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The Code of Federal Regulations is sold by the Superintendent of Documents.

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2017–1206; Product Identifier 2017–NE–42–AD; Amendment 39–19479; AD 2018–22–06]

RIN 2120–AA64

Airworthiness Directives; Pratt & Whitney Turbofan Engines

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: We are adopting a new airworthiness directive (AD) for all Pratt & Whitney (PW) PW2037, PW2037M, and PW2040 turbofan engines. This AD was prompted by an uncommanded high thrust event that occurred during approach on January 16, 2016, and during landing on April 6, 2016. This AD requires removal of the metering valve pilot valve (MVPV) within certain fuel control units (FCUs) and the MVPV's replacement with a part eligible for installation. We are issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective December 3, 2018.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of December 3, 2018.

ADDRESSES: For service information identified in this final rule, contact Pratt & Whitney Division, 400 Main St., East Hartford, CT 06118; phone: 800–565–0140; fax: 860–565–5442. You may view this service information at the FAA, Engine and Propeller Standards Branch, 1200 District Avenue, Burlington, MA 01803. For information on the availability of this material at the FAA, call 781–238–7759. It is also available on the internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2017–1206.

Examining the AD Docket

You may examine the AD docket on the internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2017–1206; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this final rule, the regulatory evaluation, any comments received, and other information. The address for Docket Operations (phone: 800–647–5527) is U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.

FOR FURTHER INFORMATION CONTACT: Kevin M. Clark, Aerospace Engineer, ECO Branch, FAA, 1200 District Avenue, Burlington, MA 01803; phone: 781–238–7088; fax: 781–238–7199; email: *Kevin.M.Clark@faa.gov.*

SUPPLEMENTARY INFORMATION:

Discussion

We issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 by adding an AD that would apply to all PW PW2037, PW2037M, and PW2040 turbofan engines. The NPRM published in the **Federal Register** on April 11, 2018 (83 FR 15519). The NPRM was prompted by reports of an uncommanded high thrust event that occurred during approach on January 16, 2016, and during landing on April 6, 2016, due to loosening of the MVPV end cap. These uncommanded events were associated with improper maintenance on the MVPV within certain FCUs. The NPRM proposed to require removal of the MVPV for certain FCUs. We are issuing this AD to address the unsafe condition on these products.

Comments

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

Request To Disallow Repairs

PW and the Boeing Company (Boeing) requested that we remove the allowance in this AD for the repair of the MVPV. The commenters noted that repairs cannot preclude damage to the valve, which could lead to future Loss of Thrust Control (LOTC) events.

We disagree because the repairs allowed by this AD will have a tamper proof feature to secure the end plugs. This feature will preclude the end plug from loosening in service. We did not change this AD.

Request To Increase Number of Affected Engines

PW requested that we revise the number of affected engines in costs of compliance section of this AD from 212 to 253. PW noted that there are 253 FCU serial numbers listed in Table 1 of PW Alert Service Bulletin (ASB) PW2000 A73–172, dated October 16, 2017.

We disagree. Although Table 1 lists 253 affected engines, our cost estimate refers to engines installed on U.S. registered airplanes. Our estimate of this number is 212 engines. We did not change this AD.

Request To Increase Cost Estimate for Parts

PW and Delta Air Lines (Delta) requested that we change the estimated parts cost to $25,482 per engine. The commenters indicated that $25,482 is the cost of a new MVPV.

We partially agree. We revised the Costs of Compliance section of this AD to estimate $25,482 as the cost of a new MVPV. We expect, however, that certain operators will have the MVPV repaired, so we are also are also including an estimate for the cost of a repaired part.

Request To Allow Any Repair to MVPV

Delta requested that we allow any FAA-approved repair to the MVPV for compliance with this AD. Delta explained that the PW MVPV does not have a tamper proof feature so the repair should not require it.

We disagree. The tamper proof feature on the end plugs ensures that the repair includes tightened end plugs and prevents future tampering or loosening during regular maintenance. The manufacturer's design does not have this tamper proof feature because no loose end plugs were found on original manufacturer parts. We did not change this AD.

Request To Explain Tamper Proof Feature on MVPV

Delta, United Airlines, and MTU Maintenance Hannover GmbH (MTU)

requested that we explain the ''tamper proof feature'' on the end plug or reference a specific repair. The commenters explained that this feature can be confusing to operators who are not familiar with the history of repairs on this part. For example, Delta commented that this language could be understood to refer to valves repaired per a process that retains the end plugs using epoxy alone as being sufficient.

