing structure of the Proposed Transaction, which was provided to the Commission subject to confidential treatment requests. For example, investors are paying significantly different amounts for shares that appear to have the same rights. The proposed investors who are parties to the Put Agreements are paying significantly less, reinforcing the appearance that they are taking less risk in the Proposed Transaction. NA Casin Group and Castle YAC, in turn, are paying significantly more than the other investors, on a per share basis. Therefore, the ownership percentages may not accurately reflect the relative investment amounts committed or risks undertaken by the various entities. This raises concerns that the percentage of ownership does not accurately reflect the investors' relative influence over the Exchange.

[90] *See* Appendix, *infra* notes 303–304 and accompanying text. *See also* Appendix, *infra* note 288 and accompanying text.

[91] *See* Appendix, *infra* note 303 and accompanying text.

[92] *See id.*

[93] *See* Appendix, *infra* note 304 and accompanying text (stating only that there are ''legitimate and well-established business purposes'' for the Put Agreements); NA Casin Holdings Letter 3, *supra* note 23, at 3 (stating that the Put Agreements serve as a ''liquidity mechanism'' and ''provide a window of opportunity for certain investors to exit their investment during a brief window two years after the closing''); and Saliba Letter 2, *supra* note 23, at 3 (explaining the Put Agreements but not explaining why they were put in place).

[94] *See supra* notes 57–58 and accompanying text.

[95] Commenters express similar concerns, asserting that it would be difficult, if not impossible, for the Exchange and the Commission to monitor compliance with these rules after approval and consummation of the Proposed Transaction. *See, e.g.,* Appendix, *infra* note 152 and accompanying text.

[96] The Exchange asserts that its board, which is subject to independence requirements under the Exchange Act, would approve future material changes to the Exchange. *See* Appendix, *infra* note 163 and accompanying text. Given the Exchange's inability to obtain information necessary to ascertain whether potential investors satisfied the proposed ownership limitations, we question whether the Exchange or its board would be able to monitor for such changes, much less ensure that any such changes are made only following approval by the board. The Exchange also notes that the upstream owners pledge to maintain relevant books and records in the United States, thus allowing it and the Commission to monitor compliance. *See also* CHX Response Letter 6, *supra* note 24, at 3. In light of the Exchange's difficulty obtaining necessary information in connection with the Proposed Transaction and for the additional reasons described in Subsection 4, below, we are not persuaded that the potential availability of books and records in the United States adequately addresses the concerns described in this section.

[97] *See supra* notes 65–67 and accompanying text.

ownership and voting limitations in the future through suspending, censuring, or deregistering CHX as an SRO pursuant to Section 19(h)(1) of the Exchange Act.[98] In other words, the Exchange is arguing that we should not be concerned about the risk of subsequent transfers that are inconsistent with the Exchange Act, or an inability on its part to monitor for such transactions, because we have the authority to take action to prevent any such transfers in the future. But Section 19(b)(2)(C) of the Exchange Act requires disapproval of a proposed rule change in the absence of an affirmative finding by the Commission that the rule change is consistent with the Exchange Act and rules and regulations thereunder. This includes a finding of consistency with Section 6(b)(1) of the Exchange Act. Our ability to seek recourse for future violations (assuming they are reported to us or we are otherwise able to detect them) is not a sufficient basis on which to make this finding if we are unable to find, at the time we consider the proposed rule change, that the proposed rules as implemented would meet this requirement.[99] As discussed above, we are unable to conclude that the proposed rules meet the requirement.

3. The Supermajority Approval Requirement

The Commission is also unable to find that the provision in the NA Casin Holdings Certificate requiring supermajority approval for certain transactions is consistent with Section 6(b)(1) of the Exchange Act. As discussed above, the NA Casin Holdings Certificate would require approval by the holders of 85% of the shares of the company's common stock to undertake certain corporate transactions related to NA Casin Holdings or any of its subsidiaries, including CHX Holdings and the Exchange.[100] In effect, this provision would allow each stockholder that holds 15% or more of the voting stock of NA Casin Holdings to veto certain transactions, including those designed to raise capital to fund the regulatory operations of the Exchange.[101] Based on its terms, such a veto appears contrary to the goal underlying voting limitations: Preventing a single stockholder from exercising undue influence over a national securities exchange or interfering with its SRO obligations. And there is nothing in the record that otherwise explains why this provision does not undermine that regulatory goal. Moreover, the introduction of the supermajority restriction after the withdrawal of three of the original proposed investors, and the revisions to the pricing structure of the Proposed Transaction, reinforces the concerns discussed above regarding whether certain investors could in effect dominate the ownership group.[102] Therefore, based on the current record, the Commission is unable to find that the proposed rule change is consistent with Section 6(b)(1) of the Exchange Act.

4. Ability To Conduct Sufficient Oversight

Finally, the Exchange's inability to obtain sufficient information to ensure compliance with the ownership and voting limitations during the rule filing process leaves us unable to find that the proposed transaction satisfies Section 6(b)(1)'s requirement that an exchange have the capacity to carry out the purposes of the Exchange Act, which includes allowing for sufficient Commission oversight.

Congress has charged the Commission ''with supervising the exercise of . . . self-regulatory power in order to [ensure] that it is used effectively to fulfill the responsibilities assigned to the self-regulatory agencies[.]'' [103] Access to books and records plays an integral role in the Commission's exercise of such oversight. To facilitate that access, Exchange Act Rule 17a–1(c) requires every national securities exchange, ''upon request of any representative of the Commission, [to] promptly furnish to the possession of such representative copies of any documents required to be kept and preserved by it[.]'' [104]

The Exchange asserts that it will be able to ensure that the Commission has access to such books and records, notwithstanding the significant role played by foreign investors in the Proposed Transaction. In particular, the Exchange notes that the remaining foreign upstream owner has submitted to United States jurisdiction and that this owner pledges to maintain relevant books and records in the United States. But we are unable to conclude that these assurances are sufficient to support a finding that the proposed rule change is consistent with the requirements of the Exchange Act, including the provisions of Section 17(b)(1) and Exchange Act Rule 17a–1.

Because under the terms of the Proposed Transaction the most significant stockholder of NA Casin Holdings would be wholly owned by a foreign entity, material portions of the relevant records may not be under the Exchange's control. As a result, the judgment about which of those books and records are sufficiently related to the activities of the Exchange that they must be maintained in the United States would rest in the first instance with the foreign indirect upstream owner.[105] Indeed, the Exchange was unable to obtain necessary information about sources of funds for, and relationships between, certain investors in the Proposed Transaction, which further supports our conclusion that the Exchange has not demonstrated that it will be able to identify or access books and records that may relate to ownership of the Exchange or to its activities, much less to ensure that such books and records are in fact kept in the United States.

This concern is particularly significant in our analysis because the nature of the reviews that we and the Exchange must conduct—including monitoring compliance with the ownership and voting limitations and compliance with Exchange Act requirements more broadly—requires prompt access to documents. Without the assurance of such access, neither the Commission nor the Exchange will be able to reliably assess compliance with the requirements in the proposed corporate documents, to look behind the attestations made by stockholders, or to monitor compliance with the ownership and voting limitations more broadly.

[98] *See* Appendix, *infra* note 307 and accompanying text.

[99] Similarly, the Exchange asserts that its board, which is subject to independence requirements under the Exchange Act, would approve future material changes to the Exchange. *See* Appendix, *infra* note 163 and accompanying text. But in light of the particular questions raised in our review of the Proposed Transaction, we do not believe a general assurance that we can rely on future board processes is sufficient to resolve these concerns.

[100] *See supra* notes 59–60 and accompanying text.

[101] The Exchange has acknowledged the importance of raising additional capital to further capitalize the Exchange so that it may continue to meet its regulatory obligations. *See* Notice, *supra* note 6, at 89549.

[102] This requirement also limits the extent to which the compliance of CHX's board with independence requirements can be seen as mitigating concerns about undue influence by certain stockholders, as the Exchange contends.

[103] S. Rep. No. 94–75, at 23 (1975).

[104] 17 CFR 240.17a–1; *see also* 15 U.S.C. 78q(b)(1).

[105] The Commission periodically encounters difficulties in arranging for the on-site review of, or production of, books and records held by foreign entities due to a variety of reasons, including privacy and blocking statutes and difficulties in obtaining assistance from foreign authorities in connection with inspections and examinations. Chinese entities, even those seeking to be directly regulated by the Commission, have presented significant challenges in connection with ensuring compliance with these requirements. *See, e.g., Matter of Dagong Global Credit Rating Co., Ltd.,* Rel. No. 34–62968 (September 22, 2010).

We have approved exchange rules that may, at least theoretically, raise similar questions about access to books and records.[106] We also recognize that some exchange rules do not provide for the maintenance of such books and records in the United States.[107] The Proposed Transaction, however, raises particular concerns not present in these other transactions approved by the Commission. Unlike approved rule changes for other exchanges, the proposed rule change here does not include specific provisions to facilitate and incentivize non-U.S. exchange owners to provide the Commission access to books and records.[108]

Because we cannot conclude, on the current record, that such access will be assured or that the Exchange will be able to satisfy Rule 17a–1(c), we are unable to find that the proposed rule change is consistent with Section 6(b)(1)'s requirement that the Exchange be so organized and have the capacity to comply with the Exchange Act, and to perform its functions as a self-regulatory organization, which includes allowing for sufficient Commission oversight.

Separately, we note that Section 6(b)(5) of the Exchange Act requires that the rules of a national securities exchange be designed, in general, to protect investors and the public interest. Here, the proposed rules are designed to effect the Proposed Transaction as currently structured and, if approved, the amended rules would be implemented through consummation of the Proposed Transaction. In light of the concerns discussed above regarding the effect of the Proposed Transaction on the ability of the Exchange and the Commission to ensure regulatory compliance now and in the future, as well as concerns raised by the confidential information, we cannot determine that the rules, as proposed, meet this requirement. Congress has stressed the importance of Commission oversight to ensure that such self-regulatory authority ''is not used in a manner inimical to the public interest or unfair to private interests.'' [109] Given the uncertainty about our access to sufficient information to fulfill this role, the Commission is currently unable to find that the proposed rule change is designed to protect investors and the public interest as required by Section 6(b)(5).

* * * * *

A number of other issues have been raised by commenters in arguing that the proposed rule change should be disapproved, including questions about the involvement of the Chinese government or the impact of Chinese foreign investment in an SRO or in U.S. markets more generally. On the record before us, for the independently sufficient reasons discussed in more detail above, we have concluded that the Exchange has not met its burden to show that approval of the proposed rule change is appropriate. Accordingly, it is not necessary for us to consider either the relevance of such foreign investment concerns to our statutory review of this proposed rule change or the merits of the concerns themselves.

IV. Conclusion

For the reasons set forth above, the Commission does not find, pursuant to Section 19(b)(2) of the Exchange Act, that the proposed rule change, as modified by Amendments No. 1 and No. 2, is consistent with the requirements of the Exchange Act and the rules and regulations thereunder applicable to a national securities exchange, and in particular, with Sections 6(b)(1) and 6(b)(5) of the Exchange Act.

It is therefore ordered, pursuant to Rule 431 of the Commission's Rules of Practice, that the earlier action taken by delegated authority, Exchange Act Release No. 81366, (August 8, 2017), 82 FR 38734 (August 15, 2017), is set aside and, pursuant to Section 19(b)(2) of the Exchange Act, that the proposed rule change (SR–CHX–2016–20), as modified by Amendments No. 1 and No. 2, be, and hereby is, disapproved.

By the Commission.

Brent J. Fields,

Secretary.

Appendix: Summary of Comments and the Exchange's Response

In total, the Commission received 90 comment letters on the proposal and 8 response letters from the Exchange.[110] Sixty-nine of these comments and five of these responses were submitted prior to the Exchange filing Amendment No. 2. Twenty-one of these comments were submitted in response to the Commission noticing Amendment No. 2, and the Exchange submitted three rebuttals in response to those comments.

A. Summary of Comments and Exchange's Response Prior to the Filing of Amendment No. 2

As explained above, in Amendment No. 2, the Exchange noticed, among other items, a change in the proposed capital structure for the upstream owners.[111] In the comment letters that were received prior to the filing of Amendment No. 2, several commenters expressed concern about the original proposed capital structure of CHX as it related to the ownership and voting limitations. Some of these commenters questioned the identities of the proposed upstream owners and the validity of the Exchange's representation that there were no Related Persons among the proposed upstream owners other than Castle YAC and NA Casin Group.[112] Several commenters also questioned the Exchange's representations regarding the backgrounds and identities of the upstream owners.[113] In addition, commenters asserted that, contrary to the Exchange's representations, several of those

[106] *See, e.g.,* Exchange Act Release No. 66871 (April 27, 2012), 77 FR 26323 (May 3, 2012) (approving the application of BOX Options Exchange, which had Canadian upstream ownership, for registration as a national securities exchange); NYSE Euronext Approval Order, *supra* note 5 (approving proposed rule changes designed to effect the combination of the NYSE Group, Inc. and the Dutch company Euronext); 56955 (December 13, 2007), 72 FR 71979, 71982–84 (December 19, 2007) (SR–ISE–2007–101) (approving a proposed rule change designed to effect a transaction in which ISE became a wholly owned subsidiary of Eurex Frankfurt AG, which has Swiss and German upstream ownership) (''ISE Approval Order''); and EDGX and EDGA Registrations, *supra* note 5 (approving the applications of EDGX Exchange, Inc. and EDGA Exchange, Inc., which were partially, indirectly owned by ISE, for registration as national securities exchanges).

[107] *See, e.g.,* Exchange Act Release No. 66871 (April 27, 2012), 77 FR 26323 (May 3, 2012); NYSE Euronext Approval Order, *supra* note 5; ISE Approval Order, *supra* note 106; and EDGX and EDGA Registrations, *supra* note 5.

[108] *See, e.g.,* ISE Approval Order, *supra* note 106, at 71983–84 (describing a procedure developed between the Commission and the Swiss Federal Banking Commission to facilitate access to books and records and noting that the failure of a non-U.S. upstream owner to adhere to its commitment to provide access to books and records would trigger a call option that would cause the non-U.S. upstream owners to lose control of the exchange); EDGX and EDGA Registrations, *supra* note 5, at 13153 (noting that the safeguards described in the ISE Order would apply equally to books and records related to EDGX and EDGA).

[109] S. Rep. No. 94–75, at 23 (1975).

[110] *See supra* notes 9, 10, 20, 23, and 24.

[111] *See supra* note 21.

[112] *See* Ciccarelli Letter, *supra* note 9; Ferris Letter 1, *supra* note 9; Ferris Letter 2, *supra* note 9; Brennan Letter, *supra* note 9; Mayer Letter, *supra* note 9; Bass Letter, *supra* note 9, at 2–4; and Strotz Letter, *supra* note 20. Another commenter asserted: ''[m]urky Chinese ownership laws, poor property ownership rights and deficient IP protection rules'' make it ''unclear who would actually own CHX under Chinese law.'' *See* Park Letter, *supra* note 9, at 4.

[113] *See* Ciccarelli Letter, *supra* note 9, at 2–9; Mayer Letter, *supra* note 9; Brennan Letter, *supra* note 9, at 1–2; Ferris Letter 1, *supra* note 9, at 2–3; Ferris Letter 2, *supra* note 9, at 1–3; Park Letter, *supra* note 9, at 2; Bass Letter, *supra* note 9, at 2–4; Milton Letter, *supra* note 20; Simpson Letter, *supra* note 20, at 2–3; Carney Letter, *supra* note 20, at 1–2; Michael Johnson Letter 1, *supra* note 20, at 4–5; Williams Letter, *supra* note 20; Strotz Letter, *supra* note 20; Watson Letter, *supra* note 20, at 3; Michael Johnson Letter 3, *supra* note 20, at 1–3; and Stephen Johnson Letter, *supra* note 20. In addition, one commenter stated that the Information Statement CHX sent to its stockholders in connection with the Proposed Transaction represented that two entities, Beijing Guoli Energy Investment Co. Ltd. and Beijing Casin Investment Holding Co. Ltd, which were not disclosed in the proposed rule change, would be involved in the Proposed Transaction. *See* Anonymous Letter 2, *supra* note 20, at 1.

proposed upstream owners may be affiliated.[114] Some of these commenters stated that, after the closing of the Proposed Transaction, approximately 99% of the voting stock in CHX would be controlled by what the commenters believe to be Chinese entities or affiliated shell nominees.[115] Several of these commenters stated that they believe that the ownership post consummation of the Proposed Transaction would deviate from the 40% ownership limitation.[116]

Several commenters also opined that the proposed upstream ownership of CHX was opaque.[117] Some of these commenters stated their views that approval of the proposal would have promoted the improper consolidation of ownership and coordinate voting control over CHX, and also materially harm the public trust in the independent and objective operation of U.S. capital markets.[118] These commenters expressed a belief that the Proposed Transaction would have concentrated ownership and voting power under Chongqing Casin and its ''coordinate'' investment entities in China.[119] And commenters expressed concern that the Commission would have been unable to monitor the ownership structure of Chongqing Casin after approval because they believed that the Commission would have little or no insight and transparency into what the commenters stated are government-dominated Chinese markets.[120] The commenters expressed a belief that this scenario would leave CHX open to undue, improper, and possibly state-driven influence via coordinated voting control by its upstream ownership.[121] Seven commenters also expressed concern about the source of funding for the Proposed Transaction.[122]

In addition, one commenter stated that as a result of the proposed ownership, there would have been ''reputational risks'' for CHX, and that ''compliance frustrations'' related to the Foreign Corrupt Practices Act and Anti-Money Laundering rules would have been at the ''front and center'' in the Commission's oversight of CHX.[123] Accordingly, the commenters stated that, given these actual or potential outcomes, the Proposed Transaction appeared inconsistent with Sections 6(b)(l) and 6(b)(5) of the Exchange Act.[124]

Commenters also expressed concern about the ability of the Commission to exercise regulatory oversight over the Exchange following the closing of the Proposed Transaction.[125] One commenter questioned whether the Commission could effectively regulate the Exchange and protect the market from abuses if the Commission staff did not know, and could not independently confirm, the backgrounds of what the commenter characterized as ''Chinese shell companies'' involved in the Proposed Transaction.[126] Another commenter argued that for the sake of the public interest, the Commission should take extreme caution in reviewing the proposed rule change and reject the Exchange's representations, which the commenter believed to be misleading.[127] Two commenters, in support of the proposed rule change, stated their beliefs that compliance will be ''strong'' regardless of the upstream owners.[128]

In response to these concerns, the Exchange stated that it did not misrepresent any facts regarding the Proposed Transaction.[129] The Exchange reaffirmed the representations that it made in the Notice that the only Related Persons among the upstream owners were Castle YAC and NA Casin Group, that there were no other Related Persons among the original proposed upstream owners, and that none of the upstream owners directly, or indirectly through one or more intermediaries, controlled, or was controlled by, or was under common control with, a governmental entity or subdivision thereof.[130] The Exchange asserted that each of these representations was supported by an opinion of counsel provided by outside counsel for CHX to the Commission, subject to a confidential treatment request.[131] The Exchange, NA Casin Holdings, and one of the proposed upstream owners also asserted that some of the comment letters contained false accusations regarding the identity, ownership, relationships, and business activities of certain upstream owners.[132] In addition, the Exchange, NA Casin Holdings, and several other commenters asserted that the proposed upstream owners are reputable businesses.[133] The Exchange also stated that the author of the Ciccarelli Letter was employing deception and xenophobia, and was attempting to undermine the Commission's rule filing process and the integrity of the government. The Exchange also requested that the Commission consider the Ciccarelli Letter ''absolutely unpersuasive.''[134]

The Exchange further asserted that it provided detailed information regarding the upstream owners to CFIUS and that CFIUS determined that there are no unresolved national security concerns with respect to the Proposed Transaction.[135] In response to this assertion, some of the commenters stated that CFIUS's approval of the Proposed Transaction has no relevance to the Commission's determination because CFIUS's review focuses solely on national security concerns, and does not relate to the ownership and voting restrictions applicable to exchanges.[136] The Exchange responded

[114] *See* Ciccarelli Letter, *supra* note 9, at 2–3; Ferris Letter 1, *supra* note 9, at 2–3; Bass Letter, *supra* note 9, at 2; Ferris Letter 2, *supra* note 9, at 4; and Carney Letter, *supra* note 20, at 1. *See also* Mayer Letter, *supra* note 9 (asserting that certain of the proposed upstream owners are shell companies put in place by Chongqing Casin to avoid ''explicit violation'' of the 40% ownership limitation, and should be examined for independence from Chongqing Casin).

[115] *See* Ciccarelli Letter, *supra* note 9, at 1–2. *See also* Ferris Letter 2, *supra* note 9, at 4; and Bass Letter, *supra* note 9, at 3.

[116] *See* Brennan Letter, *supra* note 9, at 1; Ciccarelli Letter, *supra* note 9, at 2; Ferris Letter 1, *supra* note 9, at 1; Bass Letter, *supra* note 9, at 1; Ferris Letter 2, *supra* note 9, at 4.

[117] *See* Pittenger Letter 2, *supra* note 9, at 1; Bass Letter, *supra* note 9, at 1–5; Mayer Letter, *supra* note 9; Ciccarelli Letter, *supra* note 9, at 1–4; Ferris Letter 1, *supra* note 9, at 1–4; Ferris Letter 2, *supra* note 9, at 1–5; Simpson Letter, *supra* note 20, at 2; Lee Letter, *supra* note 20; Strotz Letter, *supra* note 20, at 2; Anonymous Letter 3, *supra* note 20, at 1. *See also* Hill Letter 2, *supra* note 9 (stating that ''it is easy to become confused about exactly who wants to own this exchange'').

[118] *See* Pittenger Letter 2, *supra* note 9, at 1.

[119] *See id.*

[120] *See id. See also* Anonymous Letter 3, *supra* note 20, at 1–2 (stating the voting and ownership limitations are ''meaningless'' because there is no ''verifiable mechanism'' to monitor such limitations).

[121] *See* Pittenger Letter 2, *supra* note 9, at 1.

[122] *See* Park Letter, *supra* note 9, at 2–3 (stating that none of the foreign upstream owners are on the published State Administration of Foreign Exchange's list of entities that ''have applied and received approvals for foreign currencies'' and questioning the legitimacy of the funds being used to pay for the Proposed Transaction); Ferris Letter 1, *supra* note 9, at 2; Ferris Letter 2, *supra* note 9, at 3; Bass Letter, *supra* note 9, at 3; Carney Letter, *supra* note 20, at 1; Williams Letter, *supra* note 20; Strotz Letter, *supra* note 20, at 2; Watson Letter, *supra* note 20, at 2. In response, NA Casin Holdings asserted that the investors have available the necessary funds to close the Proposed Transaction, and that the Chinese stockholders have obtained necessary approvals from the State Administration of Foreign Exchange of China required to transfer funds to NA Casin Holdings. *See* NA Casin Holdings Letter 2, *supra* note 20, at 2.

[123] *See* Park Letter, *supra* note 9, at 3. *See also* Ferris Letter 2, *supra* note 9, at 2 (stating that concerns over possible money laundering are not addressed by NA Casin and therefore are conceded).

[124] *See* Park Letter, *supra* note 9, at 3–4.

[125] *See* Pittenger Letters 1 and 2, *supra* note 9, at 2; Ciccarelli Letter, *supra* note 9, at 1–2; Bass Letter, *supra* note 9, at 1; and Ferris Letter 1, *supra* note 9, at 4.

[126] *See* Brennan Letter, *supra* note 9, at 1.

[127] *See* Ferris Letter 1, *supra* note 9, at 4.

[128] *See* John L. Prufeta Letter, *supra* note 20; and Tara Prufeta Letter, *supra* note 20. These commenters also asserted that the voting control risk is ''mitigated by [NA Casin Group's] decision to have less voting power.'' *See id.*

[129] *See* CHX Response Letter 2, *supra* note 10, at 2, 5–6.

[130] *See id. at 5.* NA Casin Holdings also asserted that there were no other Related Persons among the investors other than Castle YAC and NA Casin Group. *See* NA Casin Holdings Letter 2, *supra* note 20, at 2.

[131] *See* CHX Response Letter 2, *supra* note 10, at 5.

[132] *See* CHX Response Letter 3, *supra* note 10, at 3–5; Saliba Letter 1, *supra* note 9, at 2; NA Casin Holdings Letter 1, *supra* note 9, at 7; NA Casin Holdings Letter 2, *supra* note 20, at 2.

[133] *See* CHX Response Letter 3, *supra* note 10, at 3; NA Casin Holdings Letter 1, *supra* note 9, at 7; NA Casin Holdings Letter 2, *supra* note 20, at 3; Gouroudeva Letter 1, *supra* note 9; Gouroudeva Letter 2, *supra* note 20; John R. Prufeta Letter 1, *supra* note 9; and Su Letter, *supra* note 20; and Xu Letter, *supra* note 20.

[134] *See* CHX Response Letter 2, *supra* note 10, at 6.

[135] *See* CHX Response Letter 2, *supra* note 10, at 5; CHX Response Letter 3, *supra* note 10, at 6; and CHX Response Letter 4, *supra* note 20, at 3. Other commenters also pointed to the CFIUS approval in support of the Proposed Transaction. *See* Richard R. Taylor Letter, *supra* note 20; Catherine Jones Letter, *supra* note 20, at 1; John R. Prufeta Letter 2, *supra* note 20; Hultgren Letter, *supra* note 20, at 2; NA Casin Holdings Letter 2, *supra* note 20, at 2–3; and Rauner Letter, *supra* note 20.

[136] *See* Ferris Letter 1, *supra* note 9, at 3; Brennan Letter, *supra* note 9, at 2; and Bass Letter, *supra* note 9, at 4–5. *See also* Strotz Letter, *supra* note 20, at 2 (stating that the CFIUS approval ''does not

that, with respect to the financial services sector, CFIUS review involves an examination of the potential disruptions to U.S. stock markets or the U.S. financial system as a whole, cybersecurity vulnerabilities, and the vulnerabilities associated with the fact that the U.S. business obtains and preserves personal information.[137] The Exchange also stated that CFIUS review includes a full and detailed assessment of the foreign investing entities, including all of their individual senior executives and major stockholders, and the extent of any foreign government control over the investors.[138] The Exchange asserted that CFIUS conducted a thorough, deep, and wide-ranging investigation of the Proposed Transaction and the proposed upstream owners, and that it concluded that there were no unresolved national security concerns.[139]

Commenters expressed further concern about whether the Chinese government could have influence or control over the Exchange and its upstream owners.[140] Some of these commenters asserted that one of the proposed upstream owners has ties to the Chinese government.[141] Several commenters also questioned whether the Chinese government could influence Chongqing Casin, stating that Chongqing Casin is involved in a number of Chinese market sectors that require close ties to the state, such as environmental protection.[142]

Commenters also asserted that Chongqing Casin owns an entity that has large outstanding debts to a Chinese-government controlled bank, and that Chongqing Casin has been using its stock and the stock of its subsidiaries to collateralize those loans, which make Chongqing Casin subject to Chinese government control.[143] NA Casin Holdings responded that Chongqing Casin has not used the equity of CHX or CHX Holdings as collateral for any financing or borrowing in connection with the Proposed Transaction.[144]

Commenters also stated that Chongqing Casin's financial assets were originally state-controlled, and that its chairman sits on an industry council overseen directly by the mayor of the Chongqing Municipality.[145] These commenters stated that, in particular, Chinese ownership or involvement presents risks as Chinese government-sponsored cyber-attacks have been conducted to devalue foreign businesses and steal intellectual property and proprietary data; the commenters asserted that this has cost American companies billions of dollars annually.[146] Commenters stated that the Proposed Transaction may therefore present financial security risks to investors and the U.S. marketplace.[147] Some commenters expressed a belief that the proposal will materially harm the public trust in the independent and objective operation of U.S. capital markets.[148] Another commenter expressed a belief that the proposal is a threat to Americans' faith in the U.S.'s national financial market infrastructure.[149] One commenter also raised concerns that a bad actor with access to an exchange's data could use information available through brokerage records and the Consolidated Audit Trail to engage in spear phishing, blackmail attempts, and other similar attacks.[150]

Another commenter expressed concern that the original proposed upstream ownership structure would have left CHX and U.S. markets open to ''undetectable manipulation'' by Chongqing Casin and the Chinese government.[151] Several commenters expressed a belief that it will be impossible for the Commission to fully monitor Chinese government involvement or manipulation over CHX.[152] These commenters further asserted that no mitigation steps can fully insulate CHX's activities and ensure that the U.S.'s interests are protected, not only in line with the intent of the Exchange Act, but also with the U.S.'s broader national security interests.[153] The commenters stated that the Chinese government has been unwilling to compromise and agree to U.S. transparency standards in their markets and that the Chinese entities involved in the Proposed Transaction have not yielded themselves to full U.S. jurisdiction or agreed to make their records available to the Exchange to ensure compliance with ownership and voting limitations, as the commenters state have been historically done in international transactions of this nature.[154] In addition, a commenter believes that the ownership of a U.S. exchange could provide enormous new opportunities for Chinese firms to list on U.S. markets and expose U.S. investors to new and unknown risks; these commenters advocated that the Proposed Transaction must be evaluated not only for its present impact, but its potential impact as well.[155]

In response, CHX denied the claim that it would be impossible for the Commission to fully monitor Chinese government

permit Casin and CHX to lie to the SEC''). Another commenter expressed concern that CFIUS disregarded the concerns of Congress when it closed its review of the Proposed Transaction. *See* Hill Letter 2, *supra* note 9. In a comment letter submitted after the filing of Amendment No. 2, this commenter expressed a view that Congress has also ''recognize[d] flaws, deficiencies and partisanship of [CFIUS].'' *See* Hill Letter 3, *supra* note 23.

[137] *See* CHX Response Letter 3, *supra* note 10, at 6.

[138] *See id.*

[139] *See id.*

[140] *See* Pittenger Letter 1, *supra* note 9, at 1–2; Pittenger Letter 2, *supra* note 9, at 1; Bass Letter, *supra* note 9, at 4; Mayer Letter, *supra* note 9; Hill Letter 2, *supra* note 9; Jones Letter, *supra* note 20; Lee Letter, *supra* note 20; Michael Johnson Letter 1, *supra* note 20, at 1; Michael Johnson Letter 2, *supra* note 20, at 3; Michael Johnson Letter 3, *supra* note 20, at 3; Pittenger Letter 3, *supra* note 20, at 1; and Anonymous Letter 3, *supra* note 20, at 2–3. One commenter also stated that there are ties between Chongqing Casin and Chinese government officials. *See* Simpson Letter, *supra* note 20, at 1–2. NA Casin Holdings denied that there are such ties, and asserted that Chongqing Casin is a privately-owned company. *See* NA Casin Holdings Letter 2, *supra* note 20, at 3.

[141] *See* Pittenger Letter 1, *supra* note 9, at 1–2; Bass Letter, *supra* note 9, at 4 (asserting that Chongqing Casin could be 40% owned and controlled by Chinese government entities and Chinese government officials); Mayer Letter, *supra* note 9; Hill Letter 2, *supra* note 9 (asserting that the Chinese government may be a minority stockholder in one of the upstream owners and that the Chinese government should not be given protections afforded to SROs); and Simpson Letter, *supra* note 20, at 2 (asserting that Chongqing Casin is 40% owned and controlled by Chinese government officials). In response, NA Casin Holdings asserted that the allegation that Chongqing Casin is 40% owned and controlled by Chinese government officials is false, and that 74.36% of Chongqing Casin is owned by Shengju Lu and the balance is owned by other persons involved in the management of Chongqing Casin. *See* NA Casin Holdings Letter 2, *supra* note 20, at 4.

[142] *See* Pittenger Letter 1, *supra* note 9, at 1. *See also* Pittenger Letter 2, *supra* note 9, at 1 (stating that the Chinese government dominates all sectors of society and consistently fails to abide by international agreements). Additionally, several commenters expressed concerns about the risks posed by CHX's plans to list shares of Chinese companies. *See, e.g.,* Pittenger Letter 1, *supra* note 9, at 1; Mayer Letter, *supra* note 9; Park Letter, *supra* note 9; Milton Letter, *supra* note 20; Anonymous Letter 3, *supra* note 20, at 2. However, one commenter and the Exchange asserted that the listing of Chinese companies would be beneficial. *See* Nobile Letter, *supra* note 9; and CHX Response Letter 5, *supra* note 20, at 2–3. The Commission notes that the Exchange does not currently list shares of such companies, and the proposed rule change under consideration would not modify the Exchange's listing rules. Any future changes to the Exchange's listing rules would be subject to Commission review under to Section 19(b)(1) of the Exchange Act and Rule 19b-4 thereunder. In addition, as a practical matter, to restart its primary listing program, the Exchange would likely seek an amendment to Rule 146 under the Securities Act of 1933 to obtain ''covered securities'' status for the stocks it lists.

[143] *See* Michael Johnson Letter 1, *supra* note 20; Michael Johnson Letter 2, *supra* note 20; Watson Letter *supra* note 20, at 1; Michael Johnson Letter 3, *supra* note 20, at 1–2; and Anonymous Letter 3, *supra* note 20, at 2. These and other commenters also expressed general concerns about the financial status of Casin Development, an affiliate of Chongqing Casin, and asserted that its trading has been halted by Chinese regulators. *See* Watson Letter, *supra* note 20, at 1; Williams Letter, *supra* note 20; and Strotz Letter, *supra* note 20, at 1 (asserting that the trading in the stock has remained halted). NA Casin Holdings responded that Casin Development has a strong asset base and a healthy business, and that due to the announcement of a major asset transfer, Casin Development applied to the Shenzhen Stock Exchange to suspend its share trading. *See* NA Casin Holdings Letter 2, *supra* note 20, at 6.

[144] *See* NA Casin Holdings Letter 2, *supra* note 20, at 2.

[145] *See* Pittenger Letter 1, *supra* note 9, at 1.

[146] *See id. See also* Huskey Letter, *supra* note 20 (expressing concern that the Proposed Transaction could allow China a ''sinister entry point'' into the U.S. financial system). Other commenters expressed general concern about Chinese involvement in the Proposed Transaction. *See* Day Letter, *supra* note 20; and Sapa Letter, *supra* note 20.

[147] *See* Pittenger Letters 1 and 2, *supra* note 9, at 1; Manchin Letter, *supra* note 9, at 1; Anonymous Letter 1, *supra* note 9; and Dandolu Letter, *supra* note 9. *See also* Watson Letter, *supra* note 20, at 3 (asserting that the Proposed Transaction is a cyber security threat); Monfort Letter, *supra* note 20 (expressing opposition to the Proposed Transaction based on national security concerns); and Anonymous Letter 3, *supra* note 20, at 1.

[148] *See* Pittenger Letter 2, *supra* note 9, at 1.

[149] *See* Manchin Letter, *supra* note 9, at 1.

[150] *See* Anonymous Letter 1, *supra* note 9.

[151] *See* Mayer Letter, *supra* note 9.

[152] *See* Pittenger Letter 3, *supra* note 20, at 1.

[153] *See id.*

[154] *See id.* at 2.

[155] *See id.*

involvement or manipulation over the Exchange.[156] CHX interpreted the commenters' statement to be implying that Chinese foreign investment should never be allowed in the U.S. because it is inherently risky and impossible to fully monitor and disagreed with that premise.[157] CHX reiterated that none of the proposed Chinese investors are owned or controlled by the Chinese government,[158] and stated that this fact has been vetted by the Exchange, outside counsel, and CFIUS.[159] CHX also emphasized CFIUS's approval in response to concerns about access to the Consolidated Audit Trail.[160] And CHX disagreed with the statement that there are no mitigation steps that can fully insulate the Exchange's activities and ensure that the U.S.'s interests are protected.[161] CHX first noted that the original capital structure of the Proposed Transaction would have resulted in the Exchange being majority owned by U.S. citizens; it also asserted that the proposed ownership limitation, voting limitation, and cure provisions would ensure that no stockholder would exercise undue influence over the Exchange.[162] CHX also pointed to the fact that members of the CHX board must meet certain independence requirements and that material changes to the Exchange must be approved by both the CHX board subject to such independence requirements and the SEC.[163] CHX further stated that, pursuant to the Exchange Act, CHX is subject to direct and rigorous oversight by the SEC, which CHX stated entails, among other things, frequent examinations of various aspects of CHX operations by Commission staff, including security and trading protocols, as well as Commission approval of certain regulatory, operational and strategic initiatives prior to implementation by CHX.[164]

CHX also disagreed with the commenters' claim that the Chinese entities involved in the Proposed Transaction had not yielded themselves to full U.S. jurisdiction or agreed to make their records available to the Exchange to ensure compliance with ownership and voting limitations.[165] CHX noted that the Chinese upstream owners had agreed to permanently and irrevocably submit to the jurisdiction of the Commission and the U.S. courts, and had appointed registered agents in the U.S. for the service of process.[166] CHX also stated that the upstream owners agreed to open books and records, as well as agreeing to keep records related to the Exchange here in the United States.[167]

CHX next responded to commenters' prediction that Chinese ownership of a U.S. exchange could provide enormous new opportunities for Chinese firms to list on U.S. markets and expose U.S. investors to new and unknown risks.[168] CHX agreed that the Proposed Transaction will provide enormous new opportunities for Chinese firms to list on U.S. markets, and stated that this is why it viewed the Chinese investors as strategically important to the Proposed Transaction.[169] CHX further stated that many firms in China desire a listing on a foreign exchange, and that the U.S. is seen as the ''gold standard.'' [170] CHX stated that it strongly believes that listing quality Chinese companies in the U.S., according to the U.S. listing rules, using U.S. accounting standards, and under the regulatory supervision of the Commission is by far the safest way for U.S. investors to get exposure to the growing Chinese market.[171]

The Exchange also stated that the Proposed Transaction will enable it to accelerate implementation of its strategic plan, which includes implementing a primary listing program focused on capital formation for emerging growth companies.[172] The Exchange further asserted that the Proposed Transaction would help empower it to meet its strategic goals and enhance its participation in the national market system.[173] The Exchange also expressed a belief that by enabling the Exchange to expand its listing program, the Proposed Transaction would promote efficiency and capital formation in the U.S. market.[174] Furthermore, a number of other commenters expressed a belief that the Proposed Transaction would benefit the U.S. capital markets and have positive economic effects.[175]

In addition, some commenters expressed concern that the Saliba Put Agreement and the Raptor Put Agreement could create voting collusion between Raptor and Saliba, resulting in an aggregate voting interest that exceeds the 20% voting limitation.[176] The

[156] *See* CHX Response Letter 5, *supra* note 20, at 1.

[157] *See id.*

[158] CHX Response Letter 1, *supra* note 10, at 2; CHX Response Letter 5, *supra* note 20, at 1.

[159] CHX Response Letter 5, *supra* note 20, at 1–2. *But see supra* note 87.

[160] CHX Response Letter 1, *supra* note 10, at 5.

[161] *See id.* at 2.

[162] *See id.*

[163] *See id.*

[164] *See id.*

[165] *See* CHX Response Letter 5, *supra* note 20, at 3.

[166] *See id.*

[167] *See id.*

[168] *See id.* at 2–3.

[169] *See id.*

[170] *See id.*

[171] *See id. See also infra* note 175.

[172] *See* CHX Response Letter 1, *supra* note 10, at 2; CHX Response Letter 3, *supra* note 10, at 2–3.

[173] *See* CHX Response Letter 4, *supra* note 20, at 5.

[174] *See id.*

[175] *See* Caban Letter, *supra* note 9 (stating that having an exchange that would help attract additional foreign investment in Chicago is an important way to help create well-paying jobs); NA Casin Holdings Letter 1, *supra* note 9, at 8 (stating that the Proposed Transaction will help establish links between the capital markets of China and the U.S. and explaining how the Proposed Transaction will attract Chinese investors to buy stocks listed on CHX and companies in Asia to list their stock on CHX); Seyedin Letter, *supra* note 9, at 1 (stating the beliefs that the Proposed Transaction will make CHX an important bridge between capital markets in the U.S. and China and that connecting U.S. and Chinese stock markets would allow the U.S. to benefit further from China's growth); Nobile Letter, *supra* note 9 (stating that the Proposed Transaction will result in some very clear benefits to the global financial community and that NA Casin Group may seek less well known, but legitimate foreign entities that would be listed on a U.S. platform strictly regulated under Commission rules and regulations); Gouroudeva Letter 1, *supra* note 9 (stating the belief that ownership of CHX by a respected Chinese company will greatly increase direct Chinese investment into the U.S. economy.); John R. Prufeta Letter 1, *supra* note 9 (stating the belief that the Proposed Transaction will provide a unique and exceedingly valuable window to major cross-border investment between the world's largest economies); Saliba Letter 1, *supra* note 9, at 2 (stating that in order for the U.S. financial markets to remain at the forefront globally, the U.S. must continually innovate and attract business from all over the globe, which the Proposed Transaction will enable); Zhong Letter 1, *supra* note 9 (expressing support for the Proposed Transaction because, among other reasons, there are positive effects of trade and commerce between top Chinese companies and U.S.-based companies and that trade is the fundamental basis for positive foreign relations); Duncan Karcher Letter 1, *supra* note 9 (expressing support for investment by Chinese companies in the U.S. because the increased ties through trade will benefit both countries); Gottlieb Letter, *supra* note 9 (stating that the Proposed Transaction will provide a needed opportunity and valuable window for cross-border investments and world economies); Denholm Letter, *supra* note 20 (stating that the Proposed Transaction will help grow the business of a local stock exchange and offer the resources to connect its businesses with the global market); Vad Letter, *supra* note 20; Himebaugh Letter, *supra* note 20 (asserting that the Proposed Transaction will have multiple beneficial political and economic effects by promoting transparency into Chinese companies by causing them to adhere to U.S. accounting standards, protecting U.S. investors investing in Chinese securities, causing money to flow into the U.S. from China, and fostering better relationships between corporate leaders that could ''translate into better political relations.''); John R. Prufeta Letter 2, *supra* note 20 (stating that Proposed Transaction would attract new businesses to CHX and spur public companies in China to list on U.S. exchanges and to be subject to the applicable accounting and transparency rules); Su Letter, *supra* note 20; Zhong Letter 2, *supra* note 20 (stating that the NA Casin Group may influence potential entities to list on U.S. exchanges); Robert R. Prufeta Letter, *supra* note 20 (stating that the Proposed Transaction will improve the business climate, spur investment, and create investment and partnership opportunities in a well-regulation environment); Xu Letter, *supra* note 20 (asserting that the Proposed Transaction would give CHX a major technology boost and attract more foreign companies to CHX, which would benefit the business community in the greater Chicago area); John L. Prufeta Letter, *supra* note 20; Alfano Letter, *supra* note 20; Tara Prufeta Letter, *supra* note 20; Pinho Letter, *supra* note 20 (stating that the Proposed Transaction could create jobs in the U.S., permit a relatively small U.S. stock exchange to develop a more ambitious agenda set benchmarks of higher governance standards for the companies from China, and promote investment flows from China to the U.S.); and Rauner Letter, *supra* note 20 (stating that the capital raised from the Proposed Transaction and a CHX primary listing program could help stimulate the Illinois economy by providing companies with access to additional capital they require to fund operations, hire staff, and grow their businesses, as well as create demand for ancillary services). Other commenters questioned these positive effects, stating that the purchase price for the Proposed Transaction would be received by CHX's existing stockholders, not CHX. *See* Stephen Johnson Letter, *supra* note 20; and Strotz Letter, *supra* note 20, at 1.

[176] *See* Brennan Letter, *supra* note 9, at 2; Mayer Letter, *supra* note 9; Ferris Letter 1, *supra* note 9, at 2; Ferris Letter 2, *supra* note 9, at 3–4; Bass Letter, *supra* note 9, at 2; and Park Letter, *supra*

Exchange responded that under the terms of the put agreements of Saliba and Raptor, NA Casin Holdings could not compel Saliba or Raptor to exercise its respective put option and that, in the event that either put agreement is exercised, CHX rules would require the resulting ownership structure to comport with the ownership and voting limitations.[177] Some of the commenters asserted that Raptor is Saliba's nominee or business partner.[178] NA Casin Holdings and Saliba responded that Raptor and Saliba have never had any relationship, are located in different cities, and are owned by different families.[179] In addition, one commenter asserted that these Put Agreements are specifically designed to skirt the Commission's exchange ownership restrictions, which would give Chongqing Casin virtual control over the Exchange.[180] In response, the Exchange explained that the Put Agreements only grant Saliba and Raptor the right to exercise their respective put options and do not grant NA Casin Holdings the right to compel the exercise of those rights.[181] The Exchange also noted that any exercise of the put rights would be subject to compliance with the ownership and voting limitations.[182]

Moreover, two commenters expressed concern that CHX and the Commission may not be aware of or able to control future transfers of ownership or voting in contravention of the ownership and voting limitations.[183] One of these commenters asserted that there are little to no controls in place at the upstream corporate ownership level that would prevent the upstream owners from transferring their voting power in CHX to even more opaque owners or ownership that involves the Chinese government.[184] The other commenter asserted that neither the Exchange nor the Commission would know if capital stock in China is being consolidated, resold, collateralized, or collusively voted in violation of the 20% voting limitation.[185] The commenter expressed concern that collusion or changes in ownership that are unknown to the Exchange or the Commission could hinder the Exchange's and the Commission's obligations to prevent conflicts of interest and improper influence under Section 6(b)(5) of the Exchange Act.[186] In addition, the commenter asserted that the upstream owners are not being required to amend their governing documents to restrict collusive voting or resale of the Exchange.[187]

In response, the Exchange stated that to the contrary, the governing documents of NA Casin Holdings and CHX Holdings do restrict the voting and sale of the Exchange's shares.[188] In addition, as noted above, the Exchange affirmed its representation that no prospective owner or any of its Related Persons under the original capital structure would have maintained an equity interest, or exercised voting power, in violation of the ownership and voting limitations.[189] The Exchange also responded that the proposed governance documents for NA Casin Holdings and CHX Holdings provide robust enforcement mechanisms for the ownership and voting limitations, and that the CHX board's composition would be required to meet certain independence requirements.[190] *The* Exchange also noted that the CHX's rules and the Exchange Act contain various provisions that would facilitate the ability of U.S. regulators, including the Commission, to monitor, compel, and enforce compliance by each of the upstream owners.[191]

Commenters also expressed concern about the ability of the Commission to exercise regulatory oversight over the Exchange following the closing of the Proposed Transaction.[192] Characterizing the proposed upstream ownership of CHX as ''opaque,'' several commenters stated that approval of the proposal would strip the Commission of its ability to carry out its statutorily mandated oversight of exchange ownership.[193] These commenters also stated that given ongoing concerns with the severe lack of transparency in China, the commenters have substantial concerns related to the Commission's ability to monitor and regulate the upstream ownership of Chongqing Casin.[194] These commenters asserted that neither Chongqing Casin nor any of its coordinate foreign entities have provided U.S. regulators with any power to monitor or regulate their activities with respect to CHX.[195] These commenters further stated that, in the past, Chinese entities have limited visibility into post-acquisition activities and have attempted to interpose arguments—such as sovereign immunity or limits to the extraterritorial application of U.S. laws—to avoid compliance with U.S. regulatory requirements.[196] The commenters expressed a belief that these actions erode investor trust and adversely affect U.S. regulatory interests.[197]

Similarly, another commenter opined that what the commenter cites as the Chinese government's continued rejection of fundamental free-market norms and property rights of private citizens makes the commenter strongly doubt whether an Exchange operating under the direct control of a Chinese entity can be trusted to self-regulate now and in the future.[198] The commenter stated that while the harms caused by NA Casin Group's acquisition of CHX may not become apparent immediately, allowing this acquisition to proceed could have a devastating effect on the health of U.S. financial markets.[199] The commenter further stated that the commenter remains unconvinced of the following: (1) That no prospective investor is influenced or controlled by the Chinese government; (2) that Exchange rules could stand against the levels of deceit employed by the Chinese government; and (3) that the Chinese government would not employ influence to affect exchange decisions or votes.[200]

Furthermore, another commenter asserted that, due to jurisdiction limitations and transparency concerns, under the current proposal, the Commission would not be able to exercise proper regulatory oversight.[201] Some commenters also expressed concern about the ability of U.S. regulators to access the books and records of the Chinese-owned upstream owners.[202] Three commenters

note 9, at 4. Under the original proposed capital structure, the aggregate holdings of Saliba and Raptor would have been 24%.

[177] *See* CHX Response Letter 2, *supra* note 10, at 6.

[178] *See* Ferris Letter 1, *supra* note 9, at 2, n. 5; and Brennan Letter, *supra* note 9, at 2.

[179] *See* NA Casin Holdings Letter 1, *supra* note 9, at 7; and Saliba Letter 1, *supra* note 9, at 2.

[180] *See* Ciccarelli Letter, *supra* note 9, at 3.

[181] *See* CHX Response Letter 2, *supra* note 10, at 6. In addition, some commenters asserted that a conflict of interest exists because one of the upstream owners, Anthony Saliba, serves on the Exchange's and CHX Holdings' boards of directors. *See* Brennan Letter, *supra* note 9, at 2–3; Ferris Letter 1, *supra* note 9, at 2; Ferris Letter 2, *supra* note 9, at 5; Bass Letter, *supra* note 9, at 2; Park Letter, *supra* note 9, at 4; Carney Letter, *supra* note 20, at 2; Strotz Letter, *supra* note 20, at 2; and Watson Letter, *supra* note 20, at 2. In response to these concerns, the Exchange noted that its current rules require a CHX board position to be reserved for certain CHX Holdings stockholders and asserts that there is no unresolved conflict of interest because Mr. Saliba recused himself from all material CHX Holdings and CHX board votes related to the Proposed Transaction. *See* CHX Response Letter 3, *supra* note 10, at 5. In addition, NA Casin Holdings stated that Saliba did not join the consortium of investors until after the merger agreement between NA Casin Holdings and CHX Holdings was executed. *See* NA Casin Holdings Letter 2, *supra* note 20, at 2.

[182] *See* CHX Response Letter 2, *supra* note 10, at 6.

[183] *See* Ciccarelli Letter, *supra* note 9, at 1; and Mayer Letter, *supra* note 9.

[184] *See* Ciccarelli Letter, *supra* note 9, at 2.

[185] *See* Mayer Letter, *supra* note 9. The commenter asserted that restricting voting of shares would not remedy ''back-room voting collusion, share re-sale or collateralization to an unknown party or state entity in China.'' *See id.*

[186] *See id.*

[187] *See id.*

[188] *See* CHX Response Letter 1, *supra* note 10, at 3–4; and CHX Response Letter 2, *supra* note 10, at 2–3.

[189] *See* CHX Response Letter 1, *supra* note 10, at 3; and CHX Response Letter 2, *supra* note 10, at 2.

[190] *See* CHX Response Letter 1, *supra* note 10, at 3. *See also* CHX Response Letter 2, *supra* note 10, at 3; and CHX Response Letter 4, *supra* note 20, at 4.

[191] *See* CHX Response Letter 2, *supra* note 10, at 2–4 (specifically noting: (1) The ownership and voting limitations; (2) provisions in which the upstream owners consent to U.S. regulatory jurisdiction and agree to maintain an agent in the U.S. for service of process; and (3) provisions requiring the upstream owners to maintain their books and records related to CHX in the U.S. and to refrain from interfering with, and to give due consideration to, the SRO function of CHX). *See also* CHX Response Letter 3, *supra* note 10, at 2.

[192] *See* Pittenger Letters 1 and 2, *supra* note 9, at 2; Ciccarelli Letter, *supra* note 9, at 1–2; Bass Letter, *supra* note 9, at 1; and Ferris Letter 1, *supra* note 9, at 4.

[193] *See* Pittenger Letter 2, *supra* note 9, at 1.

[194] *See id.*

[195] *See id.* at 2.

[196] *See id.*

[197] *See id.*

[198] *See* Manchin Letter, *supra* note 9, at 1.

[199] *See id.* at 1–2.

[200] *See id.* at 2.

[201] *See* Ciccarelli Letter, *supra* note 9, at 1–2.

[202] *See* Bass Letter, *supra* note 9, at 5; and Ferris Letter 1, *supra* note 9, at 4. *See also* Pittenger Letter

Continued

stated that they believe that the proposed foreign upstream owners will not submit to U.S. jurisdiction.[203] Another commenter stated its view that foreign ownership of the Exchange may result in lax enforcement of its rules.[204]

The Exchange responded that it believes that its rules are consistent with the requirements of the Exchange Act, and that its rules and the Exchange Act contain various provisions that would facilitate the ability of U.S. regulators, including the Commission, to monitor, compel, and enforce compliance by each of the upstream owners. In particular, upstream owners would be required to adhere to the ownership and voting limitations, submit to U.S. regulatory jurisdiction and maintain agents in the U.S. for the service of process, maintain open books and records related to their ownership of CHX and keep such books and records in the U.S., and refrain from interfering with, and give due consideration to, the SRO function of the Exchange.[205] Further, the Exchange stated that the CHX rules, along with the voting and ownership limitations, are designed to prevent undue influence on CHX.[206] The Exchange also asserted that, pursuant to the Exchange Act, the Exchange is subject to ''direct and rigorous'' oversight by the Commission, which the Exchange described as including, among other things, frequent examinations of various aspects of its operations by Commission staff, including security and trading protocols, as well as the requirement for Commission approval of certain regulatory, operational, and strategic initiatives prior to implementation by the Exchange.[207]

In addition, NA Casin Holdings asserted that extensive regulatory and governance safeguards would empower the Commission and the Exchange to prevent any influence over the Exchange and its operations that is improper or a violation of U.S. securities laws and regulations.[208] Other commenters expressed confidence that the regulatory controls currently in place are adequate to monitor the proposed investors.[209] In addition, some commenters asserted that CHX has shown willingness to submit to oversight.[210]

The Commission also received several comments regarding the approval process of the proposed rule change. One commenter expressed concern that the staff's approval order was issued so soon after CHX submitted Amendment No. 1, which the commenter stated did not allow time for the public to comment.[211] Three commenters indicated support for the proposed rule change, and raised concerns that the Commission has delayed the Proposed Transaction, or has allowed politics to interfere with the approval process.[212] Another commenter asserted that there is no reason for ''further unjustified delay'' of the Commission's approval.[213] The Exchange asserted that the upstream owners have complied with applicable laws and that therefore, the Commission should approve the proposed rule change, in furtherance of fair competition.[214]

Summary of Comments and Exchange's Response Following the Filing of Amendment No. 2

On October 2, 2017, during the Commission's review of the delegated action, CHX informed the Commission that three of the proposed upstream investors were withdrawing from the investor group. On November 6, 2017, CHX filed Amendment No. 2 to the proposed rule change to update its proposal to reflect this change in the investor group and to reflect other changes to the terms of the Proposed Transaction and the proposed rule change.[215]

In Amendment No. 2, the Exchange asserts that the new proposed capitalization structure complies with the ownership and voting limitations set forth in the NA Casin Holdings Certificate because the proposed upstream owners and their Related Persons will neither exceed the proposed 40% ownership limitation nor be permitted to vote in excess of the proposed voting limitation.[216] The Exchange represents that there are now two sets of Related Persons among the proposed upstream owners: (1) Castle YAC and NA Casin Group, which would hold a combined 40% ownership interest in NA Casin Holdings and (2) the five members of the CHX Holdings management team, which would hold an aggregate 8.32% ownership interest in NA Casin Holdings.[217] The Exchange further represents that 71% of the voting shares of NA Casin Holdings will be owned by U.S. citizens and, due to the proposed voting limitation, no less than 80% of the voting power of NA Casin Holdings will be held by U.S. citizens.[218] The Exchange also restates its prior representation that none of the upstream owners directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with a governmental entity or any political subdivision thereof.[219]

In response to Amendment No. 2, the Commission received 21 comment letters.[220] Ten of these commenters raise concerns about the proposed ownership structure of NA Casin Holdings, with a particular focus on the terms of the Put Agreements.[221] One commenter also states that the Exchange mischaracterizes NA Casin Holdings as a ''large private company that is not owned or controlled by the Chinese government.''[222] Another commenter alleges that CHX removed ''fake'' companies from the capitalization structure and replaced them with new shell nominees through what the commenter calls the ''sham'' Put Agreements.[223] The commenter states that NA Casin Group is an empty shell company controlled by Jay Lu, who the commenter states is a college student and whose actions

1, *supra* note 9, at 2 (asserting that the Public Company Accounting Oversight Board must be able to ''penetrate Chinese opacity'' before a Chinese firm is allowed to purchase an American stock exchange).

[203] *See* Ciccarelli Letter, *supra* note 9, at 3–4; Mayer Letter, *supra* note 9; and Anonymous Letter 3, *supra* note 20, at 2.

[204] *See* Hill Letter 2, *supra* note 9. This commenter also alleged that the Exchange has a record of non-compliance with regulations and failure to fully enforce its rules. This commenter reiterated this point in a comment letter submitted following the filing of Amendment No. 2. *See* Hill Letter 3, *supra* note 23.

[205] *See* CHX Response Letter 1, *supra* note 10, at 4; and CHX Response Letter 2, *supra* note 10, at 3–4.

[206] *See* CHX Response Letter 4, *supra* note 20, at 5.

[207] *See* CHX Response Letter 2, *supra* note 10, at 3–4. In addition, the Exchange stated that if CHX or the upstream owners fail to meet the requirements of the Exchange Act, or the rules and regulations thereunder, the Commission has broad authority and recourse to compel compliance or mitigate non-compliance, including suspending, censuring, or deregistering CHX as an SRO, pursuant to Section 19(h)(1) of the Exchange Act. *See* CHX Response Letter 4, *supra* note 20, at 5.

[208] *See* NA Casin Holdings Letter 1, *supra* note 9, at 1–2. Specifically, NA Casin Holdings observed that 50% of the board of the Exchange would be required to consist of ''Non-Industry Directors'' (which NA Casin Holdings notes is defined in the CHX Bylaws), who cannot be employed by any affiliate of CHX.

[209] *See* John R. Prufeta Letter 1, *supra* note 9 (stating that ''the continual scrutiny of the U.S. financial system is both essential and firmly in place'' and that the commenter believes that ''all the controls necessary to monitor the investment group exist now and will be sufficient''). *See also* Zhong Letter 1, *supra* note 9 (expressing confidence that the current controls of the U.S. regulatory system serve as an ''effective check and balance'' on both foreign and domestic investors); Duncan Karcher Letter 1, *supra* note 9 (stating that commenter ''trust[s] [the Commission's] process much more than relying on the ad hominem attacks [the commenter] read[s] within the comments section''); and Zhong Letter 2 (expressing faith in the U.S. regulatory system), *supra* note 20. *See also* Catherine Jones Letter, *supra* note 20, at 1 (asserting that the rules of CHX will remain largely unchanged with respect to the purposes of promoting just and equitable principles of trade, removing impediments to and perfecting the mechanism of the free and open market and a national market system, and in general, protecting investors and the public interest).

[210] *See* Richard R. Taylor Letter, *supra* note 20; Duncan Karcher Letter 2, *supra* note 20; and Cheryl Karcher Letter, *supra* note 20.

[211] *See* Milton Letter, *supra* note 20. *See also* Watson Letter, *supra* note 20, at 3.

[212] *See* Richard R. Taylor Letter, *supra* note 20; Ayers Letter, *supra* note 20; Duncan Karcher Letter 2, *supra* note 20; and Cheryl Karcher Letter, *supra* note 20.

[213] *See* Hultgren Letter *supra* note 20, at 1 (also asserting that the additional review period following the stay of the Division of Trading and Markets' approval ''arguably violates the Commission's time restrictions under the Exchange Act'').

[214] *See* CHX Response Letter 4, *supra* note 20, at 6.

[215] *See supra* notes 21, 27, and 30 and accompanying text.

[216] *See* Amendment No. 2, *supra* note 22, at 55142.

[217] *See id.*

[218] *See id.*

[219] *See id.*

[220] *See supra* note 23.

[221] *See* Garland Letter, *supra* note 23; Jeremy Johnson Letter, *supra* note 23, Azsai Letter, *supra* note 23; Anonymous Letter 4, *supra* note 23; Montclair Letter, *supra* note 23; Mcpherson Letter 4, *supra* note 23; Strauss Letter, *supra* note 23; Horwitz Letter, *supra* note 23; Hart Letter, *supra* note 23, at 3; and Friedman Letter *supra* note 23, at 2.

[222] *See* Friedman Letter, *supra* note 23, at 1.

[223] *See* Garland Letter, *supra* note 23.

the commenter states are controlled by his father, Shengju Lu.[224] Arguing that the holdings of Shengju Lu and Jay Lu should be aggregated with the holdings of Raptor, Saliba, and Penserra because of the Put Agreements, the commenter asserts that the Lus will control 91.68% of the shares of NA Casin Holdings.[225] The commenter states that the Put Agreements can compel NA Casin Holdings to purchase the shares of Saliba, Raptor, and Penserra or arrange for the purchase of those shares by a third-party chosen by NA Casin Holdings.[226] Likewise, another commenter asserts that the terms of the Put Agreements would place approximately 91.5% of CHX under Chongqing Casin's immediate control.[227] This commenter further asserts that the Put Agreements are designed to circumvent Commission scrutiny.[228]

Several commenters also raise the possibility that, under the Put Agreements, NA Casin Holdings may be able to force the transfer of Saliba's, Raptor's, and Penserra's shares to someone from a Chinese government agency, unknown foreign third-party entities, or a ''non-descript affiliated company.'' [229] These commenters assert that the proposed Chinese upstream owners are trying to determine who controls CHX through the terms of the Put Agreements.[230]

Similarly, and citing one of the commenters above, another commenter asserts that the Put Agreements make the entities that are parties to them ''fake'' investors, and that those investors are entering into risk-free transactions that involve the Chinese upstream owners ''pulling all the strings'' and ''dictating terms on both the timing and pricing of the put.'' [231] Another commenter asserts that the Put Agreements would obligate the Chinese owners to repurchase 50% ownership in CHX at any time, and represent ''risk-free transactions.'' [232] This commenter concludes that Saliba and Raptor therefore do not appear to be ''bona fide investors.'' [233] Two commenters also claim that Anthony Saliba has a conflict of interest by both investing in CHX through Saliba and approving the Proposed Transaction as a member of CHX's board.[234] One of these commenters further asserts that what the commenter calls the ''so-called 'American Investors' '' would hold 60% of CHX on behalf of the Chinese upstream owners due to the terms of the Put Agreements.[235]

Likewise, another commenter asserts that the parties subject to the Put Agreements are ''merely placeholders for un-disclosed third parties.'' [236] This commenter asserts that the Put Agreements ensure that the purchasers subject to them will have zero risk associated with their purchase because NA Casin Holdings will cover any losses to the investor and that the Chinese upstream owners would be ''pulling the strings on the 'Puts.' '' [237] Due to this lack of risk on behalf of the upstream owners subject to the Put Agreements, the commenter states that those investors are not bona fide investors, but merely placeholders so that CHX can obtain Commission approval of the proposed rule change.[238]

Two commenters question why CHX management would obtain an aggregate 8.32% ownership interest in NA Casin Holdings, which the commenters speculate would be granted to management at no cost.[239] One of these commenters asserts that CHX management are ''place holders'' for the Chinese owners, and that as a result, Jay Lu would ''control'' 95% of CHX's ownership.[240] In addition, another commenter questions the increase in ownership of CHX management, noting that it went from 0.88% to 8.32%, and questions whether the CHX management is contributing cash for their respective shares.[241] Another commenter claims that the terms providing this equity to CHX management amount to ''bribes and hush money to abet a fraud'' on the Commission.[242] In addition, one commenter asserts that the funds paid in the Proposed Transaction would not be invested in CHX and that no jobs would be created in Chicago as a result of the Proposed Transaction.[243]

Several commenters also assert that Chongqing Jintian, Chongqing Longshang, and Xian Tong exited the Proposed Transaction only when faced with due diligence by the Commission regarding their ownership structure.[244] One commenter suggests that the Commission should review the bank statements and sources of funds for the three proposed upstream owners who withdrew from the Proposed Transaction,[245] stating that continued review is necessary as no new investors have been added to the Proposed Transaction.[246] Another commenter asserts that the three investors' source of funds for the Proposed Transaction was Shengju Lu, an owner of Chongqing Casin.[247]

In addition, one commenter does not express support or opposition to the proposed rule change, but encourages the Commission to carefully examine the bank statements and other sources of funding for both the current proposed upstream owners and the previous upstream owners who left the group.[248] This commenter states that a ''huge red flag was raised'' when some upstream owners left the ownership group after the Commission began to investigate their backgrounds.[249] This commenter also states that the terms of the Put Agreements suggest that Saliba, Raptor, and Penserra do not intend to be long-term investors in CHX.[250] This commenter opines that the Commission must investigate the origins of the Put Agreements, and whether they were demanded by the U.S. upstream owners, another party to the Proposed Transaction, or otherwise.[251] The commenter believes that the Commission's review of bank statements and the origin of funds for the upstream owners will disclose whether the upstream owners subject to the Put Agreements are using their own funds to finance their share of the Proposed Transaction.[252]

One commenter states his belief that Chongqing Casin's source of funding is at issue, asserting that Shengju Lu leveraged stock of his company in return for loans from Chinese-government controlled banks.[253] This commenter suggests that the Chinese government is playing a role in the Proposed Transaction.[254] In addition, this commenter questions whether the Commission can carry out its duty to properly regulate the Exchange given the limits of the Commission's authority in China.[255] Another commenter states that investors from China have taken U.S. shell corporations and, through reverse mergers, acquired listed U.S. corporations that were ''defunct'' for the purpose of executing ''pump and dump'' schemes.[256] This commenter implies that such past actions might be cause for concern with regard to the Proposed Transaction.[257]

[224] *See id. See also* Hart Letter, *supra* note 23, at 2; and Friedman Letter, *supra* note 23, at 2.

[225] *See* Garland Letter, *supra* note 23.

[226] *See id.*

[227] *See* Mcpherson Letter, *supra* note 23.

[228] *See id.*

[229] *See* Garland Letter, *supra* note 23; Anonymous Letter 4, *supra* note 23; Mcpherson Letter, *supra* note 23; and Horwitz Letter, *supra* note 23 (expressing concern that, because NA Casin Holdings has the authority to identify a third-party purchaser to purchase shares sold under the put options and Jay Lu is the current signatory for NA Casin Holdings, such arrangement could result in conflicts of interest and collusion).

[230] *See id.*

[231] *See* Jeremy Johnson Letter, *supra* note 23 at 2 (citing Garland Letter, *supra* note 23).

[232] *See* Strauss Letter, *supra* note 23 at 2.

[233] *See id. See also* Hart Letter, *supra* note 23, at 3 (claiming that Saliba and Raptor are ''guaranteed handsome profits which would allow them to 'put' their CHX holdings to the Chinese at any price they would demand'').

[234] *See* Jeremy Johnson Letter, *supra* note 23 at 2; and Strauss Letter, *supra* note 23 at 2. *See also* Hart Letter, *supra* note 23, at 3; and Friedman Letter, *supra* note 23, at 3.

[235] *See id.* at 3. *See also* Gresack Letter, *supra* note 23, at 2.

[236] *See* Montclair Letter, *supra* note 23.

[237] *See id.*

[238] *See id.*

[239] *See* Strauss Letter, *supra* note 23, at 2–3; and Garland Letter, *supra* note 23 at 1. One of these commenters also questions whether the full terms of the Proposed Transaction, including any grant of stock to management, were disclosed to CHX stockholders. *See* Strauss Letter, *supra* note 23, at 3.

[240] *See id.* at 1.

[241] *See* Gresack Letter, *supra* note 23, at 2.

[242] *See* Hart Letter, *supra* note 23, at 3. *See also* Friedman Letter, at 2 *supra* note 23, at 2 (suggesting that the grant of stock to CHX management should be reviewed for violations of the Foreign Corrupt Practices Act); and Strauss Letter, *supra* note 23, at 1.

[243] *See* Strauss Letter, *supra* note 23, at 1.

[244] *See* Garland Letter, *supra* note 23, at 1; Montclair Letter, *supra* note 23; Jeremy Johnson Letter, *supra* note 23, at 1; Azsai Letter, *supra* note 23; Mcpherson Letter, *supra* note 23; Azsai Letter, *supra* note 23; Gresack Letter, *supra* note 23, at 2; Strauss Letter, *supra* note 23, at 1; and Horwitz Letter, *supra* note 23, at 1.

[245] *See supra* note 21 and accompanying text.

[246] *See* Gresack Letter, *supra* note 23, at 2.

[247] *See* Strauss Letter, *supra* note 23, at 1.

[248] *See* Gresack Letter, *supra* note 23, at 2.

[249] *See id.*

[250] *See id.*

[251] *See id.*

[252] *See id.*

[253] *See* Horwitz Letter, *supra* note 23, at 1.

[254] *See id.*

[255] *See id.* at 2.

[256] *See* Hill Letter 3, *supra* note 23.

[257] *See id.*

The Commission also received nine comment letters advocating that the Commission approve the proposed rule change.[258] One commenter states that the Proposed Transaction was approved by CFIUS and Commission staff, and agreed to by all the parties involved.[259] The commenter states that the Proposed Transaction poses no risk and urges the Commission to approve the proposed rule change as soon as possible.[260] In addition, another commenter states that CFIUS concluded that there were no unresolved national security concerns with respect to the Proposed Transaction.[261] Another commenter opines that CHX has a very good business model and that it is in an advantageous position that will drive its growth.[262] This commenter believes that the U.S. regulatory regime has proven over the years that the U.S. has a robust and successful market, and that the U.S. must continue to try to build a stronger connection for financial services between the U.S. and the world.[263]

In addition, one commenter asserts that nothing will change with the acquisition of the Exchange, and that the operational processes of the Exchange, which it states conform to guidelines set by the Commission and observed by the Financial Industry Regulatory Authority (''FINRA''), must remain the same.[264] Another commenter states that China has given global financial companies what the commenter calls unprecedented access to its economy and that the U.S. should remain open-minded when embracing a diversity of market participants in the financial sector.[265] This commenter states that both countries can benefit from increased access to each other's respective markets.[266] The fourth commenter believes that the upstream owners' investment in CHX could ''create the bridge for China-based companies to list their IPOs on the Chicago Stock Exchange thereby also providing Americans a more direct opportunity to potentially participate in Asia's major engine of growth.''[267] This commenter further opines that if these companies do not list on the Chicago Stock Exchange, they will list on competing exchanges in other countries, which the commenter believes would further erode ''[CHX's] global market share and prominence.''[268] Another commenter states that the Proposed Transaction ''stands to create many jobs'' in Chicago and to ''increase the popularity of CHX internationally.''[269] Another commenter, however, counters the point that job creation should be an important consideration for this proposed rule change.[270]

In addition, one commenter asserts that the NA Casin Group is a privately-owned company and that it is not the Chinese government and should not be treated as such.[271] Another commenter states that the international company involved with the Proposed Transaction would have 29% ownership and 20% voting rights, and therefore asserts that its influence would be ''minimal.''[272]

NA Casin Holdings states that no new investors were added to the investor consortium under the revised ownership structure in Amendment No. 2, and asserts that the arrangements among the investors were the result of arm's-length negotiations among the parties.[273] NA Casin Holdings further asserts that the identities, management, and sources of funds for the stockholders have been thoroughly disclosed in CHX's filings with the Commission.[274] NA Casin Holdings also responds to commenters' assertions about the ownership of NA Casin Group, stating that Jay Lu does not independently control either NA Casin Group or Chongqing Casin.[275] In addition, NA Casin Holdings asserts that the U.S. upstream owners are independent and unaffiliated with any investor, and that statements made in other comment letters that Jay Lu or Casin Group would control 90% of the shares of NA Casin Holdings are false.[276] NA Casin Holdings further asserts that following the closing of the Proposed Transaction, the majority of its voting power would be in the hands of the U.S. upstream owners.[277]

Two commenters respond to questions about why Chongqing Jintian, Chongqing Longshang, and Xian Tong withdrew from the Proposed Transaction.[278] NA Casin Holdings states that withdrawal of these investors from the investor consortium was the result of each such entity's ''independent decision,'' and that these entities cited a number of factors as responsible for their withdrawal, including delays in the Proposed Transaction and that funds necessary for the investment were ''tied up and unavailable for use in alternative investment opportunities.''[279] Further, NA Casin Holdings asserts that prior to their withdrawal, these entities provided all information requested by the Commission, the Commission's staff, CFIUS, and FINRA.[280] Another commenter also denies claims that some of the Chinese companies withdrew from the Proposed Transaction because they have something to hide, stating that instead, these companies withdrew from the Proposed Transaction due to the length of the regulatory process.[281] In response, three commenters that oppose the Proposed Transaction assert that NA Casin Holdings' statement that the three investors did not have available funds necessary to complete the Proposed Transaction raises questions about who was funding the entities' purchase.[282]

Two commenters deny other commenters' assertions regarding the Put Agreements.[283] Specifically, NA Casin Holdings states that contrary to the assertions of other commenters, the Put Agreements would not permit NA Casin Group to force the sale of the U.S. upstream owners' shares to unknown third parties; instead, the Put Agreement would permit NA Casin Holdings to find a third party purchaser only after a holder of a put option determines to exercise such option.[284] In addition, NA Casin Holdings asserts that the NA Casin Holdings Certificate, which imposes the voting and ownership limitations, is ''virtually indistinguishable'' from exchange applications previously approved by the Commission, and that any sale of the proposed U.S. upstream owners' shares, including transactions pursuant to the Put Agreements, would be subject to the ownership and voting limitations.[285] In addition, NA Casin Holdings states that the Put Agreements would only provide certain investors an opportunity to exit from their investments for a ''brief window'' two years after closing.[286] According to NA Casin Holdings, it would not assume all risks or liabilities of the investment of the holders of the Put Agreements, and suggestions that the proposed U.S. upstream owners would not be long-term owners are without merit.[287] NA Casin Holdings further asserts that agreements similar to the Put Agreements are common for investors in private companies, and other privately-held exchanges also provide put rights to their equity holders.[288] In addition, another commenter asserts that the NA Casin Group would not control the Put Agreements, and notes that the put right cannot be exercised for two years.[289]

[258] *See* Salters Letter, *supra* note 23; May Letter, *supra* note 23; and Richard Taylor Letter, *supra* note 23; Faux Letter, *supra* note 23; Saliba Letter 2, *supra* note 23, at 2; Briley Letter, *supra* note 23; Bleecher Letter, *supra* note 23; Marden Letter, *supra* note 23; and NA Casin Holdings Letter 3, *supra* note 23.

[259] *See* Richard Taylor Letter, *supra* note 23. *See also* Faux Letter, *supra* note 23 (stating that CFIUS cleared the sale of the exchange); and Marden Letter, *supra* note 23 (asserting that the presence of national security issues is non-existent as evident by the approval from CFIUS).

[260] *See* Richard Taylor Letter, *supra* note 23.

[261] *See* Saliba Letter 2, *supra* note 23, at 2.

[262] *See* Salters Letter, *supra* note 23.

[263] *See id.*

[264] *See* Briley Letter, *supra* note 23.

[265] *See* May Letter, *supra* note 23.

[266] *See id.*

[267] *See* Faux Letter, *supra* note 23.

[268] *See id.*

[269] *See* Marden Letter, *supra* note 23.

[270] *See* Hill Letter 3, *supra* note 23.

[271] *See* Saliba Letter 2, *supra* note 23, at 2.

[272] *See* Marden Letter, *supra* note 23.

[273] *See* NA Casin Holdings Letter 3, *supra* note 23, at 1–2.

[274] *See id.* at 2.

[275] *See id.* at 2.

[276] *See id.* at 3.

[277] *See id.* at 3.

[278] *See* Saliba Letter 2, *supra* note 23, at 2; and NA Casin Holdings Letter 3, *supra* note 23, at 2.

[279] *See* NA Casin Holdings Letter 3, *supra* note 23, at 2.

[280] *See id.; but see supra* note 86.

[281] *See* Saliba Letter 2, *supra* note 23, at 2.

[282] *See* Horwitz Letter, *supra* note 23, at 1; Hart Letter, *supra* note 23, at 1; and Friedman Letter *supra* note 23, at 3.

[283] *See* Saliba Letter 2, *supra* note 23, at 2; and NA Casin Holdings Letter 3, *supra* note 23, at 2–3.

[284] *See* NA Casin Holdings Letter 3, *supra* note 23, at 3. One commenter questions the authenticity of this third comment letter submitted by NA Casin Holdings. *See* Hart Letter, *supra* note 23, at 1.

[285] *See* NA Casin Holdings Letter 3, *supra* note 23, at 3.

[286] *See id.*

[287] *See id.*

[288] *See id.*

[289] *See* Saliba Letter 2, *supra* note 23, at 3.

The Exchange submitted three response letters following its filing of Amendment No. 2.[290] First, the Exchange asserts that the Proposed Transaction would create access to capital, attract new businesses and jobs to the U.S., and grow the U.S. economy.[291] In addition, the Exchange asserts that the Proposed Transaction is ''safe,'' stating that NA Casin Holdings would be majority-owned by U.S. owners, NA Casin Group is not owned or controlled by the Chinese government, and CFIUS concluded that there were no unresolved national security concerns with the Proposed Transaction.[292] Further, CHX asserts that the Commission would be able to verify compliance by NA Casin Holdings stockholders with the Exchange's rules, noting that CHX rules would require NA Casin Holdings stockholders to make annual attestations to the Commission and the Exchange related to their ownership levels and the existence of any voting agreements, and that the Exchange's oversight of the ownership and voting limitations would be subject to regular independent audits by a PCAOB registered auditor.[293] The Exchange states that the Commission has broad authority to compel compliance or mitigate non-compliance, including suspending, censuring or deregistering the Exchange pursuant to Section 19(h)(1) of the Exchange Act.[294] In addition, the Exchange states that NA Casin Group has agreed to permanently and irrevocably submit to the jurisdiction of the Commission and the U.S. courts, has appointed a registered agent in the U.S. for the service of process, has agreed to open books and records, and is required to keep such records in the U.S.[295]

The Exchange asserts that the three investors that withdrew from the Proposed Transaction did so due to the length of the approval process.[296] The Exchange asserts its view that: (1) The Commission's review violates Section 19(b) of the Exchange Act[297] because more than 240 days have elapsed since the date of publication of the proposed rule change; (2) the length of the Commission's review violates Rule 103 of the Commission's Rules of Practice[298] (which provides that the Rules of Practice ''shall be construed and administered to secure the just, speedy, and inexpensive determination of every proceeding'') and that where such rules conflict with statute, the statute will control; and (3) the length of the Commission's review violates Section 3(f) of the Exchange Act[299] (which requires the Commission to consider efficiency, competition, and capital formation within the national market system) by delaying (and potentially jeopardizing) the consummation of the Proposed Transaction.[300]

The Exchange asserts that, in response to Commission requests, it provided the Commission staff with various financial statements and other evidence of financial wherewithal and sources of funds from all of the prospective investors, including the three prospective investors that withdrew from the investor group.[301] Further, the Exchange asserts that there are no outstanding Commission requests for information related to the Proposed Transaction.[302]

Regarding the Put Agreements, the Exchange notes that the MIAX has offered similar put options as an incentive to its prospective stockholders through an equity rights program through which MIAX offered shares and warrants for shares in MIAX International Holdings, Inc. (''MIH'') to MIAX members that met certain financial order flow requirements, and included a provision whereby all MIAX members that received equity through the program retained a put option to require MIH to buy back shares at a fixed percentage of fair market value.[303] The Exchange submits that given the similarities between the MIAX put options and the proposed CHX put options, as well as what it characterizes as the legitimate and ''well-established'' business purposes of the Put Agreements, the Put Agreements are appropriate and consistent with Commission precedent.[304]

The Exchange also describes provisions in the CHX Holdings and NA Casin Holdings corporate documents that it believes would facilitate the ability of the Commission and the Exchange to ensure that the put options are exercised in a manner consistent with CHX rules and the Exchange Act.[305] The Exchange asserts that such provisions, the Rule 19b–4 rule filing requirement for any proposed change of control, and the Commission's broad authority to compel compliance or mitigate non-compliance with CHX rules, including suspending, censuring, or deregistering the Exchange pursuant to Section 19(h)(1) of the Exchange Act, the Commission would be able to effectively monitor and review any changes to CHX ownership.[306] The Exchange notes that, pursuant to provisions of the proposed corporate governance documents of CHX Holdings and NA Casin Holdings: (1) Each person involved in an acquisition of shares of stock of NA Casin Holdings or CHX Holdings would be required to provide NA Casin Holdings or CHX Holdings, as applicable, with written notice 14 days prior to, and such corporation would be required to provide the Commission with written notice 10 days prior to, the closing date of any acquisition that would result in any person, alone or together with its Related Persons, having voting rights or beneficial ownership of 5% or more of the outstanding stock of the corporation; (2) each stockholder of NA Casin Holdings and CHX Holdings would be required to make annual attestations to the Commission and NA Casin Holdings regarding its equity ownership level in the corporation and the identity of its Related Persons, and the existence of any agreement, arrangement, or understanding between the stockholder and any person for the purpose of acquiring, voting, holding, or disposing of shares of stock of the corporation; and (3) each person having voting rights or beneficial ownership of stock of NA Casin Holdings or CHX Holdings would be required to promptly provide the corporation with written notice of any change in its status as a Related Person of another person that owns voting stock of the corporation.[307]

In addition, in response to comments that question the details of the NA Casin Holdings shares that would be held by CHX management,[308] the Exchange states that more than half of such shares would be purchased on terms similar to other proposed upstream owners,[309] and the remaining shares would be granted by NA Casin Holdings as restricted stock subject to a customary vesting period.[310]

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[290] *See supra* note 24.

[291] *See* CHX Response Letter 6, *supra* note 24, at 1–2.

[292] *See id.* at 2–3.

[293] *See id.* at 3.

[294] *See id.*

[295] *See id.*

[296] *See id.*

[297] *See* 15 U.S.C. 78s(b).

[298] *See* 17 CFR 201.103(a).

[299] *See* 15 U.S.C. 78c(f) (requiring that the Commission consider whether a proposed rule change will promote efficiency, competition, and capital formation).

[300] *See* CHX Response Letter 8, *supra* note 24, at 1–5. The Exchange also asserts that the merger agreement could be terminated by ''regulatory *inaction*'' due to the end of the exclusivity period and ''drop dead'' termination date under the merger agreement, and expresses concern regarding the perception of such result by the international business community. *See id.* at 6.

[301] *See* CHX Response Letter 7, *supra* note 24, at 2.

[302] *Id.; but see supra* note 86. The Exchange also states that on July 11, 2017, CHXBD filed a Form CMA (a continuing membership application that the Exchange's broker-dealer affiliate is required to file with FINRA under NASD Rule 1017 prior to consummation of the Proposed Transaction) with FINRA, which was deemed ''substantially complete'' on July 28, 2017. According to CHX, CHXBD provided FINRA with several large document productions in response to seven separate information requests from FINRA staff, which included, among other things, financial statements, evidence of funds transfers, corporate governance documents and descriptions of business activities, as applicable, for all current prospective investors, as well as the three former prospective investors. The Exchange states that there are no outstanding FINRA requests related to the Proposed Transaction. *See id.* at 2–3. Nevertheless, the Commission notes that, to date, the Exchange has not notified the Commission that FINRA has approved CHXBD's continuing membership application.

[303] *See id.* at 3.

[304] *See id.*

[305] *See id.* at 4.

[306] *See id.* at 5.

[307] *See id.* at 4–5.

[308] *See supra* notes 239–242.

[309] *But see supra* note 89.

[310] *See* CHX Response Letter 7, *supra* note 24, at 4–5.

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–82723; File No. SR–NASDAQ–2018–010]

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Rule 7039 To Modify Pricing for the Nasdaq Last Sale Data Product and To Make Other Related Changes to Nasdaq Rules

February 15, 2018.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on February 2, 2018, The Nasdaq Stock Market LLC (''Nasdaq'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Rule 7039 (Nasdaq Last Sale and Nasdaq Last Sale Plus Data Feeds) [3] to modify pricing for the Nasdaq Last Sale (''NLS'') data product and to make other related changes to Nasdaq rules.

The text of the proposed rule change is available on the Exchange's website at *http://nasdaq.cchwallstreet.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] References to rules are to Nasdaq rules, unless otherwise noted.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of this proposal is to amend Rule 7039 to modify the pricing framework for the NLS data product. NLS is a market data product that comprises two proprietary data feeds containing real-time last sale Information [4] for trades executed on the Exchange or reported to the FINRA/Nasdaq Trade Reporting Facility (the ''FINRA/Nasdaq TRF'').[5] As such, NLS is a ''non-core'' product that provides a subset of the ''core'' last-sale data provided by securities information processors (''SIPs'') under the CTA Plan and the Nasdaq UTP Plan.

As reflected in the filing that originally established it,[6] NLS was designed to enable market-data ''distributors to provide free access to the data [contained in NLS] to millions of individual investors via the internet and television'' and was expected to ''increase[ ] the availability of NASDAQ proprietary market data to individual investors.'' [7] Similarly, in its filing to offer NLS on a permanent, rather than a pilot, basis, Nasdaq stated that ''[d]uring the pilot period, the program has vastly increased the availability of NASDAQ proprietary market data to individual investors. Based upon data from NLS Distributors, NASDAQ believes that since its launch in July 2008, the NLS data has been viewed by millions of investors on websites operated by Google, Interactive Data, and Dow Jones, among others.'' [8]

The fee schedule for NLS currently offers Distributors [9] several different pricing models from which they may select in determining the fees applicable to distribution of the product. Specifically, in keeping with the goal of NLS to promote the accessibility of data to individual investors, Distributors may choose to distribute NLS in an uncontrolled fashion via television or the internet and pay under pricing models that require them to estimate the number of households or website visitors to which the data is provided. Alternatively, a Distributor may opt for a pricing model that requires it to count its customers based on a username and password system, or a model under which data is supplied on an ad hoc basis in response to customer queries. In both these cases, the pricing model assumes distribution through a website, such as might be provided by a broker-dealer (''BD'') to customers who log in using a username and password, or who enter ticker symbols into a website to

[4] In this filing, Nasdaq is proposing, among other things, to adopt new defined terms for use in Rule 7039. At a later date, Nasdaq intends to submit an additional proposed rule change to move these definitions into a new rule and propose to expand its applicability to all market data fee rules in the 7000 rule series. The term ''Information'' is a broad generic term designed to encompass the full range of information or data transmitted by Nasdaq, and as such will be defined to mean ''any data or information that has been collected, validated, processed and/or recorded by the Exchange and made available for transmission relating to: (i) Eligible securities or other financial instruments, markets, products, vehicles, indicators or devices; (ii) activities of the Exchange; or (iii) other information or data from the Exchange. Information includes, but is not limited to, any element of information used or processed in such a way that Exchange Information or a substitute for such Information can be identified, recalculated or re-engineered from the processed information.'' The term is not currently defined in Exchange rules. Of note, ''Derived Data'' is excluded from the definition of ''Information,'' and as discussed below, is defined separately. The term ''Information'' will be proposed for wider use in a future rule filing concerning definitions.

[5] *See* Nasdaq Rule 7039(a)–(c). *See also* Securities Exchange Act Release No. 71351 (January 17, 2014), 79 FR 4200 (January 24, 2014) (SR–NASDAQ–2014–006) (notice of filing and immediate effectiveness regarding permanent approval of NLS).

[6] *See* SR–NASDAQ–2006–060 (Amendment No. 2, June 10, 2008) (available at *http://nasdaq.cchwallstreet.com/NASDAQ/pdf/nasdaq-filings/2006/SR-NASDAQ-2006-060_Amendment_2.pdf*). See also Securities Exchange Act Release No. 57965 (June 16, 2008), 73 FR 35178 (June 20, 2008) (SR–NASDAQ–2006–060) (approving SR–NASDAQ–2006–060, as amended by Amendment Nos. 1 and 2, to implement NLS on a pilot basis).

[7] SR–NASDAQ–2006–060 (Amendment No. 2, June 10, 2008), at 3.

[8] Securities Exchange Act Release No. 71351 (January 17, 2014), 79 FR 4200 (January 24, 2014) (SR–NASDAQ–2014–006).

[9] Nasdaq is proposing to define a ''Distributor'' as ''an entity, as identified in the Nasdaq Global Data Agreement (or any successor agreement), that executes such an Agreement and has access to Exchange Information, together with its affiliates having such access.'' The Nasdaq Global Data Agreement is the standardized agreement that entities receiving Information sign to establish a contractual relationship with the Exchange. The word is currently defined in several Exchange rules—*e.g.,* Rules 7047 (Nasdaq Basic), 7019 (Market Data Distributor Fees), and 7023 (Nasdaq Depth-of-Book Data)—in terms that focus on (i) receipt of Exchange information, and (ii) the provision of the information to internal or external Subscribers. Thus, ''Distributor'' broadly covers any person that receives Information and makes it available. Since such persons are required to sign the Nasdaq Global Data Agreement to establish a contractual right to distribute Information, the new definition is intended to simplify the definition through reference to the objective fact of a contract, but is not intended to narrow or broaden the scope of the term from the manner in which it is defined in existing rules. In fact, Rule 7019 similarly refers to the requirement that distributors execute an agreement with the Exchange. The new definition further specifies that the term Distributor includes both an entity *and its affiliates* that *have access* to Information; the inclusion of affiliates and the reference to having access are both consistent with the manner in which current definitions are interpreted. The new definition also eliminates superfluous references to *internal and external* receipt and distribution.

query for last sale information.[10] Thus, consistent with the stated purpose of NLS, the fee structure under which NLS is made available reflects a model of widespread distribution to individual investors. The fees for these different pricing models are tiered based on volume, with the fees for marginal usage reduced as a Distributor achieves certain volume levels. Moreover, the maximum monthly fee for NLS, regardless of usage levels, under these distribution models is $41,500.

Many data products sold by Nasdaq and others distinguish between data usage based on whether the data is being used by ''Professionals'' or ''Non-Professionals,'' with different prices charged for each category.[11] A ''Non-Professional'' is defined as ''a natural person who is not: (A) Registered or qualified in any capacity with the Securities and Exchange Commission, the Commodity Futures Trading Commission, any state securities agency, any securities exchange or association, or any commodities or futures contract market or association; (B) engaged as an 'investment' adviser' as that term is defined in Section 202(a)(11) of the Investment Advisers Act of 1940 (whether or not registered or qualified under that Act); or (C) employed by a bank or other organization exempt from registration under federal or state securities laws to perform functions that would require registration or qualification if such functions were performed for an organization not so exempt.'' [12] A ''Professional'' is defined as ''any natural person, proprietorship, corporation, partnership, or other entity whatever other than a Non-Professional.'' [13] The fee structure for NLS does not, however, currently contain provisions that make these distinctions or that clearly contemplate internal distribution of the product to BD employees or other Professionals. Rather, the fee structures and distribution models of NLS reflect Nasdaq's assumption that it is a product of interest to a broad range of individual investors, to be distributed in a relatively uncontrolled manner through websites (either password protected or not) or television.[14]

Nasdaq is proposing changes to the current NLS fee structure in order to more clearly reflect the use cases under which NLS is currently made available and to establish pricing for additional use cases. First, Nasdaq is proposing to categorize existing fee distribution models as ''distribution models for the general investing public,'' while also specifically identifying the terms and conditions applicable to each of these pricing categories. Thus, distribution via a username/password entitlement system is being defined as a ''Per User'' distribution model. In order to adopt the Per User model, (i) a Distributor must distribute NLS solely to ''Users'' for ''Display Usage,'' [15] (ii) all such Users must be either Non-Professionals or Professionals whom the Distributor has no reason to believe are using NLS in their professional capacity, and (iii) the Distributor must restrict and track access to NLS using a username/password logon or comparable method of regulating access approved by Nasdaq.

Thus, a Per User model might be used by a BD to distribute NLS to customers through on-line brokerage accounts accessible after the customer logs in using a username and password. While many of the Recipients of data under such a model would be Non-Professionals, the model does not require a Distributor to limit distribution to Non-Professionals. Rather, the model would allow a Distributor to provide the data to Professionals, as long as it has no reason to believe that they are using the data in a professional capacity. Thus, for example, if a BD makes the data available to all of its on-line customers, it would not have any basis to believe that customers who happen to be Professionals would be using the data in a Professional capacity. By contrast, the Per User model would not allow a BD to distribute the data to a set of Users consisting solely of its own employees, since it would be reasonable to expect that the employees would use the data in connection with their employment. Similarly, if a Distributor provided the data through terminals generally made available to Professionals in their place of employment, or marketed the product to persons known to be Professionals, it would be unreasonable for the Distributor to believe that the data was not being used for professional purposes.

The proposed standard for the applicability of the Per User model is similar to, but less strict than, the standard adopted by Nasdaq with respect to the availability of an enterprise license for a BD to distribute Nasdaq Basic [16] to an unlimited number of Professionals and Non-Professionals who are natural persons and with whom it has a brokerage relationship.[17] With

[10] Nasdaq notes that BDs may provide NLS data to customers in circumstances where they are not required to provide a consolidated display by SEC Rule 603(c), 17 CFR 242.603(c). *See* Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 35569 [sic] –37570 (June 29, 2005) (File No. S7–10–04) (''Reg NMS Adopting Release'').

[11] *See, e.g.,* Joint Self-Regulatory Organization Plan Governing the Collection, Consolidation and Dissemination of Quotation and Transaction Information for Nasdaq-Listed Securities Traded on Exchanges on an Unlisted Trading Privileged Basis (''Nasdaq UTP Plan'') (available at *http://www.utpplan.com/utp_plan*); Rule 7023 (Nasdaq Depth-of-Book Data); Rule 7026 (Distribution Models); Rule 7047 (Nasdaq Basic).

[12] The term ''Non-Professional'' is currently defined at Rules 7023(a)(3)(A) and 7047(d)(3)(A). The definition of Non-Professional is well-established in the securities industry, and has been part of the Nasdaq rule book since at least 2002. *See* Securities Exchange Act Release No. 46521 (September 20, 2002), 67 FR 61179 at n.10 (September 27, 2002) (SR–NASD–2002–33). The Exchange proposes to maintain that definition, correcting the citation to the definition of investment adviser as defined in the Investment Advisers Act of 1940.

[13] Nasdaq is proposing to adopt these definitions as part of Rule 7039, but will propose to move them, along with similar definitions appearing elsewhere in the Exchange's rules, into a single definition rule in a subsequent filing. ''Professional Subscriber'' is currently defined at Rules 7023(a)(3)(B) and 7047(d)(3)(B). The definitions proposed to be included in Rule 7039 are substantively the same as definitions found in existing Exchange rules, with the clarification that either a natural person or an entity may be a Professional.

[14] Regardless of the fee structure selected, NLS Distributors pay a monthly Distributor fee, as provided in Rule 7039(c) (which is being redesignated, with certain modifications described below, as Rule 7039(d)). In addition, as provided in Rule 7035, all market data distributors pay a monthly administrative fee (formerly a higher annual fee) of $50 (for delayed distribution) or $100 (for real-time, or real-time and delayed distribution). The administrative fee is paid on a per distributor basis; thus, if a distributor is already paying the fee with respect to a product other than NLS, it would not incur an additional administrative fee if it also began to distribute NLS.

[15] ''User'' is being defined as ''a natural person who has access to Exchange Information.'' The term is not currently defined in Exchange rules so the definition will provide a convenient nomenclature for distinguishing natural persons with access to Exchange Information from other instances of access to Exchange Information. The term is currently used, but not defined, in Rule 7039, and the new definition is intended to be consistent with the manner in which the term is currently construed. The Exchange proposes introducing a definition here to prevent any potential confusion between a User (a natural person who has access to Exchange Information), a Recipient (a natural person or entity that has access to Exchange Information), and a Subscriber (a method of accessing Exchange Information). ''Display Usage'' is being defined as ''any method of accessing Exchange Information that involves the display of such data on a screen or other mechanism designed for access or use by a natural person or persons.'' This definition is consistent with current definitions of the term in, for example, Rule 7023 (Nasdaq Depth-of-Book Data). The effect of these definitions together is to limit the availability of this pricing model to visual access by natural persons, thus excluding access by automated processes such as trading algorithms.

[16] Nasdaq Basic (Rule 7047) comprises best bid and offer and last sale information from the Exchange and the FINRA/Nasdaq TRF.

[17] Securities Exchange Act Release No. 65526 (October 11, 2011), 76 FR 64137 (October 17, 2011)

Continued

respect to that license, a Professional may not use an instance of Nasdaq Basic obtained under the license in its professional capacity; moreover, the BD Distributor would be expected to enforce this limitation or jeopardize its eligibility for the reduced fee provided by the license. The proposed standard with respect to Nasdaq Last Sale is less stringent, because occasional incidental use by a Professional in connection with its professional activities would not affect the Distributor's eligibility for the Per User fee, as long as the Distributor, in establishing the connection to the Professional User, did not have reason to believe that professional usage would occur. Nasdaq believes that a different standard that might occasionally result in incidental Professional use is reasonable because NLS contains less information and does not provide pre-trade transparency, and is therefore likely to be of less consistent use to a Professional than Nasdaq Basic or other products that provide greater pre-trade information. Accordingly, Nasdaq proposes to adopt a more permissive standard that will impose lower administrative burdens on Distributors.

A Distributor selecting the Per User model is charged based on the number of Users with the potential to access NLS during a month. However, if the Distributor is able to track the number of Users that actually accessed NLS during a month, the Distributor will be charged based on the number of such Users. This latter provision represents a change from current methodology, and will provide an incentive for Distributors to implement systems to track actual data usage, since this will allow them to reduce the fees that they pay. Apart from this change, the fees applicable to this model are not being modified.

The ''Per Query'' model will be available if: (i) A Distributor distributes NLS solely to Users for Display Usage, and (ii) the Distributor tracks queries using a method approved by Nasdaq. Thus, in contrast to a Per User model, which makes all data available in a streaming or montage format, the Per Query model supplies only as much data as the User requests on an ad hoc basis. Because a Per Query model is unlikely to be of significant use to Professionals acting in a professional capacity, the model does not place limitations on the persons to whom it is offered (as long as they are natural persons viewing the data through Display Usage). The model also does not require the Distributor to limit access through any sort of entitlement system; thus, Per Query data may be made available through a publicly accessible website. However, if a Distributor selecting the Per Query model does restrict access using a username/password system, the Distributor may opt to be charged under the Per User model in a particular month if the applicable Per Query charges that month would exceed the applicable Per User charges.[18] The applicable fees for the per query model are not being changed.

Unrestricted distribution via the internet is being defined as a ''Per Device'' model, and is available to a Distributor that: (i) Distributes NLS for Display Usage in a manner that does not restrict access, and (ii) tracks the number of unique Devices that access NLS during each month using a method approved by Nasdaq.[19] Thus, this distribution method does not require the Distributor to distinguish among Non-Professionals or Professionals receiving the data, since the data is made freely available to internet users. The method would generally be used by internet news sites, but might also be used by a BD if it wished to place freely available content on its website. A Distributor using this method would be charged for each unique Device accessing the data, regardless of whether it is controlled by a Recipient.[20] Thus, for example, if a single person owned a laptop, a smartphone, and a tablet and used all three to access the data, the Distributor would be charged for each Device. This is the case because the Distributor would track usage based on the unique characteristics of the Device (including, but not limited to, IP address, host name, and cookie data), but would likely not have data that would allow it to associate the Devices with a single user.[21]

Rule 7039 currently uses the term ''Unique Visitors'' and requires the number of Unique Visitors to be validated by a Nasdaq-approved vendor, but does not define the term. The new term ''Device'' is intended to clarify that the fee is to be assessed based on the number of Devices that visit a site to get data, rather than the number of persons. While this term does not reflect a change from the manner in which the term ''unique visitor'' has been interpreted by the Exchange, Nasdaq believes that the change will make the application of the rule clearer. Moreover, the fees associated with particular levels of distribution under this model are not changing. Nasdaq is also replacing the requirement that the number be validated by a third party with a requirement that the Distributor's tracking method be approved by Nasdaq. This change reflects the fact that methods of tracking web traffic have become more developed since the time Rule 7039 was first adopted and therefore do not require third-party validation.