We partially agree. We agree that operators without experience with this feature may be confused. We expanded the definition of a part eligible for installation to clarify the meaning of a ''tamper proof feature.'' We disagree with referencing a specific repair because we don't want to preclude future repairs that may be developed.

Request To Reference UTC Aerospace Systems Service Bulletin (SB)

Delta requested that we reference the UTC Aerospace Systems SB JFC104–1–73–58 in addition to PW ASB PW2000 A73–172, dated October 16, 2017, in this AD. Delta noted that additional instructions for replacement of the MVPV are in the UTC Aerospace Systems SB.

We disagree because the reference in this AD to the PW ASB PW2000 A73–172, dated October 16, 2017, is only to include the FCU Serial Number List. We did not change this AD.

Request To Revise Table Reference

Delta and MTU requested that we change a reference to ''Table 1'' in this AD. The commenters noted that PW ASB PW2000 A73–172, dated October 16, 2017, does not refer to the list of FCU serial numbers as ''Table 1.''

We agree. Although the PW ASB references ''Table 1'' in several places, the list of FCU serial numbers is not clearly labeled in the ASB as ''Table 1.'' We revised the reference to ''Table 1'' in the Applicability section of this AD to ''FCU Serial Number List'' to better match the service information.''

Request To Revise Reference to ''Overhaul''

Delta and MTU requested that we change the reference in this AD to ''FCU overhaul.'' The commenters indicated that this term is not standard wording.

We agree because the term ''overhaul'' can be confused with other types of maintenance. We changed the reference in this AD from ''FCU Overhaul'' to ''FCU shop visit'' to better match standard wording used in ADs.

Request To Revise Part Eligible for Installation

Delta and Fedex Express requested that we clarify the definition of a part eligible for installation from a ''zero time MVPV.'' Delta noted that there is no specification whether this refers to total time since manufacture or total time since completion of a certain level of maintenance. Fedex Express suggested we use the term ''zero time from new MVPV.''

We agree. We revised this AD to clarify that the definition of a part eligible for installation refers to a ''zero time since new MVPV'' to add clarity.

Request To Add Marking Requirement

Delta and MTU requested that we add a requirement in this AD to mark the data plate of any FCU to show it has complied with this AD. The commenters indicated that this would assist with tracking because there is no physical way to tell if operators have complied with the AD.

We disagree. It is up to the operators how to record compliance with this AD. We do not want to dictate only one method of recording compliance.

Request To Revise Installation Prohibition

PW requested that we revise the installation prohibition in this AD to allow any MVPV that is eligible for installation to be installed. PW indicated that the language in the NPRM implies that only repaired MVPVs can be installed.

We disagree because if the MVPV is one of the suspect units being removed from the FCU by the AD, then it is not a zero time since new MVPV. An MVPV that is removed per the requirements of this AD must be repaired with a tamper proof feature on the end plugs before it can be reinstalled. The installation prohibition paragraph does not prevent operators from installing a zero time since new MVPV.

Request To Clarify Compliance Time

MTU requested that we clarify the compliance time in this AD as no compliance time is stated.

We disagree because the compliance time is at the next FCU shop visit after the effective date of this AD, which is stated in the required action paragraph. We did not change this AD.

Request To Reinstall a Part After Inspection

MTU asked to be allowed to reinstall a part after it has been inspected but not repaired.

We disagree because the FCU's listed in the applicability cannot be inspected for a loose end plug without damaging the epoxy or end plugs. Once the end plug or epoxy is damaged, it must be replaced with a new MVPV or repaired properly with a tamper proof feature on the end plugs. We did not change this AD.

Support for This AD

The Air Line Pilots Association expressed support for this AD as written.

Conclusion

We reviewed the relevant data, considered the comments received, and determined that air safety and the public interest require adopting this final rule with the changes described previously and minor editorial changes. We have determined that these minor changes:

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

We also determined that these changes will not increase the economic burden on any operator or increase the scope of this final rule.

Related Service Information Under 1 CFR Part 51

We reviewed PW ASB PW2000 A73–172, dated October 16, 2017. The ASB provides a list of affected FCUs. This service information is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in the **ADDRESSES** section.

Costs of Compliance

We estimate that this AD affects 212 engines installed on airplanes of U.S. registry. We are estimating that the MVPV will be replaced with a new part on 106 engines and replaced with a repaired part on the remaining 106 engines. We estimate the following costs to comply with this AD:

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Replace MVPV with repaired part	$0	$6,490	$6,490	$687,940
Replace MVPV with new part	0	25,482	25,482	2,701,092

Authority for This Rulemaking

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

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

This AD is issued in accordance with authority delegated by the Executive Director, Aircraft Certification Service, as authorized by FAA Order 8000.51C. In accordance with that order, issuance of ADs is normally a function of the Compliance and Airworthiness Division, but during this transition period, the Executive Director has delegated the authority to issue ADs applicable to engines, propellers, and associated appliances to the Manager, Engine and Propeller Standards Branch, Policy and Innovation Division.

Regulatory Findings

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

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

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

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

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

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

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2018–22–06 Pratt & Whitney: Amendment 39–19479; Docket No. FAA–2017–1206; Product Identifier 2017–NE–42–AD.

(a) Effective Date

This AD is effective December 3, 2018.

(b) Affected ADs

None.

(c) Applicability

This AD applies to all Pratt & Whitney (PW) PW2037, PW2037M, and PW2040 turbofan engines with JFC104–1 fuel control units (FCUs) with serial numbers listed in the Accomplishment Instructions, FCU Serial Number List, of PW Alert Service Bulletin PW2000 A73–172, dated October 16, 2017.

(d) Subject

Joint Aircraft System Component (JASC) Code 7321, Fuel Control/Turbine Engines.

(e) Unsafe Condition

This AD was prompted by an uncommanded high thrust event that occurred during approach on January 16, 2016, and during landing on April 6, 2016. We are issuing this AD to prevent failure of the metering valve pilot valve (MVPV) end cap to remain taut, causing uncommanded higher fuel flow to the engine. The unsafe condition, if not addressed, could result in failure of the FCU, loss of engine thrust control and reduced control of the airplane.

(f) Compliance

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

(g) Required Actions

Remove from service the MVPV from the FCU at the next FCU shop visit after the effective date of the AD and replace the MVPV with a part eligible for installation.

(h) Definitions

(1) For the purpose of this AD, an FCU shop visit is defined as the removal of the FCU from the engine and induction of the FCU into a FCU shop that can perform these procedures regardless of the scheduled maintenance action or the reason for the FCU removal.

(2) For the purpose of this AD, a part eligible for installation is one of the following:

(i) A zero time since new MVPV, or

(ii) An MVPV repaired by a method approved by FAA that includes an end plug with tamper proof features. A tamper proof feature is a feature that goes beyond the original equipment manufacturer design of only using epoxy retention and threads to prevent end cap maintenance tampering and loosening.

(i) Installation Prohibition

After the effective date of this AD, do not install any MVPV removed in accordance with paragraph (g) unless it meets the definition of a part eligible for installation per paragraph (h)(2) of this AD.

(j) Alternative Methods of Compliance (AMOCs)

(1) The Manager, ECO Branch, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the manager of the certification office, send it to the attention of the person identified in paragraph (l) of this AD. You may email your request to: *ANE-AD-AMOC@faa.gov.*

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

(k) Related Information

For more information about this AD, contact Kevin M. Clark, Aerospace Engineer, ECO Branch, FAA, 1200 District Avenue, Burlington, MA 01803; phone: 781–238–7088; fax: 781–238–7199; email: *Kevin.M.Clark@faa.gov.*

(l) Material Incorporated by Reference

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

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

(i) Pratt & Whitney (PW) Alert Service Bulletin PW2000 A73–172, dated October 16, 2017.

(ii) [Reserved]

(3) For PW service information identified in this AD, contact Pratt & Whitney Division, 400 Main St., East Hartford, CT 06118; phone: 800–565–0140; fax: 860–565–5442.

(4) You may view this service information at FAA, Engine and Propeller Standards Branch, 1200 District Avenue, Burlington, MA 01803. For information on the availability of this material at the FAA, call 781–238–7759.

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

Issued in Burlington, Massachusetts, on October 23, 2018.

Robert J. Ganley,

Manager, Engine and Propeller Standards Branch, Aircraft Certification Service.

[FR Doc. 2018–23526 Filed 10–26–18; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2017–1034; Airspace Docket No. 17–ANM–23]

RIN 2120–AA66

Amendment of Class D and Class E Airspace; Aurora, OR

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action modifies the Class D airspace, Class E surface area airspace, and Class E airspace extending upward from 700 feet above the surface, at Aurora State Airport, Aurora, OR. Additionally, an editorial change removes the city associated with the airport name in the airspace designations, and replaces the outdated term Airport/Facility Directory with Chart Supplement in Class D airspace. These changes are necessary to accommodate airspace redesign for the safety and management of instrument flight rules (IFR) operations within the National Airspace System.