As is currently the case, the maximum fee that any Distributor would be required to pay for NLS under any combination of these distribution models would be $41,500. However, Nasdaq is proposing to eliminate the existing fee schedule for television distribution and is instead proposing that a Distributor that wishes to distribute Nasdaq Last Sale via television must pay the maximum fee and may then distribute Nasdaq Last Sale either solely via television or in

(SR–NASDAQ–2011–130) (adopting enterprise license for non-professional brokerage customers); Securities Exchange Act Release No. 72620 (July 16, 2014), 79 FR 42572 (July 22, 2014) (expanding enterprise license to include professional brokerage customers).

[18] This is not a change from the current rule, although Nasdaq is clarifying the language that describes this fee cap.

[19] As reflected in the definition adopted as part of this filing, the term ''Device'' has the same meaning as ''Subscriber.'' A Subscriber, in turn, is not a person, but rather means ''a device, computer terminal, automated service, or unique user identification and password combination that is not shared and prohibits simultaneous access, and which is capable of receiving Exchange Information; 'Interrogation Device', 'Device' or 'Access' have the same meaning as 'Subscriber'. For any device, computer terminal, automated service, or unique user identification and password combination that is shared or allows simultaneous access, Subscriber shall mean the number of such simultaneous accesses.'' The definitions of these terms are consistent with the definitions found in IM–7023–1 (U.S. Non-Display Information) and are intended to be construed in a similar manner, while specifying, in accordance with current interpretations, that the term covers the capability to receive Information as well as the actual receipt. Thus, a single Recipient with two devices constitutes two Subscribers.

[20] The term ''Recipient'' is defined to mean ''any natural person, proprietorship, corporation, partnership, or other entity whatever that has access to Exchange Information.'' This term, which is not currently defined in Exchange Rules, simply provides a convenient method for referring to both natural and legal persons that have access to Exchange Information, and is defined to prevent any confusion among the terms Subscriber (a technical term describing how Information is received from the Exchange), Recipient (a natural person or entity that receives Information), and, as discussed above, a User (a natural person who receives Information).

[21] The definition of Subscriber is also proposed to be used with respect to proposed Rule 7039(c), as described below, and Nasdaq expects to propose to apply the definition to other market data rules in the future. However, the portion of the definition pertaining to ''simultaneous accesses'' is not relevant to the ''Per Device'' model. Accordingly, Nasdaq is proposing to add language to Rule 7039(b)(3) to provide that a Distributor under the Per Device model will be charged based on the number of unique Devices without regard to the number of simultaneous accesses by a single Device.

combination with unlimited use of the Per User, Per Query, and/or Per Device model. This is the case because all current television Distributors also distribute NLS via the internet and pay the maximum fee. Thus, no current Distributors would be affected by the elimination of the specific television schedule. Moreover, in light of the confluence of television and internet content, and the extent to which television broadcasters use both media to reach their audience, Nasdaq believes that providing a license for multiple means of distribution in tandem is reasonable. Nasdaq further believes that the maximum fee of $41,500 per month is a reasonable charge to assess a Distributor that wishes to engage in unlimited distribution of the product through either television or television in combination with web-based media.

The current fee and distribution framework for NLS is not structured in a manner that contemplates distribution to a base of Professionals, such as might occur if a BD made the data available to its registered representatives through an employer-provided workstation or software application. For this reason, Nasdaq believes that it is appropriate to adopt a fee schedule that covers use cases that are not contemplated by the current fee schedule. Under the proposal, if a Distributor is not able to use any of the distribution models for the general investing public but still wishes to distribute NLS, it will be required to pay fees applicable to a model for ''specialized usage.'' In general, the model would require a Distributor to track either the number of Subscribers to which the data is made available or the number of queries made for the data, and would impose either a per Subscriber fee or a per query fee. The per Subscriber fee will be $13 for NLS for Nasdaq and $13 for NLS for NYSE/NYSE American or any Derived Data therefrom.[22] The per query fee will be $0.0025 for NLS for Nasdaq and $0.0015 for NLS for NYSE/NYSE American. The per query fees assessed to Subscribers will be capped on a monthly basis at the level of the monthly per Subscriber fee. Thus, a particular Subscriber would not be charged more than $13 for NLS for Nasdaq or $13 for NLS for NYSE/NYSE American, regardless of the number of queries submitted by it.

For Distributors under the specialized usage model that provides ''Display Usage,'' a net reporting option would be available to reduce the overall number of Subscribers for which a fee will be assessed.[23] Under the proposed netting rules:

- A Subscriber that receives access to NLS through multiple products controlled by an internal Distributor will be considered one Subscriber. Thus, if a BD acts as a Distributor of NLS in multiple forms through terminals provided to its employees, each terminal would be considered one Subscriber.
- A Subscriber that receives access to NLS through multiple products controlled by one external Distributor will be considered one Subscriber. Thus, if a BD arranges for its employees to receive access to multiple NLS products through a terminal provided by a single vendor on a terminal, each terminal would be considered one Subscriber.
- A Subscriber that receives access to NLS through one or more products controlled by an internal Distributor and also one or more products controlled by one external Distributor will be considered one Subscriber. Thus, if the BD provides employees with access through its own product(s) and through products from a single vendor on a terminal, each employee's terminal would still be considered one Subscriber.
- A Subscriber that receives access to NLS through one or more products controlled by an internal Distributor and also products controlled by multiple external Distributors will be treated as one Subscriber with respect to the products controlled by the internal Distributor and one of the external Distributors, and will be treated as an additional Subscriber for each additional external Distributor. Thus, a Subscriber receiving products through an internal Distributor and two external Distributors will be treated as two Subscribers. Put another way, access through an internal Distributor may be netted against access through one external Distributor, but netting may not occur beyond one external Distributor.

Distributors benefitting from net reporting must demonstrate adequate internal controls for identifying, monitoring, and reporting all usage. The burden will be on the Distributor to demonstrate that particular instances of netting are justified.

As an alternative to per Subscriber or per query fees, a Distributor that is a BD may purchase an enterprise license for internal Subscribers to receive NLS or Derived Data therefrom. The fee is $365,000 per month; provided, however, that if the BD obtains the license with respect to usage of NLS provided by an external Distributor that controls display of the product, the fee will be $365,000 per month for up to 16,000 internal Subscribers, plus $2 for each additional internal Subscriber over 16,000; and provided further that the BD must obtain a separate enterprise license for each external Distributor that controls display of the product if it wishes such external Distributor to be covered by an enterprise license rather than per-Subscriber fees. The enterprise license is in addition to the applicable Distributor Fee provided in Rule 7039(d).

Nasdaq Last Sale Plus

NLS Plus combines information available through NLS with information available through similar products—BX Last Sale and PSX Last Sale—offered by Nasdaq's affiliates, Nasdaq BX, Inc. (''BX'') and Nasdaq PHLX LLC (''Phlx''). Moreover, as provided in that Rule, NLS Plus may be received either by itself or in combination with Nasdaq Basic. The fees charged for NLS Plus, however, incorporate the underlying fees for the data elements combined through NLS Plus, together with an additional data consolidation fee of $350 per month. Thus, a Distributor receiving NLS Plus by itself would need to select a fee model under Rule 7039 to determine the applicable charges for the NLS component of NLS Plus (including the Distributor fee provided for by Rule 7039(d)). In addition, because a Distributor of NLS Plus is distributing each of the underlying components of NLS Plus, it also pays the administrative fees charged for distribution of Nasdaq, BX, and PSX data feeds.[24] On the other hand, a Distributor receiving NLS Plus with Nasdaq Basic would select a fee model for Nasdaq Basic and pay the fees (including Distributor fees) applicable to that product, as well as the NLS Plus data consolidation fee and applicable

[22] ''Derived Data'' is defined to mean ''any information generated in whole or in part from Exchange Information such that the information generated cannot be reverse engineered to recreate Exchange Information, or be used to create other data that is recognizable as a reasonable substitute for such Exchange Information.'' This definition is substantially the same as the definition currently found in Rule 7047 (Nasdaq Basic) and the differences in wording are intended merely to make the language clearer.

[23] Netting does not apply to uses other than Display Usage, but the same rules are used for Nasdaq Basic under Rule 7047.

[24] See Nasdaq Rule 7035; BX Rule 7035; and Phlx Pricing Schedule § VIII. All administrative fees are charged on a per Distributor, rather than a per product, basis. Currently, there are no user or Distributor fees applicable to BX Last Sale or PSX Last Sale. However, if BX or Phlx were to adopt user fees for these products in the future, the fees would also apply to persons receiving these products by means of NLS Plus.

administrative fees for each NLS Plus component.

Since the fees for NLS Plus sold without Nasdaq Basic incorporate the fees for NLS, the various pricing model options available under Rule 7039, including the new pricing for specialized usage, would also be incorporated into the pricing for NLS Plus. No change to rule language is needed to effectuate this, since the rule language already incorporates NLS fees. However, Nasdaq is proposing to amend the rule to reflect the recent change in the assessment period for administrative fees under Nasdaq Rule 7035, BX Rule 7035, and the Phlx Pricing Schedule from annual to monthly, and to use the new defined term ''Information.''

In addition, Nasdaq is amending the description of NLS contained in Rule 7039(a). As described therein, NLS contains real-time last sale information for trades executed on Nasdaq or reported to the FINRA/Nasdaq TRF for stocks listed on Nasdaq and on other markets. At the time of adoption of Rule 7039, however, it appears that the drafters of the rule used a reference to ''NYSE/Amex'' (subsequently amended to refer to ''NYSE/NYSE MKT'') as a short-hand term for stocks listed on venues other than Nasdaq, since NYSE and the American Stock Exchange were, together with Nasdaq, the primary listing venues at that time.[25] In fact, NLS has always disseminated transaction reports associated with all three national market system plan tapes—Tape A for NYSE, Tape C for Nasdaq, and Tape B for other exchanges, including the American Stock Exchange (later known as NYSE MKT and now as NYSE American). Thus, as new listing venues such as the BATS Exchange emerged, information for transactions in securities listed on those exchanges were also included. Accordingly, Nasdaq is clarifying the language of Rule 7039(a) to include ''transaction reports for NYSE-listed stocks and stocks listed on NYSE American and other Tape B listing venues.'' Nasdaq is also making additional housekeeping changes to the rule to: (i) Use the defined term ''Information'', (ii) streamline the wording of the rule's preamble, and (iii) clarify the language of certain pricing tiers to eliminate instances where the same number of Devices or queries is listed as part of two different pricing tiers.

Nasdaq is amending Rule 7039(d) (formerly 7039(c)) to provide that the monthly Distributor fee for a Distributor under subsection (c) (Distribution Models for Specialized Usage) providing external, or external and internal, distribution, is $2,000; in all other cases, the Distributor fee for NLS remains $1,500. However, Nasdaq is also adding language to provide that a Distributor of two or more products containing NLS data (*i.e.,* NLS, NLS Plus, or Nasdaq Basic) is required to pay a Distributor fee with respect to only one of the products. Thus, a Distributor of both NLS and Nasdaq Basic would not be required to pay both the fee provided for in Rule 7039 and the comparable fee provided for in Rule 7047; however, it would be required to pay the highest fee ($2,000 or $1,500) otherwise applicable to any of the products that it distributes. Finally, Nasdaq is making amendments to Rule 7047(b)(5) to: (i) Clarify that BDs distributing Nasdaq Basic thereunder also have the right to distribute Nasdaq Last Sale data to an unlimited number of Professionals and Non-Professionals who are natural persons and with whom the broker-dealer has a brokerage relationship (similar to the scope of Nasdaq Basic distribution), (ii) provide that such BDs would not be required to pay fees under Rule 7039(b) or (c); and (iii) provide that the elimination of duplicative Distributor fees provided under Rule 7039(d) would also apply under Rule 7047(b)(5), such that the BD would pay a Distributor fee with respect to only one product thereunder.

2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,[26] in general, and with Sections 6(b)(4) and (5) of the Act,[27] in particular, in that 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.

Rule 7039 and the fees established thereunder reflect Nasdaq's expectation, in creating NLS, that it would be used by market data Distributors (including retail BDs) to provide widespread distribution of last-sale information to individual investors by means of websites and television. The fee structure also reflects Nasdaq's assumption that BDs and others seeking proprietary data for Professional usage would purchase data with more content than NLS or NLS Plus, such as Nasdaq Basic or Nasdaq TotalView. Nevertheless, because there is a small amount of demand for use of NLS for purely Professional purposes, Nasdaq believes that it is appropriate to specifically define the circumstances to which the current fee schedule applies, while also establishing a set of fees for other circumstances [sic], including usage other than Display Usage and purely Professional use.

The statutory basis for Nasdaq's current fees for NLS has already been described in prior filings,[28] and Nasdaq is not modifying these long-established fees except to the extent discussed below. The overall structure for distribution of NLS contemplates widespread distribution of NLS data through the internet and television, and, in general, does not require a Distributor to categorize data Recipients as either Professionals or Non-Professionals. Thus, neither the fees nor the distribution parameters for ''Per Query'' usage are changing, although Nasdaq is adding language to specify that Per Query usage contemplates distribution to Users through Display Usage. The change is reasonable because it conforms to the natural parameters under which Per Query usage would occur: the submission of a request followed by a display of the response. In making the change, however, Nasdaq makes it clear that Per Query usage would not allow submission of automated requests to obtain data for use by an algorithm or other automated process. The change also makes is clear, however, that a Distributor using the Per Query model would not be required to ascertain the identity of Recipients; thus, the change makes it clear that Per Query usage may be made available to both Professionals and Non-Professionals. For this reason, the change is not unfairly discriminatory. Moreover, the change is equitable because it will not limit access by any current Distributors.

With respect to Per User fees (formerly username/password fees), Nasdaq is likewise proposing only minimal changes to state that the existing fee schedule requires distribution to ''Users'' (*i.e.,* natural persons) for Display Usage, and all such Users must be either Non-Professionals or Professionals whom the Distributor has no reason to believe are using NLS in their professional capacity. This change is reasonable because the level of fees associated with this use case is not changing. Moreover, the change is not inequitable because it will not limit access by any current Distributors paying under this model. Likewise, the change is not unfairly discriminatory

[25] Securities Exchange Act Release No. 57965 (June 16, 2008), 73 FR 35178 (June 20, 2008) (SR–NASDAQ–2006–060). *See also* Securities Exchange Act Release No. 68568 (January 3, 2013), 78 FR 1910 (January 9, 2013) (SR–NASDAQ–2012–145).

[26] 15 U.S.C. 78f.

[27] 15 U.S.C. 78f(b)(4) and (5).

[28] *See supra* nn. 6, 7, and 9 [sic].

because it does not require a Distributor to conduct an exhaustive and costly inquiry into the nature of each of its Users, nor does it prevent distribution to Professionals, as long as the Distributor has no reason to believe that Professionals are using NLS in their professional capacity. Similarly, the change to allow a Distributor to track actual usage by a particular User and pay only if actual usage occurs during the month (as opposed to paying for all potential Users) is reasonable because it creates an incentive for a Distributor to reduce its fees by more carefully monitoring usage by its customers. The change is equitable and not unfairly discriminatory because Nasdaq believes that all Distributors are capable of implementing the change with minimal difficulty.

The changes to the ''Per Device'' (formerly, unique visitor) use case are reasonable because they allow a Distributor to track usage based on readily available means of tracking unique Devices. Because Distributors have already adopted this methodology, the change in rule language makes it clear that this is the appropriate method to measure usage and that verification by a third-party is not required. Accordingly, the change imposes no additional administrative burdens on Distributors. The change is equitable and not unfairly discriminatory because all Distributors adopting this use case may readily use this methodology.

The elimination of a specific model for television distribution, in favor of a model under which a Distributor engaging in television distribution pays the maximum NLS fee of $41,500 per month and may then distribute Nasdaq Last Sale via television to an unlimited number of households, either solely via television or in combination with unlimited use of the Per User, Per Query, and/or Per Device model, is reasonable because the fee allows the Distributor to engage in unlimited distribution of NLS via either television alone or television in combination with another distribution model for the general investing public, without the need to monitor usage or track the identity of Recipients. Moreover, the change is equitable and not unfairly discriminatory because all current television Distributors already pay this maximum fee. Accordingly, the change will have no impact on any current Distributors. Moreover, it is unlikely that under the current fee schedule for television, distribution by a particular broadcaster would occur at a level that would allow it to pay less than the maximum fee. As a result, the per viewer cost of television distribution is, and will continue to be, extremely small when expressed as the ratio between $41,500 and the total number of viewers.

The introduction of a fee schedule for other use cases, including targeted use by Professionals and usage other than Display Usage, is not unfairly discriminatory because it is consistent with the fee schedules for numerous other data products that impose higher fees on Professionals in recognition of their more intensive usage of data feeds and the greater value they derive from such usage. Moreover, the proposed new fee schedule is consistent with an equitable allocation of fees because it recognizes the administrative costs and burdens associated with tracking Professional usage of the product, especially given the low demand for exclusively Professional use. Finally, the change is reasonable because the fees are geared to the actual level of usage, with options for either per Subscriber or per query fees. Moreover, Nasdaq is offering alternative pricing features that may allow some Distributors to reduce their level of fees, including a method for netting Subscribers and an enterprise license to allow unlimited usage by broker-dealer employees.

Nasdaq further believes that the proposed change regarding a higher monthly Distributor fee for external distribution for use by Professionals and usage other than Display Usage (*i.e.,* specialized usage) is not unreasonable because a higher fee for external, as opposed to solely internal, distribution is based on the observation that external distributors typically charge fees for external distribution, while internal distributors usually do not. As such, external distributors have the opportunity to derive greater value from such distribution, and that greater value is reflected in higher external distribution fees. The differential between external and internal distribution fees is well- recognized in the financial services industry as a reasonable distinction, and has been repeatedly accepted by the Commission as an equitable allocation of reasonable dues, fees and other charges.[29] The Act does not prohibit all distinctions among customers, but rather discrimination that is unfair. As the Commission has recognized, ''[i]f competitive forces are operative, the self-interest of the exchanges themselves will work powerfully to constrain unreasonable or unfair behavior.'' [30] Accordingly, ''the existence of significant competition provides a substantial basis for finding that the terms of an exchange's fee proposal are equitable, fair, reasonable, and not unreasonably or unfairly discriminatory.'' [31] The further change with regard to monthly Distributor fees is reasonable, equitable, and not unfairly discriminatory because it addresses a use case in which a Distributor is receiving two or three products that contain last sale information—NLS, NLS Plus and/or Nasdaq Basic—and will specify that the Distributor is not required to pay a duplicative Distributor fee in that circumstance.

In adopting Regulation NMS, the Commission granted self-regulatory organizations (''SROs'') and BDs increased authority and flexibility to offer new and unique market data to the public. It was believed that this authority would expand the amount of data available to consumers, and also spur innovation and competition for the provision of market data. The Commission concluded that Regulation NMS—by deregulating the market in proprietary data—would itself further the Act's goals of facilitating efficiency and competition:

> [E]fficiency is promoted when broker-dealers who do not need the data beyond the prices, sizes, market center identifications of the NBBO and consolidated last sale information are not required to receive (and pay for) such data. The Commission also believes that efficiency is promoted when broker-dealers may choose to receive (and pay for) additional market data based on their own internal analysis of the need for such data.[32]

The Commission was speaking to the question of whether BDs should be subject to a regulatory requirement to purchase data, such as depth-of-book data, that is *in excess of* the data provided through the consolidated tape feeds, and the Commission concluded that the choice should be left to them. Accordingly, Regulation NMS removed unnecessary regulatory restrictions on the ability of exchanges to sell their own data, thereby advancing the goals of the Act and the principles reflected in its legislative history. If the free market should determine whether proprietary data is sold to BDs at all, it follows that

[29] *See, e.g.,* Rules 7019 (Market Data Distributor Fees); 7022(c) (Short Interest Report); 7023(c) (Enterprise License Fees for Depth-of-Book Data); 7047(c) (Nasdaq Basic); and 7052(c) (Distributor Fees for Nasdaq Daily Short Volume and Monthly Short Sale Transaction Files).

[30] *See* Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770 (December 9, 2008) (SR–NYSEArca–2006–21).

[31] *Id.*

[32] *See* Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496 (June 29, 2005) (''Regulation NMS Adopting Release'').

the price at which such data is sold should be set by the market as well.

Products such as NLS provide additional choices to BDs and other data consumers, in that they provide *less than* the quantum of data provided through the consolidated tape feeds but at a lower price. Thus, they provide BDs and others with an option to use a lesser amount of data in circumstances where SEC Rule 603(c) does not require a BD to provide a consolidated display.[33] They are all, however, voluntary products for which market participants can readily substitute the consolidated data feeds. Accordingly, Nasdaq is constrained from pricing the product in a manner that would be inequitable or unfairly discriminatory. Moreover, the fees for these products, like all proprietary data fees, are constrained by the Exchange's need to compete for order flow.

Nasdaq believes that the defined terms being adopted in this proposed rule change are consistent with the provisions of Section 6 of the Act,[34] in general, and with Section 6(b)(5) of the Act,[35] in particular, in that they are designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general to protect investors and the public interest. Specifically, the defined terms are designed to promote the clear and consistent interpretation of Rule 7039, and are intended to serve as the model for a future filing that will propose consistent terminology throughout the rules governing the Exchange's Information products. As detailed above, the terms ''Derived Data'', ''Display Usage'', ''Distributor'', ''Non-Professional'', ''Professional'', ''Subscriber'', and ''Device'' are either substantively identical to, or are intended to be construed in a manner consistent with, terms already existing in the Exchange's rules, but are intended to be drafted in a clearer manner. Similarly, the terms ''Information'', ''Recipient'', and ''User'' are new, but are designed to provide convenient means of referring to concepts relevant to the application of Rule 7039 that are currently covered by undefined terms.

Finally, the Exchange notes that the housekeeping changes made by this filing—clarifying the scope of Tape B data included in NLS and the monthly nature of the administrative fee—are non-substantive in nature and do not affect the equitable allocation of reasonable dues, fees, and other charges. Rather, these changes will make affected rules clearer, more succinct, and easier to use. Accordingly, the Exchange believes that these changes are consistent with Section 6(b)(5) of the Act,[36] in that they are designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. The proposed fee structure is designed to ensure a fair and reasonable use of Exchange resources by allowing the Exchange to recoup costs while continuing to offer its data products at competitive rates to firms. In particular, the proposal with respect to existing fees and associated standards for Per User, Per Query, and Per Device fee models, as well as the fee for television distribution, are designed to promote wide distribution to investors by placing less emphasis on the distinction between Professionals and Non-Professionals than is the case with respect to other data products. Nasdaq believes that this approach will promote competition by reducing administrative burdens on Distributors. The addition of a fee schedule for targeted Professional or Non-Display usage will not place a burden on competition because Nasdaq believes that the demand for such usage is limited, but adopting the applicable fee schedule will ensure that the product is available in cases where such demand exists.[37] The other proposed changes are designed to keep industry professionals and investors better informed about NLS and NLS Plus and associated fees through changes that will provide greater clarity and precision in affected rules. These changes include the adoption of definitions that are not intended to vary substantively from definitions and concepts already reflected in Exchange rules, but are intended to promote the reader's understanding of the principles used to construe these rules.

The market for data products is extremely competitive and firms may freely choose alternative venues and data vendors based on the aggregate fees assessed, the data offered, and the value provided. This rule proposal does not burden competition, since other SROs and data vendors continue to offer alternative data products and, like the Exchange, set fees, but rather reflects the competition between data feed vendors and will further enhance such competition. NLS competes directly with existing similar products and potential products of market data vendors. The product is part of the existing market for proprietary last sale data products that is currently competitive and inherently contestable because there is fierce competition for the inputs necessary to the creation of proprietary data and strict pricing discipline for the proprietary products themselves. Numerous exchanges compete with each other for listings, trades, and market data itself, providing virtually limitless opportunities for entrepreneurs who wish to produce and distribute their own market data. This proprietary data is produced by each individual exchange, as well as other entities, in a vigorously competitive market. Similarly, with respect to the FINRA/Nasdaq TRF data that is a component of the product, allowing exchanges to operate TRFs has permitted them to earn revenues by providing technology and data in support of the non-exchange segment of the market. This revenue opportunity has also resulted in fierce competition between the two current TRF operators, with both TRFs charging extremely low trade reporting fees and rebating the majority of the revenues they receive from core market data to the parties reporting trades.

Transaction execution and proprietary data products are complementary in that market data is both an input and a byproduct of the execution service. In fact, market data and trade execution are a paradigmatic example of joint products with joint costs. The decision whether and on which platform to post an order will depend on the attributes of the platform where the order can be posted, including the execution fees, data quality and price, and distribution of its data products. Without trade executions, exchange data products cannot exist. Moreover, data products are valuable to many end users only insofar as they provide information that

[33] 17 CFR 242.603(c).

[34] 15 U.S.C. 78f.

[35] 15 U.S.C. 78f(b)(5).

[36] 15 U.S.C. 78f(b)(5).

[37] Similarly, the external Distributor fee applicable to usage under that model will not impose any burden on competition because external Distributors typically charge fees for external distribution, and thereby usually derive greater value from such distribution than internal Distributors, which typically do not charge fees, and that greater value supports higher external distribution fees. The distinction between external and internal distribution fees is common in the financial services industry, and has been applied to other products without any anti-competitive effect.

end users expect will assist them or their customers in making trading decisions.

The costs of producing market data include not only the costs of the data distribution infrastructure, but also the costs of designing, maintaining, and operating the exchange's transaction execution platform and the cost of regulating the exchange to ensure its fair operation and maintain investor confidence. The total return that a trading platform earns reflects the revenues it receives from both products and the joint costs it incurs.

Moreover, the operation of the exchange is characterized by high fixed costs and low marginal costs. This cost structure is common in content and content distribution industries such as software, where developing new software typically requires a large initial investment (and continuing large investments to upgrade the software), but once the software is developed, the incremental cost of providing that software to an additional user is typically small, or even zero (*e.g.,* if the software can be downloaded over the internet after being purchased).[38]

In Nasdaq's case, it is costly to build and maintain a trading platform, but the incremental cost of trading each additional share on an existing platform, or distributing an additional instance of data, is very low. Market information and executions are each produced jointly (in the sense that the activities of trading and placing orders are the source of the information that is distributed) and are each subject to significant scale economies. In such cases, marginal cost pricing is not feasible because if all sales were priced at the margin, Nasdaq would be unable to defray its platform costs of providing the joint products. Similarly, data products cannot make use of TRF trade reports without the raw material of the trade reports themselves, and therefore necessitate the costs of operating, regulating,[39] and maintaining a trade reporting system, costs that must be covered through the fees charged for use of the facility and sales of associated data.

An exchange's BD customers view the costs of transaction executions and of data as a unified cost of doing business with the exchange. A BD will disfavor a particular exchange if the expected revenues from executing trades on the exchange do not exceed net transaction execution costs and the cost of data that the BD chooses to buy to support its trading decisions (or those of its customers). The choice of data products is, in turn, a product of the value of the products in making profitable trading decisions. If the cost of the product exceeds its expected value, the BD will choose not to buy it. Moreover, as a BD chooses to direct fewer orders to a particular exchange, the value of the product to that BD decreases, for two reasons. First, the product will contain less information, because executions of the BD's trading activity will not be reflected in it. Second, and perhaps more important, the product will be less valuable to that BD because it does not provide information about the venue to which it is directing its orders. Data from the competing venue to which the BD is directing more orders will become correspondingly more valuable.

Similarly, in the case of products such as NLS that may be distributed through market data vendors, the vendors provide price discipline for proprietary data products because they control the primary means of access to end users. Vendors impose price restraints based upon their business models. For example, vendors such as Bloomberg and Reuters that assess a surcharge on data they sell may refuse to offer proprietary products that end users will not purchase in sufficient numbers. Internet portals, such as Google, impose a discipline by providing only data that will enable them to attract ''eyeballs'' that contribute to their advertising revenue. Retail BDs, such as Schwab and Fidelity, offer their retail customers proprietary data only if it promotes trading and generates sufficient commission revenue. Although the business models may differ, these vendors' pricing discipline is the same: they can simply refuse to purchase any proprietary data product that fails to provide sufficient value. Exchanges, TRFs, and other producers of proprietary data products must understand and respond to these varying business models and pricing disciplines in order to market proprietary data products successfully. Moreover, Nasdaq believes that products such as NLS can enhance order flow to Nasdaq by providing more widespread distribution of information about transactions in real time, thereby encouraging wider participation in the market by investors with access to the internet or television. Conversely, the value of such products to Distributors and investors decreases if order flow falls, because the products contain less content.

Competition among trading platforms can be expected to constrain the aggregate return each platform earns from the sale of its joint products, but different platforms may choose from a range of possible, and equally reasonable, pricing strategies as the means of recovering total costs. Nasdaq pays rebates to attract orders, charges relatively low prices for market information and charges relatively high prices for accessing posted liquidity. Other platforms may choose a strategy of paying lower liquidity rebates to attract orders, setting relatively low prices for accessing posted liquidity, and setting relatively high prices for market information. Still others may provide most data free of charge and rely exclusively on transaction fees to recover their costs. Finally, some platforms may incentivize use by providing opportunities for equity ownership, which may allow them to charge lower direct fees for executions and data.

In this environment, there is no economic basis for regulating maximum prices for one of the joint products in an industry in which suppliers face competitive constraints with regard to the joint offering. Such regulation is unnecessary because an ''excessive'' price for one of the joint products will ultimately have to be reflected in lower prices for other products sold by the firm, or otherwise the firm will experience a loss in the volume of its sales that will be adverse to its overall profitability. In other words, an increase in the price of data will ultimately have to be accompanied by a decrease in the cost of executions, or the volume of both data and executions will fall.[40]

[38] *See* William J. Baumol and Daniel G. Swanson, ''The New Economy and Ubiquitous Competitive Price Discrimination: Identifying Defensible Criteria of Market Power,'' Antitrust Law Journal, Vol. 70, No. 3 (2003).

[39] It should be noted that the costs of operating the FINRA/Nasdaq TRF borne by Nasdaq include regulatory charges paid by Nasdaq to FINRA.

[40] Moreover, the level of competition and contestability in the market is evident in the numerous alternative venues that compete for order flow, including SRO markets, internalizing BDs and various forms of alternative trading systems (''ATSs''), including dark pools and electronic communication networks (''ECNs''). Each SRO market competes to produce transaction reports via trade executions, and two FINRA-regulated TRFs compete to attract internalized transaction reports. It is common for BDs to further and exploit this competition by sending their order flow and transaction reports to multiple markets, rather than providing them all to a single market. Competitive markets for order flow, executions, and transaction reports provide pricing discipline for the inputs of proprietary data products. The large number of SROs, TRFs, BDs, and ATSs that currently produce proprietary data or are currently capable of producing it provides further pricing discipline for proprietary data products. Each SRO, TRF, ATS, and BD is currently permitted to produce proprietary data products, and many currently do or have announced plans to do so, including Nasdaq, NYSE, NYSE American, NYSE Arca, IEX, and BATS/Direct Edge.

The proposed fee structure is designed to ensure a fair and reasonable use of Exchange resources by allowing the Exchange to recoup costs while continuing to offer its data products at competitive rates to firms.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A)(iii) of the Act [41] and subparagraph (f)(6) of Rule 19b–4 thereunder.[42]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is: (i) Necessary or appropriate in the public interest; (ii) for the protection of investors; or (iii) otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NASDAQ–2018–010 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–NASDAQ–2018–010. 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 website (*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 website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NASDAQ–2018–010 and should be submitted on or before March 15, 2018.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[43]

Eduardo A. Aleman,

Assistant Secretary.

[FR Doc. 2018–03568 Filed 2–21–18; 8:45 am]

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[41] 15 U.S.C. 78s(b)(3)(A)(iii).

[42] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file 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.

[43] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–82720; File No. SR–PEARL–2018–03]

Self-Regulatory Organizations; MIAX PEARL, LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Expand the Short Term Option Series Program

February 15, 2018.

Pursuant to the provisions of Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 19b–4 thereunder,[2] notice is hereby given that on February 12, 2018, MIAX PEARL, LLC (''MIAX PEARL'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') a proposed rule change '') a proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is filing a proposal to expand the Short Term Option Series Program to allow Monday expirations for options listed pursuant to the Short Term Option Series Program, including options on the SPDR S&P 500 ETF Trust (''SPY'').

The text of the proposed rule change is available on the Exchange's website at *http://www.miaxoptions.com/rule-filings/pearl* at MIAX PEARL's principal office, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend MIAX PEARL Rule 100, Definitions, and Rule 404, Series of Option Contracts Open for Trading, Interpretations and Policies .02, to expand the Short Term Option Series Program (''Program'') to permit the listing and trading of options series with Monday expirations that are listed pursuant to the Program, including options on SPY. The Exchange is also proposing to make a number of non-substantive, organizational changes to MIAX PEARL Rule 100 and Rule 404, Interpretations and Policies .02, for purposes of clarification and uniformity.

Presently, MIAX PEARL Rule 100 defines a Short Term Options Series as ''a series in an option class that is approved for listing and trading on the Exchange in which the series is opened for trading pursuant to the Short Term Option Series Program provision of Rule 404, Interpretations and Policies .02.'' MIAX PEARL Rule 404, Interpretations and Policies .02, provides that a Short Term Option Series is a series in an option class that is approved for listing and trading on the Exchange in which the series is opened for trading on any Tuesday, Wednesday, Thursday or Friday that is a business day and that expires on the Wednesday or Friday of the next business week.[3] The Exchange is proposing to consolidate the rule text from Rule 404, Interpretations and Policies .02, with and into MIAX PEARL Rule 100. The Exchange notes that this rule text consolidation will not result in any substantive changes, but is purely for clarification and uniformity. Additionally, the Exchange is proposing to amend the definition in MIAX PEARL Rule 100, to permit the listing of options series that expire on Mondays, in connection with its proposal to expand the Program to permit the listing and trading of options series with Monday expirations that are listed pursuant to the Program.

The Exchange notes that this proposed rule changed is substantially similar to the proposal by Nasdaq PHLX LLC (''Phlx'') which was recently approved by the Commission.[4]

Specifically, the Exchange is proposing that it may open for trading series of options on any Monday that is a business day and that expires on the Monday of the next business week. The Exchange is also proposing to list Monday expiration series on Fridays that precede the expiration Monday by one business week plus one business day. Since MIAX PEARL Rule 404, Interpretations and Policies .02, already provides for the listing of short term option series on Fridays, the Exchange is not modifying this provision in MIAX PEARL Rule 100, to allow for Friday listing of Monday expiration series. However, the Exchange is amending MIAX PEARL Rule 100 to clarify that, in the case of a series that is listed on a Friday and expires on a Monday, that series must be listed one business week and one business day prior to that expiration (*i.e.,* two Fridays prior to expiration).

As part of this proposal, the Exchange is also proposing to amend MIAX PEARL Rule 100 to address the expiration of Monday expiration series when the Monday is not a business day. In that case, the Rule will provide that the series shall expire on the first business day immediately following that Monday. This procedure differs from the expiration date of Wednesday expiration series that are scheduled to expire on a holiday. In that case, the Wednesday expiration series shall expire on the first business day immediately prior to that Wednesday, *e.g.,* Tuesday of that week.[5] However, the Exchange believes that it is preferable to require Monday expiration series in this scenario to expire on the Tuesday of that week rather than the previous business day, *e.g.,* the previous Friday, since the Tuesday is closer in time to the scheduled expiration date of the series than the previous Friday, and therefore may be more representative of anticipated market conditions. The Exchange also notes that Cboe Exchange, Inc. (''Cboe'') uses the same procedure for options on the S&P 500 index (''SPX'') with Monday expirations that are listed pursuant to its Nonstandard Expirations Pilot Program and that are scheduled to expire on a holiday.[6]

The Exchange also proposes to make corresponding changes to MIAX PEARL Rule 404, Interpretations and Policies .02, which sets forth the requirements for SPY options that are listed pursuant to the Short Term Options Series Program, to permit Monday SPY expirations (''Monday SPY Expirations''). Accordingly, the Exchange proposes to amend Interpretations and Policies .02 to Rule 404, to state that, with respect to Monday SPY Expirations, the Exchange may open for trading on any Friday or Monday that is a business day, series of options on SPY to expire on any Monday of the month that is a business day and is not a Monday in which Quarterly Options Series expire, provided that Monday SPY Expirations that are listed on a Friday must be listed at least one business week and one business day prior to the expiration. As with the current rules for Wednesday SPY Expirations, the Exchange will also amend Interpretations and Policies .02 to state that it may list up to five consecutive Monday SPY Expirations at one time, and may have no more than a total of five Monday SPY Expirations (in addition to the maximum of five Short Term Option Series expirations for SPY expiring on Friday and five Wednesday SPY Expirations). The Exchange will also clarify that, as with Wednesday SPY Expirations, Monday SPY Expirations will be subject to the provisions of this Rule.

The interval between strike prices for the proposed Monday SPY Expirations will be the same as those for the current Short Term Option Series for Wednesday and Friday SPY Expirations. Specifically, the Monday SPY Expirations will have a $0.50 strike interval minimum. As is the case with other options series listed pursuant to the Short Term Option Series, the Monday SPY Expiration series will be P.M.-settled.

Currently, for each option class eligible for participation in the Program, the Exchange is limited to opening thirty (30) series for each expiration date for the specific class. The thirty (30) series restriction does not include series that are open by other securities exchanges under their respective short term option rules; the Exchange may list these additional series that are listed by other exchanges.[7] This thirty (30) series restriction shall apply to Monday SPY Expiration series as well. In addition, the Exchange will be able to list series that are listed by other exchanges, assuming they file similar rules with the Commission to list SPY options expiring on Mondays.

Finally, the Exchange is amending Interpretations and Policies .02(b) to

[3] *See* Exchange Rule 404, Interpretations and Policies .02.

[4] *See* Securities Exchange Release No. 82611 (February 1, 2018), 83 FR 5473 (February 7, 2018) (SR–Phlx–2017–103) (Order approving proposed rule change).

[5] *See id.*

[6] *See* Cboe Rule 24.9(e)(1) (''If the Exchange is not open for business on a respective Monday, the normally Monday expiring Weekly Expirations will expire on the following business day. If the Exchange is not open for business on a respective Wednesday or Friday, the normally Wednesday or Friday expiring Weekly Expirations will expire on the previous business day.'')

[7] *See* Exchange Rule 404, Interpretations and Policies .02(a).

Rule 404, which addresses the listing of Short Term Options Series that expire in the same week as monthly or quarterly options series. Currently, that rule states that no Short Term Option Series may expire in the same week in which monthly option series on the same class expire (with the exception of Wednesday SPY Expirations) or, in the case of Quarterly Options Series, on an expiration that coincides with an expiration of Quarterly Option Series on the same class. As with Wednesday SPY Expirations, the Exchange is proposing to permit Monday SPY Expirations to expire in the same week as monthly options series on the same class. The Exchange believes that it is reasonable to extend this exemption to Monday SPY Expirations because Monday SPY Expirations and standard monthly options will not expire on the same trading day, as standard monthly options expire on Fridays. Additionally, the Exchange believes that not listing Monday SPY Expirations for one week every month because there was a monthly SPY expiration on the Friday of that week would create investor confusion.

Relatedly, the Exchange is also amending Interpretations and Policies .02(b) to Rule 404 to clarify that Monday and Wednesday SPY Expirations may expire in the same week as monthly option series in the same class expire, but that no Short Term Option Series may expire on the same day as an expiration of Quarterly Option Series on the same class. This change will make that provision more consistent with the existing language in Interpretations and Policies .02 to Rule 404, which prohibits Wednesday SPY Expirations from expiring on a Wednesday in which Quarterly Options Series expire.

The Exchange does not believe that any market disruptions will be encountered with the introduction of P.M.-settled Monday expirations. The Exchange has the necessary capacity and surveillance programs in place to support and properly monitor trading in the proposed Monday expiration series, including Monday SPY Expirations. The Exchange currently trades P.M.-settled Short Term Option Series that expire almost every Wednesday and Friday, which provide market participants a tool to hedge special events and to reduce the premium cost of buying protection. The Exchange notes that it has been listing Wednesday expirations pursuant to MIAX PEARL Rule 100 and Rule 404 since 2017.[8] With the exception of Monday expiration series that are scheduled to expire on a holiday, the Exchange does not believe that there are any material differences between Monday expirations and Wednesday or Friday expirations for Short Term Option Series.

The Exchange seeks to introduce Monday expirations to, among other things, expand hedging tools available to market participants and to continue the reduction of the premium cost of buying protection. The Exchange believes that Monday expirations, similar to Wednesday and Friday expirations, will allow market participants to purchase an option based on their timing as needed and allow them to tailor their investment and hedging needs more effectively.

As noted above, Phlx recently received approval to list Monday expirations for SPY options pursuant to its Short Term Options program. In addition, other exchanges currently permit Monday expirations for other options. For example, Cboe lists options on the SPX with a Monday expiration as part of its Nonstandard Expirations Pilot Program.[9]

The Exchange notes that this filing is substantially similar to a companion MIAX Options filing, expanding the Short Term Option Series Program to allow Monday expirations for options listed pursuant to the Program, including options on SPY.

2. Statutory Basis

MIAX PEARL believes that its proposed rule change is consistent with Section 6(b) of the Act[10] in general, and furthers the objectives of Section 6(b)(5) of the Act[11] in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, to remove impediments to and perfect the mechanisms of a free and open market and a national market system and, in general, to protect investors and the public interest.

In particular, the Exchange believes the Short Term Option Series Program has been successful to date and that Monday expirations, including Monday SPY Expirations, simply expand the ability of investors to hedge risk against market movements stemming from economic releases or market events that occur throughout the month in the same way that the Short Term Option Series Program has expanded the landscape of hedging. Similarly, the Exchange believes Monday expirations, including Monday SPY Expirations, should create greater trading and hedging opportunities and flexibility, and will provide customers with the ability to tailor their investment objectives more effectively. While other exchanges do not currently list Monday SPY Expirations, the Exchange notes that Cboe currently permits Monday expirations for other options with a weekly expiration, such as options on the SPX.[12] Additionally, Nasdaq PHLX LLC (''Phlx'') has recently received approval from the Commission to list Monday SPY Expirations for SPY options pursuant to its Short Term Options program.[13]

With the exception of Monday expiration series that are scheduled to expire on a holiday, the Exchange does not believe that there are any material differences between Monday expirations, including Monday SPY Expirations, and Wednesday or Friday expirations, including Wednesday and Friday SPY Expirations, for Short Term Option Series. The Exchange notes that it has been listing Wednesday expiration pursuant to MIAX PEARL Rule 100 and Rule 404 since 2017.[14] The Exchange believes that it is consistent with the Act to treat Monday expiration series that expire on a holiday differently than Wednesday or Friday expiration series, since the proposed treatment for Monday expiration series will result in an expiration date that is closer in time to the scheduled expiration date of the series, and therefore may be more representative of anticipated market conditions. The Exchange also notes that Cboe uses the same procedure for SPX options with Monday expirations that are listed pursuant to its Nonstandard Expirations Pilot Program and that are scheduled to expire on a holiday.

Given the similarities between Monday SPY Expiration series and Wednesday and Friday SPY Expiration series, the Exchange believes that applying the provisions in Interpretations and Policies .02 to Rule 404 that currently apply to Wednesday SPY Expirations, to Monday SPY Expirations, is justified. For example, the Exchange believes that allowing

[8] *See* Securities Exchange Act Release No. 79947 (February 2, 2017), 82 FR 9865 (February 8, 2017) (SR–PEARL–2017–03).

[9] *See* Cboe Rule 24.9(e)(1) (''The Exchange may open for trading Weekly Expirations on any broad-based index eligible for standard options trading to expire on any Monday, Wednesday, or Friday (other than the third Friday-of-the-month or days that coincide with an EOM expiration.'').

[10] 15 U.S.C. 78f(b).

[11] 15 U.S.C. 78f(b)(5).

[12] *See supra* note 9.

[13] *See supra* note 4.

[14] *See supra* note 8.

Monday SPY Expirations and monthly SPY expirations in the same week will benefit investors and minimize investor confusion by providing Monday SPY Expirations in a continuous and uniform manner. The Exchange also believes that it is appropriate to amend Interpretations and Policies .02(b) to Rule 404 to clarify that no Short Term Option Series may expire on the same day as an expiration of Quarterly Option Series on the same class. This change will make that provision more consistent with the existing language in Interpretations and Policies .02 to Rule 404 that prohibit Wednesday SPY Expirations from expiring on a Wednesday in which Quarterly Options Series expire.

Finally, the Exchange represents that it has an adequate surveillance program in place to detect manipulative trading in Monday expirations, including Monday SPY Expirations, in the same way that it monitors trading in the current Short Term Option Series. The Exchange also represents that it has the necessary systems capacity to support the new options series.

The Exchange believes the proposed rule text organizational changes promote just and equitable principles of trade and remove impediments to and perfect the mechanism of a free and open market and a national market system because the proposed rule text organizational change conforms its rules to the rules of other exchanges. As such, the proposed amendments would foster cooperation and coordination with persons engaged in facilitating transactions in securities and would remove impediments to and perfect the mechanism of a free and open market and a national exchange system. In particular, the Exchange believes that the proposed changes will provide greater clarity to Members and the public regarding the Exchange's Rules. It is in the public interest for rules to be accurate and concise so as to eliminate the potential for confusion.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange notes that having Monday expirations is not a novel proposal, as Cboe currently lists and trades short-term SPX options with a Monday expiration, and Phlx has recently received approval from the Commission to list Monday SPY expirations. The Exchange does not believe the proposal will impose any burden on intra-market competition, as all market participants will be treated in the same manner under this proposal. Additionally, the Exchange does not believe the proposal will impose any burden on inter-market competition, as nothing prevents the other options exchanges from proposing similar rules to list and trade short-term options series with Monday expirations.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act [15] and Rule 19b–4(f)(6) thereunder.[16]

A proposed rule change filed under Rule 19b–4(f)(6) normally does not become operative for 30 days from the date of filing. However, Rule 19b–4(f)(6)(iii) [17] permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposal may become operative immediately upon filing. The Commission notes that it recently approved Phlx's substantially similar proposal to list and trade Monday SPY Expirations.[18] The Exchange has stated that waiver of the operative delay will allow the Exchange to list and trade Monday SPY Expirations as soon as possible, and therefore, promote competition among the option exchanges.[19] For these reasons, the Commission believes that the proposed rule change presents no novel issues and that waiver of the 30-day operative delay is consistent with the protection of investors and the public interest, and will allow the Exchange to remain competitive with other exchanges. Therefore, the Commission hereby waives the 30-day operative delay and designates the proposal effective upon filing.[20]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form *(http://www.sec.gov/rules/sro.shtml)*; or
- Send an email *to rule-comments@sec.gov*. Please include File Number SR–PEARL–2018–03 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–PEARL–2018–03. 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 website (*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

[15] 15 U.S.C. 78s(b)(3)(A).

[16] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intention to file 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.

[17] 17 CFR 240.19b–4(f)(6)(iii).

[18] *See supra* note 4.

[19] The Exchange also proposes a number of non-substantive changes to its rulebook. The Exchange stated these changes will help to provide clarity and therefore are in the public interest.

[20] For purposes only of waiving the 30-day operative delay, the Commission has also considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–PEARL–2018–03 and should be submitted on or before March 15, 2018.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[21]

Eduardo A. Aleman,

Assistant Secretary.

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[21] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–82721; File No. SR–PEARL–2018–01]

Self-Regulatory Organizations; MIAX PEARL LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Rule 517A, Aggregate Risk Manager for EEMs (''ARM–E''), and Rule 517B, Aggregate Risk Manager for Market Makers (''ARM–M'')

February 15, 2018.

Pursuant to the provisions of Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on February 6, 2018, MIAX PEARL, LLC (''MIAX PEARL'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') a proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is filing a proposal to amend Exchange Rule 517A, Aggregate Risk Manager for EEMs (''ARM–E''), and Rule 517B, Aggregate Risk Manager for Market Makers (''ARM–M'').

The text of the proposed rule change is available on the Exchange's website at *http://www.miaxoptions.com/rule-filings/pearl* at MIAX PEARL's principal office, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend Rule 517A, Aggregate Risk Manager for EEMs (''ARM–E''), and Rule 517B, Aggregate Risk Manager for Market Makers (''ARM–M''), to enhance the Aggregate Risk Manager (''ARM'') protections available to Members[3] on the Exchange. Specifically, the Exchange proposes to adopt a single side protection (''SSP'') feature, which is an additional, optional, and more granular feature of the ARM protection that is currently offered by the Exchange. Accordingly, the Exchange proposes to modify (i) Interpretations and Policies of Rule 517A, to adopt new subsection .02, EEM Single Side Protection; and (ii) Interpretations and Policies .01, of Rule 517B, to adopt new subsection (c), Market Maker Single Side Protection.

The Exchange currently offers a number of risk protection mechanisms to its Members. One important risk protection mechanism is the ARM. The purpose of the ARM is to remove the Member from the market, once certain pre-determined trading limit thresholds (set up in advance by the Member) have been triggered, to limit the risk exposure of the Member.

The Exchange now proposes to further enhance the ARM to introduce an SSP feature. The SSP feature, which is optional, will provide an additional level of granularity to the ARM, as this protection will apply only to quotes[4] and orders on the same side (bid or offer) of an individual option.[5] Members who avail themselves of the SSP feature will have even greater precision to tailor their risk tolerance level.

To implement the SSP feature for Electronic Exchange Members[6] the Exchange proposes to adopt new subsection .02 to Interpretations and Policies of Rule 517A, entitled EEM Single Side Protection. Subsection .02 will provide that an EEM may determine to engage the EEM Single Side Protection (''SSP'') feature for orders delivered via the MEO Interface[7] by MPID.[8] If engaged, if the full remaining size of an EEM's order, in an individual option, is exhausted by a trade, the System[9] will trigger the SSP. When triggered, the System will cancel all open orders and block all new inbound orders delivered via the MEO Interface, for that particular side of that individual option for that MPID. The System will provide a notification message to the EEM that the SSP has been triggered. The block will remain in effect until the EEM notifies the Exchange (in a manner required by the

[3] The term ''Member'' means an individual or organization that is registered with the Exchange pursuant to Chapter II of the MIAX PEARL Rules for purposes of trading on the Exchange as an ''Electronic Exchange Member'' or ''Market Maker.'' Members are deemed ''members'' under the Exchange Act. *See* Exchange Rule 100.

[4] The term ''quote'' or ''quotation'' means a bid or offer entered by a Market Maker as a firm order that updates the Market Maker's previous bid or offer, if any. When the term order is used in these Rules and a bid or offer is entered by the Market Maker in the option series to which such Market Maker is registered, such order shall, as applicable, constitute a quote or quotation for purposes of these Rules. *See* Exchange Rule 100.

[5] The term ''individual option'' means an option contract that is either a put or a call, covering a specific underlying security and having a specific exercise price and expiration date. *See* Exchange Rule 100.

[6] The term ''Electronic Exchange Member'' or ''EEM'' means the holder of a Trading Permit who is a Member representing as agent Public Customer Orders or Non-Customer Orders on the Exchange and those non-Market Maker Members conducting proprietary trading. Electronic Exchange Members are deemed ''members'' under the Exchange Act. *See* Exchange Rule 100.

[7] The term ''MEO Interface'' means a binary order interface used for submitting certain order types (as set forth in Rule 516) to the MIAX PEARL System. *See* Exchange Rule 100.

[8] The term ''MPID'' means unique market participant identifier. *See* Exchange Rule 100.

[9] The term ''System'' means the automated trading system used by the Exchange for the trading of securities. *See* Exchange Rule 100.

Exchange and communicated to Members by Regulatory Circular) [10] to reset the SSP (''SSP Reset''). The SSP feature is optionally available and may be enabled for an EEM's MPID. Additionally, the Exchange notes that Intermarket Sweep Orders [11] are not eligible for EEM Single Side Protection.

To implement the SSP feature for Market Makers,[12] the Exchange proposes to adopt new subsection (c) to Interpretations and Policies .01 of Rule 517B, entitled Market Maker Single Side Protection. Subsection (c) will provide that a Market Maker may determine to engage the Market Maker Single Side Protection (''SSP'') feature for orders delivered via the MEO Interface by MPID. If engaged, if the full remaining size of a Market Maker's order, in an individual option, is exhausted by a trade, the System will trigger the SSP. When triggered, the System will cancel all open orders and block all new inbound orders delivered via the MEO Interface, for that particular side of that individual option for that MPID. The System will provide a notification message to the Market Maker that the SSP has been triggered. The block will remain in effect until the Market Maker notifies the Exchange (in a manner required by the Exchange and communicated to Members by Regulatory Circular) [13] to reset the SSP (''SSP Reset''). The SSP feature is optionally available and may be enabled for a Market Maker's MPID. Additionally, the Exchange notes that Intermarket Sweep Orders are not eligible for Market Maker Single Side Protection.

The Exchange notes that the proposed rule change is substantially similar to a rule that is currently operative on the Exchange's affiliate, MIAX Options Exchange (''MIAX Options'').[14] MIAX Options has two types of Members; [15] MIAX Options Market Makers [16] and MIAX Options Electronic Exchange Members.[17] The Aggregate Risk Manager protections available on MIAX Options are available only to Market Makers of the Exchange. Further, on MIAX Options, the only interface connection that allows Market Makers of the Exchange to provide quotations [18] to the market is the MIAX Express Interface (''MEI'') connection.[19] Therefore, SSP on MIAX Options is limited to MIAX Options Market Makers that send Standard quotes [20] and select eQuotes [21] to the MIAX Options Exchange via an MEI connection.

Similarly, MIAX PEARL has two types of Members; Market Makers [22] and Electronic Exchange Members.[23] The MEO Interface on MIAX PEARL is analogous to the MEI Interface on MIAX Options. However, on MIAX PEARL, both Market Makers and EEMs may connect to the System using the MEO Interface. Therefore, the Exchange is proposing to amend Exchange Rule 517A, Aggregate Risk Manager for EEMs (''ARM–E''), and also Exchange Rule 517B, Aggregate Risk Manager for Market Makers (''ARM–M'').

On MIAX PEARL, the proposed rule provides that when the SSP is triggered the System will cancel all open orders submitted via the MEO interface and block all new inbound orders. Intermarket Sweep Orders are not eligible for SSP and are not canceled or blocked when the SSP is triggered. On MIAX Options, the rule text provides that when the SSP is triggered the System [24] will cancel all Standard quotes and block all new inbound Standard quotes, IOC eQuotes,[25] and FOK eQuotes [26] for that particular side of that individual option for that MPID.[27] The proposed rule will provide the same functionality currently offered on MIAX Options,[28] however due to technical differences between the MIAX Options interface (MEI) and the MIAX PEARL interface (MEO), the proposed rule text is not identical to that of MIAX Options.

To maintain consistency in the functionality between MIAX Options and MIAX PEARL, and to promote the operation of a fair and orderly market, the Exchange is excluding Intermarket Sweep Orders from the SSP functionality on MIAX PEARL.[29] MIAX PEARL and MIAX Options have a number of common Members and where feasible the Exchange strives to provide consistency between the markets so as to avoid confusion among the Members.

The Exchange has analyzed its capacity and represents that it has the necessary systems capacity to handle the potential additional message traffic that may arise from the cancellation of open orders as a result of SSP being triggered.

The Exchange will announce the implementation date of the proposed rule change by Regulatory Circular to be published no later than 60 days following the operative date of the proposed rule. The implementation date

[10] The Exchange notes that the manner by which Members will be required to notify the Exchange to remove the block will be similar to that of MIAX Options. *See* MIAX Options Regulatory Circular 2018–04, January 24, 2018.

[11] An Intermarket Sweep Order or ''ISO'', as defined in Rule 1400(h), is a limit order that is designated by a Member as an ISO in the manner prescribed by the Exchange, and is executed within the System by Members without respect to Protected Quotations of other Eligible Exchanges as defined in Rule 1400(p) and (f). ISOs are immediately executable within the System and shall not be eligible for routing. *See* Exchange Rule 516(f).

[12] The term ''Market Maker'' or ''MM'' means a Member registered with the Exchange for the purpose of making markets in option contracts traded on the Exchange and that is vested with the rights and responsibilities specified in Chapter VI of the MIAX PEARL Rules. *See* Exchange Rule 100.

[13] *See supra* note 10.

[14] *See* Securities Exchange Act Release No. 82394 (December 22, 2017), 82 FR 61638 (December 28, 2017) (SR–MIAX–2017–49). (The Exchange notes that its proposal is based on the amendment to MIAX Options Rule 612).

[15] The term MIAX Options ''Member'' means an individual or organization approved to exercise the trading rights associate with a Trading Permit. MIAX Options Members are deemed ''members'' under the Exchange Act. *See* MIAX Options Exchange Rule 100.

[16] The term MIAX Options ''Market Makers'' refers to ''Lead Market Makers'', ''Primary Lead Market Makers'' and ''Registered Market Makers'' on MIAX Options Exchange collectively. *See* MIAX Options Exchange Rule 100.

[17] The term MIAX Options ''Electronic Exchange Member'' means the holder of a Trading Permit who is not a Market Maker. Electronic Exchange Members are deemed ''members'' under the Exchange Act. *See* MIAX Options Exchange Rule 100.

[18] The term ''quote'' or ''quotation'' means a bid or offer entered by a Market Maker that is firm and may update the Market Maker's previous quote, if any. The Rules of the Exchange provide for the use of different types of quotes, including Standard quotes and eQuotes, as more fully described in MIAX Options Exchange Rule 517. A Market Maker may, at times, choose to have multiple types of quotes active in an individual option. *See* MIAX Options Exchange Rule 100.

[19] The MIAX Express Interface is a connection to MIAX systems that enables Market Makers to submit simple and complex electronic quotes to MIAX. *See* MIAX Options Fee Schedule, Section 5)d)ii), footnote 26.

[20] A Standard quote is a quote submitted by a Market Maker that cancels and replaces the Market Maker's previous Standard quote, if any. *See* MIAX Options Exchange Rule 517(a)(1).

[21] An eQuote is a quote with a specific time in force that does not automatically cancel and replace a previous Standard quote or eQuote. *See* MIAX Options Exchange Rule 517(a)(2).

[22] *See supra* note 12.

[23] *See supra* note 6.

[24] The term ''System'' means the automated trading system used by the Exchange for the trading of securities. *See* MIAX Options Exchange Rule 100.

[25] An immediate or cancel or ''IOC'' eQuote is an eQuote submitted by a Market Maker that must be matched with another quote or order for an execution in whole or in part upon receipt by the System. Any portion of the IOC eQuote not executed will be immediately canceled. *See* MIAX Options Exchange Rule 517(a)(2)(iv).

[26] A fill or kill or ''FOK'' eQuote is an eQuote submitted by a Market Maker that must be matched with another quote or order for an execution in its entirety at a single price upon receipt into the System or will be immediately cancelled. *See* MIAX Options Exchange Rule 517(a)(2)(v).

[27] MIAX Options has a separate Intermarket Sweep eQuote that is not eligible for SSP and that is not canceled or blocked when the SSP is triggered. *See* MIAX Options Exchange Rule 517(a)(2)(vi).

[28] *See* MIAX Options Exchange Rule 612, Aggregate Risk Manager (ARM).

[29] *See supra* note 27.

will be no later than 60 days following the issuance of the Regulatory Circular.

2. Statutory Basis

MIAX PEARL believes that its proposed rule change is consistent with Section 6(b) of the Act [30] in general, and furthers the objectives of Section 6(b)(5) of the Act [31] in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanisms of a free and open market and a national market system and, in general, to protect investors and the public interest.

The Exchange believes the proposed changes remove impediments to and perfect the mechanisms of a free and open market and a national market system and, in general, protect investors and the public interest by providing Members with an additional risk management tool. Members who are Market Makers have a heightened obligation on the Exchange and are obligated to submit continuous two-sided quotations in a certain number of series in their appointed classes for a certain percentage of time in each trading session,[32] rendering them vulnerable to risk from market conditions. Additionally, EEMs may also submit a large volume of orders that rest on the book also rendering them vulnerable to risk from market conditions.

The ability of a Member to engage the SSP feature of ARM is a valuable tool in assisting Members in risk management. Without adequate risk management tools Members could reduce the size of their quotations and orders which could undermine the quality of the markets available to customers and other market participants. The proposed rule change removes impediments to and is designed to perfect the mechanisms of a free and open market by giving Members the ability to further refine their risk protections from an option class level to a single side of an individual option. Accordingly, the SSP feature is designed to provide Members with greater control over their quotations and orders in the market, thereby removing impediments to and helping to perfect the mechanisms of a free and open market and a national market system and, in general, protecting investors and the public interest. In addition, providing Members with more tools for managing risk will facilitate transactions in securities because, as noted above, Members will have more confidence that protections are in place that reduce the risks from market events. As a result, the new functionality has the potential to promote just and equitable principles of trade.

The Exchange believes the proposed changes remove impediments to and perfect the mechanisms of a free and open market and a national market system and, in general, protect investors and the public interest, and promote a fair and orderly market by excluding Intermarket Sweep Orders from the SSP functionality. Intermarket Sweep Orders are used to prevent locked and crossed markets from occurring [33] and it is in the public interest for markets to remain uncrossed to promote competition and price discovery.

The Exchange notes that the proposed rule change will not relieve Exchange Market Makers of their continuous quoting obligations under Exchange Rule 605 or any other obligation under the Rules of the Exchange, or any obligations arising under Reg NMS Rule 602.[34] Nor will the proposed rule change prohibit the Exchange from taking disciplinary action against a Market Maker for failing to meet their continuous quoting obligation each trading day.

Additionally, the Exchange notes that a similar rule is currently operative on the Exchange's affiliate, MIAX Options.[35] MIAX PEARL and MIAX Options have a number of common members and where feasible the Exchange strives to offer similar functionality to reduce the potential for confusion by its members that are also members of MIAX Options.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange believes that the proposed rule change will foster competition by providing Members with the ability to specifically customize their use of the Exchange's risk management tools in order to compete for executions and order flow.

Additionally, the Exchange believes that the proposed rule change should promote competition as it is designed to allow Members greater flexibility and control of their risk exposure to protect them from market conditions that may increase their risk exposure in the market. The Exchange does not believe the proposed rule change will impose a burden on intra-market competition as the optional risk protection feature is equally available to all Members of the Exchange.

For all the reasons stated, the Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act, and believes the proposed change will enhance competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

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 for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act [36] and Rule 19b–4(f)(6) thereunder.[37]

A proposed rule change filed pursuant to Rule 19b–4(f)(6) under the Act [38] normally does not become operative for 30 days after the date of its filing. However, Rule 19b–4(f)(6)(iii) [39] permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the Exchange may immediately implement risk protections similar to those found on MIAX Options. The Exchange states that MIAX PEARL and MIAX Options have a number of common Members and

[30] 15 U.S.C. 78f(b).

[31] 15 U.S.C. 78f(b)(5).

[32] *See* Exchange Rule 605.

[33] *See supra* note 11.

[34] 17 CFR 242.602.

[35] *See supra* note 28.

[36] 15 U.S.C. 78s(b)(3)(A).

[37] 17 CFR 240.19b–4(f)(6). As required under Rule 19b–4(f)(6)(iii), the Exchange provided the Commission with written notice of its intent to file the proposed rule change, along with a brief description and the text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission.

[38] 17 CFR 240.19b–4(f)(6).

[39] 17 CFR 240.19b–4(f)(6)(iii).

where feasible it intends to implement similar risk protections to provide consistency between markets so as to avoid confusion among Members. For this reason, the Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest. Therefore, the Commission hereby waives the operative delay and designates the proposed rule change operative upon filing.[40]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–PEARL–2018–01 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–PEARL–2018–01. 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 website (*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 website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–PEARL–2018–01 and should be submitted on or before March 15, 2018.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[41]

Eduardo A. Aleman,

Assistant Secretary.

[FR Doc. 2018–03567 Filed 2–21–18; 8:45 am]

BILLING CODE 8011–01–P

[40] For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[41] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

Investment Company Act Release No. 33005A; File No. 812–14808 Morningstar Funds Trust, et al.; Notice of Application

February 15, 2018.

AGENCY: Securities and Exchange Commission (''Commission'').

ACTION: Notice.

Notice of an application for an order under section 12(d)(1)(J) of the Investment Company Act of 1940 (the ''Act'') for an exemption from sections 12(d)(1)(A), (B), and (C) of the Act and under sections 6(c) and 17(b) of the Act for an exemption from sections 17(a)(1) and (2) of the Act. The requested order would permit certain registered open-end investment companies to acquire shares of certain registered open-end investment companies (each an ''Unaffiliated Open-End Investment Company''), registered closed-end investment companies and ''business development companies,'' as defined in section 2(a)(48) of the Act (each registered closed-end management and each business development company, an ''Unaffiliated Closed-End Investment Company'' and, together with the Unaffiliated Open-End Investment Companies, the ''Unaffiliated Investment Companies''), and registered unit investment trusts (the ''Unaffiliated Trusts,'' and together with the Unaffiliated Investment Companies, the ''Unaffiliated Funds'') that are within the same group of investment companies (collectively, the ''Affiliated Funds'') and outside the same group of investment companies as the acquiring investment companies (collectively, the Affiliated Funds and, together with the Unaffiliated Funds, the ''Underlying Funds''), in excess of the limits in section 12(d)(1) of the Act.

Applicants: Morningstar Funds Trust, a Delaware statutory trust that is registered under the Act as an open-end management investment company and intends to introduce multiple series, and Morningstar Investment Management LLC, a Delaware limited liability company registered as an investment adviser under the Investment Advisers Act of 1940.

Filing Dates: The application was filed on August 10, 2017 and amended on January 19, 2018.

Hearing or Notification of Hearing: An order granting the requested relief will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the Commission's Secretary and serving applicants with a copy of the request, personally or by mail. Hearing requests should be received by the Commission by 5:30 p.m. on March 12, 2018 and should be accompanied by proof of service on the applicants, in the form of an affidavit, or, for lawyers, a certificate of service. Pursuant to Rule 0–5 under the Act, hearing requests should state the nature of the writer's interest, any facts bearing upon the desirability of a hearing on the matter, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the Commission's Secretary.

ADDRESSES: Secretary, U.S. Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090. Applicants: Daniel Needham, Morningstar Investment Management LLC, 22 West Washington Street, Chicago, IL 60602; and Michael W. Mundt, Esq., Stradley Ronon Stevens & Young, LLP, 1250 Connecticut Avenue NW, Suite 500, Washington, DC 20036.

FOR FURTHER INFORMATION CONTACT: Judy Lee, Senior Special Counsel, at (202) 551–6259, or Holly Hunter-Ceci, Assistant Chief Counsel, at (202) 551–

6825 (Division of Investment Management, Chief Counsel's Office).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained via the Commission's website 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.

Summary of the Application

1. Applicants request an order to permit (a) a Fund [1] (each a ''Fund of Funds'') to acquire shares of Underlying Funds [2] in excess of the limits in sections 12(d)(1)(A) and (C) of the Act and (b) the Underlying Funds that are registered open-end investment companies or series thereof, their principal underwriters and any broker or dealer registered under the Securities Exchange Act of 1934 to sell shares of the Underlying Fund to the Fund of Funds in excess of the limits in section 12(d)(1)(B) of the Act.[3] Applicants also request an order of exemption under sections 6(c) and 17(b) of the Act from the prohibition on certain affiliated transactions in section 17(a) of the Act to the extent necessary to permit the Underlying Funds to sell their shares to, and redeem their shares from, the Funds of Funds.[4] Applicants state that such transactions will be consistent with the policies of each Fund of Funds and each Underlying Fund and with the general purposes of the Act and will be based on the net asset values of the Underlying Funds.

2. Applicants agree that any order granting the requested relief will be subject to the terms and conditions stated in the application. Such terms and conditions are designed to, among other things, help prevent any potential (i) undue influence over an Underlying Fund that is not in the same ''group of investment companies'' as the Fund of Funds through control or voting power, or in connection with certain services, transactions, and underwritings, (ii) excessive layering of fees, and (iii) overly complex fund structures, which are the concerns underlying the limits in sections 12(d)(1)(A), (B), and (C) of the Act.

3. Section 12(d)(1)(J) of the Act provides that the Commission may exempt any person, security, or transaction, or any class or classes of persons, securities, or transactions, from any provision of section 12(d)(1) if the exemption is consistent with the public interest and the protection of investors. Section 17(b) of the Act authorizes the Commission to grant an order permitting a transaction otherwise prohibited by section 17(a) if it finds that (a) the terms of the proposed transaction are fair and reasonable and do not involve overreaching on the part of any person concerned; (b) the proposed transaction is consistent with the policies of each registered investment company involved; and (c) the proposed transaction is consistent with the general purposes of the Act. Section 6(c) of the Act permits the Commission to exempt any persons or transactions from any provision of the Act if such exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

Eduardo A. Aleman,

Assistant Secretary.

[FR Doc. 2018–03570 Filed 2–21–18; 8:45 am]

BILLING CODE 8011–01–P

[1] Applicants request that the order apply to each existing and future series of Morningstar Funds Trust and to each existing and future registered open-end investment company or series thereof that is advised by Morningstar Investment Management LLC or its successor or by any other investment adviser controlling, controlled by or under common control with Morningstar Investment Management LLC or its successor and is part of the same ''group of investment companies'' as Morningstar Funds Trust (each, a ''Fund''). For purposes of the requested order, ''successor'' is limited to an entity that results from a reorganization into another jurisdiction or a change in the type of business organization. For purposes of the request for relief, the term ''group of investment companies'' means any two or more registered investment companies, including closed-end investment companies and business development companies, that hold themselves out to investors as related companies for purposes of investment and investor services.

[2] Certain of the Underlying Funds have obtained exemptions from the Commission necessary to permit their shares to be listed and traded on a national securities exchange at negotiated prices and, accordingly, to operate as an exchange-traded fund (''ETF'').

[3] Applicants do not request relief for Funds of Funds to invest in reliance on the order in business development companies and registered closed-end investment companies that are not listed and traded on a national securities exchange.

[4] A Fund of Funds generally would purchase and sell shares of an Underlying Fund that operates as an ETF or closed-end fund through secondary market transactions rather than through principal transactions with the Underlying Fund. Applicants nevertheless request relief from sections 17(a)(1) and (2) to permit each ETF or Unaffiliated Closed-End Investment Company that is an affiliated person, or an affiliated person of an affiliated person, as defined in section 2(a)(3) of the 1940 Act, of a Fund of Funds to sell shares to or redeem shares from the Fund of Funds. This includes, in the case of sales and redemptions of shares of ETFs, the in-kind transactions that accompany such sales and redemptions. The Applicants are not seeking relief from section 17(a) for, and the requested relief will not apply to, transactions where an ETF, business development company, or closed-end fund could be deemed an affiliated person, or an affiliated person of an affiliated person, of a Fund of Funds because an investment adviser to the ETF, business development company, or closed-end fund or an entity controlling, controlled by or under common control with the investment adviser to the ETF, business development company, or closed-end fund, is also an investment adviser to the Fund of Funds.

SOCIAL SECURITY ADMINISTRATION

[Docket No. SSA–2018–0006]

Public Availability of Social Security Administration Fiscal Year (FY) 2016 Service Contract Inventory

AGENCY: Social Security Administration.

ACTION: Notice of public availability of FY 2016 Service Contract Inventories.

SUMMARY: In accordance with section 743 of Division C of the Consolidated Appropriations Act of 2010, we are publishing this notice to advise the public of the availability of the FY 2016 Service Contract inventory. This inventory provides information on FY 2016 service contract actions over $25,000. We organized the information by function to show how we distribute contracted resources throughout the agency. We developed the inventory in accordance with guidance issued on December 19, 2011 by the Office of Management and Budget's Office of Federal Procurement Policy (OFPP). OFPP's guidance is available at *https://obamawhitehouse.archives.gov/sites/default/files/omb/procurement/memo/service-contract-inventory-guidance.pdf.* You can access the inventory and summary of the inventory on our homepage at the following link: *http://www.socialsecurity.gov/sci.*

FOR FURTHER INFORMATION CONTACT: Steven Knight Jr., Office of Budget, Social Security Administration, 6401 Security Boulevard, Baltimore, MD 21235–6401. Phone (410) 965–5522, email *Steven.Knight.Jr@ssa.gov.*

Dated: February 14, 2018.

Michelle King,

Acting Deputy Commissioner for Budget, Finance, Quality, and Management.

[FR Doc. 2018–03650 Filed 2–21–18; 8:45 am]

BILLING CODE 4191–02–P

DEPARTMENT OF STATE

[Public Notice 10314]

Meeting of the United States-Bahrain Joint Forum on Environmental Cooperation and Request for Comments on the Meeting Agenda and the 2017–2021 Work Program

AGENCY: Department of State.

ACTION: Announcement of meeting; solicitation of comments; invitation to public session.

SUMMARY: The Department of State is providing notice that the governments of the United States and the Kingdom of Bahrain (the governments) intend to hold a Joint Forum on Environmental Cooperation (Joint Forum) and a public session in Manama, Bahrain, on March 7, 2018, pursuant to paragraphs 2–5 of the Memorandum of Understanding on Environmental Cooperation between the Governments of the United States and the Kingdom of Bahrain, which was signed September 14, 2004. During the Joint Forum, the governments will discuss how the United States and Bahrain can cooperate to protect the environment, review past bilateral environmental cooperation, and identify priority projects pursuant to the 2017–2021 Work Program on Environmental Cooperation (Work Program), approved in August 2017. The Department of State invites members of the public to submit written comments on items to include on the meeting agenda or in the 2017–2021 Work Program.

The Department of State also invites interested persons to attend a public session to learn more about the work of the Joint Forum and the new Work Program, and to provide advice or comments on its implementation.

DATES: The public session will be held on March 7, 2018. Information about the venue and time is available from the contact below. Comments on the Joint Forum meeting agenda and/or the 2017–2021 Work Program should be provided no later than March 1, 2018, to facilitate consideration.

ADDRESSES: Persons interested in attending the public session or in submitting comments and suggestions should contact Marko Velikonja, Office of Environmental Quality and Transboundary Issues, U.S. Department of State, by electronic mail at *Velikonjamg@state.gov* or fax at (202) 647–5947 with the subject line ''United States-Bahrain Joint Forum.''

FOR FURTHER INFORMATION CONTACT: Marko Velikonja, Telephone (202) 647–4828 or email at *Velikonjamg@state.gov.*

SUPPLEMENTARY INFORMATION: In preparing comments, submitters are encouraged to refer to:

- 2017–2021 Plan of Action, *https://www.state.gov/documents/organization/273263.pdf.*
- Other useful documents are available at: *https://www.state.gov/e/oes/eqt/trade/bahrain/.*

Robert Wing,

Acting Director, Office of Environmental Quality and Transboundary Issues, Department of State.

[FR Doc. 2018–03593 Filed 2–21–18; 8:45 am]

BILLING CODE 4710–09–P

DEPARTMENT OF STATE

[Public Notice 10315]

Notice of Public Meeting of the International Telecommunication Advisory Committee and Preparations for Upcoming International Telecommunications Meetings

This notice announces a meeting of the Department of State's International Telecommunication Advisory Committee (ITAC). The ITAC will meet on March 9, 2018, at 10:00 a.m. EST at 1101 K Street (NW), Suite 610 to review the results of recent multilateral meetings, update on preparations for the International Telecommunication Union (ITU) 2018 Plenipotentiary Conference (PP–18), and discuss preparations for upcoming other multilateral meetings at the ITU. The meeting will focus on the following topics:

1. ITU Council Working Groups
   a. Experts group on International Telecommunication Regulations (ITRs)
   b. Council Working Group for Strategic and Financial Plans
   c. Council Working Group on Financial and Human Resources
   d. Council Working Group on Implementation of the World Summit on Information Society (WSIS) Outcomes
   e. Council Working Group on International Internet-Related Public Policy Issues
2. Preparations for the ITU 2018 Plenipotentiary Conference (PP–18)
3. ITU Radiocommunication Sector (ITU–R) meetings
4. ITU Telecommunication Standardization Sector (ITU–T) meetings
5. Internet Governance Forum (IGF)
6. Regional PP–18 Preparatory Groups
7. WSIS Forum

PP–18 will take place in Dubai, United Arab Emirates, from October 29 to November 17, 2018. The Plenipotentiary Conference, which takes place every four years, is the highest policy-making body of the ITU. PP–18 will determine the overall policy direction of the ITU; adopt the strategic and financial plans for the next four years; elect the 48 members of Council, 12 members of the Radio Regulations Board, and five senior ITU elected officials; and consider and adopt, if appropriate, amendments to the ITU Constitution and Convention.

Attendance at this meeting is open to the public as seating capacity allows. The public will have an opportunity to provide comments at this meeting at the invitation of the chair. Further details on this ITAC meeting will be announced on the Department of State's email list, *ITAC@lmlist.state.gov.* Use of the ITAC list is limited to meeting announcements and confirmations, distribution of agendas and other relevant meeting documents. The Department welcomes any U.S. citizen or legal permanent resident to remain on or join the ITAC listserv by registering by email via *ITAC@state.gov* and providing his or her name, email address, telephone contact and the company, organization, or community that he or she is representing, if any. Persons wishing to request reasonable accommodation during the meeting should send their requests to *ITAC@state.gov* no later than March 1, 2018. Requests made after that time will be considered, but might not be able to be fulfilled.

Please send all inquiries to *ITAC@state.gov.*

Stephan A. Lang,

Acting Director, Multilateral Affairs, Cyber and International Communications and Information Policy, U.S. Department of State.

[FR Doc. 2018–03594 Filed 2–21–18; 8:45 am]

BILLING CODE 4710–AE–P

SURFACE TRANSPORTATION BOARD

[Docket No. MCF 21079]

Academy Bus, LLC and Franmar Leasing LLC—Purchase of Certain Assets of Daniel's Charters & Tours LLC

AGENCY: Surface Transportation Board.

ACTION: Notice tentatively approving and authorizing finance transaction.

SUMMARY: On January 23, 2018, Academy Bus LLC (Academy), a motor carrier of passengers; Franmar Leasing LLC (Franmar), a non-carrier; and Daniel's Charters & Tours LLC (Daniel's Charters), a motor carrier of passengers (collectively, Applicants) jointly filed an

application for Academy and Franmar to acquire certain properties of Daniel's Charters. The Board is tentatively approving and authorizing the transaction, and, if no opposing comments are timely filed, this notice will be the final Board action. Persons wishing to oppose the application must follow Board rules.

DATES: Comments must be filed by April 9, 2018. The applicants may file a reply by April 23, 2018. If no opposing comments are filed by April 9, 2018, this notice shall be effective on April 10, 2018.

ADDRESSES: Send an original and 10 copies of any comments referring to Docket No. MCF 21079 to: Surface Transportation Board, 395 E Street SW, Washington, DC 20423–0001. In addition, send one copy of comments to: Joseph J. Ferrara, Ferrara and Associates, 111 Paterson Avenue, Hoboken, NJ 07030.

FOR FURTHER INFORMATION CONTACT: Sarah Fancher (202) 245–0355. Federal Information Relay Service (FIRS) for the hearing impaired: 1–800–877–8339.

SUPPLEMENTARY INFORMATION: Academy is a motor carrier licensed by the Federal Motor Carrier Safety Administration (MC–646780) that provides motor carrier passenger services in Florida and Georgia, with its principal place of business located in Florida. (Appl. 3, 8.) Applicants state that Academy (Florida) ESB Trust (Academy Trust), a non-carrier controlled by Francis Tedesco (the sole trustee), is the sole member of Academy. According to Applicants, Franmar is a non-carrier New Jersey limited liability company controlled by the Tedesco Family ESB Trust (Tedesco Trust), also a non-carrier. Applicants state that Franmar is exclusively engaged in the ownership and leasing of passenger motor coaches to Academy and its affiliates.[1] Applicants further assert that Daniel's Charters, a licensed motor carrier of passengers (MC–351188), presently operates interstate charter motor coach transportation services and tour transportation services primarily in the state of Georgia. Applicants further state that Jimmy Cantrell is the majority member and manager of Daniel's Charters.

Daniel's Charters proposes to sell certain assets used in its motor coach passenger charter transportation business pursuant to an Asset Purchase Agreement, dated January 19, 2018. According to Applicants, this transaction is a result of the business determination made by Daniel's Charters to permanently withdraw from the motor coach transportation business and focus its efforts on the continued development of its tour business operations. Applicants state that, under the terms of the Asset Purchase Agreement, Academy will acquire Daniel's Charters' customer lists, charter contracts, telephone numbers, website, pending motor coach customer contracts existing as of the closing date, charter contract deposits associated with the pending contracts, and related assets and intangibles, and Franmar will acquire 32 of 34 motor coaches currently owned by Daniel's Charters. (Appl. 7.)

Under 49 U.S.C. 14303(b), the Board must approve and authorize a transaction that it finds consistent with the public interest, taking into consideration at least: (1) The effect of the proposed transaction on the adequacy of transportation to the public; (2) the total fixed charges that result; and (3) the interest of affected carrier employees. Applicants submitted information required by 49 CFR 1182.2, including information to demonstrate that the proposed transaction is consistent with the public interest under 49 U.S.C. 14303(b) and a statement, pursuant to 49 U.S.C. 14303(g), that Academy and its motor carrier affiliated companies exceeded $2 million in gross operating revenues for the preceding 12-month period.[2]

Applicants state that this acquisition is in the public interest because the transaction will not have a materially detrimental impact on the adequacy of transportation services available to the public. According to Applicants, Daniel's Charters will be selling all of its motor coach vehicles that it no longer desires to operate, no operable motor vehicles will be scrapped by Daniel's Charters, and no new buses will need to be purchased by Franmar at this time. Thus, Applicants state that the public would not lose service because the same number of buses would continue to operate. Applicants state that the transaction would promote more efficiencies and greater economic use of existing transportation capital resources, and offer the public continued service options to those customers of Daniel's Charters in need of such service.

Applicants also assert that the proposed transaction would not result in an increase to fixed charges, as the proposed transaction is expected to be for cash.

Additionally, Applicants state that the proposed transaction would have no adverse effect on qualified Daniel's Charters' employees at the locations from which Daniel's Charters operates because Academy will interview and offer employment opportunities to those employees, which Applicants claim is ''a necessity to permit Academy to continue to operate the assets acquired as a carrier.''

According to Applicants, anticompetitive effects would be unlikely because none of the operable motor vehicles will be scrapped by the seller and no new buses will need to be purchased by Franmar at this time. Thus, Applicants state, the same number of buses presently operated will continue to be operated in Academy's bus operations in Georgia.[3]

On the basis of the application, the Board finds that the proposed acquisition is consistent with the public interest and should be tentatively approved and authorized. If any opposing comments are timely filed, these findings will be deemed vacated, and, unless a final decision can be made on the record as developed, a procedural schedule will be adopted to reconsider the application. *See* 49 CFR 1182.6(c). If no opposing comments are filed by the expiration of the comment period, this notice will take effect automatically and will be the final Board action.

Board decisions and notices are available on our website at ''*WWW.STB.GOV.*''

This action is categorically excluded from environmental review under 49 CFR 1105.6(c).

It is ordered:

1. The proposed transaction is approved and authorized, subject to the filing of opposing comments.

2. If opposing comments are timely filed, the findings made in this notice will be deemed as having been vacated.

[1] Applicants state that Francis Tedesco and Mark Tedesco are lifetime beneficiaries of the Tedesco Trust, which controls a New Jersey company, also called Academy Bus, LLC, a non-carrier and the sole member of three limited liability company passenger motor carriers: Academy Express, LLC, Academy Lines, LLC, and Number 22 Hillside, LLC (together, Academy Companies). According to Applicants, none of the Academy Companies are parties to the agreement with Daniel's Charters that is the subject of this application. Applicants state that Franmar and the Tedesco Trust are commonly controlled by Francis Tedesco and Mark Tedesco. (*See* Appl. 5–6.)

[2] Applicants with gross operating revenues exceeding $2 million are required to meet the requirements of 49 CFR 1182.2(a)(5).

[3] The Board notes that the Asset Purchase Agreement contains a non-compete agreement, which prohibits Daniel's Charters and its principal, for a period of time, from soliciting or otherwise competing with Academy in the geographic areas and jurisdictions in which Daniel's Charters currently conducts its motor coach operations. (Appl., Ex. at 35.) After a review of the contractual provision, however, the Board finds that the clause does not appear to have an anticompetitive effect, on balance, in the market.

3. This notice will be effective April 10, 2018, unless opposing comments are filed by April 9, 2018.

4. A copy of this notice will be served on: (1) The U.S. Department of Transportation, Federal Motor Carrier Safety Administration, 1200 New Jersey Avenue SE, Washington, DC 20590; (2) the U.S. Department of Justice, Antitrust Division, 10th Street & Pennsylvania Avenue NW, Washington, DC 20530; and (3) the U.S. Department of Transportation, Office of the General Counsel, 1200 New Jersey Avenue SE, Washington, DC 20590.

Decided: February 15, 2018.

By the Board, Board Members Begeman and Miller.

Brendetta S. Jones,

Clearance Clerk.

[FR Doc. 2018–03644 Filed 2–21–18; 8:45 am]

BILLING CODE 4915–01–P

OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

[Docket No. USTR–2017–0024]

2018 Special 301 Review: Identification of Countries Under Section 182 of the Trade Act of 194; Request for Public Comment and Notice of a Public Hearing; Correction

AGENCY: Office of the United States Trade Representative.

ACTION: Request for comments and notice of public hearing; Correction.

SUMMARY: The Office of the United States Trade Representative (USTR) published a document in the **Federal Register** on December 27, 2017 (82 FR 61363), concerning a request for comments and notices of intent to appear at a public hearing on Section 182 of the Trade Act of 1974, commonly referred to as the ''Special 301'' provisions. The dates specified in the notice have changed. Additional information on the hearing is also provided.

FOR FURTHER INFORMATION CONTACT: Sung Chang, Director for Innovation and Intellectual Property, Office of the United States Trade Representative, at *special301@ustr.eop.gov.* You can find information about the Special 301 Review at *www.ustr.gov.*

Corrections

''Dates'' Caption

In the **Federal Register** on December 27, 2017 (82 FR 61363), correct the ''Dates'' caption to read as follows:

DATES: *March 8, 2018:* The Special 301 Subcommittee will hold a public hearing at the Office of the United State Trade Representative, 1724 F Street NW, Rooms 1&2, Washington DC. If necessary, the hearing may continue on the next business day. Please consult the USTR website for confirmation of the date and location and the schedule of witnesses.

March 14, 2018 at midnight EST: Deadline for submission of post-hearing written comments from persons who testified at the public hearing.

About April 30, 2018: USTR will publish the 2018 Special 301 Report within 30 days of the publication of the National Trade Estimate (NTE) Report.

''Background'' Caption

In the **Federal Register** on December 27, 2017 (82 FR 61363), correct the ''Background'' caption to read as follows:

I. Background

Section 182 of the Trade Act of 1974 (Trade Act) (19 U.S.C. 2242), commonly known as the ''Special 301'' provisions, requires the Trade Representative to identify countries that deny adequate and effective IPR protections or fair and equitable market access to U.S. persons who rely on intellectual property protection. The Trade Act requires the Trade Representative to determine which, if any, of these countries to identify as Priority Foreign Countries. Acts, policies or practices that are the basis of a country's identification as a Priority Foreign Country can be subject to the procedures set out in sections 301–305 of the Trade Act (19 U.S.C. 2411–2415).

In addition, USTR has created a ''Priority Watch List'' and ''Watch List'' to assist the Administration in pursuing the goals of the Special 301 provisions. Placement of a trading partner on the Priority Watch List or Watch List indicates that particular problems exist in that country with respect to IPR protection, enforcement or market access for persons that rely on intellectual property protection. Trading partners placed on the Priority Watch List are the focus of increased bilateral attention concerning the problem areas.

USTR chairs the Special 301 Subcommittee (Subcommittee) of the Trade Policy Staff Committee. The Subcommittee reviews information from many sources, and consults with and makes recommendations to the Trade Representative on issues arising under Special 301. Written submissions from the public are a key source of information for the Special 301 review process. In 2018, USTR will conduct a public hearing as part of the review process and will allow hearing participants to provide additional information relevant to the review. At the conclusion of the process, USTR will publish the results of the review in a Special 301 Report.

USTR requests that interested persons identify through the process outlined in this notice those countries whose acts, policies, or practices deny adequate and effective protection for intellectual property rights or deny fair and equitable market access to U.S. persons who rely on intellectual property protection.

Section 182 also requires the Trade Representative to identify any act, policy, or practice of Canada that affects cultural industries, was adopted or expanded after December 17, 1992, and is actionable under Article 2106 of the North American Free Trade Agreement (NAFTA). USTR invites the public to submit views relevant to this aspect of the review.

Section 182 requires the Trade Representative to identify all such acts, policies, or practices within 30 days of the publication of the NTE Report. In accordance with this statutory requirement, USTR will publish the annual Special 301 Report about April 30, 2018.

''Public Comments'' Caption

In the **Federal Register** on December 27, 2017 (82 FR 61363), correct the ''Public Comments'' caption to read as follows:

II. Public Comments

To facilitate the review, written comments should be as detailed as possible and provide all necessary information to identify and assess the effect of the acts, policies, and practices. USTR invites written comments that provide specific references to laws, regulations, policy statements, including innovation policies, executive, presidential, or other orders, and administrative, court, or other determinations that should factor in the review. USTR also requests that, where relevant, submissions mention particular regions, provinces, states, or other subdivisions of a country in which an act, policy, or practice is believed to warrant special attention. Finally, submissions proposing countries for review should include data, loss estimates, and other information regarding the economic impact on the United States, U.S. industry, and the U.S. workforce caused by the denial of adequate and effective intellectual property protection. Comments that include quantitative loss claims should include the methodology used to calculate the estimated losses.

''*Public Hearing*'' *Caption*

In the **Federal Register** on December 27, 2017 (82 FR 61363), correct the ''Public Hearing'' caption to read as follows:

III. Public Hearing

The Special 301 Subcommittee will convene a public hearing on March 8, 2018, at the Office of the United States Trade Representative, 1724 F Street NW, Rooms 1 & 2, Washington DC, at which interested persons, including representatives of foreign governments, may appear to provide oral testimony. If necessary, the hearing may continue on the next business day. Because the hearing will take place in Federal facilities, attendees must show photo identification and will be screened for security purposes. Please consult *www.ustr.gov* to confirm the date and location of the hearing and to obtain copies of the hearing schedule. USTR also will post the transcript and recording of the hearing on the USTR website as soon after the hearing as possible. Witnesses must deliver prepared oral testimony, which is limited to five minutes, before the Special 301 Subcommittee in person and in English. Subcommittee member agencies may ask questions following the prepared statement.

Notices of intent to testify and hearing statements from the public were due on February 8, 2017, and are due from foreign governments on February 22, 2018. The submissions must be in English and should include: (1) The name, address, telephone number, fax number, email address, and firm or affiliation of the individual wishing to testify, and (2) a hearing statement that is relevant to the Special 301 review.

Elizabeth L. Kendall,

Assistant U.S. Trade Representative for Innovation and Intellectual Property (Acting), Office of the United States Trade Representative.

[FR Doc. 2018–03562 Filed 2–21–18; 8:45 am]

BILLING CODE 3290–F8–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Public Notice for Waiver of Aeronautical Land Use Assurance; Great Falls International Airport, Great Falls, MT

AGENCY: Federal Aviation Administration, (FAA), DOT.

ACTION: Notice.

SUMMARY: Notice is being given that the FAA is considering a proposal from the Great Falls International Airport Authority to change certain portions of the airport from aeronautical use to non-aeronautical use at the Great Falls International Airport, Great Falls, MT. The proposal consists of 2.99 acres acquired with an Airport Improvement Program grant shown on the Airport's Exhibit ''A'' as Parcel 15.

DATES: Comments must be received by March 26, 2018.

ADDRESSES: Comments on this application may be mailed or delivered to the FAA at the following address: Mr. William C. Garrison, Manager, Federal Aviation Administration, Northwest Mountain Region, Airports Division, Helena Airports District Office, 2725 Skyway Drive, Suite 2, Helena, Montana, 59602.

FOR FURTHER INFORMATION CONTACT: Mr. Joe Nye, Civil Engineer, Federal Aviation Administration, Northwest Mountain Region, Helena Airports District Office, 2725 Skyway Drive, Suite 2, Helena, MT, 59602, (406) 449–5719. The request to release aeronautical use restrictions may be reviewed, by appointment, in person at the same location.

SUPPLEMENTARY INFORMATION: The FAA invites public comment on the request to release aeronautical use restriction of 2.99 acres at the Great Falls International Airport under the provisions of the Title 49, U.S.C. Section 47107(h).

The Great Falls International Airport Authority, referred to herein as the Authority, has requested release from the aeronautical use restrictions assigned to 2.99 acres acquired under Airport Improvement Program Grant 3–30–0036–007–1986. The 2.99 acres is shown on the Airport's Exhibit ''A'' as Parcel 15 and is isolated from the airfield by the airport entry road to the south and west.

The Great Falls International Airport has completed an appraisal of Parcel 15 and found that current fair market value of the property is $236,103. The Authority proposes to reimburse the federal interest in Parcel 15 by reinvesting an amount of $212,493 (90% of the current fair market value) towards the acquisition of an AIP eligible piece of snow removal equipment.

The Authority proposes to lease the property for continued operation of the City of Great Falls 911 Call Center as well as the construction and operation of a fueling station and restaurant on the property. The revenue from the lease of this property will be used for airport purposes. The proposed use of this property is compatible with other airport operations and is in accordance with FAA's Policy and Procedures Concerning the Use of Airport Revenue, published in **Federal Register** on February 16, 1999.

Any person may inspect the request in person at the FAA office listed above under **FOR FURTHER INFORMATION CONTACT**.

Issued in Helena, Montana on February 14, 2018.

William C. Garrison,

Manager, Helena Airports District Office.

[FR Doc. 2018–03656 Filed 2–21–18; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Summary Notice No. 2018–12]

Petition for Exemption; Summary of Petition Received; Corvus Airlines, Inc.

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice.

SUMMARY: This notice contains a summary of a petition seeking relief from specified requirements of Federal Aviation Regulations. The purpose of this notice is to improve the public's awareness of, and participation in, the FAA's exemption process. Neither publication of this notice nor the inclusion or omission of information in the summary is intended to affect the legal status of the petition or its final disposition.

DATES: Comments on this petition must identify the petition docket number and must be received on or before March 14, 2018.

ADDRESSES: Send comments identified by docket number FAA–2017–1212 using any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov* and follow the online instructions for sending your comments electronically.
- *Mail:* Send comments to Docket Operations, M–30; U.S. Department of Transportation (DOT), 1200 New Jersey Avenue SE, Room W12–140, West Building Ground Floor, Washington, DC 20590–0001.
- *Hand Delivery or Courier:* Take comments to Docket Operations in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE, Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.
- *Fax:* Fax comments to Docket Operations at 202–493–2251.

Privacy: 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 *http://www.regulations.gov,* as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *http://www.dot.gov/privacy.*

Docket: Background documents or comments received may be read at *http://www.regulations.gov* at any time. Follow the online instructions for accessing the docket or go to the Docket Operations in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE, Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Keira Jones (202) 267–6109, Office of Rulemaking, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591.

This notice is published pursuant to 14 CFR 11.85.

Issued in Washington, DC, on February 15, 2018.

Lirio Liu,

Executive Director, Office of Rulemaking.

Petition for Exemption

Docket No.: FAA–2017–1212.

Petitioner: Corvus Airlines, Inc.

Section(s) of 14 CFR Affected: § 121.119(a).

Description of Relief Sought: Corvus Airlines seeks an exemption from § 121.119(a) for supplemental operations to destinations not afforded approved weather reports or where airports are experiencing a failure of the Automated Weather Observation System (AWOS) in its entirety or missing required element(s) of such a report.

[FR Doc. 2018–03619 Filed 2–21–18; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Summary Notice No. 2018–08]

Petition for Exemption; Summary of Petition Received; Donaldson Aerospace & Defense

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice.

SUMMARY: This notice contains a summary of a petition seeking relief from specified requirements of Federal Aviation Regulations. The purpose of this notice is to improve the public's awareness of, and participation in, the FAA's exemption process. Neither publication of this notice nor the inclusion or omission of information in the summary is intended to affect the legal status of the petition or its final disposition.

DATES: Comments on this petition must identify the petition docket number and must be received on or before March 14, 2018.

ADDRESSES: Send comments identified by docket number FAA–2017–1218 using any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov* and follow the online instructions for sending your comments electronically.
- *Mail:* Send comments to Docket Operations, M–30; U.S. Department of Transportation (DOT), 1200 New Jersey Avenue SE, Room W12–140, West Building Ground Floor, Washington, DC 20590–0001.
- *Hand Delivery or Courier:* Take comments to Docket Operations in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE, Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.
- *Fax:* Fax comments to Docket Operations at 202–493–2251.

Privacy: 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 *http://www.regulations.gov,* as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *http://www.dot.gov/privacy.*

Docket: Background documents or comments received may be read at *http://www.regulations.gov* at any time. Follow the online instructions for accessing the docket or go to the Docket Operations in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE, Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: J. Justin Barcas (202) 267–7023, Office of Rulemaking, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591.

This notice is published pursuant to 14 CFR 11.85.

Issued in Washington, DC, on February 14, 2018.

Lirio Liu,

Executive Director, Office of Rulemaking.

Petition for Exemption

Docket No.: FAA–2017–1218.

Petitioner: Donaldson Aerospace & Defense

Section(s) of 14 CFR Affected: § 21.303(b)(3)

Description of Relief Sought: Donaldson Aerospace & Defense (Donaldson) petitioned the Federal Aviation Administration for an exemption from § 21.303(b)(3) of Title 14, Code of Federal Regulations (CFR). The proposed exemption, if granted, would allow Donaldson to add articles from a Transport Canada Civil Aviation approved supplemental type certificate to its existing parts manufacture approval issued by the Federal Aviation Administration under 14 CFR Subpart K.

[FR Doc. 2018–03620 Filed 2–21–18; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Notice of Intent of Waiver With Respect to Land; Akron-Canton Airport, North Canton, OH

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice.

SUMMARY The FAA is considering a proposal to change 31.581 acres of airport land from aeronautical use to non-aeronautical use and to authorize the lease of airport property located at Akron-Canton Airport, North Canton, OH. The aforementioned land consists of a partial release of Parcel ID 00 (4.53 acres) and Parcel ID 38 (27.051 acres) which is not needed for aeronautical use. The parcels are located in the Northwest quadrant of the airport, south of Greensburg Road, North Canton, OH. The property is currently designated as aeronautical use for compatible land use in support of the airfield approach. The proposed non-aeronautical use is for commercial/general industrial development.

DATES: Comments must be received on or before March 26, 2018.

ADDRESSES: Documents are available for review by appointment at the FAA Detroit Airports District Office, Evonne M. McBurrows, 11677 South Wayne Road, Suite 107, Romulus, MI, 48174 Telephone: (734) 229–2900/Fax: (734) 229–2950 and Akron-Canton Airport, 5400 Lauby Road NW#9, North Canton, OH. Telephone: (330) 499–4059.

Written comments on the Sponsor's request must be delivered or mailed to: Evonne M. McBurrows, Program Manager, Federal Aviation Administration, Detroit Airports District

Office, 11677 South Wayne Road, Suite 107, Romulus, MI 48174, Telephone Number: (734) 229–2900/FAX Number: (734) 229–2950.

FOR FURTHER INFORMATION CONTACT: Evonne M. McBurrows, Program Manager, Federal Aviation Administration, Detroit Airports District Office, 11677 South Wayne Road, Suite 107, Romulus, MI 48174. Telephone Number: (734) 229–2900/FAX Number: (734) 229–2950.

SUPPLEMENTARY INFORMATION: In accordance with section 47107(h) of Title 49, United States Code, this notice is required to be published in the **Federal Register** 30 days before modifying the land-use assurance that requires the property to be used for an aeronautical purpose.