DATES: Effective 0901 UTC, January 3, 2019. The Director of the Federal Register approves this incorporation by reference action under Title 1, Code of Federal Regulations, part 51, subject to the annual revision of FAA Order 7400.11 and publication of conforming amendments.

ADDRESSES: FAA Order 7400.11C, Airspace Designations and Reporting Points, and subsequent amendments can be viewed online at *http://www.faa.gov/air_traffic/publications/.* For further information, you can contact the Airspace Policy Group, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591; telephone: (202) 267–8783. The Order is also available for inspection at the National Archives and Records Administration (NARA).

For information on the availability of this material at NARA, call (202) 741–6030, or go to *https://www.archives.gov/federal-register/cfr/ibr-locations.html.*

FAA Order 7400.11, Airspace Designations and Reporting Points, is published yearly and effective on September 15.

FOR FURTHER INFORMATION CONTACT: Richard Farnsworth, Federal Aviation Administration, Operations Support Group, Western Service Center, 2200 S 216th Street, Des Moines, WA 98198–6547; telephone (206) 231–2244.

SUPPLEMENTARY INFORMATION:

Authority for This Rulemaking

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. Subtitle I, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it modifies Class D airspace, Class E surface area airspace, and Class E airspace extending upward from 700 feet above the surface, at Aurora State Airport, Aurora, OR, to support IFR operations at this airport.

History

The FAA published a notice of proposed rulemaking in the **Federal Register** (83 FR 7428; February 21, 2018) for Docket No. FAA–2017–1034 to modify Class D airspace, Class E surface area airspace, and Class E airspace extending upward from 700 feet above the surface, at Aurora State Airport, Aurora, OR. Interested parties were invited to participate in this rulemaking effort by submitting written comments on the proposal to the FAA. Twenty-six comments were received, all in support of the changes.

Class E airspace designations are published in paragraph 6005 of FAA Order 7400.11C, dated August 13, 2018, and effective September 15, 2018, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designation listed in this document will be published subsequently in the Order.

Availability and Summary of Documents for Incorporation by Reference

This document amends FAA Order 7400.11C, Airspace Designations and Reporting Points, dated August 13, 2018, and effective September 15, 2018. FAA Order 7400.11C is publicly available as listed in the **ADDRESSES** section of this document. FAA Order 7400.11C lists Class A, B, C, D, and E airspace areas, air traffic service routes, and reporting points.

The Rule

This amendment to Title 14, Code of Federal Regulations (14 CFR) part 71 modifies Class D airspace, Class E surface area airspace, and Class E airspace extending upward from 700 feet above the surface at Aurora State Airport, Aurora, OR.

Class D airspace is modified to a 4-mile radius of the airport, and within 1.8 miles each side of the 007° bearing from the airport extending from the 4-mile radius to 5.1 miles north of the airport (from a 4.2-mile radius of the airport from the 64° bearing from the airport clockwise to the 142° bearing, extending to a 5-mile radius from the 142° bearing clockwise to the 64° bearing from the airport). Two excluded area cutouts for Lenhardt Airpark and McGee Airport, respectively, (both nearby satellite general aviation airports) are modified by excluding that airspace below 1,500 feet MSL within the area bounded by lat. 45°11′51″ N, long. 122°45′45″ W; to lat. 45°12′50″ N, long. 122°44′34″ W; to the point where the 142° bearing from the airport intersects the 4-mile radius of the airport, thence clockwise along the airport 4-mile radius to the 174° bearing from the airport, thence to the point of beginning; and excluding that airspace below 1,500 feet MSL within the area bounded by lat. 45°15′37″ N, long. 122°51′14″ W; to the point where the 235° bearing from the airport intersects the 4-mile radius of the airport, thence

clockwise along the airport 4-mile radius to the airport 281° bearing, thence to the point of beginning (from excluding that airspace below 1,200 feet beyond 3.3 miles from the airport from the 142° bearing clockwise to the 174° bearing, and that airspace below 1,200 feet beyond 3.3 miles from the airport from the 250° bearing clockwise to the 266° bearing from the airport). The modification of the excluded areas within the Class D provides additional airspace for visual flight rules operations at the satellite airports while maintaining the required airspace to support IFR operations at Aurora State Airport. Also, an editorial change is made to the legal description replacing Airport/Facility Directory with Chart Supplement.