The property is currently designated as aeronautical use for compatible land use. This parcel of land (31.581 acres) was acquired with federal funds under project numbers 6–39–0001–08 and 3–39–0001–26. Akron-Canton Regional Airport Authority (AA) proposed non-aeronautical use is for commercial/general industrial development. AA will lease the land and receive fair market value.

The disposition of proceeds from the lease of the airport property will be in accordance with FAA's Policy and Procedures Concerning the Use of Airport Revenue, published in the **Federal Register** on February 16, 1999 (64 FR 7696).

This notice announces that the FAA is considering the release of the subject airport property at the Akron-Canton Airport, North Canton, OH from its obligations to be maintained for aeronautical purposes. Approval does not constitute a commitment by the FAA to financially assist in the change in use of the subject airport property nor a determination of eligibility for grant-in-aid funding from the FAA.

Legal Description for: Lease Parcel 31.581 Acres

The land referred to in the commitment is described as follows:

Situated in the City of Green, County of Summit, State of Ohio and known as being Lot 24 in the CAK International Business Park No. 3 Port Green, as shown on the recorded plat in Reception No. 55975637 and re-recorded as Reception No. 56001757 of Summit County Records.

Description of Leasehold Estate

Situated in the City of Green, County of Summit, and State of Ohio and known as being a part of Lot No. 24 in CAK International Business Park No. 3 Port Green as shown by plat recorded in Reception No. 55975637 and re-recorded as Reception No. 56001757 of Summit County Records and parts of the Southwest Quarter of Section No. 26 and the Northwest Quarter of Section No. 35 in the Twelfth Township of the Ninth Range of the Congress Lands North of the Old Seven Ranges, now in said city, and is bounded and described as follows:

Beginning in the easterly line of Global Parkway, 60 feet in width, at its intersection with the southerly line of said Lot No. 24, said point of beginning being marked by a ⅝ inch diameter iron pin stake (''ENVR. DESIGN GROUP'' Akron Ohio) found therein;

COURSE I Thence North 1°20′39″ East along said easterly line of Global Parkway a distance of 567.36 feet to a point at the beginning of a curve therein and witness a one inch diameter iron pin stake in a monument box in the centerline of said Global Parkway bearing North 88°39′21″ West a distance of 30.00 feet therefrom;

COURSE II Thence northerly continuing along said easterly line of Global Parkway on the arc of a curve deflecting to the LEFT (said curve having a radius of 830.00 feet, an included angle of 15°54′54″, and a chord which bears North 6°36′48″ West and is 229.81 feet in length) a distance of 230.55 feet to the point of tangency and witness a one inch diameter iron pin stake in a monument box in the centerline of said Global Parkway bearing South 75°25′46″ West a distance of 30.00 feet therefrom;

COURSE III Thence North 14°34′14″ West continuing along said easterly line of Global Parkway a distance of 412.97 feet to a point at the beginning of a curve therein and witness a one inch diameter iron pin stake in a monument box in the centerline of said Global Parkway bearing South 75°25′46″ West a distance of 30.00 feet therefrom;

COURSE IV Thence northerly continuing along said easterly line of Global Parkway on the arc of a curve deflecting to the RIGHT (said curve having a radius of 770.00 feet, an included angle of 13°34′14″, and a chord which bears North 7°47′07″ West and is 181.95 feet in length) a distance of 182.37 feet to the point of tangency and witness a one inch diameter iron pin stake in a monument box in the centerline of said Global Parkway bearing South 89°00′00″ West a distance of 30.00 feet therefrom;

COURSE V Thence North 1°00′00″ West continuing along said easterly line of Global Parkway a distance of 4.93 feet to a point therein;

COURSE VI Thence North 78°23′22″ East a distance of 695.21 feet to a point in an easterly line of the aforesaid Lot No. 24;

COURSE VII Thence South 12°16′15″ East a distance of 481.03 feet to a point;

COURSE VIII Thence South 88°14′09″ East by a line which is parallel with a northerly line of said Lot No. 24 and 20.00 feet northerly by normal measure therefrom, a distance of 183.20 feet to a point;

COURSE IX Thence South 12°16′59″ East at 20.62 feet passing through a northerly line of said Lot No. 24 and at 313.70 feet passing through the easterly line of said Lot No. 24, a total distance of 470.61 feet to a point;

COURSE X Thence South 4°22′58″ West by a line which is parallel with the most southerly line of said Lot No. 24 and 45.00 feet easterly by normal measure therefrom, a distance of 661.53 feet to a point;

COURSE XI Thence South 78°10′29″ West by a line which is parallel with the most southerly line of said Lot No. 24 and 155.00 feet southerly by normal measure therefrom, a distance of 899.28 feet to the aforesaid easterly line of Global Parkway;

COURSE XII Thence North 1°20′39″ East along said easterly line of Global Parkway a distance of 159.19 feet to the point of beginning and containing a total of 31.581 Acres of land of which 27.051 Acres of land is contained within the bounds of said Lot No. 24.

Bearings contained herein are based upon the State of Ohio Co-ordinate System of 1983 (North Zone) from observations utilizing the NAD83(2011) Reference Frame.

The intent of the above is to provide a description of the perimeter of a leasehold estate upon lands currently designated as Summit County Auditor's Permanent Parcels No. 2815964 and No. 2809144.

The Akron Canton Regional Airport Authority claims title to the above described parcel of land by or through documents recorded in Instrument No. 56001757 and Volume 6870, Page 685 of Summit County Deed Records.

Thomas M. Meeks,

Ohio Registered Surveyor No. 8764.

Issued in Romulus, Michigan, on February 12, 2018.

John L. Mayfield, Jr.,

Manager, Detroit Airports District Office, FAA, Great Lakes Region.

[FR Doc. 2018–03654 Filed 2–21–18; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Public Notice for Waiver of Aeronautical Land Use Assurance; Great Falls International Airport, Great Falls, MT

AGENCY: Federal Aviation Administration, (FAA), DOT.

ACTION: Notice.

SUMMARY: Notice is being given that the FAA is considering a proposal from the Great Falls International Airport Authority to change certain portions of the airport from aeronautical use to non-aeronautical use at the Great Falls International Airport, Great Falls, MT. The proposal consists of 5 acres of surplus property shown on the Airport's Exhibit ''A'' as the portion of Parcel 4 east of the airport's access road.

DATES: Comments must be received by March 26, 2018.

ADDRESSES: Comments on this application may be mailed or delivered to the FAA at the following address: Mr. William C. Garrison, Manager, Federal Aviation Administration, Northwest Mountain Region, Airports Division, Helena Airports District Office, 2725 Skyway Drive, Suite 2, Helena, Montana 59602.

FOR FURTHER INFORMATION CONTACT: Mr. Joe Nye, Civil Engineer, Federal Aviation Administration, Northwest Mountain Region, Helena Airports District Office, 2725 Skyway Drive, Suite 2, Helena, MT 59602–1213.

The request to release deed restrictions may be reviewed, by appointment, in person at the same location.

SUPPLEMENTARY INFORMATION: The FAA invites public comment on the request to release the aeronautical use restriction of 5 acres at the Great Falls International Airport under the provisions of Title 49, U.S.C. Section 47153(c) and 47107(h)2.

The Great Falls International Airport Authority, referred to herein as the Authority, has requested release from the aeronautical use restrictions assigned to 5 acres donated by the U.S. Government as surplus property in 1948.

The 5 acres are a fragment of a larger 780-acre parcel identified on the Airport's Exhibit A as Parcel 4. The 5 acres proposed for non-aeronautical use are isolated from the airfield by the airport entry road to the south and west. The Authority has identified these 5 acres as no longer needed for aeronautical purposes.

The Authority proposes to lease the property for the construction and operation of a fueling station and restaurant. The revenue from the lease of this property will be used for airport purposes. The proposed use of this property is compatible with other airport operations and is in accordance with FAA's Policy and Procedures Concerning the Use of Airport Revenue, published in **Federal Register** on February 16, 1999.

Any person may inspect the request in person at the FAA office listed above under **FOR FURTHER INFORMATION CONTACT**.

Issued in Helena, Montana, on February 14, 2018.

William C. Garrison,

Manager, Helena Airports District Office.

[FR Doc. 2018–03658 Filed 2–21–18; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

[FHWA Docket No. FHWA–2017–0018]

Transportation Asset Management Plan Development Processes Certification and Recertification Guidance; Transportation Asset Management Plan Consistency Determination Interim Guidance

AGENCY: Federal Highway Administration (FHWA), U.S. Department of Transportation (DOT).

ACTION: Notice.

SUMMARY: The FHWA is finalizing one guidance document and issuing one interim guidance document: Transportation Asset Management Plan Development Processes Certification and Recertification Guidance, and Transportation Asset Management Plan Consistency Determination Interim Guidance. These documents provide implementation guidance on provisions of the Moving Ahead for Progress in the 21st Century Act (MAP–21) and the Asset Management Final Rule, which requires a State department of transportation (State DOT) to develop and implement a risk-based asset management plan. Under these authorities, FHWA must certify that Transportation Asset Management Plan (TAMP) development processes established by a State DOT meet applicable requirements, and make an annual consistency determination, evaluating whether a State DOT has developed and implemented a State-approved TAMP that meets all applicable requirements. This notice finalizes the Transportation Asset Management Plan Development Processes Certification and Recertification Guidance, issues interim guidance on transportation asset management plan consistency determinations, and summarizes the comments received on the drafts of both guidance documents, FHWA's response to those comments, and any changes that were made to the guidance documents issued with this notice.

FOR FURTHER INFORMATION CONTACT: For questions about this notice contact Mr. Stephen Gaj, FHWA Office of Infrastructure, (202) 366–1336, Federal Highway Administration, 1200 New Jersey Ave. SE, Washington, DC 20590, or via email at *Stephen.Gaj@dot.gov.* For legal questions, please contact Ms. Janet Myers, FHWA Office of the Chief Counsel, (202) 366–2019, Federal Highway Administration, 1200 New Jersey Ave. SE, Washington, DC 20590–0001, or via email at *Janet.Myers@dot.gov.* Business hours for FHWA are from 8:00 a.m. to 4:30 p.m., e.t., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Electronic Access

Copies of the proposed Transportation Asset Management Plan Development Processes Certification and Recertification Guidance; and Transportation Asset Management Plan Consistency Determination Interim Guidance are available online for download and public inspection online under the docket at the Federal eRulemaking portal at: *http://www.regulations.gov.* An electronic copy of this notice may be downloaded from the Office of the Federal Register's home page at: *http://www.archives.gov/federal_register* and the Government Publishing Office's web page at: *https://www.gpo.gov/fdsys/.*

Background

Under the asset management provisions enacted in MAP–21, codified at 23 U.S.C. 119, State DOTs must develop and implement a risk-based TAMP. This TAMP must include all National Highway System (NHS) pavements and bridges, regardless of whether the State or some other entity owns the relevant NHS facility.

The FHWA Division Offices (Divisions) must take two actions with respect to State DOT asset management activities. The first is TAMP development process certification/recertification. Under 23 U.S.C. 119(e)(6), FHWA must certify at least every 4 years that the State DOT's processes for developing its TAMP are consistent with applicable

requirements. The FHWA also must recertify whenever the State amends its TAMP development processes, in accordance with 23 CFR 515.13(c). The Transportation Asset Management Plan Development Processes Certification and Recertification Guidance (Development Processes Certification Guidance) provides a framework for Divisions to undertake and complete this process certification. The second FHWA action, under 23 U.S.C. 119(e)(5), is an annual consistency determination, which evaluates whether the State DOT has developed and implemented a TAMP that is consistent with the requirements of 23 U.S.C. 119. The Transportation Asset Management Plan Consistency Determination Interim Guidance (Consistency Determination Interim Guidance) assists Divisions on evaluating whether a State DOT has developed and implemented its TAMP in accordance with provisions in 23 CFR 515.13(b). Note that best practices in guidance may be revised as the state of asset management practices advance and the asset management rule is further implemented.

Draft versions of guidance were made available for public review and comment June 6, 2017, at 82 FR 25905. The FHWA received seven comment letters from the following organizations: Alaska Department of Transportation and Public Facilities, Georgia DOT, Maryland DOT, Michigan DOT, New Jersey DOT, Wyoming DOT, and joint comments from the DOTs of Idaho, Montana, New York, North Dakota, South Dakota, and Wyoming. A summary of the comments received and FHWA's response, including any changes made in response to comments, is provided below. Based on the comments received, as well as FHWA's experience to date as it implements the certification and consistency determination requirements, FHWA concluded it is appropriate to issue final certification guidance. However, FHWA believes that issues that may affect FHWA consistency determinations are less well-defined at this time. Accordingly, FHWA is issuing the guidance on consistency determinations as interim guidance, with the expectation of finalizing that guidance later in 2018.

Concern That the Guidance Would Impose New Requirements

Several commenters (Alaska, Wyoming, and the joint commenters) expressed concern that these guidance documents would impose new requirements without undergoing the required notice and comment procedures. In response to these concerns, FHWA notes that the guidance does not impose any new requirements. Any requirements discussed in the guidance are imposed by existing statute or regulation, and those requirements can be changed only by revising these underlying authorities. Recommended best practices are clearly described as not required, and may be revised as practices advance and asset management is further implemented. The FHWA revised the introduction of both documents to clarify this point.

TAMP Consistency Determination Requirements

Alaska asked for more information on the factors that Divisions will use to determine that State DOT funding allocations are ''reasonably consistent'' with 23 U.S.C. 119. Under that section, the Secretary must determine annually that a State has developed and implemented an acceptable TAMP. As indicated in 23 CFR 515.13(b)(2), each State DOT may determine the most suitable approach for demonstrating implementation of its TAMP, so long as the information is current, documented, and verifiable. The FHWA considers the best evidence of plan implementation to be that, for the 12 months preceding the consistency determination, the State DOT funding allocations are reasonably consistent with the investment strategies in the State DOT's TAMP. This demonstration takes into account the alignment between the actual and planned levels of investment for various work types (*i.e.,* initial construction, maintenance, preservation, rehabilitation, and reconstruction (CFR 515.13(b)(2)(i))). The FHWA believes the draft guidance (page 2, third paragraph) discussion of ''reasonably consistent'' is sufficiently detailed to inform FHWA Divisions and stakeholders about this issue.

Alaska also asked for more information about how the Division will communicate its consistency determination to the State DOT. As provided in 23 CFR 515.13(b), FHWA will notify the State DOT, in writing, whether the State DOT has developed and implemented a TAMP consistent with applicable requirements. The FHWA does not believe it is necessary to further specify how the notice is delivered to the State DOT.

Declining Targets and Asset Conditions

Joint commenters and Wyoming noted that the performance management regulations in 23 CFR part 490 allow a State DOT to adopt targets for NHS bridge and pavement conditions that reflect conditions that decline at faster rates than previously was the case. The FHWA recognizes that, due to the fiscal conditions and the need for trade-offs across assets, conditions of an asset may improve, stay constant, or decline. In response to this comment, FHWA added clarifying language to the Consistency Determination Interim Guidance regarding such declining targets and asset conditions. However, the State DOT should explain in its TAMP how these improvements or declines affect long-term goals of achieving and sustaining a state of good repair. The TAMP investment strategies must, during the life of the long-term TAMP, be designed to support or make progress toward (1) achieving and sustaining a desired state of good repair over the life cycle of the assets, (2) improving or preserving the condition of the assets and the performance of the NHS relating to physical assets, and (3) achieving the national goals identified in 23 U.S.C. 150(b).

Relationship Between TAMP and Existing Transportation Planning Processes

Michigan asked for clarification on the relationship between existing transportation processes and TAMP requirements, specifically on page 20 of the draft Development Processes Certification Guidance. The requirement to integrate the State-approved TAMP into the transportation planning process calls for consideration of TAMP information and investment strategies when making programming and project selection decisions during transportation planning. The asset management rule, at 23 CFR 515.9(h), clearly describes the interaction between the TAMP and STIP: ''the State DOT must integrate its TAMP into the State DOT's planning processes that lead to the STIP, to support the State DOT's efforts to achieve the goals in 23 CFR 515.9(f).'' The FHWA encourages (but does not require) that such integration extend to including, in the STIP performance management target achievement discussion under 23 CFR 450.218(q), information about how TAMP investment strategies have been used when programming projects into the STIP. In contrast, the draft Development Processes Certification Guidance addresses the appropriate role of STIPs when State DOTs are developing their TAMPs.

The statement noted by the commenter does not contradict 23 CFR 515.9(h). The TAMPs are the product of analyses and data requirements that do not necessarily apply to other documents, such as STIPs. The guidance emphasizes the long-term nature of the TAMP. A short-term

program, like the STIP, should be used only as background information given this difference in relevant time periods. For example, hard coding STIP projects into Bridge Management Systems to impact development of investment strategies for bridge assets is not considered the use of STIP as background information. However, if a major project with significant amount of funding is delayed for some reason, then the State DOT needs to determine if this delay could have any impact on their TAMP and if so, whether the impact is significant enough to require an update. For these reasons, importing a STIP directly into a TAMP as a substitute for TAMP analysis and investment decision-making does not fulfill TAMP requirements. The FHWA concluded no change is needed to the Development Processes Certification Guidance.

TAMP Life Cycle Planning (LCP) Process and Modeling Requirements

Georgia asked for clarification on the extent and detail it should include in its TAMP submission regarding the LCP process and modeling. In response, FHWA clarifies that States do not need to include their deterioration models in detail in their TAMPs. However, the deterioration models are required to perform the required analysis, and a State DOT must identify the model(s) that are part of the State DOT's process for developing its TAMP. The State DOTs should include, as part of their process description, an explanation of how the selected model(s) provide insight into LCP, and why a certain type of management strategy is the most appropriate strategy at the time of TAMP development.

The asset management rule does not specifically require State DOTs to break assets into sub-groups; however, asset inventories normally break assets into sub-groups (for example a pavement inventory distinguishes between asphalt and concrete pavements), including appropriate condition data for each asset sub-group that are used to predict how each sub-group deteriorates. The State DOTs typically have agency-specific deterioration curves for different pavement types and components/elements of bridges by bridge type. The FHWA believes the Consistency Determination Interim Guidance, the interim document ''Using a Life Cycle Planning Process to Support Asset Management,'' and the final asset management rule adequately cover this information. No change was made to the guidance.

Update or Amendment of TAMPs

Georgia and Maryland requested clarification on the TAMP update and amendment timelines. The State DOTs must update or amend TAMPs at least every 4 years (23 CFR 515.13(c)). The State DOTs are otherwise free to update or amend plans whenever such revision is warranted.[1] The FHWA will consider annually the most recent TAMP submitted by the State DOT, along with any separate documentation submitted by the State DOT to demonstrate implementation of the plan. Thus, the State DOT should consider updating its plan whenever there is a change that has material impact on the accuracy and validity of the processes, analyses, or investment strategies in the plan. If the State DOT amends its TAMP, including any amendments to TAMP development processes, the State DOT must submit the amended document to FHWA for review. The FHWA will make the applicable determination(s) (a new process certification, consistency determination, or both). The State DOT must make such submissions at least 30 days prior to the deadline for the next FHWA consistency determination, except in the case of non-material revisions as defined in 23 CFR 515.13(c). The FHWA believes the Consistency Determination Interim Guidance and the final asset management rule adequately cover this information; thus, no change was made to the guidance.

Initial TAMP Requirements

Michigan and Maryland requested further information on the requirements for the initial TAMP. The initial TAMP must include a description of all the required TAMP development processes described in 23 CFR 515.7. The scope of this requirement includes policies, procedures, documentation, and an implementation approach that satisfy the requirements of 23 CFR part 515. The FHWA process certification is based on those aspects of the initial TAMP. Separate from the information required for the TAMP development process certification, there are requirements for additional types of information in the initial TAMP. Those requirements are discussed in Question and Answer #1 in FHWA's ''Asset Management Initial Plan Guidance,'' available on FHWA's Asset Management web page (Initial TAMP Q&A #1), at *https://www.fhwa.dot.gov/asset/.*

Specifically, Maryland asserts that the Development Processes Certification Guidance contains requirements for the initial plans that falls outside the scope of the asset management rule. The FHWA does not agree with the commenter's interpretation. Section 515.11(b) of the rule establishes flexibility for State DOTs, when preparing their initial TAMPs, to deviate in certain respects from 23 CFR 515.7 and 515.9 requirements by eliminating certain analyses from the plans. In response to the comment, FHWA added language to the Development Processes Certification Guidance clarifying that (1) certification of the State DOT's TAMP development processes is based on meeting the process requirements described in 23 CFR 515.7; and (2) the initial TAMP must provide all the information specified in 23 CFR 515.7 and 515.9, except the analyses in the three areas listed as exclusions under 515.11(b). For a detailed discussion of the initial TAMP requirements, see Initial TAMP Q&A #1, discussed above.

Further, Michigan requested that FHWA add a list of processes required for the initial TAMP to the Development Processes Certification Guidance. Because this information goes beyond the scope of the guidance documents that are the subject of this notice, FHWA did not revise the documents based on this comment. The requested information appears in the Initial TAMP Q&A #1, discussed above.

Performance Gap Analysis

Georgia and Michigan requested clarification on how to conduct the performance gap analysis, particularly, whether to use current asset condition targets given that the targets required under 23 U.S.C. 150(d) are not due until May 20, 2018.

In response to the commenter's specific questions about the use of targets in initial TAMPs, pursuant to 23 CFR 515.11(b), State DOTs are not required to include 23 U.S.C. 150(d) targets in the Initial TAMPs because the deadline for setting those targets is less than 6 months before the deadline for submission of the initial TAMP on April 30, 2018. However, FHWA encourages (but does not require) State DOTs that have performance targets, whether developed to meet 23 U.S.C. 150(d) requirements or for other reasons, to include those targets if possible. This will provide the State DOT with more experience in analysis and implementation. A State DOT that includes targets can test the effectiveness of its proposed TAMP development processes. The State DOTs may wish to establish ''temporary targets'' for use in the initial TAMP. For

[1] Note that there are provisions in 23 CFR part 490 that affect the timing and procedures for amending 23 U.S.C. 150(d) targets.

example, State DOTs may use the minimum condition requirements for NHS bridges and Interstate pavements, as established under 23 CFR part 490. Also, States are encouraged to set targets for non-Interstate pavements to get full coverage for NHS pavements. The State DOT can use various sources of information for temporary targets, such as strategic plans and other State plans.

As discussed above, State DOT may amend its TAMP at any time to add section 150(d) targets, or to revise or remove any other targets. Procedures applicable to TAMP amendments appear in 23 CFR 515.13(c). Note, however, that 23 CFR part 490 contains separate procedures that govern the amendment of part 490 targets.

The FHWA believes this information is adequately addressed in the guidance, the final asset management rule, and FHWA's ''Asset Management Initial Plan Guidance,'' available on FHWA's Asset Management web page, at *https://www.fhwa.dot.gov/asset/.*

Michigan noted that the examples of good practices for the performance gap analysis would be better suited for the portion of the Development Processes Certification Guidance entitled ''Process for Ensuring Use of Best Available Data and Use of Bridge and Pavement Management Systems'' on page 20. The FHWA agrees, and revised the final guidance as suggested.

Long-term Targets, Vision, and State of Good Repair (SOGR)

Michigan and Georgia requested additional guidance on the role of long-term targets and the State DOT's long-term vision. Michigan commented that the Consistency Determination Guidance should be expanded to clarify how the long-term vision under the performance gap analysis should fit with other TAMP requirements. Michigan is concerned that Federal and some States' performance management pavement categories may not be in alignment, and that the 10-year period for the financial plan may not align with time periods some States use for asset management.

In response to the comments concerning the use of ''long-term targets'' and ''long-term vision,'' FHWA notes that neither the rule, nor the Development Processes Certification Guidance, specifically requires the State DOT's performance gap process to include identification of long-term targets. However, it is good practice for a State DOT's performance gap process to include identification of long-term targets and performance goals. The purpose of the TAMP is to achieve or maintain the State DOT's desired SOGR, which is a long-term goal and typically will look forward more than 10 years. Identification of long-term targets is inherent in defining SOGR.

Each State DOT is required to define asset management objectives and SOGR for itself. The asset management objectives of the State DOT's TAMP should align with the State DOT's mission. The objectives must be consistent with the purpose of asset management, which is to achieve and sustain the desired SOGR over the life cycle of the assets at minimum practicable cost (23 CFR 515.9(d)(1)). In fact, to achieve this goal, the performance gap, life-cycle plan, and risk management analyses should cover periods longer than 10 years. For example, life cycle plans for bridges may cover a period of 70–100 years; however, the TAMP must include the information that covers the immediate next 10 years, not the entire 70–100 years (*see* 23 CFR 515.9(e)). The minimum 10-year period was established to acknowledge the uncertainty surrounding the validity of the assumptions that State DOTs must make to conduct analyses for periods longer than 10 years. The FHWA concluded the draft Development Processes Certification Guidance already reflects this link between the State DOT's long-term vision for SOGR and the TAMP process for performance gap analysis. No change was made in response to this comment.

Michigan specifically noted that it uses freeway and non-freeway categories for its long-term vision, rather than Interstate and NHS (excluding the Interstate) categories. The State DOT TAMPs must specifically address the Interstate and NHS (excluding the Interstate) as required under the performance management and asset management rules. State DOTs have flexibility in how they make the needed adjustments. For example, if the State DOT is managing all its freeways and the Interstate the same way, with the same SOGR goals, the State DOT should explain this in its asset management plan. No change was made in response to this comment.

Michigan also asked how it should treat assets other than NHS pavements and bridges in its long-term vision, specifically, whether it could include other assets without making those other assets subject to all TAMP requirements. If the State DOT wants to address other assets without subjecting those assets to section 515.7 or 515.9(l) analyses, the State DOT can group such assets and identify them as assets outside the TAMP (*e.g.,* ''other assets,'' ''non-TAMP assets'', ''other safety related assets,'' etc.). A State DOT may identify these other types of assets with its respective funding needs in a separate table or general discussion, but must clearly note that the TAMP framework was not used to arrive at the estimated funding needs/allocations for those non-TAMP assets. This issue is addressed in Question #11 of FHWA's ''Asset Management Initial Plan Guidance,'' available on FHWA's Asset Management web page, at *https://www.fhwa.dot.gov/asset/.* In response to this comment, FHWA added information to the Consistency Determination Interim Guidance.

Deviation From the TAMP Under Extenuating Circumstances

Michigan asked FHWA for clarification or examples of ''extenuating circumstances'' that would allow a State to deviate from its TAMP investment strategies, pursuant to 23 CFR 515.13(b)(2)(ii). In response to these comments, FHWA revised the Consistency Determination Interim Guidance, to better describe the case-by-case, extenuating circumstances determination and the information that the State DOT should provide to support deviation from the TAMP.

The FHWA may find that a State DOT has implemented its TAMP even if the State DOT has deviated from the TAMP investment strategies (23 CFR 515.13(b)(2)(ii)). To support such finding, the State DOT's deviation from its TAMP investment strategies must be the result of circumstances beyond its reasonable control. If major changes in available funding or program costs are due to natural disasters or third party (non-State) actions, those circumstances likely will qualify.[2] Circumstances caused by State action outside the State DOT, such as major State funding changes or changes in State program priorities due to State legislative or executive leadership action, may qualify as extenuating circumstances if the State DOT shows it was unable to either prevent those changes, or to offset their effects on achievement of the TAMP investment strategies. Changes in plans or priorities produced solely as a result of the transportation planning process would not typically be considered extenuating circumstances due to the State DOT's role in transportation planning and the regulatory requirements that call for integration of

[2] In the asset management final rule preamble (81 FR 73245), FHWA provided the following example of extenuating circumstances: A sudden increase in material prices that has an impact on delivery of the entire program, forcing the State DOT to divert more funds to projects already underway.

the TAMP into the transportation planning process.

If the State believes extenuating circumstances apply, it should provide an explanation of the extenuating circumstances, the impacts, the State DOT's efforts to avoid or offset the changes and impacts, and program changes that will be undertaken to account for the changed conditions. In addition, State DOT should consider updating or amending its TAMPs whenever there is a material impact on the accuracy and validity of the processes, analysis, or investment strategies in the plan. Updates and other amendments may require FHWA review (*see* 23 CFR 515.13(c)).

Best Available Data

New Jersey asked whether State DOTs could use adjusted historical data to analyze NHS bridge and pavement conditions. The State DOT must use the best available data (23 CFR 515.7(g)). If changes are made to historic data, the State DOT needs to explain what it has done, and why the State DOT believes that the quality of the historic data is improved by the changes. However, any changes in historical data will not be used to revise reporting submitted pursuant to 23 U.S.C. 150(e) or to change determinations made under 23 U.S.C. 119(e)(7) or 119(f). No change was made to either document based on this comment.

Authority: 23 U.S.C. 119; 23 CFR part 515; 49 CFR 1.85.

Issued on: February 14, 2018.

Brandye L. Hendrickson,

Acting Administrator, Federal Highway Administration.

[FR Doc. 2018–03618 Filed 2–21–18; 8:45 am]

BILLING CODE 4910–22–P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

[FHWA Docket No. FHWA–2017–0006]

Fixing America's Surface Transportation (FAST) Act; Equal Access for Over-the-Road Buses Guidance

AGENCY: Federal Highway Administration (FHWA), Department of Transportation (DOT).

ACTION: Notice.

SUMMARY: This Notice announces and outlines the final guidance for requirements contained in Section 1411(a) and (b) of the FAST Act regarding the treatment of over-the-road buses (OTRBs).

DATES: This guidance is effective February 22, 2018.

Electronic Access: This document, the request for comments, and the comments received may be viewed online through the Federal eRulemaking portal at: *http://www.regulations.gov.* Electronic submission and retrieval help and guidelines are available on the website. It is available 24 hours each day, 365 days each year. Please follow the instructions. An electronic copy of this document may also be downloaded from the Office of the Federal Register's website at: *http://www.archives.gov/federalregister* and the Government Publishing Office's website at: *http://www.gpo.gov/fdsys.*

FOR FURTHER INFORMATION CONTACT: Ms. Cynthia Essenmacher, Federal Tolling Program Manager, Center for Innovative Finance Support, Office of Innovative Program Delivery, Federal Highway Administration, 315 W. Allegan St., Ste. 201, Lansing, MI 48913, (517) 702–1856. For legal questions: Mr. Steven Rochlis, Office of the Chief Counsel, Federal Highway Administration, 1200 New Jersey Avenue SE, Washington, DC 20590, (202) 366–1395. Office hours are from 8:00 a.m. to 4:30 p.m. E.T., Monday through Friday, except for Federal holidays.

SUPPLEMENTARY INFORMATION:

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A. Background

The FHWA published a **Federal Register** Notice on April 28, 2017, at 82 FR 19784, seeking public comment for the FAST Act OTRB provisions related to high-occupancy vehicle (HOV) facilities and toll highways. In preparing this guidance to assist in the implementation of Section 1411 of the FAST Act, FHWA considered all public comments submitted to the **Federal Register** Notice.

Section 1411(a) and (b) of the FAST Act contained new requirements regarding the treatment of OTRBs that access toll highways and HOV facilities. Specifically, the FAST Act amended 23 U.S.C. 129 and 23 U.S.C. 166 to address equal access to toll or HOV facilities for OTRBs. The FAST Act amendments defined certain key terms but did not define other terms. The FHWA considered how to define the terms that were not defined under Section 1411 (Section C) as well as enumerating the toll facilities subject to the OTRB requirements (Section D), as the OTRB amendment related to toll facilities that received or will receive Federal participation under 23 U.S.C. 129. In addition, FHWA believes that Congress intended that the OTRB equal access provisions be effective beginning on December 4, 2015, the enactment date of the FAST Act, in contrast to the FAST Act effective date of October 1, 2015, as noted further in Sections B and F. Application of the OTRB requirements retroactive to the FAST Act enactment date raised potential constitutional implications associated with the application prior to the enactment date, particularly for those toll facilities operated by private taxpayers under agreement with a public authority that may have assessed different toll rates to OTRBs during this period between October 1, 2015, and December 4, 2015, without notice of the change in law.

For HOV facilities, 23 U.S.C. 166 (b)(3) was amended by the FAST Act, adding subparagraph (C) to grant HOV authorities an exception to allow public transportation vehicles (which FHWA interprets to include all public transportation vehicles, including public transportation buses) that do not meet the minimum occupancy requirements to use HOV lanes, but only if the HOV authority also gives equal access to OTRBs that serve the public. Under this exception, HOV authorities may allow all public transportation vehicles to use HOV lanes, whether they meet the minimum occupancy requirements or not, if they provide equal access to OTRBs serving the public, under the same rates, terms, and conditions as all other public transportation vehicles.

Additionally, 23 U.S.C. 166(b)(4)(C) was amended by the FAST Act, adding subparagraph (iii), to grant HOV authorities the alternative to toll vehicles not meeting the minimum occupancy requirements in HOV lanes. In that case, HOV authorities are required to provide access to OTRBs that serve the public under the same rates, terms, and conditions as public transportation buses (which FHWA interprets to exclude other types of public transportation vehicles, which may be treated differently by the HOV authority). Similarly, on toll facilities subject to 23 U.S.C. 129, the FAST Act amended 23 U.S.C. 129(a) by adding paragraph (9) to also require that OTRBs that serve the public be provided access to the toll facility under the same rates, terms, and conditions as public transportation buses.

B. Summary Discussion of Comments

Comments were submitted to the **Federal Register** Notice published in April 2017. Comments submitted to the docket can be viewed at: *https://www.regulations.gov/docketBrowser?rpp=50&so=DESC&sb=postedDate&po=0&dct=PS&D=FHWA-2017-0006.*

Commenters included the public transit constituency, both public and private operators, as well as individuals. The respondents directed their comments within three categories. The three categories are general comments, compliance, and information availability. The following summarizes the comments and FHWA's response.

General Comments

• Two commenters recommended that FHWA use the **Federal Register** Notice comments to update and expand existing tolling program guidance published on September 24, 2012.

• One commenter inquired about toll transponders recognizing exemptions on different facilities.

FHWA Response: The purpose of the Notice was to solicit comments on the new OTRB requirements that FHWA would incorporate into implementation of OTRB requirements. Comments concerning expansion of the guidance to address tolling guidance and transponder use is beyond the scope of the **Federal Register** Notice.

• One commenter would like to see FHWA explain why certain facilities are not included in the Section 129 covered facilities list.

FHWA Response: Section 1411 of the FAST Act is applicable to Federal-aid toll facilities where construction of the facility occurred under 23 U.S.C. 129(a) authority. This would include a facility that either uses Federal-aid funds on an existing toll facility in accordance with section 129(a), or imposes tolls on a facility constructed with Federal-aid funds pursuant to section 129(a). Facilities under other Federal tolling authority are not subject to OTRB requirements.

Compliance Comments

• Three commenters requested that FHWA use the existing annual audit process required under 23 U.S.C. 129(a)(3)(B) to determine whether tolling facilities are complying with the OTRB equal access requirements.

FHWA Response: The purpose of the annual audit process is to ensure facilities are complying with the limits on the use of revenues under 23 U.S.C. 129, it does not address operational aspects of the toll facility.

• Three commenters requested FHWA clearly state that bus companies have a legal right to seek refunds from toll operators to correct unequal treatment.

FHWA Response: If an OTRB entity believes equal access was not provided by a covered facility any time after December 4, 2015, that entity should contact the owner/operator of the facility to request a refund. The FHWA does not own, operate, or control the HOV and toll facilities subject to the OTRB requirements.

• Three commenters recommended that the FHWA guidance should make it clear to Division Administrators and to the public authority recipients of Federal funding that the OTRB requirements are already effective and have been in effect since October 1, 2015, and do not depend on any further guidance or other action by FHWA to be enforceable.

FHWA Response: The FHWA acknowledges that the changes in law are effective beginning on the enactment date of the FAST Act on December 4, 2015, and continue in effect, but believes that the issuance of this guidance clarifies the OTRB provisions and will assist affected parties that are subject to the OTRB requirements.

Information Availability Comments

• Three commenters suggested that FHWA require that all facility agencies create and publish their respective rates, terms, and conditions for use of their facilities.

FHWA Response: The FHWA does not own, operate, and control the toll facilities and does not have jurisdiction to impose this suggested requirement.

• One commenter requested FHWA amend the Section 129 facilities list to include the names of the tolling authorities responsible for the operation of each facility.

FHWA Response: The FHWA is publishing an inventory of facilities that received Federal-aid funding under 23 U.S.C. 129 and are subject to the OTRB provisions. See section D, below.

All comments were taken into consideration when developing this final **Federal Register** Notice. The following sections of this Notice provide the final guidance for implementation of the OTRB requirements. This guidance is also available at FHWA's website: [INSERT LINK].

C. Applicable Definitions for Implementing Section 1411 of the FAST Act

For the purposes of implementing FAST Act Section 1411 amendments to 23 U.S.C. 129 and 166, FHWA will use the following definitions previously stated in the **Federal Register** Notice at 82 FR 19784. The definitions are:

''*Over-the-road bus*'' is defined as a bus characterized by an elevated passenger deck located over a baggage compartment.

''*Public Transportation Bus*'' is a category of public transportation vehicle (as defined in 23 U.S.C. 166(f)(6)), consisting of a motor vehicle with motive power, except a trailer, designed for carrying more than 10 persons.

''*Public Transportation Vehicle* '' means a vehicle that (A) provides designated public transportation (as defined in section 221 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12141) or provides public school transportation (to and from public or private primary, secondary, or tertiary schools); and (B)(i) is owned or operated by a public entity; (ii) is operated under a contract with a public entity; or (iii) is operated pursuant to a license by the Secretary or a State agency to provide motorbus or school vehicle transportation services to the public.

''*Serve/Serving the Public*'' means provision of service to the general public, including general or special service (including charter service) on a regular and continuing basis.

''*Toll Facility*'' means a toll highway, bridge, or tunnel or approach to the highway, bridge, or tunnel constructed under 23 U.S.C. 129(a).

D. Covered Facilities Subject to OTRB Equal Access

Section 129 Facilities

Section 1411 of the FAST Act is applicable to Federal-aid toll facilities where construction of the facility occurred under 23 U.S.C. 129(a) authority. Facilities ''constructed under'' Section 129 includes both facilities subject to Section 129 tolling agreements executed prior to the Moving Ahead for Progress in the 21st Century Act (MAP–21) (Pub. L. 112–141), which eliminated the requirement for a Section 129 toll agreement, and facilities that have become (or will become) subject to Section 129 post-MAP–21 (which may, or may not, have a tolling Memorandum of Understanding with FHWA). This would include a facility that either uses Federal-aid funds on an existing toll facility in accordance with Section 129(a), or imposes tolls on a facility constructed with Federal-aid funds pursuant to Section 129(a).

Federal-aid toll facilities that were constructed under other Federal tolling authorities and not subject to Section 1411 of the FAST Act are included in the Section 129 Covered Facilities list

for reference. Other Federal tolling authorities include the Surface Transportation and Uniform Relocation Assistance Act of 1987 (Pub. L. 100–17) and the Intermodal Surface Transportation Efficiency Act of 1991 (Pub. L. 102–240).

The OTRB Section 129 Covered Facilities list can be found at the FHWA's Center for Innovative Finance Support's website at: *https://www.fhwa.dot.gov/ipd/revenue/road_pricing/tolling_pricing/active_agreements.aspx.* The FHWA will annually review and update this list for additions and completeness.

Section 166 Facilities

Under 23 U.S.C. 166(f)(2), the term ''HOV facility'' means a high occupancy vehicle facility. There are no exclusions or exceptions under this definition based on Federal-aid participation in the construction or operation of the HOV facility. Therefore, FHWA believes amendments made by Section 1411 of the FAST Act are applicable to all Section 166 HOV facilities, regardless of Federal-aid participation in the project.

E. Compliance

The requirements of 23 U.S.C. 129(a) and 23 U.S.C. 301 apply to the use of Federal-aid funds for construction (as defined at 23 U.S.C. 101(a)(4)) on tolled highways, bridges, and tunnels, including the use of emergency relief funds for repairs to toll facilities (see 23 CFR 668.109(b)(9)). When Federal funds are used for allowable purposes under 23 U.S.C. 129, grantees are required to follow applicable statute, regulations, and policies. This includes equal access and treatment for OTRBs.

F. Effective Date

If an OTRB entity believes equal access was not provided by a covered facility any time after December 4, 2015, that entity should contact the owner/operator of the facility to address this concern.

Issued on: February 15, 2018.

Brandye L. Hendrickson,

Acting Administrator, Federal Highway Administration.

[FR Doc. 2018–03617 Filed 2–21–18; 8:45 am]

BILLING CODE 4910–22–P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Environmental Impact Statement; Henry County, Virginia

AGENCY: U.S. Department of Transportation, Federal Highway Administration.

ACTION: Notice of Intent to prepare an environmental impact statement.

SUMMARY: The U.S. Department of Transportation, Federal Highway Administration (FHWA), in coordination with the Virginia Department of Transportation (VDOT), is issuing this notice of intent to advise the public, agencies, and stakeholders that an Environmental Impact Statement (EIS) will be prepared to study the effects of a highway project under consideration along the Route 220 corridor in Henry County, Virginia.

DATES: To ensure that a full range of issues related to the study are addressed and all potential issues are identified, comments and suggestions are invited from all interested parties. Comments and suggestions concerning the range of issues to be evaluated in the EIS should be submitted to FHWA at the address below within 30 days of the issuance of this notice to ensure timely consideration.

FOR FURTHER INFORMATION CONTACT: Mr. Mack Frost, Planning and Environment Specialist, Federal Highway Administration, 400 North 8th Street, Suite 750, Richmond, VA 23219–4825; email: *Mack.Frost@dot.gov;* (804)–775–3352.

SUPPLEMENTARY INFORMATION: The environmental review of transportation improvement alternatives for the Route 220 corridor will be conducted in accordance with the requirements of the National Environmental Policy Act (NEPA) of 1969, as amended (42 U.S.C. 4321, *et seq.*), 23 U.S.C. 139, Council on Environmental Quality (CEQ) regulations implementing NEPA (40 CFR 1500–1508), FHWA regulations implementing NEPA (23 CFR 771.101–771.139) and all applicable Federal, State, and local governmental laws and regulations.

1. *Description of the Proposed Action:* The EIS will evaluate the environmental effects from reasonable project alternatives and determine the potential for significant impacts to social, economic, natural or physical environmental resources associated with these alternatives.

2. *Description of Study Area:* A study area large enough to incorporate detailed studies for a full range of reasonable alternatives to be considered for the project will be evaluated. The study area is anticipated to generally encompass a portion of Henry County southeast of the City of Martinsville, roughly following Greensboro Road (U.S. Route 220) from the North Carolina state line until turning northeast along William F. Stone Highway (U.S. Route 58 Bypass) until A.L. Philpott Highway (U.S. Route 58). The specific geographic limits of the study area will be informed during scoping and defined through the course of the study.

3. *Scoping and Public Review Process:* VDOT, in coordination with FHWA, will solicit public and agency comments through this notice as well as public scoping meetings on the proposed action. The locations, dates, and times for each meeting will be publicized through the VDOT website (*http://www.virginiadot.org/projects/salem/default.asp*) and in newspapers with local and regional circulation, including the Roanoke Times and the Martinsville Bulletin. Scoping materials will be available at the meetings and oral and written comments will be solicited. Comments may also be sent to the address above.

Notification of the draft EIS for public and agency review will be made in the **Federal Register** and using other methods to be jointly determined by FHWA and VDOT. Those methods will identify where interested parties can go to review a copy of the draft EIS.

For the draft EIS, public hearings will be held and a minimum 45-day comment period will be provided. The hearings will be conducted by VDOT and announced a minimum of 15 days in advance of the meetings. VDOT will provide information for the public hearings, including the locations, dates, and times for each meeting through a variety of means including the VDOT website (*http://www.virginiadot.org/projects/salem/default.asp*) and by newspaper advertisement.

4. *Additional Review and Consultation:* The EIS will comply with other Federal and State requirements including, but not limited to: Section 404 of the Clean Water Act of 1972, the State water quality certification under Section 401 of the Clean Water Act of 1972; protection of endangered and threatened species under Section 7 of the Endangered Species Act; consideration of cultural resources under Section 106 of the National Historic Preservation Act; protection of water quality under the Virginia/National Pollutant Discharge Elimination System; and consideration

of minority and low income populations under Executive Order 12898; 23 U.S.C. 315; 49 CFR 1.48; 33 CFR part 325.

(Catalog of Federal Domestic Assistance Program Number 20.205, Highway Planning and Construction. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program.)

Issued on: February 13, 2018.

Mack Frost Jr.,

Environmental Specialist, Federal Highway Administration, Richmond, Virginia.

[FR Doc. 2018–03597 Filed 2–21–18; 8:45 am]

BILLING CODE 4910–22–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

Notice of Funding Opportunity for Law Enforcement Strategies for Reducing Trespassing Pilot Grant Program

AGENCY: Federal Railroad Administration (FRA), Department of Transportation (DOT).

ACTION: Notice of Funding Opportunity (NOFO).

SUMMARY: This notice details the application requirements and procedures to obtain grant [1] funding for eligible projects under the Law Enforcement Strategies for Reducing Trespassing Pilot Grant Program. The opportunities described in this notice are available under Catalog of Federal Domestic Assistance number 20.301, ''Rail Safety Grants.''

DATES: Applications for funding under this solicitation are due no later than 5:00 p.m. EDT, on April 23, 2018. Applications for funding received after 5:00 p.m. EDT on April 23, 2018 will not be considered for funding. See Section D of this notice for additional information on the application process.

ADDRESSES: Applications must be submitted via *www.Grants.gov*. Only applicants who comply with all submission requirements described in this notice and submit applications through *Grants.gov* will be eligible for award. For any supporting application materials that an applicant is unable to submit via *Grants.gov*, an applicant may submit an original and two (2) copies to Amy Houser, Office of Program Delivery, Federal Railroad Administration, 1200 New Jersey Avenue SE, Room W36–412, Washington, DC 20590. However, due to delays caused by enhanced screening of mail delivered via the U.S. Postal Service, applicants are advised to use other means of conveyance (such as courier service) to assure timely receipt of materials.

FOR FURTHER INFORMATION CONTACT: For further information regarding this notice, please contact Michail Grizkewitsch, Office of Railroad Safety, Federal Railroad Administration, 1200 New Jersey Avenue SE, Room W33–446, Washington, DC 20590; email: *Michail.grizkewitsch@dot.gov*; phone: (202) 493–1370.

SUPPLEMENTARY INFORMATION:

Notice to applicants: FRA recommends that applicants read this notice in its entirety prior to preparing application materials. There are several administrative prerequisites and eligibility requirements described herein that applicants must comply with to submit an application. Additionally, applicants should note that the required Project Narrative component of the application package may not exceed 25 pages in length.

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A. Program Description

Trespassing on a railroad's private property and along railroad rights-of-way is the leading cause of rail-related fatalities in America. Since 1997, more people have been fatally injured each year by trespassing than in motor vehicle collisions with trains at highway-rail grade crossings. Nationally, approximately 500 trespassing deaths occur each year.

By definition, trespassers are on railroad property without permission. They are most often people who walk across or along railroad tracks as a shortcut to another destination. They also may be engaged in another activity such as loitering, hunting, bicycling, snowmobiling, or all-terrain vehicle (ATV) riding.

From August 3 to August 6, 2015, FRA sponsored the 2015 Right-of-Way (ROW) Fatality and Trespass Prevention Workshop in Charlotte, North Carolina (*https://www.fra.dot.gov/conference/row/index.shtml*). One of the main objectives of the workshop was to present best practices and solicit new ideas about new or expanded initiatives, strategies, programs, and trespass prevention. The workshop provided a variety of presentations which covered key topic areas such as community outreach, enforcement, hazard management, infrastructure design and technology, pedestrian issues, and intentional deaths/acts.

The Enforcement Session of the Workshop covered effective safety and security initiatives to identify, apprehend, prosecute, and track trespassers along railroad ROWs. One of the top recommended actions from the Enforcement Session was to ''establish a federally funded grant program designed specifically for the enforcement of state, county, or municipal laws relating to railroad trespass violations.''

In response to that recommendation, FRA is initiating a ''Pilot Grant Program'' to assist communities at risk for rail trespassing related incidents and fatalities. The objective of this program is to evaluate the effectiveness of funding local law enforcement activities intended to reduce trespassing on the rail ROWs.

The funded agencies will perform rail trespassing enforcement related activities and report those activities and associated benefits to FRA. The data obtained from the activities performed in this Pilot Grant Program will help determine the effectiveness of funding local law enforcement agencies for rail trespass prevention activities.

Funding for research and development, including this Pilot Grant Program, was made available by the Consolidated Appropriations Act, 2016, Public Law 114–113, Div. L, Tit. I, 129 Stat. 2242, 2853 (2015). FRA's research and development programs are authorized in 49 U.S.C. 20108, 49 U.S.C. 301(6) and 49 U.S.C. 103(i) authorizes the Administrator to make grants.

B. Federal Award Information

This notice contains the requirements and procedures applicants must follow to secure funding under the Pilot Grant Program. The total amount of discretionary funding available for approved expenses under this NOFO is $150,000. There are no predetermined minimum or maximum dollar thresholds for awards. FRA anticipates making multiple awards with the available funding. FRA may not be able to award grants to all eligible applications, nor even to all applications that meet or exceed the stated evaluation criteria (see Section E, Application Review Information). Projects must be completed within the six-month period of performance under the grant. FRA will make awards for projects selected under this notice

[1] The term ''grant'' is used throughout this document and is intended to reference funding awarded through a grant agreement, as well as funding awarded through a cooperative agreement.

through cooperative agreements. Cooperative agreements allow for substantial Federal involvement in carrying out the agreed upon investment, including technical assistance, review of interim work products, and increased program oversight under 2 CFR part 200, appendix I. The funding provided under these cooperative agreements will be made available to grantees on a reimbursable basis. Applicants must certify that their expenditures are allowable, allocable, reasonable, and necessary to the approved project before seeking reimbursement from FRA.

C. Eligibility Information

This section of the notice explains the requirements for submitting an eligible grant application. Applications that do not meet the requirements in this section will be considered ineligible for funding. Instructions for conveying eligibility information to FRA are detailed in Section D of this NOFO.

1. Eligible Applicants

The following entities are eligible applicants for all project types permitted under this notice (see Section C.3, ''Other—Project Eligibility''):

a. The applicant and co-applicant pool is limited to state, county, municipal, local, and regional law enforcement agencies in the U.S.

b. Applicants for this grant must have a demonstrated rail trespass problem in their community.

c. At least 1 mile of FRA-regulated railroad mainline track must be within the boundaries of the applying agency's jurisdiction.

2. Cost Sharing or Matching

Neither cost sharing nor matching is a requirement for this grant program.

3. Other—Project Eligibility

Projects eligible for funding under this NOFO are for enforcement activities focused on specific railroad trespassing laws to reduce related incidents and casualties, particularly in areas near railroad trespass ''hot'' spots.

The hourly rate for enforcement officer activities should be limited to the officer's overtime rate (*e.g.* 1.5 times the base rate). Administrative costs are capped at 1% of the total grant award. Projects must be completed within the six-month period of performance under the grant.

The applicant must collect and report the following information to FRA for activities performed using the grant funding:

- Date, time, number of officers, location and description of enforcement activity;
- Justification or reason for selected enforcement activity;
- Number of contacts (*i.e.* encounters with trespassers);
- Number of warnings and/or citations issued; and
- The deterrence effect of such activities and method for measuring such deterrence. The grantee must explain how they determine deterrence effect.

D. Application and Submission Information

Required documents for the application package are outlined below. Applicants must complete and submit the application package. The application package must include historical data such as law enforcement activity, trespassing incident and casualty records, or criminal complaints. FRA suggests submission of supporting documentation such as letters of support.

1. Address To Request Application Package

Applicants must submit all application materials through *http://www.Grants.gov* no later than 5:00 p.m. EDT, on April 23, 2018. Applicants are strongly encouraged to apply early to ensure that all materials are received before the application deadline. General information for submitting applications through *Grants.gov* can be found at: *https://www.fra.dot.gov/Page/P0270*.

2. Content and Form of Application Submission

Applicants should read this section carefully and must submit all required information.

a. Project Narrative

This section describes the minimum requirement for the Project Narrative. FRA also recommends the Project Narrative generally adhere to the following outline. The narrative may include spreadsheet documents, tables, maps, drawings, and other materials, as appropriate. The Project Narrative must not exceed 25 pages excluding cover pages and table of contents. Pages in excess of the maximum will not be reviewed.

The Project Narrative must:

i. Include a title page that lists the following elements in either a table or formatted list: project title; location (*i.e.,* town, city, county, State, Congressional district); applicant organization name; name of any co-applicants; and amount of Federal funding requested;

ii. Designate a point of contact for the applicant and provide his or her name and contact information, including phone number, mailing address, and email address. The point of contact must be an employee of the applicant;

iii. Explain how the applicant meets the applicant eligibility criteria outlined in Section C of this notice;

iv. Provide a brief 4–6 sentence summary of the proposed project, capturing the challenges the proposed project aims to address, intended outcomes, and anticipated benefits that will result from the proposed project;

v. Include a detailed project description that expands upon the brief summary required above. This detailed description should provide, at a minimum, additional background on the challenges the project aims to address, the expected beneficiaries of the project, the specific components and elements of the project, and any other information the applicant deems necessary to justify the proposed project. The detailed description should clearly explain how the proposed project meets the project eligibility criteria in Section C of this notice;

vi. Include geospatial data for the project showing trespass ''hotspots.'' If applicable, the project description must also cite specific DOT National Highway-Rail Crossing Inventory information for trespass ''hot'' spots at grade crossings, including the name of the railroad that owns the infrastructure (or the crossing owner, if different from the railroad), the name of the primary operating railroad, the DOT National Highway-Rail Crossing Inventory Number, and the name of the roadway at the crossing. Applicants can search for data to meet this requirement at the following link: *http://safetydata.fra.dot.gov/OfficeofSafety/default.aspx*; and

vii. Include a thorough discussion of how the proposed project meets all the evaluation criteria. Applicants should note that FRA reviews applications based upon the evaluation criteria in Section E.1.b; therefore, an application should sufficiently address the evaluation criteria.

b. Additional Application Elements

Applicants must include the following documents in the application package:

i. SF 424—Application for Federal Assistance;

ii. SF 424A—Budget Information for Non-Construction;

iii. SF 424B—Assurances for Non-Construction;

iv. FRA's Additional Assurances and Certifications; and

v. SF LLL—Disclosure of Lobbying Activities.

Forms needed for the electronic application process are at *www.grants.gov.*

c. Post-Selection Requirements

See Section F(2) for post-selection requirements.

3. Unique Entity Identifier, System for Award Management (SAM), and Submission Instructions

To apply for funding through *Grants.gov*, applicants must be properly registered. Complete instructions on how to register and submit an application can be found at *www.Grants.gov.* Registering with *Grants.gov* is a one-time process; however, it can take up to several weeks for first-time registrants to receive confirmation and a user password. FRA recommends that applicants start the registration process as early as possible to prevent delays that may preclude submitting an application package by the application deadline. Applications will not be accepted after the due date. Delayed registration is not an acceptable justification for an application extension.

FRA may not make a grant award to an applicant until the applicant has complied with all applicable Data Universal Numbering System (DUNS) and SAM requirements. (Please note that if a Dun & Bradstreet DUNS number must be obtained or renewed, this may take a significant amount of time to complete.) Late applications that are the result of a failure to register or comply with *Grants.gov* applicant requirements in a timely manner will not be considered. To submit an application through *Grants.gov*, applicants must:

a. Obtain a DUNS number

A DUNS number is required for *Grants.gov* registration. The Office of Management and Budget requires that all businesses and nonprofit applicants for Federal funds include a DUNS number in their applications for a new award or renewal of an existing award. A DUNS number is a unique nine-digit sequence recognized as the universal standard for the government in identifying and keeping track of entities receiving Federal funds. The identifier is used for tracking purposes and to validate address and point of contact information for Federal assistance applicants, recipients, and sub-recipients. The DUNS number will be used throughout the grant life cycle. Obtaining a DUNS number is a free, one-time activity. Applicants may obtain a DUNS number by calling 1–866–705–5711 or by applying online at *http://www.dnb.com/us.*

b. Register With the SAM at *www.SAM.gov*

All applicants for Federal financial assistance must maintain current registrations in the SAM database. An applicant must be registered in SAM to successfully register in *Grants.gov*. The SAM database is the repository for standard information about Federal financial assistance applicants, recipients, and sub recipients. Organizations that have previously submitted applications via *Grants.gov* are already registered with SAM, as it is a requirement for *Grants.gov* registration. Please note, however, that applicants must update or renew their SAM registration at least once per year to maintain an active status. Therefore, it is critical to check registration status well in advance of the application deadline. If an applicant is selected for an award, the applicant must maintain an active SAM registration with current information throughout the period of the award. Information about SAM registration procedures is available at *www.sam.gov.*

c. Create a *Grants.gov* username and password

Applicants must complete an Authorized Organization Representative (AOR) profile on *www.Grants.gov* and create a username and password. Applicants must use the organization's DUNS number to complete this step. Additional information about the registration process is available at: *https://www.grants.gov/web/grants/applicants/organization-registration.html.*

d. Acquire Authorization for Your AOR From the E-Business Point of Contact (E-Biz POC)

The E-Biz POC at the applicant's organization must respond to the registration email from *Grants.gov* and login at *www.Grants.gov* to authorize the applicant as the AOR. Please note there can be more than one AOR for an organization.

e. Submit an Application Addressing All Requirements Outlined in This NOFO

If an applicant experiences difficulties at any point during this process, please call the *Grants.gov* Customer Center Hotline at 1–800–518–4726, 24 hours a day, 7 days a week (closed on Federal holidays). For information and instructions on each of these processes, please see instructions at: *http://www.grants.gov/web/grants/applicants/apply-for-grants.html.*

Note: Please use generally accepted formats such as .pdf, .doc, .docx, .xls, .xlsx and .ppt, when uploading attachments. While applicants may embed picture files, such as .jpg, .gif, and .bmp, in document files, applicants should not submit attachments in these formats. Additionally, the following formats will not be accepted: .com, .bat, .exe, .vbs, .cfg, .dat, .db, .dbf, .dll, .ini, .log, .ora, .sys, and .zip.

4. Submission Dates and Times

Complete applications must be received through *www.Grants.gov* no later than 5:00 p.m. EDT, on April 23, 2018.

To ensure a fair competition of limited discretionary funds, the following conditions are not valid reasons to permit late submissions: (1) Failure to complete the *Grants.gov* registration process before the deadline; (2) failure to follow *Grants.gov* instructions on how to register and apply as posted on its website; (3) failure to follow all the instructions in this NOFO; or (4) technical issues experienced with the applicant's computer or information technology environment.

5. Intergovernmental Review

Executive Order 12372 requires applicants from State and local units of government or other organizations providing services within a State to submit a copy of the application to the State Single Point of Contact (SPOC), if one exists, and if this program has been selected for review by the State. Applicants must contact their State SPOC to determine if the program has been selected for State review.

6. Funding Restrictions

Court costs are not an eligible expense under this grant. FRA will only approve pre-award costs consistent with 2 CFR 200.458. Under 2 CFR 200.458, grant recipients must seek written approval from FRA for pre-award activities to be eligible for reimbursement under the cooperative agreement.

E. Application Review Information

1. Criteria

a. Intake and Eligibility Criteria

FRA will first screen each application for eligibility (eligibility requirements are outlined in Section C of this notice) and completeness (application documentation and submission requirements are outlined in Section D of this notice).

b. Evaluation Criteria

FRA-led technical panels of subject-matter experts will evaluate all eligible and complete applications using the evaluation criteria outlined in this section. FRA will analyze each application using the criteria and factors below.

i. Technical Merit. FRA will evaluate application information for the degree to which:

a. The application is thorough and responsive to all the requirements outlined in this notice.

b. The tasks outlined in the project narrative are appropriate to achieve the expected safety benefits of the proposed project.

c. The proposed costs or level of effort are realistic and sufficient to accomplish the tasks.

ii. Project Benefits

FRA intends to award funds to projects that achieve the maximum benefits possible. FRA will evaluate the extent to which:

a. The application contains data and/or supporting information to describe the safety risk posed by rail trespassing in the applicant's jurisdiction. This information could include counts of trespass incidents and casualties, close calls and media coverage of high-visibility encounters.

b. The applicant describes the expected safety benefit of the project, namely how initiatives funded by this program will reduce trespassing on the rail ROW.

c. The applicant demonstrates a cooperative relationship with stakeholders (*e.g.* rail owners and operators, adjacent property owners, municipal governments).

c. Selection Criteria

In addition to the evaluation criteria, the projects selected for funding will advance FRA's current mission and key priorities.

2. Review and Selection Process

FRA will review the applications as follows:

a. Screen applications for completeness and eligibility;

b. Evaluate complete and eligible applications (conducted by technical panels applying the evaluation criteria); and

c. Select projects for funding (completed by the FRA Administrator applying selection criteria).

F. Federal Award Administration Information

1. Federal Award Notices

Applications selected for funding will be announced after the application review period through a press release on FRA's website. Following the announcement, unsuccessful applicants will be notified in writing of the outcomes of the application selection process with a brief explanation of the decision. FRA will contact applicants with successful applications after announcement with information and instructions about the award process. Notification of a selected application is not an authorization to begin proposed project activities. A formal Notice of Grant Agreement signed by both the grantee and the FRA containing an approved scope, schedule, and budget, is required before the award is considered complete.

The period of performance for grants awarded under this notice will be six months. FRA will only consider written requests to extend the period of performance with specific and compelling justifications for why an extension is required. Any obligated funding not spent by the grantee and reimbursed by the FRA upon completion of the grant will be de-obligated.

2. Administrative and National Policy Requirements

Due to funding limitations, projects that are selected for funding may receive less than the amount originally requested. In those cases, applicants must be able to demonstrate that the proposed projects are still viable and can be completed with the amount awarded.

Grantees and entities receiving funding from the grantee (sub-recipients) must comply with all applicable laws and regulations. A non-exclusive list of administrative and national policy requirements that grantees must follow includes: 2 CFR part 200; procurement standards; compliance with Federal civil rights laws and regulations; disadvantaged business enterprises; debarment and suspension; drug-free workplace; FRA's and OMB's Assurances and Certifications; Americans with Disabilities Act; and labor standards, safety requirements, environmental protection, National Environmental Policy Act, environmental justice, and Buy American (41 U.S.C. 8302) provisions. See: *https://www.fra.dot.gov/Page/P0269.*

3. Reporting

a. Reporting Matters Related to Integrity and Performance

Before making a Federal award with a total amount of Federal share greater than the simplified acquisition threshold (see 2 CFR 200.88 Simplified Acquisition Threshold), FRA will review and consider any information about the applicant that is in the designated integrity and performance system accessible through SAM (currently the Federal Awardee Performance and Integrity Information System (FAPIIS)) (see 41 U.S.C. 2313).

An applicant, at its option, may review information in the designated integrity and performance systems accessible through SAM and comment on any information about itself that a Federal awarding agency previously entered and is currently in the designated integrity and performance system accessible through SAM.

FRA will consider any comments by the applicant, in addition to the other information in the designated integrity and performance system, in making a judgment about the applicant's integrity, business ethics, and record of performance under Federal awards when completing the review of risk posed by applicants as described in 2 CFR 200.205.

b. Progress Reporting on Grant Activity

Each applicant selected for a grant will be required to comply with all standard FRA reporting requirements, including quarterly progress reports, quarterly Federal financial reports, and interim and final performance reports, as well as all applicable auditing, monitoring and close out requirements. Reports may be submitted electronically.

c. Performance Reporting

Each applicant selected for funding must collect information and report on the project's performance as directed by the FRA to assess progress.

The applicant must comply with all relevant requirements of 2 CFR part 200.

G. Federal Awarding Agency Contact

For further information regarding this notice and the grants program, please contact Michail Grizkewitsch, Office of Railroad Safety, Federal Railroad Administration, 1200 New Jersey Avenue SE, Room W33–446, Washington, DC 20590; email: *Michail.grizkewitsch@dot.gov.*

Issued in Washington, DC on February 15, 2018.

Jamie Rennert,

Director, Office of Program Delivery, Federal Railroad Administration.

[FR Doc. 2018–03579 Filed 2–21–18; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA–2018–0005; Notice 1]

Hino Motors, Ltd., Receipt of Petition for Decision of Inconsequential Noncompliance

AGENCY: National Highway Traffic Safety Administration (NHTSA), Department of Transportation (DOT).

ACTION: Receipt of petition.

SUMMARY: Hino Motors Sales USA, Inc., a wholly owned subsidiary of Hino Motors, Ltd. (collectively referred to as ''Hino''), has determined that certain model year (MY) 2014–2018 Hino heavy duty trucks do not fully comply with Federal Motor Vehicle Safety Standard (FMVSS) No. 101, *Controls and Displays.* Hino filed a noncompliance report dated December 11, 2017, and subsequently petitioned NHTSA on December 21, 2017, for a decision that the subject noncompliance is inconsequential as it relates to motor vehicle safety.

DATES: The closing date for comments on the petition is March 26, 2018.

ADDRESSES: Interested persons are invited to submit written data, views, and arguments on this petition. Comments must refer to the docket and notice number cited in the title of this notice and submitted by any of the following methods:

- *Mail:* Send comments by mail addressed to 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 comments by hand to U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590. The Docket Section is open on weekdays from 10 a.m. to 5 p.m. except Federal Holidays.
- *Electronically:* Submit comments electronically by logging onto the Federal Docket Management System (FDMS) website at *https://www.regulations.gov/.* Follow the online instructions for submitting comments.
- Comments may also be faxed to (202) 493–2251.

Comments must be written in the English language, and be no greater than 15 pages in length, although there is no limit to the length of necessary attachments to the comments. If comments are submitted in hard copy form, please ensure that two copies are provided. If you wish to receive confirmation that comments you have submitted by mail were received, please enclose a stamped, self-addressed postcard with the comments. Note that all comments received will be posted without change to *https://www.regulations.gov,* including any personal information provided.

All comments and supporting materials received before the close of business on the closing date indicated above will be filed in the docket and will be considered. All comments and supporting materials received after the closing date will also be filed and will be considered to the fullest extent possible.

When the petition is granted or denied, notice of the decision will also be published in the **Federal Register** pursuant to the authority indicated at the end of this notice.

All comments, background documentation, and supporting materials submitted to the docket may be viewed by anyone at the address and times given above. The documents may also be viewed on the internet at *https://www.regulations.gov* by following the online instructions for accessing the dockets. The docket ID number for this petition is shown in the heading of this notice.

DOT's complete Privacy Act Statement is available for review in a **Federal Register** notice published on April 11, 2000, (65 FR 19477–78).

SUPPLEMENTARY INFORMATION:

I. Overview: Hino has determined that certain MY 2014–2018 Hino heavy duty trucks do not fully comply with the requirements of Table 2 of FMVSS No. 101, *Controls and Displays* (49 CFR 571.101). Hino filed a noncompliance report dated December 11, 2017, pursuant to CFR part 573, *Defect and Noncompliance Responsibility and Reports,* and subsequently petitioned NHTSA on December 21, 2017, pursuant to 49 U.S.C. 30118(d) and 30120(h) and 49 CFR part 556, for an exemption from the notification and remedy requirements of 49 U.S.C. Chapter 301 on the basis that this noncompliance is inconsequential as it relates to motor vehicle safety.

This notice of receipt of their petition is published under 49 U.S.C. 30118 and 30120 and does not represent any agency decision or other exercise of judgment concerning the merits of the petition.

II. Vehicles Involved: Approximately 30,025 MY 2014–2018 Hino NJ8J, NV8J, and NH8J heavy duty trucks, manufactured between September 1, 2013, and October 30, 2017, are potentially involved.

III. Noncompliance: Hino describes the noncompliance as the omission of the words ''Brake Air'' for the Low Brake Air Pressure telltale as required in Table 2 of FMVSS No. 101.

IV. Rule Requirements: Paragraphs S5 and S5.2.1 as well as Table 2 of FMVSS No. 101, include the requirements relevant to this petition:

- Each passenger car, multipurpose passenger vehicle, truck and bus that is fitted with a control, a telltale, or an indicator must meet the requirements listed in Table 1 or Table 2 of FMVSS No. 101 for the location, identification, color, and illumination of that control, telltale or indicator.
- Each control, telltale and indicator that is listed in column 1 of Table 1 or Table 2 of FMVSS No. 101 must be identified by the symbol specified for it in column 2 or the word or abbreviation specified for it in column 3 of Table 1 or Table 2.

V. Summary of Petition: Hino described the subject noncompliance and stated its belief that the noncompliance is inconsequential as it relates to motor vehicle safety.

In support of its petition, Hino submitted the following reasoning:

1. Hino notes that the purpose of the low brake air pressure telltale is to alert the driver to a low air condition, consistent with the requirements of FMVSS No. 121, S5.1.5 (warning signal). The ISO symbol for brake system malfunction together with an audible alert that occurs in the subject vehicles would alert the driver to an air issue with the brake system. Once alerted, the driver can check the actual air pressure by reading the front and rear air gauges and seeing the red contrasting color on the gauges indicating low pressure.

2. When the air pressure drops below 79 psi, the ISO symbol illuminates and the audible alert sounds, both of which are described in the Driver's/Owner's Manual of the subject vehicles. Therefore, even if the telltale is not ''BRAKE AIR,'' it is possible for the driver to be alerted that the air pressure is low.

3. There are two scenarios when a low brake air pressure condition could exist: A parked vehicle and a moving vehicle. In both conditions, the driver would be alerted to a low-air condition by the following means:

- Red contrasting color of the ISO symbol
- Audible alert to the driver as long as the vehicle has low air (and park brake is released)
- Air pressure gauges for the front and rear air reservoirs clearly indicating the level of air pressure in the system

• Red contrasting color on the air gauges indicating low air pressure

The functionality of both the parking brake system and the service brake system remains unaffected by using the ISO symbol for brake malfunction instead of ''Brake Air'' for the telltale in the subject vehicles.

4. NHTSA Precedents—Hino notes that NHTSA has previously granted petitions for decisions of inconsequential noncompliance for similar brake telltale issues:

(a) Docket No. NHTSA–2017–0011, 82 FR 33551 (July 20, 2017), grant of petition for Daimler Trucks North America, LLC.

(b) Docket No. NHTSA–2014–0046, 79 FR 78559 (December 30, 2014), grant of petition for Chrysler Group, LLC

(c) Docket No. NHTSA–2012–0004, 78 FR 69931 (November 21, 2013), grant of petition for Ford Motor Company.

In these instances, the vehicles displayed an ISO symbol for the brake telltale instead of the wording required under FMVSS No. 101. The ISO symbol in combination with other available warnings was deemed sufficient to provide the necessary driver warnings.

Hino concluded by expressing the belief that the subject noncompliance is inconsequential as it relates to motor vehicle safety, and that its petition to be exempted from providing notification of the noncompliance, as required by 49 U.S.C. 30118, and a remedy for the noncompliance, as required by 49 U.S.C. 30120, should be granted.

To view Hino's petition analyses in their entirety you can visit *https://www.regulations.gov* by following the online instructions for accessing the dockets and by using the docket ID number for this petition shown in the heading of this notice.

NHTSA notes that the statutory provisions (49 U.S.C. 30118(d) and 30120(h)) that permit manufacturers to file petitions for a determination of inconsequentiality allow NHTSA to exempt manufacturers only from the duties found in sections 30118 and 30120, respectively, to notify owners, purchasers, and dealers of a defect or noncompliance and to remedy the defect or noncompliance. Therefore, any decision on this petition only applies to the subject vehicles that Hino no longer controlled at the time it determined that the noncompliance existed. However, any decision on this petition does not relieve vehicle distributors and dealers of the prohibitions on the sale, offer for sale, or introduction or delivery for introduction into interstate commerce of the noncompliant vehicles under their control after Hino notified them that the subject noncompliance existed.

Authority: 49 U.S.C. 30118, 30120: delegations of authority at 49 CFR 1.95 and 501.8.

Jeffrey M. Giuseppe,

Associate Administrator for Enforcement.

[FR Doc. 2018–03678 Filed 2–21–18; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA–2014–0125; Notice 2]

General Motors, LLC, Grant of Petition for Decision of Inconsequential Noncompliance

AGENCY: National Highway Traffic Safety Administration (NHTSA), Department of Transportation (DOT).

ACTION: Grant of petition.

SUMMARY: General Motors, LLC, (GM) has determined that certain model year (MY) 2015 GMC multipurpose passenger vehicles (MPV) do not fully comply with Federal Motor Vehicle Safety Standard (FMVSS) No. 108, *Lamps, Reflective Devices, and Associated Equipment.* GM has filed a noncompliance report dated November 5, 2014. GM also petitioned NHTSA on November 26, 2014, for a decision that the subject noncompliance is inconsequential as it relates to motor vehicle safety.

FOR FURTHER INFORMATION CONTACT: Mike Cole, Office of Vehicle Safety Compliance, NHTSA, telephone (202) 366–5319, facsimile (202) 366–3081.

SUPPLEMENTARY INFORMATION:

I. Overview: GM has determined that certain MY 2015 GMC MPVs do not fully comply with FMVSS No. 108, *Lamps, Reflective Devices, and Associated Equipment* (49 CFR 571.108). GM has filed a noncompliance report dated November 5, 2014, pursuant to 49 CFR part 573, Defect and Noncompliance Responsibility and Reports. GM also petitioned NHTSA on November 26, 2014, pursuant to 49 U.S.C. 30118(d) and 30120(h) and 49 CFR part 556, for an exemption from the notification and remedy requirements of 49 U.S.C. Chapter 301 on the basis that this noncompliance is inconsequential as it relates to motor vehicle safety.

Notice of receipt of the petition was published with a 30-day public comment period, on June 11, 2015, in the **Federal Register** (80 FR 33334). No comments were received. To view the petition and all supporting documents log onto the Federal Docket Management System (FDMS) website at: *http://www.regulations.gov/.* Then follow the online search instructions to locate docket number ''NHTSA–2014–0125.''

II. Vehicles Involved: Affected are approximately 51,616 MY 2015 GMC Yukon, Yukon Denali, Yukon XL, and Yukon XL Denali MPVs manufactured between September 19, 2013, and October 10, 2014. See GM's petition for additional details.

III. Noncompliance: GM explains that the noncompliance is that under certain conditions the parking lamps on the subject vehicles fail to meet the device activation requirements of paragraph S7.8.5 of FMVSS No. 108.

IV. Rule Requirements: Paragraph S7.8.5 of FMVSS No. 108 titled ''Activation,'' as detailed in Table I–a, includes the requirements relevant to this petition:

• Parking lamps must be activated when the headlamps are activated in a steady burning state.

V. Summary of GM's Analyses: GM stated its belief that the subject noncompliance is inconsequential to motor vehicle safety for the following reasons:

(A) GM explains that the condition is difficult to create even in laboratory settings, let alone real-world driving conditions. GM also stated that they were only able to duplicate the condition under the following circumstances:

• The vehicle is being operated during the daytime with the master lighting switch in ''AUTO'' mode.

• The transmission is not in ''Park.''

• Three or more high-inrush current spikes that exceed the body control module (BCM) inrush current threshold occur on the parking lamp/daytime running lamp (DRL) circuit within a period of 0.625 seconds. While there may be other methods for triggering these spikes (*e.g.,* a service event), GM has only been able to isolate one cause: manually moving the master lighting control from ''AUTO'' to parking lamp (or headlamp), back to ''AUTO'' and back to parking lamp (or headlamp) within 0.625 seconds.

(B) GM believes that drivers are unlikely to cause these spikes during real-world driving. The subject vehicles are equipped with automatic-headlamp operation, so there is very little need for drivers to ever manually operate their vehicle's master lighting control. But even if a driver were inclined to do so, rapidly cycling a vehicle's master lighting control from ''AUTO'' to parking lamp (or headlamp) back to ''AUTO'' and back to parking lamp (or headlamp) in less than a second is a highly unusual maneuver that few (if

any) drivers would ever attempt during normal vehicle operation.

(C) GM additionally explained that the condition is short-lived and that if the condition does occur any of the following routine operations will automatically correct the condition:

- The ignition is turned off and then on with the master lighting control in ''AUTO'' mode.
- Turning the ignition off with the master lighting control in any mode other than ''AUTO,'' and then turning the ignition back on after a minimum of ten minutes.
- Cycling the master lighting control to off and then back to any on position.
- If the vehicle is in DRL mode, activating both turn signals, or shifting the transmission in and out of ''PARK.''

(D) GM notes that while the condition affects the parking lamps and DRLs it does not affect the operation of the vehicle's other lamps.

(E) GM also cited a previous petition that NHTSA granted dealing with a noncompliance that GM believes is similar to the noncompliance that is the subject of its petition.

GM is not aware of any field incidents or warranty claims relating to the subject noncompliance.

GM has additionally informed NHTSA that it corrected the noncompliance in subsequent production of the subject vehicles.

In summation, GM believes that the described noncompliance of the subject vehicles is inconsequential to motor vehicle safety, and that its petition, seeking to exempt GM from providing recall notification of noncompliance as required by 49 U.S.C. 30118 and remedying the recall noncompliance as required by 49 U.S.C. 30120 should be granted.

GM's complete petition and all supporting documents are available by logging onto the Federal Docket Management System (FDMS) website at: *https://www.regulations.gov/* and following the online search instructions to locate the docket number listed in the title of this notice.

NHTSA'S Decision:

NHTSA's Analysis: NHTSA has reviewed and accepts GM's analyses that the subject noncompliance is inconsequential to motor vehicle safety.

NHTSA stresses that compliant parking lamps are important safety features of vehicles. There are a number of factors that led NHTSA to the conclusion that under the specific circumstances described in this petition, this situation would have a low probability of occurrence and, if it should occur, it would neither be long lasting nor likely to occur during a period when parking lamps are generally in use. Importantly, when the noncompliance does occur, other lamps remain functional. The combination of all of the factors, specific to this case, abate the risk to safety.

As defined by FMVSS No. 108, parking lamps are lamps on both the left and right of the vehicle which show to the front and are intended to mark the vehicle when parked or serve as a reserve front position indicating system in the event of headlamp failure. While this definition does not mention daytime or nighttime, NHTSA believes the primary benefit of parking lamps to motor vehicle safety occurs during dusk and darkness.

Based on GM's explanation, the condition during which the parking lamps do not activate simultaneously with the headlamps could only originate under a very narrow set of circumstances that cause the vehicle to falsely diagnose a short-to-ground of the parking lamp circuit. Furthermore, these narrow circumstances would only occur when the DRLs are activated which is during the daytime. For the condition to present itself during darkness, it would have had to originate during the day and continue operation past twilight, because that is when the headlamps and other required lamps (including parking lamps) are automatically activated. In addition, the condition would only exist until one of the actions that would reset the system and eliminate the condition occurred. GM explains the five conditions under which this occurs,[1] including actions like turning the vehicle off and then back on again while the lighting switch is in the default position.

Therefore, NHTSA concludes that there is a very remote chance that this situation would occur during dusk or darkness when parking lamps are important to safety and, importantly, that if the situation were to occur, it would correct itself during normal vehicle operations.

GM referred to two prior inconsequential noncompliance petitions NHTSA granted involving noncompliant conditions caused by a rare, or very specific and rare sequence of events. The first was a petition from Nissan North America (see 78 FR 59090), regarding a unique sequence of actions that can lead to the shift position indicator displaying the incorrect shift position. While this issue was considered a rare occurrence, the primary reason for granting the petition was that the vehicle could not be started or operated when the shift position indicator was in its noncompliant state. NHTSA does not believe that this prior petition supports GM's argument in this case since the relevant issue is that the vehicles under GM's current petition can be operated with the noncompliant condition.

The second was a petition from GM (see 78 FR 35355), regarding the occupant classification system telltale. In this case, GM explained, that on rare occasions (estimated as once every 18 months) during a particular ignition cycle, the passenger airbag telltale indicates that the airbag is ''OFF,'' regardless of whether the airbag was or was not suppressed at the time. Despite the erroneous telltale, the airbag still functioned as designed and there was no danger to the vehicle occupants because of this noncompliance. Once again, NHTSA does not believe that this prior petition supports GM's argument in this case because the airbag was still fully functional and operating as designed.

NHTSA's Decision: In consideration of the foregoing, NHTSA finds that GM has met its burden of persuasion that the subject FMVSS No. 108 noncompliance is inconsequential to motor vehicle safety. Accordingly, GM's petition is hereby granted and GM is consequently exempted from the obligation of providing notification of, and a free remedy for, that noncompliance under 49 U.S.C. 30118 and 30120.

NHTSA notes that the statutory provisions (49 U.S.C. 30118(d) and 30120(h)) that permit manufacturers to file petitions for a determination of inconsequentiality allow NHTSA to exempt manufacturers only from the duties found in sections 30118 and 30120, respectively, to notify owners, purchasers, and dealers of a defect or noncompliance and to remedy the defect or noncompliance. Therefore, this decision only applies to the subject vehicles that GM no longer controlled at the time it determined that the noncompliance existed. However, the granting of this petition does not relieve vehicle distributors and dealers of the prohibitions on the sale, offer for sale, or introduction or delivery for introduction into interstate commerce of the noncompliant vehicles under their

[1] Other reset conditions include: The ignition is turned off and then turned on with the master lighting control in ''AUTO'' mode; the ignition is turned off with the master lighting control in any mode other than ''AUTO'' and the vehicle is restarted after the ignition is off for a minimum of ten minutes; the master lighting control is turned off and then to any on position; the transmission is moved in and out of ''Park'' while the vehicle is in DRL mode (daytime and master lighting control is in ''AUTO'' position); or both turn signals are activated while the vehicle is in DRL mode.

control after GM notified them that the subject noncompliance existed.

Authority: (49 U.S.C. 30118, 30120: delegations of authority at 49 CFR 1.95 and 501.8).

Jeffrey M. Giuseppe,

Associate Administrator for Enforcement.

[FR Doc. 2018–03677 Filed 2–21–18; 8:45 am]

BILLING CODE 4910–59–P

U.S.-CHINA ECONOMIC AND SECURITY REVIEW COMMISSION

Notice of Open Public Hearing

AGENCY: U.S.-China Economic and Security Review Commission.

ACTION: Notice of open public hearing.

SUMMARY: Notice is hereby given of the following hearing of the U.S.-China Economic and Security Review Commission.

The Commission is mandated by Congress to investigate, assess, and report to Congress annually on ''the national security implications of the economic relationship between the United States and the People's Republic of China.'' Pursuant to this mandate, the Commission will hold a public hearing in Washington, DC on March 8, 2018 on ''China, the United States, and Next Generation Connectivity.''

DATES: The hearing is scheduled for Thursday, March 8, 2018 from 9:00 a.m. to 2:50 p.m.

ADDRESSES: TBD, Washington, DC. A detailed agenda for the hearing will be posted on the Commission's website at *www.uscc.gov.* Also, please check the Commission's website for possible changes to the hearing schedule. *Reservations are not required to attend the hearing.*

FOR FURTHER INFORMATION CONTACT: Any member of the public seeking further information concerning the hearing should contact Leslie Tisdale, 444 North Capitol Street NW, Suite 602, Washington DC 20001; telephone: 202–624–1496, or via email at *ltisdale@uscc.gov. Reservations are not required to attend the hearing.*

SUPPLEMENTARY INFORMATION:

Background: This is the third public hearing the Commission will hold during its 2018 report cycle. This hearing will compare and contrast U.S. and Chinese pursuit of next generation connected devices and networks and the implications for U.S. economic competitiveness and national security. The hearing will focus on U.S. and Chinese 5th generation wireless technology (5G) and Internet of Things standards and technology development, U.S. usage of Chinese Internet of Things technologies and 5G networks, and the ability of Chinese firms to collect and utilize data from U.S. consumers through Internet of Things technologies. The hearing will be co-chaired by Commissioner Michael Wessel and Commissioner Larry Wortzel. Any interested party may file a written statement by March 8, 2018, by mailing to the contact above. A portion of each panel will include a question and answer period between the Commissioners and the witnesses.

Authority: Congress created the U.S.-China Economic and Security Review Commission in 2000 in the National Defense Authorization Act (Pub. L. 106–398), as amended by Division P of the Consolidated Appropriations Resolution, 2003 (Pub. L. 108–7), as amended by Public Law 109–108 (November 22, 2005), as amended by Public Law 113–291 (December 19, 2014).

Dated: February 16, 2018.

Kathleen Wilson,

Finance and Operations Director, U.S.-China Economic and Security Review Commission.

[FR Doc. 2018–03621 Filed 2–21–18; 8:45 am]

BILLING CODE 1137–00–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0068]

Agency Information Collection Under OMB Review: Application for Service-Disabled Veterans Insurance

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995, this notice announces that the Veterans Benefits Administration (VBA), Department of Veterans Affairs, will submit the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden; it includes the actual data collection instrument.

DATES: Comments must be submitted on or before March 26, 2018.

ADDRESSES: Submit written comments on the collection of information through *www.Regulations.gov,* or to Office of Information and Regulatory Affairs, Office of Management and Budget, Attn: VA Desk Officer; 725 17th St. NW, Washington, DC 20503 or send through electronic mail to *oira_submission@omb.eop.gov.* Please refer to ''OMB Control No. 2900–0068'' in any correspondence.

FOR FURTHER INFORMATION CONTACT: Cynthia Harvey-Pryor, Enterprise Records Service (005R1B), Department of Veterans Affairs, 810 Vermont Avenue NW, Washington, DC 20420, (202) 461–5870 or email *cynthia.harvey-pryor@va.gov.* Please refer to ''OMB Control No. 2900–0068'' in any correspondence.

SUPPLEMENTARY INFORMATION:

Authority: Pub. L. 104–13; 44 U.S.C. 3501–3521.

Title: Application for Service-Disabled Veterans Insurance, VA Form 29–4364 and VA Form 29–0151.

OMB Control Number: 2900–0068.

Type of Review: Reinstatement of a previously approved collection.

Abstract: These forms are used by veterans to apply for Service-Disabled Veterans Insurance, to designate a beneficiary and to select an optional settlement.

The **Federal Register** Notice with a 60-day comment period soliciting comments on this collection of information was published at 82 FR 229 on November 30, 2017, pages 56857–56858.

Affected Public: Individuals and Households.

Estimated Annual Burden: 8,333 hours.

Estimated Average Burden per Respondent: 20 minutes.

Frequency of Response: On occasion.

Estimated Number of Respondents: 25,000 respondents.

By direction of the Secretary.

Cynthia Harvey-Pryor,

Department Clearance Officer, Office of Quality, Privacy and Risk, Department of Veterans Affairs.

[FR Doc. 2018–03584 Filed 2–21–18; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0695]

Agency Information Collection Activity: Application for Reimbursement of Licensing or Certification Test Fees

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: The Veterans Benefits Administration (VBA), Department of Veterans Affairs (VA), is announcing an

opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act (PRA) of 1995, Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed revision of a currently approved collection, and allow 60 days for public comment in response to the notice.

DATES: Written comments and recommendations on the proposed collection of information should be received on or before April 23, 2018.

ADDRESSES: Submit written comments on the collection of information through Federal Docket Management System (FDMS) at *www.Regulations.gov* or to Nancy J. Kessinger, Veterans Benefits Administration (20M33), Department of Veterans Affairs, 810 Vermont Avenue NW, Washington, DC 20420 or email to *nancy.kessinger@va.gov.* Please refer to ''OMB Control No. 2900–0695'' in any correspondence. During the comment period, comments may be viewed online through FDMS.

FOR FURTHER INFORMATION CONTACT: Cynthia Harvey-Pryor at (202) 461–5870.

SUPPLEMENTARY INFORMATION: Under the PRA of 1995, Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. This request for comment is being made pursuant to Section 3506 of the PRA.

With respect to the following collection of information, VBA invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of VBA's functions, including whether the information will have practical utility; (2) the accuracy of VBA's estimate of the burden of the proposed collection of information; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or the use of other forms of information technology.

Authority: Title V of Public Law 110–252.

Title: Application for Reimbursement of Licensing or Certification Test Fees.

OMB Control Number: 2900–0695.

Type of Review: Revision of a currently approved collection.

Abstract: Claimants complete VA Form 22–0803 to request reimbursement of licensing or certification fees paid.

Affected Public: Individuals or households.

Estimated Annual Burden: 660 hours.

Estimated Average Burden per Respondent: 15 minutes.

Frequency of Response: Annually.

Estimated Number of Respondents: 2,641.

By direction of the Secretary.

Cynthia Harvey-Pryor,

Department Clearance Officer, Office of Quality, Privacy and Risk, Department of Veterans Affairs.

[FR Doc. 2018–03586 Filed 2–21–18; 8:45 am]

BILLING CODE 8320–01–P

FEDERAL REGISTER

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Part II

Federal Communications Commission

47 CFR Parts 1, 8, and 20

Restoring Internet Freedom; Final Rule

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 1, 8, and 20

[WC Docket No. 17–108; FCC 17–166]

Restoring Internet Freedom

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In this document, the Federal Communications Commission (Commission) returns to the light-touch regulatory scheme that enabled the internet to develop and thrive for nearly two decades. The Commission restores the classification of broadband internet access service as a lightly-regulated information service and reinstates the private mobile service classification of mobile broadband internet access service. The *Restoring Internet Freedom Order* requires internet service providers (ISPs) to disclose information about their network management practices, performance characteristics, and commercial terms of service. Finding that transparency is sufficient to protect the openness of the internet and that conduct rules have greater costs than benefits, the Order eliminates the conduct rules imposed by the *Title II Order.*

DATES: *Effective date:* April 23, 2018, except for amendatory instructions 2, 3, 5, 6, and 8, which are delayed as follows. The FCC will publish a document in the **Federal Register** announcing the effective date(s) of the delayed amendatory instructions, which are contingent on OMB approval of the modified information collection requirements in 47 CFR 8.1 (amendatory instruction 5). The Declaratory Ruling, Report and Order, and Order will also be effective upon the date announced in that same document.

FOR FURTHER INFORMATION CONTACT: Ramesh Nagarajan, Competition Policy Division, Wireline Competition Bureau, at (202) 418–2582, *ramesh.nagarajan@fcc.gov.* For additional information concerning the Paperwork Reduction Act information collection requirements contained in this document, send an email to *PRA@fcc.gov* or contact Nicole Ongele at (202) 418–2991.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Declaratory Ruling, Report and Order, and Order (''*Restoring Internet Freedom Order*'') in WC Docket No. 17–108, adopted on December 14, 2017 and released on January 4, 2018. The full text of this document is available at *https://apps.fcc.gov/edocs_public/attachmatch/FCC-17-166A1.pdf.* The full text is also available for public inspection during regular business hours in the FCC Reference Information Center, Portals II, 445 12th Street SW, Room CY–A257, Washington, DC 20554. To request materials in accessible formats for people with disabilities (*e.g.,* braille, large print, electronic files, audio format, etc.) or to request reasonable accommodations (*e.g.,* accessible format documents, sign language interpreters, CART, etc.), send an email to *fcc504@fcc.gov* or call the Consumer & Governmental Affairs Bureau at (202) 418–0530 (voice) or (202) 418–0432 (TTY). The language following the **DATES** caption of this preamble is provided to ensure compliance with 1 CFR 18.17.

Synopsis

In this Declaratory Ruling, Report and Order, and Order, the Commission restores the light-touch regulatory scheme that fostered the internet's growth, openness, and freedom. Through these actions, we advance our critical work to promote broadband deployment in rural America and infrastructure investment throughout the nation, brighten the future of innovation both within networks and at their edge, and move closer to the goal of eliminating the digital divide.

I. Ending Public-Utility Regulation of the Internet

1. We reinstate the information service classification of broadband internet access service, consistent with the Supreme Court's holding in *Brand X.* Based on the record before us, we conclude that the best reading of the relevant definitional provisions of the Act supports classifying broadband internet access service as an information service. Having determined that broadband internet access service, regardless of whether offered using fixed or mobile technologies, is an information service under the Act, we also conclude that as an information service, mobile broadband internet access service should not be classified as a commercial mobile service or its functional equivalent. We find that it is well within our legal authority to classify broadband internet access service as an information service, and reclassification also comports with applicable law governing agency decisions to change course. While we find our legal analysis sufficient on its own to support an information service classification of broadband internet access service, strong public policy considerations further weigh in favor of an information service classification. Below, we find that economic theory, empirical data, and even anecdotal evidence also counsel against imposing public-utility style regulation on ISPs. The broader internet ecosystem thrived under the light-touch regulatory treatment of Title I, with massive investment and innovation by both ISPs and edge providers, leading to previously unimagined technological developments and services. We conclude that a return to Title I classification will facilitate critical broadband investment and innovation by removing regulatory uncertainty and lowering compliance costs.

A. Reinstating the Information Service Classification of Broadband Internet Access Service

1. Scope

2. We continue to define ''broadband internet access service'' as a mass-market retail service by wire or radio that provides the capability to transmit data to and receive data from all or substantially all internet endpoints, including any capabilities that are incidental to and enable the operation of the communications service, but excluding dial-up internet access service. By mass market, we mean services marketed and sold on a standardized basis to residential customers, small businesses, and other end-user customers such as schools and libraries. ''Schools'' would include institutions of higher education to the extent that they purchase these standardized retail services. For purposes of this definition, ''mass market'' also includes broadband internet access service purchased with the support of the E-rate and Rural Healthcare programs, as well as any broadband internet access service offered using networks supported by the Connect America Fund (CAF), but does not include enterprise service offerings or special access services, which are typically offered to larger organizations through customized or individually negotiated arrangements.

3. The term ''broadband internet access service'' includes services provided over any technology platform, including but not limited to wire, terrestrial wireless (including fixed and mobile wireless services using licensed or unlicensed spectrum), and satellite. For purposes of our discussion, we divide the various forms of broadband internet access service into the two categories of ''fixed'' and ''mobile.'' With these two categories of services—fixed and mobile—we intend to cover the entire universe of internet access services at issue in the Commission's

prior broadband classification decisions, as well as all other broadband internet access services offered over other technology platforms that were not addressed by prior classification orders. We also make clear that our classification finding applies to all providers of broadband internet access service, as we delineate them here, regardless of whether they lease or own the facilities used to provide the service. ''Fixed'' broadband internet access service refers to a broadband internet access service that serves end users primarily at fixed endpoints using stationary equipment, such as the modem that connects an end user's home router, computer, or other internet access device to the internet. The term encompasses the delivery of fixed broadband over any medium, including various forms of wired broadband services (*e.g.,* cable, DSL, fiber), fixed wireless broadband services (including fixed services using unlicensed spectrum), and fixed satellite broadband services. ''Mobile'' broadband internet access service refers to a broadband internet access service that serves end users primarily using mobile stations. Mobile broadband internet access includes, among other things, services that use smartphones or mobile-network-enabled tablets as the primary endpoints for connection to the internet. The term also encompasses mobile satellite broadband services. We note that ''public safety services'' as defined in Section 337(f)(1) would not meet the definition of ''broadband internet access service'' subject to the rules herein given that ''such services are not made commercially available to the public by the provider'' as a mass-market retail service.

4. As the Commission found in 2010, broadband internet access service does not include services offering connectivity to one or a small number of internet endpoints for a particular device, *e.g.,* connectivity bundled with e-readers, heart monitors, or energy consumption sensors, to the extent the service relates to the functionality of the device. To the extent these services are provided by ISPs over last-mile capacity shared with broadband internet access service, they would be non-broadband internet access service data services (formerly specialized services). As the Commission found in both 2010 and 2015, non-broadband internet access service data services do not fall under the broadband internet access service category. Such services generally are not used to reach large parts of the internet; are not a generic platform, but rather a specific applications-level service; and use some form of network management to isolate the capacity used by these services from that used by broadband internet access services. Further, we observe that to the extent ISPs ''use their broadband infrastructure to provide video and voice services, those services are regulated in their own right.''

5. Broadband internet access service also does not include virtual private network (VPN) services, content delivery networks (CDNs), hosting or data storage services, or internet backbone services (if those services are separate from broadband internet access service), consistent with past Commission precedent. The Commission has historically distinguished these services from ''mass market'' services, as they do not provide the capability to transmit data to and receive data from all or substantially all internet endpoints. We do not disturb that finding here. Consistent with past Commissions, we note that the transparency rule we adopt today applies only so far as the limits of an ISP's control over the transmission of data to or from its broadband customers.

6. Finally, we observe that to the extent that coffee shops, bookstores, airlines, private end-user networks such as libraries and universities, and other businesses acquire broadband internet access service from an ISP to enable patrons to access the internet from their respective establishments, provision of such service by the premise operator would not itself be considered a broadband internet access service unless it was offered to patrons as a retail mass market service, as we define it here. Although not bound by the transparency rule we adopt today, we encourage premise operators to disclose relevant restrictions on broadband service they make available to their patrons. Likewise, when a user employs, for example, a wireless router or a Wi-Fi hotspot to create a personal Wi-Fi network that is not intentionally offered for the benefit of others, he or she is not offering a broadband internet access service under our definition, because the user is not marketing and selling such service to residential customers, small business, and other end-user customers such as schools and libraries.

2. Broadband Internet Access Service is an Information Service Under the Act

7. In deciding how to classify broadband internet access service, we find that the best reading of the relevant definitional provisions of the Act supports classifying broadband internet access service as an information service. Section 3 of the Act defines an ''information service'' as ''the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.'' Section 3 defines a ''telecommunications service,'' by contrast, as ''the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.'' Finally, Section 3 defines ''telecommunications''—used in each of the prior two definitions—as ''the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received.'' Prior to the *Title II Order* the Commission had long interpreted and applied these terms to classify various forms of internet access service as information services—a conclusion affirmed as reasonable by the Supreme Court in *Brand X.* Our action here simply returns to that prior approach.

8. When interpreting a statute it administers, the Commission, like all agencies, ''must operate 'within the bounds of reasonable interpretation.' And reasonable statutory interpretation must account for both 'the specific context in which . . . language is used' and 'the broader context of the statute as a whole.' '' Below, we first explore the meaning of the ''capability'' contemplated in the statutory definition of ''information service,'' and find that broadband internet access service provides consumers the ''capability'' to engage in all of the information processes listed in the information service definition. We also find that broadband internet access service likewise provides information processing functionalities itself, such as DNS and caching, which satisfy the capabilities set forth in the information service definition. We then address what ''capabilities'' we believe are being ''offered'' by ISPs, and whether these are reasonably viewed as separate from or inextricably intertwined with transmission, and find that broadband internet access service offerings inextricably intertwine these information processing capabilities with transmission.

9. We find that applying our understanding of the statutory definitions to broadband internet access service as it is offered today most soundly leads to the conclusion that it

is an information service. Although the internet marketplace has continued to develop in the years since the earliest classification decisions, broadband internet access service offerings still involve a number of ''capabilities'' within the meaning of the Section 3 definition of information services, including critical capabilities that all ISP customers must use for the service to work as it does today. While many popular uses of the internet have shifted over time, the record reveals that broadband internet access service continues to offer information service capabilities that typical users both expect and rely upon. Indeed, the basic nature of internet service—''[p]rovid[ing] consumers with a comprehensive capability for manipulating information using the internet via high-speed telecommunications''—has remained the same since the Supreme Court upheld the Commission's similar classification of cable modem service as an information service twelve years ago.

10. A body of precedent from the courts and the Commission served as the backdrop for the 1996 Act and informed the Commission's original interpretation and implementation of the statutory definitions of ''telecommunications,'' ''telecommunications service,'' and ''information service.'' The classification decisions in the *Title II Order* discounted or ignored much of that precedent. Without viewing ourselves as formally bound by that prior precedent, we find it eminently reasonable, as a legal matter, to give significant weight to that pre-1996 Act precedent in resolving how the statutory definitions apply to broadband internet access service, enabling us to resolve statutory ambiguity in a manner that we believe best reflects Congress's understanding and intent. Our analysis thus is not at odds with the statement in *USTelecom* that the 1996 Act definitions were not ''intended to freeze in place the Commission's existing classification of various services.'' Consistent with this approach as a traditional tool of statutory interpretation, we reject arguments that suggest that we should disregard this precedent largely out-of-hand. More generally, of course, this precedent—*Brand X* in particular—demonstrates that the Act does not compel a telecommunications service classification.

a. Broadband Internet Access Service Information Processing Capabilities

11. We begin by evaluating the ''information service'' definition and conclude that it encompasses broadband internet access service. Broadband internet access service includes ''capabilit[ies]'' meeting the information service definition under a range of reasonable interpretations of that term. In other contexts, the Commission has looked to dictionary definitions and found the term ''capability'' to be ''broad and expansive,'' including the concepts of ''potential ability'' and ''the capacity to be used, treated, or developed for a particular purpose.'' Because broadband internet access service necessarily has the capacity or potential ability to be used to engage in the activities within the information service definition—''generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications''—we conclude that it is best understood to have those ''capabilit[ies].'' The record reflects that fundamental purposes of broadband internet access service are for its use in ''*generating*'' and ''*making available*'' information to others, for example through social media and file sharing; ''*acquiring*'' and ''*retrieving*'' information from sources such as websites and online streaming and audio applications, gaming applications, and file sharing applications; ''*storing*'' information in the cloud and remote servers, and via file sharing applications; ''*transforming*'' and ''*processing*'' information such as by manipulating images and documents, online gaming use, and through applications that offer the ability to send and receive email, cloud computing and machine learning capabilities; and ''*utilizing*'' information by interacting with stored data. These are just a few examples of how broadband internet access service enables customers to generate, acquire, store, transform, process, retrieve, utilize, and make available information. These are not merely incidental uses of broadband internet access service—rather, because it not only has ''the capacity to be used'' for these ''particular purpose[s]'' but was designed and intended to do so, we find that broadband internet access is best interpreted as providing customers with the ''capability'' for such interactions with third party providers.

12. We also find that broadband internet access is an information service irrespective of whether it provides the *entirety* of any end user functionality or whether it provides end user functionality in tandem with edge providers. We do not believe that Congress, in focusing on the ''offering of a capability,'' intended the classification question to turn on an analysis of which capabilities the end user selects. Further, we are unpersuaded by commenters who assert that in order to be considered an ''information service,'' an ISP must not only offer customers the ''capability'' for interacting with information that may be offered by third parties (''click-through''), but must also provide the ultimate content and applications themselves. Although there is no dispute that many edge providers likewise perform functions to facilitate information processing capabilities, they *all* depend on the combination of information-processing and transmission that ISPs make available through broadband internet access service. The fundamental purpose of broadband internet access service is to ''enable a constant flow of computer-mediated communications between end-user devices and various servers and routers to facilitate interaction with online content.''

13. From the earliest decisions classifying internet access service, the Commission recognized that even when ISPs enable subscribers to access third party content and services, that can constitute ''a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications.'' As the Commission explained in the *Stevens Report,* ''[s]ubscribers can retrieve files from the World Wide Web, and browse their contents, *because* their service provider offers the 'capability for . . . acquiring, . . . retrieving [and] utilizing . . . information.' '' Attempts to distinguish the Commission's classification precedent thus are unfounded insofar as they fail to account for this aspect of the Commission's analysis in those orders. Thus, even where an ISP enables end-users to access the content or applications of a third party, the Commission nonetheless found that constituted the requisite information service ''capability.'' When the *Title II Order* attempted to evaluate customer perception based on their usage of broadband internet access service, it failed to persuasively grapple with the relevant implications of prior Commission classification precedent. The *Title II Order* argued that broadband internet access service primarily is used to access content, applications, and services from third parties unaffiliated with the ISP in support of the view that customers perceive it as a separate offering of telecommunications. The *Title II Order* offers no explanation as to why its narrower view of ''capability''

was more reasonable than the Commission's previous, long-standing view (other than seeking to advance the classification outcome that *Order* was driving towards). Consequently, the *Title II Order* essentially assumed away the legal question of whether end-users perceive broadband internet access service as offering them the ''capability for . . . acquiring, . . . retrieving [and] utilizing . . . information'' under the broader reading of ''capability'' in prior Commission precedent.

14. But even if ''capability'' were understood as requiring more of the information processing to be performed by the classified service itself, we find that broadband internet access service meets that standard. Not only do ISPs offer end users the capability to interact with information online in each and every one of the ways set forth above, they also do so through a variety of functionally integrated information processing components that are part and parcel of the broadband internet access service offering itself. In particular, we conclude that DNS and caching functionalities, as well as certain other information processing capabilities offered by ISPs, are integrated information processing capabilities offered as part of broadband internet access service to consumers today. In addition to DNS and caching, the record reflects that ISPs may also offer a variety of additional features that consist of information processing functionality inextricably intertwined with the underlying service. These additional features include, and are not limited to: email, speed test servers, backup and support services, geolocation-based advertising, data storage, parental controls, unique programming content, spam protection, pop-up blockers, instant messaging services, on-the-go access to Wi-Fi hotspots, and various widgets, toolbars, and applications. While we do not find the offering of these information processing capabilities determinative of the classification of broadband internet access service, their inclusion in the broadband internet access service, and the capabilities and functionalities necessary to make these features possible, further support the ''information service'' classification.

15. *DNS.* We find that DNS is an indispensable functionality of broadband internet access service. While we accept that DNS is not necessary for transmission, we reject assertions that it is not indispensable to the broadband internet access service customers use—and expect—today. DNS is a core function of broadband internet access service that involves the capabilities of generating, acquiring, storing, transforming, processing, retrieving, utilizing and making available information. DNS is used to facilitate the information retrieval capabilities that are inherent in internet access. DNS allows '''click through' access from one web page to another, and its computer processing functions analyze user queries to determine which website (and server) would respond best to the user's request.'' And ''[b]ecause it translates human language (*e.g.,* the name of a website) into the numerical data (*i.e.,* an IP address) that computers can process, it is indispensable to ordinary users as they navigate the internet.'' Without DNS, a consumer would not be able to access a website by typing its advertised name (*e.g., fcc.gov* or *cnn.com*). The *Brand X* Court recognized the importance of DNS, concluding that ''[f]or an internet user, 'DNS is a must. . . . [N]early all of the internet's network services use DNS. That includes the World Wide Web, electronic mail, remote terminal access, and file transfer.' '' While ISPs are not the sole providers of DNS services, the vast majority of ordinary consumers rely upon the DNS functionality provided by their ISP, and the absence of ISP-provided DNS would fundamentally change the online experience for the consumer. We also observe that DNS, as it is used today, provides more than a functionally integrated address-translation capability, but also enables other capabilities critical to providing a functional broadband internet access service to the consumer, including for example, a variety of underlying network functionality information associated with name service, alternative routing mechanisms, and information distribution.

16. The treatment of similar functions in MFJ precedent bolsters our conclusion. Despite the fact that the telecommunications management exception (and information service definition more broadly) was drawn most directly from the MFJ, the *Title II Order* essentially ignored MFJ precedent when concluding that DNS fell within the statutory telecommunications management exception. In addition, even the *Title II Order*'s limited use of *Computer Inquiries* precedent focused mostly on relatively high-level Commission statements about the general sorts of capabilities that could be basic (or adjunct-to-basic) or drew analogies to specific holdings that are at best ambiguous as to their application to broadband internet access service. When analyzing ''gateway'' functionalities by which BOCs would provide end-users with access to third party information services, the MFJ court found that ''address translation,'' which enabled ''the consumer [to] use an abbreviated code or signal . . . in order to access the information service provider'' such as through ''the translation of a mnemonic code into [a] telephone number,'' rendered gateways an information service. We recognize that gateway functionalities and broadband internet access service are not precisely coextensive in scope. We do, however, find similarities between functionalities such as address translation and storage and retrieval to key functionalities provided by ISPs as part of broadband internet access service, and we conclude the court found such gateway and similar functionalities independently sufficient to warrant an information service classification under the MFJ. The ''address translation'' gateway function appears highly analogous to the DNS function of broadband internet access service, which enables end users to use easier-to-remember domain names to initiate access to the associated IP addresses of edge providers. That MFJ precedent, neglected by the *Title II Order,* thus supports our finding that the inclusion of DNS in broadband internet access service offerings likewise renders that service an information service. We rely on this analogy between DNS and particular functions classified under pre-1996 Act precedent not because the technologies are identical in all particulars, but because they share the same relevant characteristics for purposes of making a classification decision under the Act. Given the close fit between DNS and the address translation function classified as an information service under the MFJ coupled with the fact that the statutory information service definition (and telecommunications management exception) was drawn more directly from the MFJ, we find the MFJ precedent entitled to more weight than analogies to *Computer Inquiries* precedent. We thus are not persuaded by arguments seeking to analogize DNS to directory assistance, which the Commission classified as ''adjunct-to-basic'' under the *Computer Inquiries.*

17. We thus find that the *Title II Order* erred in finding that DNS functionalities fell within the telecommunications systems management exception to the definition of ''information service.'' That exception from the statutory information service definition was drawn from the language of the MFJ, and was understood as ''directed at internal operations, not at services for

customers or end users.'' The court's definition of information services excluded capabilities ''for the management, control, or operation of a telecommunication system or the management of a telecommunications service.'' Under the Communications Act, the definition of ''information services'' includes an identically-worded ''telecommunications management'' exception. Commission precedent and legislative history likewise recognize that the definition was drawn from the MFJ. We interpret the concepts of ''management, control, or operation'' in the telecommunications management exception consistent with that understanding. Applying that interpretation, we find the record reflects that little or nothing in the DNS look-up process is designed to help an ISP ''manage'' its network; instead, DNS functionalities ''provide stored information to *end* users to help them navigate the internet.'' As AT&T explains: ''When an end user types a domain name into his or her browser and sends a DNS query to an ISP, . . . the ISP . . . converts the human-language domain name into a numerical IP address, and it then conveys that information back to the end user . . . [who] (via his or her browser) thereafter sends a follow-up request for the internet resources located at that numerical IP address.'' DNS does not merely ''manage'' a telecommunications service, as some commenters assert, but rather is a function that is useful and essential to providing internet access for the ordinary consumer. We are persuaded that ''[w]ere DNS simply a management function, this would not be the case.'' Comparing functions that *would* fall within the exception illustrates the distinction. For example, in contrast to DNS's interaction with users and their applications, ''non-user, management-only protocols might include things such as Simple Network Management Protocol (SNMP), Network Control Protocol (NETCONF), or DOCSIS bootfiles for controlling the configuration of cable modems.'' These protocols support services that manage the network independent of the transmission of information initiated by a user. Other functions that would fall into the telecommunications systems management exception might include information systems for account management and billing, configuration management, and the monitoring of failures and other state information, and to keep track of which addresses are reachable through each of the interconnected neighboring networks.

18. The *Title II Order* drew erroneous conclusions from *Computer Inquiries* precedent and too quickly rejected objections to its treatment of DNS as meeting the telecommunications management exception. The same shortcomings are present in the *Title II Order's* analysis of caching, as well. Under the *Computer Inquiries* framework, the Commission held that some capabilities ''may properly be associated with basic [common carrier] service without changing its nature, or with an enhanced service without changing the classification of the latter as unregulated under Title II of the Act.'' These commonly came to be known as ''adjunct'' capabilities. The Commission has held that functions it had classified as ''adjunct-to-basic'' under the *Computer Inquiries* framework will fall within the statutory telecommunications management exception to the information service definition. Drawing loose analogies to certain functions described as adjunct-to-basic under Commission precedent, the *Title II Order* held that DNS fell within the telecommunications management exception.

19. The *Title II Order* incorrectly assumed that so long as a functionality was, in part, used in a manner that could be viewed as adjunct-to-basic, it necessarily was adjunct-to-basic regardless of what the functionality otherwise accomplished. In addition to the MFJ precedent, Bureau precedent similarly has observed that adjunct-to-basic capabilities do not include functions ''useful to end users, rather than carriers.'' Given the lack of ambiguity in the MFJ's holding in this regard, we find it more reasonable to interpret this precedent to call for a similar requirement that ''adjunct to basic'' services do not include services primarily useful to end-users, and reject arguments to the contrary. Although confronted with claims that DNS is, in significant part, designed to be useful to end-users rather than providers, the *Title II Order* nonetheless decided that it fell within the telecommunications management exception. The same is true of the *Title II Order's* treatment of caching. While conceding that DNS, as well as other functions like caching, ''do provide a benefit to subscribers,'' the *Title II Order* held that they nonetheless fell within the telecommunications management exception because it found some aspect of their operation also was of use to providers in managing their networks. This expansive view of the telecommunications management exception—and associated narrowing of the scope of information services—is a transposition of the analytical approach embodied in the MFJ and *Computer Inquiries;* under the approach in the pre-1996 Act precedent, the analysis would instead begin with the broad language of the information service or enhanced service definitions, generally excluding particular functions only if the purpose served clearly was narrowly focused on facilitating bare transmission. The Commission and the courts made clear the narrow scope of the 'adjunct-to-basic' or 'telecommunications management' categories in numerous decisions in many different contexts.). Notably, the focus remains on the purpose or use of the specific function in question and not merely whether the resulting service, as a whole, is useful to end-users.

20. The *Title II Order* also put misplaced reliance on *Computer Inquiries* adjunct-to-basic precedent from the traditional telephone service context as a comparison when evaluating broadband internet access service functionalities. Because broadband internet access service was not directly addressed in pre-1996 Act *Computer Inquiries* and MFJ precedent, analogies to functions that were classified under that precedent must account for potentially distinguishing characteristics not only in terms of technical details but also in terms of the regulatory backdrop. The 1996 Act enunciates a policy for the internet that distinguishes broadband internet access from legacy services like traditional telephone service. The 1996 Act explains that it is federal policy ''to preserve the vibrant and competitive free market that presently exists for the internet and other interactive computer services, unfettered by Federal or State regulation.'' The application of potentially ambiguous precedent to broadband internet access service should be informed by how well—or how poorly—it advances that deregulatory statutory policy. We find that our approach to that precedent, which results in an information service classification of broadband internet access service, better advances that deregulatory policy than the approach in the *Title II Order,* which led to the imposition of utility-style regulation under Title II.

21. The regulatory history of traditional telephone service also informs our understanding of *Computer Inquiries* precedent, further distinguishing it from broadband internet access service. Given the long history of common carriage offering of that service by the time of the *Computer Inquiries,* it is understandable that some precedent started with a presumption

that the underlying service was a ''basic service.'' But similar assumptions would not be warranted in the case of services other than traditional telephone service for which there was no similar longstanding history of common carriage. Thus, not only did the *Title II Order* rely on specific holdings that are at best ambiguous in their analogy to technical characteristics of broadband internet access service, but it failed to adequately appreciate key regulatory distinctions between traditional telephone service and broadband internet access service. Thus, for example, the fact that the adjunct-to-basic classification of directory assistance arose in the traditional telephone context likewise persuades us to give it relatively little weight here as an analogy to DNS, and we reject arguments to the contrary.

22. *Caching.* We also conclude that caching, a functionally integrated information processing component of broadband internet access service, provides the capability to perform functions that fall within the information service definition. As the record reflects, ''[c]aching does much more than simply enable the user to obtain more rapid retrieval of information through the network; caching depends on complex algorithms to determine what information to store where and in what format.'' This requires ''extensive information processing, storing, retrieving, and transforming for much of the most popular content on the internet,'' and as such, caching involves storing and retrieving capabilities required by the ''information service'' definition. The Court affirmed this view in *Brand X,* finding ''reasonable'' the ''Commission's understanding'' that internet service ''facilitates access to third-party web pages by offering consumers the ability to store, or 'cache,' popular content on local computer servers,'' which constitutes ''the 'capability for . . . acquiring, [storing] . . . retrieving [and] utilizing information.' ''

23. We find that ISP-provided caching does not merely ''manage'' an ISP's broadband internet access service and underlying network, it enables and enhances consumers' access to and use of information online. The record shows that caching can be realized as part of a service, such as DNS, which is predominantly to the benefit of the user (DNS caching). We disagree with assertions in the record that suggest that ISP-provided caching is not a vital part of broadband internet access service offerings, as it may be stymied by the use of HTTPS encryption. Caching can also be realized in terms of content that can be accumulated by the ISP through non-confidential (*i.e.,* non-encrypted) retrieval of information from websites (Web caching). In this case, the user benefits from a rapid retrieval of information from a local cache or repository of information while the ISP benefits from less bandwidth resources used in the retrieval of data from one or more destinations. DNS and Web caching are functions provided as part and parcel of the broadband internet access service. When ISPs cache content from across the internet, they are not performing functions, like switching, that are instrumental to pure transmission, but instead storing third party content they select in servers in their own networks to enhance access to information. The record reflects that without caching, broadband internet access service would be a significantly inferior experience for the consumer, particularly for customers in remote areas, requiring additional time and network capacity for retrieval of information from the internet. Thus, because caching is useful to the consumer, we conclude that the *Title II Order* erred in incorrectly categorizing caching as falling within the telecommunications system management exception to the definition of ''information service.''

24. In addition, the *Title II Order*'s failure to consider applicable MFJ precedent led to mistaken analogies when it concluded that caching fell within the statutory telecommunications management exception. In relevant precedent, the MFJ court observed that the information service restriction generally ''prohibits the [BOCs] from 'storing' and 'retrieving' information,'' but identified ''quite distinct settings in which storage capabilities of the [BOCs] could be used in the information services market.'' One of the categories of storage and retrieval identified by the court appears highly comparable to caching. That category involved BOC provision of ''storage space in their gateways for databases created by others'' such as ''information service providers and end users,'' making ''communication more efficient by moving information closer to the end user, thereby reducing transmission costs.'' This functionality—recognized as an information service by the MFJ court—appears highly analogous to caching, and lends historical support to our view that the caching functionality within broadband internet access service is best understood as rendering broadband internet access service an information service. The first category the court identified was ''very short term storage,'' including, among other things, ''the basic packet switching function,'' which ''involves the breakdown of data or voice communications into small bits of information that are then collected and transmitted between nodes,'' involving ''constant storage, error checking, and retransmission, as required for accurate transmission.'' Although the court was not entirely clear, it seemed to suggest that such functions were not information services under the MFJ. This category appears to bear little similarity to caching, however. The third category of ''storage and retrieval'' information service functions identified by the court would include the BOC's provision of ''voice messaging, voice storage and retrieval, and electronic mail.'' Because that category does not appear as analogous to caching as the category identified by the court and described above, nor was it relied upon in the *Title II Order*'s discussion of caching, we do not focus on that third category in our discussion here.

25. Ignoring that MFJ precedent, the *Title II Order* erred in seeking to analogize caching to '' 'store and forward technology [used] in routing messages through the network as part of a basic service' '' mentioned in the *Computer II Final Decision.* In fact, consistent with the MFJ court's identification of distinct uses of storage and forwarding, the cited portion of the *Computer II Final Decision* recognized that ''the kind of enhanced store and forward services that can be offered are many and varied.'' In that regard, the *Computer II Final Decision* distinguished ''[t]he offering of store and forward *services*'' from ''store and forward *technology,*'' explaining that ''[m]essage or packet switching, for example, is a store and forward technology that may be employed in providing basic service.'' Reading that discussion in full context and in harmony with subsequent MFJ precedent, the reference in the *Computer II Final Decision* to ''store and forward technology'' appears better understood as mirroring a category of storage and retrieval of information that the MFJ court suggested was not an information service—in particular, ''the basic packet switching function, . . . [which] involves the breakdown of data or voice communications into small bits of information that are then collected and transmitted between nodes.'' That category of activity relied upon in the *Title II Order* thus actually appears to be barely or not at all analogous to caching. We instead find more persuasive the

MFJ court's information service treatment of BOC provision of ''storage space in their gateways for databases created by others'' such as ''information service providers and end users''—a distinct category of storage and retrieval functionality that is a close fit to caching. We are unpersuaded by claims that this MFJ precedent only is analogous to CDNs and not ''transparent caching'' based on asserted differences in how it is determined what content will be stored in each scenario. Although the factual scenario discussed in the MFJ anticipated end-users or information service providers electing what information to store, and that fact may have partially informed the court's decision whether to ultimately allow BOCs to provide that capability notwithstanding its classification as an information service, we do not read the underlying classification as turning on that issue. Further, in addition to the distinctions between caching and store-and-forward technology acknowledged even in this filing, Peha Dec. 7, 2017 *Ex Parte* Letter at 4, we find additional shortcomings in how the *Title II Order* relied on adjunct-to-basic precedent.

b. ISPs' Service Offerings Inextricably Intertwine Information Processing Capabilities With Transmission

26. Having established that broadband internet access service has the information processing capabilities outlined in the definition of ''information service,'' the relevant inquiry is whether ISPs' broadband internet access service offerings make available information processing technology inextricably intertwined with transmission. Below we examine both how consumers perceive the offer of broadband internet access service, as well as the nature of the service actually offered by ISPs, and conclude that ISPs are best understood as offering a service that inextricably intertwines the information processing capabilities described above and transmission.

27. We begin by considering the ordinary customer's perception of the ISP's offer of broadband internet access service. As *Brand X* explained, ''[i]t is common usage to describe what a company 'offers' to a consumer as what the consumer perceives to be the integrated finished product.'' ISPs generally market and provide information processing capabilities and transmission capability together as a single service. Therefore, it is not surprising that consumers perceive the offer of broadband internet access service to include more than mere transmission, and that customers want and pay for functionalities that go beyond mere transmission. As Cox explains, ''[w]hile consumers also place significant weight on obtaining a reliable and fast internet connection, they view those attributes as a means of enabling these capabilities to interact with information online, not as ends in and of themselves.'' Indeed, record evidence confirms that consumers highly value the capabilities their ISPs offer to acquire information from websites, utilize information on the internet, retrieve such information, and otherwise process such information. NHMC's argument, based on what it asserts to be a representative sample of consumer complaints filed with the Commission, is not persuasive. NHMC's methodology relied on Natural Language Processing (NLP) to determine words that co-occur in such complaints, and then used ''iterative clustering algorithms'' to ''ma[p] connections among them.'' Neither NHMC's methodology nor the representative extracts of the complaints NHMC submitted demonstrate that individual complaints about particular aspects of service reflect how a customer would perceive service offerings as a whole. Indeed, the sample of complaints attached by NHMC features a broad set of issues, ranging widely from questions about speed to ''losing my internet connection,'' ''charg[ing] extra for your services,'' ''interrupt[ing] the service,'' ''bully[ing] me into share plans,'' ''Google arbitrarily engag[ing] in monopolistic practices,'' ''charg[ing] me modem rental fee,'' or ''basically no technical support.'' We further note that to the extent that perceived speed is a common complaint, that does not mean consumers view broadband internet access service as a pure transmission service. A consumer's perceived speed for many activities (such as web browsing) depends on information-processing elements of the service like DNS and caching; indeed, caching's primary consumer benefit is allowing a more rapid retrieval of information from a local cache (increasing the perceived speed of a consumer's connection). Moreover, the Commission has never relied on such complaints to identify what a service is. And for good reason: We expect consumer complaints about problems with a service—not every aspect of it. Indeed, applying such a methodology would lead to absurd results: Should we redefine the public switched network based on the millions of robocall complaints we get each year or the rural-call-completion problems that we know are too prevalent? Of course not.

28. This view also accords with the Commission's historical understanding that ''[e]nd users subscribing to . . . broadband internet access service expect to receive (and pay for) a finished, functionally integrated service that provides access to the internet. End users do not expect to receive (or pay for) two distinct services—both internet access service and a distinct transmission service, for example.'' While the *Title II Order* dwells at length on the prominence of transmission speed in ISP marketing, it makes no effort to compare that emphasis to historical practice. In fact, ISPs have been highlighting transmission speed in their marketing materials since long before the *Title II Order.* The very first report on advanced telecommunication capability pursuant to Section 706(b) of the 1996 Act, released in 1999, cited ISPs' marketing of their internet access service speed. ISPs' inclusion of speed information in their marketing also was acknowledged by the Court in *Brand X,* which nonetheless upheld the Commission's information service classification as reasonable. Indeed, consideration of ISP marketing practices has been part of the backdrop of all of the Commission's decisions classifying broadband internet access service as an information service and thus cannot justify a departure from the historical classification of broadband internet access service as an information service.

29. The *Title II Order's* reliance on ISP marketing also assumes that it provides a complete picture of what consumers perceive as the finished product. First, the record reflects that ISP marketing of broadband encompasses features beyond speed and reliability. Further, because all broadband internet access services rely on DNS and commonly also rely on caching by ISPs, to the extent that those capabilities, in themselves, do not provide a point of differentiation among services or providers, it would be unsurprising that ISPs did not feature them prominently in their marketing or advertising, particularly to audiences already familiar with broadband internet access service generally. Indeed, speed and reliability are not exclusive to telecommunications services; rather, the record reflects that speed and reliability are crucial attributes of an information service. As such, we reject assertions that speed and reliability are only characteristics of telecommunications services and further note that ISPs market these aspects because they can be differentiated, unlike DNS or caching. Consequently, the mere fact that broadband internet access service

marketing often focuses on characteristics, such as transmission speed, by which services and providers can be differentiated sheds little to no light on whether consumers perceive broadband internet access service as inextricably intertwining that data transmission with information service capabilities. Neither the discussion of the consumer's perspective by Justice Scalia nor that in the *Title II Order* identifies good reasons to depart from the Commission's prior understanding that broadband internet access is a single, integrated information service. Justice Scalia contended that how customers perceive cable modem service is best understood by considering the services for which it would be a substitute—in his view at the time, dial-up internet access and digital subscriber line (DSL) service over telephone networks. However, dial-up internet access has substantially diminished in marketplace significance in the subsequent years. In addition, the legal compulsion for facilities-based carriers to offer broadband transmission on a common carrier basis was eliminated in 2005. Fixed and mobile wireless broadband internet access service have grown to play a much more prominent role in the broadband internet access service marketplace, along with satellite broadband internet access service, none of which ever was under a legal compulsion to offer broadband transmission on a common carrier basis—nor, prior to the *Title II Order,* were they interpreted as voluntarily doing so. Consequently, whatever might have been arguable at the time of *Brand X,* the service offerings in the marketplace as it developed thereafter provide no reason to expect that consumers ''inevitabl[y]'' would view broadband internet access service as involving ''*both* computing functionality *and* the physical pipe'' as separate offerings based on comparisons to the likely alternatives.

30. Separate and distinct from our finding that an ISP ''offers'' an information service from the consumer's perspective, we find that as a factual matter, ISPs offer a single, inextricably intertwined information service. The record reflects that information processes must be combined with transmission in order for broadband internet access service to work, and it is the combined information processing capabilities and transmission functions that an ISP offers with broadband internet access service. Thus, even assuming that any individual consumer could perceive an ISP's offer of broadband internet access service as akin to a bare transmission service, the information processing capabilities that are actually offered as an integral part of the service make broadband internet access service an information service as defined by the Act. As such, we reject commenters' assertions that the primary function of ISPs is to simply transfer packets and not process information.

31. The inquiry called for by the relevant classification precedent focuses on the nature of the service offering the provider makes, rather than being limited to the functions within that offering that particular subscribers do, in fact, use or that third parties also provide. As the Commission recognized in the *Cable Modem Order,* internet access service was appropriately classified as an offering of the capabilities with the definition of an information service ''regardless of whether subscribers use all of the functions provided as part of the service.'' The *Title II Order* erroneously contended that, because functions like DNS and caching potentially could be provided by entities other than the ISP itself, those functions should not be understood as part of a single, integrated information service offered by ISPs. However, the fact that some consumers obtain these functionalities from third-party alternatives is not a basis for ignoring the capabilities that a broadband provider actually ''offers.'' The *Title II Order* gave no meaningful explanation why a contrary, narrower interpretation of ''offer'' was warranted other than, implicitly, its seemingly end-results driven effort to justify a telecommunications service classification of broadband internet access service.

32. Our findings today are consistent with classification precedent prior to the *Title II Order,* which consistently found that ISPs offer a single, integrated service. Although we find the pre-1996 Act *classification* precedent relevant to our classification of broadband internet access service, we reject the view that Congress would have expected classification under the 1996 Act's statutory definitions to be tied to the substantive common carrier transmission *requirements* imposed under those frameworks. We conclude that the best view of the text and structure of the Act undercuts arguments that Congress sought to preserve the substance of pre-1996 Act regulations through the definitions it adopted. Instead, where Congress sought to address substantive requirements akin to those in the MFJ and *Computer Inquiries,* it did so by adopting subjective obligations in the 1996 Act—even if not identical to the pre-1996 Act requirements—and subject to their own Congressionally specified standards for when and to what entities they apply. In addition, the wholesale service focus of substantive MFJ and *Computer Inquiries* common carrier transmission obligations also distinguishes them from the retail service we classify here, likewise undermining any claimed relevance of those pre-1996 Act transmission requirements to our classification decision. The Commission recognized, for example, that the transmission underlying broadband internet access required by the *Computer Inquiries* to be offered on an unbundled, common carrier basis and provided to ISPs was not a ''retail'' service within the meaning of Section 251(c)(4) resale requirements. Nor did such a common carrier transmission service itself enable access to the internet, even if purchased by end-users. By comparison, under the *Computer Inquiries,* the finished service offered to end-users relying on the required common carrier transmission as an input was regulated as an enhanced service, not a common carrier offering, even when offered by the facilities-based carrier's subsidiary. Given our focus here on the finished retail broadband internet access service, we see little relevance to prior regulatory requirements that were imposed to ensure competing providers had access to a wholesale input in the form of a compelled common carriage offering of bare transmission that did not itself provide internet access. Even the early classification analysis in the *Stevens Report* recognized that ''[i]n offering service to end users'' ISPs ''do more than resell [ ] data transport services. They conjoin the data transport with data processing, information provision, and other computer-mediated offerings, thereby creating an information service.'' In *Brand X,* the Court rejected claims that ''[w]hen a consumer . . . accesses content provided by parties other than the cable company'' that ''consumer uses 'pure transmission.' '' Subsequent Commission decisions involving other forms of broadband internet access likewise all concluded that the broadband internet access service was a single, integrated service that did not involve a stand-alone offering of telecommunications. Although parties have, over time, held various views regarding the proper classification of broadband internet access services, the mere fact that a party held such a view in the past, or holds such a view today, does not render a Commission decision confirming a particular view ''moot,''

since a private party's subjective view is not authoritative. The Court further found that ''the high-speed transmission used to provide cable modem service is a functionally integrated component of that service because it transmits data only in connection with the further processing of information and is necessary to provide internet service.'' This distinction makes broadband internet access service fundamentally different than standard telephone service, which the Supreme Court noted does not become an ''information service'' merely because its transmission service may be ''trivially affected'' by some additional capability such as voicemail. Where the addition of some further capability has appeared to have only a trivial effect on the nature of a service, the Commission has previously declined requests for reclassification. Due to the functionally integrated nature of broadband internet access service, however, we reject claims that those decisions call for a different approach than we adopt here. Likewise, the outcome in the Bureau-level *Cisco WebEx Order* accords with our approach, given the finding that the information service capabilities more than trivially affected the transmission capability in the scenario addressed there. Contrary to some arguments, the Bureau had no need to—and did not—address the classification of other service scenarios, and we reject arguments for a different classification approach that are premised on assumptions about how those unaddressed scenarios would have been analyzed or classified. The core, essential elements of these prior analyses of the functional nature of internet access remain persuasive as to broadband internet access service today. We adhere to that view notwithstanding arguments that some subset of the array of internet access uses identified in the *Stevens Report* or subsequent decisions either are no longer as commonly used, or occur more frequently today. Even at the time of the *Cable Modem Order* the Commission recognized the role of user-generated content, and its decision in no way hinged on distinctions in how retail customers of cable modem service used that service in that respect.

33. We disagree with commenters who assert that ISPs necessarily offer both an information service and a telecommunications service because broadband internet access service includes a transmission component. In providing broadband internet access service, an ISP *makes use* of telecommunications—*i.e.,* it provides information-processing capabilities ''via telecommunications''—but does not separately *offer* telecommunications on a stand-alone basis to the public. By definition, *all* information services accomplish their functions ''via telecommunications,'' and as such, broadband internet access service has always had a telecommunications component intrinsically intertwined with the computer processing, information provision, and computer interactivity capabilities an information service offers. We observe that placing information in IP packets does not change the form of information. We find that the transmission of IP packets is transmission of the user's choosing, and also agree that ''[c]hanging the packet structure of an IP packet from IPv4 to IPv6'' does not change the form of the information. As just one example, in support of its classification decision, the *Title II Order* notes that it is technically possible for a transmission component underlying broadband internet access service to be separated out and offered on a common carrier basis. The same would be equally true of many information services, however, given that the information service capabilities are, by definition, available ''via telecommunications.'' Indeed, service providers, who are in the best position to understand the inputs used in broadband internet access service, do not appear to dispute that the ''via telecommunications'' criteria is satisfied even if also arguing that they are *not providing* telecommunications to end-users. For example, ISPs typically transmit traffic between aggregation points on their network and the ISPs' connections with other networks. Whether self-provided by the ISP or purchased from a third party, that readily appears to be transmission between or among points selected by the ISP of traffic that the ISP has chosen to have carried by that transmission link. We reject as overbroad the claim that ''a transmission is 'telecommunications' within the meaning of 47 U.S.C. 153(30) *only* if the transmission is capable of communicating with *all* circuit switched devices on the PSTN or has the purpose of facilitating the use of the PSTN without altering its fundamental character as a telephone network.'' This claim appears premised on incorporating Section 332's definition of a commercial mobile service (which must be ''interconnected'' with the ''public switched network'') into Section 3 of the Act and drawing from pre-1996 Act precedent using an end-to-end analysis to determine the regulatory jurisdiction of communications traffic to inform the interpretation of the term ''points.'' But we find no evidence in the text of the statute that Congress intended to import the commercial mobile service definition from one section into another, and our precedent similarly does not countenance such an importation. Nor is the end-to-end analysis the only pre-1996 Act precedent from which the concept of ''points'' in the ''telecommunications'' definition might have been drawn so as to unambiguously foreclose our conclusion that ''via telecommunications'' is satisfied here. Such inclusion of a transmission component does not render broadband internet access services telecommunications services; if it did, the entire category of information services would be narrowed drastically. Because we find it more reasonable to conclude that at least some telecommunications is being used as an input into broadband internet access service—thereby satisfying the ''via telecommunications'' criteria—we need not further address the scope of the ''telecommunications'' definition in order to justify our classification of broadband internet access service as an information service. We thus do not comprehensively address other criticisms of the *Title II Order*'s interpretation and applications of the ''telecommunications'' definition, which potentially could have implications beyond the scope of issues we are considering in this proceeding.

34. The approach we adopt today best implements the Commission's long-standing view that Congress intended the definitions of ''telecommunications service'' and ''information service'' to be mutually exclusive ways to classify a given service. As the *Brand X* Court found, the term ''offering'' in the telecommunications service definition ''can reasonably be read to mean a 'stand-alone' offering of telecommunications.'' Where, as in the case of broadband internet access services, a service involving transmission inextricably intertwines that transmission with information service capabilities—in the form of an integrated information service—there cannot be ''a 'stand-alone' offering of telecommunications'' as required under that interpretation of the telecommunications service definition. This conclusion is true even if the information service could be said to involve the provision of telecommunications as a component of the service. The Commission's historical approach to internet access services carefully navigated that issue, while the *Title II Order,* by contrast, threatened to

usher in a much more sweeping scope of ''telecommunications services.''

35. The *Title II Order* interpretation stands in stark contrast to the Commission's historical classification precedent and the views of all Justices in *Brand X.* Beginning with the earliest classification decisions, the Commission found that transmission provided by ISPs outside the last mile was part of an integrated information service. The DSL transmission service previously required to be unbundled by the *Computer Inquiries* rules likewise was limited to the ''last mile'' connection between the end-user and the ISP. Nor did any Justice in *Brand X* contest the view that, beyond the last mile, cable operators were offering an information service. Indeed, the *Title II Order*'s broad interpretation of ''telecommunications service'' stands in contrast to the views of Justice Scalia himself, on which the *Title II Order* purports to rely. Justice Scalia was skeptical that a telecommunications service classification of cable modem service would lead to the classification of ISPs as telecommunications carriers based on the transmission underlying their ''connect[ions] to other parts of the internet, including internet backbone providers.'' Yet the *Title II Order* reached essentially that outcome. The *Title II Order*'s interpretation of the statutory definitions did not merely lead it to classify ''last mile'' transmission as a telecommunications service. Rather, under the view of the *Title II Order,* even the transmissions underlying an ISP's connections to other parts of the internet, including internet backbone providers, were part of the classified telecommunications service. Even if the *Title II Order*'s classification approach does not technically render the category of information services a nullity, the fact that its view of telecommunications services sweeps so much more broadly than previously considered possible provides significant support for our reading of the statute and the classification decision we make today. That the Commission previously identified policy concerns about internet traffic exchange says nothing about classification, and thus is not to the contrary. Nor did the *Advanced Services* proceedings identify interconnection obligations on providers of xDSL transmission as services necessary to ensure the provision of internet access. Instead, any interconnection obligations identified there were limited to interconnection between providers of common carrier xDSL transmission service and other telecommunications carriers (rather than providers of edge services or non-common carrier backbone services). The cited portion of the *Advanced Services Remand Order* does not even have anything to do with interconnection requirements or the scope of functions in an xDSL-based advanced service. Rather, it analyzed the jurisdiction of the traffic being carried over the service, which, under the traditional end-to-end analysis, was not limited in scope to any given service within a broader communications pathway.

36. In contrast, our approach leaves ample room for a meaningful range of ''telecommunications services.'' Historically, the Commission has distinguished service offerings that ''always and necessarily combine'' functions such as ''computer processing, information provision, and computer interactivity with data transport, enabling end users to run a variety of applications such as email, and access web pages and newsgroups,'' on the one hand, from services ''that carriers and end users typically use [ ] for basic transmission purposes'' on the other hand. Our interpretation thus stops far short of the view that ''*every transmission* of information becomes an information service.'' Thus, an offering like broadband internet access service that ''always and necessarily'' includes integrated transmission and information service capabilities would be an information service. The distinction between services that ''always and necessarily'' include integrated transmission and information service capabilities and those that do not also highlights a critical difference between internet access service and the service addressed in precedent such as the *Advanced Services Order.* The transmission underlying internet access service that, prior to the *Wireline Broadband Classification Order,* carriers had been required by the *Computer Inquiries* to unbundle and offer as a bare transmission service on a common carrier basis to ensure its availability to competing enhanced service providers—and which did not itself provide internet access—is another specific example of a service that does not ''always and necessarily'' include integrated transmission and information service capabilities. The Commission naturally recognized at the time that the compelled common carriage offering of bare transmission was a telecommunications service, and we reject the view that such an acknowledgment is inconsistent with, or undercuts our reliance on, precedent classifying internet access service as an integrated information service. In addition, the discussion of xDSL advanced services in the *Advanced Services Order* cited by commenters addressed the transmission service generally. It did not purport to be focused specifically on the use of xDSL transmission in connection with internet access service, rather than addressing the classification of the stand-alone transmission service as a general matter. The Commission's historical interpretation thus gives full meaning to both ''information service'' and ''telecommunications service'' categories in the Act.

37. We reject assertions that the analysis we adopt today would necessarily mean that standard telephone service is likewise an information service. The record reflects that broadband internet access service is categorically different from standard telephone service in that it is ''*designed with* advanced features, protocols, and security measures so that it can integrate directly into electronic computer systems and enable users to electronically create, retrieve, modify and otherwise manipulate information stored on servers around the world.'' Further, ''[t]he dynamic network functionality enabling the internet connectivity provided by [broadband internet access services] is fundamentally different from the largely static one dimensional, transmission oriented Time Division Multiplexing (TDM) voice network.'' This finding is consistent with past distinctions. Under pre-1996 Act MFJ precedent, for example, although the provision of time and weather services was an information service, when a BOC's traditional telephone service was used to call a third party time and weather service ''the Operating Company does not 'provide information services' within the meaning of section II(D) of the decree; it merely transmits a call under the tariff.'' In other words, the fundamental nature of traditional telephone service, and the commonly-understood purpose for which traditional telephone service is designed and offered, is to provide basic transmission—a fact not changed by its incidental use, on occasion, to access information services. By contrast, the fundamental nature of broadband internet access service, and the commonly-understood purpose for which broadband internet access service is designed and offered, is to enable customers to generate, acquire, store, transform, process, retrieve, utilize, and make available information. In addition, broadband internet access service

includes DNS and caching functionalities, as well as certain other information processing capabilities. As such, we reject assertions that, under the approach we adopt today, any telephone service would be an information service because voice customers can get access to either automated information services or a live person who can provide information.

38. Additionally, efforts to treat the *Stevens Report* as an outlier that should not have been followed in subsequent classification decisions—and should not be followed here—are ultimately unpersuasive. The clear recognition in the *Stevens Report* that the ISPs at issue were themselves providing data transmission as part of their offerings undercuts arguments seeking to distinguish the *Stevens Report* based on the theory that the transmission used to connect to ISPs typically involved common carrier services either directly (via a call to a dial-up ISP using traditional telephone service) or indirectly (with the ISP using common carrier broadband transmission as a wholesale input into its retail information service). While the extent of data transmission provided by the ISPs that were found to be offering information services in the *Stevens Report* might be incrementally less than the transmission provided by the ISPs dealt with in subsequent information service classification decisions, that appears to be at most a difference in degree, rather than a difference in kind, and the record does not demonstrate otherwise. Nor can the *Stevens Report's* analysis and information service classification be distinguished on the grounds that the ISPs there generally did not own the facilities they used. Although the *Stevens Report* observed that the analysis of whether a single integrated service was being offered was ''more complicated when it comes to offerings by facilities-based providers,'' it did not prejudge the resolution of that question. Thus, there is no reason to simply assume that it was inappropriate for the Commission to build upon the *Stevens Report* precedent when analyzing service offerings from facilities-based providers beginning in the *Cable Modem Order.* Nor do commenters identify material technical differences when facilities ownership is involved that would mandate a different classification analysis. While the *Stevens Report* recognized that under *Computer Inquires* precedent ''offerings by non-facilities-based providers combining communications and computing components should always be deemed enhanced,'' had its analysis simply been carrying forward that approach most of its analysis would have been unnecessary (since internet access clearly did combine communications and computing components). Thus, whether or not the more extensive analysis set forth in the *Stevens Report* was necessary to find internet access provided by non-facilities-based ISPs to be an information service, that analysis cannot be said to be a mere relic of the *Computer Inquiries* approach to non-facilities based providers. Finally, our reliance on classification precedent does not rest on the *Stevens Report* alone, but draws from the full range of classification precedent, both pre- and post-1996 Act. This reliance notably includes not only the Commission's classification decisions, but the Supreme Court's subsequent analysis in *Brand X.* And although some commenters criticize the lack of express consideration of the possible application of the telecommunications management exception in the *Stevens Report,* our evaluation of the pre-1996 Act MFJ and *Computer Inquiries* precedent better accords with outcome of that *Report* and the subsequent classification decisions than it does with the *Title II Order* in that regard. We reject similar criticisms of other precedent for the same reason.

3. Other Provisions of the Act Support Broadband's Information Service Classification

39. We also find that other provisions of the Act support our conclusion that broadband internet access service is best classified as an information service. We do not assert that the language in Sections 230 and 231 is determinative of the information service classification; rather, we find it to be supportive of our analysis of the textual provisions at issue. As such, we find Public Knowledge's assertions that the Commission's reasoning ''would overrule the Supreme Court's holding in *Brand X* . . . [in which] the Court ruled that the Communications Act does not make explicit the correct classification of BIAS'' inapposite. For instance, Congress codified its view in Section 230(b)(2) of the Act, stating that it is the policy of the United States ''to preserve the vibrant and competitive free market that presently exists for the internet and other interactive computer services, unfettered by Federal or State regulation.'' This statement confirms that the free market approach that flows from classification as an information service is consistent with Congress's intent. In contrast, we find it hard to reconcile this statement in Section 230(b)(2) with a conclusion that Congress intended the Commission to subject broadband internet access service to common carrier regulation under Title II.

40. Additional provisions within Sections 230 and 231 of the Act lend further support to our interpretation. Section 230(f)(2) defines an interactive computer service to mean ''*any information service,* system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system *that provides access to the Internet* and such systems operated or services offered by libraries or educational institutions.'' Thus, on its face, the plain language of this provision appears to reflect Congress' judgment that internet access service is an information service.

41. Section 230 states that an ''information service'' includes ''a service or system that provides access to the internet,'' and we disagree with commenters who read the definition of ''interactive computer service'' differently. Specifically, we disagree with commenters asserting that it is unclear whether the clause ''including specifically a service . . . that provides access to the internet'' modifies ''information service'' or some other noun phrase, such as ''access software provider'' or ''system.'' We think it a more reasonable interpretation that the phrase ''service . . . that provides access to the internet'' modifies the noun phrase ''information service.'' Similarly, we disagree that Section 230(f)(2) proves only ''that there exist information services that provide access to the internet, not that all services that provide access to the internet are information services.'' On the contrary, we agree with AT&T that ''the formula 'any X, including specifically a Y,' does logically imply that all Ys are Xs.''

42. Reliance on Section 230(f)(2) to inform the Commission's interpretations and applications of Titles I and II accords with widely accepted canons of statutory interpretation. The Supreme Court has recognized there is a ''natural presumption that identical words used in different parts of the same act are intended to have the same meaning.'' And there is nothing in the context of either section that overcomes the presumption. Indeed, the similarity of circumstances confirms the presumption of similar meaning, as the deregulatory approach to information services embodied in Titles I and II, as well as the deregulatory policy of Section 230, were all adopted as part of the 1996 Act. Thus, we disagree with the *Title II Order's* argument that giving

Section 230 its plain meaning would be ''an oblique'' way to ''settle the regulatory status of broadband internet access.'' On the contrary, we agree that ''it is hardly 'oblique' for Congress to confirm in Section 230 that internet access should be classified as an unregulated information service when elsewhere in the same legislation Congress codifies a definition of 'information services' that was long understood to include gateway services such as internet access.'' And while the *USTelecom* court did not find this definition determinative on the issue, we find that ''it is nonetheless a strong indicator that Congress was more comfortable with the prevailing view that provision of internet access is not a telecommunications service, and should not be subject to the array of Title II statutory provisions.'' We find inapplicable the *USTelecom* court's invocation of the principle that ''Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions.'' Section 230 did not alter any fundamental details of Congress's regulatory scheme but was part and parcel of that scheme, and confirmed what follows from a plain reading of Title I—namely, that broadband internet access service meets the definition of an information service. The legislative history of Section 230 also lends support to the view that Congress did not intend the Commission to subject broadband internet access service to Title II regulation. The congressional record reflects that the drafters of Section 230 did ''not wish to have a Federal Computer Commission with an army of bureaucrats regulating the internet.'' We likewise reject arguments premised on the theory that we are treating definitions in Section 230 and 231 as dispositive, rather than relying on them to inform our understanding of Congress' intent as revealed by the text and structure of the Act more broadly.

43. Section 231, inserted into the Communications Act a year after the 1996 Act's passage, similarly lends support to our conclusion that broadband internet access service is an information service. It expressly states that ''internet access service'' ''does not include telecommunications services,'' but rather ''means a service that enables users to access content, information, electronic mail, or other services offered over the internet, and may also include access to proprietary content, information, and other services as part of a package of services offered to consumers.'' Further, the carve-outs in Section 231(b)(1)–(2) differentiate the provision of telecommunications services and the provision of internet access service. It is hard to imagine clearer statutory language. The Commission has consistently held that categories of telecommunications service and information service are mutually exclusive; thus, because it is an information service, internet access cannot be a telecommunications service. Our interpretation of ''telecommunications service'' and ''information service'' as mutually exclusive ways to classify a given service thus demonstrates the relevance of Section 231 notwithstanding that it does not expressly define broadband internet access service as an information service. On its face then, this language strongly supports our conclusion that, under the best reading of the statute, broadband internet access service is an information service, not a telecommunications service. Nothing in the text of Section 231 reveals that the use of ''internet access service'' there is limited to dial-up internet access. To the contrary, it would seem anomalous for Congress only to exempt entities providing dial-up internet access and not other forms of internet access from the prohibitions of Section 231(a). We thus are unpersuaded by arguments advocating a narrower interpretation of ''internet access service'' in Section 231.

44. We also find that the purposes of the 1996 Act are better served by classifying broadband internet access service as an information service. Congress passed the Telecommunications Act to ''promote competition and reduce regulation.'' Further, as a bipartisan group of Senators stated, ''[n]othing in the 1996 Act or its legislative history suggests that Congress intended to alter the current classification of internet and other information services or to expand traditional telephone regulation to new and advanced services.'' Or as Senator John McCain put it, ''[i]t certainly was not Congress's intent in enacting the supposedly pro-competitive, deregulatory 1996 Act to extend the burdens of current Title II regulation to internet services, which historically have been excluded from regulation.'' It stands these goals on their head for the Commission, as deployment of advanced services reaches the mainstream of Americans' lives, to perpetuate the very Title II regulatory edifice that the 1996 Act sought to dismantle. An information service classification will ''reduce regulation'' and preserve a free market ''unfettered by Federal or State regulation.''

45. Finally, we observe that the structure of Title II appears to be a poor fit for broadband internet access service. Indeed, numerous Title II provisions explicitly assume that all telecommunications services are a telephone service. For example, Section 221 addresses special provisions related to telephone companies, Section 251 addresses the obligations of local exchange carriers and incumbent local exchange carriers, and Section 271 addresses limitations on Bell Operating Companies' provision of interLATA services. For example, to obtain authority to offer in-region interLATA services, the BOCs have to offer a number of functions of particular relevance to the provision of telephone service. Therefore, it is no surprise that the *Title II Order* found that many provisions of Title II were ill-suited to broadband internet access services, and the Commission was forced to, on its own motion, forbear either in whole or in part on a permanent or temporary basis from 30 separate sections of Title II as well as from other provisions of the Act and Commission rules. We find that the significant forbearance the Commission deemed necessary in the *Title II Order* strongly suggests that the regulatory framework of Title II, which was specifically designed to regulate telephone services, is unsuited for the dissimilar and dynamic broadband internet access service marketplace.

B. Reinstating the Private Mobile Service Classification of Mobile Broadband Internet Access Service

46. Having determined that broadband internet access service, regardless of whether offered using fixed or mobile technologies, is an information service under the Act, we now address the appropriate classification of mobile broadband internet access service under Section 332 of the Act. We restore the prior longstanding definitions and interpretation of this section and conclude that mobile broadband internet access service should not be classified as a commercial mobile service or its functional equivalent.

47. *Background.* Section 332 of Title III, enacted by Congress as part of the Omnibus Budget Reconciliation Act of 1993 (the Budget Act), provides a specific framework that applies to providers of ''commercial mobile service.'' The section defines ''commercial mobile service'' as: ''any mobile service . . . that is provided for profit and makes interconnected service available (A) to the public or (B) to such classes of eligible users as to be effectively available to a substantial portion of the public, as specified by regulation by the Commission.''

''Interconnected service,'' in turn, is defined as ''service that is interconnected with the public switched network (as such terms are defined by regulation by the Commission).'' In 1994, the Commission adopted regulations implementing this section, codifying the definition of ''commercial mobile service'' under the term ''commercial mobile radio service'' (CMRS). Looking at the statute's text, structure, legislative history, and purpose, the Commission defined the ''public switched network'' as ''[a]ny common carrier switched network, whether by wire or radio, including local exchange carriers, interexchange carriers, and mobile service providers, that use[s] the North American Numbering Plan in connection with the provision of switched services.'' It defined ''interconnected service'' as ''a service that gives subscribers the capability to communicate . . . [with] *all* other users on the public switched network.''

48. Section 332 distinguishes commercial mobile service from ''private mobile service,'' defined as ''any mobile service . . . that is not a commercial mobile service or the functional equivalent of a commercial mobile service, as specified by regulation by the Commission.'' In 1994, the Commission established its functional equivalence test, which starts with a presumption that ''a mobile service that does not meet the definition of CMRS is a private mobile radio service.'' Overcoming this presumption requires an analysis of a variety of factors to determine whether the mobile service in question is the functional equivalent of commercial mobile service, including ''consumer demand for the service to determine whether the service is closely substitutable for a commercial mobile radio service; whether changes in price for the service under examination, or for the comparable commercial mobile radio service would prompt customers to change from one service to the other; and market research information identifying the targeted market for the service under review.'' Emphasizing the high bar it had set, the Commission expected that ''very few mobile services that do not meet the definition of CMRS will be a close substitute for a commercial mobile radio service.'' We note that, in another Order adopted today, we are recodifying these factors under Section 20.3 of the Commission's rules, but not modifying their substance.

49. The Act treats providers of commercial mobile service as common carriers, and the legislative history of the 1996 Act suggests that Congress intended the definition of ''telecommunications service'' to include commercial mobile service. In contrast, the Act prohibits the Commission from treating providers of private mobile service as common carriers.

50. In 2007, the Commission found that wireless broadband internet access service was not a commercial mobile service because it did not meet the definition of an ''interconnected service'' under the Act and the Commission's rules. It found that wireless broadband internet access was not ''interconnected'' with the ''public switched network'' because it did not use the North American Numbering Plan, which limited ''subscribers' ability to communicate to or receive communication from all users in the public switched network.'' The Commission concluded that Section 332 and the Commission's rules ''did not contemplate wireless broadband internet access service as provided today'' and that a commercial mobile service ''must still be interconnected with the local exchange or interexchange switched network as it evolves.''

51. In the *Title II Order,* the Commission reversed course. First, the Commission changed definitions of two key terms within the definition of commercial mobile service. It broadened the definition of the term ''public switched network'' to include services that use ''public IP addresses.'' And it redefined the term ''interconnected service'' by deleting the word ''all'' from the requirement that the service give subscribers the capability to communicate with ''*all* other users on the public switched network,'' so that a service would be interconnected even if users of such a service could not communicate with all other users. By manipulating these definitions, the Commission engineered a conclusion that mobile broadband internet access was interconnected with the public switched network and was an interconnected service under Section 332.

52. Second, the *Title II Order* found that even if it had not changed the definitions, it could change the scope of the service to meet them. Specifically, the Commission found that ''users have the 'capability' . . . to communicate with NANP numbers using their broadband connection through the use of VoIP applications.'' Accordingly it found that, by including services not offered by the mobile broadband internet access service provider as part of the service, mobile broadband internet access service would now meet the regulatory definition of ''interconnected service'' adopted in 1994.

53. Third, the *Title II Order* eschewed the functional equivalence test contained in the Commission's rules to find that mobile broadband internet access service was functionally equivalent to commercial mobile service. Rather than apply that test, the Commission reasoned that the two were functionally equivalent because ''like commercial mobile service, [mobile broadband internet access service] is a widely available, for profit mobile service that offers mobile subscribers the capability to send and receive communications on their mobile device to and from the public.''

54. In the *Internet Freedom Notice of Proposed Rulemaking (NPRM)* (82 FR 25568), the Commission proposed to ''restore the meaning of 'public switched network' under Section 332(d)(2) to its pre-*Title II Order* focus on the traditional public switched telephone network'' and ''to return to our prior definition of 'interconnected service.' '' The Commission further proposed to return to the analysis of the *Wireless Broadband Internet Access Order* and find that mobile broadband internet access service was a private mobile service. Finally, it proposed to reconsider the *Title II Order's* departure from the functional equivalence test codified in our rules.

55. *Discussion.* We find that the definitions of the terms ''public switched network'' and ''interconnected service'' that the Commission adopted in the 1994 *Second CMRS Report and Order* reflect the best reading of the Act, and accordingly, we readopt the earlier definitions. We further find that, under these definitions, mobile broadband internet access service is not a commercial mobile service.

56. We find that the Commission's original interpretation of ''public switched network'' was more consistent with the ordinary meaning and commonly understood definition of the term and with Commission precedent. On multiple prior occasions before Section 332(d)(2) was enacted, the Commission used the term ''public switched network'' to refer to the traditional public switched telephone network. In 1981, for example, the Commission noted that ''the public switched network interconnects all telephones in the country.'' In 1992, the Commission described its cellular service policy as ''encourag[ing] the creation of a nationwide, seamless system, interconnected with the public switched network so that cellular and landline telephone customers can

communicate with each other on a universal basis.'' Courts also used the term ''public switched network'' when referring to the traditional telephone network. Based on this history of usage of the term, the Commission, in 1994, tied its definition of the term ''public switched network'' to the traditional switched telephone network. We find this approach appropriately reflects the fundamental canon of statutory construction that ''unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning.'' We find that the legislative history of the Budget Act further supports this view. One commenter notes that the Budget Act conferees chose the Senate version of the relevant statutory definitions, including the use of the term ''public switched network,'' over the House version, which used the term ''public switched telephone network,'' and argues that Congress thereby rejected the latter term. We note, however, that the conferees also expressly identified the substantive differences between the House and Senate versions of the definitions, and notably absent from their list was any contrast between the Senate's use of ''public switched network'' and the House's use of ''public switched telephone network,'' suggesting that the conferees did not view the two terms as a significant difference.

57. We also find that the Commission's prior interpretation is more consistent with the text of Section 332(d)(2), in which Congress provided that commercial mobile service must provide a service that is interconnected with ''*the* public switched network.'' We find that the use of the definite article ''the'' and singular term ''network'' shows that Congress intended ''public switched network'' to mean a single, integrated network. We therefore agree with commenters who argue that it was not meant to encompass multiple networks whose users cannot necessarily communicate or receive communications across networks. Consistent with Congress's directive to define ''*the* public switched network,'' the restored definition reflects that the public switched network is a singular network that ''must still be interconnected with the local exchange or interexchange switched network as it evolves,'' as opposed to multiple networks that need not be connected to the public telephone network. That the Commission's original interpretation better reflects Congressional intent is further evidenced by the fact that, although Congress has amended the Communications Act and Section 332 on multiple occasions since the Commission defined the term, it has never changed the Commission's interpretation. As we further discuss elsewhere in connection with the term ''interconnected service,'' we find the best interpretation is to classify a service under Section 332 based solely on the nature of the service offered. Even if we were to consider such applications, however, we find that the public switched telephone network and the internet are and will continue to be distinct and separate networks, and cannot be considered a singular, integrated network as intended by the term ''the public switched network.'' The deployment of the Internet of Things (IoT), for example, will mean a dramatic increase in the number of non-VoIP-capable end-points, such as IP-enabled televisions, washing machines, and thermostats, and other smart devices.

58. We also restore the definition of ''interconnected service'' that existed prior to the *Title II Order.* Prior to that Order, the term was defined under the Commission's rules as a service ''that gives subscribers the capability to communicate to or receive communication from *all* other users on the public switched network.'' The *Title II Order* modified this definition by deleting the word ''all,'' finding that mobile broadband internet access service should still be considered an interconnected service even if it only enabled users to communicate with ''some'' other users of the public switched network rather than all. We agree with commenters who argue that the best reading of ''interconnected service'' is one that enables communication between its users and all other users of the public switched network. This reading ensures that the public switched network remains the single, integrated network that we find Congress intended in Section 332(d)(2), as reflected in the statutory definition of ''interconnected service'' as one that is interconnected with ''the public switched network.'' The *Title II Order* rejected this reading on the ground that the Commission has previously recognized that interconnected services may be limited in certain ways. While an interconnected service is required to provide its users with the capability to communicate with or receive communication from all other users of the public switched network, the Commission has permitted an interconnected service to restrict access to the public switched network in certain limited ways (such as the blocking of 900 numbers). This limited exception to general access has existed since the original definition of the term ''interconnected service'' was adopted, and the record does not demonstrate that it has caused confusion or misunderstandings about what services may be considered interconnected. Accordingly, we will continue to apply the definition of ''interconnected service'' in this fashion, and we see no need to codify any language further clarifying the exception. We agree with Verizon, however, that ''[t]here is a massive difference between limited, targeted restrictions that deny access to certain points on the network and the situation envisioned by the *Title II Order,* where millions of users on what is ostensibly the same network are incapable of reaching each other.''

59. Some commenters who argue that the *Title II Order*'s revised definitions should be maintained point to Congress's delegation of interpretational authority to the Commission and the Commission's previous position that it could define the public switched network based on new technology and consumer demand. In defining the terms ''public switched network'' and ''interconnected service'' in the *Second CMRS Report and Order,* however, the Commission recognized that commercial mobile service must still be interconnected with the local exchange or interexchange switched network, and it stated that ''any switched common carrier service that is interconnected with the traditional local exchange or interexchange switched network will be defined as part of that network for purposes of our definition of 'commercial mobile radio services.' '' We disagree with commenters arguing that, by not including IP addresses in the definition of the public switched network, the Commission would be failing to recognize the evolution of mobile network technologies that have blurred the lines between circuit switched and packet switched networks. The Commission's original decision properly reflects that the public switched network should not be defined in a static way and should reflect that the public switched network is continuously growing and changing, but also ensures that, as it grows and evolves, the public switched network remains a single integrated network incorporating the traditional local and interexchange telephone networks and enabling users to send or receive messages to or from all other users. Further, although the *Title II Order* found that the revised definitions

adopted at that time were warranted as better reflecting current technological developments, including the ''rapidly growing and virtually universal use of mobile broadband service'' and the ''universal access provided . . . by and to mobile broadband,'' the Commission expressly noted that its determination was ''a policy judgment that section 332(d) expressly delegated to the Commission, consistent with its broad spectrum management authority under Title III.'' We find that this analysis places undue weight on the wide availability of a mobile service, as being effectively available to a substantial portion of the public is merely one of the definitional criteria. The Commission found that the updated definitions would be consistent with Congress's intent to create a symmetrical regulatory framework among mobile services that were similarly ''broadly available'' to the public. While we agree that Congress intended, in adopting Section 332, to regulate similar mobile services symmetrically, we do not believe that Congress intended for the Commission to regulate mobile services symmetrically simply because they are similarly ''broadly available.'' First, being ''effectively available to a substantial portion of the public'' is a necessary, but not sufficient, requirement for classification as commercial mobile service. Second, as noted, Congress set as the touchstone for regulatory symmetry only those mobile services that are ''functionally equivalent.'' In light of definitional analysis discussed above, as well as the public policy considerations that we have found to support our decision to classify broadband internet access service as an information service, we find under the same authority that such developments do not persuade us to retain the modified definitions.

60. We find that mobile broadband internet access service does not meet the regulatory definition of ''interconnected service'' that the Commission originally adopted in 1994 and which we readopt today, and therefore it does not meet the definition of commercial mobile service. As the Commission found in the *Wireless Broadband Internet Access Order,* ''[m]obile wireless broadband Internet access service in and of itself does not provide the capability to communicate with all users of the public switched network'' because it does ''not use the North American Numbering Plan to access the Internet, which limits subscribers' ability to communicate to or receive communications from *all* users in the public switched network.'' Accordingly, it is ''not an 'interconnected service' as the Commission has defined the term in the context of section 332.''

61. We disagree with the conclusion in the *Title II Order* that, because an end user can use a separate application or service that rides on top of the broadband internet access service for interconnected communications, mobile broadband internet access service meets the definition of ''interconnected service.'' We find that the definition of ''interconnected service'' focuses on the characteristics of the offered mobile service itself. Thus, the service in question must itself provide interconnection to the public switched network using the NANP to be considered an interconnected service. Our interpretation is consistent with Commission precedent that, prior to the *Title II Order,* had classified a service based on the nature of the service itself. This interpretation is also consistent with Section 332(d)(1), which defines commercial mobile service as a service that itself ''makes interconnected service available . . . to the public,'' and with Section 332(d)(2), which defines ''interconnected service'' as ''service that is interconnected with the public switched network.'' These statutory definitions focus on the functions of the service itself rather than ''whether the service allows consumers to acquire other services that bridge the gap to the telephone network.'' Thus, we are not persuaded by arguments that ''applications such as Google Voice reflect the fully interconnected nature of the mobile broadband and legacy telephone networks.'' Our determination reflects that the relevant service must itself be an ''interconnected service,'' and not merely a capability to acquire interconnection. We further note that viewing broadband internet access service as a distinct service from application layer services that may be accessed by it, even if the applications are pre-installed in the mobile device offered by the provider, ensures that similar mobile broadband internet access services are not regulated in a disparate fashion based on what applications a particular provider chooses to install in their offered devices. This is consistent with the fundamental purpose under Section 332 of regulatory symmetry between similar mobile services, and also avoids regulatory inconsistencies that would result when mobile devices are brought to a particular service provider by the consumer that do not include the provider's choice of pre-installed apps. While OTI New America argues that the need to obtain such apps to make an interconnected call does not make mobile broadband internet access service different from traditional telephone service, which has always required customer premises equipment to complete an interconnected call, we find the analogy inapt. With traditional CMRS, even where consumers obtain their premises equipment or mobile devices separately, the function of interconnection is provided by the purchased mobile service itself. Because the focus is solely on the relevant service provided, we also disagree that physical connections between networks, in and of themselves, establish that the relevant services are interconnected, and we further disagree that mobile broadband internet access service should be considered an interconnected service simply because a separate interconnected voice service may be provided using the same packet-switched network layer.

62. Consistent with the Commission's analysis in the *Wireless Broadband Internet Access Order,* the fact that ''consumers are now able to use a variety of Internet-enabled applications that allow them to send calls and texts to NANP end-points'' does not make mobile broadband internet access service itself an interconnected service as defined by our rules. The increased use and availability of mobile VoIP applications does not change the fact that mobile broadband internet access as a core service is distinct from the service capabilities offered by applications (whether installed by a user or hardware manufacturer) that may ride on top of it. When viewed as a distinct service, it is apparent that today's mobile broadband internet access service itself does not enable users to reach NANP telephone numbers and therefore cannot be considered an interconnected service. We do not here address whether IP-based services or applications such as Wi-Fi Calling or VoLTE would meet the definition of ''interconnected service'' under Section 332 and the Commission's rules. We disagree with OTI New America's argument that the growing availability of Wi-Fi Calling provided by mobile carriers that also offer mobile broadband internet access service supports the classification of mobile broadband internet access service as a commercial mobile service. The two are distinct services and subject to separate classification determinations. Similarly, even if providers are increasingly offering voice service and mobile broadband internet access service

together, this does not support classifying and regulating the latter in the same way as the former. Providers have long offered multiple services of mixed classification, subject to the rule that they are regulated as common carriers to the extent they offer services that are subject to Title II regulation.

63. Moreover, in light of the determination above that mobile broadband internet access service should be restored to its classification as an information service, and consistent with our findings today that reinstating this classification will serve the public interest, we also find that it will serve the public interest for the Commission to exercise its statutory authority to return to its original conclusion that mobile broadband internet access is not a commercial mobile service. We note that commenters who support the *Title II Order's* revised definition of ''public switched network'' do not dispute that Congress expressly delegated authority to the Commission to define the key terms, *i.e.,* ''public switched network'' and ''interconnected service.'' No one disputes that, consistent with the Commission's previous findings, if mobile broadband internet access service were a commercial mobile service for purposes of Section 332 and were also classified as an information service, such a regulatory framework could lead to contradictory and absurd results. Among these problems, as the Commission explained in 2007, is that a contrary reading of the Act would result in an internal contradiction within the statutory framework, because Section 332 would require that the service provider be treated as a common carrier insofar as it provides mobile wireless broadband internet access service, while Section 3 clearly would prohibit the application of common carrier regulation of such a service provider's provision of that service. Indeed, the *Title II Order,* like the 2007 *Wireless Broadband Internet Access Order,* recognized and sought to avoid the significant problems in construing Section 332 in a manner that set up this ''statutory contradiction'' with the scope of Title II. Construing the CMRS definition to exclude mobile broadband internet access service as an information service similarly avoids this contradiction, furthers the Act's overall intent to allow information services to develop free from common carrier regulations, and is consistent with the public policy analysis in connection with our determination to reclassify mobile broadband internet access as an information service. Further, it avoids the absurd result of singling out mobile providers of broadband internet access service for such common carrier regulation while freeing fixed broadband internet access services from such regulation, notwithstanding that, as discussed elsewhere in this Order, there is generally greater competition in the provision of mobile broadband internet access service than in fixed broadband internet access service. We note that wireless services similar to mobile broadband internet access service were not available in the market place in 1993 when Congress adopted Section 332 or, in 1996, when Congress adopted the Section 3 definition of ''telecommunication carrier.''

64. In addition to finding that mobile broadband internet access is not a commercial mobile service, we also adopt our proposal to reconsider the Commission's analysis regarding functional equivalence in the *Title II Order.* For the same reasons discussed below with respect to our authority to revisit the classification of broadband internet access service, we disagree with arguments regarding limits on the Commission's ability to revisit the *Title II Order's* findings regarding functional equivalence. In addition, we note that the *Title II Order,* in reaching the conclusion that mobile broadband internet access was a commercial mobile service, relied in part on the need to avoid a statutory contradiction with its determination that the service was a telecommunications service. Given our decision to restore the original classification of mobile broadband internet access service as an information service, this change additionally warrants revisiting our conclusions with regard to the classification of mobile broadband internet access service under Section 332. We find that the test for functional equivalence adopted in the *Second CMRS Report and Order* reflects the best interpretation of Section 332. Under this test, a variety of factors will be evaluated to make a determination whether the mobile service in question is the functional equivalent of a commercial mobile radio service, including: Consumer demand for the service to determine whether the service is closely substitutable for a commercial mobile radio service; whether changes in price for the service under examination, or for the comparable commercial mobile radio service would prompt customers to change from one service to the other; and market research information identifying the targeted market for the service under review. In contrast, as noted above, the *Title II Order* based its finding of functional equivalence on the notion that ''like commercial mobile service, [mobile broadband Internet access] is a widely available, for profit mobile service that offers mobile subscribers the capability to send and receive communications on their mobile device to and from the public.'' Commenters who support the classification of mobile broadband internet access service as a commercial mobile service similarly contend that mobile broadband internet access service shares no similarities with other private mobile services such as taxi dispatch services and that, in contrast, ''there is no networked service more open, interconnected, and universally offered than mobile broadband Internet access service.'' We note that the statute directs us to determine whether mobile broadband internet access is functionally equivalent to a commercial mobile service, not whether it is functionally dissimilar from certain systems classified as private mobile.

65. We believe the test of functional equivalence adopted in the *Second CMRS Report and Order* hews much more faithfully to the intent of Congress than the approach applied in the *Title II Order* or the analyses in the record focusing on the extent of service availability. If Congress meant for widespread public access to a widely used service to be the determining factor for what is ''functionally equivalent'' to a commercial mobile service, it would not have included being ''interconnected with the public switched network'' in the statutory definition of the service. Indeed, the relevant House Report, in describing ''private carriers'' that under the current law were offering service ''[f]unctionally . . . indistinguishable'' from carriers classified as common carriers, highlighted that these private carriers were offering services interconnected with the public switched network. Although the Commission has discretion to determine whether services are functionally equivalent, we find that the *Title II Order's* reliance on the public's ''ubiquitous access'' to mobile broadband internet access service alone was insufficient to establish functional equivalency. In contrast, the test established in the *Second CMRS Report and Order* provides a thorough consideration of factors that are indicative of whether a service is closely substitutable in the eyes of consumers for a commercial mobile service.

66. Applying the test adopted by the Commission in the *Second CMRS Report and Order,* we find that mobile broadband internet access service today is not the functional equivalent of

commercial mobile service as defined by the Commission. We note again that, under this test, services not meeting the definition of commercial mobile service are presumed to be not functionally equivalent, a presumption particularly intuitive here in light of the functional differences between traditional commercial mobile services like mobile voice and today's mobile broadband services. The evidence on demand substitutability only reinforces this presumption. First, mobile broadband internet access service and traditional mobile voice services have different service characteristics and intended uses. Consumers purchase mobile broadband internet access service to access the internet, on-line video, games, search engines, websites, and various other applications, while they purchase mobile voice service solely to make calls to other users using NANP numbers. Pricing and marketing information similarly support the conclusion that today mobile broadband internet access service and traditional mobile voice services are not ''closely substitutable.'' Such evidence suggests, for example, that mobile service providers target different types of customer groups when advertising voice, as opposed to mobile broadband internet access service. Moreover, at this time, voice-only mobile services tend to be much less expensive than mobile broadband internet access services, and they appear to be targeted to consumers who seek low-cost mobile service. Currently, for example, unlimited voice and text only plans may range from $15 to $25 per month. In contrast, unlimited mobile broadband internet plans may range from $60 to $90 per month for a single line. Nothing in the record suggests that changing the price for one service by a small but significant percentage would prompt a significant percentage of customers to move to the other service. Accordingly, under the functional equivalence standard adopted in the *CMRS Second Report and Order,* we find that mobile broadband internet access today is not the functional equivalent of commercial mobile service. The two services have different service characteristics and intended uses and are not closely substitutable for each other, as evidenced by the fact that changes in price for one service generally will not prompt significant percentages of customers to change from one service to the other. We make a conforming revision to the definition of ''commercial mobile radio service'' in Section 20.3 of the Commission's rules to reflect our determination that mobile broadband internet access service is not the functional equivalent of commercial mobile service.

C. Public Policy Supports Classifying Broadband Internet Access Service as an Information Service

67. While our legal analysis concluding that broadband internet access service is best classified as an information service under the Act is sufficient grounds alone on which to base our classification decision, the public policy arguments advanced in the record and economic analysis reinforce that conclusion. We find that reinstating the information service classification for broadband internet access service is more likely to encourage broadband investment and innovation, furthering our goal of making broadband available to all Americans and benefitting the entire internet ecosystem. For almost 20 years, there was a bipartisan consensus that broadband should remain under Title I, and ISPs cumulatively invested $1.5 trillion in broadband networks between 1996 and 2015. Commenters who claim recent growth in online video streaming services is evidence of the need for Title II regulation ignore the fact that the growth of online video streaming services was largely made possible by the network investments made under Title I and as such demonstrates instead the success of the longstanding light-touch framework under Title I. During that period of intense investment, broadband deployment and adoption increased dramatically, as the combined number of fixed and mobile internet connections increased from 50.2 million to 355.2 million from 2005 to 2015, and even as early as 2011, a substantial majority of Americans had access to broadband at home. As of 2016, roughly 91 percent of homes had access to networks offering 25 Mbps, and there were 395.9 million wireless connections, twenty percent more than the U.S. population. Mobile data speeds have also dramatically increased, with speeds increasing 40-fold from the 3G speeds of 2007. Cable broadband speeds increased 3,200 percent between 2005 and 2015, while prices per Mbps fell by more than 87 percent between 1996 and 2012.

68. Based on the record in this proceeding, we conclude that economic theory, empirical studies, and observational evidence support reclassification of broadband internet access service as an information service rather than the application of public-utility style regulation on ISPs. We find the Title II classification likely has resulted, and will result, in considerable social cost, in terms of foregone investment and innovation. At the same time, classification of broadband internet access service under Title II has had no discernable incremental benefit relative to Title I classification. The regulations promulgated under the Title II regime appear to have been a solution in search of a problem. Close examination of the examples of harm cited by proponents of Title II to justify heavy-handed regulation reveal that they are sparse and often exaggerated. Moreover, economic incentives, including competitive pressures, support internet openness. We find that the gatekeeper theory, the bedrock of the *Title II Order*'s overall argument justifying its approach, is a poor fit for the broadband internet access service market. Further, even if there may be potential harms, we find that pre-existing legal remedies, particularly antitrust and consumer protection laws, sufficiently address such harms so that they are outweighed by the well-recognized disadvantages of public utility regulation. As such, we find that public policy considerations support our legal finding that broadband internet access service is an information service under the Act.

1. Title II Regulation Imposes Substantial Costs on the Internet Ecosystem

69. The Commission has long recognized that regulatory burdens and uncertainty, such as those inherent in Title II, can deter investment by regulated entities and, until the *Title II Order,* its regulatory framework for cable, wireline, and wireless broadband internet access services reflected that reality. Congress has similarly recognized the burdens associated with regulation. For example, the 1996 Act states its purpose is to ''reduce regulation,'' and directs the Commission to regularly review regulations and repeal those it deems unnecessary or harmful to investment, competition, and the public interest. This concern is well-documented in the economics literature on regulatory theory, and the record also supports the theory that the regulation imposed by Title II will negatively impact investment. The balance of the evidence in the record suggests that Title II classification has reduced ISP investment in broadband networks, as well as hampered innovation, because of regulatory uncertainty. The record also demonstrates that small ISPs, many of which serve rural consumers, have been particularly harmed by Title II. And there is no convincing evidence of increased investment in the edge that

would compensate for the reduction in network investment.

70. *Investment by ISPs.* As the Commission has noted in the past, increased broadband deployment and subscribership require investment, and the regulatory climate affects investment. The mechanisms by which public utility regulation can depress investment by the regulated entity are well-known in the regulatory economics literature. The owners of network infrastructure make long-term, irreversible investments. In theory, public utility regulation is intended to curb monopoly pricing just enough that the firm earns a rate of return on its investments equivalent to what it would earn in a competitive market. In practice, public utility regulation can depress profits below the competitive rate of return for a variety of reasons. This reduction in the expected return reduces the incentive to invest. Importantly, the risk that regulation might push returns below the competitive level also creates a disincentive for investment.

71. We first look to broadband investment in the aggregate and find that it has decreased since the adoption of the *Title II Order.* ISP capital investment increased each year from the end of the recession in 2009 until 2014, when it peaked. In 2015, capital investment by broadband providers appears to have declined for the first time since the end of the recession in 2009. And investment levels fell again in 2016—down more than 3 percent from 2014 levels. Although declines in broadband capital investments have occurred in the past with changes in the business cycle, the most recent decline is particularly curious given that the economy has not experienced a recession in recent years but rather has been growing. While observing trends in the data by itself cannot establish the cause of directional movements, the stark trend reversal that has developed in recent years suggests that changes to the regulatory environment created by the *Title II Order* have stifled investment. In addition to data trends, the record contains a variety of other studies, using different methodologies which seek to determine how imposition of public-utility style regulation might affect ISPs' investments.

72. Comparisons of ISP investment before and after the *Title II Order* suggest that reclassification has discouraged investment. Performing such a comparison, economist Hal Singer concluded that ISP investment by major ISPs fell by 5.6 percent between 2014 and 2016. Singer attempted to account for a few significant factors unrelated to Title II that might affect investment, by subtracting some investments that are clearly not affected by the regulatory change (such as the accounting treatment of Sprint's telephone handsets, AT&T's investments in Mexico, and DirecTV investments following its acquisition by AT&T in the middle of this period). In contrast, Free Press presents statistics that it claims demonstrate that broadband deployment and ISP investment ''accelerated'' to ''historic levels'' after the Commission approved the *Title II Order.* But Free Press fails to account for factors such as foreign investment and the appropriate treatment of handsets as capital expenditures, as Singer did.

73. A comparative assessment that adjusted the Free Press and Singer numbers so that they covered the same ISPs, spanned the same time period, and subtracted investments unaffected by the regulatory change, found that both sets of numbers demonstrate that ISP investment fell by about 3 percent in 2015 and by 2 percent in 2016. A Free State Foundation calculation using broadband capital expenditure data for 16 of the largest ISPs reached a result similar to Singer's, but this analysis simply compared actual ISP investment to a trend extrapolated from pre-2015 data. These types of comparisons can only be regarded as suggestive, since they fail to control for other factors that may affect investment (such as technological change, the overall state of the economy, and the fact that large capital investments often occur in discrete chunks rather than being spaced evenly over time), and companies may take several years to adjust their investment plans. Nonetheless, these comparisons are consistent with other evidence in the record that indicates that Title II adversely affected broadband investment. A separate comparison of the United States' ISP investment with ISP investment in Europe also suggests that ISP investment might decline further if the U.S., under the *Title II Order,* moves toward a regulatory system more like Europe's. A USTelecom research brief finds that European investment per capita is about 50 percent lower than broadband investment in the U.S. per capita. As some commenters point out, this study compares the U.S. with the much more regulatory European system, which includes mandatory unbundling at regulated rates. Thus, it presents a picture of how investment could change if the U.S. moves toward the European system under Title II, not an assessment of the direct results of the *Title II Order.*

74. The record also contains analyses attempting to assess the predicted causal effects of Title II regulation on ISP investment and/or output. Some of these studies are ''natural experiments'' that seek to compare outcomes occurring after policy changes to a relevant counterfactual that shows what outcomes would have occurred in the absence of the policy change. No single study is dispositive, but methodologies designed to estimate impacts relative to a counterfactual tend to provide more convincing evidence of causal impacts of Title II classification. Having reviewed the record of these studies, the balance of the evidence indicates that Title II discourages investment by ISPs—a finding consistent with economic theory. The record does not provide sufficient evidence to quantify the size of the effect of Title II on investment. An additional type of evidence is the effect of the *Title II Order* on stock prices. According to that study, in the short term, the decision appears to have had little direct effect on stock prices, except for a few cable ISPs. That may reflect the forward-looking, predictive capabilities of market players.

75. Prior FCC regulatory decisions provide a natural experiment allowing this question to be studied. Scholars employing the natural experiment approach found that prior to 2003, subscribership to cable modem service (not regulated under Title II) grew at a far faster rate than subscribership to DSL internet access service (the underlying 'last mile' facilities and transmission which were regulated under Title II). After 2003, when the Commission removed line-sharing rules on DSL, DSL internet access service subscribership experienced a statistically significant upward shift relative to cable modem service. A second statistically significant upward shift in DSL internet access service subscribership relative to cable modem service occurred after the Commission classified DSL internet access service as an information service in 2005. This evidence suggests that Title II discourages not just ISP investment, but also deployment and subscribership, which ultimately create benefits for consumers. While some commenters contend that deployment and subscribership continued to increase after the *Title II Order,* such that nothing is amiss, this casual observation does not compare observed levels of subscribership and deployment to a relevant counterfactual that controls for other factors.

76. An assessment of how ISP investment reacted to news of impending Title II regulation suggests that the threat of Title II regulation discouraged ISP investment. Such statistical analysis allows one to compare the actual level of investment with a counterfactual estimate of what investment would have been in the absence of the change in risk. This study found that Chairman Genachowski's 2010 announcement of a framework for reclassifying broadband under Title II—a credible increase in the risk of reclassification that surprised financial markets—was associated with a $30 billion–$40 billion annual decline in investment in the U.S. Bureau of Economic Analysis' ''broadcasting and telecommunications'' category between 2011 and 2015. The study attributes the decline to the threat of Title II regulation, rather than net neutrality *per se,* because no similar decline occurred when the FCC adopted the four principles to promote an open internet in 2005. Because the study's measure of investment data covers the entire broadcasting and telecommunications industries, the change in investment measured in this study might be larger than the change in broadband investment associated with the threat of Title II regulation. Accordingly, the findings may be a more reliable indicator of the direction of the change in investment than the absolute size of the change. At the very least, the study suggests that news of impending Title II regulation is associated with a reduction in ISP investment over a multi-year period.

77. Some commenters have argued that this study does not identify the effect of Title II on ISP investment, because the ''last mile'' facilities and transmission underlying DSL internet access service (essentially incumbent LEC broadband supply) were under Title II before 2005, during the study's pre-treatment period. However, to the extent that a fraction of the industry was subject to Title II (and at the time the bulk of broadband subscribers used cable modem services that were not regulated under Title II), this would imply Ford's negative result for investment was understated.

78. The study is also disputed by the Internet Association, which submitted an economic study arguing that the threat and eventual imposition of Title II status on broadband internet service providers in 2010 and 2015 did not have a measurable impact on telecommunications investment in the U.S. While we appreciate the alternative method and data sources introduced by that study, several elements lead us to discount its findings. The estimation of the impact of events in both 2010 and 2015 relies partially on forecast rather than actual data, which likely lessens the possibility of finding an effect of Title II on investment. In addition, when examining cable and telecommunications infrastructure investment in the U.S., the study relies on a regression discontinuity over time model, thereby eliminating the use of a separate control group to identify the effect of policy changes. We believe use of such a model in these circumstances is unlikely to yield reliable results. The Internet Association study claims that its test of the 2010 effect did not use forecast data. However, comparing the reported number of observations in Tables B1 and B2 of the study clearly indicates that the same datasets were used to estimate 2010 and 2015 effects. Furthermore, we note that the Phoenix Center attempted to replicate the results of Table B1 and obtained strikingly different results when excluding the forecast data. Unfortunately, the Phoenix Center chose to only estimate Hooton's baseline model, which did not control for obviously confounding factors such as the business cycle, and therefore we place limited weight on the Phoenix Center's revisions.

79. In light of the foregoing record evidence, we conclude that reclassification of broadband internet access service from Title II to Title I is likely to increase ISP investment and output. The studies in the record that control the most carefully for other factors that may affect investment (the Ford study and the Hazlett & Wright study) support this conclusion. Ford controls for macroeconomic factors that influence the overall economy using a two-way fixed-effects model. Hazlett & Wright's analysis of the effects of Title II on DSL subscribership cites regression analysis that controls for factors influencing the overall economy by including Canadian DSL subscribership as an explanatory variable. Consequently, we disagree with commenters who assert that Title II has increased or had no effect on ISP investment, given the failure of other studies to account for complexity of corporate decision-making and the macroeconomic effects that can play a role in investment cycles. We also disagree with commenters who assert that it may be too soon to meaningfully assess the economic effects that Title II has had on broadband infrastructure investment.

80. *Regulatory Uncertainty.* The evidence that Title II has depressed broadband investment is bolstered by other record evidence showing that Title II stifled network innovation. Among the unseen social costs of regulation are those broadband innovations and developments that never see the light of day. ISP investment does not simply take the form of greater deployment, but can also be directed toward new and more advanced services for consumers. Research and development is an inherently risky part of any business, and the Commission's actions should not introduce greater uncertainty and risk into the process without a clear need to do so. Numerous commenters have stated that the uncertainty regarding what is allowed and what is not allowed under the new Title II broadband regime has caused them to shelve projects that were in development, pursue fewer innovative business models and arrangements, or delay rolling out new features or services. Even large ISPs with significant resources have not been immune to the dampening effect that uncertainty can have on a firm's incentive to innovate. Charter, for instance, has asserted that it has ''put on hold a project to build out its out-of-home Wi-Fi network, due in part to concerns about whether future interpretations of Title II would allow Charter to continue to offer its Wi-Fi network as a benefit to its existing subscribers.'' Cox has also stated that it has approached the ''development and launch of new products and service features with greater caution'' due to the uncertainty created by the Title II classification. And while new service offerings can take a while to develop and launch, Comcast cites ''Title II overhang'' as a burden that delayed the launch of its IP-based transmission of its cable service, due to a year-long investigation.

81. Utility-style regulation is particularly inapt for a dynamic industry built on technological development and disruption. It is well known that extensive regulation distorts production as well as consumption choices. Regulated entities are inherently restricted in the activities in which they may engage, and the products that they may offer. Asking permission to engage in new activities or offer new products or services quickly becomes a major preoccupation of the utility. This is apparent upon a casual observation of heavily-regulated utilities, such as the U.S. power, water, and mass transit systems. These are industries where competition has been effectively deemed impossible, run by quasi-public monopolies that lack incentives to invest, innovate, or even properly maintain their facilities.

Within the communications industry, it is apparent that the most regulated sectors, such as basic telephone service, have experienced the least innovation, whereas those sectors that have been traditionally free to innovate, such as internet service, have greatly evolved. In the communications industry, incumbents have often used Commission regulation under the direction of the ''public interest'' to thwart innovation and competitive entry into the sector and protect existing market structures. Given the unknown needs of the networks of the future, it is our determination that the utility-style regulations potentially imposed by Title II run contrary to the public interest.

82. The record confirms that concern about ''regulatory creep''—whereby a regulator slowly increases its reach and the scope of its regulations—has exacerbated the regulatory uncertainty created by the *Title II Order.* Even at the time of adoption, the Commission itself did not seem to know how the *Title II Order* would be interpreted. As then-Chairman Wheeler stated in February 2015, ''we don't really know. No blocking, no throttling, no fast lanes. Those can be bright-line rules because we know about those issues. But we don't know where things go next.'' With future regulations open to such uncertainties, Title II regulation adds a risk premium on each investment decision, which reduces the expected profitability of potential investments and deters investment. For example, the *Title II Order* did not forbear from *ex post* enforcement actions related to subscriber charges, raising concerns that *ex post* price regulation was very much a possibility. Further, providers have asserted that although the Commission forbore from the full weight of Title II in the *Title II Order,* they were less willing to invest due to concerns that the Commission could reverse course in the future and impose a variety of costly regulations on the broadband industry—such as rate regulation and unbundling/open access requirements—placing any present investments in broadband infrastructure at risk. These concerns were compounded by the fact that while the *Title II Order* itself announced forbearance from *ex ante* price regulation, at the same time it imposed price regulation with its ban on paid prioritization arrangements, which mandated that ISPs charge edge providers a zero price. These threats to the ISP business model have been felt throughout financial markets. As Craig Moffett of MoffettNathanson explained, ''[i]t would be naïve to suggest that the implication of Title II, particularly when viewed in the context of the FCC's repeated findings that the broadband market is non-competitive, doesn't introduce a real risk of price regulation.'' These risks are not merely theoretical: As CenturyLink contends, financial analysts lowered industry stock ratings due in part to the major risks Title II posed to the industry, which resulted in lower stock prices and lost market capitalization.

83. For these reasons, ''any rational ISP will think twice before investing in innovative business plans that might someday be found to violate the Commission's undisclosed policy preferences and thus give rise to a cease-and-desist order and perhaps massive forfeiture penalties.'' We conclude that this ever-present threat of regulatory creep is substantially likely to affect the risk calculus taken by ISPs when deciding how to invest their shareholders' capital, potentially deterring them from investing in broadband, and to encourage them to direct capital toward less inherently-risky business operations. Many ISPs are part of integrated multi-sector holding companies, which allows them to more easily shift capital away from sectors where their investments would face greater regulatory risk, and toward more investment-friendly sectors. We find unpersuasive the alleged inconsistencies between ISPs claiming that the *Title II Order* decreased their willingness or ability to invest in broadband infrastructure, and their statements to investors that the *Title II Order* has not had a negative impact on their broadband deployments. First, some of the comments claiming that corporate officers' statements to investors prove that Title II has increased investment use highly selective quotations that ignore other statements to investors that imply the opposite. Second, as other commenters point out, the latter often constitute statements susceptible to multiple interpretations, such as AT&T CEO Randall Stephenson stating that his company planned to ''deploy more fiber next year than [it] did this year.'' Third, these ambiguous statements do not take into account the relevant counterfactual scenario in which Title II regulation had not been adopted. Fourth, we observe that some of the comments attempting to highlight a discrepancy between statements to investors and statements in this proceeding simply show executives stating that their business *practices* will not change because they were not engaged in the conduct prohibited by the *Title II Order,* not that the firms' investment priorities remained the same after the *Title II Order.* As such, we disagree with commenters who assert that maintaining the *Title II Order* regime is the best means of addressing regulatory uncertainty.

84. *Small ISPs and Rural Communities.* The Commission's decision in 2015 to reclassify broadband internet access service as a telecommunications service has had particularly deleterious effects on small ISPs and the communities they serve, which are often rural and/or lower-income. The record reflects that small ISPs and new entrants into the market face disproportionate costs and burdens as a result of regulation. Many small ISPs lack the extensive resources necessary to comply with burdensome regulation, and the record evinces a widespread consensus that reclassification of broadband internet access service as a telecommunications service has harmed small ISPs by forcing them to divert significant resources to legal compliance and deterring them from taking financial risks.

85. Small ISPs state that these increased compliance costs and regulatory burdens have forced them to divert money and attention away from planned broadband service and network upgrades and expansions, thus delaying, deferring, or forgoing the benefits they would have brought ''to their bottom lines, their customers, and their communities.'' A coalition of National Multicultural Organizations highlights that the uncertainty inherent under Title II ''already has produced results that slow needed innovation and broadband adoption, effects that are most acutely felt in rural and socioeconomically-challenged urban communities.'' The record is replete with instances in which small ISPs reduced planned, or limited new, investment in broadband infrastructure as a result of the regulatory uncertainty stemming from the adoption of the *Title II Order.* Because the logical expectation that Title II regulation would have particularly harmful effects on small ISPs and the communities they serve in is borne out by strong record evidence from a wide range of small ISPs, we are unpersuaded by speculative suggestions that small ISPs' investment decisions can be fully or primarily explained based on other considerations such that the effect of Title II regulation can be neglected. The Wireless Internet Service Providers Association (WISPA) surveyed its members and found that over 80 percent had ''incurred additional expense in complying with

the Title II rules, had delayed or reduced network expansion, had delayed or reduced services and had allocated budget to comply with the rules.'' The threat of *ex post* rate regulation has hung particularly heavily on the heads of small ISPs, ''who are especially risk-averse, causing them to run all current and planned offerings against the 'just' and 'reasonable' and unreasonably discriminatory standards of sections 201 and 202 of the Act.'' The effects have been strongly felt by small ISPs, given their more limited resources, leading to depressed hiring in rural areas most in need of additional resources.

86. Compounding the difficulties faced by small ISPs, the record also reflects that the '' 'black cloud' of common carriage regulations'' resulted in increased difficulties for small ISPs in obtaining financing. A coalition of 70 small wireless ISPs cited the uncertainty created by the *Title II Order* as a major reason that their costs of capital have risen, preventing them from further expanding and improving their networks. The new regulatory burdens, risks, and uncertainties combined with ''diminished access to capital create a vicious cycle—the regulatory burdens make it more difficult to attract capital, and less capital makes it more difficult to comply with regulatory burdens.'' A coalition of 19 municipal ISPs cited high legal and consulting fees necessary to navigate the *Title II Order,* as well as regulatory compliance risk as a reason for delaying or abandoning new features and services. While, of course, not all small ISPs have faced these challenges, there is substantial record evidence that regulatory uncertainty resulting from the Commission's reclassification of broadband internet access service in 2015 risks stifling innovation, and that it has already done so with respect to small ISPs, which ultimately harms consumers.

87. We anticipate that the beneficial effects of our decision today to restore the classification of broadband internet access service to an information service will be particularly felt in rural and/or lower-income communities, giving smaller ISPs a stronger business case to expand into currently unserved areas. Enabling ISPs to freely experiment with services and business arrangements that can best serve their customers, without excessive regulatory and compliance burdens, is an important factor in connecting underserved and hard-to-reach populations. We are committed to bridging the digital divide, and recognize that small ISPs ''disproportionately provide service in rural and underserved areas where they are either the only available broadband service option or provide the only viable alternative to an incumbent broadband provider.'' We anticipate that returning broadband internet access service to a light-touch regulatory framework will help further the Commission's statutory imperative to ''encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans'' by helping to incentivize ISPs to expand coverage to underserved areas. We therefore reject arguments that our classification decision harms low-income communities.

88. *Investment at the Edge.* Finally, to more fully discern the impact of Title II, we must look at investment throughout the broadband ecosystem, including investment and innovation at the edge, as well as with other ecosystem participants (manufacturers, etc.). We agree with commenters who assert that looking only at ISP investment ignores investment that is occurring at the edge. While there is tremendous investment occurring at the edge, the record does not suggest a correlation between edge provider investment and Title II regulation, nor does it suggest a causal relationship that edge providers have increased their investments as a result of the *Title II Order.* Free Press argues that since adoption of the *Title II Order,* innovation and investment at the edge has increased. While high growth rates are associated with the internet industry, the evidence presented does not show the imposition of Title II regulation on internet access service providers caused recent edge provider investment. That requires an estimate as to what would have happened in the absence of Title II regulation (*e.g.,* analysis following the methods employed in the studies of Ford, and of Hazlett & Wright).

89. In fact, one could argue that in the absence of Title II regulation, edge providers would have made even higher levels of investment than they undertook. In many cases, the strongest growth for a firm or industry predates the *Title II Order.* For example, Free Press highlights that the data processing, hosting, and related services industry increased capital expenditures by 26 percent in 2015, a significant increase in investment. However, in 2013, well before the 2014 *Open Internet NPRM* that led to the *Title II Order,* that industry increased investment by over 100 percent. Similarly, Netflix's greatest relative increase in capital expenditures occurred in 2013. Amazon increased its spending on technology and content, which consists primarily of research and development expenses, by 28 percent in 2016, while in 2013 the increase was 41 percent. We do not claim that these data points prove that edge provider investment would have been greater in the absence of the *Title II Order,* but we find that Free Press does not demonstrate that there is a significant difference in the investment behavior of edge providers due to the *Title II Order.*

2. Utility-Style Regulation of Broadband Is a Solution in Search of a Problem

90. *The internet was open before Title II, and many economic factors support openness.* The internet thrived for decades under the light-touch regulatory regime in place before the *Title II Order,* as ISPs built networks and edge services were born. We find that the sparse evidence of harms discussed in the *Title II Order*—evidence repeated by commenters in this proceeding as the basis for adopting a Title II classification—demonstrates that the incremental benefits of Title II over light-touch regulation are inconsequential, and pale in comparison to the significant costs of public-utility regulation. We therefore reject the argument that sparse evidence of harms is sufficient to justify the imposition of Title II.

91. The internet as we know it developed and flourished under light-touch regulation. It is self-evident that the hypothetical harms against which the *Title II Order* purported to protect did not thwart the development of the internet ecosystem. Edge providers have been able to disrupt a multitude of markets—finance, transportation, education, music, video distribution, social media, health and fitness, and many more—through innovation, all without subjecting the networks that carried them to onerous utility regulation. It is telling that the *Title II Order* and its proponents in this proceeding can point only to a handful of incidents that purportedly affected internet openness, while ignoring the two decades of flourishing innovation that preceded the *Title II Order.*

92. The first instance of actual harm cited by the *Title II Order* involved Madison River Communications, a small DSL provider accused in 2005 of blocking ports used for VoIP applications, thereby foreclosing competition to its telephony business. Madison River entered into a consent decree with the Enforcement Bureau, paying $15,000 to the U.S. Treasury and agreeing that it ''shall not block ports used for VoIP applications or otherwise prevent customers from using VoIP applications.'' Vonage, an over-the-top

VoIP provider, later confirmed in press reports that it had initiated a complaint against Madison River at the Commission and that other small ISPs had blocked its VoIP services.

93. Next, the *Title II Order* referenced Comcast's throttling of BitTorrent, a peer-to-peer networking protocol. Comcast, which was at the time the nation's second-largest ISP, admitted that it interfered with about a tenth of BitTorrent TCP connections, and independent investigations suggested that Comcast interfered with over half of BitTorrent streams. After receiving a formal complaint about the practice, the Commission found ''that Comcast's conduct poses a substantial threat to both the open character and efficient operation of the internet, and is not reasonable,'' and ordered Comcast to cease the interference. However, the D.C. Circuit vacated the Commission's order in *Comcast.*

94. *Madison River* and *Comcast-BitTorrent*—the anecdotes most frequently cited in favor of Title II regulation—demonstrate that any problematic conduct was quite rare. The more recent incidents discussed in the *Title II Order* also show that since 2008, few tangible threats to the openness of the internet have arisen. First, in 2012, AT&T restricted customers on certain data plans from accessing FaceTime on its cellular network for three months. AT&T contended it did so due to network management concerns, while application developers argued the restriction limited consumer choice. Regardless of the merits, AT&T ultimately reversed its decision within three months and the decision did not affect consumers who had data caps.

95. The final example—though not an example of harm to consumers—discussed in the *Title II Order* was Comcast's Xfinity TV application for the Xbox, which was criticized for exempting subscribers from their Comcast data caps. However, the service was provided as a specialized service, similar to certain VoIP and video offerings that use IP but are not delivered via the public internet. Accordingly, the Xfinity Xbox application was not subject to the 2010 or 2015 rules, as it was a so-called ''non-BIAS data service.'' However, the *Title II Order* further clouded this carve-out for innovative services by threatening to enforce the rules adopted under the *Order* against ISPs if it deemed after the fact, that those services were ''functional equivalents'' of broadband internet access services, as the *Open Internet Order* had done in 2010.

96. Certain commenters have claimed that there have been other harms to internet openness, but most of their anecdotes do not entail harms that the *Title II Order* purported to combat. Electronic Frontier Foundation and the Internet Engineers point to a number of alleged practices by ISPs, including stripping encryption from certain communications, inserting JavaScript code into third-party web pages, sending search data to third parties, and adding cookies. However, none of the bright-line rules promulgated in the *Title II Order* would have halted these practices, and whether they are covered by the ''general conduct rule'' is at best unclear. Similarly, the claim among several commenters that certain mobile providers blocked Google Wallet is misleading. Mobile providers refused to support Google Wallet because it required integration with the secure element of the handset's SIM card, which mobile providers believed introduced security vulnerabilities. OTI's argument about AT&T blocking Slingbox—which ''redirected a TV signal'' to the iPhone app—from its 3G network in 2009 fails to provide support for Title II regulation for a similar reason, because as AT&T explained at the time, ''we don't restrict users from going to a website that lets them view videos. But what our terms and conditions prohibit is the transferring, or slinging, of a TV signal to their personal computer or smartphone.'' In an attempt to manage its 3G network, AT&T restricted slinging to Wi-Fi, while reiterating that consumers could still access video streaming websites. We also recognize the existence of consumer complaints, but for the reasons discussed in Part IV.B below, we do not find them indicative of actual harm that the Commission's net neutrality rules are intended to protect against.

97. Because of the paucity of concrete evidence of harms to the openness of the internet, the *Title II Order* and its proponents have heavily relied on purely speculative threats. We do not believe hypothetical harms, unsupported by empirical data, economic theory, or even recent anecdotes, provide a basis for public-utility regulation of ISPs. Indeed, economic theory demonstrates that many of the practices prohibited by the *Title II Order* can sometimes harm consumers and sometimes benefit consumers; therefore, it is not accurate to presume that all hypothetical effects are harmful. Intrusive, investment-inhibiting Title II regulation requires a showing of actual harms, and after roughly fifteen years of searching, proponents of Title II have found ''astonishing[ly]'' few. Further, the transparency rule we adopt today will require ISPs to clearly disclose such practices and this, coupled with existing consumer protection and antitrust laws, will significantly reduce the likelihood that ISPs will engage in actions that would harm consumers or competition. To the extent that our approach relying on transparency requirements, consumer protection laws, and antitrust laws does not address all concerns, we find that any remaining unaddressed harms are small relative to the costs of implementing more heavy-handed regulation.

98. *Incentives.* We find, based on the record before us, that ISPs have strong incentives to preserve internet openness, and these interests typically outweigh any countervailing incentives an ISP might have. Consequently, Title II regulation is an unduly heavy-handed approach to what, at worst, are relatively minor problems. Although the *Title II Order* argued that ISPs were incentivized to harm edge innovation, it also conceded that ISPs benefit from the openness of the internet. The *Title II Order* found that ''when a broadband provider acts as a gatekeeper, it actually chokes consumer demand for the very broadband product it can supply.'' We agree. The content and applications produced by edge providers often complement the broadband internet access service sold by ISPs, and ISPs themselves recognize that their businesses depend on their customers' demand for edge content. It is therefore no surprise that many ISPs have committed to refrain from blocking or throttling lawful internet conduct notwithstanding any Title II regulation. Finally, to the extent these economic forces fail in any particular situation, existing consumer protection and antitrust laws additionally protect consumers. We therefore find that Title II, and the attendant utility-style regulation of ISPs, are an unnecessarily heavy-handed approach to protecting internet openness.

99. The *Open Internet* and *Title II Orders* claimed to base their actions on a theory that broadband adoption is driven by a ''virtuous cycle,'' whereby edge provider development ''increase[s] end-user demand for [Internet access services], which [drive] network improvements, which in turn lead to further innovative network uses.'' While the primary reason for this seems to be concern about the exercise of market power, footnote 68 suggests a secondary reason: ISPs ''will typically not take into account the effect that reduced edge provider investment and innovation has on the attractiveness of the internet to

end users that rely on other broadband providers—and will therefore ignore a significant fraction of the cost of foregone innovation.'' However, neither the *Open Internet Order* nor our record provide a mechanism to explain how this would occur, and why the impact on the ISP would not be proportional to its own business, and so be fully accounted for in its decisions, and provides no evidence that even if possible, there was a measurable impact from such an effect. The *Title II Order* concluded that Commission action was necessary to protect this virtuous cycle because ''gatekeeper'' power on the part of ISPs might otherwise thwart it, as ISPs ''are unlikely to fully account for the detrimental impact on edge providers' ability and incentive to innovate and invest.'' However, the economic analysis in the *Open Internet Order* and *Title II Order* was at best only loosely based on the existing economics literature, in some cases contradicted peer-reviewed economics literature, and included virtually no empirical evidence.

100. We find it essential to take a holistic view of the market(s) supplied by ISPs. ISPs, as well as edge providers, are important drivers of the virtuous cycle, and regulation must be evaluated accounting for its impact on ISPs' capacity to drive that cycle, as well as that of edge providers. The underlying economic model of the virtuous cycle is that of a two-sided market. Notably, the two-sided market we discuss here is the economic concept; we are not attempting to define a market for antitrust purposes. In a two-sided market, intermediaries—ISPs in our case—act as platforms facilitating interactions between two different customer groups, or sides of the market—edge providers and end users. The *Open Internet Order* takes the position that edge provider innovation drives consumer adoption of internet access and platform upgrades. The key characteristic of a two-sided market, however, is that participants on each side of the market value a platform service more as the number and/or quality of participants on the platform's other side increases. (The benefits subscribers on one side of the market bring to the subscribers on the other, and *vice versa,* are called positive externalities.) Thus, rather than a single side driving the market, both sides generate network externalities, and the platform provider profits by inducing both sides of the market to use its platform. In maximizing profit, a platform provider sets prices and invests in network extension and innovation, subject to costs and competitive conditions, to maximize the gain both sides of the market obtain from interacting across the platform. The more competitive the market, the larger the net gains to subscribers and edge providers. Any analysis of such a market must account for each side of the market and the platform provider.

101. Innovation by ISPs may take the form of reduced costs, network extension, increased reliability, responsiveness, throughput, ease of installation, and portability. These types of innovations are as likely to drive additional broadband adoption as are services of edge providers. In 2016, nearly 80 percent of Americans used fixed internet access at home. There is no evidence that the remaining nearly one-fifth of the population are all waiting for the development of applications that would make internet access useful to them. Rather, the cost of broadband internet access service is a central reason for non-adoption. ISP innovation that lowers the relative cost of internet access service is as likely as edge innovation, if not more so, to positively impact consumer adoption rates. Indeed, ISPs likely play a crucial role by offering, for example, low-margin or loss-leading offers designed to induce skeptical internet users to discover the benefits of access. In response to a larger base of potential customers, the returns to innovation by edge providers would be expected to rise, thereby spurring additional innovative activity in that segment of the market.

102. Accordingly, arguments that ISPs have other incentives to take actions that might harm the virtuous cycle, and hence might require costly Title II regulation, need to be explained and evaluated empirically. In a two-sided market, three potential reasons for Title II regulation arise: The extent to which ISPs have market power in selling internet access to end users; the extent to which ISPs have market power in selling to edge providers access to the ISP's subscribers (end users), which seems to primarily be to what the Commission and others appear to be referring when using the term ''gatekeeper''; and the extent to which the positive externalities present in a two-sided market might lead to market failure even in the absence (or because of that absence) of ISP market power. In considering each of these, we find that, where there are problems, they have been overestimated, and can be substantially eliminated or reduced by the more light-handed approach this order implements.

103. Our approach recognizes our limits as regulators, and is appropriately focused on the long-lasting effects of regulatory decisions. Thus, we seek to balance the harms that arise in the absence of regulation against the harms of regulation, accounting for, in particular, the effects of our actions on investment decisions that could increase competition three to five or more years from now. This is different from forbidding certain behavior or a merger on antitrust grounds due to the likelihood of imminent, non-transitory price increases. As a result, our discussion of competition need not have any implications for conventional antitrust analysis. We note that our reclassification of broadband internet access service as an information service leaves the usual recourse of antitrust and consumer protection action available to all parties. That is, heavy-handed Title II regulation is unnecessary to enforce antitrust and consumer protection laws.

104. *Fixed ISPs Often Face Material Competitive Constraints.* The premise of Title II and other public utility regulation is that ISPs can exercise market power sufficient to substantially distort economic efficiency and harm end users. However, analysis of broadband deployment data, coupled with an understanding of ISPs' underlying cost structure, indicates fixed broadband internet access providers frequently face competitive pressures that mitigate their ability to exert market power. Therefore, the primary market failure rationale for classifying broadband internet access service under Title II is absent. Furthermore, the presence of competitive pressures in itself protects the openness of the internet. The theory that competition is the best way to protect consumers is the ''heart of our national economic policy'' and the premise of the 1996 Act. We therefore find that the competition that exists in the broadband market, combined with the protections of our consumer protection and antitrust laws against anticompetitive behaviors, will constrain the actions of an ISP that attempts to undermine the openness of the internet in ways that harm consumers, and to the extent they do not, any resulting harms are outweighed by the harms of Title II regulation. Our discussion of competitive effects, unless otherwise specified, does not rely on or define any antitrust market.

105. *ISP Competition in Supplying Internet Access to Households.* Starting with fixed internet access, including fixed satellite and terrestrial fixed wireless service, competition, with

whatever limitations may be inherent in these different technologies, appears to be widespread, at lower speeds for most households (we make no finding as to whether lower speed fixed internet access services are in the same market as higher speed fixed internet access services):

PERCENT OF U.S. POPULATION IN DEVELOPED CENSUS BLOCKS IN WHICH RESIDENTIAL FIXED BROADBAND ISPS REPORTED DEPLOYMENT

[as of December 31, 2016]

Speed of at least:	Number of providers			
	3+ (%)	2 (%)	1 (%)	0 (%)
3 Mbps down and 0.768 Mbps up	97.0	2.8	0.1	0.1
10 Mbps down and 1 Mbps up	93.6	5.7	0.6	0.1
25 Mbps down and 3 Mbps up	43.9	32.6	19.1	4.4

106. However, because there are questions as to the extent fixed satellite and fixed terrestrial wireless internet access service are broadly effective competitors for wireline internet access service, we do not rely on this data, except to note that these services, where available, place some competitive constraints on wireline providers. Fixed wireless and satellite subscriptions decisions suggest that consumers generally prefer fixed wireline services to these, even at lower speeds. For example, at bandwidths of 3 Mbps downstream and 0.768 Mbps upstream, satellite providers report deployment in 99.1 percent of developed census blocks, but only account for 1.7 percent of subscriptions, while terrestrial fixed wireless providers report deployment in 38.5 percent of developed census blocks, but only account for 0.9 percent of all subscriptions. Focusing on competition among wireline service providers, and excluding DSL with speeds less than 3 Mbps down and 0.768 Mbps up, shows less, but still widespread, competition:

PERCENT OF U.S. POPULATION IN DEVELOPED CENSUS BLOCKS IN WHICH RESIDENTIAL BROADBAND WIRELINE ISPS REPORTED DEPLOYMENT

[as of December 31, 2016]

Speed of at least:	Number of providers			
	3+ (%)	2 (%)	1 (%)	0 (%)
3 Mbps down and 0.768 Mbps up	12.1	67.2	16.2	4.4
10 Mbps down and 1 Mbps up	9.0	58.5	26.3	6.2
25 Mbps down and 3 Mbps up	5.9	45.2	39.6	9.2

107. While not reported, the percent of households in developed census blocks closely tracks the entries for the percent of population in developed census tracts. For example, approximately 79.7 percent of U.S. households are in a census block where at least two wireline suppliers offer speeds of at least 3 Mbps down and 0.768 Mbps up. This table understates competition in several respects. First, even two competing wireline ISPs place competitive constraints on each other. ISPs' substantial sunk costs imply that competition between even two ISPs is likely to be relatively strong. Thus, to the extent market power exists, it is unlikely to significantly distort what would otherwise be efficient choices. A wireline ISP, anywhere it is active, necessarily has made substantial sunk investments. Yet, the cost of adding another customer, or of carrying more traffic from the same customers, is relatively low. Accordingly, a wireline ISP has strong incentives, even when facing a single competitor, to capture customers or induce greater use of its network, so long as its current prices materially exceed the marginal cost of such changes. In addition, empirical research finds that the largest benefit from competition generally comes from the presence of a second provider, with added benefits of additional providers falling thereafter, especially in the presence of large sunk costs. Indeed, a wireline provider may be willing to cut prices to as low as the incremental cost of supplying a new customer. Thus, in this industry, even two active suppliers in a location can be consistent with a noticeable degree of competition, and in any case, can be expected to produce more efficient outcomes than any regulated alternative. We do not claim that a second wireline provider results in textbook perfect competition, but rather, given ISP recovery of sunk investments becomes more difficult as competition increases, and the critical nature of allowing such recovery, market outcomes may well ensure approximately competitive rates of return. Other industries with large sunk costs have shown that ''price declines with the addition of the first competitor, but drops by very little thereafter.'' Nothing in this order should be construed as finding that these statements appropriately characterize the addition of the first fixed wireline competitor in a particular context, only that in general such an addition likely will have a material impact on moving prices toward competitive levels.

108. Second, competitive pressures often have spillover effects across a given corporation, meaning an ISP facing competition broadly, if not universally, will tend to treat customers that do not have a competitive choice as if they do. This is because acting badly in uncompetitive areas may be operationally expensive (*i.e.,* requiring different equipment, different policies, different worker training, and different call centers to address differing circumstances) and reputationally expensive (*e.g.,* even if behavior is confined to an uncompetitive market,

customers in competitive markets may churn after learning about such behavior). Accordingly (and unsurprisingly), most ISPs actively try to minimize the discrepancies in their terms of service, network management practices, billing systems, and other policies—even if they offer different service tiers or pricing in different areas. Approximately 79 percent of U.S. households are found in census blocks that at least two wireline ISPs report serving, and approximately another 8 percent of households are in census blocks where the unique wireline ISP providing service in the census block faces competition from a rival in 90 percent of the blocks it serves. Such ISPs included the top ten ISPs when ranked by covered census blocks, and also when ranked by households in covered census blocks, except the ninth, Windstream. Our conclusions do not hinge on finding effective competition everywhere. We find that competition exists in various forms nearly everywhere and to the extent that effective competition is not universal, the costs of Title II regulation outweigh the benefits of our more light-touch approach.

109. The Commission's prior findings on churn in the broadband marketplace do not dissuade us from concluding that wireline broadband ISPs often face competitive pressures. Although the Commission has previously found voluntary churn rates for broadband service to be quite low, a view which some commenters echo, substantial, quantified evidence in the record dissuades us from repeating that finding here. Regardless, even if high churn rates make market power unlikely, low churn rates do not *per se* indicate market power. For example, they may reflect competitive actions taken by ISPs to attract customers to sign up for contracts, and to retain existing customers, such as discount and bonus offers. Moreover, actions such as these, and others, are indicative of competition. For example, ISPs engage in a significant degree of advertising, aiming to draw new subscribers and convince subscribers to other fixed ISPs to switch providers. Similarly, ISPs employ ''save desks'' often taking aggressive actions to convince subscribers seeking service cancellation to continue to subscribe, often at a discounted price. Thus, the record indicates material competition for customers regardless of churn levels.

110. *There is even greater competition in mobile wireless.* Mobile wireless ISPs face competition in most markets, with widespread and ever extending head-to-head competition between four major carriers. As of January 2017, at least four wireless broadband service providers covered approximately 92 percent of the U.S. population with 3G technology or better. Even in rural areas at least four service providers covered approximately 69 percent of the population. These coverage estimates represent deployment of mobile networks and do not indicate the extent to which providers offer service to residents in the covered areas.

111. Both the *Title II Order* and its supporters in the current proceeding fail to properly account for the pressure mobile internet access exerts on fixed, including fixed wireline, internet access supply. While we recognize that fixed and mobile internet access have different characteristics and capabilities, for example, typically trading off speed and data caps limits against mobility, increasing numbers of internet access subscribers are relying on mobile services only. In 2015, one in five households used only mobile internet access service to go online at home (up from one in ten in 2013), and close to 15 percent of households with incomes in excess of $100,000 (up from six percent in 2013), exclusively used mobile internet access service at home. New America/OTI notes that this study states that low-income Americans are far more likely to become mobile dependent than consumers who have higher levels of income. However, as noted above, this same study by the U.S. Census Bureau, which includes data collected from nearly 53,000 households, also found a significant increase in mobile-only use by higher-income households, and that the growth in the proportion of high-income households that exclusively use mobile internet service at home is accelerating. Several commenters discussed their own views on the extent to which mobile wireless might exert competitive pressure in some instances. Competition constrains a firm's prices if the firm is prevented from raising price to levels that absent switching to competitors, would increase the firm's profits. The extent of the switching need not be large. For example, with constant unit costs, a 5% price increase would be prevented if that would lead to slightly less than 5% of the firm's customers to either stop consuming altogether or to switch to a rival. Suppliers of internet access service are likely to be more sensitive to customer loss than the case with constant marginal cost, since in general the marginal costs of internet access service fall as subscriber numbers increase, meaning, in addition to the revenues lost due to leaving customers, profits are also eroded due to a rise in the average cost of supplying those who remain. With the advent of 5G technologies promising sharply increased mobile speeds in the near future, the pressure mobile exerts in the broadband market place will become even more significant.

112. *ISP Competition in Supplying Edge Providers Access to End Users.* On the other side of the market, to the extent ISPs have market power in supplying edge providers, ISP prices to edge providers could distort economic efficiency (a potential harm that is distinct from anticompetitive behavior or because of a failure to internalize a relevant externality). Loosely speaking, such power over an edge provider can arise under one of two conditions: The ISP has conventional market power over the edge provider because it controls a substantial share of (perhaps a specific subset of) end-user subscribers that are of interest to the edge provider, or that edge provider's customers only subscribe to one ISP (a practice known as single homing).

113. Narrowly focusing on fixed ISPs, Comcast, the largest wireline ISP, has approximately one quarter of all residential subscribers in the US, while at speeds of at least 25 Mbps down and 3 Mbps up, the Herfindahl-Hirschman Index measure of concentration for the supply of access to residential fixed broadband internet access service subscribers meets the Department of Justice (DOJ) designation of ''moderately concentrated'' (DOJ considers a market with an HHI value of between 1,500 and 2,500 to be moderately concentrated):

HHI OF SERVED RESIDENTIAL FIXED BROADBAND INTERNET ACCESS SERVICE SUBSCRIBERS

[as of December 31, 2016]

Speed	HHI
3 Mbps down and 0.768 Mbps up	1,473
10 Mbps down and 1 Mbps up	1,743
25 Mbps down and 3 Mbps up	2,208

114. Large shares of end-user subscribers, and/or market concentration, however, do not seem a likely source or indicator of conventional market power capable of significantly distorting efficient choices, with the possible exception of edge providers whose services require characteristics currently only available on high-speed fixed networks (such as video, which requires both high speeds and substantial monthly data

allowances, and gaming and certain other applications, which require high speeds and low latency). Given Comcast's market share, even a fledgling edge provider that can only be viable in the long term if it offers service to three quarters of broadband subscribers, may not depend on gaining access to any single provider. And calculating market shares for wireline ISPs based on their end users may be too simplistic if edge providers can reach end users at locations other than their homes, such as at work, or through a mobile ISP. We reject claims that we should entirely neglect this possibility based on assertions that users might be limited in their ability or willingness to switch between different options for broadband internet access in unspecified circumstances and for unspecified reasons. In addition, ISPs have good incentives to encourage new entrants that bring value to end users, both because such new entrants directly increase the value of the platform's service, and because they place competitive pressure on other edge providers, forcing lower prices, again increasing the value of the platform's service. Moreover, those smaller edge providers may benefit from tiered pricing, such as paid prioritization, as a means of gaining entry. If the entrant offers a more valuable service than an incumbent, then this would be a profitable strategy, and while it is common to claim new entrants would not have the deep pockets necessary to implement such an entry strategy, new economy startups have demonstrated that capital markets are willing to provide funds for potentially profitable ideas, despite high failure rates, presumably because of the large potential gains when an entrant is successful. Examples of successful new entrants that started behind dominant incumbents, include Google (against established search engines such as Yahoo, and the map provider, MapQuest), Amazon (against traditional bricks and mortar storefronts), and Facebook (against MySpace). In fact, some edge providers might consider reaching end users on mobile devices to be roughly as valuable as, or more valuable than, reaching end users on wireline networks.

115. In addition, larger edge providers, such as Amazon, Facebook, Google and Microsoft, likely have significant advantages that would reduce the prospect of inefficient outcomes due to ISP market power. For example, the market capitalization of the smallest of these five companies, Amazon, is more than twice that of the largest ISP, Comcast, and the market capitalization of Google alone is greater than every cable company in America combined. Action by these larger edge providers preventing or reducing the use of ISP market power could spill over to smaller edge providers, and in any case, is unlikely to anticompetitively harm them given existing antitrust protections (since arrangements between an ISP and a large established edge provider must be consistent with antitrust law). Consequently, any market power even the largest ISPs have over access to end users is limited in the extent it can distort edge provider decisions (or those of their end users).

116. Despite the preceding analysis, a second claim is made that relies solely on the second factor, single homing: ''regardless of the competition in the local market for broadband internet access, once a consumer chooses a broadband provider, that provider has a monopoly on access to the subscriber . . . Once the broadband provider is the sole provider of access to an end user, this can influence that network's interactions with edge providers, end users, and others.'' Commenters have echoed this ''terminating access monopoly'' concern. This argument is often conflated with arguments about retail competition more generally, but it is a distinct concept that has been endorsed by the FCC and the courts in various contexts. The focus on edge providers' bargaining position vis-à-vis ISPs is warranted in light of the fact that any gatekeeper power applies to edge providers, not end users. The *Title II Order* contended that these forces applied to all ISPs, whether large or small, fixed or mobile, fiber or satellite, and ''therefore [it] need not consider whether market concentration gives broadband providers the ability to raise prices.''

117. As a blanket statement, this position is not credible. It is unlikely that any ISP, except the very largest, could exercise substantial market power in negotiations with Google or Netflix, but almost certainly no small wireless ISP, or a larger but still small rural cable company or incumbent LEC, could do so. Further, from the perspective of many edge providers, end users do not single home, but subscribe to more than one platform (*e.g.,* one fixed and one mobile) capable of granting the end user effective access to the edge provider's content (*i.e.,* they multi-home). As the *Title II Order* acknowledges, to the extent multihoming occurs in the use of an application, there is no terminating monopoly.

118. Moreover, to the extent a terminating monopoly exists for some edge providers, and it is not offset or more than offset by significant advantages, there is the question of the extent to which the resulting prices are economically inefficient. A terminating (access) monopoly arises when customers on one side of the market, roughly speaking end users in our case, single home with little prospect of switching to another platform in the short run, while customers on the other side, roughly speaking edge providers in our case, find it worthwhile to multi-home. The terminating monopoly differs from conventional market power because it can arise despite effective competition between platforms. In that case, platforms must vigorously compete for single-homing end users, but have less need to compete for edge providers, who subscribe to all platforms. Such an arrangement is mutually reinforcing. Single homers can reach all the multi-homers despite only subscribing to one platform. Multi-homers must subscribe to all platforms to reach all single homers. This means each ISP faces strong pressures to cut prices to end users, but does not face similar pressures in pricing to edge providers. However, ISPs are unlikely to earn supranormal profits, so any markups earned from edge providers in excess of total costs are generally passed through to end users. While such an outcome generally will not be efficient, there is no general presumption about the extent of that inefficiency, or even if prices to the multi-homers ideally should be lower than would emerge in the absence of a termination monopoly. In the present case, there is no substantive evidence in the record that demonstrates how different efficient prices to edge providers would be from the prices that would emerge without rules banning paid prioritization or prohibiting ISPs from charging providers at all.

119. Lastly, we find the record presents no compelling evidence that any inefficiencies, to the extent they exist, justify Title II regulation. There is no empirical evidence that the likely effects from conventional market power or the terminating monopoly, to the extent they exist, are likely to be significant, let alone outweigh the harmful effects of Title II regulation. For all these reasons, we find no case for supporting Title II regulation of ISP prices to edge providers. We note that the terminating monopoly problem in voice telecommunications is one created by common-carriage regulation, not one solved by it. Specifically, carriers must interconnect with each other and originating carriers must pay

terminating carriers rates set by the terminating carrier in their tariff (with some government oversight). That leads to a ''bargaining'' situation where one party sets the terms of the deal and the other must accept it or complain to the regulator—in other words, the regulations prohibit a normal free market from developing. Such regulatory requirements do not exist in broadband. Furthermore, two additional aspects unique to the traditional telephone market created those problems: (1) Voice call originators, who are (with the exception of reverse charge calls) the analogue to edge providers in voice-telecommunications, do not directly negotiate with the carrier that sets call termination charges, but rather only have a relationship with the call originating carrier. However, the originating carrier gains from high call termination charges when it terminates calls on its own network, so faces a conflict of interest when negotiating call termination charges on behalf of its subscribers. In fact, such a regime provides carriers with a mechanism for using the input price of call termination to collude on retail prices. In contrast, edge providers can directly connect with an ISP to reach that ISP's end users, without seeking the ISP's help to terminate on another ISP's network (unlike in voice telecommunications), or can use intermediaries such as Cogent and Akamai, who largely do not terminate traffic to their own end users, so do not face the conflict that voice carriers face when negotiating termination charges. (2) Even if call originating carriers had good incentives to negotiate reasonable termination charges, regulation that requires interconnection, but does not appropriately regulate termination charges, seriously weakens their ability to obtain reasonable rates. Threatening to not interconnect is not an available negotiating ploy in telecommunications, but is one available to edge providers, especially larger ones, in negotiating with ISPs. Moreover, historically voice telephony consisted of geographic monopolies, making it pointless for one carrier to threaten another with disconnection since the end users of the disconnected carrier could not switch to a different carrier. Again, this is not true for internet access.

120. *Externalities Associated With General-Purpose Technologies Are Not a Convincing Rationale for Title II Regulation.* Some commenters make somewhat inchoate arguments that ISPs should not be permitted to treat different edge providers' content differently or charge more than a zero price because the internet is a ''general purpose technology'' and/or the services of some edge providers create positive externalities that the edge providers cannot appropriate. Hogendorn may propose the most coherent version of this argument: Because the internet is a general purpose technology (GPT), when an ISP sets a price to any edge provider, the ISP does not take into account the positive externalities generated by the broad (*e.g.,* GPT) use of those edge providers' applications (just as edge providers do not). Unfortunately, these commentators fail to define or substantiate the extent of the problem, if any; fail to demonstrate how much the situation would be improved by requiring nondiscriminatory treatment of all edge providers; do not explain why, if nondiscriminatory treatment is required, it should be at a zero price; do not assess whether the costs of such an intervention would be offset by the benefits; and do not consider whether other less regulatory measures would be more appropriate. For example, ISPs are one of many input suppliers to edge providers, so taxing only ISPs would create distortions in edge provider provision which could offset any (undemonstrated) benefits such tax would bring. These problems are more acute if only specific (as yet unidentified) edge providers generate positive externalities in supply. Instead, these commenters seek to apply Title II regulation to all ISPs, and consider the solution to their concern that certain services or the internet itself might be inefficiently undersupplied (for reasons well beyond the control of ISPs) to be a ban on ISPs only (and not other input suppliers of edge providers) charging edge providers *any* price. We reject this approach as unreasonable and unreasoned.

3. Pre-Existing Consumer Protection and Competition Laws Protect the Openness of the Internet

121. In the unlikely event that ISPs engage in conduct that harms internet openness, despite the paucity of evidence of such incidents, we find that utility-style regulation is unnecessary to address such conduct. Other legal regimes—particularly antitrust law and the FTC's authority under Section 5 of the FTC Act to prohibit unfair and deceptive practices—provide protection for consumers. These long-established and well-understood antitrust and consumer protection laws are well-suited to addressing any openness concerns, because they apply to the whole of the internet ecosystem, including edge providers, thereby avoiding tilting the playing field against ISPs and causing economic distortions by regulating only one side of business transactions on the internet.

122. *Consumer Protection.* The FTC has broad authority to protect consumers from ''unfair or deceptive acts or practices.'' As the nation's premier consumer protection agency, the FTC has exercised its authority, which arises from Section 5 of the FTC Act, to protect consumers in all sectors of the economy. The FTC has used its Section 5 authority to enjoin some of the practices at issue in this proceeding, such as throttling. The FTC is prohibited under the FTC Act from regulating common carriers. As a result, the Commission's classification of broadband internet access service as a common carriage telecommunications service stripped the FTC of its authority over ISPs. Therefore, as discussed in greater detail below, the return to Title I will increase the FTC's effectiveness in protecting consumers. Today's reclassification of broadband internet access service restores the FTC's authority to enforce any commitments made by ISPs regarding their network management practices that are included in their advertising or terms and conditions, as the FTC did so successfully in *FTC* v. *TracFone.* The FTC's unfair-and-deceptive-practices authority ''prohibits companies from selling consumers one product or service but providing them something different,'' which makes voluntary commitments enforceable. The FTC also requires the ''disclos[ur]e [of] material information if not disclosing it would mislead the consumer,'' so if an ISP ''failed to disclose blocking, throttling, or other practices that would matter to a reasonable consumer, the FTC's deception authority would apply.'' Today's reclassification also restores the FTC's authority to take enforcement action against unfair acts or practices. An unfair act or practice is one that creates substantial consumer harm, is not outweighed by countervailing benefits to consumers, and that consumers could not reasonably have avoided. A unilateral change in a material term of a contract can be an unfair practice. The FTC's 2007 Report on Broadband Industry Practices raises the possibility that an ISP that starts treating traffic from different edge providers differently without notifying consumers and obtaining their consent may be engaging in a practice that would be considered unfair under the FTC Act.

123. Many of the largest ISPs have committed in this proceeding not to block or throttle legal content. These

commitments can be enforced by the FTC under Section 5, protecting consumers without imposing public-utility regulation on ISPs. As discussed below, we believe that case-by-case, *ex post* regulation better serves a dynamic industry like the internet and reduces the risk of over-regulation. We also reject assertions that the FTC has insufficient authority, because, as Verizon argues, ''[i]f broadband service providers' conduct falls outside [the FTC's] grant of jurisdiction—that is, if their actions cannot be described as anticompetitive, unfair, or deceptive—then the conduct should not be banned in the first place.'' In addition to rejecting claims that the FTC's authority is insufficient, we also reject arguments that it lacks the necessary expertise to protect consumers in this area. The comments by the FTC's Acting Chairman in this proceeding persuade us of that agency's understanding of the issues and of its ability to resume oversight of ISP practices. Just as importantly, any loss of expertise is outweighed by the benefits of having a single expert consumer protection agency overseeing the entire internet ecosystem. We anticipate sharing information and expertise with the FTC as we work together to protect consumers under the framework adopted today. And the transparency rule that we adopt today should allay any concerns about the ambiguity of ISP commitments, by requiring ISPs to disclose if the ISPs block or throttle legal content. For the same reasons, the transparency rule allows us to reject the argument that antitrust and consumer protection enforcers cannot detect problematic conduct. Finally, we expect that any attempt by ISPs to undermine the openness of the internet would be resisted by consumers and edge providers. We also observe that all states have laws proscribing deceptive trade practices.

124. *Antitrust.* The antitrust laws, particularly Sections 1 and 2 of the Sherman Act, as well as Section 5 of the FTC Act, protect competition in all sectors of the economy where the antitrust agencies have jurisdiction. When challenged as anticompetitive under the antitrust laws, the types of conduct and practices prohibited under the *Title II Order* would likely be evaluated under the ''rule of reason,'' which amounts to a consumer welfare test. The Communications Act includes an antitrust savings clause, so the antitrust laws apply with equal vigor to entities regulated by the Commission. Should the hypothetical anticompetitive harms that proponents of Title II imagine eventually come to pass, application of the antitrust laws would address those harms.

125. Section 1 of the Sherman Act bars contracts, combinations, or conspiracies in restraint of trade, making anticompetitive arrangements illegal. If ISPs reached horizontal agreements to unfairly block, throttle, or discriminate against internet conduct or applications, these agreements likely would be *per se* illegal under the antitrust laws. EFF argues that the single entity doctrine means that a vertically-integrated ISP could collude with its affiliated content arm without fear of the antitrust laws. This argument is inapposite, however, because such a claim against a vertically-integrated ISP would likely be based on Section 2 of the Sherman Act under an attempted monopolization theory, rather than as a Section 1 collusion claim. Section 2 of the Sherman Act, which applies if a firm possesses or has a dangerous probability of achieving monopoly power, prohibits exclusionary conduct, which can include refusals to deal and exclusive dealing, tying arrangements, and vertical restraints. Section 2 makes it unlawful for a vertically integrated ISP to anticompetitively favor its content or services over unaffiliated edge providers' content or services. Treble damages are available under both Section 1 and Section 2. We note that FTC enforcement of Section 5 is broader and would apply in the absence of monopoly power.

126. Most of the examples of net neutrality violations discussed in the *Title II Order* could have been investigated as antitrust violations. Madison River Communications blocked access to VoIP to foreclose competition to its telephony business; an antitrust case would have focused on whether the company was engaged in anticompetitive foreclosure to preserve any monopoly power it may have had over telephony. Whether one regards Comcast's behavior toward BitTorrent as blocking or throttling, it could have been pursued either as an antitrust or consumer protection case. The Commission noted that BitTorrent's service allowed users to view video that they might otherwise have to purchase through Comcast's Video on Demand service—a claim that could be considered an anticompetitive foreclosure claim under antitrust. Comcast also failed to disclose this network management practice and initially denied that it was engaged in any throttling—potentially unfair or deceptive acts or practices. If an ISP that also sells video services degrades the speed or quality of competing ''Over the Top'' video services (such as Netflix), that conduct could be challenged as anticompetitive foreclosure.

127. Among the benefits of the antitrust laws over public utility regulation are (1) the rule of reason allows a balancing of pro-competitive benefits and anti-competitive harms; (2) the case-by-case nature of antitrust allows for the regulatory humility needed when dealing with the dynamic internet; (3) the antitrust laws focus on protecting competition; and (4) the same long-practiced and well-understood laws apply to all internet actors.

128. *Reasonableness.* The unilateral conduct that is covered by Section 2 of the Sherman Act would be evaluated under a standard similar to the rule of reason applicable to conduct governed by Section 1, ''an all-encompassing inquiry, paying close attention to the consumer benefits and downsides of the challenged practice based on the facts at hand.'' We believe that such an inquiry will strike a better balance in protecting the openness of the internet and continuing to allow the ''permissionless innovation'' that made the internet such an important part of the modern U.S. economy, as antitrust uses a welfare standard defined by economic analysis shaped by a significant body of precedent. Compare this to the Internet Conduct Standard, which would examine a variety of considerations broader than consumer welfare, as well as factors yet to be determined.

129. The case-by-case, content-specific analysis established by the rule of reason will allow new innovative business arrangements to emerge as part of the ever-evolving internet ecosystem. New arrangements that harm consumers and weaken competition will run afoul of the Sherman Act, and successful plaintiffs will receive treble damages. The FTC and DOJ can also bring enforcement actions in situations where private plaintiffs are unable or unwilling to do so. New arrangements benefiting consumers, like so many internet innovations over the last generation, will be allowed to continue, as was the case before the imposition of Title II utility-style regulation of ISPs.

130. We reject commenters' assertions that the case-by-case nature of antitrust enforcement makes it inherently flawed. A case-by-case approach minimizes the costs of overregulation, including tarring all ISPs with the same brush, and reduces the risk of false positives when regulation is necessary. We believe the Commission's bright-line and internet conduct rules are more likely to inhibit innovation before it occurs, whereas antitrust enforcement can adequately remedy harms should they occur. As

such, we reject the argument that innovation is best protected by *ex ante* rules and command-and-control government regulation. Further, while a handful of ISPs are large and vertically integrated with content producers, most ISPs are small companies that have no leverage in negotiations with large edge providers, which include some of the most valuable companies in the world. Regulating these companies is unnecessarily harmful. The antitrust laws can be tailored to the ISP's circumstances. We reject as fundamentally speculative claims that significantly different behavior is likely from entities that were subject to antitrust suits, as compared to those that have not yet been—but still could be—subject to such suits, or based on the theory that antitrust authorities are likely to negotiate materially different resolutions even for similarly situated entities or circumstances.

131. Moreover, the case-by-case analysis, coupled with the rule of reason, allows for innovative arrangements to be evaluated based on their real-world effects, rather than a regulator's *ex ante* predictions. Such an approach better fits the dynamic internet economy than the top-down mandates imposed by Title II. Further, the antitrust laws recognize the importance of protecting innovation. Indeed, the FTC has pursued several cases in recent years where its theory of harm was decreased innovation. Accordingly, we believe that antitrust law can sufficiently protect innovation, which is a matter of particular importance for the continued development of the internet. Some commenters argue that antitrust law is more limited in scope than the rules in the *Title II Order,* antitrust enforcement necessarily takes place after some harm has already occurred, and proving an antitrust violation can be expensive and time-consuming. However, with a body of established and evolving precedent, the FTC's antitrust enforcement is fact-based, flexible and applicable to internet-related markets before the *Title II Order.* We find that the antitrust framework will strike a better balance by protecting competition and consumers while providing industry with greater regulatory certainty. We also find that the combination of the transparency rule, ISP commitments, and their enforcement by the FTC sufficiently address the argument made by several commenters that antitrust moves too slowly and is too expensive for many supposed beneficiaries of regulation.

132. Additionally, the existence of antitrust law deters much potential anticompetitive conduct before it occurs, and where it occurs offers recoupment through damages to harmed competitors. Some commenters have cast doubt on the effectiveness of *ex post* enforcement, preferring *ex ante* rules. Yet as the FTC staff noted in its comments, this is a false dichotomy. ''Effective rule of law requires both appropriate standards—whether established by common law court, Congress in statute, or by an agency in rules—and active enforcement of those standards.'' Even the ''bright line'' rules in the *Title II Order* contain an exception for ''reasonable network management.'' An ISP accused of violating those rules would be the subject of an *ex post* FCC enforcement action. The FCC would have to determine *ex post* whether a challenged practice constituted technical network management or not.

133. Moreover, economic research has demonstrated that the threat of antitrust enforcement deters anticompetitive actions. Block et al. find that an increase in the likelihood of antitrust enforcement in the U.S. has a significant effect on lowering prices to consumers. Similarly it has been found that countries with vigorous antitrust statutes and enforcement, such as the United States, reduce the effects of anticompetitive behavior when it does occur. There is also evidence that firms, once they have been subject to an enforcement action, are less likely to violate the antitrust laws in the future. Overall, we have confidence that the use of antitrust enforcement to protect competition in the broadband internet service provider market will ensure that consumers continue to reap the benefits of that competition. We conclude that the light-touch approach that we adopt today, in combination with existing antitrust and consumer protection laws, more than adequately addresses concerns about internet openness, particularly as compared to the rigidity of Title II. Some commenters have raised issues about the feasibility of antitrust as applied to some potential harms. CompTIA and OTI claim that the unilateral refusal to deal and essential facilities cases are more difficult to bring after *Verizon Commc'ns, Inc.* v. *Law Offices of Curtis V. Trinko,* 540 U.S. 398 (2004) and *Pacific Bell Tel. Co.* v. *linkLine Commc'ns, Inc.,* 555 U.S. 438 (2009). To the extent these commenters are correct, the transparency rule and FTC enforcement of the commitments (based on Section 5 of the FTC's Act broader reach than antitrust) remain to protect the openness of the internet, and the shifts in antitrust doctrine do not support the imposition of Title II.

134. *Focus on protecting competition.* One of the benefits of antitrust law is its strong focus on protecting competition and consumers. If a particular practice benefits consumers, antitrust law will not condemn it. The fact that antitrust law protects competition means that it also protects other qualities that consumers value. ''[The] assumption that competition is the best method of allocating resources in a free market recognizes that all elements of a bargain—quality, service, safety, and durability—and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers.'' The market competition that antitrust law preserves will protect values such as free expression, to the extent that consumers value free expression as a service attribute and are aware of how their ISPs' actions affect free expression. The lack of evidence of harms to free expression on the internet also bolsters our belief that Title II is unnecessary to protect social values that are not the focus of antitrust. The anecdotes of harms to internet openness cited by supporters of the *Title II Order* almost exclusively concern business decisions regarding network management, rather than being aimed at or impacting political expression. In any case, the transparency rule and the ISP commitments backed up by FTC enforcement are targeted to preserving free expression, particularly the no-blocking commitment. Therefore, we believe that the argument that antitrust law does not consider non-economic factors such as free expression and diversity fails to support Title II regulation.

135. Finally, applying antitrust principles to ISP conduct is consistent with longstanding economic and legal principles that cover all sectors of the economy, including the entire internet ecosystem. Applying the same body of law to ISPs, edge providers, and all internet actors avoids the regulatory distortions of Title II, which ''impos[ed] asymmetric behavioral regulations . . . on broadband ISPs under the banner of protecting internet openness, but le[ft] internet edge providers free to threaten or engage in the same types of behavior prohibited to ISPs free of any *ex ante* constraints.'' Our decision today to return to light-touch Title I regulation and the backstop of generally-applicable antitrust and consumer protection law ''help[s] to ensure a level, technology-neutral playing field'' for the whole internet.

D. Restoring the Information Service Classification Is Lawful and Necessary

136. The Commission has the legal authority to return to the classification of broadband internet access service as an ''information service.'' The Supreme Court made clear when affirming the Commission's original information service classification of cable modem service that Congress ''delegated to the Commission authority to execute and enforce the Communications Act, as well as prescribe the rules and regulations necessary in the public interest to carry out the provisions.'' This delegation includes the legal authority to interpret the definitional provisions of the Communications Act. Nothing in the record meaningfully contests this fundamental point. Relying on that authority, we change course from the *Title II Order* and restore the information service classification of broadband internet access service, which represents the best interpretation of the Act. We reject arguments against reclassification based on alleged shortcomings in the justification for changing course provided in the *Internet Freedom NPRM* given that we fully explain here our rationale for revisiting the *Title II Order's* classification of broadband internet access service. As discussed above, this action is supported by the text, structure, and history of the Act, the nature of ISP offerings, judicial and Commission precedent, and the public policy consequences flowing from reclassification. For this reason, and for those set forth more fully in Section III above, we reject claims that an information service classification is unambiguously precluded. Such assertions are contrary to our interpretation of the statutory language and our application of it to the facts before us and also find no support in the relevant court precedent addressing prior classification decisions, which either affirmed an information service classification or affirmed the recent telecommunications service classification as merely a permissible interpretation of ambiguous statutory language. In making these arguments, commenters do not dispute the Commission's general authority to interpret and apply the Act, but merely present arguments regarding the reasonableness or permissibility of interpreting or applying the Act in particular ways.

137. An agency of course may decide to change course, and such a decision is not, as some commenters suggest, inherently suspect. The Supreme Court has observed that there is ''no basis in the Administrative Procedure Act or in our opinions for a requirement that all agency change be subjected to more searching review. . . . [I]t suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better, which the conscious change of course adequately indicates.'' Relevant precedent holds that we need only ''examine the relevant data and articulate a satisfactory explanation for [our] action,'' a duty we fully satisfy here. The ''possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence.'' As such, we reject arguments that reclassification must be premised on changed factual circumstances or preceded by a significant gap in time. Rather, we are ''entitled to assess administrative records and evaluate priorities'' in light of our current policy judgments. As the Court recognized in *Brand X,* ''in *Chevron* itself, the Court deferred to an agency interpretation that was a recent reversal of agency policy.'' The *USTelecom* decision supports our understanding of the relevant legal standard, affirming the *Title II Order's* reclassification of broadband internet access service irrespective of whether any facts had changed.

138. Such a change in course can be justified on a variety of possible grounds. The Supreme Court observed in *Brand X* that ''the agency . . . must consider varying interpretations and the wisdom of its policy on a continuing basis, for example in response to . . . a change in administrations.'' In addition, if an agency's predictions ''prove erroneous, the Commission will need to reconsider'' the associated regulatory actions ''in accordance with its continuing obligation to practice reasoned decision-making.'' In short, the Commission's reasoned determination today that classifying broadband internet access service as an information service is superior both as a matter of textual interpretation and public policy suffices to support the change in direction—even absent any new facts or changes in circumstances. But even assuming such new facts were necessary, the record provides several other sufficient and independent bases for our decision to revisit the classification of broadband internet access service.

139. For example, we find that the *Title II Order's* regulatory predictions have not been borne out. Although purporting to adopt a 'light-touch' regulatory framework for broadband internet access service, this view of the *Title II Order's* action faced skepticism at the time, and we find those concerns confirmed in practice. For example, the Wireless Telecommunications Bureau initiated inquiries into wireless ISPs' sponsored data and zero-rated offerings, leading to a report casting doubt on the legality of certain types of such offerings. That report was later retracted. And the Commission proceeded, in the wake of the reclassification in the *Title II Order,* to adopt complex and highly prescriptive privacy regulations for broadband internet access service, which ultimately were disapproved by Congress under the Congressional Review Act. The amorphous and potentially wide-ranging implications of the Title II-based regulatory framework have hindered (or will likely hinder) marketplace innovation, as the record here indicates and as one logically would expect. We thus reject the suggestion that the *Title II Order* yielded ''legal and economic certainty.'' That certain specific steps eventually were rolled back is no cure—rather, those initial actions provide cause for significant concerns that the regulatory framework adopted in the *Title II Order* would be anything but ''light-touch'' over time. Given the evidence that the Title II-based framework prompted additional regulatory action and was not living up to its ''light-touch'' label, we disagree with claims that ''[t]here has been no material change of circumstance since the adoption of the'' *Title II Order,* or that the shortcomings inherent in the Title II approach could be addressed adequately through minor adjustments to the rules adopted in the *Title II Order.*

140. Further, we are not persuaded that there were reasonable reliance interests in the *Title II Order* that preclude our revisiting the classification of broadband internet access service. Contrary to Twilio's assertion that bright-line rules are over a decade old, we note that the Commission did not establish any rules until 2010—just seven years ago—and did not establish enforceable bright-line rules until 2015—just two years ago. Assertions in the record regarding absolute levels of edge investment do not meaningfully attempt to attribute particular portions of that investment to any reliance on the *Title II Order.* Nor are we persuaded that such reliance would have been reasonable in any event, given the lengthy prior history of information service classification of broadband internet access service, which we are simply restoring here after the brief

period of departure initiated by the *Title II Order.*

141. ''[A]n agency literally has no power to act . . . unless and until Congress confers power upon it.'' And so our role is to achieve the outcomes Congress instructs, invoking the authorities that Congress has given us—not to assume that Congress *must* have given us authority to address any problems the Commission identifies. However, rather than looking to Congress to address its statutory authority after the 2010 *Comcast* decision, the Commission instead attempted increasingly-regulatory approaches under existing statutory provisions, culminating in the *Title II Order's* application of a legal regime that was ill-suited for broadband internet access service. Returning to the Commission's historically sound approach to interpreting and applying the Act to broadband internet access service corrects what we see as shortcomings in how the Commission, in the recent past, conceptualized its role in this context.

142. We also conclude that the Commission should have been cautioned against reclassifying broadband internet access service as a telecommunications service in 2015 because doing so involved ''laying claim to extravagant statutory power over the national economy while at the same time strenuously asserting that the authority claimed would render the statute 'unrecognizable to the Congress that designed' it.'' Such interpretations ''typically [are] greet[ed] . . . with a measure of skepticism'' by courts, and we believe they should be by the Commission, as well. We rely on these principles to inform what interpretation constitutes the best reading of the Act independent of any broader legal implications that potentially could result from such considerations. Thus, although the separate opinions in the denial of rehearing *en banc* in *USTelecom* debated the application of such principles here—including with respect to issues of agency deference and the permissibility of the Commission's prior classification—we need not and do not reach such broader issues. As relevant here, the DC Circuit in *Verizon* observed that ''regulation of broadband internet providers''—there, rules that required *per se* common carriage—''certainly involves decisions of great 'economic and political significance.' '' That seems at least as apt a description of the *Title II Order* decision classifying broadband internet access service as a common carrier telecommunications as one adopting rules compelling the service to be offered in a manner that is *per se* common carriage. In particular, the *Title II Order* recognized that classification of broadband internet access service as a telecommunications service would, absent forbearance, subject the service and its providers to a panoply of duties and requirements ill-suited to broadband internet access service. Thus, not only did reclassification involve what we see as a claim of extravagant statutory power, but the Commission found that much of the resulting power was not sensibly applied to broadband internet access service—a view we believe also would be held by Congress itself. Restoring the information service classification that applied for nearly two decades before the *Title II Order* does not require any claim by the Commission of extravagant statutory power over broadband internet access service and eliminates the anomaly that ill-fitting Title II regulation would apply by default to broadband internet access service. These considerations thus lend support to our decision to reclassify broadband internet access service as an information service.

E. Effects on Regulatory Structures Created by the Title II Order

143. In this section, we clarify the regulatory effects of today's reinstatement of broadband internet access service as a Title I ''information service'' on other regulatory frameworks affected or imposed by the *Title II Order,* including the effects on: (1) Internet traffic exchange arrangements; (2) the *Title II Order's* forbearance framework; (3) privacy; (4) wireline broadband infrastructure; (5) wireless broadband infrastructure; (6) universal service; (7) jurisdiction and preemption; and (8) disability access. We do not intend for today's classification to affect ISPs' obligations under the Communications Assistance for Law Enforcement Act, the Foreign Intelligence Surveillance Act, or the Electronic Communications Privacy Act. No commenter identifies any such effect of reclassification, nor does such a change appear to have justified the classification decision in the *Title II Order.* We also are not persuaded that our classification decision will itself have material negative consequences as it relates to safe harbor protections for ISPs under the Digital Millennium Copyright Act (DMCA). Our actions here return to the analysis in *Brand X* and other pre-2015 classification decisions and the associated successful regulatory framework, and we are not persuaded that the DMCA would apply materially differently now so as to render the regulatory framework for broadband internet access service less successful today.

1. Ending Title II Regulation of Internet Traffic Exchange

144. The *Title II Order* applied, for the first time, the requirements of Title II to internet traffic exchange ''by an edge provider . . . with the broadband provider's network.'' OTI's argument that internet traffic exchange was not classified as a Title II service is unpersuasive. The *Title II Order* did not subject internet traffic exchange to Title II obligations but, as OTI acknowledges, interpreted broadband internet access services *to include* internet traffic exchange between an ISP and an edge provider or its transit provider as ''a portion'' of the service, or alternatively as used ''for and in connection with'' that service. In doing so, the *Title II Order* applied certain Title II requirements to these internet traffic exchange arrangements. We make clear that as a result of our decision to restore the longstanding classification of broadband internet access service as an information service, internet traffic exchange arrangements are no longer subject to Title II and its attendant obligations. We thus return internet traffic exchange to the longstanding free market framework under which the internet grew and flourished for decades.

145. *Background.* As the *Title II Order* acknowledges, the market for internet traffic exchange between ISPs and edge providers or their intermediaries ''historically has functioned without significant Commission oversight.'' We disagree with assertions that withdrawing from regulation of interconnection agreements would represent a break with longstanding Commission precedent. The Commission made clear in the *Open Internet Order* that it did not intend the open internet rules ''to affect existing arrangements for network interconnections, including existing paid peering arrangements.'' For many years, both ISPs and edge providers largely paid third-party backbone service providers for transit, and backbone providers connected upstream until they reached Tier 1 backbone service providers which provided access to the full internet. In recent years, particularly with the rise of online video, edge providers increasingly used CDNs and direct interconnection with ISPs, rather than transit, to increase the quality of their service. At the same time, ISPs have increasingly built or acquired their own backbone services, allowing them to interconnect with

other networks without paying for third-party transit services.

146. Notwithstanding these developments, but in line with other aspects of the *Title II Order* seeking to extend the Commission's regulatory authority, the Commission seized on a handful of anecdotes to extend utility-style regulation to internet traffic exchange arrangements. The *Title II Order* applied eight different sections of Title II, including Sections 201, 202, and 208, to traffic exchange between ISPs and edge providers or their intermediaries. We reject the argument that this application of Title II, which includes potential Commission mandates ''to establish physical connections with other carriers, to establish through routes and charges applicable thereto and the divisions of such charges, and to establish and provide facilities and regulations for operating such through routes,'' was light-touch, measured regulation. Although the *Title II Order* did not apply the bright-line rules to internet traffic exchange, it stated that the Commission would be ''available to hear disputes regarding arrangements for the exchange of traffic with a broadband internet access provider raised under Sections 201 and 202 on a case-by-case basis.'' The Commission did not articulate specific criteria that it would apply when hearing such disputes.

147. *Deregulating Internet Traffic Exchange.* Today, we return to the pre-*Title II Order* status quo by classifying broadband internet access service as an information service and, in doing so, reverse that Order's extension of Title II authority to internet traffic exchange arrangements. As was the case before the *Title II Order,* we retain subject-matter jurisdiction over internet traffic exchange under Title I, to the extent such exchange arrangements are ''wire'' or ''radio communications.'' There is no dispute that ISPs, backbone transit providers, and large edge providers are sophisticated, well-capitalized businesses. Indeed, the *Title II Order* acknowledged as much, and refused to impose ''prescriptive rules'' or even ''draw policy conclusions concerning new paid internet traffic arrangements.'' Notwithstanding these acknowledgments, the *Title II Order* cast a shadow on new arrangements in this sector by applying a range of common carrier requirements to internet traffic exchange.

148. We believe that applying Title II to internet traffic exchange arrangements was unnecessary and is likely to unduly inhibit competition and innovation. As the court in *USTelecom* observed, the *Title II Order*'s oversight of interconnection was premised on the concern that ISPs could evade the restrictions imposed via regulation of the ''last mile'' through actions taken in connection with internet interconnection arrangements. Here, however, we conclude that Title II regulation and conduct rules are not warranted even as to the ''last mile.'' The *Title II Order* itself recognized that the need for intervention in matters of internet interconnection was less certain than its conclusions regarding ISP actions in the ''last mile.'' Against that backdrop, along with our finding that Commission regulation of ISP conduct in the ''last mile'' is unwarranted, we see no grounds for finding that Title II regulation of internet traffic exchange is necessary here. And absent Title II as a hook for regulation of internet traffic exchange, we can identify no other source of statutory authority to impose market-wide prophylactic regulation on these arrangements. To the extent we have previously proposed conditions on internet traffic exchange activities in the context of specific mergers, those conditions were based on the circumstances of specific entities in specific transactions and were agreed to by those entities to facilitate a proposed merger. Those conditions were not, however, predicated on any statutory provision giving the Commission general authority to engage in prophylactic regulation of all interconnection arrangements.

149. Instead, we find that freeing internet traffic exchange arrangements from burdensome government regulation, and allowing market forces to discipline this emerging and competitive market is the better course. It is telling that, in the absence of Title II regulation, the cost of internet transit fell over 99 percent on a cost-per-megabit basis from 2005 to 2015. We do not rely on transit pricing alone, but consider it in combination with the other factors discussed in this section, and thus reject as inapposite claims that transit pricing alone is an inadequate way of evaluating internet traffic exchange. Further, we find that even those commenters that insist that ISPs wield undue power in the interconnection market have offered no evidence that ISPs generally charge supra-competitive prices for internet traffic exchange arrangements. Moreover, we reject the proposition that prior examples of settlement-free peering necessarily mean that a transit price above zero is inherently anti- or supra-competitive. While the move to paid peering may affect the bottom line of Tier 1 transit providers, those effects cannot justify *ex ante* regulation unless they are anti-competitive and harm end users. The record is devoid of evidence of consumer harm in this regard since the resolution of the Netflix congestion issues in 2014. Indeed, the new case-by-case dispute process has gone unused, even as OVDs—which ISPs presumably might view as competitors to affiliated video programming products or services—have proliferated. Moreover, contrary to these unsubstantiated claims of harm, we find that there are substantial pro-competitive and pro-consumer benefits to alternative internet traffic exchange arrangements. Because we conclude that this is the wiser course, we reject comments asserting that a dispute resolution process is needed.

150. We welcome the growth of alternative internet traffic exchange arrangements, including direct interconnection, CDNs, and other innovative efforts. All parties appear to agree that direct interconnection has benefited consumers by reducing congestion, increasing speeds, and housing content closer to consumers, and allowed ISPs to better manage their networks. CDNs play a similar role. We believe that market dynamics, not Title II regulation, allowed these diverse arrangements to thrive. Our decision to reclassify broadband internet access service as an information service, and to remove Title II utility-style regulation from internet traffic exchange, will spur further investment and innovation in this market. Returning to the pre-*Title II Order* light-touch framework will also eliminate the asymmetrical regulatory treatment of parties to internet traffic exchange arrangements. As NTCA explains, the *Title II Order* imposed a one-sided interconnection duty upon last-mile ISPs—even though, especially in rural areas, ''many ISPs are a tiny fraction of the size of upstream middle mile and transit networks or content and edge providers.'' The record reflects that the asymmetric regulation imposed under the *Title II Order* unjustifiably provided edge providers, many of whom are sophisticated entities with significant market power due to high demand for their content, with additional leverage in negotiating interconnection. We anticipate that eliminating one-sided regulation of internet traffic exchange and restoring regulatory parity among sophisticated commercial entities will allow the parties to more efficiently negotiate mutually-acceptable arrangements to meet end user demands for network usage.

151. We find that present competitive pressures in the market for internet

traffic exchange mitigate the risk that an ISP might block or degrade edge provider traffic through arrangements for internet traffic exchange sufficiently to undermine the need for regulatory oversight through Title II regulation. We thus disagree with generalized assertions by some commenters to the contrary. In drawing this conclusion, we recognize that the Commission previously imposed internet interconnection conditions in the *AT&T/DirecTV Order* and *Charter/TWC Order* to address claimed risks that the merged entity could use internet interconnection to disadvantage rivals, particularly competing providers of over-the-top video services. We decline to draw judgments about the nature of the market as a whole from individual determinations made in the context of particular merger orders. As an initial matter, the Commission made these determinations pursuant to its authority to impose conditions on transfers of licenses or authorizations. As noted above, the Commission has identified no broader general authority to impose these conditions on the interconnection market as a whole. In addition, those orders were based on an analysis of specific issues raised in those adjudications and application of a public-interest statutory standard that differs from the competition-based standard applied by the Department of Justice's Antitrust Division during merger review. Further, those orders were based on a narrowly-focused analysis of specific issues raised in those adjudications. As we explain above, based on the record here, we decline to repeat that finding of high switching costs. Finally, because those orders were adopted without the benefit of notice-and-comment rulemaking, we decline to make general inferences from conditions contained in such documents, when the voluminous record submitted in this proceeding persuades us that the interconnection market is competitive. We thus are unpersuaded that the actions taken in the *AT&T/DirecTV Order* and *Charter/TWC Order* should guide our decisions here. Interconnection concerns generally focus on the possibility that an ISP could block or allow congestion on paths used to deliver traffic to that ISP as a way of harming rivals or extracting unreasonable payments associated with that interconnection. Edge providers have a variety of options in deciding how to deliver their content to ISPs, including a large number of transit providers, CDNs, and direct interconnection. Edge providers also can shift the path for their traffic in response to congestion in real time. To address the possibility that edge providers could simply shift their traffic away from a blocked or congested path, it appears in most cases that the ISP would need to engage in blocking or allow congestion on essentially all paths to its network, affecting all traffic to and from the ISP's customers. To the extent that some theorize that an ISP might harm rivals with particularly high volumes of internet traffic through actions taken with respect to a smaller number of interconnection paths, we are not persuaded that such large providers of internet traffic would lack sufficient leverage to achieve a reasonable marketplace resolution, particularly given the increased likelihood that such a large source of internet traffic would be highly valued by end-users with which it could communicate directly regarding any interconnection dispute. In addition, although certain forms of traffic might be particularly sensitive to the quality of interconnection such that some alternative interconnection paths would be inferior, it is likely that blocking or allowing degradation of a substantial number of paths to the ISP still would be necessary for such conduct to effectively impact such traffic given that the concerns in the record center on large ISPs, that are more likely than small ISPs to have multiple viable interconnection paths. Further, that is but one of many considerations that would affect the relative incentives and marketplace leverage of the relevant ISP and interconnecting network and/or edge provider. The practical viability of such a strategy thus depends in general on an ISP's willingness to undermine the performance of all or virtually all internet traffic to and from its customers. An ISP's incentive to take such a step would involve a complex marketplace evaluation requiring it to account for the associated risk of customer dissatisfaction. Although this consideration alone does not necessarily guarantee that no ISP ever would engage in such conduct, we reject interconnection-related concerns that fail to meaningfully grapple with this factor. Further, this factor must be considered in conjunction with the overlay of legal protections, such as antitrust and consumer protection laws discussed below. We find that these marketplace dynamics are likely to impede, if not preclude, any effort by an ISP to harm a specific edge provider's traffic.

152. Insofar as certain commenters contend that incidents such as Cogent's experience delivering Netflix traffic in 2014 suggest otherwise, we note that the origin of the Cogent-Netflix congestion is disputed and that Cogent admitted to de-prioritizing certain types of traffic for the congestion. In any event, there is ample evidence that major edge providers, including Netflix, YouTube, and other large OVDs, are some of the ''most-loved'' brands in the world. Their reputations and the importance of reputation to their business and brand gives them significant incentive to inform consumers and work to shape consumer perceptions in the event of any dispute with ISPs. This incentive mitigates potential concerns that consumers lack the knowledge and ability to hold their ISPs accountable for interconnection disputes. Further, as NCTA explains, ''the edge providers that send enough traffic to impact interconnection—*e.g.,* Netflix, Google/YouTube, Facebook, and Amazon—are entities critical for a broadband provider to meet its customers' needs.'' As another commenter explains, edge providers, including OVDs, are complementary to ISPs' broadband business, and reducing the value of these complementary products would harm ISPs by reducing demand for their services. For all of these reasons, we find that market dynamics are likely to mitigate the risk that ISPs will block, degrade, or deprioritize specific edge providers' traffic.

153. In addition, if an ISP attempts to block or degrade traffic in a manner that is anti-competitive, such conduct may give rise to actions by federal or state agencies under antitrust or consumer protection laws. Some commenters have called for continued *ex post* regulation of internet traffic exchange between ISPs and transit or edge providers, potentially under Title I, or disclosure requirements. For the reasons discussed here, we reject these arguments. As to antitrust laws, antitrust authorities are empowered to police anti-competitive conduct by ISPs (conduct that would be particularly salient in cases where ISP competition was limited or nonexistent). We reject the argument that the Commission's decision in the *Charter-Time Warner Cable Merger Order* compels us to apply Title II regulation to interconnection for the reasons discussed herein, *infra* Part VI.A. In addition, the backstop of generally-applicable consumer protection laws continues to protect consumers and edge providers. These laws, particularly antitrust laws which prevent certain refusals to deal, will also protect small, rural ISPs which may face difficulties interconnecting with edge providers, transit providers, and larger

ISPs. Accordingly, assertions that public-utility regulation of internet traffic exchange arrangements is necessary to allow consumers to reach content of their choice are unpersuasive.

154. Even assuming that economic incentives and antitrust and consumer protection remedies may not prevent or redress all potential harms in the interconnection market, we find the regulatory approach adopted in the *Title II Order* fatally overbroad as it relates to the interconnection concerns identified in the record here. The *Title II Order*'s legal basis for oversight of interconnection depended on the definition of broadband internet access service to include traffic exchange and the classification of that entire service as a telecommunications service subject to Title II—a classification that applied to all ISPs, regardless of size or other characteristics. Here, however, we have already rejected the *Title II Order*'s rationales for Title II regulation and explained the harms that flow from that regime. The record reveals that retaining the *Title II Order* approach to interconnection would be overbroad in other ways, as well. The classification decision in that *Order* applied to all ISPs regardless of size, while the concerns about ISPs in the record here center on a few of the largest ISPs. The *Title II Order* classification also applied irrespective of the specific traffic being carried, while some advocates of interconnection oversight here express particular concerns about certain subsets of traffic, like video traffic. Particularly given the marketplace complexities associated with whether a given ISP would, in fact, engage in harmful conduct, we are not persuaded that the inchoate interconnection concerns identified in the record here would justify retaining the *Title II Order*'s approach to interconnection with its sweeping, preemptive—and harmful—resulting consequences.

2. Forbearance

155. As we have reinstated the information service classification of broadband internet access service, the forbearance granted in the *Title II Order* is now moot. We return to the pre-*Title II Order* status quo and allow providers voluntarily electing to offer broadband transmission on a common carrier basis to do so under the frameworks established in the *Wireline Broadband Classification Order* and the *Wireless Broadband Internet Access Order.* We also clarify that carriers are no longer permitted to use the *Title II Order* forbearance framework (*i.e.,* no carrier will be permitted to maintain, or newly elect, the *Title II Order* forbearance framework).

156. Prior to the *Title II Order,* some facilities-based wireline carriers chose to offer broadband transmission services on a common carrier basis subject to the full range of Title II requirements. In the 2005 *Wireline Broadband Classification Order,* the Commission ruled that broadband internet access was an information service, but at the same time permitted facilities-based wireline carriers to voluntarily elect to offer the transmission component of broadband internet access service (often referred to as digital subscriber line or DSL) on a common carrier basis. Operators choosing to offer broadband transmission on a common carriage basis could do so under tariff or could use non-tariff arrangements. The Commission permitted facilities-based carriers to choose whether to offer wireline broadband internet access transmission as non-common carriage or common carriage to ''enable facilities-based wireline internet access providers to maximize their ability to deploy broadband internet access services and facilities in competition with other platform providers, under a regulatory framework that provides all market participants with the flexibility to determine how best to structure their business operations.'' Generally, ISPs that chose to elect common carrier status were smaller carriers that served ''rural, sparsely-populated areas'' and obtained significant benefits from the provision of broadband transmission services on a common carriage basis, including the ability to participate in common tariff arrangements via the NECA pools and the availability of high-cost universal service support.

157. We agree with NTCA and NECA that the broadband transmission services currently offered by rural LECs under tariff differ substantially from the broadband internet access services at issue in this proceeding, and as such are not impacted by our decision to reclassify broadband internet access service as an information service. The term ''wireline broadband internet access service'' refers to ''a mass-market retail service by wire that provides the capability to transmit data to and receive data from all or substantially all internet endpoints, including any capabilities that are incidental to and enable the operation of the communications service, but excluding dial-up internet access service.'' Broadband transmission services do not provide end users with direct connectivity to the internet backbone or content, but instead enable data traffic generated by end users to be transported to an ISP's Access Service Connection Point over rural LEC local exchange service facilities for subsequent interconnection with the internet backbone.

158. Carriers offering broadband transmission service have never been subject to the *Title II Order* forbearance framework. The *Title II Order* forbearance framework with respect to broadband internet access service did not encompass broadband transmission services and permitted carriers to voluntarily elect to offer transmission services on a common carriage basis pursuant to the *Wireline Broadband Classification Order.* The *Title II Order* made clear that broadband transmission services would continue to be subject to the full panoply of Title II obligations (*e.g.,* USF contributions), including those from which the Commission forbore from in the *Title II Order.* Thus, only carriers that elected to cease offering broadband transmission services and instead offer broadband internet access services (including a transmission service component) were subject to the *Title II Order* forbearance framework (*e.g.,* forbearance from USF contributions applied to such carriers). Over one hundred providers opted-into the *Title II Order* forbearance framework and in their letters to the Commission, they noted that the transmission component would only be provided as part of the complete broadband internet access service.

159. Today, we return to the pre-*Title II Order* status quo and allow carriers to elect to offer broadband transmission services on a common carrier basis, either pursuant to tariff or on a non-tariffed basis. We find the reasoning in the *Wireline Broadband Classification Order* for offering these options persuasive. Irrespective of the regulatory classification of broadband internet access services, the Commission has continuously permitted facilities-based wireline carriers to provide broadband internet transmission services on a Title II common carriage basis, with substantial flexibility in deciding how such services may be offered (*i.e.,* on a tariffed or non-tariffed basis). Providing these options offers small carriers much-needed regulatory certainty as they have sought to deploy and maintain broadband internet access services to their customers. We reiterate that broadband transmission services are not impacted by our decision to reclassify broadband internet access service as an information service.

160. We clarify that carriers that choose to offer transmission service on a common carriage basis are, as under the *Wireline Broadband Classification*

Order, subject to the full set of Title II obligations, to the extent they applied before the *Title II Order.* Similarly, a wireless broadband internet access provider may choose to offer the transmission component as a telecommunications service and the transmission component of wireless broadband internet access service as a telecommunications service only if the entity that provides the transmission voluntarily undertakes to provide it indifferently on a common carrier basis. Such an offering is a common carrier service subject to Title II. In addition, a wireless broadband internet access provider that chooses to offer the telecommunications transmission component as a telecommunications service may also be subject to the ''commercial mobile service'' provisions of the Act. Further, we clarify that those carriers that had previously been offering a broadband transmission service (subject to the full panoply of Title II regulations) and that elected to instead offer broadband internet access service after the *Title II Order* now will be deemed to be offering an information service. The Commission has never allowed carriers offering broadband transmission services on a common carrier basis to opt in to the *Title II Order* forbearance framework for those transmission services. Carriers that prefer light-touch regulation may elect to offer broadband internet access service as an information service. Although WTA argues that allowing rural LECs to opt into the forbearance framework will ''enable a much more level competitive playing field in the retail marketplace,'' no other carriers are subject to that framework, and we find that allowing carriers to opt into the forbearance framework will result in a regulatory disparity. We therefore reject WTA's argument that the Commission should continue to permit opting into the *Title II Order* forbearance. To the extent that other related issues are raised in the record, we find that those issues are better addressed in the appropriate proceeding.

161. We also reject AT&T's assertion that the Commission should conditionally forbear from all Title II regulations as a preventive measure to address the contingency that a future Commission might seek to reinstate the *Title II Order.* Although AT&T explains that ''conditional forbearance would provide an extra level of insurance against the contingency that a future, politically motivated Commission might try to reinstate a 'common carrier' classification,'' we see no need to address the complicated question of prophylactic forbearance and find such extraordinary measures unnecessary.

3. Returning Broadband Privacy Authority to the FTC

162. By reinstating the information service classification of broadband internet access service, we return jurisdiction to regulate broadband privacy and data security to the Federal Trade Commission (FTC), the nation's premier consumer protection agency and the agency primarily responsible for these matters in the past. Restoring FTC jurisdiction over ISPs will enable the FTC to apply its extensive privacy and data security expertise to provide the uniform online privacy protections that consumers expect and deserve.

163. Historically, the FTC protected the privacy of broadband consumers, policing every online company's privacy practices consistently and initiating numerous enforcement actions. In fact, the FTC has ''brought over 500 enforcement actions protecting the privacy and security of consumer information, including actions against ISPs and against some of the biggest companies in the internet ecosystem.'' When the Commission reclassified broadband internet access service as a common carriage telecommunications service in 2015, however, that action stripped FTC authority over ISPs because the FTC is prohibited from regulating common carriers. The effect of this decision was to shift responsibility for regulating broadband privacy to the Commission. And in lieu of an even playing field, the Commission adopted sector-specific rules that deviated from the FTC's longstanding framework. In March 2017, Congress voted under the Congressional Review Act (CRA) to disapprove the Commission's 2016 *Privacy Order,* which prevents us from adopting rules in substantially the same form.

164. Undoing Title II reclassification restores jurisdiction to the agency with the most experience and expertise in privacy and data security, better reflects congressional intent, and creates a level playing field when it comes to internet privacy. Restoring FTC authority to regulate broadband privacy and data security also fills the consumer protection gap created by the *Title II Order* when it stripped the FTC of jurisdiction over ISPs. Consumers expect information to be ''treated consistently across the internet ecosystem and that their personal information will be subject to the same framework, in all contexts.'' Under the FTC's technology neutral approach to privacy regulation, consumers will have the consistent level of protection across the internet ecosystem that they expect. With over 100 years of experience, only the FTC can apply consumer protection rules consistently across industries. As NTCA contends, the FTC has not only the legal jurisdiction, but also the subject matter expertise. In 2007, the FTC issued a 167-page report that delved into both the technical and legal bases of the internet and how the law approaches it. Moreover, the FTC has been involved in numerous initiatives that address consumer protection in the broadband marketplace. The FTC's ''flexible, enforcement-focused approach has enabled the agency to apply strong consumer privacy and security protections across a wide range of changing technologies and business models, without imposing unnecessary or undue burdens on industry.'' Moreover, the flexibility of the FTC's enforcement framework ''allows room for new business models that could support expensive, next-generation networks with revenue other than consumers' monthly bills.'' The FTC has already ''delivered the message to entities in a range of fields—retailers, app developers, data brokers, health companies, financial institutions, third-party service providers, and others—that they need to provide consumers with strong privacy and data security protections.'' The same approach should apply to ISPs. We also observe that ISPs are not uniquely positioned with respect to their insight into customers' private browsing behavior. As the FTC found in 2012, ''ISPs are just one type of large platform provider that may have access to all or nearly all of a consumer's online activity. Like ISPs, operating systems and browsers may be in a position to track all, or virtually all, of a consumer's online activity to create highly detailed profiles.'' And only the FTC operates on a national level across industries, which is especially important when regulating providers that operate across state lines. In light of the FTC's decades of successful experience, including its oversight of ISP privacy practices prior to 2015, we find arguments that we should decline to reclassify to retain sector-specific control of ISP privacy practices unpersuasive. The FTC has previously brought enforcement actions against ISPs regarding internet access and related issues. The FTC has also ''brought enforcement actions in matters involving access to content via broadband and other internet access services,'' such as the FTC's challenge to the proposed AOL and Time Warner merger, in part, over concern for potential harm to consumers' broadband

internet access. We also note that while it may be true that the Commission itself has longstanding privacy experience with respect to traditional telephone service providers, we disagree that this history uniquely qualifies the Commission to regulate the privacy practices of ISPs or other online providers, when prior to 2015, the Commission did not, and indeed lacked the authority to, regulate such providers. We do not believe that experience with traditional telephone service providers necessarily translates to experience or expertise with respect to all communications providers. Some commenters object that the FTC is not suited to protect privacy on the internet, citing the FTC's narrower authority and fewer resources than the Commission and the absence of specific statutory directive from Congress to the FTC to regulate privacy. As discussed above, these criticisms are unfounded. Furthermore, the uncertainty related to the Commission's current authority over broadband privacy regulation created by the CRA resolution of disapproval also weighs in favor of returning jurisdiction to the FTC.

165. We also reject arguments that rely on the Ninth Circuit panel decision holding that the common carrier exemption precludes FTC oversight of non-common carriage activities of common carriers. As the FCC's amicus letter explained in that case, the panel decision erred by overlooking the textual relationship between the statutes governing the FTC's and FCC's jurisdiction. We note that commenter concerns focus not just on the FTC's privacy authority but its authority more generally. We reject those arguments for the reasons stated above. Consistent with the Commission's request, the Ninth Circuit granted rehearing *en banc* of the panel decision, and in doing so it set aside the earlier panel opinion. This *en banc* order means that the *Title II Order*'s reclassification of broadband internet access service serves as the only current limit on the authority of the FTC to oversee the conduct of internet service providers. We note that at any given time there always may be some litigation pending somewhere in the country challenging the scope or validity of various laws—whether the Communications Act, FTC Act, or state consumer protection laws—that the FCC might seek to rely on directly (in the case of the Act) or indirectly (where relying in part on the availability of protections provided by other laws). The Commission would be paralyzed if it had to wait for all such litigation to be resolved before it acted. Because the panel decision has been set aside in *FTC* v. *AT&T Mobility,* we do not view that case as materially different than any other such pending litigation—so we likewise do not view it as necessary to wait on the resolution of that case before acting here. In light of these considerations and the benefits of reclassification, we find objections based on *FTC* v. *AT&T Mobility* insufficient to warrant a different outcome.

4. Wireline Infrastructure

166. To the extent today's classification decision impacts the deployment of wireline infrastructure, we will address that topic in detail in proceedings specific to those issues. The importance of facilitating broadband infrastructure deployment indicates that our authority to address barriers to infrastructure deployment warrants careful review in the appropriate proceedings. We disagree with commenters who assert that Title II classification is necessary to maintain our authority to promote infrastructure investment and broadband deployment. Because the same networks are often used to provide broadband and either telecommunications or cable service, we will take further action as is necessary to promote broadband deployment and infrastructure investment. Further, Title I classification of broadband internet access services is consistent with the Commission's broadband deployment objectives, whereas the Title II regulatory environment undermines the very private investment and buildout of broadband networks the Commission seeks to encourage. Additionally, in the twenty states and the District of Columbia that have reverse-preempted Commission jurisdiction over pole attachments, those states rather than the Commission are empowered to regulate the pole attachment process.

167. We are resolute that today's decision not be misinterpreted or used as an excuse to create barriers to infrastructure investment and broadband deployment. For example, we caution pole owners not to use this *Order* as a pretext to increase pole attachment rates or to inhibit broadband providers from attaching equipment—and we remind pole owners of their continuing obligation to offer ''rates, terms, and conditions [that] are just and reasonable.'' We will not hesitate to take action where we identify barriers to broadband infrastructure deployment. We have been working diligently to remove barriers to broadband deployment and fully intend to continue to do so.

5. Wireless Infrastructure

168. When the Commission first classified wireless broadband internet access as an information service in 2007, it emphasized that certain statutory provisions in Section 224 (regarding pole attachments) and 332(c)(7) (local authority over zoning) of the Act would continue to apply where the same infrastructure was used to provide a covered service (*e.g.,* cable or telecommunications service) as well as wireless broadband internet access. Section 224 gives cable television systems and providers of telecommunications services the right to attach to utility poles of power and telephone companies at regulated rates. Section 332(c)(7) generally preserves state and local authority over ''personal wireless service facilities'' siting or modification, but subjects that authority to certain limitations. Among other limitations, it provides that state or local government regulation (1) ''shall not unreasonably discriminate among providers of functionally equivalent services,'' (2) ''shall not prohibit or have the effect of prohibiting the provision of personal wireless services'' and (3) may not regulate the siting of personal wireless service facilities ''on the basis of the environmental effects of [RF] emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions.''

169. As to Section 224, the Commission clarified in the *Wireless Broadband Internet Access Order* that where the same infrastructure would provide ''both telecommunications and wireless broadband internet access service,'' the provisions of Section 224 governing pole attachments would continue to apply to such infrastructure used to provide both types of service. The Commission similarly clarified that Section 332(c)(7)(B) would continue to apply to wireless broadband internet access service where a wireless service provider uses the same infrastructure to provide its ''personal wireless services'' and wireless broadband internet access service.

170. We reaffirm the Commission's interpretations regarding the application of Sections 224 and 332(c)(7) to wireless broadband internet access service here. The Commission's rationale from 2007, that commingling services does not change the fact that the facilities are being used for the provisioning of services within the scope of the statutory provision, remains equally valid today. This clarification will alleviate concerns that wireless broadband internet access providers not face increased barriers to infrastructure

deployment as a result of today's reclassification. This clarification also is consistent with our commitment to promote broadband deployment and close the digital divide.

171. Although the wireless infrastructure industry has changed significantly since the adoption of the *Wireless Broadband Internet Access Order,* it remains the case that cell towers and other forms of network equipment can be used ''for the provision'' of both personal wireless services and wireless broadband internet access on a commingled basis. These communications facilities are sometimes built by providers themselves, but are increasingly being deployed by third-parties who then offer the use of these facilities to wireless service providers for a variety of services, including telecommunications services and information services. To remove any uncertainty, we clarify that Section 332(c)(7) applies to facilities, including DAS or small cells, deployed and offered by third-parties for the purpose of provisioning communications services that include personal wireless services. Consistent with the statutory provisions and Commission precedent, we consider infrastructure that will be deployed for the provision of personal wireless services, including third-party facilities such as neutral-host deployments, to be ''facilities for the provision of personal wireless services'' and therefore subject to Section 332(c)(7) as ''personal wireless service facilities'' even where such facilities also may be used for broadband internet access services.

172. We reiterate our commitment to expand broadband access, encourage innovation and close the digital divide. We will closely monitor developments on broadband infrastructure deployment and move quickly to address barriers in a future proceeding if necessary.

6. Universal Service

173. The reclassification of consumer and small business broadband access as an information service does not affect or alter the Commission's existing programs to support the deployment and maintenance of broadband-capable networks, *i.e.,* the Connect America Fund's high-cost universal service support mechanisms. As explained in the *USF/ICC Transformation Order,* the Commission has authority to ensure that ''the national policy of promoting broadband deployment and ubiquitous access to voice telephony services is fully realized'' and require that ''carriers receiving support . . . offer broadband capabilities to customers.'' What services a particular customer subscribes to is irrelevant as long as high-cost support is used to build and maintain a network that provides both voice and broadband internet access service. Thus, the classification of broadband internet access as an information service does not change the eligibility of providers of those services to receive federal high-cost universal service support.

174. *Lifeline.* We conclude that we need not address concerns in the record about the effect of our reclassification of broadband internet access service as an information service on the Lifeline program at this time. In November 2017, we adopted an NPRM in the Lifeline proceeding (*Lifeline NPRM*) (83 FR 2075) in which we proposed limiting Lifeline support to facilities-based broadband service provided to a qualifying low-income consumer over the eligible telecommunication carrier's (ETC's) voice- and broadband-capable last-mile network, and sought comment on discontinuing Lifeline support for service provided over non-facilities-based networks, to advance our policy of focusing Lifeline support to encourage investment in voice- and broadband-capable networks. As explained in the *Lifeline NPRM,* we ''believe the Commission has authority under Section 254(e) of the Act to provide Lifeline support to ETCs that provide broadband service over facilities-based broadband-capable networks that support voice service'' and that ''[t]his legal authority does not depend on the regulatory classification of broadband internet access service and, thus, ensures the Lifeline program has a role in closing the digital divide regardless of the regulatory classification of broadband service.'' We thus find that today's reinstatement of the information service classification for broadband internet access service does not require us to address here our legal authority to continue supporting broadband internet access service in the Lifeline program, as such concerns are more appropriately addressed in the ongoing Lifeline proceeding.

7. Preemption of Inconsistent State and Local Regulations

175. We conclude that regulation of broadband internet access service should be governed principally by a uniform set of federal regulations, rather than by a patchwork that includes separate state and local requirements. Our order today establishes a calibrated federal regulatory regime based on the pro-competitive, deregulatory goals of the 1996 Act. Allowing state and local governments to adopt their own separate requirements, which could impose far greater burdens than the federal regulatory regime, could significantly disrupt the balance we strike here. Federal courts have uniformly held that an affirmative federal policy of *de*regulation is entitled to the same preemptive effect as a federal policy of regulation. In addition, allowing state or local regulation of broadband internet access service could impair the provision of such service by requiring each ISP to comply with a patchwork of separate and potentially conflicting requirements across all of the different jurisdictions in which it operates. Just as the *Title II Order* promised to ''exercise our preemption authority to preclude states from imposing regulations on broadband service that are inconsistent'' with the federal regulatory scheme, we conclude that we should exercise our authority to preempt any state or local requirements that are inconsistent with the federal deregulatory approach we adopt today.

176. We therefore preempt any state or local measures that would effectively impose rules or requirements that we have repealed or decided to refrain from imposing in this order or that would impose more stringent requirements for any aspect of broadband service that we address in this order. This includes any state laws that would require the disclosure of broadband internet access service performance information, commercial terms, or network management practices in any way inconsistent with the transparency rule we adopt herein. Our transparency rule is carefully calibrated to reflect the information that consumers, entrepreneurs, small businesses, and the Commission needs to ensure a functioning market for broadband internet access services and to ensure the Commission has sufficient information to identify market-entry barriers—all without unduly burdening ISPs with disclosure requirements that would raise the cost of service or otherwise deter innovation within the network. Among other things, we thereby preempt any so-called ''economic'' or ''public utility-type'' regulations, including common-carriage requirements akin to those found in Title II of the Act and its implementing rules, as well as other rules or requirements that we repeal or refrain from imposing today because they could pose an obstacle to or place an undue burden on the provision of broadband internet access service and conflict with the deregulatory approach we adopt today. The terms ''economic regulation'' and ''public utility-type regulation,'' as used here, are terms of art that the

Commission has used to include, among other things, requirements that all rates and practices be just and reasonable; prohibitions on unjust or unreasonable discrimination; tariffing requirements; accounting requirements; entry and exit restrictions; interconnection obligations; and unbundling or network-access requirements. We are not persuaded that preemption is contrary to Section 706(a) of the 1996 Act, 47 U.S.C. 1302(a), insofar as that provision directs state commissions (as well as this Commission) to promote the deployment of advanced telecommunications capability. For one thing, as discussed *infra,* we conclude that Section 706 does not constitute an affirmative grant of regulatory authority, but instead simply provides guidance to this Commission and the state commissions on how to use any authority conferred by other provisions of federal and state law. For another, nothing in this order forecloses state regulatory commissions from promoting the goals set forth in Section 706(a) through measures that we do not preempt here, such as by promoting access to rights-of-way under state law, encouraging broadband investment and deployment through state tax policy, and administering other generally applicable state laws. Finally, insofar as we conclude that Section 706's goals of encouraging broadband deployment and removing barriers to infrastructure investment are best served by preempting state regulation, we find that Section 706 *supports* (rather than prohibits) the use of preemption here.

177. Although we preempt state and local laws that interfere with the federal deregulatory policy restored in this order, we do not disturb or displace the states' traditional role in generally policing such matters as fraud, taxation, and general commercial dealings, so long as the administration of such general state laws does not interfere with federal regulatory objectives. We thus conclude that our preemption determination is not contrary to Section 414 of the Act, which states that ''[n]othing in [the Act] shall in any way abridge or alter the remedies now existing at common law or by statute.'' Under this order, states retain their traditional role in policing and remedying violations of a wide variety of general state laws. The record does not reveal how our preemption here would deprive states of their ability to enforce any remedies that fall within the purview of Section 414. In any case, a general savings clause like Section 414 ''do[es] not preclude preemption where allowing state remedies would lead to a conflict with or frustration of statutory purposes.'' Indeed, the continued applicability of these general state laws is one of the considerations that persuade us that ISP conduct regulation is unnecessary here. Nor do we deprive the states of any functions expressly reserved to them under the Act, such as responsibility for designating eligible telecommunications carriers under Section 214(e); exclusive jurisdiction over poles, ducts, conduits, and rights-of-way when a state certifies that it has adopted effective rules and regulations over those matters under Section 224(c); or authority to adopt state universal service policies not inconsistent with the Commission's rules under Section 254. We find no basis in the record to conclude that our preemption determination would interfere with states' authority to address rights-of-way safety issues. We note that we continue to preempt any state from imposing any new state universal service fund contributions on broadband internet access service. We appreciate the many important functions served by our state and local partners, and we fully expect that the states will ''continue to play their vital role in protecting consumers from fraud, enforcing fair business practices, for example, in advertising and billing, and generally responding to consumer inquiries and complaints'' within the framework of this order.

178. *Legal Authority.* We conclude that the Commission has legal authority to preempt inconsistent state and local regulation of broadband internet access service on several distinct grounds.

179. First, the U.S. Supreme Court and other courts have recognized that, under what is known as the impossibility exception to state jurisdiction, the FCC may preempt state law when (1) it is impossible or impracticable to regulate the intrastate aspects of a service without affecting interstate communications and (2) the Commission determines that such regulation would interfere with federal regulatory objectives. Here, both conditions are satisfied. Indeed, because state and local regulation of the aspects of broadband internet access service that we identify would interfere with the balanced federal regulatory scheme we adopt today, they are plainly preempted.

180. As a preliminary matter, it is well-settled that internet access is a jurisdictionally interstate service because ''a substantial portion of internet traffic involves accessing interstate or foreign websites.'' Thus, when the Commission first classified a form of broadband internet access service in the *Cable Modem Order,* it recognized that cable internet service is an ''interstate information service.'' Five years later, the Commission reaffirmed the jurisdictionally interstate nature of broadband internet access service in the *Wireless Broadband Internet Access Order.* And even when the *Title II Order* reclassified broadband internet access service as a telecommunications service, the Commission continued to recognize that ''broadband internet access service is jurisdictionally interstate for regulatory purposes.'' The record continues to show that broadband internet access service is predominantly interstate because a substantial amount of internet traffic begins and ends across state lines.

181. Because both interstate and intrastate communications can travel over the same internet connection (and indeed may do so in response to a single query from a consumer), it is impossible or impracticable for ISPs to distinguish between intrastate and interstate communications over the internet or to apply different rules in each circumstance. Accordingly, an ISP generally could not comply with state or local rules for intrastate communications without applying the same rules to interstate communications. We therefore reject the view that the impossibility exception to state jurisdiction does not apply because some aspects of broadband internet access service could theoretically be regulated differently in different states. Even if it were possible for New York to regulate aspects of broadband service differently from New Jersey, for example, it would not be possible for New York to regulate the use of a broadband internet connection for *intrastate communications* without also affecting the use of that same connection for *interstate communications.* The relevant question under the impossibility exception is not whether it would be possible to have separate rules in separate states, but instead whether it would be feasible to allow separate state rules for intrastate communications while maintaining uniform federal rules for interstate communications. Thus, because any effort by states to regulate intrastate traffic would interfere with the Commission's treatment of interstate traffic, the first condition for conflict preemption is satisfied. OTI insists that broadband service ''can easily be separated into interstate and intrastate'' communications based on ''the location of the ISP.'' In OTI's view, if ''the closest ISP headend, tower, or other facility to the customer'' is in the same state as the customer, then the customer's internet

communications are all intrastate. This view misapprehends the end-to-end analysis employed by the Communications Act to distinguish interstate and intrastate communications, which looks to where a communication ultimately originates and terminates—such as the server which hosts the content the consumer is requesting—rather than to intermediate steps along the way (such as the location of the ISP). Indeed, OTI's view that a communication is intrastate whenever the ''last mile'' facilities between the customer and the communications carrier are within the same state would improperly deem virtually all communications to be intrastate, including interstate telephone calls, contrary to long-settled precedent.

182. The second condition for the impossibility exception to state jurisdiction is also satisfied. For the reasons explained above, we find that state and local regulation of the aspects of broadband internet access service that we identify would interfere with the balanced federal regulatory scheme we adopt today.

183. Second, the Commission has independent authority to displace state and local regulations in accordance with the longstanding federal policy of nonregulation for information services. For more than a decade prior to the 1996 Act, the Commission consistently preempted state regulation of information services (which were then known as ''enhanced services''). When Congress adopted the Commission's regulatory framework and its deregulatory approach to information services in the 1996 Act, it thus embraced our longstanding policy of preempting state laws that interfere with our federal policy of nonregulation.

184. Multiple provisions enacted by the 1996 Act confirm Congress's approval of our preemptive federal policy of nonregulation for information services. Section 230(b)(2) of the Act, as added by the 1996 Act, declares it to be ''the policy of the United States'' to ''preserve the vibrant and competitive free market that presently exists for the internet and other interactive computer services''—including ''any information service''—''unfettered by Federal or State regulation.'' The Commission has observed that this provision makes clear that ''federal authority [is] preeminent in the area of information services'' and that information services ''should remain free of regulation.'' To this same end, by directing that a communications service provider ''shall be treated as a common carrier under [this Act] only to the extent that it is engaged in providing telecommunications services,'' Section 3(51)—also added by the 1996 Act—forbids any common-carriage regulation, whether federal or state, of information services.

185. Finally, our preemption authority finds further support in the Act's forbearance provision. Under Section 10(e) of the Act, Commission forbearance determinations expressly preempt any contrary state regulatory efforts. It would be incongruous if state and local regulation were preempted when the Commission decides to forbear from a provision that would otherwise apply, or if the Commission adopts a regulation and then forbears from it, but not preempted when the Commission determines that a requirement does not apply in the first place. Nothing in the Act suggests that Congress intended for state or local governments to be able to countermand a federal policy of nonregulation or to possess any greater authority over broadband internet access service than that exercised by the federal government. Some commenters note that Section 253(c), 47 U.S.C. 253(c), preserves certain state authority over telecommunications services. But that provision has no relevance here, given our finding that broadband internet access service is an information service. Although Section 253(c) recognizes that states have historically played a role in regulating telecommunications services, there is no such tradition of state regulation of information services, which have long been governed by a federal policy of nonregulation.

8. Disability Access Provisions

186. The Communications Act provides the Commission with authority to ensure that consumers with disabilities can access broadband networks regardless of whether broadband internet access service is classified as telecommunications service or information service. The Twenty-First Century Communications and Video Accessibility Act of 2010 (CVAA) already applies a variety of accessibility requirements to broadband internet access service. Congress adopted the CVAA after recognizing that ''internet-based and digital technologies . . . driven by growth in broadband . . . are now pervasive, offering innovative and exciting ways to communicate and share information.'' Congress thus clearly had internet-based communications technologies in mind when enacting the accessibility provisions of Section 716 (as well as the related provisions of Sections 717–718) and in providing important protections with respect to advanced communications services (ACS). ACS means: ''(A) interconnected VoIP service; (B) non-interconnected VoIP service; (C) electronic messaging service; and (D) interoperable video conferencing service.'' In particular, to ensure that people with disabilities have access to the communications technologies of the Twenty-First Century, the CVAA added several provisions to the Communications Act, including Section 716 of the Act, which requires that providers of advanced communications services (ACS) and manufacturers of equipment used for ACS make their services and products accessible to people with disabilities, unless it is not achievable to do so. These mandates already apply according to their terms in the context of broadband internet access service. The CVAA also adopted a requirement, in Section 718, that ensures access to internet browsers in wireless phones for people who are blind and visually impaired. In addition, the CVAA directed the Commission to enact regulations to prescribe, among other things, that networks used to provide ACS ''may not impair or impede the accessibility of information content when accessibility has been incorporated into that content for transmission through . . . networks used to provide [ACS].'' Finally, new Section 717 creates new enforcement and recordkeeping requirements applicable to Sections 255, 716, and 718. Section 710 of the Act addressing hearing aid compatibility and implementing rules enacted thereunder also apply regardless of any action taken in this Order. To the extent that other accessibility issues arise, we will address those issues in separate proceedings in furtherance of our statutory authority to ensure that broadband networks are accessible to and usable by individuals with disabilities.

9. Continued Applicability of Title III Licensing Provisions

187. We also note that our decision today to classify wireless broadband internet access service as an information service does not affect the general applicability of the spectrum allocation and licensing provisions of Title III and the Commission's rules to this service. Title III generally provides the Commission with authority to regulate ''radio communications'' and ''transmission of energy by radio.'' Among other provisions, Title III gives the Commission the authority to adopt rules preventing interference and allows it to classify radio stations. It also establishes the basic licensing scheme for radio stations, allowing the Commission to grant, revoke, or modify

licenses. Title III further allows the Commission to make such rules and regulations and prescribe such restrictions and conditions as may be necessary to carry out the provisions of the Act. Provisions governing access to and use of spectrum (and their corresponding Commission rules) do not depend on whether the service using the spectrum is classified as a telecommunications or information service under the Act.

II. A Light–Touch Framework To Restore Internet Freedom

188. For decades, the lodestar of the Commission's approach to preserving internet freedom was a light-touch, market-based approach. This approach debuted at the dawn of the commercial internet during the Clinton Administration, when an overwhelming bipartisan consensus made it national policy to preserve a digital free market ''unfettered by Federal or State regulation.'' It continued during the Bush Administration, as reflected in the ''Four Freedoms'' articulated by Chairman Powell in 2004 and was then formally adopted by a unanimous Commission in 2005 as well as in a series of classification decisions reviewed above. These include the freedoms for consumers to (1) ''access the lawful internet content of their choice''; (2) ''run applications and use services of their choice, subject to the needs of law enforcement''; (3) ''connect their choice of legal devices that do not harm the network''; and (4) ''enjoy competition among network providers, application and service providers, and content providers.'' And it continued for the first six years of the Obama Administration. We reaffirm and honor this longstanding, bipartisan commitment by adopting a light-touch framework that will preserve internet freedom for all Americans.

189. To implement that light-touch framework, we next reevaluate the rules and enforcement regime adopted in the *Title II Order.* That reevaluation is informed—as it must be—by the return of jurisdiction to the Federal Trade Commission to police ISPs for anticompetitive acts or unfair and deceptive practices. Against that backdrop, we first decide to retain the transparency rule adopted in the *Open Internet Order* with slight modifications. History has shown that transparency is critical to openness—consumers and entrepreneurs are not afraid to make their voices heard when ISPs engage in practices to which they object. And we conclude that preexisting federal protections—alongside the transparency rule we adopt today—are not only sufficient to protect internet freedom, but will do so more effectively and at lower social cost than the *Title II Order's* conduct rules. In short, we believe the light-touch framework we adopt today will pave the way for additional innovation and investment that will facilitate greater consumer access to more content, services, and devices, and greater competition.

A. Transparency

190. ''Sunlight,'' Justice Brandeis famously noted, ''is . . . the best of disinfectants.'' This is the case in our domain. Properly tailored transparency disclosures provide valuable information to the Commission to enable it to meet its statutory obligation to observe the communications marketplace to monitor the introduction of new services and technologies, and to identify and eliminate potential marketplace barriers for the provision of information services. Such disclosures also provide valuable information to other internet ecosystem participants; transparency substantially reduces the possibility that ISPs will engage in harmful practices, and it incentivizes quick corrective measures by providers if problematic conduct is identified. Appropriate disclosures help consumers make informed choices about their purchase and use of broadband internet access services. Moreover, clear disclosures improve consumer confidence in ISPs' practices while providing entrepreneurs and other small businesses the information they may need to innovate and improve products.

191. Today, we commit to balanced ISP transparency requirements based on a sound legal footing. We return, with minor adjustments, to the transparency rule adopted in the 2010 *Open Internet Order,* which provides consumers and the Commission with essential information while minimizing the burdens imposed on ISPs. In so doing, we modify the existing transparency rule to eliminate many of the burdensome additional reporting obligations adopted by the Commission in the *Title II Order.* We find that those additional obligations do not benefit consumers, entrepreneurs, or the Commission sufficiently to outweigh the burdens imposed on ISPs. The transparency rule we adopt will aid the Commission in ''identifying . . . market entry barriers for entrepreneurs and other small businesses in the provision and ownership of . . . information services.'' We also conclude that our transparency rule readily survives First Amendment scrutiny. The disclosure requirements we adopt apply to both fixed and mobile ISPs.

1. History of the Transparency Rule

192. *The Open Internet Order.* The transparency rule, first adopted in the *Open Internet Order,* requires both fixed and mobile ISPs to ''publicly disclose accurate information regarding the network management practices, performance, and commercial terms of its broadband internet access services sufficient for consumers to make informed choices.'' In addition, the *Open Internet Order* provided guidance on both what information should be disclosed and how those disclosures should be made. The Commission described the types of information that should be included in each category, but emphasized the importance of flexibility in implementing the rule, making clear that ''effective disclosures will likely include some or all'' of the listed types of information. Though the other rules adopted in the *Open Internet Order* were overturned, the D.C. Circuit upheld the transparency rule in *Verizon.*

193. *2011 Advisory Guidance.* On June 30, 2011, the Enforcement Bureau and Office of General Counsel released guidance ''regarding specific methods of disclosure that will be considered to comply with the transparency rule,'' addressing concerns about the scope of required disclosures and potential burdens on small providers. The *2011 Advisory Guidance* provided detail on methods for disclosure of actual performance metrics, and the contents of the disclosures regarding network practices, performance characteristics, and commercial terms, and clarified the requirement that disclosures be made ''at the point of sale.'' The *2011 Advisory Guidance* clarified that disclosure of the information listed in paragraphs 56 and 98 of the *Open Internet Order* was sufficient to satisfy the transparency rule notwithstanding the *Open Internet Order's* assertion that the list was ''not necessarily exhaustive, nor is it a safe harbor.'' Paragraph 56 of the *Open Internet Order* provided the following non-exhaustive list of disclosures: network practices, including congestion management, application-specific behavior, device attachment rules, and security; performance characteristics, including a service description and the impact of specialized services; and commercial terms, including pricing, privacy policies, and redress options. Paragraph 98 made clear that mobile ISPs must comply with the transparency requirements and states that such providers must ''disclose their third-party device and application certification procedures, if any'';

''clearly explain their criteria for any restrictions on use of their network''; and ''expeditiously inform device and application providers of any decisions to deny access to the network or of a failure to approve their particular devices or applications.''

194. *2014 Advisory Guidance.* In July 2014, in the wake of the *Verizon* decision, the Enforcement Bureau issued further guidance emphasizing the importance of consistency between an ISP's disclosures under the transparency rule and that provider's advertising claims or other public statements. The *2014 Advisory Guidance* explained that the transparency rule ''prevents a broadband internet access provider from making assertions about its service that contain errors, are inconsistent with the provider's disclosure statement, or are misleading or deceptive.''

195. *Title II Order.* In the *Title II Order,* the Commission broadened the transparency rule's requirements by interpreting the rule to mandate certain additional reporting obligations it termed ''enhancements.'' These additional reporting obligations, although falling within the same broad categories as those listed in the *Open Internet Order,* required that providers include far greater technical detail in their disclosures. For example, all ISPs, except small providers exempt under the *Small Provider Waiver Order,* were required to make specific disclosures regarding the commercial terms (including specific information regarding prices and fees), performance characteristics (including, for example, packet loss and a requirement that these disclosures be reasonably related to the performance a consumer could expect in the geographic area in which they are purchasing service), and network practices (including, for example, application and user-based practices) of the broadband internet access services they offer. The *Open Internet Order,* read together with the *2011 Advisory Guidance,* limited the performance characteristic disclosures to a service description (''[a] general description of the service, including the service technology, expected and actual access speed and latency, and the suitability of the service for real-time applications'') and the impact of specialized services. The *Open Internet Order* included specific disclosures related to congestion management, application-specific behavior, device attachment rules, and security. The *Title II Order* also established a safe harbor for the form and format of disclosures intended for consumers and delegated development of the format to the agency's Consumer Advisory Committee (CAC). The *2016 Advisory Guidance,* released on delegated authority, provided examples of acceptable methodologies for disclosure of performance characteristics and offered guidance regarding compliance with the point of sale requirement. For example, the guidance notes that for many fixed providers, performance is likely to be consistent across the provider's footprint so long as the same technology is deployed and that in such a case a single disclosure for the full service area may be sufficient. By contrast, mobile performance may vary, and the guidance suggested the use of CMA as an appropriate geographic area on which to base disclosures.

2. Refining the Transparency Rule

196. Today, we retain the transparency rule as established in the *Open Internet Order,* with some modifications, and eliminate the additional reporting obligations of the *Title II Order.* We find many of those additional reporting obligations significantly increased the burdens imposed on ISPs without providing countervailing benefits to consumers or the Commission. As a result, we recalibrate the requirements under the transparency rule. Specifically, we adopt the following rule:

Any person providing broadband internet access service shall publicly disclose accurate information regarding the network management practices, performance, and commercial terms of its broadband internet access services sufficient to enable consumers to make informed choices regarding the purchase and use of such services and entrepreneurs and other small businesses to develop, market, and maintain internet offerings. Such disclosure shall be made via a publicly available, easily accessible website or through transmittal to the Commission.

For purposes of these rules, ''consumer'' includes any subscriber to the ISP's broadband internet access service, and ''person'' includes any ''individual, group of individuals, corporation, partnership, association, unit of government or legal entity, however organized.''

197. In doing so, we note that the record overwhelmingly supports retaining at least some transparency requirements. Crucially, the transparency rule will ensure that consumers have the information necessary to make informed choices about the purchase and use of broadband internet access service, which promotes a competitive marketplace for those services. Disclosure supports innovation, investment, and competition by ensuring that entrepreneurs and other small businesses have the technical information necessary to create and maintain online content, applications, services, and devices, and to assess the risks and benefits of embarking on new projects. We reject commenter assertions that we should not maintain any transparency requirements. CenturyLink does not identify which requirements from the 2010 transparency rule it believes could arguably be ''onerous.'' Further, as discussed above, we find that a transparency requirement is necessary and sufficient to protect internet openness, given that we lack authority to adopt conduct rules and in addition find that an enforceable transparency rule obviates the need for bright line conduct rules.

198. What is more, disclosure increases the likelihood that ISPs will abide by open internet principles by reducing the incentives and ability to violate those principles, that the internet community will identify problematic conduct, and that those affected by such conduct will be in a position to make informed competitive choices or seek available remedies for anticompetitive, unfair, or deceptive practices. Transparency thereby ''increases the likelihood that harmful practices will not occur in the first place and that, if they do, they will be quickly remedied.'' We apply our transparency rule to broadband internet access service, as well as functional equivalents or any service that is used to evade the transparency requirements we adopt today. As the Commission explained in the *Open Internet Order,* ''a key factor in determining whether a service is used to evade the scope of the rules is whether the service is used as a substitute for broadband internet access service. For example, an internet access service that provides access to a substantial subset of internet endpoints based on end users' preference to avoid certain content, applications, or services; internet access services that allow some uses of the internet (such as access to the World Wide Web) but not others (such as email); or a 'Best of the Web' internet access service that provides access to 100 top websites could not be used to evade the open internet rules applicable to 'broadband internet access service.' '' We caution ISPs that they may not evade application of the transparency rule ''simply by blocking end users' access to some internet points.''

a. Content of Required Disclosures

199. We require ISPs to prominently disclose network management practices, performance, and commercial terms of their broadband internet access service, and find substantial record support (including from ISPs) for following the course set out by the *Open Internet Order.* We find that the elements of the transparency rule we adopt today help consumers make the most educated decision as to which ISP to choose and keep entrepreneurs and other small businesses effectively informed of ISP practices so that they can develop, market, and maintain internet offerings. Although we agree with the *Open Internet Order* that ''the best approach is to allow flexibility in implementation of the transparency rule,'' we describe the specific requirements to guide ISPs and ensure that consumers, entrepreneurs, and other small businesses receive sufficient information to make our rule effective.

200. *Network Management Practices.* In the *Open Internet Order,* the Commission required ISPs to disclose their congestion management, application-specific behavior, device attachment rules, and security practices. We adopt those same requirements and further require ISPs to disclose any blocking, throttling, affiliated prioritization, or paid prioritization in which they engage. Although requiring disclosure of network management practices imposes some burden on ISPs, we find the benefits of enabling the public and the Commission to identify any problematic conduct and suggest fixes substantially outweigh those costs. The record generally supports disclosure of ISP network practices.

201. We specifically require all ISPs to disclose:

- *Blocking.* Any practice (other than reasonable network management elsewhere disclosed) that blocks or otherwise prevents end user access to lawful content, applications, service, or non-harmful devices, including a description of what is blocked.
- *Throttling.* Any practice (other than reasonable network management elsewhere disclosed) that degrades or impairs access to lawful internet traffic on the basis of content, application, service, user, or use of a non-harmful device, including a description of what is throttled.
- *Affiliated Prioritization.* Any practice that directly or indirectly favors some traffic over other traffic, including through use of techniques such as traffic shaping, prioritization, or resource reservation, to benefit an affiliate, including identification of the affiliate.
- *Paid Prioritization.* Any practice that directly or indirectly favors some traffic over other traffic, including through use of techniques such as traffic shaping, prioritization, or resource reservation, in exchange for consideration, monetary or otherwise.
- *Congestion Management.* Descriptions of congestion management practices, if any. These descriptions should include the types of traffic subject to the practices; the purposes served by the practices; the practices' effects on end users' experience; criteria used in practices, such as indicators of congestion that trigger a practice, including any usage limits triggering the practice, and the typical frequency of congestion; usage limits and the consequences of exceeding them; and references to engineering standards, where appropriate.
- *Application-Specific Behavior.* Whether and why the ISP blocks or rate-controls specific protocols or protocol ports, modifies protocol fields in ways not prescribed by the protocol standard, or otherwise inhibits or favors certain applications or classes of applications.
- *Device Attachment Rules.* Any restrictions on the types of devices and any approval procedures for devices to connect to the network.
- *Security.* Any practices used to ensure end-user security or security of the network, including types of triggering conditions that cause a mechanism to be invoked (but excluding information that could reasonably be used to circumvent network security). We expect ISPs to exercise their judgment in deciding whether it is necessary and appropriate to disclose particular security measures. The Commission's primary concern is those security measures likely to affect a consumer's ability to access the content, applications, services, and devices of his or her choice. As a result, we do not expect ISPs to disclose internal network security measures that do not directly bear on a consumer's choices.

We do not mandate disclosure of any other network management practices. Notably, we define ''reasonable network management'' to mean a practice ''appropriate and tailored to achieving a legitimate network management purpose, taking into account the particular network architecture and technology of the broadband internet access service.'' The record reflects an overwhelming preference for this approach from the *Open Internet Order,* which provides ISPs greater flexibility and certainty.

202. *Performance Characteristics.* In the *Open Internet Order,* the Commission required ISPs to disclose a service description as well as the impact of specialized services (non-broadband internet access service data services) on performance. We find that the *Open Internet Order's* performance metric disclosures benefit consumers without placing an undue burden on ISPs.

203. We specifically require all ISPs to disclose:

- *Service Description.* A general description of the service, including the service technology, expected and actual access speed and latency, and the suitability of the service for real-time applications. For purposes of satisfying this requirement, fixed ISPs that choose to participate in the Measuring Broadband America (MBA) program may disclose their results as a sufficient representation of the actual performance their customers can expect to experience. Fixed ISPs that do not participate may use the methodology from the MBA program to measure actual performance, or may disclose actual performance based on internal testing, consumer speed test data, or other data regarding network performance, including reliable, relevant data from third-party sources. Mobile ISPs that have access to reliable information on network performance may disclose the results of their own or third-party testing. Those mobile ISPs that do not have reasonable access to such network performance data may disclose a Typical Speed Range (TSR) representing the range of speeds and latency that can be expected by most of their customers, for each technology/service tier offered, along with a statement that such information is the best approximation available to the broadband provider of the actual speeds and latency experienced by its subscribers.
- *Impact of Non-Broadband Internet Access Service Data Services.* If applicable, what non-broadband internet access service data services, if any, are offered to end users, and whether and how any non-broadband internet access service data services may affect the last-mile capacity available for, and the performance of, broadband internet access service.

204. *Commercial Terms.* In the *Open Internet Order,* the Commission required ISPs to disclose commercial terms of service, including price, privacy policies, and redress options. The record in this proceeding supports retaining these disclosures. These disclosures inform the Commission, consumers, entrepreneurs, and other small businesses about the parameters of the service, without imposing costly

burdens on ISPs. We therefore require ISPs to make the following disclosures:

• *Price.* For example, monthly prices, usage-based fees, and fees for early termination or additional network services.

• *Privacy Policies.* A complete and accurate disclosure about the ISP's privacy practices, if any. For example, whether any network management practices entail inspection of network traffic, and whether traffic is stored, provided to third parties, or used by the ISP for non-network management purposes.

• *Redress Options.* Practices for resolving complaints and questions from consumers, entrepreneurs, and other small businesses.

205. *Eliminating the Title II Order's Additional Reporting Obligations.* Today, we return to a more balanced approach—one that provides sufficient information for the Commission to meet its statutory requirements, enables consumers to make informed choices about the purchase and use of broadband internet access service, and ensures entrepreneurs and other small businesses can develop, market, and maintain internet offerings, while minimizing costly and unnecessary burdens on ISPs.

206. We eliminate the additional reporting obligations adopted in the *Title II Order* and the related guidance in the *2016 Advisory Guidance* and return to the requirements established in the *Open Internet Order.* We find that these additional reporting obligations unduly burden ISPs without providing a comparable benefit to consumers. That is especially true for the performance metric, which mandated disclosure of packet loss, geographically-specific disclosures, and disclosure of performance at peak usage times among other things.

207. The record supports the elimination of these additional reporting obligations and our return to the requirements under the *Open Internet Order.* The record indicates that the additional performance disclosures are among the most burdensome. CenturyLink estimated that during the two-year period from February 2015 through February 2017, 1,650 hours of employee time were required to comply with the additional reporting obligations, compared to 860 additional hours spent complying with the other new requirements of the *Title II Order.* Disclosure of packet loss, for example, requires providers to conduct additional engineering analysis. Notably, the Office of Management and Budget (OMB) in the prior Administration declined to approve packet loss when reviewing these additional reporting obligations for mobile ISPs, suggesting concern that the additional reporting obligations provided little consumer benefit relative to their cost. After all, consumers have little understanding of what packet loss means; what they *do* want to know is whether their internet access service will support real-time applications, which is the consumer-facing impact of these performance metrics. Although some commenters argue that additional reporting of these esoteric metrics are valuable to some consumers and entrepreneurs, they provide inadequate support for these benefits. In addition, providing such information imposes significant costs on providers. Weighing the additional costs to ISPs against the limited incremental benefits to consumers, entrepreneurs, and small businesses, we conclude that the net benefits of these additional reporting obligations are likely negative. The approach we take today achieves the benefits of transparency at much lower cost than the *Title II Order.*

208. *Small Providers.* Small providers have asked us to maintain the exemption found in the *Small Provider Order* to the extent that any of additional reporting obligations still apply. Because the requirements we adopt today eliminate all of these additional obligations and do not impose disparately high burdens on small providers, we find an exemption for small providers unnecessary. Further, the requirements are critical to ensuring that consumers have sufficient information to make informed choices in their selection of ISPs and to deter ISPs from secretly erecting barriers to market entry by entrepreneurs and other small businesses. As a result, we decline to provide an exemption for smaller providers at this time.

b. Means and Format of Disclosure

209. *Means of Disclosure.* The Commission relies on ISP disclosures to identify market-entry barriers for entrepreneurs and small businesses and ensure consumers have the information they need in selecting an ISP. And given the sheer number of ISPs offering service throughout the country—4,559 at last count—we believe the most effective way to monitor for any such barriers is to require the public disclosure of an ISP's practices so that Commission staff can review them while letting consumers, entrepreneurs, and other small businesses report to the Commission any market-barriers they discover. Accordingly, ISPs must publicly disclose the information required by our transparency rule.

210. We give ISPs two options for disclosure. First, they may include the disclosures on a publicly available, easily accessible website. Consistent with Commission precedent, we expect that ISPs will make disclosures in a manner accessible by people with disabilities. ISPs doing so need not distribute hard copy versions of the required disclosures and need not file them with the Commission, which can review the disclosures as needed on the ISPs' websites. For ISPs electing this option, we reaffirm the means of disclosure requirement from the *Open Internet Order* and the clarification found in the *2011 Advisory Guidance.* Alternatively, ISPs may transmit their disclosures to the Commission, and we will make them available on a publicly available, easily accessible website. We direct the Consumer and Governmental Affairs Bureau, in coordination with the Wireline Competition Bureau, to issue a Public Notice explaining how ISPs can exercise this option. We also note that ISPs that do not transmit their disclosures to the FCC will be deemed as having elected the first option (and may later elect that option despite prior transmittal by informing the Commission in a manner specified in the aforementioned Public Notice). By offering these two options, we allow ISPs (and especially smaller ISPs) the ability to choose the least burdensome method of disclosure that will nonetheless ensure that Commission staff, consumers, entrepreneurs, and other small businesses have access to the information they need in carrying out our obligation to identify market-entry barriers.

211. We also eliminate the direct notification requirement adopted in the *Title II Order.* We find the direct notification requirement unduly burdensome to ISPs and unnecessary in light of the other forms of public disclosure required. In contrast, we find that the disclosures adopted in the *Open Internet Order* and *2011 Advisory Guidance* appropriately balance making information easy to reach and the costs of disclosure for ISPs.

212. *Format of Disclosure.* We eliminate the consumer broadband label safe harbor for form and format of disclosures adopted in the *Title II Order.* Adopting the label could require some ISPs to expend substantial resources to tailor their disclosures to fit the format. And limited adoption, caused by the potentially high burdens associated with adapting disclosures to a particular format, significantly reduces the value of the uniform format. Moreover, mandating such a format would increase the burden for those ISPs required to

revise their existing disclosure to conform to the mandated format. We find that requiring all ISPs to disclose the same information, regardless of format, will allow for comparability between offerings, and enable the Commission to meet its statutory reporting requirements.

3. Authority for the Transparency Rule

213. Just as the Commission did in the *Open Internet Order,* we rely on Section 257 of the Communications Act as authority for the transparency requirements we retain. Section 257(a) directs the Commission to ''identify[ ] and eliminat[e] . . . market entry barriers for entrepreneurs and other small businesses in the provision and ownership of telecommunications services and information services, or in the provision of parts or services to providers of telecommunications services and information services.'' Section 257(a) set a deadline of 15 months from the enactment of the 1996 Act for the Commission's initial effort in that regard, and Section 257(c) directs the Commission, triennially thereafter, to report to Congress on such marketplace barriers and how they have been addressed by regulation or could be addressed by recommended statutory changes. Consistent with the Commission's longstanding view, Section 257(c) is properly understood as imposing a continuing obligation on the agency to identify barriers described in Section 257(a) that may emerge in the future, rather than limited to those identified in the original Section 257(a) proceeding. Because Sections 257(a) and (c) clearly anticipate that the Commission and Congress would take steps to help eliminate previously-identified marketplace barriers, limiting the triennial reports only to those barriers identified in the original Section 257(a) proceeding could make such reports of little to no ongoing value over time. We thus find it far more reasonable to interpret Section 257(c) as contemplating that the Commission will perform an ongoing market review to identify any new barriers to entry, and that the statutory duty to ''identify and eliminate'' implicitly empowers the Commission to require disclosures from those third parties who possess the information necessary for the Commission and Congress to find and remedy market entry barriers. Although Section 257 does not specify precisely how the Commission should obtain and analyze information for purposes of its reports to Congress, we construe the statutory mandate to ''identify'' the presence of market barriers as including within it direct authority to collect evidence to prove that such barriers exist. While this direct authority suffices to support the Commission's adoption of the transparency rule, Sections 4, 201(b), and 303(r) of the Act also give us rulemaking authority to implement the Act, including the provisions we rely on as authority for our transparency requirements. In his partial concurrence and partial dissent in *Verizon,* Judge Silberman stated with respect to the transparency rule that ''[t]he Commission is required to make triennial reports to Congress on 'market entry barriers' in information service, and requiring disclosure of network management practices appears to be reasonably ancillary to that duty.''

214. Our disclosure requirements will help us both identify and address potential market entry barriers in the provision and ownership of information services and the provision of parts and services to information service providers. In particular, some internet applications and services previously have been found to be information services, and, more generally, entrepreneurs and small businesses participating in the internet marketplace could be seeking to act as either providers of information services or providers of parts and services to information services (or both). The language of Section 257(a) appears reasonably read to encompass those entrepreneurs' and small businesses' services under one or more of the covered categories, and there is no dispute in the record in that regard. Because we find that internet entrepreneurs and small businesses that depend on their customers using broadband internet access service are covered by Section 257(a) in any case, we need not and do not address with greater specificity the specific category or categories into which particular edge services fall. In addition, the manner in which an ISP provides broadband internet access service, including but not limited to its network management practices, can affect how well particular internet applications or services of entrepreneurs and small businesses perform when used by that ISP's subscribers. Aspects of the performance of broadband internet access services, particularly if undisclosed, thus could constitute barriers within the scope of Section 257(a) in the future, depending on how the marketplace evolves, regardless of whether or not particular practices do so today. For example, if ISPs do not disclose key details of how they provide broadband internet access service, that could leave entrepreneurs and small businesses participating in the internet marketplace unable to determine how well particular existing or contemplated offerings are likely to perform for users, and thus unable to determine if their service will be usable to a sufficient number of potential customers to make the offering viable. Such undisclosed practices also can leave consumers unable to judge which broadband internet access service offerings will best meet their needs given the applications and service they wish to use. As a result, even if a sufficient number of consumers theoretically are accessible by a broadband internet access service offering with sufficient technical characteristics to make a given internet application or service viable, an entrepreneur's or small business's entry into the market for that service could be undermined if consumers are unable to identify which of the various broadband internet access services offerings has the required technical characteristics. By contrast, the record reveals that the disclosure of practices and service characteristics we require today helps entrepreneurs and small businesses understand how well particular internet application or service offerings are likely to work with particular ISPs' broadband internet access services and helps consumers make the most educated choice among ISPs and particular broadband internet access service offerings, especially if they have particular interests in using internet applications or services that are highly dependent on broadband internet access service performance. The disclosures themselves thus are likely to reduce any potential risk of particular practices being such a barrier—had they not been publicly disclosed—and also enable us to recommend to Congress any legislative changes that we might find warranted based on our analysis of these practices. While we observe that the transparency rule will help eliminate potential barriers, our reliance on Section 257 as authority for the transparency rule centers on the need for that rule to identify barriers and report to Congress in that regard. Contrary to some arguments, we thus do not interpret Section 257 as an over-arching grant of authority to eliminate any and all barriers we might identify. We also are not persuaded by summary claims that Section 257 does not grant us authority here insofar as those claims lack meaningful analysis of the text of that provision. Thus, we continue to believe that Section 257 provides us authority for the rule we adopt.

215. We believe that eliminating market entry barriers in the provision

and ownership of information services and the provision of parts and services to information service providers will help bring the benefits of new inventions and developments to the public. In addition, we conclude that the oversight over ISPs' practices that the Commission, FTC, and other antitrust and consumer protection authorities can exercise as a result of the transparency rule likewise will promote innovation and competition, spreading the benefits of technological development to the American people broadly.

216. *The Transparency Requirements Are Consistent With the First Amendment.* We conclude that the transparency requirements represent permissible regulation of commercial speech. The ultimate effect of the required disclosures is to ensure that key details regarding service characteristics, rates, and terms of broadband internet access service offerings are available to potential customers before they make their purchasing decisions. As stated above, ISPs have two options for complying with the transparency requirements. One is to make the disclosures on a publicly available, easily accessible website. Alternatively, ISPs can elect to simply provide that information to the Commission, which will then itself make the information publicly available. The *Title II Order* evaluated the transparency rule at issue there under *Zauderer* v. *Office of Disciplinary Counsel of Supreme Court of Ohio,* and there is some record support for applying that framework. We recognize that there remains some debate regarding the application of *Zauderer,* as opposed to the *Central Hudson* framework that generally governs First Amendment review of commercial speech regulation. We need not resolve that here, because we find that our rule would withstand scrutiny even under *Central Hudson.* In particular, our transparency rule directly advances substantial government interests and is no more extensive than necessary.

217. The transparency requirements we retain directly advance substantial government interests in encouraging competition and innovation. The Act itself reveals the significance of these interests. In Section 257 of the Act, Congress specifically directed the Commission to identify market entry barriers in the provision of information services and their inputs, eliminating them where possible, and reporting to Congress on the need for any statutory changes required to address such barriers. In carrying out our responsibilities under Section 257, Congress directed us to advance, among other things, ''vigorous economic competition'' and ''technological advancement.'' Such interests are similar to those recognized as substantial by courts, as well.

218. The disclosure of information regarding broadband internet access service characteristics, rates, and terms directly advance those statutory directives. We thus disagree with arguments that there is insufficient justification for our transparency requirements to withstand First Amendment scrutiny. Moreover, commenters do not cite precedent demonstrating that only ''systematic or enduring problem[s]'' can provide the basis for requirements that withstand First Amendment scrutiny. Broadband internet access service subscribers will be able to use the disclosed information to evaluate broadband internet access service offerings and determine which offering will best enable the use of the applications and service they desire. This helps guard against the potential barrier to entry and deterrent to technological advancement that otherwise could be faced by entrepreneurs' and small business' innovative internet applications and service offerings, which may be dependent on the technical characteristics of broadband internet access service. The information disclosed by ISPs also is relevant to internet application and service providers' purchase of services from those ISPs. The record reveals evidence that a number of the internet applications and services that might be particularly sensitive to the manner in which an ISP provides broadband internet access service potentially could benefit from the freedom this order provides for providers of such services and ISPs to enter prioritization arrangements to better ensure the performance of those internet applications and services. Thus, the disclosures enable entrepreneurs, small businesses, and other participants in the internet marketplace to evaluate how well their offerings will perform by default relative to the prioritization services that ISPs offer them. Enabling internet application and service providers to evaluate their options in this way helps reduce barriers to entry that otherwise could exist and encourages entrepreneurs' and small businesses' ability to compete and develop and advance innovating offerings in furtherance of our statutory objectives. In addition to those considerations, as the Commission has recognized, disclosures help ensure accountability by ISPs and the potential for quick remedies if problematic practices occur. The disclosures also provide the Commission the information it needs for the evaluation required by Section 257 of the Act, enabling us to spur regulatory action or seek legislative changes as needed. The transparency rule we retain thus directly advances the substantial government interests identified in Section 257 of the Act.

219. The transparency requirements also are no more extensive than necessary. The disclosures covered by our transparency rule are tied to our duties under Section 257 of the Communications Act. We also observe in this regard that the most significant concerns were raised with respect to the additional reporting obligations adopted in the *Title II Order* and here we eliminate those requirements in favor of a rule consistent in scope with the 2010 transparency rule. In addition, an ISP's direct public disclosure of the information encompassed by the transparency rule is just one option; it may instead submit the information to the Commission, which would then make public. We thus conclude that the transparency requirements are appropriately tailored to the Congressionally-recognized goals that we seek to advance.

B. Bright-Line and General Conduct Rules

220. We eliminate the conduct rules adopted in the *Title II Order*—including the general conduct rule and the prohibitions on paid prioritization, blocking, and throttling. We do so for three reasons. First, the transparency rule we adopt, in combination with the state of broadband internet access service competition and the antitrust and consumer protection laws, obviates the need for conduct rules by achieving comparable benefits at lower cost. Second, scrutinizing closely each prior conduct rule, we find that the costs of each rule outweigh its benefits. Third, the record does not identify any legal authority to adopt conduct rules for all ISPs, and we decline to distort the market with a patchwork of non-uniform, limited-purpose rules.

1. Transparency Leads to Openness

221. Transparency, competition, antitrust laws, and consumer protection laws achieve similar benefits as conduct rules at lower cost. The effect of the transparency rule we adopt is that ISP practices that involve blocking, throttling, and other behavior that may give rise to openness concerns will be disclosed to the Commission and the

public. As the Commission found in the *Open Internet Order,* ''disclosure increases the likelihood that broadband providers will abide by open internet principles, and that the internet community will identify problematic conduct and suggest fixes . . . thereby increas[ing] the chances that harmful practices will not occur in the first place and that, if they do, they will be quickly remedied.'' The transparency rule will also assist ''third-party experts such as independent engineers and consumer watchdogs to monitor and evaluate network management practices.''

222. History demonstrates that public attention, not heavy-handed Commission regulation, has been most effective in deterring ISP threats to openness and bringing about resolution of the rare incidents that arise. The Commission has had transparency requirements in place since 2010, and there have been very few incidents in the United States since then that plausibly raise openness concerns. It is telling that the two most-discussed incidents that purportedly demonstrate the need for conduct rules, concerning Madison River and Comcast/BitTorrent, occurred before the Commission had in place an enforceable transparency rule. And it was the disclosure, through complaints to the Commission and media reports of the conduct at issue in those incidents, that led to action against the challenged conduct.

223. As public access to information on ISP practices has increased, there has been a shift toward ISPs resolving openness issues themselves with less and less need for Commission intervention. In 2005, the Enforcement Bureau entered into a consent decree to resolve the allegations against Madison River. In 2008, Comcast reached a settlement with BitTorrent months before the Commission issued *Comcast-BitTorrent.* By 2012, with a transparency rule in place, AT&T reversed its blocking of access to FaceTime over its cellular network on certain data plans of its own accord within approximately three months. This trend toward swift ISP self-resolution comes, admittedly, from only a few data points because, with transparency in place, almost no incidents of harm to internet openness have arisen, suggesting that ISPs are ''resolving'' issues by not letting them occur in the first place.

224. We think the disinfectant of public scrutiny and market pressure, not the threat of heavy-handed Commission regulation, best explain the paucity of issues and their increasingly fast ISP-driven resolution. Since the Commission adopted a transparency rule in the *Open Internet Order,* conduct requirements have varied substantially, from the rules adopted in the *Open Internet Order,* to no conduct rules after the *Verizon* court case, to the rules adopted in the *Title II Order.* Yet through all that time, the Commission released only one Notice of Apparent Liability, against AT&T for allegedly violating the transparency rule. The dearth of actions enforcing conduct rules is striking. Further, the *Title II Order* and *Open Internet Order* do not, and could not, claim an epidemic or even uptick of blocking or degradation of traffic in the wake of the *Comcast* or *Verizon* court decisions vacating the Commission's prior attempts at openness regulation. These time periods provide a natural experiment disproving the notion that conduct rules are necessary to promote openness. We thus reject arguments to the contrary.

225. Although we think transparency promotes openness and empowers consumers, we recognize that regulation has an important role to play as a backstop where genuine harm is possible. In particular, transparency amplifies the power of antitrust law and the FTC Act to deter and where needed remedy behavior that harms consumers. While some commenters assert that proof is difficult in antitrust proceedings, our transparency rule requires ISPs to outline their business practices and service offerings forthrightly and honestly. This requirement both deters ISPs from engaging in anticompetitive, unfair, or deceptive conduct and gives consumers and regulators the tools they need to take action in the face of such behavior. Many ISPs have committed to abide by open internet principles. By restoring authority to the FTC to take action against deceptive ISP conduct, reclassification empowers the expert consumer protection agency to exercise the authority granted to them by Congress if ISPs fail to live up to their word and thereby harm consumers.

226. Transparency thus leads to openness and achieves comparable benefits to conduct rules. Moreover, the costs of compliance with a transparency rule are much lower than the costs of compliance with conduct rules. We therefore decline to impose this additional cost given our view that transparency drives a free and open internet, and in light of the FTC's and DOJ's authority to address any potential harms. To the extent that conduct rules lead to any additional marginal deterrence, we deem the substantial costs—including costs to consumers in terms of lost innovation as well as monetary costs to ISPs—not worth the possible benefits.

2. Costs of Conduct Rules Outweigh Benefits

a. General Conduct Rule

227. We find that the vague Internet Conduct Standard is not in the public interest. Following adoption of this Order, the FTC will be able to vigorously protect consumers and competition through its consumer protection and antitrust authorities. Given this, we see little incremental benefit and significant cost to retaining the Internet Conduct Standard. The rule has created uncertainty and likely denied or delayed consumer access to innovative new services, and we believe the net benefit of the Internet Conduct Standard is negative. As such, we find commenters urging the Commission to retain this standard, even with modifications, unpersuasive.

228. Based on our experience with the rule and the extensive record, we are persuaded that the Internet Conduct Standard is vague and has created regulatory uncertainty in the marketplace hindering investment and innovation. Because the Internet Conduct Standard is vague, the standard and its implementing factors do not provide carriers with adequate notice of what they are and are not permitted to do, *i.e.,* the standard does not afford parties a ''good process for determining what conduct has actually been forbidden.'' The rule simply warns carriers to behave in accordance with what the Commission *might* require, without articulating any actual standard. Even ISP practices based on consumer choice are not presumptively permitted; they are merely ''less likely'' to violate the rule. Moreover, the uncertainty caused by the Internet Conduct Standard goes far beyond what supporters characterize as the flexibility that is necessary in a regulatory structure to address future harmful behavior. We thus find that the vague Internet Conduct Standard subjects providers to substantial regulatory uncertainty and that the record before us demonstrates that the Commission's predictive judgment in 2015 that this uncertainty was ''likely to be short term and will dissipate over time as the marketplace internalizes [the] Title II approach'' has not been borne out.

229. Increasing our concerns about the Internet Conduct Standard, other agencies already have significant experience protecting against the harms to competition and to consumers that the Internet Conduct Standard purports to reach. The FTC, for example, has authority over unfair and deceptive practices, both with respect to competition and consumer protection.

We find that the FTC's authority over unfair and deceptive practices and antitrust laws, with guidance from its ample body of precedent, already provides the appropriate flexibility and predictability to protect consumers and competition and addresses new practices that might develop with less harm to innovation. We also observe that because FTC and antitrust authority apply across industries, further precedent is likely to develop more quickly, while a sector-specific general conduct rule is likely to develop more slowly. While antitrust laws use a consumer welfare standard defined by economic analysis to evaluate harmful conduct, the Internet Conduct Standard includes a non-exhaustive grab bag of considerations that are much broader and hazier than the consumer welfare standard, and leaves the door open for the Commission to consider other factors or unspecified conduct it would like to take into account.

230. We anticipate that eliminating the vague Internet Conduct Standard will reduce regulatory uncertainty and promote network investment and service-related innovation. As we discussed above, regulatory uncertainty serves as a major barrier to investment and innovation. The record reflects that ISPs and edge providers of all sizes have foregone and are likely to forgo or delay innovative service offerings or different pricing plans that benefit consumers, citing regulatory uncertainty under the Internet Conduct Standard in particular. Indeed, these harms are not limited to ISPs—the rule ''creates paralyzing uncertainty for app developers and other edge providers,'' as well as equipment manufacturers. Even some proponents of Title II acknowledge these public interest harms. Commenters also note that ''money spent on backward-looking regulatory compliance is money not spent on more productive uses, such as investments in broadband plant and services.'' We anticipate that eliminating the Internet Conduct Standard will benefit consumers, increase competition, and eliminate regulatory uncertainty that has ''a corresponding chilling effect on broadband investment and innovation.''

231. The now-rescinded Zero-Rating Report issued by the Wireless Telecommunications Bureau illustrates the uncertainty ISPs experience as a result of the Internet Conduct Standard adopted in the *Title II Order.* As described in the Report, ''zero-rated'' content, applications, and services are those that end users can access without the data consumed being counted toward the usage allowances or data caps imposed by an operator's service plans. But following a thirteen-month investigation during which providers were left uncertain about whether their zero-rating practices complied with the Internet Conduct Standard, the Report still did not identify specific evidence of harm from particular zero-rating programs that increased the amount of data that consumers could use or provide certainty about whether particular zero-rating programs were legally permissible. Instead, it offered a ''set of overall considerations'' that it said would help ISPs assess whether a particular zero-rating plan violates the *Title II Order.* The now-rescinded *Zero-Rating Report* demonstrated that under the Internet Conduct Standard ISPs have faced two options: Either wait for a regulatory enforcement action that could arrive at some unspecified future point or stop providing consumers with innovative offerings.

232. We anticipate that eliminating the vague Internet Conduct Standard will also lower compliance and other related costs. The uncertainty surrounding the rule ''establishes a standard for behavior that virtually requires advice of counsel before a single decision is made'' and raises ''costs [especially for smaller ISPs that] struggle to understand its application to their service prices, terms, conditions, and practices.'' Smaller ISPs contend that they cannot ''afford to be the subject of enforcement actions by the Commission or defend themselves before the Commission as a result of consumer complaints, because the costs of having to defend their actions before the Commission in Washington are enormous, relative to their resources.'' ISPs ''that are required to defend themselves against arbitrary enforcement actions and/or frivolous complaints will not have the time or financial resources to invest in their business. The costs of such compliance will likely be passed onto consumers via higher prices and/or limited service offerings and upgrades.'' The record reflects widespread agreement from commenters with otherwise-divergent views that the Internet Conduct Standard creates significant harm without countervailing benefits.

233. We are further persuaded that the advisory opinion process introduced in the *Title II Order* ''offers no real relief from the unintended consequences of the Internet Conduct Standard.'' The record reflects that the Internet Conduct Standard and the advisory opinions available under it ''[are] completely divorced from the rapid pace of innovation in the mobile marketplace'' because ISP innovations would be indefinitely delayed while the Commission conducts a searching analysis of any such offering that might violate the standard. The fact that no ISP has requested an advisory opinion in the two years since the launch of the advisory opinion process reinforces our conclusion that the process is too uncertain and costly. As such, we reject commenters' assertions to the contrary.

b. Paid Prioritization

234. We also decline to adopt a ban on paid prioritization. The transparency rule we adopt, along with enforcement of the antitrust and consumer protection laws, addresses many of the concerns regarding paid prioritization raised in this record. Thus, the incremental benefit of a ban on paid prioritization is likely to be small or zero. On the other hand, we expect that eliminating the ban on paid prioritization will help spur innovation and experimentation, encourage network investment, and better allocate the costs of infrastructure, likely benefiting consumers and competition. For these reasons and because we find that eliminating the ban on paid prioritization arrangements could lead to lower prices for consumers for broadband internet access service, we find that our action benefits low-income communities and non-profits, and we reject arguments to the contrary. We reject the argument that the benefits of our elimination of the paid prioritization ban must be ''uniform across providers or geographic areas.'' This is an unnecessarily high and rigid threshold. The public—including low-income communities—benefits, and that is enough. Thus, the costs (forgone benefits) of the ban are likely significant and outweigh any incremental benefits of a ban on paid prioritization.

235. *Innovation.* We anticipate that lifting the ban on paid prioritization will increase network innovation, as the record demonstrates that the ban on paid prioritization agreements has had, and will continue to have, a chilling effect on network innovation generally, and on the development of high quality-of-service (QoS) arrangements—which require guarantees regarding packet loss, packet delay, secure connectivity, and guaranteed bandwidth—in particular. As CTIA argues, the *Title II Order* implicitly recognized this point, but its insistence that these arrangements be treated as non-broadband internet access data services reduced the flexibility of ISPs and edge providers, created uncertainty about the line between non-broadband internet access data services and broadband internet access services, and likely reduced innovation. The record reflects that the

ban on paid prioritization has hindered the deployment of these services by denying network operators the ability to price these services, an important tool for appropriately allocating resources in a market economy. We reject commenter assertions that banning the use of price as a signal provides more accurate price signals. Relatedly, we reject the argument that non-price signals, including user-directed prioritization, are by themselves sufficient to allow innovation and development in this area, because in a market system, price signals are generally necessary to efficiently allocate resources. Further, as commenters note, there has been significant uncertainty about the scope of the prohibition on paid prioritization arrangements. Some commenters contend that this uncertainty surrounding network operators' ability to provide ''differentiated services'' has cast a shadow on the development of next generation networks.

236. We also expect that ending the flat ban on paid prioritization will encourage the entry of new edge providers into the market, particularly those offering innovative forms of service differentiation and experimentation. As ITTA explains, ''[i]t is routine for entities that do business over the internet to pay for a variety of services to provide an optimal user experience for their customers. Companies have been doing so for years without disturbing the thriving internet ecosystem.'' We therefore reject arguments that the ban is necessary to provide a level playing field for edge providers. Indeed, in other areas of the economy, paid prioritization has helped the entry of new providers and brands. It is therefore no surprise that paid prioritization has long been used throughout the economy. Paid prioritization could allow small and new edge providers to compete on a more even playing field against large edge providers, many of which have CDNs and other methods of distributing their content quickly to consumers. We thus reject arguments that allowing pro-competitive paid prioritization will reduce the entry and expansion of small, new edge providers. In so finding, we do not mean to suggest that CDN services themselves constitute paid prioritization.

237. *Efficiency.* We find that a ban on paid prioritization is also likely to reduce economic efficiency, also likely harming consumer welfare. This finding is supported by the economic literature on two-sided markets such as this one, and the record. If an ISP faces competitive forces, a prohibition against two-sided pricing (*i.e.,* a zero-price rule), while benefiting edge providers, typically would harm both subscribers and ISPs. Moreover, the level of harm to subscribers and ISPs generally would exceed the gain obtained by the edge providers and, thus, would lead to a reduction in total economic welfare. The reasons for this are straightforward. Some edge services and their associated end users use more data or require lower latency; this may be the case, for example, with high-bandwidth applications such as Netflix, which in the first half of 2016 generated more than a third of all North American internet traffic. Without paid prioritization, ISPs must recover these costs solely from end users, but ISPs cannot always set prices targeted at the relevant end users. The resulting prices create inefficiencies. Consumers who do not cause these costs must pay for them, and end users who do cause these costs to some degree free-ride, inefficiently distorting usage of both groups. When paid prioritization signals to edge providers the costs their content or applications cause, edge providers can undertake actions that would improve the efficiency of the two-sided market. For example, they could invest in compression technologies if those come at a lower cost than paid prioritization, enhancing efficiency, or, if they have a pricing relationship with their end users, they could directly charge the end user for priority, leading those end users to adjust their usage if the user's value does not exceed the service's cost, again enhancing economic efficiency. We disagree with commenters asserting that this is likely to significantly burden edge providers by requiring them to negotiate with hundreds of ISPs because as discussed, paid prioritization is likely to be focused only on applications that require special QoS guarantees. And to the extent an ISP has market power, antitrust and consumer protection laws could be used to address ISPs' anti-competitive paid prioritization practices. Given the extent of competition in internet access supply, we find a ban on paid prioritization is unlikely to improve economic efficiency, and if it were to do so it would only be by accident (*i.e.,* if the efficient second-best was to require ISPs to provide access to edge providers at a zero price).

238. *Network investment.* The mere possibility that charging edge providers may sometimes be economically inefficient is not sufficient to overcome the general presumption that allowing firms additional pricing tools generally enhances economic efficiency, especially when investments must be made as demand rises to reduce congestion. The economic literature and the record both suggest that paid prioritization can increase network investment. For example, one study presents a model in which two competing ISPs serve a continuum of edge providers. It finds that allowing ISPs to offer paid prioritization leads to higher investment in broadband capacity as well as greater innovation on the edge provider side of the market. According to the authors, paid prioritization causes the ISP to invest more in network capacity, reducing congestion and thereby inducing congestion-sensitive edge providers to enter the market. The increased ISP investment occurs for two reasons: Incremental investment is more profitable because the ISP can now charge edge providers in addition to subscribers, and paid prioritization allows more edge providers who need a high quality of service to enter the market. Another study also develops a theoretical model in which paid prioritization always results in higher ISP investment. We anticipate that lifting the ban on paid prioritization may also increase the entry of new ISPs and encourage current providers to expand their networks by making it easier for ''ISPs [to] benefit from their new investments.'' Thus, we reject the argument that the ban is necessary to ensure long-term network investment.

239. We reject assertions that allowing paid prioritization would lead ISPs to create artificial scarcity on their networks by neglecting or downgrading non-paid traffic. This argument has been strongly criticized as having ''no support in economic theory that such incentives exist or are sufficiently strong as to outweigh countervailing incentives.'' Moreover, as discussed above, in practice paid prioritization is likely to be used to deliver enhanced service for applications that need QoS guarantees. As AT&T explains, ''[l]ast-mile access is not a zero-sum game, and prioritizing the packets for latency-sensitive applications will not typically degrade other applications sharing the same infrastructure,'' such as email, software updates, or cached video. We thus reject arguments premised on the theory that ISPs could and would act to create artificial scarcity on their networks and thereby broadly require paid prioritization. Because of these practical limits on paid prioritization, we reject the argument that non-profits and independent and diverse content producers, who may be less likely to need QoS guarantees, will be harmed by lifting the ban.

240. *Reduction in price to consumers.* Eliminating the ban on paid prioritization arrangements could lead to lower prices for consumers for broadband internet access service, as ISPs may be able to recoup some of their costs from edge providers. Although we do not premise our analysis on the expectation of a total pass-through of these revenues to end-users, we find no support for assumptions that there would be no pass-through of revenues at all. As one study explains, the *Title II Order's* ban on paid prioritization arrangements ''can lead to higher prices that are charged to all end users—regardless of whether or not the end user subscribes to the content service that causes the congestion.''

241. *Closing the digital divide.* Paid prioritization can also be a tool in helping close the digital divide by reducing broadband internet access service subscription prices for consumers. The zero-price rule imposed by the blanket ban on paid prioritization ''imposes a regressive subsidy, transferring wealth from the economically disadvantaged to the comparatively rich by forcing the poor to support high-bandwidth subscription services skewed towards the wealthier.'' One study concludes that ''[a]t the margin, this would cause the lowest-end users to simply stop subscribing to internet services, which would further exacerbate the existing digital divide.'' Accordingly, economic ''models . . . suggest that network neutrality regulation is more likely to worsen than improve the digital divide.'' Because ending the ban on paid prioritization is likely to help close the digital divide, we reject assertions to the contrary that ending the paid prioritization rule's effective subsidization of high-bandwidth services will harm consumers overall. We reject the contrary argument that ISPs will engage in ''virtual redlining'' because, as discussed, paid prioritization is likely to lead to increased network investment and lower costs to end users, particularly benefiting those on the wrong side of the digital divide. Allowing ISPs to charge both sides of the market could also enable additional arrangements to provide special low-cost broadband access, increasing broadband adoption among lower-income consumers. For example, permitting ''differential pricing'' may enable the development of ''[p]latforms that are both free and tailored to [people without internet access],'' similar to Facebook's Free Basics program in developing countries. Nokia suggests that ''a start-up company that wants to reach new customers with a bandwidth intensive application that will not work as intended below a certain service tier . . . should be allowed to offer to boost [a] consumer's bandwidth so he or she can experience their product as intended,'' and argues such arrangements ''are most likely to benefit lower-income consumers, since those that already purchase high-tier services are less likely to benefit from third-party-pays QoS enhancements.''

242. *Addressing Harms.* We find that antitrust law, in combination with the transparency rule we adopt, is particularly well-suited to addressing any potential or actual anticompetitive harms that may arise from paid prioritization arrangements. The transparency rule will require ISPs to disclose any practices that favor some internet traffic over other traffic, if the practices are paid or benefit any affiliated entity. The transparency rule will provide greater information to all participants in the internet ecosystem and empower them to act if they identify any potential anticompetitive conduct. Antitrust law is ideally situated to determine whether a specific arrangement, on balance, is anti-competitive or pro-competitive. We therefore reject the argument that the paid prioritization ban should be modified to more squarely focus on anticompetitive conduct. While these alternative formulations may not be as problematic as the blanket ban, for the reasons discussed above, antitrust law is better placed than *ex ante* regulations to balance the potential benefits and harms of new arrangements. Moreover, to the extent that they exist, the potential harms to internet openness stemming from paid prioritization arrangements are outweighed by the distortions that banning paid prioritization would impose. Under the antitrust laws, a paid prioritization agreement challenged as anticompetitive would be evaluated under the case-specific rule of reason. Paid prioritization would be prohibited only when it harms competition, for example, by inappropriately favoring an affiliate or partner in a way that ultimately harms economic competition in the relevant market. The case-by-case, deliberative nature of antitrust is well-suited for this area, as it is difficult to determine on an *ex ante* basis which paid prioritization agreements are anticompetitive, and in fact, no internet paid prioritization agreements have yet been launched in the United States, rendering any concerns about such practices purely theoretical at this time. We therefore reject arguments that *ex ante* rules are preferable.

243. Lastly, antitrust laws would not prevent an ISP from exercising legally-acquired market power to earn market rents, so long as it is not used anticompetitively, but we do not consider any harms that might result from this to be so large as to justify the harms that a total prohibition on paid prioritization would entail. For harms from the exercise of legally-acquired market power to arise, the ISP must have market power over the edge provider. However, as shown above, ISPs usually face at least moderate competition, and all the more so taking a medium-term perspective. Consequently, the harms that could possibly occur from exercise of such power are not likely to be large. Further, the extent to which any harms actually occur will be muted by two factors. First, ISPs have strong incentives to keep edge provider output high (as this increases the value end users see in subscribing to the ISP, and signals to edge providers that the ISP recognizes their contribution to the platform). Thus, harm will only occur to the extent the ISP is unable to devise pricing schemes that preserve edge providers' incentives to bring content while maximizing the ISP's profit (the exercise of market power is only harmful when it excludes what would otherwise be efficient purchases of access). Second, as discussed above, increased prices from edge providers are to a potentially significant extent passed through to end users in the form of lower prices for broadband internet access service, with the result that end user demand for edge provider content is increased. The extent of such pass-through offsets these harms. Accordingly, we expect the harms from dictating pricing uniformity to edge providers exceed any harms that may emerge from a lack of such regulation.

c. Blocking and Throttling

244. We find the no-blocking and no-throttling rules are unnecessary to prevent the harms that they were intended to thwart. We find that the transparency rule we adopt today—coupled with our enforcement authority and with FTC enforcement of ISP commitments, antitrust law, consumer expectations, and ISP incentives—will be sufficient to prevent these harms, particularly given the consensus against blocking practices, as reflected in the scarcity of actual cases of such blocking. For the same reasons, we reject alternative formulations of the no-blocking and no-throttling rules.

245. *Transparency rule.* As discussed above, the transparency rule we adopt, combined with antitrust and consumer

protection laws, obviate the need for conduct rules by achieving comparable benefits at lower cost. In addition, several factors specific to blocking and throttling will work to prevent the potential harms that could be caused by blocking and throttling. First, most attempts by ISPs to block or throttle content will likely be met with a fierce consumer backlash. As one commenter explains, such blocking or throttling is ''unlikely to occur, because it must be sufficiently blatant to be of any benefit to the ISP, that [it] only increases the likelihood of getting caught.'' Second, numerous ISPs, including the four largest fixed ISPs, have publicly committed not to block or throttle the content that consumers choose. The transparency rule will ensure that ISPs reveal any deviation from these commitments to the public, and addresses commenter concerns that consumers will not understand the source of any blocking or throttling. Violations of the transparency rule will be subject to our enforcement authority. Furthermore, the FTC possesses the authority to enforce these commitments, as it did in *TracFone.* Third, the antitrust laws prohibit anticompetitive conduct, and to the extent blocking or throttling by an ISP may constitute such conduct, the existence of these laws likely deters potentially anticompetitive conduct. Finally, ISPs have long-term incentives to preserve internet openness, which creates demand for the internet access service that they provide.

246. *Consensus against blocking and throttling.* We emphasize once again that we do not support blocking lawful content, consistent with long-standing Commission policy. The potential consequences of blocking or throttling lawful content on the internet ecosystem are well-documented in the record and in Commission precedent. Stakeholders from across the internet ecosystem oppose the blocking and throttling of lawful content, including ISPs, public interest groups, edge providers, other content producers, network equipment manufacturers, government entities, and other businesses and individuals who use the internet. This consensus is among the reasons that there is scant evidence that end users, under different legal frameworks, have been prevented by blocking or throttling from accessing the content of their choosing. It also is among the reasons why providers have voluntarily abided by no-blocking practices even during periods where they were not legally required to do so. As to free expression in particular, we note that none of the actual incidents discussed in the *Title II Order* squarely implicated free speech. If anything, recent evidence suggests that hosting services, social media platforms, edge providers, and other providers of virtual internet infrastructure are more likely to block content on viewpoint grounds. Furthermore, in the event that any stakeholder were inclined to deviate from this consensus against blocking and throttling, we fully expect that consumer expectations, market incentives, and the deterrent threat of enforcement actions will constrain such practices *ex ante.* To the extent that these incentives prove insufficient and any stakeholder engages in such conduct, such practices can be policed *ex post* by antitrust and consumer protection agencies.

247. Additionally, as urged by the prior Commission when defending the *Title II Order,* and as confirmed in the concurrence in the denial of rehearing *en banc* by the two judges in the majority in *USTelecom,* the *Title II Order* allows ISPs to offer curated services, which would allow ISPs to escape the reach of the *Title II Order* and to filter content on viewpoint grounds. In practice, the *Title II Order* ''deregulates curated Internet access relative to conventional Internet access [and] may induce ISPs to filter content more often,'' rendering the no-blocking and no-throttling rules ineffectual as long as an ISP disclosed it was offering curated services. The curated services exemption arising from the *Title II Order* confirms our judgment that transparency requirements, rather than conduct rules, are the most effective means of preserving internet openness.

3. The Record Does Not Identify Authority for Comprehensive Conduct Rules

248. The record in this proceeding does not persuade us that there are any sources of statutory authority that individually, or in the aggregate, could support conduct rules uniformly encompassing all ISPs. We find that provisions in Section 706 of the 1996 Act directing the Commission to encourage deployment of advanced telecommunications capability are better interpreted as hortatory rather than as independent grants of regulatory authority. We also are not persuaded that Section 230 of the Communications Act is a grant of regulatory authority that could provide the basis for conduct rules here. Nor does the record here reveal other sources of authority that collectively would provide a sure foundation for conduct rules that would treat all similarly-situated ISPs the same.

a. Section 706 of the 1996 Act

249. We conclude that the directives to the Commission in Section 706(a) and (b) of the 1996 Act to promote deployment of advanced telecommunications capability are better interpreted as hortatory, and not as grants of regulatory authority. We thus depart from the interpretation of those provisions adopted by the Commission beginning in the *Open Internet Order,* and return to a reading of that language in Section 706 of the 1996 Act consistent with the Commission's original interpretation.

250. We adopt this reading in light of the text, structure, and history of the 1996 Act and Communications Act. Section 706(a) directs that:

> The Commission and each State commission with regulatory jurisdiction over telecommunications services shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.

In turn, Section 706(b) provides in pertinent part that ''[i]f the Commission's determination'' under an annual inquiry into deployment of advanced telecommunications capability ''is negative, it shall take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market.''

251. The relevant text of Section 706(a) and (b) of the 1996 Act is reasonably read as exhorting the Commission to exercise market-based or deregulatory authority granted under other statutory provisions, particularly the Communications Act. The Commission otherwise has authority under the Communications Act to employ price cap regulation for services subject to rate regulation; to employ regulatory forbearance; to promote competition in the local telecommunications market; and to remove barriers to infrastructure investment. The Commission thus need not interpret Section 706 as an independent grant of regulatory authority to give those provisions meaning. Further, consistent with

normal canons of statutory interpretation, the language ''other regulating methods'' in Section 706(a) is best understood as consistent with the language that precedes it, and thus likewise reasonably is read as focused on the exercise of other statutory authority like that under the Communications Act, rather than itself constituting an independent grant of regulatory authority. This view also comports with the Commission's original interpretation of the language of Section 706(a), avoids rendering the provisions of Section 706(a) or (b) surplusage, and does not otherwise conflict with the statutory text. Although the term ''shall'' ''generally indicates a command that admits of no discretion,'' because the Commission has other authority under the Communications Act that it can exercise consistent with the direction in Section 706(a) and (b) of the 1996 Act, our interpretation is not at odds with the use of ''shall encourage'' in Section 706(a) or ''shall take immediate action'' in Section 706(b). In particular, Section 706(a) provides a general, ongoing exhortation for the Commission to encourage deployment of advanced telecommunications capability through exercise of other authority, while Section 706(b) directs the Commission to do so by taking ''immediate action'' in the event of a negative finding under the Section 706(b) inquiry. The direction in Section 706(b) of the 1996 Act that the Commission exercise other authority by taking ''immediate action'' in the event of a negative finding under the Section 706(b) inquiry could, for example, form part of the basis for petition(s) for Commission rulemaking based on such other authority in the wake of a negative finding in the Section 706(b) inquiry. Although the Tenth Circuit concluded that the possibility of such an interpretation of Section 706(b) would not unambiguously compel the conclusion that the provision is hortatory, the court's decision does not limit our ability to rely on that as a factor that persuades us that Section 706(b) is better read as hortatory.

252. We not only find that the relevant language in Sections 706(a) and (b) of the 1996 Act permissibly can be read as hortatory, but are persuaded that is the better interpretation. Arguments in the record supporting Section 706 of the 1996 Act as granting regulatory authority generally contend that this is a permissible interpretation but do not persuade us it is the better reading. For one, although the relevant provisions in Section 706(a) and (b) identify certain regulatory tools (like price cap regulation and regulatory forbearance) and marketplace outcomes (like increased competition and reduced barriers to infrastructure investment), they nowhere identify the providers or entities whose conduct could be regulated under Section 706 if interpreted as a grant of such authority. This lack of detail stands in stark contrast to Congress's approach in many other provisions enacted or modified as part of the 1996 Act that clearly are grants of authority to employ similar regulatory tools or pursue similar marketplace outcomes and that directly identify the relevant providers or entities subject to the exercise of that regulatory authority. The absence of any similar language in Section 706(a) and (b) of the 1996 Act supports our view that those provisions are better read as directing the Commission regarding its exercise of regulatory authority granted elsewhere. Our consideration of this as one factor persuading us that Section 706 of the 1996 Act is better read as hortatory is not undercut by our reliance on Section 257 as authority for disclosure requirements that provide us information needed to identify potential barriers to entry and investment while also helping mitigate any such barriers. Although Section 257 does not expressly identify entities from which we can obtain information, other aspects of Section 257 persuade us that our interpretation of that provision as a grant of authority to obtain the information we require from ISPs is necessary for us to carry out our duties under that provision for the reasons discussed above. Here, by contrast, this consideration combines with many others to collectively persuade us that Section 706 of the 1996 Act is better read as hortatory.

253. Indeed, under the *Open Internet Order*'s theory of Section 706(a) and (b) as independent grants of authority, the Commission could rely on those provisions to impose duties or adopt regulations equivalent to those directly addressed by the provisions of the Communications Act focused on promoting competition and/or deployment that go beyond the entities, contexts, and circumstances that bounded the Communications Act provisions. Section 706(a) and (b) direct the Commission to promote competition in the local telecommunications market and otherwise encourage the deployment of advanced telecommunications capability. Promoting local competition and/or encouraging the deployment of telecommunications networks likewise are key objectives of a number of provisions added to the Communications Act by the 1996 Act, each of which were limited in scope to address the actions of particular, defined entities and were triggered in particular, defined circumstances. For example, the 1996 Act amended Section 224 of the Communications Act to expand specified communications providers' access to utilities' poles, ducts, conduit, and rights-of-way to ''ensure that the deployment of communications networks and the development of competition are not impeded by private ownership and control of the scarce infrastructure and rights-of-way that many communications providers must use in order to reach customers.'' The market-opening framework in Sections 251(a)–(c), 252, and 271 of the Communications Act, applicable respectively to telecommunications carriers, LECs, incumbent LECs, and BOCs, also were added by the 1996 Act. The 1996 Act also added provisions to the Communications Act to eliminate regulatory barriers to competition and network deployment in certain defined circumstances. We are skeptical that at the same time Congress enacted carefully-tailored regulatory regimes codified in various provisions of the Communications Act, it simultaneously granted the Commission redundant authority to impose those same duties or adopt similar regulatory treatment largely unbound by that tailoring in a ''Miscellaneous'' provision of the same legislation.

254. Our interpretation of Section 706 of the 1996 Act as hortatory also is supported by the implications of the *Open Internet Order*'s interpretation for the regulatory treatment of the internet and information services more generally. The interpretation of Section 706(a) and (b) that the Commission adopted beginning in the *Open Internet Order* reads those provisions to grant authority for the Commission to regulate information services so long as doing so could be said to encourage deployment of advanced telecommunications capability at least indirectly. A reading of Section 706 as a grant of regulatory authority that could be used to heavily regulate information services—as under the Commission's prior interpretation—is undercut by what the Commission has found to be Congress' intent in other provisions of the Communications Act enacted in the 1996 Act—namely, to distinguish between telecommunications services and information services, with the latter left largely unregulated by default.

255. In addition, the 1996 Act added Section 230 of the Communications Act, which provides, among other things, that ''[i]t is the policy of the United States . . . to preserve the vibrant and competitive free market that presently exists for the internet and other interactive computer services, unfettered by Federal or State regulation.'' The *Open Internet Order* asserted that ''[m]aximizing end-user control is a policy goal Congress recognized in Section 230(b) of the Communications Act.'' In full, however, Section 230(b)(3) states that ''[i]t is the policy of the United States—. . . to encourage *the development of technologies* which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services.'' Although the rules in the *Open Internet Order* would have considered the extent to which a network management practice is subject to end-user control when evaluating the reasonableness of discrimination, that *Order* does not explain why that (or conduct rules more generally) would better encourage the development of technologies for end-user control than would be the case without such rules. The *Title II Order* is similar in this regard. Assertions of the sort in those *Orders* thus provide no basis for concluding that regulating ISPs is likely to better ''encourage the development of technologies which maximize user control'' than the absence of such regulations. A necessary implication of the prior interpretation of Section 706(a) and (b) as grants of regulatory authority is that the Commission could regulate not only ISPs but also edge providers or other participants in the internet marketplace—even when they constitute information services, and notwithstanding Section 230 of the Communications Act—so long as the Commission could find at least an indirect nexus to promoting the deployment of advanced telecommunications capability. For example, some commenters argue that ''it is content aggregators (think Netflix, Etsy, Google, Facebook) that probably exert the greatest, or certainly the most direct, influence over access.'' Section 230 likewise is in tension with the view that Section 706(a) and (b) grant the Commission regulatory authority as the Commission previously claimed. These inconsistencies are avoided, however, if the deployment directives of Section 706(a) and (b) are viewed as hortatory.

256. Prior Commission guidance regarding how it would interpret and apply the authority it claimed under Section 706(a) and (b) of the 1996 Act does not allay our concerns with the interpretation of those provisions as grants of regulatory authority. For example, the *Open Internet Order* stated that Section 706 authority only would be used to regulate ''communication by wire or radio,'' consistent with Sections 1 and 2 of the Communications Act. Other provisions enacted in the 1996 Act that clearly grant authority to promote competition or network deployment themselves generally address either facilities being used to engage in communications or the communications themselves, however. Thus, applying Section 706 of the 1996 Act only to communication by wire or radio would not prevent the Commission from replicating such requirements. In addition, broadband internet access service itself involves communications by wire or radio—as do many other internet information services. Consequently, this Commission guidance also does not resolve tensions between the Commission's prior theory of Section 706 authority and the 1996 Act's general deregulatory approach to information services or Section 230's enunciation of the federal policy ''to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation.''

257. Nor are the specific, problematic implications we identify with the Commission's prior interpretation of Section 706 as a grant of authority avoided by the Commission's explanation that its use of such authority must encourage the deployment of advanced telecommunications capability by promoting competition or removing barriers to infrastructure investment. Given the already-recognized nexus between the relevant Communications Act provisions and the promotion of network deployment and/or local competition, the record provides no reason to believe the Commission would have difficulty demonstrating at least an indirect effect on the deployment of advanced telecommunications capability should it wish, as a policy matter, to impose equivalent requirements under an assertion of authority under Section 706(a) and (b) without adhering to limitations or constraints present in the Communications Act provisions. Perhaps if the Commission required a tighter connection between a given regulatory action and promoting deployment of advanced telecommunications capability, it might reduce the magnitude of the inconsistency somewhat, but the record does not reveal that such an approach would eliminate it entirely or even diminish it to such an extent as to materially strengthen the argument for interpreting the relevant provisions of Section 706(a) and (b) as grants of regulatory authority. Such proposals also do not address the other reasons for viewing Sections 706(a) and (b) as hortatory in light of the statutory text and structure. Likewise, the *Open Internet Order* shows that the Commission can readily find that criterion met in order to regulate an information service like broadband internet access service notwithstanding the 1996 Act's general deregulatory approach for information service and the deregulatory internet policy specified in Section 230 of the Act.

258. Guidance in the *Open Internet Order* also asserted that the exercise of Section 706 authority could not be ''inconsistent with other provisions of law,'' but effectively viewed that as a very low bar to satisfy, finding it reasonable to exercise Section 706 authority to impose duties on information service providers that did not meaningfully ''differ[ ] from the nondiscrimination standard applied to common carriers generally.'' So long as regulations fall outside the constraints of Sections 3(51) and 332(c)(2) of the Act—upon which the reversal in *Verizon* was based—neither precedent nor the record here demonstrate that the reference to ensuring that any Section 706 authority be exercised ''[ ]consistent with other provisions of law'' would meaningfully preclude the types of requirements that we find difficult to square with the carefully tailored authority in the Communications Act. Conversely, if the fact that a matter is addressed by the Communications Act were a more serious constraint on claimed Section 706(a) and (b) authority, it is unclear how meaningful such claimed authority would be in practice. It thus likewise would be unclear what affirmative reason we would have for interpreting them as grants of authority contrary to the other indicia that they are hortatory. For example, Sections 201(b) and 202(a) of the Act prohibit unjust and unreasonable rates and practices and unjust an unreasonable discrimination with respect to common carrier services. If that precluded reliance on Section 706(a) and (b) to impose analogous restrictions unbounded by the self-described scope of Sections 201(b) and

202(a), the Commission seemingly would be left with no authority to adopt conduct rules of the sort at issue here after reclassification. Nor do commenters citing other possible uses of Section 706(a) and (b) as authority explain how such exercise of authority could be reconciled with the view that it would be a serious constraint on claimed Section 706(a) and (b) authority if a matter is addressed by the Communications Act (such as in Sections 201 and 202, the market-opening provisions in Sections 251–261, provisions designed to address barriers to infrastructure deployment like Sections 224 and 254, or other provisions). Thus, interpreting the Communications Act as a more serious constraint might partially address one basis for interpreting Section 706(a) and (b) as hortatory, but simultaneously would undercut the arguments in the record for interpreting them as grants of authority.

259. We also are unpersuaded by the *Open Internet Order's* citation of legislative history to support its interpretation of Section 706(a) and (b) as grants of regulatory authority. The *Open Internet Order* cited a Senate report for the proposition that those provisions of Section 706 ''are 'a necessary fail-safe' to guarantee that Congress's objective is reached.'' The Commission itself previously noted the ambiguous significance of that language. In addition, the relevant Senate bill at the time of the Senate report would have directed the Commission, in the event of a negative finding in its deployment inquiry, to ''take immediate action *under this section*'' and stated that ''it may preempt State commissions that fail to act to ensure such availability.'' The final, enacted version of Section 706(b), by contrast, omitted the language ''under this section,'' and also omitted the express preemption language, leaving it ambiguous whether the statement in the Senate report was premised on statutory language excluded from the enacted provision. For its part, the conference report neither repeats the ''fail-safe'' language from the Senate report nor elaborates on the modifications made to the language in the Senate bill. Even if it were appropriate to consult legislative history, we conclude that that history is ultimately ambiguous and are not persuaded that it supports interpreting Section 706(a) and (b) of the 1996 Act as grants of regulatory authority.

260. The inability to impose penalties to enforce violations of requirements adopted under Section 706(a) and (b) of the 1996 Act also undercuts arguments that those provisions should be interpreted as grants of regulatory authority. Section 706 of the 1996 Act was not incorporated into the Communications Act, nor does the 1996 Act provide for it to be enforced as part of the Communications Act. Where Congress intended a statute outside the Communications Act to be enforced as if it were part of the Communications Act, it has expressly stated that in the relevant statute. Thus, the Communications Act provisions generally authorizing penalties do not apply to Section 706 of the 1996 Act or rules adopted thereunder. In pertinent part, to enforce rules under Section 503(b)(1) of the Communications Act, the rules must be ''issued by the Commission under [the Communications] Act.'' Other penalty provisions in the Communications Act are specific to narrower topics or the statutory section in which they appear, and thus also would not be authorized penalties for violations of rules implementing Section 706 of the 1996 Act. Although the *Title II Order* claimed that Section 706 of the 1996 Act included an implicit grant of enforcement authority, even under that theory, an 'implicit' grant of enforcement authority might enable actions like declaratory rulings or cease-and-desist orders, but would not appear to encompass authority to impose penalties given the absence of statutory language clearly granting that authority. As a fallback, the *Title II Order* asserted, without elaboration, that by relying on the grant of rulemaking authority in Section 4(i) of the Communications Act to adopt rules implementing Section 706 of the 1996 Act, the resulting rules would be within the scope of those for which forfeitures could be imposed under the Communications Act.

261. We believe that the better view is that reliance on the Communications Act for rulemaking authority alone would not render the resulting rules ''issued by the Commission under [the Communications] Act'' as required to trigger the forfeiture provisions of Section 503 of the Act. Given that Section 503 is about enforcement consequences from violating standards of conduct specified by, among other things, relevant Commission rules, we think that language is best read as focused on rules implementing the Commission's substantive regulatory authority under the Communications Act. Insofar as the substantive standard to which an entity is being held flows not from the Communications Act but from the Commission's assertion of authority under the 1996 Act, we believe that our forfeiture authority under Section 503 of the Communications Act consequently would not encompass such rules. The practical inability to back up rules implementing Section 706 with penalties thus undercuts the *Open Internet Order's* claim that its interpretation would mean that Section 706 of the 1996 Act could serve as a '' 'fail safe' that 'ensures' the Commission's ability to promote advanced services.'' Under our interpretation, by contrast, Section 706(a) and (b) of the 1996 Act exhort the Commission to use Communications Act authority that it does, in fact, have authority to enforce through penalties. We thus are persuaded that Section 706(a) and (b) of the 1996 Act are better interpreted as hortatory, rather than as grants of regulatory authority. Because we otherwise find ample grounds to conclude that Section 706(a) and (b) of the 1996 Act are not grants of regulatory authority, we need not, and thus do not, address arguments claiming additional reasons to reach that same conclusion. Likewise, because we conclude that Section 706(a) and (b) do not grant regulatory authority at all, we need not, and do not, address the issue of whether any authority under those provisions is, at most, deregulatory authority. We also reject arguments that we should wait on the completion of the latest inquiry under Section 706(b) before evaluating the interpretation of Section 706. Under the prior interpretation, Section 706(a) was a grant of authority independent of Section 706(b), and particularly insofar as we would not interpret Section 706(b) as a grant of authority in any case, we see no reason to wait on the results of the inquiry under that provision.

262. Our conclusion that Section 706 of the 1996 Act is better read as hortatory is not at odds with the fact that two courts concluded that the Commission permissibly could adopt the alternative view that it is a grant of regulatory authority. Those courts did not find that the Commission's previous reading was the only (or even the most) reasonable interpretation of Section 706, leaving the Commission free to adopt a different interpretation upon further consideration. Indeed, the DC Circuit in *Verizon* observed that the language of Section 706(a) ''certainly could be read'' as hortatory. The court also recognized as much with respect to Section 706(b), given its lack of clarity. Those cases thus leave us free to act on our conclusion here that Section 706 is most reasonably read as hortatory, not as an independent grant of regulatory authority.

263. We also disagree with arguments that we should keep in place a misguided and flawed interpretation of Section 706(a) and (b) of the 1996 Act to preserve any existing rules or our ability going forward to take regulatory action based on such assertions of authority. We are not persuaded by concerns that reinterpreting Section 706(a) and (b) of the 1996 Act in this manner could undercut Commission rules adopted in other contexts because such arguments do not identify circumstances—nor are we otherwise aware of any—where the prior interpretation of the relevant provisions of Section 706(a) and/or (b) was, in whole or in part, a necessary basis for the rules. Similarly, concerns that our interpretation will limit states' regulatory authority do not identify with specificity any concrete need for such authority beyond any authority provided by state law, even assuming *arguendo* that such authority could have flowed from the prior interpretation of Section 706(a). MMTC and NABOB express concerns that disavowing Section 706 as a source of authority could constrain the Commission's ability to address ''digital redlining.'' They do not explain, however, why other statutory provisions such as Section 254 are inadequate to address issues of unserved or underserved communities should more ultimately be found to be needed beyond the Commission's other efforts to promote broadband deployment more generally. We also are unpersuaded by arguments for maintaining the prior interpretation in a general effort to retain greater authority to regulate ISPs. Given that agencies like the Commission are creatures of Congress, and given our responsibility to bring to bear appropriate tools when interpreting and implementing the statutes we administer, we find it more appropriate to adopt what we view as the far better interpretation of Section 706(a) and (b) given both the specific context of Section 706 and the broader statutory context. If Congress wishes to give the Commission more explicit direction to impose certain conduct rules on ISPs, or to impose such rules itself within constitutional limits, it is of course free to do so. We decline to read such wide-ranging authority, however, into provisions that, on our reading today, are merely hortatory, and are at best ambiguous.

264. Independently, we also are not persuaded that the prior interpretation of Section 706(a) and (b) of the 1996 Act would better advance policy goals relevant here. We have other sources of authority on which to ground our transparency requirements without adopting an inferior interpretation of Section 706(a) and (b). With respect to conduct rules, in addition to our decision that limits on our legal authority counsel against adopting such rules, we separately find that such rules are not otherwise justified by the record here. Consequently, we need not stretch the words of Section 706 of the 1996 Act because we can protect internet freedom even without it. Rather, we are persuaded to act in the manner that we believe reflects the best interpretation given the text and structure of the Act, the legislative history, and the policy implications of alternative interpretations.

b. Section 230 of the Communications Act

265. We are not persuaded that Section 230 of the Communications Act grants the Commission authority that could provide the basis for conduct rules here. In *Comcast,* the DC Circuit observed that the Commission there ''acknowledge[d] that Section 230(b)'' is a ''statement [ ] of policy that [itself] delegate[s] no regulatory authority.'' Although the *Internet Freedom NPRM* sought comment on Section 230, the record does not reveal an alternative interpretation that would enable us to rely on it as a grant of regulatory authority for rules here. Instead, we remain persuaded that Section 230(b) is hortatory, directing the Commission to adhere to the policies specified in that provision when otherwise exercising our authority. In addition, even assuming *arguendo* that Section 230 could be viewed as a grant of Commission authority, we are not persuaded it could be invoked to impose regulatory obligations on ISPs. In particular, Section 230(b)(2) provides that it is U.S. policy ''to preserve the vibrant and competitive free market that presently exists for the internet and other interactive computer services, unfettered by Federal or State regulation.'' Adopting requirements that would impose federal regulation on broadband internet access service would be in tension with that policy, and we thus are skeptical such requirements could be justified by Section 230 even if it were a grant of authority as relevant here. Consequently, although Section 230 is relevant to our interpretation and implementation of other statutory provisions, the record does not reveal a basis for relying on it as a source of regulatory authority for conduct rules here.

c. Other Provisions in Titles II, III, and VI of the Communications Act

266. Other identified sources of potential authority appear significantly limited and not capable of bringing all ISPs under one comprehensive regulatory framework. The *Open Internet Order* cited provisions in Titles II, III, and VI of the Communications Act in support of the conduct rules adopted there, and some commenters echo those theories—generally without elaboration. Some comments identified possible sources of authority for rules other than the sorts of conduct rules at issue in this proceeding, and we do not discuss such other sources of authority here. We also are not persuaded by claims that Section 1 of the Act is a grant of regulatory authority here. In this very context, the DC Circuit has held that Section 1 is better understood as a statement of Congressional policy. A number of those assertions of authority appear of uncertain validity on this record. The identified additional sources of potential authority, even collectively, do not appear to provide a sound basis for conduct rules that would encompass all ISPs. We do not formally resolve the potential scope and contours of those claims of authority given the significant limitations in the record here and the potential for unanticipated spill-over effects, but the potential weaknesses—unresolved on this record—nonetheless make us cautious about seeking to rely on them at this time. Insofar as our position regarding these additional potential sources of authority is at least a partial change in course from the positions taken in the *Open Internet Order*—which reflected a broader and/or less questioning view of these theories—we conclude that such a change in course is warranted by our analysis here, which identifies details or nuances in the required analysis that were not adequately addressed in the *Open Internet Order* or resolved on this record. Further, even as to those ISPs that could be subject to conduct rules under those statutory theories, in many cases the scope of conduct that could be addressed appears quite limited. The result of an attempt to exercise the identified potential authority thus would appear, at best, to result in a patchwork framework that appears unlikely to materially address many of the concerns historically raised to justify conduct rules while being likely to introduce regulatory distortions in the marketplace.

267. *Authority over ISPs That Also Offer Telecommunications Services.* On this record, claims of authority to adopt

conduct rules governing ISPs that also offer telecommunications services have many shortcomings. The *Open Internet Order* contended that ISPs that also offer telecommunications services might engage in network management practices or prioritization that reduces competition for their voice services, arguably implicating Section 201(b)'s prohibition on unjust or unreasonable rates or practices in the case of common carrier voice services and/or Section 251(a)(1)'s interconnection requirements for common carriers. The *Open Internet Order* never squares these legal theories with the statutory prohibition on treating telecommunications carriers as common carriers when they are not engaged in the provision of telecommunications service or with the similar restriction on common carrier treatment of private mobile services. That *Order* also is ambiguous whether it is relying on these provisions for direct or ancillary authority. If claiming direct authority, the *Open Internet Order* fails to reconcile its theories with relevant precedent and to address key factual questions. With respect to Section 201, in the *Computer Inquiries,* for example, when the Commission concluded that facilities-based carriers' actions when offering enhanced services might affect the justness and reasonableness of their common carrier offerings under Section 201, it responded by exercising ancillary authority, rather than direct authority under Section 201. With respect to Section 251(a)(1), the Commission has held that that provision only involves the linking of networks and not the transport and termination of traffic. The *Open Internet Order* does not explain why telecommunications carriers would seek to link their networks with other carriers by delivering traffic through a broadband internet access service rather than through normal means of direct or indirect interconnection. Even in the more likely case that these represented theories of ancillary authority, the *Open Internet Order's* failure to forthrightly engage with the theories on those terms leaves it unclear how conduct rules are sufficiently ''necessary'' to the implementation of Section 201 and/or Section 251(a)(1) to satisfy the standard for ancillary authority under *Comcast.* The limited, indirect references to Section 201 and 251(a)(1) authority in the record here do not resolve these questions about possible Section 201- or 251(a)(1)-based theories, either.

268. The *Open Internet Order* also noted that Section 256 of the Act addresses coordinated network planning related to interconnection, but did not put forward a theory for relying on that as authority for conduct rule. To the contrary, it cited the holding in *Comcast* ''acknowledging Section 256's objective, while adding that Section 256 does not 'expand[ ] . . . any authority that the Commission[ ] otherwise has under law.' '' To the extent that commenters here mention Section 256 at all, they do not explain how the Commission could overcome that holding in *Comcast* for purposes of relying on that provision as authority for rules here.

269. An alarm company urges us to rely on Section 275 of the Act, but we see substantial shortcomings in using as a basis for ancillary authority for conduct rules. Section 275 of the Act imposes certain nondiscrimination requirements on incumbent LECs related to alarm monitoring services, along with restrictions on all LECs' recording or use of data from calls to alarm monitoring providers for purposes of marketing competing alarm monitoring services. Arguments that ancillary authority based on Section 275 could support rules that prohibit ISPs that also offer alarm monitoring services from blocking or throttling alarm monitoring traffic or engaging in anticompetitive paid prioritization of alarm monitoring traffic are premised on a reading of Section 275 as a far broader mandate to protecting alarm monitoring competition than the specifics of its language support. Given the Commission's existing ability to directly apply the duties and restrictions of Section 275 to the specific entities covered by that Section, the record leaves us unable to conclude that the proposed alarm monitoring-related ISP conduct rules are sufficiently ''necessary'' to our implementation of Section 275 to satisfy the standard for ancillary authority under *Comcast.* Nor does the record demonstrate what basis we have for the proposed exercise of ancillary authority to regulate any ISPs that fall outside the scope of Section 275 but that offer alarm monitoring services.

270. *Authority With Respect to Audio and Video.* The *Open Internet Order's* theories of authority related to Commission oversight of audio and video offerings have significant deficiencies, as well. In that *Order,* the Commission argued that because local television stations and radio stations distributed their content over the internet, actions by ISPs to block, degrade, or charge unreasonable fees for carrying such traffic would interfere with certain statutory responsibilities. Once again, the Commission was unclear whether it was asserting direct or ancillary authority. The *Open Internet Order* cited policy pronouncements from provisions of the Act and associated precedent without any clear indication how the underlying authority directly applied to ISPs' conduct. To the extent that the *Open Internet Order* was claiming ancillary authority, its failure to forthrightly engage with an ancillary authority theory again leaves it unclear how conduct rules are sufficiently ''necessary'' to its implementation of these provisions to satisfy the standard for ancillary authority under *Comcast,* nor are these issues adequately addressed by the limited references to this potential authority in the record.

271. We find significant limitations to the *Open Internet Order's* theories based on direct authority under Title VI of the Act, as well. The Commission contended in the *Open Internet Order* that ''MVPD practices that discriminatorily impede'' competing online video are a ''related practice'' to video program carriage agreements and thus subject to the restrictions in Section 616(a) of the Act. That expansive view of a ''related practice'' seems challenging to square with the overall structure and approach of Section 616, which is focused on facilitating program carriage agreements between video programming vendors and MVPDs. But the *Open Internet Order* suggests that an MVPD/ISP could violate rules implementing Section 616(a) with respect to the programming of a video programming vendor that never even sought a program carriage agreement with that MVPD. In such cases, there appears to be no actual or potential program carriage agreement to which the MVPD/ISP's conduct would be a ''related practice[ ].'' To the contrary, the broader structure of Section 616(a) seems to contemplate that there would be some effort by the video programming vendor to obtain carriage, subject to the possibly of a complaint. Neither the *Open Internet Order* nor the record here provides a response enabling us to address these concerns.

272. The *Open Internet Order's* legal theory under Section 628 of the Act also appears to have substantial shortcomings. The *Open Internet Order* contended that ''[a] cable or telephone company's interference with online transmission of programming by DBS operators or stand-alone online video programming aggregators that may function as competitive alternatives to traditional MVPDs would frustrate Congress's stated goals in enacting Section 628 of the Act'' and ''[t]he Commission therefore is authorized to adopt open internet rules under Section 628(b), (c)(1), and (j).'' Under the terms of the statute, that at most could restrict

such entities' conduct if it constitutes ''unfair or deceptive acts or practices the purpose or effect of which is to prevent or hinder significantly the ability of an MVPD to deliver satellite cable programming or satellite broadcast programming.'' The cursory discussion in the *Open Internet Order,* while suggesting that ISP practices could have some effect on the viability of stand-alone MVPDs like DISH, does not provide any meaningful explanation why particular conduct would rise to the level of ''prevent[ing] or significantly hinder[ing]'' DISH (or others) from being able to deliver satellite cable programming or satellite broadcast programming. The minimal discussion of this Title VI authority in the record here does not remedy that shortcoming either.

273. *Authority With Respect to Wireless Licensees.* Although the Commission could rely on Title III licensing authority to support conduct rules as it has in the past, that historical approach would result in disparate treatment of ISPs, enabling conduct rules encompassing wireless ISPs, but not wireline ISPs. For the reasons set forth below, we decline to adopt a patchwork of rules that subjects different categories of ISPs to different treatment. In addition, applying conduct rules just to such providers would have the anomalous result of more heavily regulating providers that face among the most competitive marketplace conditions.

d. Our Evaluation of Possible Authority for Conduct Rules Confirms That Such Rules Are Inappropriate

274. Our analyses of potential theories of legal authority for conduct rules (other than Title II authority relied upon in the *Title II Order*) persuades us on the record here that ISP conduct rules are unwarranted. The two provisions most directly on point—Section 706 of the 1996 Act and Section 230(b) of the Communications Act—are better read as policy pronouncements rather than grants of regulatory authority. In addition, Section 230(b)(2) identifies Congress' deregulatory policy for the internet, explaining that ''[i]t is the policy of the United States . . . to preserve the vibrant and competitive free market that presently exists for the internet and other interactive computer services, unfettered by Federal or State regulation.'' This policy is reinforced by the deregulatory objectives of the 1996 Act more generally. Against that policy backdrop, had Congress wanted us to regulate ISPs' conduct we find it most likely that they would have spoken to that directly. Thus, the fact that the Commission would be left here to comb through myriad provisions of the Act in an effort to cobble together authority for ISP conduct rules itself leaves us dubious such rules really are within the authority granted by Congress. Because we decline to adopt conduct rules here, we need not reach the arguments in the record that imposing such rules on ISPs would violate the First Amendment. We are unpersuaded by the suggestion that allowing ISPs to enter paid prioritization arrangements, even if subject to a commercial reasonableness standard, would trigger First Amendment scrutiny as a restriction on entities wishing to transmit speech on the internet. The failure to restrict ISPs' actions through conduct rules does not require ISPs to act in any particular manner, and those arguments do not reveal why allowing ISPs to decide whether and when to enter paid prioritization arrangements would constitute state action triggering the First Amendment.

275. In addition, the absence of demonstrated statutory authority that could support comprehensive conduct rules would leave us with, at most, a patchwork of non-uniform rules that would have problematic consequences and doubtful value. Virtually all of the remaining sources of possible authority identified in the *Open Internet Order* or the record here would encompass only discrete subsets of ISPs, such as ISPs that otherwise are providing common carrier voice services; ISPs that otherwise are cable operators or MVPDs; or ISPs that hold wireless licenses, among others. Individually, each of these sources of authority would leave substantial segments of ISPs unaddressed by any conduct rules. In addition, most of the remaining sources of authority would, at most, enable the Commission to target narrow types of behaviors, including, among other examples, actions by ISPs that otherwise offer common carrier voice services to interfere with competing over-the-top voice services or actions by certain ISPs that otherwise are video providers that harm the distribution of satellite programming. Importantly, substantial questions also remain on the record here about the merits of most of those theories of legal authority. For example, most if not all wired ISPs would appear to fall outside the scope of any sound basis of authority for conduct rules addressing the theories of harm identified in the *Open Internet Order.* This would leave substantial portions of the marketplace unaddressed by conduct rules including a number of the largest ISPs.

276. Imposing conduct rules on only some, but not all, ISPs risks introducing regulation-based market distortions by limiting some ISPs' ability to participate in the marketplace in a manner equivalent to other ISPs. ISPs subject to conduct rules would be limited in the ways in which they could manage traffic on their networks and/or the commercial arrangements they could enter related to their carriage of traffic beyond the requirements to which other ISPs are subject. As a result, they are likely to face increased network costs and network management challenges and see decreased revenue opportunities from commercial arrangements relative to existing or potential competitors not similarly constrained by conduct rules. In various contexts, the Commission previously has recognized that such artificial regulatory distinctions can distort the marketplace and undercut competition. The primary objectives of the 1996 Act are ''[t]o promote competition and reduce regulation,'' and the Commission likewise has observed that ''[c]ompetitive markets are superior mechanisms for protecting consumers by ensuring that goods and services are provided to consumers in the most efficient manner possible and at prices that reflect the cost of production.'' Thus, the risk that disparate regulatory treatment under patchwork conduct rules could harm existing or potential competition is a significant concern. Even assuming *arguendo* that the record demonstrated harms for which conduct rules were warranted—which it does not—the record does not demonstrate that any incremental benefits from patchwork regulation would outweigh the harm from the resulting potential for marketplace distortions.

277. Patchwork conduct rules also would not appear to address many of the theories of harm identified in the *Open Internet Order.* A number of those theories of harm would need to be addressed by comprehensive or near-comprehensive conduct rules. Here, by contrast, substantial segments of the marketplace would be left unaddressed by patchwork ISP conduct rules. Thus, patchwork conduct rules that conceivably might be supported by authority identified here would not meaningfully address such concerns, even assuming *arguendo* that the record here supported such theories of harm.

C. Enforcement

278. In light of the modifications to our regulations, we also revise our enforcement practices under them. The *Internet Freedom NPRM* sought comment on the Commission's

Ombudsperson, formal complaint rules, and advisory opinions established in the *Title II Order.* For the reasons discussed below, we remove these enforcement mechanisms. Our existing informal complaint procedures combined with transparency and competition, as well as antitrust and consumer protection laws, will ensure that ISPs continue to be held accountable for their actions, while removing unnecessary and ineffective regulatory processes and unused mechanisms.

279. *Open Internet Ombudsperson.* We find that there is no need for a separate Ombudsperson and thereby eliminate the Ombudsperson position. The *Title II Order* created the role of an Ombudsperson ''to provide assistance to individuals and organizations with questions or complaints regarding the open internet to ensure that small and often unrepresented groups reach the appropriate bureaus and offices to address specific issues.'' In particular, the *Title II Order* tasked the Ombudsperson with ''conducting trend analysis of open internet complaints and, more broadly, market conditions, that could be summarized in reports to the Commission regarding how the market is functioning for various stakeholders . . . . [and] investigat[ing] and bring[ing] attention to open internet concerns, and refer[ing] matters to the Enforcement Bureau for potential further investigation.'' We agree that it is important for the Commission to have staff who monitor consumer complaints and provide consumers with additional information; however, we disagree that a separate Ombudsperson role is necessary to perform this function specifically for transparency complaints. Instead, as suggested in the record, we determine that the existing consumer complaint process administered by the Commission's Consumer and Governmental Affairs Bureau is best suited to and will process all informal transparency complaints. We reject as unsupported any suggestions that only an Ombudsperson, and not other professional staff from the Consumer and Governmental Affairs Bureau, would be able to engage with consumers in beneficial ways. Indeed, the name, purpose, and well-established track record for that Bureau make clear its understanding of and responsiveness to consumer concerns.

280. We find that staff from the Consumer and Governmental Affairs Bureau—other than the Ombudsperson—have been performing the Ombudsperson functions envisioned by the *Title II Order.* Since the existing rules became effective in June 2015, the Consumer and Governmental Affairs Bureau has engaged in an ongoing review of informal consumer complaints submitted to the Ombudsperson and to the Commission's Consumer Complaint Center. Many complaints convey frustration or dissatisfaction with a person or entity or discuss a subject without actually alleging wrongdoing on which the Commission may act; others represent isolated incidents that do not form a trend that allow judicious use of our limited resources. Staff from the Consumer and Governmental Affairs Bureau review all informal open internet complaints received by the Commission, and work with staff in the Enforcement Bureau who also monitor media reports and conduct additional research to identify complaint trends so the Commission can best target its enforcement capabilities toward entities that have a pattern of violating the Communications Act and the Commission's rules, regulations, and orders. The Commission's decision not to expend its limited resources investigating each complaint that consumers believe may be related to the open internet rules does not mean that the Commission ''has not taken the time to analyze these materials'' as alleged by some parties in the record. Rather, this ongoing review has helped identify trends in this subject matter as well as the many others over which we have jurisdiction and which generate far more consumer complaints.

281. We emphasize that we are not making any changes to our informal complaint processes. Our decision to eliminate the Open Internet Ombudsperson does not impact the existing review of trends or existing responses to consumer complaints by the Consumer and Governmental Affairs Bureau and the Enforcement Bureau. Instead, it reduces confusion by making clear that staff specifically trained to work with consumers, known as Consumer Advocacy and Mediation Specialists (CAMS), are best suited to help consumers by providing them with understandable information about the issue they might be experiencing and to help file a complaint against a service provider if the consumer believes the service provider is violating our rules. When a consumer needs additional information that the CAMS cannot provide, that complaint is often shared with the expert Bureau or Office to provide additional information to the consumer.

282. Our experience also persuades us that the demand for a distinct Ombudsperson is not sufficient to retain the position. For the 10 month period from December 16, 2016 through November 16, 2017, the email address and phone number associated with the Ombudsperson received only 38 emails and 10 calls related to the open internet—with only 7 emails and 2 calls coming in during the 5 month period between mid-July and mid November 2017. By comparison, during that same time period, the Consumer and Governmental Affairs Bureau's Consumer Complaint Center received roughly 7,700 complaints that consumers identified as relating to open internet. This figure includes complaints filed through the Consumer Complaint Center and the FCC Call Center for which the consumer self-selected the issue ''Open Internet/Net Neutrality'' or the call center agent selected ''Open Internet'' based on the consumer's description of the issue, and does not exclude open internet campaigns. These statistics make clear that consumers have generally not been seeking out the Ombudsperson position for assistance with concerns about internet openness and that consumers are comfortable working with the Consumer and Governmental Affairs Bureau to protect their interests.

283. *Formal Complaint Rules.* We similarly find that it is no longer necessary to allow for formal complaints under Part 8 of the Act as we believe that the informal complaint process is sufficient in this area. We encourage consumers to file informal complaints for apparent violations of the transparency rule in order to assist the Commission in monitoring the broadband market and furthering our goals under Section 257 to identify market entry barriers. We also note that under the revised regulatory approach adopted today, consumers and other entities potentially impacted by ISPs' conduct will have other remedies available to them outside of the Commission under other consumer protection laws to enforce the promises made under the transparency rule.

284. *Advisory Opinions.* Because we are eliminating the conduct rules, we find that the justification for enforcement advisory opinions no longer exists. Moreover, our experience with enforcement advisory opinions and the evidence in the record would lead us to eliminate the use of advisory opinions in the context of open internet conduct in any event. The record indicates that enforcement advisory opinions do not diminish regulatory uncertainty, particularly for small providers. Rather they add costs and uncertain timelines since there is no specific timeframe within which to act, which can also inhibit innovation. Further, the fact that no ISP has requested an advisory opinion since

they first became available further demonstrates that they are not needed.

III. Cost-Benefit Analysis

285. The *Internet Freedom NPRM* solicited input for a cost-benefit analysis in this proceeding, with special emphasis on identifying ''whether the decision will have positive net benefits.'' There was generally favorable record support for conducting this analysis. Relying on the findings discussed above in light of the record before us and as a result of our economic analysis, we use a cost-benefit analysis framework to evaluate key decisions. While the record provides little data that would allow us to quantify the magnitudes of many of the effects, our findings with respect to the key decisions we make in this Order allow for a reasonable assessment of the direction of the effect on economic efficiency (*i.e.* net positive or net negative benefits). This assessment is equivalent to conducting a qualitative cost-benefit analysis, because the purpose of comparing benefits and costs is to identify whether a policy change improves economic efficiency. We reject the argument that the *Internet Freedom NPRM* provided inadequate notice regarding our cost-benefit analysis here. The Commission made clear in that *NPRM* that it ''propose[d] to compare the costs and the benefits'' of each of the ''changes for which we seek comment above.'' It also provided detailed guidance to commenting parties about the way in which the Commission proposed to conduct its cost-benefit analysis, and the nature of the information it was seeking in order to do so. The result is a robust record on we have based our analysis. Moreover, that *NPRM* plainly provided ''the terms or substance of the proposed rule,'' and also provided ''sufficient factual detail and rationale for the rule to permit interested parties to comment meaningfully.'' Nor can there be any question that ''[t]he final rule'' is a ''logical outgrowth'' of the notice.

286. As proposed in the *Internet Freedom NPRM,* we evaluate maintaining the classification of broadband internet access service as a telecommunications service (*i.e.,* Title II regulation); maintaining the internet conduct rule; maintaining the no-blocking rule; maintaining the no-throttling rule; and maintaining the ban on paid prioritization. Throughout this section, when discussing maintaining broadband internet access service as a telecommunications service, we mean as implemented by the *Title II Order,* where the Commission forbore from applying some sections of the Act and some Commission rules. We also evaluate the benefits and costs associated with transparency regulations. We make each of these evaluations by organizing the relevant economic findings made throughout the Order into a cost-benefit framework.

287. The primary benefits, costs, and transfers attributable to this Order are the changes in the economic welfare of consumers, ISPs, and edge providers that would occur due to our actions. In our analysis of the net benefits of maintaining the Title II classification, the internet conduct rule, and the bright-line rules, we compare against a state we would expect to exist if we did *not* maintain the classification or a particular rule. As explained in the *Internet Freedom NPRM,* we ''recognize that in certain cases repealing or eliminating a rule does not result in a total lack of regulation but instead means that other regulations continue to operate or other regulatory bodies will have authority.'' As discussed elsewhere in this Order, when analyzing the net benefits of maintaining the Title II classification, our comparison is to a situation where a Title I regime for broadband internet access service, and antitrust and consumer protection enforcement, remain in place. Further, given this Order's adoption of a transparency rule, when considering net benefits of the current rules we compare against a state where the transparency rule we adopt is in effect (as well as the antitrust and consumer protection enforcement that exists under a Title I classification). We also recognize that the actions we analyze separately could potentially be interdependent, but we believe a separate consideration of each is a reasonable way to approximate the net benefits. We believe that attempting to assert the nature of these interdependencies, particularly given the limited record on such matters, would introduce considerable subjectivity while not likely improving the ability of the analysis to guide our decisions. Moreover, we consider additional regulation, for example, adding an additional rule to a baseline package of Title II regulation and another rule (or none) is likely to have greater negative impacts in terms of regulatory uncertainty, and distortion of efficient choices, than the baseline package, while at best having little or no additional impact on the positive impacts (if any) of each element of the baseline package. That is, the interactions increase uncertainty and the unintended side effects of each element, without making each element materially more effective.

288. To conduct the cost-benefit analysis, we first consider the question of maintaining the Title II classification of broadband internet access service. We next consider approaches to transparency. Then to evaluate the internet conduct rule and the bright-line rules, we assume that we will not maintain the Title II classification and we will adopt our transparency rule. This approach allows us practically to evaluate the rules in a way that incorporates the decisions on classification and transparency that we have come to in this Order.

289. *Maintaining Title II Classification of Broadband Internet Access Service.* We have found that the *Title II Order* decreased investment and is likely to continue to decrease investment by ISPs. These decreases in investments are likely to result in less deployment of service to unserved areas and less upgrading of facilities in already served areas. For consumers, this means some will likely not have access to high-speed services over fixed or mobile networks and some will not experience better service as quickly as they otherwise would under a Title I classification. While the evidence in the record on the effect of Title II is varied in terms of details due to different methodologies, data, etc., we found that the Title II classification did directionally decrease investment by ISPs. Since the *Title II Order* classified broadband internet access service under Title II and adopted rules simultaneously, it is difficult methodologically to make a clear delineation between the effect of the classification and the rules. However, the theoretical underpinnings of our finding about the effect of Title II specifically also support the finding of a negative impact on investment as a result of Title II *per se.*

290. As the *Internet Freedom NPRM* noted, ''the networks built with capital investments are only a means to an end . . . the private costs borne by consumers and businesses of maintaining the *status quo* [*i.e.,* Title II classification] result from decreased value derived from using the networks.'' Ideally, we would estimate consumers' and businesses' valuations of the service or service improvements foregone caused by Title II classification. Unfortunately, the record before us does not allow for such estimation. We can reasonably conclude, however, that providers expect to recoup their investments over time through revenues generated by employing the networks resulting from the investment. Since these revenues come from consumers and businesses who are willing to pay

at least their value of the service, the investment foregone due to Title II is a lower bound on the value consumers lose if the FCC maintains the Title II classification. This is a conservative estimate as the social welfare impact of this forgone investment would likely have been positive, because frequently (1) a customer's willingness to pay exceeds what the customer actually pays, and (2) the provider may make an economic profit. We therefore conclude that the private costs of maintaining a Title II classification due to foregone network investment are directionally negative and likely constitute at least several billion dollars annually based on the record.

291. The Commission also asked in the *Internet Freedom NPRM* about additional costs that could result from foregone network investments. When regulation discourages investment in the network, society is likely to lose some spillover benefits that the purchasers of broadband internet access do not themselves capture. Such forgone benefits can include network externalities (the network becomes more valuable the more users are on the network, but individual ISPs do not capture all of these, as they are obtained by end users on other ISPs' networks), and improvements in productivity and innovation that occur because broadband is a general-purpose technology. The record provides little information that could be used to quantify such costs, but it is reasonable to conclude that there are social costs beyond the private costs associated with the foregone investment.

292. Next, we consider the benefits associated with maintaining the Title II classification. The relevant comparison is what incremental benefit the Title II classification provides over and above the Title I scenario. In the Title I scenario, the FTC has jurisdiction over broadband internet access service providers. The record does not convince us that Title II classification *per se* provides any benefit over and above Title I classification. We also find above that the record does not provide evidence supporting the conclusion that the Title II classification affects edge investment. To the extent Title II provides a benefit, it appears to do so by serving as a legal basis relied upon to adopt rules. Therefore, in this cost-benefit analysis we conclude the incremental benefits of maintaining the Title II classification are approximately zero.

293. Finding that the benefits of maintaining the Title II classification are approximately zero, coupled with our finding that the private and social costs are positive, we conclude that maintaining the Title II classification would have net negative benefits. Thus, maintaining the Title II classification would decrease overall economic welfare, and our cost-benefit analysis supports the decision to reclassify broadband internet access service as a Title I service.

294. *Evaluating Transparency Rules.* As discussed already, we find that the benefits of a transparency rule are positive based on the record. Given our decision to classify broadband internet access service under Title I, the benefits of a transparency rule are expected to be of considerable magnitude since it is a key element of our approach of relying on enforcement under antitrust and consumer protection law to prevent and remedy harmful behaviors by ISPs. Numerous commenters indicate the benefits of a free and open internet are large, so to the extent a transparency rule under our Title I approach is important for maintaining a free and open internet, we can conclude the benefits are positive and considerable. Furthermore, transparency can provide other benefits in terms of consumer welfare. Namely, if transparency helps mitigate economic deadweight loss due to information asymmetry or if it helps consumers better satisfy their preferences in their purchasing decisions, then additional benefits will accrue. We therefore conclude that our transparency approach, as well as the transparency approaches in the *Open Internet Order* and the *Title II Order,* all have positive benefits.

295. The costs of the transparency rules may vary given differences in their implementation. Comparing the transparency approach in the *Open Internet Order* and the *Title II Order,* we conclude the costs were greater for the latter. Based on the record, we determined above that the additional transparency requirements in the *Title II Order* were particularly burdensome. Although the record is limited on the costs of these transparency rules, the Commission's Paperwork Reduction Act (PRA) filings indicate the *Title II Order* transparency rule increased the burden on the public by thousands of hours per year, costing hundreds of thousands of dollars. While we do not have specific information on our transparency rule's costs, it is fairly similar to that in the *Open Internet Order.* Therefore, we conclude that a reasonable approximation for the PRA burden associated with our rule is approximately half the preceding burden estimate. We recognize there are other costs to this requirement not accounted for in the PRA estimate, though the PRA estimate provides a starting point for sizing the costs, particularly as we compare several alternative transparency approaches.

296. Combining our conclusion about the benefits of a transparency rule with our assessments of the costs of the several transparency rules, we conclude that the transparency rule in the *Title II Order* would have the smallest net positive benefit of the three. That is because we do not believe the additional elements of the *Title II Order* transparency regime have significant additional benefits but they do impose significant additional costs. However, our transparency rule would have a larger net positive benefit than the transparency rule in the *Title II Order.* Therefore, our cost-benefit analysis of the transparency alternatives supports our decision to adopt a transparency rule more limited than the one in the *Title II Order.*

297. *Maintaining the Internet Conduct Rule.* We have determined elsewhere that the internet conduct rule has created uncertainty and ultimately deterred innovation and investment. The record does not provide sufficient information for us to estimate the magnitude of this effect. However, we do find that maintaining the internet conduct rule imposes social costs in terms of increased uncertainty, reduced investment, and reduced innovation.

298. We also find above that the benefits of the internet conduct standard are limited if not approximately zero. In this cost-benefit analysis, we consider the incremental benefit of the internet conduct standard relative to the regulatory environment created by this Order. The regulatory environment created by this Order will have antitrust and consumer protection enforcement in place through the FTC. We find that the internet conduct standard provides approximately zero additional benefits compared to that baseline.

299. Based on the record available, we conclude that maintaining the internet conduct standard would impose net negative benefits. The costs of the rule are considerable as the evidence shows that it had large effects on consumers obtaining innovative services (as demonstrated by the zero-rating experiences). The innovations that were delayed or never brought to market would likely have cost many millions or even billions of dollars in lost consumer welfare. At the same time, for the reasons explained already, the benefits of the conduct rule are approximately zero. This leads us to conclude that the internet conduct standard has a net negative effect on economic welfare,

and supports our decision not to maintain the internet conduct rule.

300. *Maintaining the Ban on Paid Prioritization.* We have determined elsewhere in this Order that the ban on paid prioritization has created uncertainty and reduced ISP investment. We also find that the ban is likely to prevent certain types of innovative applications from being developed or adopted. The record does not provide sufficient information for us to estimate the magnitude of these effects. However, we do find that maintaining the ban on paid prioritization imposes substantial social costs.

301. We also find above that the benefits of the ban on paid prioritization are limited. In this cost-benefit analysis, we consider the incremental benefit of the ban on paid prioritization relative to the regulatory environment created by this Order. The regulatory environment created by this Order will have antitrust and consumer protection enforcement in place. So we must ask what the ban on paid prioritization provides in additional benefits when compared to that baseline. We concluded that transparency combined with antitrust and consumer enforcement at the FTC will be able to address the vast majority of harms the ban on paid prioritization is intended to prevent. To the extent there are harms not well addressed by this enforcement, we would expect those cases to be infrequent and involve relatively small amounts of harm, though the record does not allow us to estimate this magnitude. Antitrust law, in combination with the transparency rule we adopt, is particularly well-suited to addressing any potential or actual anticompetitive harms that may arise from paid prioritization arrangements. While antitrust law does not address harms that may arise from the legal use of market power, we have found that such market power is limited, and ISPs also have countervailing incentives to keep edge provider output high and keep subscribers on the network. The record therefore supports a finding of small to zero benefits.

302. Based on the record available, we conclude that maintaining the ban on paid prioritization would impose net negative benefits. The record shows that in some cases innovative services and business models would benefit from paid prioritization. At the same time, for the reasons explained already, the benefits of maintaining the ban are small or zero. We therefore conclude that the ban on paid prioritization has a net negative effect on economic welfare. This conclusion supports our decision to not maintain the ban on paid prioritization.

303. *Maintaining the Bans on Blocking and Throttling.* We find that the costs of these bans are likely small. This is supported by the fact that ISPs voluntarily have chosen in some cases to commit to not blocking or throttling. However, we also recognize that these rules may create some compliance costs nonetheless. For example, when considering new approaches to managing network traffic, an ISP must apply due diligence in evaluating whether the practice might be perceived as running afoul of the rules. As network management becomes increasingly complex, the compliance costs of these rules could increase.

304. Having adopted a transparency rule, we find the benefits of bans on blocking and throttling are approximately zero since the transparency rule will allow antitrust and consumer protection law, coupled with consumer expectations and ISP incentives, to mitigate potential harms. That is, we have determined that replacing the prohibitions on blocking and throttling with a transparency rule implements a lower-cost method of ensuring that threats to internet openness are exposed and deterred by market forces, public opprobrium, and enforcement of the consumer protection laws. We conclude therefore that maintaining the bans on blocking and throttling has a small net negative benefit, compared to the new regulatory environment we create (*i.e.* Title I classification and our transparency rule).

IV. Order

A. Denial of INCOMPAS Petition To Modify Protective Orders

305. INCOMPAS requests that we modify the protective orders in four recent major transaction proceedings involving internet service providers to allow confidential materials submitted in those dockets to be used in this proceeding. INCOMPAS argues that the materials ''are necessary to understanding and fully analyzing incumbent broadband providers' ability and incentives to harm edge providers.'' The motion is opposed by the three companies whose materials would be most affected—Comcast, Charter and AT&T—as well as by Verizon. For the reasons set forth below, after carefully ''balancing . . . the public and private interests involved,'' we deny INCOMPAS's request.

306. The Commission's protective orders limit parties' use of the materials obtained under the protective order solely to ''the preparation and conduct'' of that particular proceeding, and expressly prohibit the materials being used ''for any other purpose, including . . . in any other administrative, regulatory or judicial proceedings.'' The terms of the relevant protective orders therefore prohibit INCOMPAS from using the confidential materials it obtained in those prior dockets in the current proceeding. Further, parties reasonably expect that the information they submit pursuant to the strictures of a protective order will be used in accordance with the terms of that order and that the order's explicit prohibitions will not be changed years later. That is not to imply, however, that the Commission cannot request the submission of information in a proceeding simply because it has been provided pursuant to a protective order in another proceeding.

307. Before discussing the substance of INCOMPAS's request, we note that, as a formal matter, the Commission does not modify protective orders to allow materials to be used in a different proceeding. Rather, where we find that the public interest is served by submitting certain materials into a docket, we do so, subject to a protective order specific to that proceeding if the material is confidential. That is true whether the materials have been submitted in prior proceedings or not. The question before us, then, is whether we will require the relevant parties to submit into this docket the presumptively confidential information INCOMPAS has identified.

308. The Commission is not required to enter into the record and review every document that a party to a proceeding deems relevant, especially where, as here, those documents may number in the tens of thousands. Nor, as a general matter, does the Commission allow for discovery by parties—which is essentially what INCOMPAS seeks here—except in adjudications that have been set for hearing. The Commission has broad discretion in how to manage its own proceedings, and we find several problems with requiring the materials INCOMPAS seeks to be submitted into this rulemaking docket.

309. First, much of the material INCOMPAS seeks is now several years old and INCOMPAS has offered little demonstration of its relevance to this proceeding. For example, Comcast's ability to discriminate against online video providers in 2009 and 2010 shines little light on its ability to do so now. Also, as the opponents argue, many of the confidential materials cited by the Commission in its prior transaction

decisions were cited as part of a larger group of mostly publicly available information. Having the competitively sensitive information from those transactions in this record would therefore not significantly add to the Commission's understanding of the issues, especially since the participants in the current proceeding and the Commission already have available the Commission's prior conclusions and reasoning, as well as the underlying public information.

310. Second, INCOMPAS asks for information only from the few industry participants who happen to have had large transactions before the Commission. But where the Commission has sought information in large rulemaking proceedings, it sought information from the entire industry, not just from a select few participants. Transaction review is an adjudicatory matter, involving the entities engaging in the transaction—not the entire industry or marketplace. Particularly given that there are thousands of ISPs doing business in the United States, INCOMPAS does not address how a quite incomplete picture of industry practices could meaningfully improve the Commission's analysis.

311. Third, granting the request would pose several administrative difficulties. It is unclear how much of the material INCOMPAS seeks is still in the possession of the parties: The relevant portions of the proceedings are finished, and many of the materials may have been destroyed. And what is available at the Commission would be difficult and costly to produce. Making the information available to others also would be administratively difficult. For example, in the recent Business Data Services proceeding, the Commission made the competitively sensitive data available for review only through a secure data enclave, a process which took significant time and resources to establish. And in most Commission proceedings, the parties who own the confidential information are required to provide that material directly to persons who seek to review it pursuant to terms outlined in the applicable protective order. Here, in contrast, it is likely that the Commission itself would have to make the confidential information available, further depleting scarce Commission resources.

312. Finally, as noted above, the materials INCOMPAS seeks were provided pursuant to express assurances against their use in future proceedings.

313. INCOMPAS cites two examples in which the Commission staff placed into the record competitively sensitive materials originally submitted in another docket. We find both inapposite. As an initial matter, we note that the Commission is not bound by its staff's prior decisions. The first example INCOMPAS cites involved a series of spectrum license transfers between wireless telecommunications companies where the Commission added confidential data to the docket under a new protective order. When evaluating transactions such as these, the Commission regularly uses subscriber data derived from regular periodic confidential filings made by all telecommunications companies to determine market shares. In such transactions, this use of subscriber data is often the only way to calculate market share, which is a critical element to analyzing the potential competitive harms of the proposed transaction. Balancing that need against the potential competitive harm to providers, we have determined that allowing that material to be reviewed pursuant to a protective order best serves the public interest. For the reasons expressed above, we do not reach the same conclusions with respect to the materials here.

314. INCOMPAS also cites the recent investigation of certain business data services tariffs, in which the Commission placed the record of the contemporaneous business data services rulemaking proceeding into the docket of the tariff investigations. As the opponents note, the tariff investigation was not only related to the rulemaking proceeding, it actually was determined by the staff to be ''an outgrowth'' of that proceeding. Further, there was no Commission decision in the rulemaking proceeding on which the participants in the tariff proceeding could rely; the proceeding was still ongoing. All of the participants in the tariff proceeding, moreover, were participating in the rulemaking proceeding. Here, by contrast, the current rulemaking is not related to the prior transactions; the parties may rely on prior written Commission decisions; and literally millions more comments have been submitted in this rulemaking than in the prior transaction proceedings. Finally, we note that none of the parties that owned the confidential information in the Business Data Services rulemaking proceeding raised confidentiality concerns with respect to that information being placed into the tariff investigation docket. Here, they do.

315. Even absent the legal and administrative barriers discussed above, the substance of the past transaction orders compels us to deny INCOMPAS' motion. When, as it has in the past, the Commission determines a specific transaction involving certain large broadband providers is likely to create competitive or other public interest harm, the conditions imposed are applicable *only* to those entities engaging in the transaction. Those proceedings involved some of the nation's largest broadband providers, and the Commission's conclusions were based on the specific circumstances involved. This is because transaction review is an adjudicatory matter, involving the motives, plans, and capabilities of the entities engaging in the transaction—not the entire industry or marketplace. Indeed, transaction reviews specifically do not address issues that are not transaction-specific but are industry-wide. The targeted and flexible approach the Commission used to ameliorate the potential harms it found in those transactions is not transferable to a permanent, one-size-fits-all approach in this rulemaking applicable to hundreds of ISPs.

316. Further, in those limited instances in which the Commission found conduct remedies necessary, it almost always applied them on a temporary basis, in recognition that markets change over time. That is true even more so in industries that are characterized by rapidly changing technologies. Similarly, the Commission often has provided that it will ''consider a petition for modification of this condition if it can be demonstrated that there has been a material change in circumstance or the condition has proven unduly burdensome, rendering the condition no longer necessary in the public interest,'' and has acted accordingly. None of this would be the case with respect to the regulations that some commenters urge us to adopt in this rulemaking.

317. INCOMPAS argues that ''[l]ooking to the past is the standard way for administrative agencies to make predictive judgments.'' However, the analysis supporting our decision to re-classify broadband internet access service as an information service is quite different from the analysis the Commission employs when conducting a transaction review. In this rulemaking, we are not considering whether, as a result of a transfer of a Commission license, a licensee is likely to gain market power, allowing it to take anticompetitive actions that it otherwise could not. Instead, we are reasonably considering the long-term costs and benefits of Title II and other *ex ante* regulation in an increasingly dynamic market. As such, we choose a conservative and administrable approach to formulating a light-touch

regulatory framework—which is appropriate in a rulemaking.

318. In addition to rejecting the INCOMPAS petition on the merits, we find that the petition is procedurally flawed. Although some of the companies that objected to INCOMPAS's request were the applicants in the proceedings from which INCOMPAS seeks confidential information, they are not the only owners of confidential information submitted in those dockets. INCOMPAS did not file its request in those dockets—which are long dormant—and others whose confidential information would be disclosed if we were to grant INCOMPAS's request have not been notified of the request to have the opportunity to object. That would need to occur before any of their information could be made available, even pursuant to a protective order.

319. Taking into account and sensibly balancing the factors discussed above, we find that the public interest would not be served by requiring the submission into the docket of the current proceeding the presumptively confidential information INCOMPAS seeks. We therefore deny INCOMPAS's request.

B. Denial of NHMC Motion Regarding Informal Consumer Complaints

320. The National Hispanic Media Coalition (NHMC) requests that we incorporate in the record of this proceeding the informal complaint materials released as part of NHMC's Freedom of Information Act (FOIA) request and establish a new pleading cycle for public comment on those materials. NHMC argues that the materials ''are directly relevant to the [NPRM's] questions regarding the effectiveness of the [*Title II Order*]'' and that if we deny NHMC's request, ''any decision in this proceeding would be based on an insufficient and fundamentally flawed record.'' The motion is opposed by several parties who argue that the informal complaint materials are not relevant to this proceeding, and that the motion ''appears to be . . . aimed [ ] at prolonging this proceeding unnecessarily.'' For the reasons set forth below, we deny NHMC's request.

321. In responding to NHMC's underlying FOIA requests, we produced nearly 70,000 pages of records responsive to the requests. The documents we provided to NHMC included informal consumer complaints filed with the Consumer and Governmental Affairs Bureau, data relating to the complaints, responses to the informal complaints from the carrier involved in a specific complaint—all filed by the consumer under the category of Open Internet/Net Neutrality—and consumer complaint correspondence with the Open Internet Ombudsperson. We provided this large quantity of documents to NHMC on a rolling basis and made all of the documents available to the public in our FOIA Electronic Reading Room.

322. Under Commission rules, and as noted by opponents to the motion, ''NHMC is free to put into the record whatever it believes to be relevant via *ex parte* letters.'' NHMC began receiving the documents it claims are relevant to the proceeding on June 20, 2017. During the following months, NHMC engaged with Commission staff to discuss the consumer complaint documents. NHMC also conducted an Expert Analysis of the consumer complaint documents and submitted the analysis along with the complaints it found relevant in the record, in addition to submitting the full universe of consumer complaints it received under the FOIA request into the record on December 1—nearly three months after the Commission produced them all. Thus, we remain unpersuaded that NHMC requires additional time to review the documents and instead agree with commenters that NHMC has raised ''the mere existence of these complaints as a pretext for delay.''

323. The *Internet Freedom NPRM* sought comment on consumer harm in a variety of contexts and, in response, received over 22 million comments discussing consumers' view of the *Title II Order,* including any harm that may or may not have occurred under its rules. After routinely reviewing the consumer complaints over the past two years, and conducting a robust review of the voluminous record in this proceeding, we agree with opponents to the motion that ''it is exceedingly unlikely that these informal complaints identify any net neutrality 'problem' that [advocates] have somehow overlooked in their many massive submissions in this docket.'' The Commission takes consumer complaints seriously and finds them valuable in informing us about trends in the marketplace, but we reiterate that they are informal complaints that, in most instances, have not been verified. Further, the overwhelming majority of these informal complaints do not allege conduct implicating the Open Internet rules. Of the complaints that do discuss ISPs, they often allege frustration with a person or entity, but do not allege wrongdoing under the Open Internet rules. The consumer complaints NHMC submitted in the record as part of the Expert Analysis further support this point. Further, we are not required to resolve all of these informal complaints before proceeding with a rulemaking. Since we do not rely on these informal complaints as the basis for the decisions we make today, we do not have an obligation to incorporate them into the record.

324. We are convinced that we have a full and complete record on which to base our determination today without incorporating the materials requested by NHMC. Further, because the record remained open for over three months after the complete production of documents under NHMC FOIA's request, and NHMC filed an analysis the materials it deemed relevant in the record, we believe that NHMC had ample opportunity to ''meaningfully review the informal complaint materials and provide comment.''

V. Procedural Matters

A. The Administrative Record

325. In reviewing the record in this rulemaking, the Commission complied with its obligations under the Administrative Procedure Act (APA), including the obligation to consider all ''relevant matter'' received, to adequately consider ''important aspect[s] of the problem,'' and to ''reasonably respond to those comments that raise significant problems.'' Consistent with these obligations, the Commission focused its review of the record on the submitted comments that bear substantively on the legal and public policy consequences of the actions we take today. Thus, our decision to restore internet freedom did not rely on comments devoid of substance, or the thousands of identical or nearly-identical non-substantive comments that simply convey support or opposition to the proposals in the *Internet Freedom NPRM.*

326. Because we have complied with our obligations under the APA, we reject calls to delay adoption of this Order out of concerns that certain non-substantive comments (on which the Commission did not rely) may have been submitted under multiple different names or allegedly ''fake'' names. The Commission is under no legal obligation to adopt any ''procedural devices'' beyond what the APA requires, such as identity-verification procedures. In addition, the Commission has previously decided not to apply its internal rules regarding false statements in the rulemaking context because we do not want ''to hinder full and robust public participation in such policymaking proceedings by encouraging collateral wrangling over

the truthfulness of the parties' statements.'' To the extent that members of the public are concerned about the presence in the record of identical or nearly-identical non-substantive comments that simply convey support or opposition to the proposals in the *Internet Freedom NPRM,* those comments in no way impeded the Commission's ability to identify or respond to material issues in the record. Indeed, the Order demonstrates the Commission's deep engagement with the substantive legal and public policy questions presented in this proceeding.

B. Final Regulatory Flexibility Analysis

327. As required by the Regulatory Flexibility Act (RFA), an Initial Regulatory Flexibility Analysis (IRFA) was incorporated into the *Internet Freedom NPRM.* The Commission sought written public comment on the possible significant economic impact on small entities regarding the proposals addressed in the *Internet Freedom NPRM,* including comments on the IRFA. Pursuant to the RFA, a Final Regulatory Flexibility Analysis is set forth in the Order.

C. Paperwork Reduction Act Analysis

328. This document contains new or modified information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104–13. It will be submitted to the Office of Management and Budget (OMB) for review under Section 3507(d) of the PRA. OMB, the general public, and other federal agencies will be invited to comment on the new information collection requirements contained in this proceeding. In addition, we note that pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, *see* 44 U.S.C. 3506(c)(4), we previously sought specific comment on how the Commission might further reduce the information collection burden for small business concerns with fewer than 25 employees.

329. In this present document, we require any person providing broadband internet access service to publicly disclose accurate information regarding the network management practices, performance, and commercial terms of their broadband internet access services sufficient to enable consumers to make informed choices regarding the purchase and use of such services and entrepreneurs and other small businesses to develop, market, and maintain internet offerings. We have assessed the effects of this rule and find that any burden on small businesses will be minimal because (1) the rule gives ISPs flexibility in how to implement the disclosure rule, (2) the rule gives providers adequate time to develop cost-effective methods of compliance, and (3) the rule eliminates the additional reporting obligations adopted in the *Title II Order.*

D. Congressional Review Act

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

E. Data Quality Act

331. The Commission certifies that it has complied with the Office of Management and Budget Final Information Quality Bulletin for Peer Review, 70 FR 2664, January 14, 2005, and the Data Quality Act, Public Law 106–554 (2001), codified at 44 U.S.C. 3516 note, with regard to its reliance on influential scientific information in the Declaratory Ruling, Report and Order, and Order in WC Docket No. 17–108.

F. Accessible Formats

332. To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an email to *fcc504@fcc.gov* or call the Consumer & Governmental Affairs Bureau at 202–418–0530 (voice), 202–418–0432 (tty). Contact the FCC to request reasonable accommodations for filing comments (accessible format documents, sign language interpreters, CARTS, *etc.*) by email: *FCC504@fcc.gov;* phone: (202) 418–0530 (voice), (202) 418–0432 (TTY).

VI. Final Regulatory Flexibility Analysis

333. As required by the Regulatory Flexibility Act of 1980 (RFA), as amended, Initial Regulatory Flexibility Analysis (IRFAs) was incorporated in the *Notice of Proposed Rule Making* (*Internet Freedom NPRM*) for this proceeding. The Commission sought written public comment on the proposals in the *Internet Freedom NPRM,* including comment on the IRFA. The Commission received comments on the *Internet Freedom NPRM* IRFA, which are discussed below. This present Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.

A. Need for, and Objectives of, the Final Rules

334. In order to return the internet to the light-touch regulatory environment that allowed investment to increase and consumers to benefit, we return broadband internet access service to its longstanding classification as an information service, and eliminate several rules adopted in the *Title II Order,* including the general conduct standard, the ban on paid prioritization, and the no-blocking and no-throttling rules. We retain the transparency rule adopted in the *Open Internet Order,* with modifications, while eliminating the additional reporting obligations created in the *Title II Order,* the *Title II Order's* direct notification requirement, and the broadband label ''safe harbor.''

335. We also eliminate the formal complaint procedures under Part 8 of the Act, because the informal complaint procedures are sufficient. We eliminate the other components of the enforcement regime created in the *Title II Order,* including the position of Open Internet Ombudsperson and the issuance of advisory opinions. We also return mobile broadband internet access service to its longstanding definition as a private mobile radio service under Section 332 of the Communications Act.

The transparency rule we adopt is necessary because properly tailored transparency disclosures provide valuable information to the Commission to enable it to meet its statutory obligation to observe the communications marketplace to monitor the introduction of new services and technologies, and to identify and eliminate potential marketplace barriers for the provision of information service. Such disclosures also provide valuable information to other internet ecosystem participants; transparency substantially reduces the possibility that ISPs will engage in harmful practices, and it incentivizes quick corrective measures by providers if problematic conduct is identified. Appropriate disclosures help consumers make informed choices about their purchase and use of broadband services. Moreover, clear disclosures improve consumer confidence in ISPs' practices, ultimately increasing user adoption and leading to additional investment and innovation, while providing entrepreneurs and other small businesses the necessary information to innovate and improve products.

336. Our enforcement changes will ensure that ISPs will be held accountable for any violations of the transparency rule. We eliminate the formal complaint procedures because the informal complaint procedure, in conjunction with other redress options including consumer protection laws, will sufficiently protect consumers. Additionally, we eliminate the position of Open Internet Ombudsperson because the staff from the Consumer and

Governmental Affairs Bureau—other than the Ombudsperson—have been performing the Ombudsperson functions envisioned by the *Title II Order.* We also eliminate the issuance of enforcement advisory opinions, because enforcement advisory opinions do not diminish regulatory uncertainty, particularly for small providers. Instead, they add costs and uncertain timelines since there is no specific timeframe within which to act, which can also inhibit innovation.

337. We return mobile broadband internet access service to its original classification as a private mobile radio service because we find that the definitions of the terms ''public switched network'' and ''interconnected service'' that the Commission adopted in the 1994 *Second CMRS Report and Order* reflect a better reading of the Act. Accordingly, we readopt those definitions.

338. We restore the definition of interconnected service that existed prior to the *Title II Order.* Prior to that Order, the term ''interconnected service'' was defined under the Commission's rules as a service ''that gives subscribers the capability to communicate to or receive communication from *all* other users on the public switched network.'' The *Title II Order* modified this definition by deleting the word ''all,'' finding that mobile broadband internet access service should still be considered an interconnected service even if it only enabled users to communicate with ''some'' other users of the public switched network rather than all. We conclude that the better reading of ''interconnected service'' is one that enables communication between its users and all other users of the public switched network.

339. The legal basis for the rules we adopt today includes sections 3, 4, 201(b), 230, 231, 257, 303, 332, 403, 501, and 503 of the Communications Act of 1934, as amended, 47 U.S.C. 153, 154, 201(b), 230, 231, 257, 303, 332, 403, 501, 503. The transparency rule we adopt today relies on Section 257 of the Communications Act. Section 257 requires the Commission to make triennial reports to Congress, and those triennial reports must identify ''market entry barriers for entrepreneurs and other small businesses in the provision and ownership of telecommunications services and information services.''

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

340. The Wireless Internet Service Providers Association (WISPA) argued that the IRFA was incomplete and inaccurate. We find that this FRFA sufficiently addresses WISPA's concerns and explains how we ''alleviate many of the significant financial harms on small providers imposed by the [*Title II Order*].''

C. Response to Comments by the Chief Counsel for Advocacy of the Small Business Administration

341. Pursuant to the Small Business Jobs Act of 2010, which amended the RFA, the Commission is required to respond to any comments filed by the Chief Counsel of the Small Business Administration (SBA), and to provide a detailed statement of any change made to the proposed rule(s) as a result of those comments.

342. The Chief Counsel did not file any comments in response to the proposed rule(s) in this proceeding.

D. Description and Estimate of the Number of Small Entities To Which the Final Rule May Apply

343. The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted. The RFA generally defines the term ''small entity'' as having the same meaning as the terms ''small business,'' ''small organization,'' and ''small governmental jurisdiction.'' In addition, the term ''small business'' has the same meaning as the term ''small business concern'' under the Small Business Act. A small business concern is one that: (1) Is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA). Nationwide, there are a total of approximately 28.2 million small businesses, according to the SBA. A ''small organization'' is generally ''any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.''

1. Total Small Entities

344. *Small Entities, Small Organizations, Small Governmental Jurisdictions.* Our actions, over time, may affect small entities that are not easily categorized at present. We therefore describe here, at the outset, three comprehensive small entity size standards that could be directly affected herein. First, while there are industry specific size standards for small businesses that are used in the regulatory flexibility analysis, according to data from the SBA's Office of Advocacy, in general a small business is an independent business having fewer than 500 employees. These types of small businesses represent 99.9 percent of all businesses in the United States which translates to 28.8 million businesses. Next, the type of small entity described as a ''small organization'' is generally ''any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.'' Nationwide, as of August 2016, there were approximately 356,494 small organizations based on registration and tax data filed by nonprofits with the Internal Revenue Service (IRS). Finally, the small entity described as a ''small governmental jurisdiction'' is defined generally as ''governments of cities, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand.'' U.S. Census Bureau data from the 2012 Census of Governments indicates that there were 90,056 local governmental jurisdictions consisting of general purpose governments and special purpose governments in the United States. Of this number there were 37,132 General purpose governments (county, municipal and town or township) with populations of less than 50,000 and 12,184 Special purpose governments (independent school districts and special districts) with populations of less than 50,000. The 2012 U.S. Census Bureau data for most types of governments in the local government category shows that the majority of these governments have populations of less than 50,000. Based on this data we estimate that at least 49,316 local government jurisdictions fall in the category of ''small governmental jurisdictions.''

2. Broadband Internet Access Service Providers

345. The rules we adopt apply to broadband internet access service providers. The Economic Census places these firms, whose services might include Voice over Internet Protocol (VoIP), in either of two categories, depending on whether the service is provided over the provider's own telecommunications facilities (*e.g.,* cable and DSL ISPs), or over client-supplied telecommunications connections (*e.g.,* dial-up ISPs). The former are within the category of Wired Telecommunications Carriers, which has an SBA small business size standard of 1,500 or fewer employees. These are also labeled ''broadband.'' The latter are within the category of All Other Telecommunications, which has a size standard of annual receipts of $32.5 million or less. These are labeled non-broadband. Census data for 2012 show that there were 3,117 firms that operated

that year. Of this total, 3,083 operated with fewer than 1,000 employees. For the second category, census data for 2012 show that there were 1,442 firms that operated for the entire year. Of those firms, a total of 1,400 had annual receipts less than $25 million. Consequently, we estimate that the majority of broadband internet access service provider firms are small entities.

346. The broadband internet access service provider industry has changed since this definition was introduced in 2007. The data cited above may therefore include entities that no longer provide broadband internet access service, and may exclude entities that now provide such service. To ensure that this FRFA describes the universe of small entities that our action might affect, we discuss in turn several different types of entities that might be providing broadband internet access service. We note that, although we have no specific information on the number of small entities that provide broadband internet access service over unlicensed spectrum, we include these entities in our Initial Regulatory Flexibility Analysis.

3. Wireline Providers

347. *Wired Telecommunications Carriers.* The U.S. Census Bureau defines this industry as ''establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired communications networks. Transmission facilities may be based on a single technology or a combination of technologies. Establishments in this industry use the wired telecommunications network facilities that they operate to provide a variety of services, such as wired telephony services, including VoIP services, wired (cable) audio and video programming distribution, and wired broadband internet services. By exception, establishments providing satellite television distribution services using facilities and infrastructure that they operate are included in this industry.'' The SBA has developed a small business size standard for Wired Telecommunications Carriers, which consists of all such companies having 1,500 or fewer employees. Census data for 2012 show that there were 3,117 firms that operated that year. Of this total, 3,083 operated with fewer than 1,000 employees. Thus, under this size standard, the majority of firms in this industry can be considered small.

348. *Local Exchange Carriers (LECs).* Neither the Commission nor the SBA has developed a size standard for small businesses specifically applicable to local exchange services. The closest applicable NAICS Code category is for Wired Telecommunications Carriers, as defined in paragraph 12 of this FRFA. Under that size standard, such a business is small if it has 1,500 or fewer employees. Census data for 2012 show that there were 3,117 firms that operated that year. Of this total, 3,083 operated with fewer than 1,000 employees. The Commission therefore estimates that most providers of local exchange carrier service are small entities that may be affected by the rules adopted.

349. *Incumbent Local Exchange Carriers (incumbent LECs).* Neither the Commission nor the SBA has developed a small business size standard specifically for incumbent local exchange services. The closest applicable NAICS Code category is Wired Telecommunications Carriers as defined in paragraph 17 of this FRFA. Under that size standard, such a business is small if it has 1,500 or fewer employees. According to Commission data, 3,117 firms operated in that year. Of this total, 3,083 operated with fewer than 1,000 employees. Consequently, the Commission estimates that most providers of incumbent local exchange service are small businesses that may be affected by the rules and policies adopted. One thousand three hundred and seven (1,307) Incumbent Local Exchange Carriers reported that they were incumbent local exchange service providers. Of this total, an estimated 1,006 have 1,500 or fewer employees.

350. *Competitive Local Exchange Carriers (Competitive LECs), Competitive Access Providers (CAPs), Shared-Tenant Service Providers, and Other Local Service Providers.* Neither the Commission nor the SBA has developed a small business size standard specifically for these service providers. The appropriate NAICS Code category is Wired Telecommunications Carriers, as defined in paragraph 17 of this FRFA. Under that size standard, such a business is small if it has 1,500 or fewer employees. U.S. Census data for 2012 indicate that 3,117 firms operated during that year. Of that number, 3,083 operated with fewer than 1,000 employees. Based on this data, the Commission concludes that the majority of Competitive LECs, CAPs, Shared-Tenant Service Providers, and Other Local Service Providers are small entities. According to Commission data, 1,442 carriers reported that they were engaged in the provision of either competitive local exchange services or competitive access provider services. Of these 1,442 carriers, an estimated 1,256 have 1,500 or fewer employees. In addition, 17 carriers have reported that they are Shared-Tenant Service Providers, and all 17 are estimated to have 1,500 or fewer employees. In addition, 72 carriers have reported that they are Other Local Service Providers. Of this total, 70 have 1,500 or fewer employees. Consequently, the Commission estimates that most providers of competitive local exchange service, competitive access providers, Shared-Tenant Service Providers, and Other Local Service Providers are small entities that may be affected by the adopted rules.

351. We have included small incumbent LECs in this present RFA analysis. As noted above, a ''small business'' under the RFA is one that, *inter alia,* meets the pertinent small business size standard (*e.g.,* a telephone communications business having 1,500 or fewer employees), and ''is not dominant in its field of operation.'' The SBA's Office of Advocacy contends that, for RFA purposes, small incumbent LECs are not dominant in their field of operation because any such dominance is not ''national'' in scope. We have therefore included small incumbent LECs in this RFA analysis, although we emphasize that this RFA action has no effect on Commission analyses and determinations in other, non-RFA contexts.

352. *Interexchange Carriers (IXCs).* Neither the Commission nor the SBA has developed a definition for Interexchange Carriers. The closest NAICS Code category is Wired Telecommunications Carriers as defined in paragraph 17 of this FRFA. The applicable size standard under SBA rules is that such a business is small if it has 1,500 or fewer employees. According to Commission data, 359 companies reported that their primary telecommunications service activity was the provision of interexchange services. Of this total, an estimated 317 have 1,500 or fewer employees and 42 have more than 1,500 employees. Consequently, the Commission estimates that the majority of interexchange service providers are small entities that may be affected by rules adopted.

353. *Operator Service Providers* (*OSPs*). Neither the Commission nor the SBA has developed a small business size standard specifically for operator service providers. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees. According to Commission data, 33 carriers have

reported that they are engaged in the provision of operator services. Of these, an estimated 31 have 1,500 or fewer employees and two have more than 1,500 employees. Consequently, the Commission estimates that the majority of OSPs are small entities that may be affected by our adopted rules.

354. *Other Toll Carriers.* Neither the Commission nor the SBA has developed a definition for small businesses specifically applicable to Other Toll Carriers. This category includes toll carriers that do not fall within the categories of interexchange carriers, operator service providers, prepaid calling card providers, satellite service carriers, or toll resellers. The closest applicable NAICS Code category is for Wired Telecommunications Carriers as defined above. Under the applicable SBA size standard, such a business is small if it has 1,500 or fewer employees. Census data for 2012 shows that there were 3,117 firms that operated that year. Of this total, 3,083 operated with fewer than 1,000 employees. Thus, under this category and the associated small business size standard, the majority of Other Toll Carriers can be considered small. According to internally developed Commission data, 284 companies reported that their primary telecommunications service activity was the provision of other toll carriage. Of these, an estimated 279 have 1,500 or fewer employees. Consequently, the Commission estimates that most Other Toll Carriers are small entities that may be affected by rules adopted pursuant to the Order.

4. Wireless Providers—Fixed and Mobile

355. The broadband internet access service provider category covered by these rules may cover multiple wireless firms and categories of regulated wireless services. Thus, to the extent the wireless services listed below are used by wireless firms for broadband internet access service, the proposed actions may have an impact on those small businesses as set forth above and further below. In addition, for those services subject to auctions, we note that, as a general matter, the number of winning bidders that claim to qualify as small businesses at the close of an auction does not necessarily represent the number of small businesses currently in service. Also, the Commission does not generally track subsequent business size unless, in the context of assignments and transfers or reportable eligibility events, unjust enrichment issues are implicated.

356. *Wireless Telecommunications Carriers (except Satellite*). This industry comprises establishments engaged in operating and maintaining switching and transmission facilities to provide communications via the airwaves, such as cellular services, paging services, wireless internet access, and wireless video services. The appropriate size standard under SBA rules is that such a business is small if it has 1,500 or fewer employees. For this industry, Census data for 2012 show that there were 967 firms that operated for the entire year. Of this total, 955 firms had fewer than 1,000 employees. Thus under this category and the associated size standard, the Commission estimates that the majority of wireless telecommunications carriers (except satellite) are small entities. Similarly, according to internally developed Commission data, 413 carriers reported that they were engaged in the provision of wireless telephony, including cellular service, Personal Communications Service (PCS), and Specialized Mobile Radio (SMR) services. Of this total, an estimated 261 have 1,500 or fewer employees. Consequently, the Commission estimates that approximately half of these firms can be considered small. Thus, using available data, we estimate that the majority of wireless firms can be considered small.

357. The Commission's own data—available in its Universal Licensing System—indicate that, as of October 25, 2016, there are 280 Cellular licensees that will be affected by our actions today. The Commission does not know how many of these licensees are small, as the Commission does not collect that information for these types of entities. Similarly, according to internally developed Commission data, 413 carriers reported that they were engaged in the provision of wireless telephony, including cellular service, Personal Communications Service, and Specialized Mobile Radio Telephony services. Of this total, an estimated 261 have 1,500 or fewer employees, and 152 have more than 1,500 employees. Thus, using available data, we estimate that the majority of wireless firms can be considered small.

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

359. *1670–1675 MHz Services.* This service can be used for fixed and mobile uses, except aeronautical mobile. An auction for one license in the 1670–1675 MHz band was conducted in 2003. One license was awarded. The winning bidder was not a small entity.

360. *Wireless Telephony.* Wireless telephony includes cellular, personal communications services, and specialized mobile radio telephony carriers. As noted, the SBA has developed a small business size standard for Wireless Telecommunications Carriers (except Satellite). Under the SBA small business size standard, a business is small if it has 1,500 or fewer employees. According to Commission data, 413 carriers reported that they were engaged in wireless telephony. Of these, an estimated 261 have 1,500 or fewer employees and 152 have more than 1,500 employees. Therefore, a little less than one third of these entities can be considered small.

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

362. On January 26, 2001, the Commission completed the auction of 422 C and F Block Broadband PCS licenses in Auction No. 35. Of the 35 winning bidders in that auction, 29

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

363. *Specialized Mobile Radio Licenses.* The Commission awards ''small entity'' bidding credits in auctions for Specialized Mobile Radio (SMR) geographic area licenses in the 800 MHz and 900 MHz bands to firms that had revenues of no more than $15 million in each of the three previous calendar years. The Commission awards ''very small entity'' bidding credits to firms that had revenues of no more than $3 million in each of the three previous calendar years. The SBA has approved these small business size standards for the 900 MHz Service. The Commission has held auctions for geographic area licenses in the 800 MHz and 900 MHz bands. The 900 MHz SMR auction began on December 5, 1995, and closed on April 15, 1996. Sixty bidders claiming that they qualified as small businesses under the $15 million size standard won 263 geographic area licenses in the 900 MHz SMR band. The 800 MHz SMR auction for the upper 200 channels began on October 28, 1997, and was completed on December 8, 1997. Ten bidders claiming that they qualified as small businesses under the $15 million size standard won 38 geographic area licenses for the upper 200 channels in the 800 MHz SMR band. A second auction for the 800 MHz band was held on January 10, 2002 and closed on January 17, 2002 and included 23 BEA licenses. One bidder claiming small business status won five licenses.

364. The auction of the 1,053 800 MHz SMR geographic area licenses for the General Category channels began on August 16, 2000, and was completed on September 1, 2000. Eleven bidders won 108 geographic area licenses for the General Category channels in the 800 MHz SMR band and qualified as small businesses under the $15 million size standard. In an auction completed on December 5, 2000, a total of 2,800 Economic Area licenses in the lower 80 channels of the 800 MHz SMR service were awarded. Of the 22 winning bidders, 19 claimed small business status and won 129 licenses. Thus, combining all four auctions, 41 winning bidders for geographic licenses in the 800 MHz SMR band claimed status as small businesses.

365. In addition, there are numerous incumbent site-by-site SMR licenses and licensees with extended implementation authorizations in the 800 and 900 MHz bands. We do not know how many firms provide 800 MHz or 900 MHz geographic area SMR service pursuant to extended implementation authorizations, nor how many of these providers have annual revenues of no more than $15 million. One firm has over $15 million in revenues. In addition, we do not know how many of these firms have 1,500 or fewer employees, which is the SBA-determined size standard. We assume, for purposes of this analysis, that all of the remaining extended implementation authorizations are held by small entities, as defined by the SBA.

366. *Lower 700 MHz Band Licenses.* The Commission previously adopted criteria for defining three groups of small businesses for purposes of determining their eligibility for special provisions such as bidding credits. The Commission defined a ''small business'' as an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding $40 million for the preceding three years. A ''very small business'' is defined as an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than $15 million for the preceding three years. Additionally, the lower 700 MHz Service had a third category of small business status for Metropolitan/Rural Service Area (MSA/RSA) licenses—''entrepreneur''—which is defined as an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than $3 million for the preceding three years. The SBA approved these small size standards. An auction of 740 licenses (one license in each of the 734 MSAs/RSAs and one license in each of the six Economic Area Groupings (EAGs)) commenced on August 27, 2002, and closed on September 18, 2002. Of the 740 licenses available for auction, 484 licenses were won by 102 winning bidders. Seventy-two of the winning bidders claimed small business, very small business or entrepreneur status and won a total of 329 licenses. A second auction commenced on May 28, 2003, closed on June 13, 2003, and included 256 licenses: 5 EAG licenses and 476 Cellular Market Area licenses. Seventeen winning bidders claimed small or very small business status and won 60 licenses, and nine winning bidders claimed entrepreneur status and won 154 licenses. On July 26, 2005, the Commission completed an auction of 5 licenses in the Lower 700 MHz band (Auction No. 60). There were three winning bidders for five licenses. All three winning bidders claimed small business status.

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

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

369. *700 MHz Guard Band Licensees.* In 2000, in the 700 MHz Guard Band Order, the Commission adopted size standards for ''small businesses'' and ''very small businesses'' for purposes of determining their eligibility for special provisions such as bidding credits and installment payments. A small business in this service is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding $40 million for the

preceding three years. Additionally, a very small business is an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than $15 million for the preceding three years. SBA approval of these definitions is not required. An auction of 52 Major Economic Area licenses commenced on September 6, 2000, and closed on September 21, 2000. Of the 104 licenses auctioned, 96 licenses were sold to nine bidders. Five of these bidders were small businesses that won a total of 26 licenses. A second auction of 700 MHz Guard Band licenses commenced on February 13, 2001, and closed on February 21, 2001. All eight of the licenses auctioned were sold to three bidders. One of these bidders was a small business that won a total of two licenses.

370. *Air-Ground Radiotelephone Service.* The Commission has previously used the SBA's small business size standard applicable to Wireless Telecommunications Carriers (except Satellite), *i.e.,* an entity employing no more than 1,500 persons. There are approximately 100 licensees in the Air-Ground Radiotelephone Service, and under that definition, we estimate that almost all of them qualify as small entities under the SBA definition. For purposes of assigning Air-Ground Radiotelephone Service licenses through competitive bidding, the Commission has defined ''small business'' as an entity that, together with controlling interests and affiliates, has average annual gross revenues for the preceding three years not exceeding $40 million. A ''very small business'' is defined as an entity that, together with controlling interests and affiliates, has average annual gross revenues for the preceding three years not exceeding $15 million. These definitions were approved by the SBA. In May 2006, the Commission completed an auction of nationwide commercial Air-Ground Radiotelephone Service licenses in the 800 MHz band (Auction No. 65). On June 2, 2006, the auction closed with two winning bidders winning two Air-Ground Radiotelephone Services licenses. Neither of the winning bidders claimed small business status.

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

372. *3650–3700 MHz band.* In March 2005, the Commission released a *Report and Order and Memorandum Opinion and Order* that provides for nationwide, non-exclusive licensing of terrestrial operations, utilizing contention-based technologies, in the 3650 MHz band (*i.e.,* 3650–3700 MHz). As of April 2010, more than 1270 licenses have been granted and more than 7433 sites have been registered. The Commission has not developed a definition of small entities applicable to 3650–3700 MHz band nationwide, non-exclusive licensees. However, we estimate that the majority of these licensees are Internet Access Service Providers (ISPs) and that most of those licensees are small businesses.

373. *Fixed Microwave Services.* Microwave services include common carrier, private-operational fixed, and broadcast auxiliary radio services. They also include the Local Multipoint Distribution Service (LMDS), the Digital Electronic Message Service (DEMS), and the 24 GHz Service, where licensees can choose between common carrier and non-common carrier status. At present, there are approximately 36,708 common carrier fixed licensees and 59,291 private operational-fixed licensees and broadcast auxiliary radio licensees in the microwave services. There are approximately 135 LMDS licensees, three DEMS licensees, and three 24 GHz licensees. The Commission has not yet defined a small business with respect to microwave services. For purposes of the IRFA, we will use the SBA's definition applicable to Wireless Telecommunications Carriers (except satellite)—*i.e.,* an entity with no more than 1,500 persons. Under the present and prior categories, the SBA has deemed a wireless business to be small if it has 1,500 or fewer employees. The Commission does not have data specifying the number of these licensees that have more than 1,500 employees, and thus is unable at this time to estimate with greater precision the number of fixed microwave service licensees that would qualify as small business concerns under the SBA's small business size standard. Consequently, the Commission estimates that there are up to 36,708 common carrier fixed licensees and up to 59,291 private operational-fixed licensees and broadcast auxiliary radio licensees in the microwave services that may be small and may be affected by the rules and policies adopted herein. We note, however, that the common carrier microwave fixed licensee category includes some large entities.

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

375. In 2009, the Commission conducted Auction 86, the sale of 78 licenses in the BRS areas. The Commission offered three levels of bidding credits: (i) A bidder with attributed average annual gross revenues that exceed $15 million and do not exceed $40 million for the preceding three years (small business) received a

15 percent discount on its winning bid; (ii) a bidder with attributed average annual gross revenues that exceed $3 million and do not exceed $15 million for the preceding three years (very small business) received a 25 percent discount on its winning bid; and (iii) a bidder with attributed average annual gross revenues that do not exceed $3 million for the preceding three years (entrepreneur) received a 35 percent discount on its winning bid. Auction 86 concluded in 2009 with the sale of 61 licenses. Of the ten winning bidders, two bidders that claimed small business status won 4 licenses; one bidder that claimed very small business status won three licenses; and two bidders that claimed entrepreneur status won six licenses.

5. Satellite Service Providers

376. *Satellite Telecommunications Providers.* Two economic census categories address the satellite industry. Both categories have a small business size standard of $32.5 million or less in average annual receipts, under SBA rules.

377. *Satellite Telecommunications.* This category comprises firms ''primarily engaged in providing telecommunications services to other establishments in the telecommunications and broadcasting industries by forwarding and receiving communications signals via a system of satellites or reselling satellite telecommunications.'' The category has a small business size standard of $32.5 million or less in average annual receipts, under SBA rules. For this category, Census Bureau data for 2012 show that there were a total of 333 firms that operated for the entire year. Of this total, 299 firms had annual receipts of less than $25 million. Consequently, we estimate that the majority of satellite telecommunications providers are small entities.

378. *All Other Telecommunications.* ''All Other Telecommunications'' is defined as follows: ''This U.S. industry is comprised of establishments that are primarily engaged in providing specialized telecommunications services, such as satellite tracking, communications telemetry, and radar station operation. This industry also includes establishments primarily engaged in providing satellite terminal stations and associated facilities connected with one or more terrestrial systems and capable of transmitting telecommunications to, and receiving telecommunications from, satellite systems. Establishments providing internet services or voice over internet protocol (VoIP) services via client supplied telecommunications connections are also included in this industry.'' The SBA has developed a small business size standard for ''All Other Telecommunications,'' which consists of all such firms with gross annual receipts of $32.5 million or less. For this category, Census Bureau data for 2012 show that there were 1,442 firms that operated for the entire year. Of those firms, a total of 1,400 had annual receipts less than $25 million. Consequently, we conclude that the majority of All Other Telecommunications firms can be considered small.

6. Cable Service Providers

379. Because Section 706 requires us to monitor the deployment of broadband using any technology, we anticipate that some broadband service providers may not provide telephone service. Accordingly, we describe below other types of firms that may provide broadband services, including cable companies, MDS providers, and utilities, among others.

380. *Cable and Other Subscription Programming.* This industry comprises establishments primarily engaged in operating studios and facilities for the broadcasting of programs on a subscription or fee basis. The broadcast programming is typically narrowcast in nature (*e.g.,* limited format, such as news, sports, education, or youth-oriented). These establishments produce programming in their own facilities or acquire programming from external sources. The programming material is usually delivered to a third party, such as cable systems or direct-to-home satellite systems, for transmission to viewers. The SBA size standard for this industry establishes as small, any company in this category which has annual receipts of $38.5 million or less. According to 2012 U.S. Census Bureau data, 367 firms operated for the entire year. Of that number, 319 operated with annual receipts of less than $25 million a year and 48 firms operated with annual receipts of $25 million or more. Based on this data, the Commission estimates that the majority of firms operating in this industry are small.

381. *Cable Companies and Systems (Rate Regulation).* The Commission has developed its own small business size standards for the purpose of cable rate regulation. Under the Commission's rules, a ''small cable company'' is one serving 400,000 or fewer subscribers nationwide. Industry data indicate that there are currently 4,600 active cable systems in the United States. Of this total, all but nine cable operators nationwide are small under the 400,000-subscriber size standard. In addition, under the Commission's rate regulation rules, a ''small system'' is a cable system serving 15,000 or fewer subscribers. Current Commission records show 4,600 cable systems nationwide. Of this total, 3,900 cable systems have fewer than 15,000 subscribers, and 700 systems have 15,000 or more subscribers, based on the same records. Thus, under this standard as well, we estimate that most cable systems are small entities.

382. *Cable System Operators (Telecom Act Standard).* The Communications Act of 1934, as amended, also contains a size standard for small cable system operators, which is ''a cable operator that, directly or through an affiliate, serves in the aggregate fewer than one percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed $250,000,000 are approximately 52,403,705 cable video subscribers in the United States today. Accordingly, an operator serving fewer than 524,037 subscribers shall be deemed a small operator if its annual revenues, when combined with the total annual revenues of all its affiliates, do not exceed $250 million in the aggregate. Based on available data, we find that all but nine incumbent cable operators are small entities under this size standard. We note that the Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed $250 million. Although it seems certain that some of these cable system operators are affiliated with entities whose gross annual revenues exceed $250,000,000, we are unable at this time to estimate with greater precision the number of cable system operators that would qualify as small cable operators under the definition in the Communications Act.

7. All Other Telecommunications

383. ''All Other Telecommunications'' is defined as follows: ''This U.S. industry is comprised of establishments that are primarily engaged in providing specialized telecommunications services, such as satellite tracking, communications telemetry, and radar station operation. This industry also includes establishments primarily engaged in providing satellite terminal stations and associated facilities connected with one or more terrestrial systems and capable of transmitting telecommunications to, and receiving telecommunications from, satellite systems. Establishments providing internet services or voice over internet

protocol (VoIP) services via client supplied telecommunications connections are also included in this industry.'' The SBA has developed a small business size standard for ''All Other Telecommunications,'' which consists of all such firms with gross annual receipts of $32.5 million or less. For this category, Census Bureau data for 2012 show that there were 1,442 firms that operated for the entire year. Of those firms, a total of 1,400 had annual receipts less than $25 million. Consequently, we conclude that the majority of All Other Telecommunications firms can be considered small.

E. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements for Small Entities

384. Today's action requires broadband internet access service providers to ''publicly disclose accurate information regarding the network management practices, performance, and commercial terms of its broadband internet access services sufficient to enable consumers to make informed choices regarding the purchase and use of such services and entrepreneurs and other small businesses to develop, market, and maintain internet offerings.''

385. Broadband internet access service providers must disclose performance characteristics, network practices, and commercial terms. The required disclosures must either be posted on a publicly available, easily accessible website, or they must be submitted to the Commission, which will post the disclosures on a publicly available, easily accessible website.

386. Because the disclosure requirements we adopt today eliminate the additional reporting obligations found in the *Title II Order,* we decline to provide an exemption for smaller providers at this time. While a commenter emphasized that small broadband internet access service providers had an even more pressing need to be classified as information service providers, today's action applies equally to all providers of broadband internet access service, and therefore does even more than the initial comment requested.

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

387. Today's action restores broadband internet access service's original classification as an information service. This will significantly decrease the burdens on small entities. Additionally, the removal of the additional reporting obligations, the direct notification requirement, and the broadband provider safe harbor form will minimize the burdens providers face.

388. The transparency rule we adopt today strikes an appropriate balance by requiring ISPs to disclose information that will allow consumers to make informed choices and that will enable the Commission to enable it to meet its statutory obligation to observe the communications marketplace to monitor the introduction of new services and technologies and to identify and eliminate potential marketplace barriers for the provision of information service, while simultaneously freeing providers from onerous burdens that produce little public benefit. While retaining the transparency rule, with modifications, from the *Open Internet Order,* we eliminate the additional reporting obligations, the direct notification requirements, and the broadband label ''safe harbor,'' all of which will reduce the burdens on ISPs. The additional reporting obligations, the direct notification requirement, and the ''safe harbor'' all required ISPs to expend significant resources without a corresponding gain to consumers, entrepreneurs, or other small businesses.

389. We also eliminate several rules adopted in the *Title II Order,* including the general conduct standard, the ban on paid prioritization, and the no-blocking and no-throttling rules. We eliminate these rules for three reasons. First, the transparency rule we adopt, in combination with the state of broadband internet access service competition and the antitrust and consumer protection laws, obviate the need for conduct rules by achieving comparable benefits at lower cost. Second, the record does not identify any legal authority to adopt conduct rules for all ISPs, and we decline to distort the market with a patchwork of non-uniform, limited-purpose rules. Third, scrutinizing closely each prior conduct rule, we find that the costs of each rule outweigh its benefits.

390. We also eliminate the position of Open Internet Ombudsperson, the formal complaint process, and the issuance of advisory opinions, because the work of the Open Internet Ombudsperson is more appropriately handled by Commission staff, and because the issuance of advisory opinions and the formal complaint process have not been shown to provide any benefit to broadband internet access service providers or consumers.

391. Finally, we return mobile broadband internet access service to its original classification as a private mobile radio service and restore the definition of interconnected service that existed prior to the *Title II Order.* This will remove regulatory burdens from providers of mobile broadband internet access service, including small providers.

G. Report to Congress

392. The Commission will send a copy of this Declaratory Ruling, Report and Order, and Order, including this FRFA, in a report to be sent to Congress pursuant to the SBREFA. In addition, the Commission will send a copy of this Declaratory Ruling, Report and Order, and Order, including the FRFA, to the Chief Counsel for Advocacy of the SBA. A copy of the Declaratory Ruling, Report and Order, and Order, and the FRFA (or summaries thereof) will also be published in the **Federal Register**.

VII. Ordering Clauses

393. Accordingly, *it is ordered* that, pursuant to Sections 3, 4, 201(b), 230, 231, 257, 303, 332, 403, 501, and 503 of the Communications Act of 1934, as amended, 47 U.S.C. 153, 154, 201(b), 230, 231, 257, 303, 332, 403, 501, 503, this Declaratory Ruling, Report and Order, and Order *is adopted.*

394. *It is further ordered* that parts 1, 8, and 20 of the Commission's rules *are amended* as set forth in the Final Rules of the Order.

395. *It is further ordered* that this Declaratory Ruling, Report and Order, and Order, including those amendments which contain new or modified information collection requirements that require approval by the Office of Management and Budget (OMB) under the Paperwork Reduction Act *will become effective* upon the effective date announced when the Commission publishes a document in the **Federal Register** announcing such OMB approval and the effective date. It is our intention in adopting the foregoing Declaratory Ruling and these rule changes that, if any provision of the Declaratory Ruling or the rules, or the application thereof to any person or circumstance, is held to be unlawful, the remaining portions of such Declaratory Ruling and the rules not deemed unlawful, and the application of such Declaratory Ruling and the rules to other person or circumstances, shall remain in effect to the fullest extent permitted by law.

396. *It is further ordered* that the *incompas* Petition to Modify Protective Orders is *denied.*

397. *It is further ordered* that the National Hispanic Media Coalition (NHMC) Motion Regarding Informal Consumer Complaints is *denied.*

398. *It is further ordered* that the Commission's Consumer & Governmental Affairs Bureau, Reference Information Center, *shall send* a copy of this Declaratory Ruling, Report and Order, and Order to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. 801(a)(1)(A).

399. *It is further ordered* that, pursuant to 47 CFR 1.4(b)(1), the period for filing petitions for reconsideration or petitions for judicial review of this Declaratory Ruling, Report and Order, and Order will commence on the date that a summary of this Declaratory Ruling, Report and Order, and Order is published in the **Federal Register**.

List of Subjects in 47 CFR Parts 1, 8, and 20

Administrative practice and procedure, Cable television, Common carriers, Communications common carriers, Reporting and recordkeeping requirements, Satellites, Telecommunications, Telephone, Radio.

Federal Communications Commission.

Marlene H. Dortch,

Secretary, Office of the Secretary.

Final Rules

For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR parts 1, 8, and 20 as follows:

PART 1—PRACTICE AND PROCEDURE

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

Authority: 47 U.S.C. 34–39, 151, 154(i), 154(j), 155, 157, 160, 201, 225, 227, 303, 309, 332, 1403, 1404, 1451, 1452, and 1455.

■ 2. Amend § 1.49 by revising paragraph (f)(1)(i) to read as follows:

§ 1.49 Specifications as to pleadings and documents.

* * * * *

(f) * * *

(1) * * *

(i) Formal complaint proceedings under section 208 of the Act and in §§ 1.720 through 1.736, and pole attachment complaint proceedings under section 224 of the Act and in §§ 1.1401 through 1.1424;

* * * * *

PART 8—INTERNET FREEDOM

■ 3. The authority citation for part 8 is revised to read as follows:

Authority: 47 U.S.C. 154, 201(b), 257, and 303(r).

■ 4. Amend part 8 by revising the part heading to read as set forth above.

■ 5. Revise § 8.1 to read as follows:

§ 8.1 Transparency.

(a) Any person providing broadband internet access service shall publicly disclose accurate information regarding the network management practices, performance characteristics, and commercial terms of its broadband internet access services sufficient to enable consumers to make informed choices regarding the purchase and use of such services and entrepreneurs and other small businesses to develop, market, and maintain internet offerings. Such disclosure shall be made via a publicly available, easily accessible website or through transmittal to the Commission.

(b) Broadband internet access service is a mass-market retail service by wire or radio that provides the capability to transmit data to and receive data from all or substantially all internet endpoints, including any capabilities that are incidental to and enable the operation of the communications service, but excluding dial-up internet access service. This term also encompasses any service that the Commission finds to be providing a functional equivalent of the service described in the previous sentence or that is used to evade the protections set forth in this part.

(c) A network management practice is reasonable if it is appropriate and tailored to achieving a legitimate network management purpose, taking into account the particular network architecture and technology of the broadband internet access service.

§§ 8.2, 8.3, 8.5, 8.7, 8.9, 8.11, 8.12, 8.13, 8.14, 8.15, 8.16, 8.17, 8.18, and 8.19 [Removed]

■ 6. Remove §§ 8.2, 8.3, 8.5, 8.7, 8.9, 8.11, 8.12, 8.13, 8.14, 8.15, 8.16, 8.17, 8.18, and 8.19.

PART 20—COMMERCIAL MOBILE SERVICES

■ 7. The authority citation for part 20 continues to read as follows:

Authority: 47 U.S.C. 151, 152(a) 154(i), 157, 160, 201, 214, 222, 251(e), 301, 302, 303, 303(b), 303(r), 307, 307(a), 309, 309(j)(3), 316, 316(a), 332, 610, 615, 615a, 615b, 615c, unless otherwise noted.

■ 8. Amend § 20.3 by:

■ a. In the definition of ''Commercial mobile radio service,'' revising paragraph (b);

■ b. In the definition of ''Interconnected Service,'' revising paragraph (a); and

■ c. Revising the definition of ''Public Switched Network.''

The revisions read as follows:

§ 20.3 Definitions.

* * * * *

Commercial mobile radio service. * * *

* * * * *

(b) The functional equivalent of such a mobile service described in paragraph (a) of this definition.

* * * * *

Interconnected Service. * * *

(a) That is interconnected with the public switched network, or interconnected with the public switched network through an interconnected service provider, that gives subscribers the capability to communicate to or receive communication from all other users on the public switched network; or

* * * * *

Public Switched Network. Any common carrier switched network, whether by wire or radio, including local exchange carriers, interexchange carriers, and mobile service providers, that uses the North American Numbering Plan in connection with the provision of switched services.

* * * * *

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Part III

Department of the Interior

Bureau of Land Management

43 CFR Parts 3160 and 3170

Waste Prevention, Production Subject to Royalties, and Resource Conservation; Rescission or Revision of Certain Requirements; Proposed Rule

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

43 CFR Parts 3160 and 3170

[18X.LLWO310000.L13100000.PP0000]

RIN 1004–AE53

Waste Prevention, Production Subject to Royalties, and Resource Conservation; Rescission or Revision of Certain Requirements

AGENCY: Bureau of Land Management, Interior.

ACTION: Proposed rule.

SUMMARY: On November 18, 2016, the Bureau of Land Management (BLM) published in the **Federal Register** a final rule entitled, ''Waste Prevention, Production Subject to Royalties, and Resource Conservation'' (''2016 final rule''). After reconsidering the cost, complexity, and other implications of the 2016 final rule, the BLM is now proposing to revise the 2016 final rule in a manner that reduces unnecessary compliance burdens, is consistent with the BLM's existing statutory authorities, and re-establishes long-standing requirements that the 2016 final rule replaced. In addition to requesting public comment on the proposed rule generally, the BLM is also requesting comment on ways that the BLM can reduce the waste of gas by incentivizing the capture, reinjection, or beneficial use of the gas.

DATES: Send your comments on this proposed rule to the BLM on or before April 23, 2018. A comment to the OMB on the proposed information collection revisions is best assured of being given full consideration if the OMB receives it by March 26, 2018.

ADDRESSES:

Mail: U.S. Department of the Interior, Director (630), Bureau of Land Management, Mail Stop 2134LM, 1849 C St. NW, Washington, DC 20240, Attention: 1004–AE53.

Personal or messenger delivery: U.S. Department of the Interior, Bureau of Land Management, 20 M Street SE, Room 2134 LM, Washington, DC 20003, Attention: Regulatory Affairs.

Federal eRulemaking Portal: https://www.regulations.gov. In the Searchbox, enter ''RIN 1004–AE53'' and click the ''Search'' button. Follow the instructions at this website.

FOR COMMENTS ON INFORMATION-COLLECTION ACTIVITIES

Fax: Office of Management and Budget (OMB), Office of Information and Regulatory Affairs, Desk Officer for the Department of the Interior, fax 202–395–5806.

Electronic mail: OIRA_Submission@omb.eop.gov.

Please indicate ''Attention: OMB Control Number 1004–0211,'' regardless of the method used to submit comments on the information collection burdens. If you submit comments on the information-collection burdens, you should provide the BLM with a copy, at one of the street addresses shown earlier in this section, so that we can summarize all written comments and address them in the final rulemaking. Comments not pertaining to the proposed rule's information-collection burdens should not be submitted to OMB. The BLM is not obligated to consider or include in the Administrative Record for the final rule any comments that are improperly directed to OMB.

FOR FURTHER INFORMATION CONTACT: Catherine Cook, Acting Division Chief, Fluid Minerals Division, 202–912–7145 or *ccook@blm.gov,* for information regarding the substance of this proposed rule or information about the BLM's Fluid Minerals program. For questions relating to regulatory process issues, contact Faith Bremner at 202–912–7441 or *fbremner@blm.gov.* Persons who use a telecommunications device for the deaf (TDD) may call the Federal Relay Service (FRS) at 1–800–877–8339, 24 hours a day, 7 days a week, to leave a message or question with the above individuals. You will receive a reply during normal business hours.

SUPPLEMENTARY INFORMATION:

I. Executive Summary
II. Public Comment Procedures
III. Background
IV. Discussion of the Proposed Rule
V. Procedural Matters

I. Executive Summary

On November 18, 2016, the BLM published in the **Federal Register** a final rule entitled, ''Waste Prevention, Production Subject to Royalties, and Resource Conservation'' (82 FR 83008) (''2016 final rule''). The 2016 final rule was intended to: Reduce waste of natural gas from venting, flaring, and leaks during oil and natural gas production activities on onshore Federal and Indian leases; clarify when produced gas lost through venting, flaring, or leaks is subject to royalties; and clarify when oil and gas production may be used royalty-free. The 2016 final rule became effective on January 17, 2017, with some requirements taking effect immediately, but the majority of requirements phased-in on January 17, 2018 or later.

On March 28, 2017, President Trump issued Executive Order (E.O.) 13783, ''Promoting Energy Independence and Economic Growth,'' directing the BLM to review the 2016 final rule and to publish proposed rules suspending, revising, or rescinding it, if appropriate.

The BLM reviewed the 2016 final rule and found that some impacts were under-estimated and many provisions of the rule would add regulatory burdens that unnecessarily encumber energy production, constrain economic growth, and prevent job creation. This proposed rule would revise the 2016 final rule so that the remaining requirements would be consistent with the policies set forth in section 1 of E.O. 13783, which states that ''[i]t is in the national interest to promote clean and safe development of our Nation's vast energy resources, while at the same time avoiding regulatory burdens that unnecessarily encumber energy production, constrain economic growth, and prevent job creation.''

More specifically, the BLM acknowledges that the 2016 final rule contains requirements that overlap with other Federal and State requirements and regulations. However, unlike the Environmental Protection Agency (EPA) regulations with which the rule overlaps, the 2016 final rule would affect existing wells, including a substantial number that are likely to be marginal or low-producing and therefore less likely to remain economical to operate if subjected to additional compliance costs. The 2016 final rule also contains numerous administrative and reporting burdens that are unnecessary and likely to constrain development. Finally, as explained in the Regulatory Impact Analysis (RIA) prepared for this rule, the BLM reviewed the 2016 final rule and determined that the costs the rule is expected to impose would exceed the benefits it is expected to generate. For these reasons, the BLM is now proposing to revise the 2016 final rule in a manner that reduces unnecessary compliance burdens and, in large part, re-establishes the long-standing requirements that the 2016 final rule replaced.

II. Public Comment Procedures

If you wish to comment on this proposed rule, you may submit your comments to the BLM by mail, personal or messenger delivery, or through *https://www.regulations.gov* (see the **ADDRESSES** section).

Please make your comments on the proposed rule as specific as possible, confine them to issues pertinent to the proposed rule, and explain the reason

for any changes you recommend. Where possible, your comments should reference the specific section or paragraph of the proposal that you are addressing. The BLM is not obligated to consider or include in the Administrative Record for the final rule comments that we receive after the close of the comment period (see **DATES**) or comments delivered to an address other than those listed above (see **ADDRESSES**).

Comments, including names and street addresses of respondents, will be available for public review at the address listed under ''**ADDRESSES:** Personal or messenger delivery'' during regular hours (7:45 a.m. to 4:15 p.m.), Monday through Friday, except holidays. Before including your address, telephone number, email address, or other personal identifying information in your comment, be advised 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 from public review your personal identifying information, we cannot guarantee that we will be able to do so.

As explained later, this proposed rule would include revisions to information collection requirements that must be approved by the Office of Management and Budget (OMB). If you wish to comment on the revised information collection requirements in this proposed rule, please note that such comments must be sent directly to the OMB in the manner described in the **ADDRESSES** section. The OMB is required to make a decision concerning the collection of information contained in this proposed rule between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment to the OMB on the proposed information collection revisions is best assured of being given full consideration if the OMB receives it by March 26, 2018.

III. Background

The BLM manages more than 245 million acres of public land, known as the National System of Public Lands, primarily located in 12 Western States, including Alaska. The BLM also manages 700 million acres of subsurface mineral estate throughout the nation.

The BLM's onshore oil and gas management program is a major contributor to the nation's oil and gas production. In fiscal year (FY) 2016, sales volumes from Federal onshore production lands accounted for 9 percent of domestic natural gas production, and 5 percent of total U.S. oil production.[1] Over $1.9 billion in royalties were collected from all oil, natural gas, and natural gas liquids transactions in FY 2016 on Federal and Indian Lands.[2] Royalties from Federal lands are shared with States. Royalties from Indian lands are collected for the benefit of the Indian owners.

The venting or flaring of some natural gas is a practically unavoidable consequence of oil and gas development. Whether during well drilling, production testing, well purging, or emergencies, it is not uncommon for gas to reach the surface that cannot be feasibly used or sold. When this occurs, the gas must either be combusted (''flared'') or released to the atmosphere (''vented''). Depending on the circumstances, operators may also flare natural gas on a longer-term basis from production operations, predominantly in situations where an oil well co-produces natural gas (or ''associated gas'') in an exploratory area or a field that lacks adequate gas-capture infrastructure to bring the gas to market. Still other venting or flaring of gas from production equipment may occur by design and as a substitute for other power generated facilities at the wellsite.

In response to oversight reviews and a recognition of increased flaring from Federal and Indian leases, the BLM developed a final rule entitled, ''Waste Prevention, Production Subject to Royalties, and Resource Conservation,'' which was published in the **Federal Register** on November 18, 2016 (81 FR 83008) (''2016 final rule''). The 2016 final rule replaced the BLM's existing policy at that time, Notice to Lessees and Operators of Onshore Federal and Indian Oil and Gas Leases, Royalty or Compensation for Oil and Gas Lost (NTL–4A).

The 2016 final rule was intended to: Reduce waste of natural gas from venting, flaring, and leaks during oil and natural gas production activities on onshore Federal and Indian leases; clarify when produced gas lost through venting, flaring, or leaks is subject to royalties; and clarify when oil and gas production may be used royalty free on-site. The 2016 final rule became effective on January 17, 2017, with some requirements taking effect immediately, but the majority of requirements phased-in over time.

On March 28, 2017, President Trump issued E.O. 13783, entitled, ''Promoting Energy Independence and Economic Growth,'' requiring the BLM to review the 2016 final rule. Section 7(b) of E.O. 13783 directs the Secretary of the Interior to review four specific rules, including the 2016 final rule, for consistency with the policy articulated in section 1 of the Order and to publish proposed rules suspending, revising, or rescinding those rules, if appropriate. Among other things, section 1 of E.O. 13783 states that ''[i]t is in the national interest to promote clean and safe development of our Nation's vast energy resources, while at the same time avoiding regulatory burdens that unnecessarily encumber energy production, constrain economic growth, and prevent job creation.''

To implement E.O. 13783, Secretary of the Interior Ryan Zinke issued Secretarial Order No. 3349, entitled, ''American Energy Independence'' on March 29, 2017, which, among other things, directs the BLM to review the 2016 final rule to determine whether it is fully consistent with the policy set forth in section 1 of E.O. 13783.

The BLM reviewed the 2016 final rule and believes that it is inconsistent with the policy in section 1 of E.O. 13783. The BLM found that the impacts resulting from some provisions of the rule were underestimated and would add regulatory burdens that unnecessarily encumber energy production, constrain economic growth, and prevent job creation. This proposed rule would revise the 2016 final rule so that the remaining requirements would be consistent with the policies set forth in section 1 of E.O. 13783.

On October 5, 2017, the BLM published a proposed rule that would suspend the implementation of certain requirements in the 2016 final rule until January 17, 2019 (82 FR 46458). After a public comment period, the BLM finalized this temporary suspension on December 8, 2017 (82 FR 58050) (''Suspension Rule''). The purpose of the Suspension Rule is to avoid imposing temporary or permanent compliance costs on operators for requirements that may be rescinded or significantly revised in the near future. The BLM plans to conclude its revision of the 2016 final rule during the period of the suspension effected by the Suspension Rule.

The BLM has several reasons for modifying the requirements in the 2016 final rule. First, the 2016 final rule is more expensive to implement and generates fewer benefits than initially

[1] United States Department of the Interior, ''Budget Justifications and Performance Integration Fiscal Year 2018: Bureau of Land Management'' at VII–77, available at *https://www.doi.gov/sites/doi.gov/files/uploads/fy2018_blm_budget_justification.pdf.*

[2] Derived from data available on the Office of Natural Resources Revenue website's ''Statistical Information'' page, accessible at *https://statistics.onrr.gov/.*

estimated. The BLM reviewed the 2016 final rule's requirements and determined that the rule's compliance costs for industry and implementation costs for the BLM would exceed the rule's benefits. For a more detailed explanation, see the analysis of the 2016 final rule's requirements (baseline scenario) in the Regulatory Impact Analysis (RIA) prepared for this rule (RIA at 38). Over the 10-year evaluation period (2019–2028), the total net benefits posed by the 2016 final rule are estimated to be −$627 to −$902 million (net present value (NPV) and interim domestic social cost of methane (SC–CH_4) using a 7 percent discount rate) or −$581 to −$945 million (NPV and interim domestic SC–CH_4 using a 3 percent discount rate).

In addition, many of the 2016 final rule's requirements would pose a particular compliance burden to operators of marginal or low-producing wells, and there is concern that those wells would not be economical to operate with the additional compliance costs. Although the characteristics of what is considered to be a marginal well can vary, the percentage of the nation's oil and gas wells classified as marginal is high. The Interstate Oil and Gas Compact Commission (IOGCC) published a report in 2015 detailing the contributions of marginal wells to the nation's oil and gas production and economic activity.[3] According to the IOGCC, about 69.1 and 75.9 percent of the nation's operating oil and gas wells, respectively, are marginal (IOGCC 2015 at 22). The IOGCC defines a marginal well as ''a well that produces 10 barrels of oil or 60 Mcf of natural gas per day or less'' (IOGCC 2015 at 2).[4] The U.S. Energy Information Administration (EIA) reported that, in 2016, roughly 76.4 percent of oil wells produced less than or equal to 10 barrels of oil equivalent (BOE) per day and 81.3 percent of oil wells produced less than or equal to 15 BOE/day. For gas wells, EIA reported that roughly 71.6 percent produced less than or equal to 10 BOE/day and 78.2 percent less than or equal to 15 BOE/day. For both oil and gas wells, EIA estimates that 73.3 percent of all wells produce less than 10 BOE/day.[5] On Federal lands, this would equate to 68,972 wells designated as marginal.[6]

The 2016 final rule's requirements that would impose a particular burden on marginal or low-producing wells include leak detection and repair (LDAR), pneumatic equipment, and liquids unloading requirements. The 2016 final rule allows for exemptions from many of the requirements when compliance would impose such costs that the operator would cease production and abandon significant recoverable reserves. Although the 2016 final rule allowed operators to request an alternative LDAR program, there is no full exemption from the requirement. Due to the prevalence of marginal and low-producing wells, we would expect that many exemptions would be warranted, making the burden imposed by the exemption process excessive. It is also possible that some proportion of marginal wells would be prematurely shut-in by their operators due to the costs and uncertainties involved in obtaining an exemption from the BLM or the costs associated with an alternate LDAR program.

There are many other reporting requirements in the 2016 final rule and the cumulative effect of the burden is substantial. Specifically, the BLM estimates that the 2016 final rule would impose administrative costs of about $14 million per year ($10.7 million to be borne by the industry and $3.27 million to be borne by the BLM). The BLM estimates that the proposed revision of the 2016 final rule would alleviate the vast majority of these burdens and would pose administrative burdens of only $349,000 per year. (See RIA section 3.2.2).

In addition, the 2016 final rule has many requirements that overlap with the EPA's authority under the Clean Air Act, and in particular EPA's New Source Performance Standards at 40 CFR part 60, subparts OOOO (NSPS OOOO) and OOOOa (NSPS OOOOa). For example, the EPA's NSPS OOOO regulates new, reconstructed, and modified pneumatic controllers, storage tanks, and gas wells completed using hydraulic fracturing, while NSPS OOOOa regulates new, reconstructed, and modified pneumatic pumps, fugitive emissions from well sites and compressor stations, and oil wells completed using hydraulic fracturing, in addition to the requirements in NSPS OOOO.

The BLM's 2016 final rule also regulates these source categories. While the EPA regulates new, modified, and reconstructed sources, the BLM crafted the 2016 final rule to address the remaining existing facilities within these same source categories. However, by forcing operators to upgrade equipment to meet the BLM's standard, operators could need to replace old equipment with new equipment. Thus, the 2016 final rule could compel facilities not intended to fall under the purviews of NSPS OOOO and NSPS OOOOa to become regulated facilities.

In addition, as the BLM acknowledged during the development of the 2016 final rule,[7] some States with significant Federal oil and gas production have similar regulations addressing the loss of gas from these sources. For example, the State of Colorado has regulations that restrict methane emissions during most oil and gas well completions and recompletions, impose requirements for pneumatic controllers and storage vessels, require a comprehensive LDAR program, and set standards for liquids unloading.[8] The Utah Department of Environmental Quality issued a General Approval Order on June 5, 2014, that applies to new and modified oil and gas well sites and tank batteries and requires: Pneumatic controllers to be low bleed or have their emissions routed to capture or flare, pneumatic pumps to route emissions to capture or flare, and operators to inspect for leaks at least annually.[9] Since the promulgation of the 2016 final rule, the State of California has issued new regulations that require quarterly monitoring of methane emissions from oil and gas wells, compressor stations and other equipment involved in the production of oil and gas, impose limitations on venting from natural gas powered pneumatic devices and pumps,

[3] IOGCC, ''Marginal Wells: Fuel for Economic Growth. 2015 Report.'' Available on the web at *http://iogcc.ok.gov/websites/iogcc/images/MarginalWell/MarginalWell-2015.pdf.*

[4] By other definitions, marginal or stripper wells might include those with production of up to 15 barrels of oil or 90 Mcf of natural gas per day or less. The U.S. Energy Information Administration (EIA) reported that, in 2009, roughly 78.7 percent of oil wells produced less than or equal to 10 barrels of oil equivalent (BOE) per day and 85.4 percent of oil wells produced less than or equal to 15 BOE/day. For gas wells, EIA reported that roughly 64.5 percent produced less than or equal to 10 BOE/day and 73.3 percent less than or equal to 15 BOE/day. EIA, ''United States Total 2009: Distribution of Wells by Production Rate Bracket.'' December 2010. Available on the web at *https://www.eia.gov/naturalgas/archive/petrosystem/us_table.html.*

[5] EIA, ''The Distribution of U.S. Oil and Natural Gas Wells by Production Rate.'' December 2017. Available on the web at *https://www.eia.gov/petroleum/wells/.*

[6] Estimated percent of marginal wells applied to the number of Federal and Indian wells, provided in the BLM Oil and Gas Statistics, *available at https://www.blm.gov/programs/energy-and-minerals/oil-and-gas/oil-and-gas-statistics.*

[7] 81 FR 6616, 6633–34 (Feb. 8, 2016).

[8] Colorado Air Quality Control Commission, Regulation 7, 5 CCR 1001–9, Sections XII, XVII, and XVIII.

[9] State of Utah, Department of Environmental Quality, Division of Air Quality, Approval Order: General Approval Order for a Crude Oil and Natural Gas Well Site and/or Tank Battery, DAQE–AN1492500001–14 (June 5, 2014).

and require vapor recovery from tanks under certain circumstances.[10]

Furthermore, the BLM is not confident that all provisions of the 2016 final rule would survive judicial review. During the development of the 2016 final rule, the BLM received comments from the regulated industry and some States arguing that the BLM's proposed rule exceeded the BLM's statutory authority. Specifically, these commenters objected that the proposed rule, rather than preventing ''waste,'' was actually intended to regulate air quality, a matter within the regulatory jurisdiction of the EPA and the States under the Clean Air Act. Commenters also asserted that the proposed rule exceeded the BLM's waste prevention authority by requiring conservation without regard to economic feasibility, a key factor in determining whether a loss of oil or gas is prohibited ''waste'' under the Mineral Leasing Act. Immediately after the 2016 final rule was issued, petitions for judicial review of the rule were filed by industry groups and States with significant BLM-managed Federal and Indian minerals. *Wyoming* v. *U.S. Dep't of the Interior,* Case No. 2:16–cv–00285–SWS (D. Wyo.). Petitioners in this litigation maintain that the BLM's promulgation of the 2016 final rule was arbitrary and capricious (in violation of the Administrative Procedure Act), and that the 2016 final rule exceeded the BLM's statutory authority by regulating air quality and failing to give due consideration to economic feasibility. Although the court denied petitioners' motions for a preliminary injunction, the court did express concerns that the BLM may have usurped the authority of the EPA and the States under the Clean Air Act, and questioned whether it was appropriate for the 2016 final rule to be justified based on its environmental and societal benefits, rather than on its resource conservation benefits alone. The BLM requests comment on whether the 2016 final rule was consistent with its statutory authority.

The 2016 final rule also has requirements that limit the flaring of associated gas produced from oil wells. The 2016 final rule sought to constrain this flaring through the imposition of a ''capture percentage'' requirement, requiring operators to capture a certain percentage of the gas they produce, after allowing for a certain volume of flaring per well. The requirement would become more stringent over a period of years. The BLM reviewed State regulations, rules, and orders designed to limit the waste of oil and gas resources and the flaring of natural gas, and determined that states with the most significant BLM-managed oil and gas production place restrictions or limitations on gas flaring from oil wells. For example, the State of North Dakota has requirements that are similar (but not identical) to the 2016 final rule. Other States generally have flaring limits that trigger a review by a governing board to determine whether the gas should be conserved. A memorandum containing a summary of the statutory and regulatory restrictions on venting and flaring in the 10 States responsible for approximately 99 percent of Federal oil and gas production is available on the *Federal eRulemaking Portal: https://www.regulations.gov.* In the Searchbox, enter ''RIN 1004–AE53'', click the ''Search'' button, open the Docket Folder, and look under Supporting Documents.

The BLM regulates the development of Federal and Indian onshore oil and gas resources pursuant to its authority under the following statutes: The Mineral Leasing Act of 1920 (30 U.S.C. 188–287), the Mineral Leasing Act for Acquired Lands (30 U.S.C. 351–360), the Federal Oil and Gas Royalty Management Act (30 U.S.C. 1701–1758), the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1701–1785), the Indian Mineral Leasing Act of 1938 (25 U.S.C. 396a–g), the Indian Mineral Development Act of 1982 (25 U.S.C. 2101–2108), and the Act of March 3, 1909 (25 U.S.C. 396). These statutes authorize the Secretary of the Interior to promulgate such rules and regulations as may be necessary to carry out the statutes' various purposes.[11] The Federal and Indian mineral leasing statutes share a common purpose of promoting the development of Federal and Indian oil and gas resources for the financial benefit of the public and Indian mineral owners.[12] The Mineral Leasing Act requires lessees to ''use all reasonable precautions'' [13] to prevent the waste of oil or gas and authorizes the Secretary of the Interior to prescribe rules ''for the prevention of undue waste.'' [14] The Federal Oil and Gas Royalty Management Act establishes royalty liability for ''oil or gas lost or wasted . . . when such loss or waste is due to negligence on the part of the operator of the lease, or due to the failure to comply with any rule or regulation, order or citation issued under [the mineral leasing laws].'' [15] In the Federal Land Policy and Management Act of 1976, Congress declared ''that it is the policy of the United States that . . . the public lands be managed in a manner which recognizes the Nation's need for domestic sources of minerals . . . .'' [16] In order to make certain that the development of Federal and Indian oil and gas resources will not be unnecessarily hindered by regulatory burdens, the BLM is exercising its inherent authority [17] to reconsider the 2016 final rule. The BLM's reconsideration of the 2016 final rule is intended to ensure that the BLM's waste prevention regulations require ''reasonable precautions'' on the part of operators, that the BLM's regulations prevent ''undue waste,'' and that the BLM's regulations do not unnecessarily constrain domestic mineral production.

IV. Discussion of the Proposed Rule

A. Summary and Request for Comment

The 2016 final rule replaced the BLM's existing policy, NTL–4A, which governed venting and flaring from BLM-administered leases for more than 35 years. Because the BLM has found the 2016 final rule to impose excessive costs, and believes that a regulatory framework similar to NTL–4A can be applied in a manner that limits waste without unnecessarily burdening production, the BLM is proposing to replace the requirements contained in the 2016 final rule with requirements similar to, but with notable improvements on, those contained in NTL–4A.

The preamble to the 2016 final rule suggested that NTL–4A was outdated and needed to be overhauled to account for technological advancements and to incorporate ''economical, cost-effective, and reasonable measures that operators can take to minimize gas waste.'' [18] But, as evidenced by the Regulatory Impact Analysis for the 2016 final rule and the RIA prepared for this proposed rule, many of the requirements imposed by the 2016 final rule were not, in fact, cost-effective and actually imposed

[10] **CAL. CODE REGS.** Tit. 17, §§ 95665–95677.

[11] 30 U.S.C. 189 (MLA); 30 U.S.C. 359 (MLAAL); 30 U.S.C. 1751(a) (FOGRMA); 43 U.S.C. 1740 (FLPMA); 25 U.S.C. 396d (IMLA); 25 U.S.C. 2107 (IMDA); 25 U.S.C. 396.

[12] *See, e.g., California Co.* v. *Udall,* 296 F.2d 384, 388 (DC Cir. 1961) (noting that the MLA ''was intended to promote wise development of . . . natural resources and to obtain for the public a reasonable financial return on assets that 'belong' to the public.'').

[13] 30 U.S.C. 225.

[14] 30 U.S.C. 187.

[15] 30 U.S.C. 1756.

[16] 43 U.S.C. 1701.

[17] *See Ivy Sports Med., LLC* v. *Burwell,* 767 F.3d 81, 86 (DC Cir. 2014) (noting the ''oft-repeated'' principle that the ''power to reconsider is inherent in the power to decide'').

[18] 81 FR 83008, 83009, 83017 (Nov. 18, 2016).

compliance costs well in excess of the value of the resource to be conserved.

The BLM believes that a return to the NTL–4A framework, as explained in more detail in the section-by-section discussion below, is appropriate and will ensure that operators take ''reasonable precautions'' to prevent ''undue waste.'' Where the 2016 final rule introduced sensible improvements on NTL–4A—for example, the requirement that a person remain onsite during liquids unloading in order to minimize the loss of gas—the BLM has endeavored to retain them in this proposed rule.

The BLM requests comments on each of the provisions proposed for rescission, modification, or replacement as outlined below and described more fully in the following section-by-section discussions.

The BLM is proposing to rescind the following requirements of the 2016 final rule:

- Waste Minimization Plans;
- Well drilling requirements;
- Well completion and related operations requirements;
- Pneumatic controllers equipment requirements;
- Pneumatic diaphragm pumps equipment requirements;
- Storage vessels equipment requirements; and
- LDAR requirements.

In addition, under this proposal, the following requirements in the 2016 final rule would be modified and/or replaced with requirements that are similar to those that were in NTL–4A:

- Gas capture requirements would be revised to conform with policy similar to that found in NTL–4A;
- Downhole well maintenance and liquids unloading requirements; and
- Measuring and reporting volumes of gas vented and flared.

The remaining requirements in the 2016 final rule would either be retained, modified only slightly, or removed, but the impact of the removal would be small relative to the items listed previously.

The BLM is not proposing to revise the royalty provisions (§ 3103.3–1) or the royalty-free use provisions (subpart 3178) that were part of the 2016 final rule. However, as explained below, the BLM is taking comment on subpart 3178.

Many of the provisions of the 2016 final rule that are proposed for complete rescission are focused on emissions from sources and operations, which are more appropriately regulated by EPA under its Clean Air Act authority, and for which there are analogous EPA regulations at 40 CFR part 60, subparts OOOO and OOOOa. Specifically, these emissions-targeting provisions of the 2016 final rule are §§ 3179.102, 3179.201, 3179.202, and 3179.203, and §§ 3179.301 through 3179.305. The BLM has chosen to rescind these provisions based on a number of considerations.

First, the BLM believes that these provisions create unnecessary regulatory overlap in light of EPA's Clean Air Act authority and its analogous EPA regulations that similarly reduce losses of gas.[19] In general, the emissions-targeting provisions of the 2016 final rule were crafted so that compliance with similar provisions within EPA's regulations would constitute compliance with the BLM's regulations. Although EPA's regulations apply to new, reconstructed, and modified sources, while the 2016 final rule's requirements would also apply to existing sources, the BLM notes that the EPA's regulations at 40 CFR part 60 subpart OOOO have been in place since 2011 and that over time, as existing well sites are decommissioned and new well sites come online, the EPA's regulations at 40 CFR part 60 subpart OOOOa will displace the BLM's regulations, eventually rendering the emissions-targeting provisions of the 2016 final rule entirely duplicative. By removing these duplicative provisions, the proposed rule would fall squarely within the scope of the BLM's authority to prevent waste and would leave the regulation of air emissions to the EPA, the agency with the experience, expertise, and clear statutory authority to do so.

Second, the BLM has reviewed and revised the impact analysis and reconsidered whether the substantial compliance costs associated with the emissions-targeting provisions are justified by the value of the gas that is expected to be conserved as a result of compliance. The BLM has made the policy determination that it is not appropriate for ''waste prevention'' regulations to impose compliance costs greater than the value of the resources they are expected to conserve. Although the RIA for the 2016 final rule found that, in total, the benefits of these provisions outweighed their costs, this finding depended on benefits that were likely overestimated and compliance costs that were likely underestimated. The BLM seeks comment on the uncertainties and assumptions in the RIA.

E.O. 13783, at Section 5, disbanded the earlier Interagency Working Group on Social Cost of Greenhouse Gases (IWG) and withdrew the Technical Support Documents[20] upon which the RIA for the 2016 final rule relied for the valuation of changes in methane emissions. The SC–CH_4 estimates presented by the BLM for this rule are interim values for use in regulatory analyses until an improved estimate of the impacts of climate change to the U.S. can be developed. In accordance with E.O. 13783, they are adjusted to reflect discount rates of 3 percent and 7 percent, and to present domestic rather than global impacts of climate change, consistent with OMB Circular A–4. The 7 percent rate is intended to represent the average before-tax rate of return to private capital in the U.S. economy. The 3 percent rate is intended to reflect the rate at which society discounts future consumption, which is particularly relevant if a regulation is expected to affect private consumption directly. When relying on the assumed domestic impacts of climate change, the benefits of many of the emissions-targeting provisions do not outweigh their costs. And, because the value of the conserved gas would not outweigh the costs, the BLM is not confident that its legal authority to prescribe rules ''for the prevention of undue waste''[21] would cover many of the emissions-targeting provisions in the 2016 final rule.

Finally, the BLM recognizes that the oil and gas exploration and production industry continues to pursue reductions in methane emissions on a voluntary basis. For example, XTO Energy, Inc., which operates 2,435 BLM-administered leases, has publicly stated that it is undertaking a 3-year plan to phase out high-bleed pneumatic devices from its operations and will be implementing an enhanced LDAR program. In December 2017, the American Petroleum Institute (API) announced a voluntary program to reduce methane emissions. The API announced that 26 companies, including ExxonMobil, Chevron, Shell, Anadarko and EOG Resources, would take action to implement LDAR programs and replace, remove, or retrofit high-bleed pneumatic controllers with low- or zero-emitting devices.[22]

[19] The BLM is aware that the EPA has proposed a temporary stay of some of the requirements contained in NSPS OOOOa and that the EPA is undertaking a reconsideration of these requirements. See 82 FR 27645 (June 16, 2017). The BLM has coordinated with the EPA during the development of this proposed rule and is committed to continued coordination with the EPA throughout the process of revising the 2016 final rule.

[20] Technical Update of the Social Cost of Carbon for Regulatory Impact Analysis Under E.O. 12866 (published August 26, 2016) and its Addendum.

[21] 30 U.S.C. 187.

[22] Osborne, J., ''Oil companies clamping down on methane leaks,'' *Houston Chronicle* (Dec. 6, 2017);

The BLM seeks comment on this proposed rule. The BLM has allowed a 60-day comment period for this proposed rule, which the BLM believes will afford the public a meaningful opportunity to comment.

The BLM intends that each of the provisions of the proposed rule are severable. It is reasonable to consider the provisions severable as they do not depend on each other. To the extent that two or more provisions inextricably depend on each other, they would not be severable. The BLM requests comment on the severability of the proposed provisions.

The BLM is also seeking comment on the royalty-free use regulations, which were codified at 43 CFR subpart 3178 as part of the 2016 final rule. The royalty-free use provisions in subpart 3178 are viewed as being consistent with applicable Federal law, executive orders, and policies. However, the BLM is still interested in whether the requirements of subpart 3178 can be improved. An issue of particular interest to the BLM is whether the requirement for prior BLM approval for royalty-free treatment in the situations covered under § 3178.5 is appropriate. The BLM would like to know whether the incremental royalty accountability offered by prior BLM approval justifies the requirement in § 3178.5.

Finally, the BLM requests comment on ways that the BLM can reduce the waste of gas by incentivizing the capture, reinjection, or beneficial use of the gas. The BLM is interested to learn of best practices that could be incorporated into the final rule that would encourage operators to capture, use, or reinject gas without imposing excessive compliance burdens that could unnecessarily encumber energy production, constrain economic growth, and prevent job creation.

B. Section-by-Section Discussion

1. 2016 Final Rule Requirements Proposed for Rescission

With this proposed rule, the BLM would rescind the following provisions of the 2016 final rule:

43 CFR 3162.3–1(j)—Drilling Applications and Plans

In the 2016 final rule, the BLM added a paragraph (j) to 43 CFR 3162.3–1, which requires that when submitting an Application for Permit to Drill (APD) for an oil well, an operator must also submit a waste-minimization plan. Submission of the plan is required for approval of the APD, but the plan is not itself part of the APD, and the terms of the plan are not enforceable against the operator. The purpose of the waste-minimization plan is for the operator to set forth a strategy for how the operator will comply with the requirements of 43 CFR subpart 3179 regarding the control of waste from venting and flaring from oil wells.

The waste-minimization plan must include information regarding: The anticipated completion date(s) of the proposed oil well(s); a description of anticipated production from the well(s); certification that the operator has provided one or more midstream processing companies with information about the operator's production plans, including the anticipated completion dates and gas production rates of the proposed well or wells; and identification of a gas pipeline to which the operator plans to connect.

Additional information is required when an operator cannot identify a gas pipeline with sufficient capacity to accommodate the anticipated production from the proposed well, including: A gas pipeline system location map showing the proposed well(s); the name and location of the gas processing plant(s) closest to the proposed well(s); all existing gas trunklines within 20 miles of the well, and proposed routes for connection to a trunkline; the total volume of produced gas, and percentage of total produced gas, that the operator is currently venting or flaring from wells in the same field and any wells within a 20-mile radius of that field; and a detailed evaluation, including estimates of costs and returns, of potential on-site capture approaches.

The BLM estimates that the administrative burden of the waste-minimization plan requirements would be roughly $1 million per year for the industry and $180,000 per year for the BLM (2016 RIA at 96 and 100).

This proposed rule would completely rescind the waste minimization plan requirement of § 3162.3–1(j). The BLM believes that the waste minimization plan requirement imposes an unnecessary administrative burden on both operators and the BLM. The BLM believes that there will be sufficient information-based safeguards against undue waste even in the absence of the waste minimization plan requirement for the following reasons. First, the BLM has found that comparable gas capture plan requirements in North Dakota and New Mexico will ensure that operators in those States take account of the availability of capture infrastructure when seeking permission to drill a well. Second, State regulations in Utah, Wyoming, and Montana require operators to submit production information similar to that required under § 3162.3–1(j)(2) when operators seek approval for routine flaring. Finally, where flaring is not otherwise authorized, an operator would be required to submit one of the following before it could receive approval for royalty-free flaring of associated gas under proposed § 3179.201(c): (1) A report supported by engineering, geologic, and economic data which demonstrates to the BLM's satisfaction that the expenditures necessary to market or use the gas are not economically justified; or (2) An action plan that will eliminate the flaring within a time period approved by the BLM. These requirements would help to meet the purpose of § 3162.3–1(j), which is to ensure that operators do not waste gas without giving due consideration to the possibility of marketing or using the gas.

In addition, the extensive amount of information that an operator must include in the waste minimization plan makes compliance with the requirement cumbersome for operators. Operators have also expressed concern that the waste minimization plan requirement will slow down APD processing as BLM personnel take time to determine whether the waste minimization plan submitted by an operator is ''complete and adequate,'' and whether the operator has provided all required pipeline information to the full extent that the operator can obtain it.

In light of the foregoing, the BLM believes that there is limited (if any) benefit to the waste minimization plan requirement of § 3162.3–1(j) and is therefore proposing to rescind it in its entirety.

43 CFR 3179.7—Gas Capture Requirement

In the 2016 final rule, the BLM sought to constrain routine flaring through the imposition of a ''capture percentage'' requirement, requiring operators to capture a certain percentage of the gas they produce, after allowing for a certain volume of flaring per well. The capture percentage requirement (as amended by the 2017 Suspension Rule) would become more stringent over a period of years, beginning with an 85 percent capture requirement (5,400 Mcf per well flaring allowable) in January 2019, and eventually reaching a 98 percent capture requirement (750 Mcf per well flaring allowable) in January

American Petroleum Institute, ''Natural Gas, Oil Industry Launch Environmental Partnership to Accelerate Reductions in Methane, VOCs,'' *available at http://www.api.org/news-policy-and-issues/news/2017/12/04/natural-gas-oil-environmental-partnership-accelerate-reductions-methane-vocs.*

2027. An operator could choose to comply with the capture targets on each of the operator's leases, units or communitized areas, or on a county-wide or state-wide basis.

The BLM estimates that this requirement, over 10 years from 2019–2028, would impose costs of $516 million to $1.04 billion and generate cost savings from product recovery of $424 to $564 million (RIA at 41). The annual costs and cost savings would be expected to increase as the requirements increase in stringency.

This proposed rule would completely rescind the 2016 final rule's capture percentage requirements for a number of reasons. The BLM believes these requirements to be overly complex and ultimately ineffective at reducing flaring. In the early years, when capture percentages are not as high and allowable flaring is high, the 2016 final rule allows for large amounts of royalty-free flaring. In the later years, the BLM believes that the 2016 final rule would introduce complexities that would undermine its effectiveness. Because of the common use of horizontal drilling through multiple leaseholds of different ownership, the 2016 final rule's coordination requirements in § 3179.12 (providing for coordination with States and tribes when any requirement would adversely impact production from non-Federal and non-Indian interests) create a high degree of uncertainty over how the capture requirements would be implemented and what their impact would be. Even if the capture percentage requirements were implemented and effective, the BLM is concerned that the prescriptive nature of the approach would allow for unnecessary flaring in some cases while prohibiting necessary flaring in others. For example, even if an operator could feasibly capture all of the gas it produces from a Federal well, the operator could still flare a certain amount of gas without violating § 3179.7's capture percentage requirements. Thus, in situations where the operator faces transmission or processing plant capacity limitations (*i.e.,* where a pipeline or processing plant does not have the capacity to take all of the gas that is being supplied to it), § 3179.7 would allow the operator to flare gas from a Federal well in order to produce more gas from a nearby non-Federal well for which there are tighter regulatory or contractual constraints on flaring.

In addition, the capture percentage requirement affords less flexibility for smaller operators with fewer operating wells than it does for larger operators with a greater number of operating wells. A small operator with only a few wells in an area with inadequate gas-capture infrastructure would likely be faced with curtailing production or violating § 3179.7's prescriptive limits. On the other hand, a larger operator with many wells would have greater flexibility to average the flaring allowable over its portfolio and avoid curtailing production or other production constraints.

In place of the 2016 final rule's capture percentage requirements, the proposed rule would address the routine flaring of associated gas by deferring to State or tribal regulations where possible and codifying the familiar NTL–4A standard for royalty-free flaring as a backstop where no applicable State or tribal regulation exists. The proposed rule's approach to the routine flaring of associated gas is explained more fully below (see the discussion of revised § 3179.201).

43 CFR 3179.8—Alternative Capture Requirement

Section 3179.8 allows operators of leases issued before January 17, 2017, to request a lower capture percentage requirement than would otherwise be imposed under § 3179.7. In order to obtain this lower capture requirement, an operator must demonstrate that the applicable capture percentage under § 3179.7 would ''impose such costs as to cause the operator to cease production and abandon significant recoverable oil reserves under the lease.'' Because the BLM is proposing to rescind the capture requirements of § 3179.7, the BLM is also proposing to rescind the mechanism for obtaining a lower capture requirement. If § 3179.7 is rescinded, there is no need for § 3179.8.

43 CFR 3179.11—Other Waste Prevention Measures

Section 3179.11(a) states that the BLM may exercise its existing authority under applicable laws and regulations, as well as under the terms of applicable permits, orders, leases, and unitization or communitization agreements, to limit production from a new well that is expected to force other wells off of a common pipeline. Section 3179.11(b) states that the BLM may similarly exercise existing authority to delay action on an APD or impose conditions of approval on an APD. Section 3179.11 is not an independent source of authority or obligation on the part of the BLM. Rather, § 3179.11 was intended to clarify how the BLM may exercise existing authorities in addressing the waste of gas. However, the BLM understands that § 3179.11 could easily be misread to indicate that the BLM has plenary authority to curtail production or delay or condition APDs regardless of the circumstances. Because § 3179.11 is unnecessary and is susceptible to misinterpretation, the BLM is proposing to rescind § 3179.11.

43 CFR 3179.12—Coordination With State Regulatory Authority

Section 3179.12 states that, to the extent an action to enforce 43 CFR subpart 3179 may adversely affect production of oil or gas from non-Federal and non-Indian mineral interests, the BLM will coordinate with the appropriate State regulatory authority. The purpose of this provision is to ensure that due regard is given to the States' interests in regulating the production of non-Federal and non-Indian oil and gas. The BLM is proposing to rescind § 3179.12 because, as explained more fully below, the BLM is proposing to revise subpart 3179 in a manner that defers to State and tribal requirements with respect to the routine flaring of associated gas. In light of this new approach, the BLM believes that there is much less concern that subpart 3179 could be applied in ways that State regulatory agencies find to be inappropriate. The BLM continues to recognize the value of coordinating with State regulatory agencies, but no longer considers it necessary to include a coordination requirement in subpart 3179.

43 CFR 3179.101—Well Drilling

Current § 3179.101(a) requires that gas reaching the surface as a normal part of drilling operations be used or disposed of in one of four ways: (1) Captured and sold; (2) Directed to a flare pit or flare stack; (3) Used in the operations on the lease, unit, or communitized area; or (4) Injected. Section 3179.101(a) also specifies that gas may not be vented, except under the circumstances specified in § 3179.6(b) or when it is technically infeasible to use or dispose of the gas in one of the ways specified above. Section 3179.101(b) states that gas lost as a result of a loss of well control will be classified as avoidably lost if the BLM determines that the loss of well control was due to operator negligence.

The BLM is proposing to rescind § 3179.101 because it would be duplicative under revised subpart 3179. In essence, § 3179.101(a) requires an operator to flare gas lost during well drilling rather than vent it (unless technically infeasible). This same requirement would be contained in proposed § 3179.6(b). Current § 3179.101(b) states that where gas is lost during a loss of well control, the

lost gas will be considered ''avoidably lost'' if the BLM determines that the loss of well control was due to operator negligence. This principle would be contained in proposed § 3179.4(b), which requires an absence of operator negligence in order for lost gas to be considered ''unavoidably lost.''

43 CFR 3179.102—Well Completion and Related Operations

Current § 3179.102 addresses gas that reaches the surface during well-completion, post-completion, and fluid-recovery operations after a well has been hydraulically fractured or refractured. It requires the gas to be disposed of in one of four ways: (1) Captured and sold; (2) Directed to a flare pit or stack, subject to a volumetric limitation in § 3179.103; (3) Used in the lease operations; or (4) Injected. Section 3179.102 specifies that gas may not be vented, except under the narrow circumstances specified in § 3179.6(b) or when it is technically infeasible to use or dispose of the gas in one of the four ways specified above. Section 3179.102(b) provides that an operator will be deemed to be in compliance with its gas capture and disposition requirements if the operator is in compliance with the requirements for control of gas from well completions established under 40 CFR part 60, subparts OOOO or OOOOa, or if the well is not a ''well affected facility'' under those regulations. Section 3179.102(c) and (d) would allow the BLM to exempt an operator from the requirements of § 3179.102 where the operator demonstrates that compliance would cause the operator to cease production and abandon significant recoverable oil reserves under the lease.

This proposed rule would rescind current § 3179.102 in its entirety. The EPA finalized regulations in 40 CFR part 60, subpart OOOOa, that are applicable to all of the well completions covered by § 3179.102. See 81 FR 35824 (June 3, 2016); 81 FR 83055–56. In light of the complete overlap with EPA regulations, and the fact that compliance with these regulations satisfies an operator's obligations under § 3179.102, the BLM has concluded that § 3179.102 is duplicative and unnecessary. In the 2016 final rule, the BLM recognized the duplicative nature of § 3179.102, but sought to establish a ''backstop'' in the ''unlikely event'' that the analogous EPA regulations ceased to be in effect. See 81 FR 83056. The BLM no longer believes that it is appropriate to insert duplicative regulations into the CFR as insurance against unlikely events. In addition, the BLM questions the appropriateness of issuing regulations that serve as a backstop to the regulations of other Federal agencies, especially when those regulations are promulgated under different authorities. The BLM continues to believe that applicable EPA regulations adequately address the loss of gas associated with unconventional well completions, and therefore proposes to rescind § 3179.102.

43 CFR 3179.201—Equipment Requirements for Pneumatic Controllers

Section 3179.201 addresses pneumatic controllers that use natural gas produced from a Federal or Indian lease, or from a unit or communitized area that includes a Federal or Indian lease. Section 3179.201 applies to such controllers if the controllers: (1) Have a continuous bleed rate greater than 6 standard cubic feet per hour (scf/hour) (''high-bleed'' controllers); and (2) Are not covered by EPA regulations that prohibit the new use of high-bleed pneumatic controllers (40 CFR part 60, subparts OOOO or OOOOa), but would be subject to those regulations if the controllers were new, modified, or reconstructed. Section 3179.201(b) requires the applicable pneumatic controllers to be replaced with controllers (including, but not limited to, continuous or intermittent pneumatic controllers) having a bleed rate of no more than 6 scf/hour, subject to certain exceptions. Section 3179.201(d) (as amended by the 2017 Suspension Rule) requires that this replacement occur no later than January 17, 2019, or within 3 years from the effective date of the 2016 final rule if the well or facility served by the controller has an estimated remaining productive life of 3 years or less. Section 3179.201(b)(4) and (c) would allow the BLM to exempt an operator from the requirements of § 3179.201 where the operator demonstrates that compliance would cause the operator to cease production and abandon significant recoverable oil reserves under the lease.

The BLM estimates that this requirement, over 10 years from 2019–2028, would impose costs of about $12 million to $13 million and generate cost savings from product recovery of $24 million to $30 million (RIA at 41).

This proposed rule would rescind § 3179.201 in its entirety. Low-bleed continuous pneumatic controllers are already very common, representing about 89 percent of the continuous bleed pneumatic controllers in the petroleum and natural gas production sectors.[23] The EPA has regulations in 40 CFR part 60, subparts OOOO and OOOOa that require new, modified, or reconstructed continuous bleed controllers to be low-bleed.

The BLM believes that these analogous EPA regulations will adequately address the loss of gas from pneumatic controllers on Federal and Indian leases over time, as new facilities come online and more of the existing high-bleed continuous controllers are replaced by low-bleed continuous controllers, pursuant to the EPA regulations. The BLM understands the typical lifespan of a pneumatic controller to be 10 to 15 years.

Furthermore, low-bleed continuous pneumatic controllers are expected to generate revenue for operators when employed at sites from which gas is captured and sold and when the sale price of gas is generally higher than it is now. Thus, we expect many operators to adopt low-bleed pneumatic controllers even in the absence of § 3179.201's requirements.

Finally, as discussed above, the BLM recognizes that the oil and gas exploration and production industry continues to pursue reductions in methane emissions on a voluntary basis, and the BLM expects these efforts to result in a reduction in the number of high-bleed pneumatic devices employed by the industry. For the foregoing reasons, the BLM finds § 3179.201 to be unnecessary and is therefore proposing to rescind it.

43 CFR 3179.202—Requirements for Pneumatic Diaphragm Pumps

Section 3179.202 establishes requirements for operators with pneumatic diaphragm pumps that use natural gas produced from a Federal or Indian lease, or from a unit or communitized area that includes a Federal or Indian lease. It applies to such pumps if they are not covered under EPA regulations at 40 CFR part 60, subpart OOOOa, but would be subject to that subpart if they were a new, modified, or reconstructed source. For covered pneumatic pumps, § 3179.202 requires that the operator either replace the pump with a zero-emissions pump or route the pump exhaust to processing equipment for capture and sale. Alternatively, an operator may route the exhaust to a flare or low-pressure combustion device if the operator makes a determination (and notifies the BLM through a Sundry Notices and Reports on Wells, Form 3160–5) that replacing the pneumatic diaphragm pump with a zero-emissions

[23] EPA. Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990–2015 (published April 2017). Annex 3. Data are available in Table 3.5–5 and Table 3.6–7.

pump or capturing the pump exhaust is not viable because: (1) A pneumatic pump is necessary to perform the function required; and (2) Capturing the exhaust is technically infeasible or unduly costly. If an operator makes this determination and has no flare or low-pressure combustor on-site, or routing to such a device would be technically infeasible, the operator is not required to route the exhaust to a flare or low-pressure combustion device. Under § 3179.202(h) (as amended by the 2017 Suspension Rule), an operator must replace its covered pneumatic diaphragm pump or route the exhaust gas to capture or flare beginning no later than January 17, 2019. Section 3179.202(f) and (g) would allow the BLM to exempt an operator from the requirements of § 3179.202 where the operator demonstrates that compliance would cause the operator to cease production and abandon significant recoverable oil reserves under the lease.

This proposed rule would rescind § 3179.202 in its entirety. The BLM is concerned that the costs of compliance with § 3179.202 outweigh the value of its conservation effects. The BLM estimates that § 3179.202, over 10 years from 2019–2028, would impose costs of about $29 million to $30 million, but only generate cost savings from product recovery of $18 million to $22 million (RIA at 41). The BLM also believes that the analogous EPA regulations in 40 CFR part 60, subpart OOOOa, will adequately address the loss of gas from pneumatic diaphragm pumps on Federal and Indian leases as more and more of them are covered by the EPA regulations over time.

Finally, as discussed above, industry is reportedly making ongoing efforts to retire old leak-prone equipment, including pneumatic pumps, on a voluntary basis.

For these reasons, the BLM is proposing to rescind § 3179.202 in its entirety.

43 CFR 3179.203—Storage Vessels

Section 3179.203 applies to crude oil, condensate, intermediate hydrocarbon liquid, or produced-water storage vessels that contain production from a Federal or Indian lease, or from a unit or communitized area that includes a Federal or Indian lease, and that are not subject to 40 CFR part 60, subparts OOOO or OOOOa, but would be if they were new, modified, or reconstructed sources. If such storage vessels have the potential for volatile organic compound (VOC) emissions equal to or greater than 6 tons per year (tpy), § 3179.203 requires operators to route all gas vapor from the vessels to a sales line. Alternatively, the operator may route the vapor to a combustion device if it determines that routing the vapor to a sales line is technically infeasible or unduly costly. The operator may also submit a Sundry Notice to the BLM that demonstrates that compliance with the above options would cause the operator to cease production and abandon significant recoverable oil reserves under the lease due to the cost of compliance.

The BLM is proposing to rescind § 3179.203 in its entirety. The BLM is concerned that the costs of compliance with § 3179.203 outweigh the value of its conservation effects. The BLM estimates that § 3179.203, over 10 years from 2019–2028, would impose costs of about $51 million to $56 million while only generating cost savings from product recovery of about $1 million (RIA at 41). The BLM also believes that the analogous EPA regulations in 40 CFR part 60, subparts OOOO and OOOOa, will adequately address the loss of gas from storage vessels on Federal and Indian leases as more and more of them are covered by the EPA regulations over time.

Furthermore, the BLM has always believed that § 3179.203 would have a limited reach, due to the 6 tpy emissions threshold and the carve-out for storage vessels covered by EPA regulations. The BLM estimated in the RIA for the 2016 final rule that § 3179.203 would impact fewer than 300 facilities on Federal and Indian lands.[24] In light of the EPA's requirements for storage vessels, and the limited reach and modest conservation impacts of § 3179.203, the BLM is proposing to rescind § 3179.203 in its entirety. Finally, we note that, even if § 3179.203 is rescinded as proposed, the BLM would retain the authority to impose royalties on vapor losses from storage vessels under proposed § 3179.4(b)(2)(vii) when the BLM determines that recovery of the vapors is warranted.

43 CFR 3179.301 Through 3179.305—Leak Detection and Repair

Sections 3179.301 through 3179.305 establish leak detection, repair, and reporting requirements for: (1) Sites and equipment used to produce, process, treat, store, or measure natural gas from or allocable to a Federal or Indian lease, unit, or communitization agreement; and (2) Sites and equipment used to store, measure, or dispose of produced water on a Federal or Indian lease. Section 3179.302 prescribes the instruments and methods that may be used for leak detection. Section 3179.303 prescribes the frequency for inspections and § 3179.304 prescribes the time frames for repairing leaks found during inspections. Finally, § 3179.305 requires operators to maintain records of their LDAR activities and submit an annual report to the BLM. Pursuant to § 3179.301(f) (as amended by the 2017 Suspension Rule), operators must begin to comply with the LDAR requirements of §§ 3179.301 through 3179.305 before: (1) January 17, 2019, for all existing sites; (2) 60 days after beginning production for sites that begin production after January 17, 2019; and (3) 60 days after a site that was out of service is brought back into service and re-pressurized.

The BLM is proposing to rescind §§ 3179.301 to 3179.305 in their entirety. The BLM is concerned that the costs of compliance with §§ 3179.301 to 3179.305 outweigh the value of their conservation effects. The BLM estimates that these requirements, over 10 years from 2019–2028, would impose costs of about $550 million to $688 million and generate cost savings from product recovery of about $116 million to $148 million (RIA at 41). In addition, the BLM estimates that the administrative burdens associated with the LDAR requirements, at roughly $5 million, represent the bulk of the administrative burdens of the 2016 final rule.

The BLM believes that the analogous EPA regulations in 40 CFR part 60, subpart OOOOa, will adequately address the loss of fugitive gas on Federal and Indian leases over time, as new facilities come online and more and more existing facilities are reconstructed or modified and become covered by the EPA regulations.

Finally, the BLM is concerned that §§ 3179.301 to 3179.305 apply to all wellsites equally. Wellsites that are not connected to deliver gas to market would not achieve any waste reduction because sales from the recovered gas would not be realized. More importantly, the BLM believes that the LDAR requirements are unnecessarily burdensome to operators of marginal wells, particularly marginal oil wells. The BLM does not believe that the potential fugitive gas losses from marginal oil wells (with production rates fewer than 10 bbl per day or 15 bbl per day) would be substantial enough to warrant the costs of maintaining a LDAR program with semi-annual inspection frequencies. As noted previously, the

[24] U.S. Bureau of Land Management, ''Regulatory Impact Analysis for: Revisions to 43 CFR 3100 (Onshore Oil and Gas Leasing) and 43 CFR [3160] (Onshore Oil and Gas Operations), Additions of 43 CFR 3178 (Royalty-Free Use of Lease Production) and 43 CFR 3179 (Waste Prevention and Resource Conservation),'' pg. 69 (Nov. 10, 2016).

BLM believes that over 69 percent of oil wells on the public lands are marginal.

43 CFR 3179.401—State or Tribal Requests for Variances From the Requirements of This Subpart

Section 3179.401 would allow a State or tribe to request a variance from any provisions of subpart 3179 by identifying a State, local, or tribal regulation to be applied in place of those provisions and demonstrating that such State, local, or tribal regulation would perform at least equally well as those provisions in terms of reducing waste of oil and gas, reducing environmental impacts from venting and/or flaring of gas, and ensuring the safe and responsible production of oil and gas.

The BLM is proposing to rescind § 3179.401 because it believes that the variance process established by this section will no longer be necessary in light of the BLM's proposal to codify NTL–4A standards and to defer to State and tribal regulations for the routine flaring of associated gas, as explained in the discussion of proposed § 3179.201.

2. Revised Subpart 3179

With this proposed rule, the BLM would revise subpart 3179, as follows:

43 CFR 3179.1 Purpose

Section 3179.1 states that the purpose of 43 CFR subpart 3179 is to implement and carry out the purposes of statutes relating to prevention of waste from Federal and Indian leases, the conservation of surface resources, and management of the public lands for multiple use and sustained yield. The BLM is not proposing any revision to existing § 3179.1 as a part of this rulemaking. Section 3179.1 is presented here for context.

43 CFR 3179.2 Scope

This section specifies which leases, agreements, tracts, and facilities are covered by this subpart. The section also states that subpart 3179 applies to Indian Mineral Development Act (IMDA) agreements, unless specifically excluded in the agreement or unless the relevant provisions of this subpart are inconsistent with the agreement, and to agreements for the development of tribal energy resources under a Tribal Energy Resource Agreement entered into with the Secretary of the Interior, unless specifically excluded in the agreement. Existing § 3179.2 remains largely unchanged. However, the BLM is proposing to revise paragraph (a)(5) by using the more-inclusive words ''well facilities'' instead of the words ''wells, tanks, compressors, and other equipment'' to describe the onshore equipment that would be subject to this proposed rule. The purpose of the phrase ''wells, tanks, compressors, and other equipment'' has been to specify components subject to LDAR requirements which, as described above, the BLM is proposing to rescind.

43 CFR 3179.3 Definitions and Acronyms

This proposed section would keep, in their entirety, four of the 18 definitions that appear in existing § 3179.3: ''Automatic ignition system,'' ''gas-to-oil ratio,'' ''liquids unloading,'' and ''lost oil or lost gas.'' The definition for ''capture'' is retained in this proposed rule, except the word ''reinjection'' has been changed to ''injection'' in order to be consistent with references to conservation by injection (as opposed to reinjection) elsewhere in subpart 3179.

A definition for ''gas well'' is also maintained in this proposed rule, however the second and third sentences in the existing definition would be removed. The second-to-last sentence in the existing definition of ''gas well'' would be removed because, though a well's designation as a ''gas'' well or ''oil'' well is appropriately determined by the relative energy values of the well's products, the 6,000 scf/bbl standard in existing § 3179.3 is not a commonly used standard. The last sentence in the existing definition of ''gas well,'' which states generally that an oil well will not be reclassified as a gas well when its gas-to-oil ratio (GOR) exceeds the 6,000 scf/bbl threshold, would be removed and replaced with a simpler qualifier making clear that a well's status as a ''gas well'' is ''determined at the time of completion.''

A new definition for ''oil well'' is proposed to be added that would define an ''oil well'' as a ''well for which the energy equivalent of the oil produced exceeds the energy equivalent of the gas produced, as determined at the time of completion.'' The addition of a definition of ''oil well'' should help to make clear when proposed § 3179.201's requirements for ''oil-well gas'' apply.

A definition of ''waste of oil or gas'' is proposed to be added that would define waste, for the purposes of subpart 3179, to mean any act or failure to act by the operator that is not sanctioned by the authorized officer as necessary for proper development and production, where compliance costs are not greater than the monetary value of the resources they are expected to conserve, and which results in: (1) A reduction in the quantity or quality of oil and gas ultimately producible from a reservoir under prudent and proper operations; or (2) avoidable surface loss of oil or gas. This definition incorporates the familiar definition of ''waste of oil or gas'' from BLM's operating regulations at 43 CFR 3160.0–5, but adds an important limitation: Waste does not occur where the cost of conserving the oil or gas exceeds the monetary value of that oil or gas. This definition is intended to codify the BLM's policy determination that it is not appropriate for ''waste prevention'' regulations to impose compliance costs greater than the value of the resources they are expected to conserve. The BLM requests comment and data pertinent to this proposed definition of ''waste of oil or gas.''

This proposed section would remove 12 definitions from the existing regulations because they are no longer needed: ''Accessible component,'' ''capture infrastructure,'' ''compressor station,'' ''continuous bleed,'' ''development oil well,'' ''high pressure flare,'' ''leak,'' ''leak component,'' ''liquid hydrocarbon,'' ''pneumatic controller,'' ''storage vessel,'' and ''volatile organic compounds (VOC).'' These definitions pertain to requirements in existing subpart 3179 that the BLM is proposing to rescind.

43 CFR 3179.4 Determining When the Loss of Oil or Gas Is Avoidable or Unavoidable

Proposed § 3179.4 describes the circumstances under which lost oil or gas would be classified as ''avoidably lost'' or ''unavoidably lost.'' Under proposed § 3179.5, royalty would be due on all avoidably lost oil or gas, while royalty is not due on unavoidably lost oil or gas. The proposed revision of § 3179.4 includes concepts from both existing § 3179.4 and NTL–4A, Sections II. and III.

Proposed paragraph (a) defines ''avoidably lost'' production and mirrors the ''avoidably lost'' definition in NTL–4A Section II.A. Proposed paragraph (a) would define avoidably lost gas as gas that is vented or flared without BLM approval, and produced oil or gas that is lost due to operator negligence, the operator's failure to take all reasonable measures to prevent or control the loss, or the operator's failure to comply fully with applicable lease terms and regulations, appropriate provisions of the approved operating plan, or prior written BLM orders. This paragraph would replace the ''avoidably lost'' definition that appears in the last paragraph of existing § 3179.4, which primarily defines ''avoidably lost'' oil or gas as lost oil gas that is not ''unavoidably lost'' and also expressly includes ''excess flared gas'' as defined

in existing § 3179.7, which the BLM is proposing to rescind.

Proposed paragraph (b) defines ''unavoidably lost'' production. Proposed paragraph (b)(1) follows language from Section II.C(2) of NTL–4A. It states that oil or gas that is lost due to line failures, equipment malfunctions, blowouts, fires, or other similar circumstances is considered to be unavoidably lost production, unless the BLM determines that the loss resulted from operator negligence, the failure to take all reasonable measures to prevent or control the loss, or the failure of the operator to comply fully with applicable lease terms and regulations, appropriate provisions of the approved operating plan, or prior written orders of the BLM.

Proposed paragraph (b)(2) is substantially similar to the definition of ''unavoidably lost'' oil or gas that appears in existing § 3179.4(a). This paragraph improves upon NTL–4A by providing clarity to operators and the BLM about which losses of oil or gas should be considered ''unavoidably lost.'' Paragraph (b)(2) introduces a list of operations or sources from which lost oil or gas would be considered ''unavoidably lost,'' so long as the operator has not been negligent, has taken all reasonable measures to prevent or control the loss, and has complied fully with applicable laws, lease terms, regulations, provisions of a previously approved operating plan, or other written orders of the BLM.

Except for cross references, proposed § 3179.4(b)(2)(i) through (vi) are the same as paragraphs (a)(1)(i) through (vi) in existing § 3179.4. These paragraphs list the following operations or sources from which lost oil or gas would be considered ''unavoidably lost'': Well drilling; well completion and related operations; initial production tests; subsequent well tests; exploratory coalbed methane well dewatering; and emergencies.

This proposed rule would remove normal operating losses from pneumatic controllers and pumps (existing § 3179.4(a)(1)(vii)) from the list of unavoidable losses because the use of gas in pneumatic controllers and pumps is already royalty free under existing § 3178.4(a)(3).

Proposed paragraph (b)(2)(vii) is similar to existing § 3179.4(a)(1)(viii), but has been rephrased to reflect the NTL–4A provisions pertaining to storage tank losses (NTL–4A Section II.C(1)). Under proposed 3179.4(b)(2)(vii), normal gas vapor losses from a storage tank or other low-pressure production vessel would be unavoidably lost, unless the BLM determines that recovery of the vapors is warranted. Changing the phrase ''operating losses'' (as used in existing § 3179.4(a)(1)(viii)) to ''gas vapor losses'' makes clear that this provision applies to low pressure gas losses and that the operator should have separated gas from the oil before placing it in the tank.

Proposed § 3179.4(b)(2)(viii) is the same as existing § 3179.4(a)(1)(ix). It states that well venting in the course of downhole well maintenance and/or liquids unloading performed in compliance with § 3179.104 is an operation from which lost gas is considered ''unavoidably lost.''

The proposed revision does not retain existing § 3179.4(a)(1)(x), which classifies leaks as unavoidable losses when the operator has complied with the LDAR requirements in existing §§ 3179.301 through 3179.305. The BLM is proposing to rescind these LDAR requirements and so there is no need to reference these requirements as a limitation on losses through leaks. The BLM requests comment on whether regulatory text should be added to § 3179.4(b) to provide clarity to the BLM's position that leaks are considered unavoidably lost.

Proposed § 3179.4(b)(2)(ix) is the same as existing § 3179.4(a)(1)(xi), identifying facility and pipeline maintenance, such as when an operator must blow-down and depressurize equipment to perform maintenance or repairs, as an operation from which lost oil or gas would be considered ''unavoidably lost,'' so long as the operator has not been negligent and has complied with all appropriate requirements.

The proposed rule does not include existing § 3179.4(a)(1)(xii). This paragraph lists the flaring of gas from which at least 50 percent of natural gas liquids have been removed and captured for market as an unavoidable loss. This provision was included in the 2016 final rule as part of the BLM's effort to adopt a gas capture percentage scheme similar to that of North Dakota. The BLM is proposing to remove this provision because it is proposing to rescind the gas capture percentage requirements contained in the 2016 final rule.

The proposed rule does not include existing § 3179.4(a)(2). Section 3179.4(a)(2) provides that gas that is flared or vented from a well that is not connected to a gas pipeline is unavoidably lost, unless the BLM has determined otherwise. Existing § 3179.4(a)(2) was essentially a blanket approval for royalty-free flaring from wells not connected to a gas pipeline. Flaring from these wells, however, would no longer be royalty free if the operator failed to meet the gas capture requirements imposed by existing § 3179.7 and the flared gas thus became royalty-bearing ''excess flared gas.'' Because the BLM is proposing to rescind § 3179.7, maintaining existing 3179.4(a)(2) would amount to sanctioning unrestricted flaring from wells not connected to gas pipelines. The routine flaring of oil-well gas from wells not connected to a gas pipeline is addressed by proposed § 3179.201, which is discussed in more detail below.

Proposed § 3179.4(b)(3) states that produced gas that is flared or vented with BLM authorization or approval is unavoidably lost. This provision mirrors proposed § 3179.4(a), which states that gas that is flared or vented without BLM authorization or approval is avoidably lost, and provides clarity to operators about royalty obligations with respect to authorized venting and flaring.

43 CFR 3179.5 When Lost Production Is Subject to Royalty

The proposed rule would not change § 3179.5. This section would continue to state that royalty is due on all avoidably lost oil or gas and that royalty is not due on any unavoidably lost oil or gas.

43 CFR 3179.6 Venting Limitations

The title of this section in the proposed rule has been changed from ''venting prohibitions'' to ''venting limitations.'' The proposed rule would retain most of the provisions in existing § 3179.6. The purpose of both sections is to prohibit flaring and venting from gas wells, with certain exceptions, and to require operators to flare, rather than vent, any uncaptured gas, whether from oil wells or gas wells, with certain exceptions.

Proposed § 3179.6(a) is the same as the existing § 3179.6(a), except the cross reference has been updated. It states that gas-well gas may not be flared or vented, except where it is unavoidably lost, pursuant to § 3179.4(b). This same restriction on the flaring of gas-well gas was included in NTL–4A.

Both proposed and existing § 3179.6(b) state that operators must flare, rather than vent, any gas that is not captured, with the exceptions listed in subsequent paragraphs. Although the text of NTL–4A did not contain a similar requirement that, in general, lost gas should be flared rather than vented, the implementing guidance for NTL–4A in the United States Geological Survey's (USGS) Conservation Division Manual did contain a similar preference for flaring over venting. The flaring of gas is generally preferable to the venting of

gas due to safety concerns. Proposed § 3179.6(b) therefore represents an improvement on NTL–4A by making clear in the regulation, rather than in implementation guidance, that lost gas should be flared when possible.

The first three flaring exceptions in both the proposed and existing § 3179.6 are identical: Paragraph (b)(1) allows for venting when flaring is technically infeasible; paragraph (b)(2) allows for venting in the case of an emergency, when the loss of gas is uncontrollable, or when venting is necessary for safety; and, paragraph (b)(3) allows for venting when the gas is vented through normal operation of a natural-gas-activated pump or pneumatic controller.

The fourth flaring exception, listed in proposed § 3179.6(b)(4), would allow gas vapors to be vented from a storage tank or other low-pressure production vessel, except when the BLM determines that gas-vapor recovery is warranted. Although this language is somewhat different than what appears in existing § 3179.6(b)(4), it has the same practical effect. It has been changed in this proposed rule in order to align the language with proposed § 3179.4(b)(vii) and to remove the cross-reference to the storage tank requirements in existing § 3179.203, which the BLM is proposing to rescind.

The fifth flaring exception, listed in proposed § 3179.6(b)(5), would apply to gas that is vented during downhole well maintenance or liquids unloading activities. This is similar to existing § 3179.6(b)(5), except that the proposed rule would remove the cross reference to existing § 3179.204. Although the proposed revision of subpart 3179 would retain limitations on royalty-free losses of gas during well maintenance and liquids unloading in proposed § 3179.104, no cross-reference to those restrictions is necessary in this section, which simply addresses whether the gas may be vented or flared, not whether it is royalty-bearing.

The proposed rule would remove the flaring exception listed in existing § 3179.6(b)(6), which applies when gas is vented through a leak, provided that the operator has complied with the LDAR requirements in §§ 3179.301 through 3179.305. The BLM is proposing to rescind these LDAR requirements so there is no need to reference these requirements as a limitation on venting through leaks.

The sixth flaring exception, listed in proposed § 3179.6(b)(6), is identical to the exception listed in existing § 3179.6(b)(7). This exception would allow gas venting that is necessary to allow non-routine facility and pipeline maintenance to be performed.

The seventh flaring exception, listed in proposed § 3179.6(b)(7), is identical to the exception listed in existing § 3179.6(b)(8). This exception would allow venting when a release of gas is unavoidable under § 3179.4, and Federal, State, local, or tribal law, regulation, or enforceable permit terms prohibit flaring.

Proposed § 3179.6(c) is identical to existing § 3179.6(c). Both sections require all flares or combustion devices to be equipped with automatic ignition systems.

Authorized Flaring and Venting of Gas

43 CFR 3179.101 Initial Production Testing

Proposed § 3179.101 would establish volume and duration standards which limit the amount of gas that may be flared royalty free during initial production testing. The gas is no longer royalty free after reaching either limit. Proposed § 3179.101 would establish a volume limit of 50 million cubic feet (MMcf) of gas that may be flared royalty free during the initial production test of each completed interval in a well. Additionally, proposed § 3179.101 would limit royalty-free initial production testing to a 30 day period, unless the BLM approves a longer period.

The 2016 final rule also uses volume and duration thresholds to limit royalty-free initial production testing. Existing § 3179.103 provides for up to 20 MMcf of gas to be flared royalty free during well drilling, well completion, and initial production testing operations combined. Under existing § 3179.103, upon receiving a Sundry Notice request from the operator, the BLM may increase the volume of royalty-free flared gas up to an additional 30 MMcf. Under existing § 3179.103, similar to proposed § 3179.101, the BLM allows royalty-free testing for a period of up to 30 days after the start of initial production testing. The BLM may extend, upon request, the initial production testing period by up to an additional 60 days. Further, existing § 3179.103 provides additional time for dewatering and testing exploratory coalbed methane wells. Under existing § 3179.103, such wells have an initial royalty-free period of 90 days (rather than 30 days for all other well types), and the possibility of the BLM approving, upon request, up to two additional 90-day periods.

Under NTL–4A, gas lost during initial production testing was royalty free for a period not to exceed 30 days or the production of 50 MMcf of gas, whichever occurred first, unless a longer test period was authorized by the State and accepted by the BLM.

The volume and duration limits in proposed § 3179.101 are similar to those in existing § 3179.103. Both sections allow 30 days from the start of the test, and both allow for extensions of time. However, existing § 3179.103 limits an extension to no more than 60 days, whereas proposed § 3179.101 does not specify an extension limit. Proposed § 3179.101 would allow for up to 50 MMcf of gas to be flared royalty free, with no express opportunity for an extension. By comparison, existing § 3179.103 allows for 20 MMcf to be flared royalty free, with the possibility of an additional 30 MMcf of gas flared with BLM approval, and no opportunity for an extension beyond the cumulative 50 MMcf of gas. The BLM requests comment on whether royalty-free flaring during initial production testing should be limited to 50 MMcf or 30 days (with the possibility of an extension).

The provision for exploratory coalbed methane wells in existing § 3179.103 is the most notable difference between it and this proposed rule with regard to the initial production testing. Existing § 3179.103 provides for up to 270 cumulative royalty-free production testing days for exploratory coalbed methane wells, whereas the proposed rule contains no special provision for such wells. Exploratory coalbed methane wells are expected to be an exceedingly low percentage of future wells drilled, and so the BLM does not believe that a special provision addressing these wells is necessary. In the future, if an exploratory coalbed methane well requires additional time for initial production testing, this can be handled under proposed § 3179.101(b), which allows an operator to request a longer test period without imposing an outside limit on the length of the additional test period the BLM might approve.

43 CFR 3179.102 Subsequent Well Tests

Proposed § 3179.102(a) provides that gas flared during well tests subsequent to the initial production test is royalty free for a period not to exceed 24 hours, unless the BLM approves or requires a longer test period. Proposed § 3179.102(b) provides that the operator may request a longer test period and must submit its request using a Sundry Notice. Proposed § 3179.102 is functionally identical to existing § 3179.104.

NTL–4A included royalty-free provisions for ''evaluation tests'' and for ''routine or special well tests.'' Because NTL–4A also contained specific

provisions for ''initial production tests,'' all of the other mentioned tests were presumed to be subsequent to the initial production tests. Under NTL–4A, royalty-free evaluation tests were limited to 24 hours, with no mention of a possibility for extension. Routine or special well tests, which are well tests other than initial production tests and evaluation tests, were royalty free under NTL–4A, but only after approval by the BLM.

The provisions for subsequent well tests in proposed § 3179.102 are essentially the same as those in both the 2016 final rule and in NTL–4A. All three provide for a base test period of 24 hours, and all three have a provision for the BLM to approve a longer test period. Proposed § 3179.102 improves upon NTL–4A by making the requirements for subsequent well tests more clear.

43 CFR 3179.103 Emergencies

Under proposed § 3179.4(b)(2)(vi), royalty is not due on gas that is lost during an emergency. Proposed § 3179.103 describes the conditions that constitute an emergency, and lists circumstances that do not constitute an emergency. As provided in proposed § 3179.103(d), an operator would be required to estimate and report to the BLM on a Sundry Notice the volumes of gas that were flared or vented beyond the timeframe for royalty-free flaring under proposed § 3179.103(a) (*i.e.,* venting or flaring beyond 24 hours, or a longer necessary period as determined by the BLM).

The provisions in proposed § 3179.103 are nearly identical to those in existing § 3179.105. The most notable change from the 2016 final rule is in describing those things that do not constitute an emergency. Where existing § 3179.105(b)(1) specifies that ''more than 3 failures of the same component within a single piece of equipment within any 365-day period'' is not an emergency, proposed § 3179.103(c)(4) simplifies that concept by including ''recurring equipment failures'' among the situations caused by operator negligence that do not constitute an emergency. This simplification addresses the practical difficulties involved in tracking the number of times the failure of a specific component of a particular piece of equipment causes emergency venting or flaring, and recognizes that recurring failures of the same equipment, even if involving different ''components,'' may not constitute a true unavoidable emergency. The BLM requests comment on how to best determine when recurring equipment failures constitute emergencies and whether a certain number of failures of the same equipment should provide a standard for when losses of gas due to equipment failures are royalty-bearing.

The description of ''emergencies'' in NTL–4A was brief and was subject to varied interpretations. The purpose behind both existing § 3179.105 and proposed § 3179.103 is to improve upon NTL–4A by narrowing the meaning of ''emergency,'' such that it is uniformly understood and consistently applied.

43 CFR 3179.104 Downhole Well Maintenance and Liquids Unloading

Under proposed § 3179.4(b)(2)(viii), gas lost in the course of downhole well maintenance and/or liquids unloading performed in compliance with proposed § 3179.104 is royalty free. Proposed § 3179.104(a) states that gas vented or flared during downhole well maintenance and well purging is royalty free for a period not to exceed 24 hours. Proposed § 3179.104(a) also states that gas vented from a plunger lift system and/or an automated well control system is royalty free. Proposed § 3179.104(b) states that the operator must minimize the loss of gas associated with downhole well maintenance and liquids unloading, consistent with safe operations. Proposed § 3179.104(c) states, for wells equipped with a plunger lift system or automated control system, minimizing gas loss under paragraph (b) includes optimizing the operation of the system to minimize gas losses to the extent possible consistent with removing liquids that would inhibit proper function of the well. Proposed § 3179.104(d) provides that the operator must ensure that the person conducting the purging remains present on-site throughout the event in order to end the event as soon as practical, thereby minimizing any venting to the atmosphere. Proposed § 3179.104(e) defines ''well purging'' as blowing accumulated liquids out of a wellbore by reservoir gas pressure, whether manually or by an automatic control system that relies on real-time pressure or flow, timers, or other well data, where the gas is vented to the atmosphere, and it does not apply to wells equipped with a plunger lift system. Proposed § 3179.104(e) is identical to existing § 3179.204(g).

Existing § 3179.204 requires the operator to ''minimize vented gas'' in liquids unloading operations, but does not impose volume or duration limits. As with proposed § 3179.104, existing § 3179.204 allows for gas vented or flared during well purging to be royalty free provided that the operator ensures that the person conducting the operation remains on-site throughout the event. Existing § 3179.204 also requires plunger lift and automated control systems to be optimized to minimize gas loss associated with their effective operation. The main difference between existing § 3179.204 and proposed § 3179.104 is that existing § 3179.204(c) requires the operator to file a Sundry Notice with the BLM the first time that each well is manually purged or purged with an automated control system. That Sundry Notice would need to include documentation showing that the operator evaluated the feasibility of using methods of liquids unloading other than well purging and that the operator determined that such methods were either unduly costly or technically infeasible. Although the administrative burden is apparent, filing this Sundry Notice would require the operator to evaluate and analyze other methods of liquids unloading, which is expected to impose costs on the operator. And, the evaluation may lead the operator to identify a more costly alternative that could not be ignored as ''unduly costly.'' Additionally, under existing § 3179.204, the operator would file a Sundry Notice with the BLM each time a well purging event exceeded either a duration of 24 hours in a month or an estimated gas loss of 75 Mcf in a month. For each manual purging event, the operator would also need to keep a record of the cause, date, time, duration, and estimate of the volume of gas vented. The operator would maintain these records and make them available to the BLM upon request.

With respect to royalty, gas vented during well purging was addressed in NTL–4A as follows: ''. . . operators are authorized to vent or flare gas on a short-term basis without incurring a royalty obligation . . . during the unloading or cleaning up of a well during . . . routine purging . . . not exceeding a period of 24 hours.'' As used in NTL–4A, it is unclear whether the ''24 hours'' limit was intended to be 24 hours per month or 24 hours per purging event. Under the latter interpretation, there would be no practical or enforceable limit to the volume of gas vented, or to the time during which purging could occur, because purging could occur in successive events of 24 hours duration.

In terms of minimizing the loss of gas during well purging events, proposed § 3179.104 and existing § 3179.204 are essentially the same. Differences between the two are found in the reporting and recordkeeping requirements imposed by the 2016 final rule. The intent of these recordkeeping requirements, as explained in the 2016 final rule preamble, was to build a

record of the amount of gas lost through these operations so that information might lead to better future management of liquids unloading operations. The BLM now believes that the reporting and recordkeeping requirements in existing § 3179.204 are unnecessary and unduly burdensome. In particular, the reporting requirement of existing § 3179.204(c) appears to be unnecessary because wells undergoing manual well purging are in decline and any alternative method of liquids unloading is unlikely to be economical for those wells. At this time, the BLM does not believe that it is in a position to develop better waste management techniques based on information collected pursuant to existing § 3179.204.

As mentioned above, proposed § 3179.104(d) would require the person conducting manual well purging to remain present on-site throughout the event to end the event as soon as practical. This provision was not a requirement in NTL–4A, and was first established in the 2016 final rule. The BLM is seeking comment on the operational feasibility of this provision or if another measure would be less burdensome, but achieve the same result.

Other Venting or Flaring

43 CFR 3179.201 Oil Well Gas

Proposed § 3179.201 would govern the routine flaring of associated gas from oil wells. The requirements of proposed § 3179.201 would replace the ''capture percentage'' requirements of the 2016 final rule. Short term flaring, such as that experienced during initial production testing, subsequent well testing, emergencies, and downhole well maintenance and liquids unloading, would be governed by proposed §§ 3179.101 through 3179.104.

Proposed § 3179.201(a) would allow operators to vent or flare oil-well gas royalty free when the venting or flaring is done in compliance with applicable rules, regulations, or orders of the State regulatory agency (for Federal gas) or tribe (for Indian gas). This section establishes State or tribal rules, regulations, and orders as the prevailing regulations for the venting and flaring of oil-well gas on BLM-administered leases, unit participating areas (PAs), or communitization agreements (CAs).

Under the 2016 rule, an operator's royalty obligations for venting or flaring are determined by the avoidable/unavoidable loss definitions and the gas capture requirement thresholds. Operator royalty obligations for vented or flared gas from oil wells in NTL–4A was, for the most part, dependent on an ''avoidable loss'' determination by the BLM. NTL–4A allowed for the BLM to ratify or accept the venting or flaring rules, regulations, or orders of the appropriate State regulatory agency. The proposed rule implements this concept from NTL–4A by deferring to the rules, regulations, or orders of State regulatory agencies or a tribe. This change both simplifies an operator's obligations by aligning Federal and State venting and flaring requirements for oil-well gas and allows for region-specific regulation of oil-well gas that accounts for regional differences in production, markets, and infrastructure. An operator would owe royalty on any oil-well gas flared in violation of applicable State or tribal requirements.

The BLM has analyzed the statutory and regulatory restrictions on venting and flaring in the 10 States constituting the top eight producers of Federal oil and the top eight producers of Federal gas, which collectively produce more than 99 percent of Federal oil and more than 98 percent of Federal gas. The BLM found that each of these States have statutory or regulatory restrictions on venting and flaring that are expected to constrain the waste of associated gas from oil wells. Most of these States require an operator to obtain approval from the State regulatory authority (by justifying the need to flare) in order to engage in the flaring of associated gas.[25] North Dakota has a similar requirement, but, in the Bakken, Bakken/Three Forks, and Three Forks pools, restricts flaring through the application of gas-capture goals that function similarly to the capture percentage requirements of the 2016 final rule. Summaries of the State statutory and regulatory restrictions on venting and flaring analyzed by the BLM are contained in a Memorandum that has been published for public review on *https://www.regulations.gov.* In the Searchbox, enter ''RIN 1004–AE53'', click the ''Search'' button, open the Docket Folder, and look under Supporting Documents.

It is the intent of proposed § 3179.201(a) to defer to State and tribal statutes and regulations, like those described in the Memorandum, that provide a reasonable assurance to the BLM that operators will not be permitted to engage in the flaring of associated gas without limitation and that the waste of associated gas will be controlled. The BLM requests comment on whether the language of proposed § 3179.201(a) achieves that intent.

Proposed § 3179.201(b) exclusively addresses oil-well gas production from an Indian lease. Vented or flared oil-well gas from an Indian lease will be treated as royalty free pursuant to proposed § 3179.201(a) only to the extent it is consistent with the BLM's trust responsibility.

In the event a State regulatory agency or tribe does not currently have rules, regulations or orders governing venting or flaring of oil-well gas, the BLM is proposing to codify the NTL–4A approach as a backstop, providing a way for operators to obtain BLM approval to vent or flare oil-well gas royalty free by submitting an application with sufficient justification as described in proposed § 3179.201(c). Applications for royalty-free venting or flaring of oil-well gas must include either: (1) An evaluation report supported by engineering, geologic, and economic data demonstrating that capturing or using the gas is not economical; or (2) An action plan showing how the operator will minimize the venting or flaring of the gas within 1 year of the application. If an operator vents or flares oil-well gas in excess of 10 MMcf per well during any month, the BLM may determine the gas to be avoidably lost and subject to royalty assessment. The BLM notes that there was no similar provision in NTL–4A allowing for the BLM to impose royalties where flaring under an action plan exceeds 10 MMcf per well per month. However, this provision is based on guidance in the Conservation Division Manual[26] (at 644.5.3F), which was developed by the USGS and has long been used by the BLM as implementation guidance for NTL–4A. The BLM requests comment on this provision, including whether 10 MMcf per well per month is an appropriate threshold and whether specific criteria for when royalty will be imposed should be included in the regulatory text. The BLM also requests comment on whether a longer or shorter period for minimizing flaring under an action plan is appropriate.

As under NTL–4A, the evaluation report required under proposed § 3179.201(c)(1) would be required to demonstrate to the BLM's satisfaction that the expenditures necessary to market or beneficially use the gas are not economically justified. Under proposed § 3179.201(d)(1), the evaluation report would be required to include estimates of the volumes of oil and gas that would be produced to the economic limit if the application to vent or flare were approved, and estimates of

[25] These States are: New Mexico, Wyoming, Colorado, Utah, Montana, Texas, and Oklahoma.

[26] Available at *https://www.ntc.blm.gov/krc/uploads/172/NTL-4A%20Royalty%20or%20Compensation%20for%20Oil%20and%20Gas%20Lost.pdf.*

the volumes of oil and gas that would be produced if the applicant was required to market or use the gas.

From the information contained in the evaluation report, the BLM will determine whether the operator can economically operate the lease if it is required to market or use the gas, taking into consideration both oil and gas production, as well as the economics of a field-wide plan. Under proposed § 3179.201(d)(2), the BLM would be able to require operators to provide updated evaluation reports as additional development occurs or economic conditions improve, but no more than once a year. NTL–4A did not contain a similar provision allowing the BLM to require an operator to update its evaluation report based on changing circumstances. Proposed § 3179.201(d)(2) thus represents a change from NTL–4A. The BLM requests comment on methods for determining whether the operator can economically operate the lease. The BLM also requests comment on the once-a-year limitation on the BLM's authority to require an updated report.

An action plan submitted under proposed § 3179.201(c)(2) would be required to show how the operator will minimize the venting or flaring of the oil-well gas within 1 year. An operator may apply for an approval of an extension of the 1-year time limit. In the event the operator fails to implement the action plan, the entire volume of gas vented or flared during the time covered by the action plan would be subject to royalty.

Proposed § 3179.201(e) provides for grandfathering of prior approvals to flare royalty free. These approvals would continue in effect until no longer necessary because the venting or flaring is authorized by the rules, regulations, or orders of an appropriate State regulatory agency or tribe under proposed § 3179.201(a), or the BLM requires an updated evaluation report and determines to amend or revoke its approval. Existing § 3179.10 of the 2016 rule (as amended by the 2017 Suspension Rule) allows approvals to flare royalty free to continue in effect until January 17, 2019. The BLM specifically requests comment on whether the grandfathering scheme outlined in proposed § 3179.201(e) is appropriate and whether any possible improvements can be made in order to ensure a smooth transition for operators, including whether it is appropriate to phase-out or require the BLM to provide affirmative determinations (*i.e.,* allow for negative consent).

Measurement and Reporting Responsibilities

43 CFR 3179.301 Measuring and Reporting Volumes of Gas Vented and Flared

Proposed § 3179.301(a) would require operators to estimate or measure all volumes of lost oil and gas, whether avoidably or unavoidably lost, from wells, facilities, and equipment on a lease, unit PA, or CA and report those volumes under applicable Office of Natural Resources Revenue (ONRR) reporting requirements. Under proposed § 3179.301(b), the operator could: (1) Estimate or measure the vented or flared gas in accordance with applicable rules, regulations, or orders of the appropriate State or tribal regulatory agency; (2) Estimate the volume of the vented or flared gas based on the results of a regularly performed GOR test and measured values for the volume of oil production and gas sales, to allow BLM to independently verify the volume, rate, and heating value of the flared gas; or (3) Measure the volume of the flared gas. The BLM requests comment on any other potential means of estimating these volumes that would reduce burden and maintain accuracy.

Under proposed § 3179.301(c), the BLM would be able to require the installation of additional measurement equipment whenever it determines that the existing methods are inadequate to meet the purposes of subpart 3179. NTL–4A contained essentially the same provision. Based on past experience in implementing NTL–4A, the BLM believes that proposed § 3179.301(c) would help to ensure accuracy and accountability in situations in which high volumes of royalty-bearing gas are being flared.

Proposed § 3179.301(d) would allow the operator to combine gas from multiple leases, unit PAs, or CAs for the purpose of flaring or venting at a common point, but the operator would be required to use a BLM-approved method to allocate the quantities of the vented or flared gas to each lease, unit PA, or CA. Commingling to a single flare is allowed because the BLM recognizes that the additional costs of requiring individual flaring measurement and meter facilities for each lease, unit PA, or communitized area are not necessarily justified by the incremental royalty accountability afforded by the separate meters and flares.

Proposed § 3179.301 is essentially the same as existing § 3179.9. The main difference between the two is that existing § 3179.9 requires measurement or calculation under a particular protocol when the volume of flared gas exceeds 50 Mcf per day.

C. Summary of Estimated Impacts

The BLM reviewed the proposed rule and conducted an RIA and Environmental Assessment (EA) that examine the impacts of the proposed requirements. The draft RIA and draft EA that the BLM prepared have been posted in the docket for the proposed rule on the *Federal eRulemaking Portal: https://www.regulations.gov.* In the Searchbox, enter ''RIN 1004–AE53'', click the ''Search'' button, open the Docket Folder, and look under Supporting Documents. The following discussion is a summary of the proposed rule's economic impacts. For a more complete discussion of the expected economic impacts of the proposed rule, please review the draft RIA.

The BLM's proposed rule would remove almost all of the requirements in the 2016 final rule that we previously estimated would pose a compliance burden to operators and generate benefits of gas savings or reductions in methane emissions. The proposed rule would replace the 2016 final rule's requirements with requirements largely similar to those that were in NTL–4A. Also, for the most part, the proposed rule would remove the administrative burdens associated with the 2016 final rule's subpart 3179.

The baseline for the analysis of this proposed rule accounts for the BLM's 2017 Suspension Rule that has suspended or delayed certain requirements of the 2016 final rule until January 17, 2019. 82 FR 58050 (Dec. 8, 2017). The effect of the 2017 Suspension Rule is to shift the impacts of the affected requirements into the near future. The BLM also revisited the underlying assumptions used in the RIA for the 2016 final rule. Specifically, the BLM revisited the underlying assumptions pertaining to LDAR, administrative burdens, and climate benefits (see sections 3.2, 3.3, and 7 of the RIA).

For this proposed rule, we track the impacts over the first 10 years of implementation against the baseline. The period of analysis in the RIA prepared for the 2016 final rule was 10 years and the period of analysis in the RIA prepared for the 2017 Suspension Rule was 10 years after the suspension or delay. Results are provided using the net present value (NPV) of costs and benefits estimated over the evaluation period, calculated using 7 percent and 3 percent discount rates.

Estimated Reductions in Compliance Costs (Excluding Cost Savings)

First, we examined the reductions in compliance costs, excluding the savings that would have been realized from product recovery. The proposed rule would reduce compliance costs from the baseline. Over the 10-year evaluation period (2019–2028), we estimate a total reduction in compliance costs of $1.32 billion to 1.60 billion (NPV using a 7 percent discount rate) or $1.66 billion to 2.03 billion (NPV using a 3 percent discount rate). We expect very few compliance costs associated with the proposed rule, including the remaining administrative burdens.

Estimated Reduction in Benefits

The proposed rule would reduce benefits from the baseline, since estimated cost savings that would have come from product recovery would be forgone and the emissions reductions would also be forgone. The proposed rule would result in forgone cost savings from natural gas recovery. Over the 10-year evaluation period (2019–2028), we estimate total forgone cost savings from natural gas recovery (from the baseline) of $629 million (NPV using a 7 percent discount rate) or $824 million (NPV using a 3 percent discount rate). The proposed rule also expected to result in forgone methane emissions reductions. Over the 10-year evaluation period (2019–2028), we estimate total forgone methane emissions reductions from the baseline valued at $66 million (NPV and interim domestic SC–CH4 using a 7 percent discount rate) or $259 million (NPV and interim domestic SC–CH4 using a 3 percent discount rate).

Estimated Net Benefits

The proposed rule is estimated to result in positive net benefits relative to the baseline. More specifically, we estimate that the reduction of compliance costs would exceed the forgone cost savings from recovered natural gas and the value of the forgone methane emissions reductions. Over the 10-year evaluation period (2019–2028), we estimate total net benefits from the baseline of $625–900 million (NPV and interim domestic SC–CH_4 using a 7 percent discount rate) or $578–942 million (NPV and interim domestic SC–CH_4 using a 3 percent discount rate).

Energy Systems

The proposed rule is expected to influence the production of natural gas, natural gas liquids, and crude oil from onshore Federal and Indian oil and gas leases. However, since the relative changes in production are expected to be small, we do not expect that the proposed rule would significantly impact the price, supply, or distribution of energy.

The proposed rule would reverse the estimated incremental changes in crude oil and natural gas production associated with the 2016 final rule. Over the 10-year evaluation period (2019–2028), we estimate that 18.4 million barrels of crude oil production and 22.7 Bcf of natural gas production would no longer be deferred (as it would have been under the 2016 final rule). However, we also estimate that there would be 299 Bcf of forgone natural gas production (that would have been produced and sold under the 2016 final rule).

For context, we note the share of the total U.S. production in 2015 that the incremental changes in production would represent. The per-year average of the estimated crude oil volume that would no longer be deferred represents 0.058 percent of the total U.S. crude oil production in 2015. The per-year average of the estimated natural gas volume that would no longer be deferred represents 0.008 percent of the total U.S. natural gas production in 2015. The per-year average of the estimated forgone natural gas production represents 0.109 percent of the total U.S. natural gas production in 2015.

Royalty Impacts

The 2016 final rule, when implemented, would be expected to impact the production of crude oil and natural gas from Federal and Indian oil and gas leases. In the RIA for the 2016 final rule, the BLM estimated that the rule's requirements would generate additional natural gas production, but that substantial volumes of crude oil production would be deferred or shifted to the future. The BLM concluded that the 2016 final rule would generate overall additional royalty, with the royalty gains from the additional natural gas produced outweighing the value of the royalty losses from crude oil production (and some associated gas) being deferred into the future.

The proposed rule, which reverses most of the 2016 final rule's provisions, is expected to reverse the estimated royalty impacts of the 2016 final rule. This formulation does not account for the potential countervailing impacts of the reduction in compliance burdens, which might spur additional production on Federal and Indian lands and therefore have a positive impact on royalties.

We note that royalty impacts are presented separately from the costs, benefits, and net benefits. Royalty payments are recurring income to Federal or tribal governments and costs to the operator or lessee. As such, they are transfer payments that do not affect the total resources available to society. An important but sometimes difficult problem in cost estimation is to distinguish between real costs and transfer payments. While transfers should not be included in the economic analysis estimates of the benefits and costs of a regulation, they may be important for describing the distributional effects of a regulation.

The proposed rule is expected to result in forgone royalty payments to the Federal Government, tribal governments, States, and private landowners. Over the 10-year evaluation period (2019–2028), we estimate total forgone royalty payments (from the baseline) of $26.4 million (NPV using a 7 percent discount rate) or $32.7 million (NPV using a 3 percent discount rate).

Consideration of Alternative Approaches

E.O. 13563 reaffirms the principles of E.O. 12866 and requires that agencies, among other things, ''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.''

The 2016 final rule established requirements and direct regulation on operators. If the proposed rule were finalized, then the BLM would remove the requirements of the 2016 final rule that impose the most substantial direct regulatory burdens on operators. Also, with the proposed rule, the BLM would remove the duplicative operational and equipment requirements and paperwork and administrative burdens.

In developing this proposed rule, the BLM considered scenarios for retaining certain requirements currently in subpart 3179. For example, we examined the impacts of retaining subpart 3179 in its entirety (essentially taking no action). We also examined the impacts of retaining the gas capture requirements of the 2016 final rule (§§ 3179.7–3179.8) and the measurement/metering requirements (§ 3179.9) while rescinding the operational and equipment requirements addressing venting from leaks, pneumatic equipment, and storage tanks. The results of these alternative scenarios are presented in Section 4 of the RIA.

Employment Impacts

E.O. 13563 reaffirms the principles established in E.O. 12866, but calls for additional consideration of the regulatory impact on employment. E.O. 13563 states, ''Our regulatory system must protect public health, welfare, safety, and our environment while promoting economic growth, innovation, competitiveness, and job creation.'' An analysis of employment impacts is a standalone analysis and the impacts should not be included in the estimation of benefits and costs.

This proposed rule would remove or replace requirements of the BLM's 2016 final rule on waste prevention and is a deregulatory action. As such, we estimate that it would result in a reduction of compliance costs for operators of oil and gas leases on Federal and Indian lands. Therefore, it is likely that the impact, if any, on employment would be positive.

In the RIA for the 2016 final rule, the BLM concluded that the requirements were not expected to impact the employment within the oil and gas extraction, drilling oil and gas wells, and support activities industries, in any material way. This determination was based on several reasons. First, the estimated incremental gas production represented only a small fraction of the U.S. natural gas production volumes. Second, the estimated compliance costs represented only a small fraction of the annual net incomes of companies likely to be impacted. Third, for those operations that would have been impacted, the 2016 final rule had provisions that would exempt these operations from compliance to the extent that the compliance costs would force the operator to shut in production. Based on these factors, the BLM determined that the 2016 final rule would not alter the investment or employment decisions of firms or significantly adversely impact employment. The RIA also noted that the requirements would necessitate the one-time installation or replacement of equipment and the ongoing implementation of an LDAR program, both of which would require labor.

We do not believe that the proposed rule would substantially alter the investment or employment decisions of firms. By removing or revising the requirements of the 2016 final rule, the BLM would alleviate the associated compliance burdens on operators. The investment and labor necessary to comply with the 2016 rule would not be needed. We do not believe that the cost savings in themselves would be substantial enough to substantially alter the investment or employment decisions of firms. We also recognize that there may be a small positive impact on investment and employment due to the reduction in compliance burdens if the output effects dominate. The magnitude of the reductions would be relatively small but could carry competitiveness impacts, specifically on marginal wells on Federal lands, deterring investment. In sum, the effect on investment and employment of this rule remains unknown.

Small Business Impacts

The BLM reviewed the Small Business Administration (SBA) size standards for small businesses and the number of entities fitting those size standards as reported by the U.S. Census Bureau. We conclude that small entities represent the majority of entities operating in the onshore crude oil and natural gas extraction industry and, therefore, the proposed rule would impact a substantial number of small entities. To examine the economic impact of the rule on small entities, the BLM performed a screening analysis on a sample of potentially affected small entities, comparing the reduction of compliance costs to entity profit margins. This screening analysis showed that the estimated per-entity reduction in compliance costs would result in an average increase in profit margin of 0.19 percentage points (based on the 2014 company data).[27]

The BLM also notes that most of the emissions-based requirements in the 2016 final rule (including LDAR, pneumatic controllers, pneumatic pumps, and liquids unloading requirements) would impose a particular burden on marginal or low-producing wells.[28] There is concern that those wells would not be able to be operated profitably with the additional compliance costs imposed by the 2016 final rule. While the 2016 final rule allows for exemptions when compliance would impose such costs that the operator would cease production and abandon significant recoverable reserves, due to the prevalence of marginal and low-producing wells, the BLM expects that many exemptions would be warranted, making the burdens imposed by the exemption process, in itself, excessive. The prospect of either shutting-in a marginal well or assuming unwarranted administrative burdens to avoid compliance costs potentially represents a substantial loss of income for companies operating marginal wells. The BLM's proposal would rescind or revise these requirements in the 2016 final rule, thus reducing compliance costs for all wells, including marginal wells, and reducing the potential economic harm to small businesses.

Impacts Associated With Oil and Gas Operations on Tribal Lands

The proposed rule would apply to oil and gas operations on both Federal and Indian leases. In the RIA, the BLM estimates the impacts associated with operations on Indian leases, as well as royalty implications for tribal governments. We estimate these impacts by scaling down the total impacts by the share of oil wells on Indian lands and the share of gas wells on Indian Lands. Please reference the RIA at section 4.4.5 for a full explanation of the estimated impacts.

V. Procedural Matters

Regulatory Planning and Review (E.O. 12866, E.O. 13563)

Executive Order 12866 provides that the Office of Information and Regulatory Affairs within the Office of Management and Budget (OMB) will review all significant rules. The Office of Information and Regulatory Affairs has determined that this proposed rule is economically 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.

This proposed rule would rescind or revise portions of the BLM's 2016 final rule. We have developed this proposed rule in a manner consistent with the requirements in Executive Order 12866 and Executive Order 13563. The BLM reviewed the requirements of the

[27] Average commodity price in 2014 was higher than subsequent years; therefore, the result in profit margin may not be representative of the increase in profit margin as a result of the updated rulemaking.

[28] As explained previously, the IOGCC defines a marginal well as one that produces 10 barrels of oil or 60 Mcf of natural gas per day or less and reports that about 69.1 and 75.9 percent of the nation's operating oil and gas wells, respectively, are marginal.

proposed rule and determined that it will not 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. For more detailed information, see the RIA prepared for this proposed rule. The RIA has been posted in the docket for the proposed rule on the Federal eRulemaking Portal: *https://www.regulations.gov.* In the Searchbox, enter ''RIN 1004–AE53'', click the ''Search'' button, open the Docket Folder, and look under Supporting Documents.

Reducing Regulation and Controlling Regulatory Costs (E.O. 13771)

This proposed rule is expected to be an E.O. 13771 deregulatory action. Details on the estimated cost savings of this proposed rule can be found in the rule's RIA.

Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) (RFA) generally requires that Federal agencies prepare a regulatory flexibility analysis for rules subject to the notice-and-comment rulemaking requirements under the Administrative Procedure Act (5 U.S.C. 500 *et seq.*), if the rule would have a significant economic impact, whether detrimental or beneficial, on a substantial number of small entities. *See* 5 U.S.C. 601–612. Congress enacted the RFA to ensure that government regulations do not unnecessarily or disproportionately burden small entities. Small entities include small businesses, small governmental jurisdictions, and small not-for-profit enterprises.

The BLM reviewed the SBA size standards for small businesses and the number of entities fitting those size standards as reported by the U.S. Census Bureau in the Economic Census. The BLM concludes that the vast majority of entities operating in the relevant sectors are small businesses as defined by the SBA. As such, the proposed rule would likely affect a substantial number of small entities.

The BLM reviewed the proposed rule and estimates that it would generate cost savings of about $69,000 per entity per year. These estimated cost savings would provide relief to small operators which, the BLM notes, represent the overwhelming majority of operators of Federal and Indian leases.

For the purpose of carrying out its review pursuant to the RFA, the BLM believes that the proposed rule would not have a ''significant economic impact on a substantial number of small entities,'' as that phrase is used in 5 U.S.C. 605. An initial regulatory flexibility analysis is therefore not required. In making a ''significant'' determination under the RFA, BLM used an estimated per-entity cost savings to conduct a screening analysis. The analysis shows that the average reduction in compliance costs associated with this proposed rule are a small enough percentage of the profit margin for small entities, so as not be considered ''significant'' under the RFA.

Details on this determination can be found in the RIA for the proposed rule.

Small Business Regulatory Enforcement Fairness Act

This proposed rule is a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. This proposed rule:

(a) Would have an annual effect on the economy of $100 million or more.

(b) Would not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions.

(c) Would not have a significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises.

Unfunded Mandates Reform Act (UMRA)

This proposed rule would not impose an unfunded mandate on State, local, or tribal governments, or the private sector of $100 million or more per year. The proposed rule would not have a significant or unique effect on State, local, or tribal governments or the private sector. The proposed rule contains no requirements that would apply to State, local, or tribal governments. It would rescind or revise requirements that would otherwise apply to the private sector. A statement containing the information required by the Unfunded Mandates Reform Act (UMRA) (2 U.S.C. 1531 *et seq.*) is not required for the proposed rule. This proposed rule is also not subject to the requirements of section 203 of UMRA because it contains no regulatory requirements that might significantly or uniquely affect small governments, because it contains no requirements that apply to such governments, nor does it impose obligations upon them.

Governmental Actions and Interference With Constitutionally Protected Property Right—Takings (Executive Order 12630)

This proposed rule would not affect a taking of private property or otherwise have taking implications under Executive Order 12630. A takings implication assessment is not required. The proposed rule would rescind or revise many of the requirements placed on operators by the 2016 final rule. Operators would not have to undertake the associated compliance activities, either operational or administrative. Therefore, the proposed rule would impact some operational and administrative requirements on Federal and Indian lands. All such operations are subject to lease terms which expressly require that subsequent lease activities be conducted in compliance with subsequently adopted Federal laws and regulations. This proposed rule conforms to the terms of those leases and applicable statutes and, as such, the rule is not a government action capable of interfering with constitutionally protected property rights. Therefore, the BLM has determined that the rule would not cause a taking of private property or require further discussion of takings implications under Executive Order 12630.

Federalism (Executive Order 13132)

Under the criteria in section 1 of Executive Order 13132, this proposed rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement. A federalism impact statement is not required.

The proposed rule would not have a substantial direct effect on the States, on the relationship between the Federal Government and the States, or on the distribution of power and responsibilities among the levels of government. It would not apply to States or local governments or State or local governmental entities. The rule would affect the relationship between operators, lessees, and the BLM, but it does not directly impact the States. Therefore, in accordance with Executive Order 13132, the BLM has determined that this proposed rule does not have sufficient federalism implications to warrant preparation of a Federalism Assessment.

Civil Justice Reform (Executive Order 12988)

This proposed rule complies with the requirements of Executive Order 12988. More specifically, this proposed rule meets the criteria of section 3(a), which requires agencies to review all

regulations to eliminate errors and ambiguity and to write all regulations to minimize litigation. This proposed rule also meets the criteria of section 3(b)(2), which requires agencies to write all regulations in clear language with clear legal standards.

Consultation and Coordination With Indian Tribal Governments (Executive Order 13175 and Departmental Policy)

The Department 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 proposed rule under the Department's consultation policy and under the criteria in Executive Order 13175 and have identified substantial direct effects on federally recognized Indian tribes that would result from this proposed rule. Under this proposed rule, oil and gas operations on tribal and allotted lands would no longer be subject to many of the requirements placed on operators by the 2016 final rule.

The BLM believes that revising the requirements of subpart 3179 would prevent Indian lands from being viewed as less attractive to oil and gas operators than non-Indian lands due to unnecessary and burdensome compliance costs, thereby preventing economic harm to tribes and allottees. The BLM is conducting tribal outreach which it believes is appropriate given that the proposed rule would remove many of the compliance burdens of the 2016 final rule, defer to tribal laws, regulations, rules, and orders, with respect to oil-well gas flaring from Indian leases, and otherwise revise subpart 3179 in a manner that aligns it with NTL–4A. The BLM notified tribes of the action and requested feedback and comment through the respective BLM State Office Directors. Future tribal consultation may occur on an ongoing basis.

Paperwork Reduction Act

1. Overview

The Paperwork Reduction Act (PRA) (44 U.S.C. 3501–3521) provides that an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information, unless it displays a currently valid control number. 44 U.S.C. 3512. Collections of information include requests and requirements that an individual, partnership, or corporation obtain information, and report it to a Federal agency. 44 U.S.C. 3502(3); 5 CFR 1320.3(c) and (k).

OMB approved 24 information collection activities in a final rule pertaining to waste prevention and assigned control number 1004–0211 to those activities. See ''Waste Prevention, Production Subject to Royalties, and Resource Conservation,'' Final Rule, 81 FR 83008 (Nov. 18, 2016). In the Notice of Action approving the 24 information collection activities in the 2016 final rule, OMB announced that the control number will expire on January 31, 2018. The Notice of Action also included terms of clearance.

On October 5, 2017, the BLM proposed a rule that would suspend or delay several regulations in the 2016 final rule. In that proposed rule, the BLM requested the extension of control number 1004–0211 until January 31, 2019, including the 24 information collection activities in the 2016 final rule. The BLM invited public comment on the proposed extension of control no. 1004–0211. The BLM also submitted the information collection request for this proposed rule to OMB for review in accordance with the PRA.

The BLM finalized that rule on December 8, 2017. See 82 FR 58050. OMB approved the information collection activities in the rule with an expiration date of December 31, 2020, and with a Term of Clearance that maintains the effectiveness of the Terms of Clearance associated with the 2016 final rule. That Term of Clearance requires the BLM to submit to the Office of Information and Regulatory Affairs draft guidance to implement the collection of information requirements of the 2016 final rule no later than 3 months after January 17, 2019.

This proposed rule would not modify any regulations in 43 CFR subpart 3178. Accordingly, the BLM requests continuation of the information collection activity at 43 CFR 3178.5, 3178.7, 3178.8, and 3178.9 (''Request for Approval for Royalty-Free Uses On-Lease or Off-Lease'').

The proposed rule would remove the information collection activity at 43 CFR 3162.3–1(j) (''Plan to Minimize Waste of Natural Gas''). The proposed rule also would remove or revise many regulations and information collection activities in 43 CFR subpart 3179. As a result, the BLM now requests revision of control number 1004–0211 to include:

- The information collection activities in this proposed rule; and
- The information collection activity entitled ''Request for Approval for Royalty-Free Uses On-Lease or Off-Lease.''

The BLM requests comments on the following subjects:

- Whether the collection of information is necessary for the proper functioning of the BLM, including whether the information will have practical utility;
- The accuracy of the BLM's estimate of the burden of collecting the information, including the validity of the methodology and assumptions used;
- The quality, utility, and clarity of the information to be collected; and
- How to minimize the information collection burden on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other forms of information technology.

If you want to comment on the information collection requirements of this proposed rule, please send your comments directly to OMB, with a copy to the BLM, as directed in the **ADDRESSES** section of this preamble. Please identify your comments with ''OMB Control Number 1004–0211.'' OMB is required to make a decision concerning the collection of information contained in this proposed rule between 30 to 60 days after publication of this document in the **Federal Register**. Therefore, a comment to OMB is best assured of having its full effect if OMB receives it by March 26, 2018.

2. Summary of Information Collection Activities

Title: Waste Prevention, Production Subject to Royalties, and Resource Conservation (43 CFR parts 3160 and 3170).

OMB Control Number: 1004–0211.

Form: Form 3160–5, Sundry Notices and Reports on Wells.

Description of Respondents: Holders of Federal and Indian (except Osage Tribe) oil and gas leases, those who belong to Federally approved units or communitized areas, and those who are parties to oil and gas agreements under the Indian Mineral Development Act, 25 U.S.C. 2101–2108.

Respondents' Obligation: Required to obtain or retain a benefit.

Frequency of Collection: On occasion.

Abstract: The BLM requests that control number 1004–0211 be revised to include the information collection activities in this proposed rule, as well as the information collection activity in 43 CFR subpart 3178 that was in the 2016 final rule. The BLM also requests the removal of the information collection activity in 43 CFR 3162.3–1(j) that was in the 2016 final rule, and the removal or revision of the information collection activities that were in 43 CFR subpart 3179 of the 2016 final rule.

Estimated Number of Responses: 1,075.

Estimated Total Annual Burden Hours: 4,010.

Estimated Total Non-Hour Cost: None.

3. Information Collection Request

A. The BLM requests that OMB control number 1004–0211 continue to include the following information collection activity that was included at 43 CFR subpart 3178 of the 2016 final rule:

Request for Approval for Royalty-Free Uses On-Lease or Off-Lease (43 CFR 3178.5, 3178.7, 3178.8, and 3178.9)

Section 3178.5 requires submission of a Sundry Notice (Form 3160–5) to request prior written BLM approval for use of gas royalty free for the following operations and production purposes on the lease, unit or communitized area:

- Using oil or gas that an operator removes from the pipeline at a location downstream of the facility measurement point (FMP);
- Removal of gas initially from a lease, unit PA, or communitized area for treatment or processing because of particular physical characteristics of the gas, prior to use on the lease, unit PA or communitized area; and
- Any other type of use of produced oil or gas for operations and production purposes pursuant to § 3178.3 that is not identified in § 3178.4.

Section 3178.7 requires submission of a Sundry Notice (Form 3160–5) to request prior written BLM approval for off-lease royalty-free uses in the following circumstances:

- The equipment or facility in which the operation is conducted is located off the lease, unit, or communitized area for engineering, economic, resource-protection, or physical-accessibility reasons; and
- The operations are conducted upstream of the FMP.

Section 3178.8 requires that an operator measure or estimate the volume of royalty-free gas used in operations upstream of the FMP. In general, the operator is free to choose whether to measure or estimate, with the exception that the operator must in all cases measure the following volumes:

- Royalty-free gas removed downstream of the FMP and used pursuant to §§ 3178.4 through 3178.7; and
- Royalty-free oil used pursuant to §§ 3178.4 through 3178.7.

If oil is used on the lease, unit or communitized area, it is most likely to be removed from a storage tank on the lease, unit or communitized area. Thus, this regulation also requires the operator to document the removal of the oil from the tank or pipeline.

Section 3178.8(e) requires that operators use best available information to estimate gas volumes, where estimation is allowed. For both oil and gas, the operator must report the volumes measured or estimated, as applicable, under ONRR reporting requirements. As revisions to Onshore Oil and Gas Orders No. 4 and 5 have now been finalized as 43 CFR subparts 3174 and 3175, respectively, the final rule text now references § 3173.12, as well as § 3178.4 through § 3178.7 to clarify that royalty-free use must adhere to the provisions in those sections.

Section 3178.9 requires the following additional information in a request for prior approval of royalty-free use under § 3178.5, or for prior approval of off-lease royalty-free use under § 3178.7:

- A complete description of the operation to be conducted, including the location of all facilities and equipment involved in the operation and the location of the FMP;
- The volume of oil or gas that the operator expects will be used in the operation and the method of measuring or estimating that volume;
- If the volume expected to be used will be estimated, the basis for the estimate (*e.g.,* equipment manufacturer's published consumption or usage rates); and
- The proposed disposition of the oil or gas used (*e.g.,* whether gas used would be consumed as fuel, vented through use of a gas-activated pneumatic controller, returned to the reservoir, or disposed by some other method).

B. The BLM requests the revision of the following information collection activities in accordance with this proposed rule:

Request for Extension of Royalty-Free Flaring During Initial Production Testing (43 CFR 3179.101)

A regulation in the 2016 final rule, 43 CFR 3179.103, allows gas to be flared royalty free during initial production testing. The regulation lists specific volume and time limits for such testing. An operator may seek an extension of those limits on royalty-free flaring by submitting a Sundry Notice (Form 3160–5) to the BLM.

A regulation in this proposed rule, 43 CFR 3179.101, would be similar to the 2016 final rule in addressing the royalty-free treatment of gas volumes flared during initial production testing. 43 CFR 3179.101 in this proposed rule would provide that gas flared during the initial production test of each completed interval in a well is royalty free until one of the following occurs:

- The operator determines that it has obtained adequate reservoir information;
- 30 days have passed since the beginning of the production test, unless the BLM approves a longer test period; or
- The operator has flared 50 MMcf of gas.

Section 3179.101 of this proposed rule would also provide that an operator may request a longer test period by submitting a Sundry Notice.

Request for Extension of Royalty-Free Flaring During Subsequent Well Testing (43 CFR 3179.102)

A regulation in the 2016 final rule, 43 CFR 3179.104, allows gas to be flared royalty free for no more than 24 hours during well tests subsequent to the initial production test. That regulation allows an operator to seek authorization to flare royalty free for a longer period by submitting a Sundry Notice (Form 3160–5) to the BLM.

A regulation in this proposed rule, 43 CFR 3179.102, is substantively identical to 43 CFR 3179.104 in the 2016 final rule. Accordingly, the BLM requests that the information collection activity at 43 CFR 3179.102 of this proposed rule replace the activity at 43 CFR 3179.104 of the 2016 final rule.

Emergencies (43 CFR 3179.103)

A regulation in the 2016 final rule, 43 CFR 3179.105, allows an operator to flare gas royalty free during a temporary, short-term, infrequent, and unavoidable emergency. A regulation in this proposed rule, at 43 CFR 3179.103, is almost identical to 43 CFR 3179.105 of the 2016 final rule. The BLM thus requests that the information collection activity entitled, ''Reporting of Venting or Flaring (43 CFR 3179.105)'' be re-named ''Emergencies (43 CFR 3179.103).''

As provided at 43 CFR 3179.103(a) of this proposed rule, gas flared or vented during an emergency would be royalty free for a period not to exceed 24 hours, unless the BLM determines that emergency conditions exist necessitating venting or flaring for a longer period. Section 3179.103(d) of this proposed rule would require the operator to report to the BLM on a Sundry Notice, within 45 days of the start of an emergency, the estimated volumes flared or vented beyond the timeframe specified in paragraph (a).

As defined at 43 CFR 3179.103(b) of this proposed rule, an ''emergency'' for purposes of 43 CFR subpart 3179 would be a temporary, infrequent and unavoidable situation in which the loss of gas or oil is uncontrollable or necessary to avoid risk of an immediate

and substantial adverse impact on safety, public health, or the environment, and is not due to operator negligence.

As provided at 43 CFR 3179.103(c) of this proposed rule, the following events would not constitute emergencies for the purposes of royalty assessment:

- The operator's failure to install appropriate equipment of a sufficient capacity to accommodate the production conditions;
- Failure to limit production when the production rate exceeds the capacity of the related equipment, pipeline, or gas plant, or exceeds sales contract volumes of oil or gas;
- Scheduled maintenance;
- A situation caused by operator negligence, including recurring equipment failures; or
- A situation on a lease, unit, or communitized area that has already experienced 3 or more emergencies within the past 30 days, unless the BLM determines that the occurrence of more than 3 emergencies within the 30 day period could not have been anticipated and was beyond the operator's control.

C. The BLM requests the removal of the following information collection activities in accordance with this proposed rule:

1. ''Plan to Minimize Waste of Natural Gas'';
2. ''Notification of Choice to Comply on County- or State-wide Basis'';
3. ''Request for Approval of Alternative Capture Requirement'';
4. ''Request for Exemption from Well Completion Requirements'';
5. ''Notification of Functional Needs for a Pneumatic Controller'';
6. ''Showing that Cost of Compliance Would Cause Cessation of Production and Abandonment of Oil Reserves (Pneumatic Controller)'';
7. ''Showing in Support of Replacement of Pneumatic Controller within 3 Years'';
8. ''Showing that a Pneumatic Diaphragm Pump was Operated on Fewer than 90 Individual Days in the Prior Calendar Year'';
9. ''Notification of Functional Needs for a Pneumatic Diaphragm Pump'';
10. ''Showing that Cost of Compliance Would Cause Cessation of Production and Abandonment of Oil Reserves (Pneumatic Diaphragm Pump)'';
11. ''Showing in Support of Replacement of Pneumatic Diaphragm Pump within 3 Years'';
12. ''Storage Vessels'';
13. ''Downhole Well Maintenance and Liquids Unloading—Documentation and Reporting'';
14. ''Downhole Well Maintenance and Liquids Unloading—Notification of Excessive Duration or Volume'';
15. ''Leak Detection—Compliance with EPA Regulations'';
16. ''Leak Detection—Request to Use an Alternative Monitoring Device and Protocol'';
17. ''Leak Detection—Operator Request to Use an Alternative Leak Detection Program'';
18. ''Leak Detection—Operator Request for Exemption Allowing Use of an Alternative Leak-Detection Program that Does Not Meet Specified Criteria'';
19. ''Leak Detection—Notification of Delay in Repairing Leaks'';
20. ''Leak Detection—Inspection Recordkeeping and Reporting''; and
21. ''Leak Detection—Annual Reporting of Inspections.''

D. The BLM requests the addition of following information collection activity, in accordance with this proposed rule:

Oil-Well Gas (43 CFR 3179.201)

A regulation in this proposed rule, 43 CFR 3179.201, would provide that, except as otherwise provided in 43 CFR subpart 3179, oil-well gas may not be vented or flared royalty free unless BLM approves such action in writing. The BLM would be authorized to approve an application for royalty-free venting or flaring of oil-well gas upon determining that royalty-free venting or flaring is justified by the operator's submission of either:

(1) An evaluation report supported by engineering, geologic, and economic data that demonstrates to the BLM's satisfaction that the expenditures necessary to market or beneficially use such gas are not economically justified; or

(2) An action plan showing how the operator will minimize the venting or flaring of the gas within 1 year or within a greater amount of time if the operator justifies an extended deadline. If the operator fails to implement the action plan, the gas vented or flared during the time covered by the action plan would be subject to royalty.

The data in the evaluation report that is mentioned above would need to include:

- The applicant's estimates of the volumes of oil and gas that would be produced to the economic limit if the application to vent or flare were approved; and
- The volumes of the oil and gas that would be produced if the applicant were required to market or use the gas.

The BLM would be authorized to require the operator to provide an updated evaluation report as additional development occurs or economic conditions improve. In addition, the BLM would be authorized to determine that gas is avoidably lost and therefore subject to royalty if flaring exceeds 10 MMcf per well during any month.

4. Burden Estimates

This proposed rule would result in the following adjustments in hour or cost burden that result from the review of the proposed rule under Executive Order 12866:

1. The hours per response for Request for Approval for Royalty-Free Uses On-Lease or Off-Lease would be increased from 4 to 8.

2. The number of responses for ''Request for Extension of Royalty-Free Flaring During Initial Well Testing'' would be increased from 500 to 750.

Program changes in this proposed rule would result in 62,125 fewer responses than in the 2016 final rule (1,075 responses minus 63,200 responses) and 78,160 fewer burden hours than in the 2016 final rule (4,010 responses minus 82,170 responses. The program changes and their reasons are itemized in Tables 15–1 and 15–2 of the supporting statement.

The following table details the annual estimated hour burdens for the information activities described above:

Type of response A	Number of responses B	Hours per response C	Total hours (column B × column C) D
Request for Approval for Royalty-Free Uses On-Lease or Off-Lease, 43 CFR 3178.5, 3178.7, 3178.8, and 3178.9, Form 3160–5	50	8	400
Request for Extension of Royalty-Free Flaring During Initial Production Testing, 43 CFR 3179.101, Form 3160–5	750	2	1,500
Request for Extension of Royalty-Free Flaring During Subsequent Well Testing, 43 CFR 3179.102, Form 3160–5	5	2	10

Type of response A	Number of responses B	Hours per response C	Total hours (column B × column C) D
Emergencies, 43 CFR 3179.103, Form 3160–5	250	2	500
Oil-Well Gas, 43 CFR 3179.201	20	80	1,600
Totals	1,075		4,010

National Environmental Policy Act

The BLM has prepared a draft environmental assessment (EA) to determine whether this proposed rule would have a significant impact on the quality of the human environment under the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321 *et seq.*). If the final EA supports the issuance of a Finding of No Significant Impact for the rule, the preparation of an environmental impact statement pursuant to the NEPA would not be required.

The draft EA has been placed in the file for the BLM's Administrative Record for the rule at the address specified in the **ADDRESSES** section. The EA has also been posted in the docket for the rule on the *Federal eRulemaking Portal: https://www.regulations.gov.* In the Searchbox, enter ''RIN 1004–AE53'', click the ''Search'' button, open the Docket Folder, and look under Supporting Documents. The BLM invites the public to review the draft EA and suggests that anyone wishing to submit comments on the EA should do so in accordance with the instructions contained in the ''Public Comment Procedures'' section above.

Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use (Executive Order 13211)

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

Section 4(b) of Executive Order 13211 defines a ''significant energy action'' as ''any action by an agency (normally published in the **Federal Register**) that promulgates or is expected to lead to the promulgation of a final rule or regulation, including notices of inquiry, advance notices of rulemaking, and notices of rulemaking: (1)(i) That is a significant regulatory action under Executive Order 12866 or any successor order, and (ii) Is likely to have a significant adverse effect on the supply, distribution, or use of energy; or (2) That is designated by the Administrator of the Office of Information and Regulatory Affairs as a significant energy action.''

The rule would rescind or revise certain requirements in the 2016 final rule and would reduce compliance burdens. The BLM determined that the 2016 final rule would not have impacted the supply, distribution, or use of energy. It stands to reason that a revision in a manner that conforms 43 CFR subpart 3179 with the policies governing venting and flaring prior to the 2016 final rule will likewise not have an impact on the supply, distribution, or use of energy. As such, we do not consider the proposed rule to be a ''significant energy action'' as defined in Executive Order 13211.

Clarity of This Regulation (Executive Orders 12866)

We are required by Executive Orders 12866 (section 1(b)(12)), 12988 (section 3(b)(1)(B)), and 13563 (section 1(a)), and by the Presidential Memorandum of June 1, 1988, to write all rules in plain language. This means that each rule must:

(a) Be logically organized;

(b) Use the active voice to address readers directly;

(c) Use common, everyday words and 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 the BLM 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.

Authors

The principal authors of this proposed rule are: James Tichenor and Michael Riches of the BLM Washington Office; Rebecca Hunt of the BLM New Mexico State Office, Eric Jones of the BLM Moab, Utah Field Office; David Mankiewicz of the BLM Farmington, New Mexico Field Office; and Beth Poindexter of the BLM Dickinson, North Dakota Field Office; assisted by Faith Bremner of the BLM's Division of Regulatory Affairs and by the Department of the Interior's Office of the Solicitor.

List of Subjects

43 CFR Part 3160

Administrative practice and procedure; Government contracts; Indians—lands; Mineral royalties; Oil and gas exploration; Penalties; Public lands—mineral resources; Reporting and recordkeeping requirements.

43 CFR Part 3170

Administrative practice and procedure; Flaring; Government contracts; Incorporation by reference; Indians—lands; Mineral royalties; Immediate assessments; Oil and gas exploration; Oil and gas measurement; Public lands—mineral resources; Reporting and record keeping requirements; Royalty-free use; Venting.

Dated: February 8, 2018.

Joseph R. Balash,

Assistant Secretary for Land and Minerals Management.

43 CFR Chapter II

For the reasons set out in the preamble, the Bureau of Land Management proposes to amend 43 CFR parts 3160 and 3179 as follows:

PART 3160—ONSHORE OIL AND GAS OPERATIONS

■ 1. The authority citation for part 3160 continues to read as follows:

Authority: 25 U.S.C. 396d and 2107; 30 U.S.C. 189, 306, 359, and 1751; and 43 U.S.C. 1732(b), 1733, and 1740; and Sec. 107, Pub. L. 114–74, 129 Stat. 599, unless otherwise noted.

§ 3162.3–1 [Amended]

■ 2. Amend § 3162.3–1 by removing paragraph (j).

PART 3170—ONSHORE OIL AND GAS PRODUCTION

■ 3. The authority citation for part 3170 continues to read as follows:

Authority: 25 U.S.C. 396d and 2107; 30 U.S.C. 189, 306, 359, and 1751; and 43 U.S.C. 1732(b), 1733, and 1740.

■ 4. Revise subpart 3179 to read as follows:

Subpart 3179—Waste Prevention and Resource Conservation

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Subpart 3179—Waste Prevention and Resource Conservation

§ 3179.1 Purpose.

The purpose of this subpart is to implement and carry out the purposes of statutes relating to prevention of waste from Federal and Indian (other than Osage Tribe) leases, conservation of surface resources, and management of the public lands for multiple use and sustained yield. This subpart supersedes those portions of Notice to Lessees and Operators of Onshore Federal and Indian Oil and Gas Leases, Royalty or Compensation for Oil and Gas Lost (NTL–4A), pertaining to, among other things, flaring and venting of produced gas, unavoidably and avoidably lost gas, and waste prevention.

§ 3179.2 Scope.

(a) This subpart applies to:

(1) All onshore Federal and Indian (other than Osage Tribe) oil and gas leases, units, and communitized areas, except as otherwise provided in this subpart;

(2) IMDA oil and gas agreements, unless specifically excluded in the agreement or unless the relevant provisions of this subpart are inconsistent with the agreement;

(3) Leases and other business agreements and contracts for the development of tribal energy resources under a Tribal Energy Resource Agreement entered into with the Secretary, unless specifically excluded in the lease, other business agreement, or Tribal Energy Resource Agreement;

(4) Committed State or private tracts in a federally approved unit or communitization agreement defined by or established under 43 CFR subpart 3105 or 43 CFR part 3180; and

(5) All onshore well facilities located on a Federal or Indian lease or a federally approved unit or communitized area.

(b) For purposes of this subpart, the term ''lease'' also includes IMDA agreements.

§ 3179.3 Definitions and acronyms.

As used in this subpart, the term:

Automatic ignition system means an automatic ignitor and, where needed to ensure continuous combustion, a continuous pilot flame.

Capture means the physical containment of natural gas for transportation to market or productive use of natural gas, and includes injection and royalty-free on-site uses pursuant to subpart 3178.

Gas-to-oil ratio (GOR) means the ratio of gas to oil in the production stream expressed in standard cubic feet of gas per barrel of oil.

Gas well means a well for which the energy equivalent of the gas produced, including its entrained liquefiable hydrocarbons, exceeds the energy equivalent of the oil produced, as determined at the time of well completion.

Liquids unloading means the removal of an accumulation of liquid hydrocarbons or water from the wellbore of a completed gas well.

Lost oil or lost gas means produced oil or gas that escapes containment, either intentionally or unintentionally, or is flared before being removed from the lease, unit, or communitized area, and cannot be recovered.

Oil well means a well for which the energy equivalent of the oil produced exceeds the energy equivalent of the gas produced, as determined at the time of well completion.

Waste of oil or gas means any act or failure to act by the operator that is not sanctioned by the authorized officer as necessary for proper development and production, where compliance costs are not greater than the monetary value of the resources they are expected to conserve, and which results in: (1) A reduction in the quantity or quality of oil and gas ultimately producible from a reservoir under prudent and proper operations; or (2) avoidable surface loss of oil or gas.

§ 3179.4 Determining when the loss of oil or gas is avoidable or unavoidable.

For purposes of this subpart:

(a) *Avoidably lost* production means:

(1) Gas that is vented or flared without the authorization or approval of the BLM; or

(2) Produced oil or gas that is lost when the BLM determines that such loss occurred as a result of:

(i) Negligence on the part of the operator;

(ii) The failure of the operator to take all reasonable measures to prevent or control the loss; or

(iii) The failure of the operator to comply fully with the applicable lease terms and regulations, appropriate provisions of the approved operating plan, or prior written orders of the BLM.

(b) *Unavoidably lost* production means:

(1) Oil or gas that is lost because of line failures, equipment malfunctions, blowouts, fires, or other similar circumstances, except where the BLM determines that the loss was avoidable pursuant to § 3179.4(a)(2);

(2) Oil or gas that is lost from the following operations or sources, except where the BLM determines that the loss was avoidable pursuant to § 3179.4(a)(2):

(i) Well drilling;

(ii) Well completion and related operations;

(iii) Initial production tests, subject to the limitations in § 3179.101;

(iv) Subsequent well tests, subject to the limitations in § 3179.102;

(v) Exploratory coalbed methane well dewatering;

(vi) Emergencies, subject to the limitations in § 3179.103;

(vii) Normal gas vapor losses from a storage tank or other low pressure production vessel, unless the BLM determines that recovery of the gas vapors is warranted;

(viii) Well venting in the course of downhole well maintenance and/or liquids unloading performed in compliance with § 3179.104; or

(ix) Facility and pipeline maintenance, such as when an operator must blow-down and depressurize equipment to perform maintenance or repairs; or

(3) Produced gas that is flared or vented with BLM authorization or approval.

§ 3179.5 When lost production is subject to royalty.

(a) Royalty is due on all avoidably lost oil or gas.

(b) Royalty is not due on any unavoidably lost oil or gas.

§ 3179.6 Venting limitations.

(a) Gas well gas may not be flared or vented, except where it is unavoidably lost pursuant to § 3179.4(b).

(b) The operator must flare, rather than vent, any gas that is not captured, except:

(1) When flaring the gas is technically infeasible, such as when the gas is not readily combustible or the volumes are too small to flare;

(2) Under emergency conditions, as defined in § 3179.105, when the loss of gas is uncontrollable or venting is necessary for safety;

(3) When the gas is vented through normal operation of a natural gas-activated pneumatic controller or pump;

(4) When gas vapor is vented from a storage tank or other low pressure production vessel, unless the BLM determines that recovery of the gas vapors is warranted;

(5) When the gas is vented during downhole well maintenance or liquids unloading activities;

(6) When the gas venting is necessary to allow non-routine facility and pipeline maintenance to be performed, such as when an operator must, upon occasion, blow-down and depressurize equipment to perform maintenance or repairs; or

(7) When a release of gas is unavoidable under § 3179.4 and flaring is prohibited by Federal, State, local or tribal law, regulation, or enforceable permit term.

(c) For purposes of this subpart, all flares or combustion devices must be equipped with an automatic ignition system.

Authorized Flaring and Venting of Gas

§ 3179.101 Initial production testing.

(a) Gas flared during the initial production test of each completed interval in a well is royalty free until one of the following occurs:

(1) The operator determines that it has obtained adequate reservoir information;

(2) 30 days have passed since the beginning of the production test, unless the BLM approves a longer test period; or

(3) The operator has flared 50 million cubic feet (MMcf) of gas.

(b) The operator may request a longer test period and must submit its request using a Sundry Notice.

§ 3179.102 Subsequent well tests.

(a) Gas flared during well tests subsequent to the initial production test is royalty free for a period not to exceed 24 hours, unless the BLM approves or requires a longer test period.

(b) The operator may request a longer test period and must submit its request using a Sundry Notice.

§ 3179.103 Emergencies.

(a) Gas flared or vented during an emergency is royalty free for a period not to exceed 24 hours, unless the BLM determines that emergency conditions exist necessitating venting or flaring for a longer period.

(b) For purposes of this subpart, an ''emergency'' is a temporary, infrequent and unavoidable situation in which the loss of gas or oil is uncontrollable or necessary to avoid risk of an immediate and substantial adverse impact on safety, public health, or the environment, and is not due to operator negligence.

(c) The following do not constitute emergencies for the purposes of royalty assessment:

(1) The operator's failure to install appropriate equipment of a sufficient capacity to accommodate the production conditions;

(2) Failure to limit production when the production rate exceeds the capacity of the related equipment, pipeline, or gas plant, or exceeds sales contract volumes of oil or gas;

(3) Scheduled maintenance;

(4) A situation caused by operator negligence, including recurring equipment failures; or

(5) A situation on a lease, unit, or communitized area that has already experienced 3 or more emergencies within the past 30 days, unless the BLM determines that the occurrence of more than 3 emergencies within the 30 day period could not have been anticipated and was beyond the operator's control.

(d) Within 45 days of the start of the emergency, the operator must estimate and report to the BLM on a Sundry Notice the volumes flared or vented beyond the timeframe specified in paragraph (a) of this section.

§ 3179.104 Downhole well maintenance and liquids unloading.

(a) Gas vented or flared during downhole well maintenance and well purging is royalty free for a period not to exceed 24 hours, provided that the requirements of paragraphs (b) through (d) of this section are met. Gas vented or flared from a plunger lift system and/or an automated well control system is royalty free, provided the requirements of paragraphs (b) and (c) of this section are met.

(b) The operator must minimize the loss of gas associated with downhole well maintenance and liquids unloading, consistent with safe operations.

(c) For wells equipped with a plunger lift system and/or an automated well control system, minimizing gas loss under paragraph (b) of this section includes optimizing the operation of the system to minimize gas losses to the extent possible consistent with removing liquids that would inhibit proper function of the well.

(d) For any liquids unloading by manual well purging, the operator must ensure that the person conducting the well purging remains present on-site throughout the event to end the event as soon as practical, thereby minimizing to the maximum extent practicable any venting to the atmosphere;

(e) For purposes of this section, ''well purging'' means blowing accumulated liquids out of a wellbore by reservoir gas pressure, whether manually or by an automatic control system that relies on real-time pressure or flow, timers, or other well data, where the gas is vented to the atmosphere, and it does not apply to wells equipped with a plunger lift system.

Other Venting or Flaring

§ 3179.201 Oil-well gas.

(a) Except as provided in §§ 3179.101, 3179.102, 3179.103, and 3179.104 of this subpart, vented or flared oil-well gas is royalty free if it is vented or flared pursuant to applicable rules, regulations, or orders of the appropriate State regulatory agency or tribe.

(b) With respect to production from Indian leases, vented or flared oil-well gas will be treated as royalty free pursuant to paragraph (a) of this section only to the extent it is consistent with the BLM's trust responsibility.

(c) Except as otherwise provided in this subpart, oil-well gas may not be vented or flared royalty free unless BLM approves it in writing. The BLM may approve an application for royalty-free venting or flaring of oil-well gas if it determines that it is justified by the operator's submission of either:

(1) An evaluation report supported by engineering, geologic, and economic data that demonstrates to the BLM's satisfaction that the expenditures necessary to market or beneficially use such gas are not economically justified. If flaring exceeds 10 MMcf per well during any month, the BLM may determine that the gas is avoidably lost and therefore subject to royalty; or

(2) An action plan showing how the operator will minimize the venting or flaring of the oil-well gas within 1 year. An operator may apply for approval of an extension of the 1-year time limit, if justified. If the operator fails to implement the action plan, the gas vented or flared during the time covered by the action plan will be subject to royalty. If flaring exceeds 10 MMcf per well during any month, the BLM may determine that the gas is avoidably lost and therefore subject to royalty.

(d) The evaluation report in paragraph (c)(1) of this section:

(1) Must include all appropriate engineering, geologic, and economic data to support the applicant's determination that marketing or using the gas is not economically viable. The information provided must include the applicant's estimates of the volumes of oil and gas that would be produced to the economic limit if the application to vent or flare were approved and the volumes of the oil and gas that would be produced if the applicant was required to market or use the gas. When evaluating the feasibility of marketing or using of the gas, the BLM will determine whether the operator can economically operate the lease if it is required to market or use the gas, considering the total leasehold production, including both oil and gas, as well as the economics of a field-wide plan; and

(2) The BLM may require the operator to provide an updated evaluation report as additional development occurs or economic conditions improve, but no more than once a year.

(e) An approval to flare royalty free, which is in effect as of the effective date of this rule, will continue in effect unless:

(1) The approval is no longer necessary because the venting or flaring is authorized by the applicable rules, regulations, or orders of an appropriate State regulatory agency or tribe, as provided in paragraph (a) of this section; or

(2) The BLM requires an updated evaluation report under paragraph (d)(2) of this section and determines to amend or revoke its approval.

Measurement and Reporting Responsibilities

§ 3179.301 Measuring and reporting volumes of gas vented and flared.

(a) The operator must estimate or measure all volumes of lost oil and gas, whether avoidably or unavoidably lost, from wells, facilities and equipment on a lease, unit PA, or communitized area and report those volumes under applicable ONRR reporting requirements.

(b) The operator may:

(1) Estimate or measure vented or flared gas in accordance with applicable rules, regulations, or orders of the appropriate State or tribal regulatory agency;

(2) Estimate the volume of the vented or flared gas based on the results of a regularly performed GOR test and measured values for the volumes of oil production and gas sales, to allow BLM to independently verify the volume, rate, and heating value of the flared gas; or

(3) Measure the volume of the flared gas.

(c) The BLM may require the installation of additional measurement equipment whenever it is determined that the existing methods are inadequate to meet the purposes of this subpart.

(d) The operator may combine gas from multiple leases, unit PAs, or communitized areas for the purpose of flaring or venting at a common point, but must use a method approved by the BLM to allocate the quantities of the vented or flared gas to each lease, unit PA, or communitized area.

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