Class E surface area airspace is modified to be coincident with the dimensions of the Class D airspace except no exclusion is provided in the vicinity of Lenhardt Airpark (''excluding that airspace below 1,500 feet MSL within the area bounded by lat. 45°11′51″ N, long. 122°45′45″ W; to lat. 45°12′50″ N, long. 122°44′34″ W; to the point where the 142° bearing from the airport intersects the 4-mile radius of the airport, thence clockwise along the airport 4-mile radius to the 174° bearing from the airport, thence to the point of beginning''). Class E surface area airspace is required within this Class D cutout to ensure Class E weather requirements exist from the surface and protect IFR arrival operations to Aurora State Airport.

Class E airspace extending upward from 700 feet is modified to within a 6.5-mile radius (from a 7-mile radius) from the airport 043° bearing clockwise to the airport 350° bearing and within a 9-mile radius (from a 6.5-mile radius) from the airport 350° bearing clockwise to the airport 043° bearing, and within 1.6 miles each side of a 007° bearing from the airport extending from the 9-mile radius of the airport to 20.6 miles north of the airport (from within 1.6 miles either side of the 007° bearing from airport extending from the 7-mile radius to 20 miles northeast of the airport), and within 1.8 miles each side of a line extending from lat. 45°21′12″ N, long. 122°58′41″ W, to lat. 45°19′20″ N, long. 122°49′07″ W (from within 1.2 miles either side of the 306° bearing from airport extending from the 7-mile radius to 10.9 miles northwest of the airport).

The airport designations for the Class D and E airspace areas are amended by removing the name of the city associated with the airport to be in compliance with a change to FAA Order 7400.2L, Procedures for Handling Airspace Matters.

Regulatory Notices and Analyses

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current, is non-controversial and unlikely to result in adverse or negative comments. It, therefore: (1) Is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a Regulatory Evaluation as the anticipated impact is so minimal. Since this is a routine matter that only affects air traffic procedures and air navigation, it is certified that this rule, when promulgated, will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

Environmental Review

The FAA has determined that this action qualifies for categorical exclusion under the National Environmental Policy Act in accordance with FAA Order 1050.1F, ''Environmental Impacts: Policies and Procedures,'' paragraph 5–6.5a. This airspace action is not expected to cause any potentially significant environmental impacts, and no extraordinary circumstances exist that warrant preparation of an environmental assessment.

Lists of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

Adoption of the Amendment

In consideration of the foregoing, the Federal Aviation Administration amends 14 CFR part 71 as follows:

PART 71—DESIGNATION OF CLASS A, B, C, D, AND E AIRSPACE AREAS; AIR TRAFFIC SERVICE ROUTES; AND REPORTING POINTS

■ 1. The authority citation for part 71 continues to read as follows:

Authority: 49 U.S.C. 106(f), 106(g); 40103, 40113, 40120; E.O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389.

§ 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR 71.1 of FAA Order 7400.11C, Airspace Designations and Reporting Points, dated August 13, 2018, and effective September 15, 2018, is amended as follows:

Paragraph 5000 Class D Airspace.

* * * * *

ANM OR D Aurora, OR [Amended]

Aurora State Airport, OR
(Lat. 45°14′50″ N, long. 122°46′12″ W)

That airspace extending upward from the surface to and including 2,700 feet MSL within a 4-mile radius of Aurora State Airport and within 1.8 miles each side of the 007° bearing from the airport extending from the 4-mile radius to 5.1 miles north of the airport, excluding that airspace below 1,500 feet MSL within the area bounded by lat. 45°11′51″ N, long. 122°45′45″ W; to lat. 45°12′50″ N, long. 122°44′34″ W; to the point where the 142° bearing from the airport intersects the 4-mile radius of the airport, thence clockwise along the airport 4-mile radius to the 174° bearing from the airport, thence to the point of beginning, and excluding that airspace below 1,500 feet MSL within the area bounded by lat. 45°15′37″ N, long. 122°51′14″ W; to the point where the 235° bearing from the airport intersects the 4-mile radius of the airport, thence clockwise along the airport 4-mile radius to the airport 281° bearing, thence to the point of beginning. This Class D airspace area is effective during the specific dates and times established in advance by a Notice to Airmen. The effective date and time will thereafter be continuously published in the Chart Supplement.

Paragraph 6002 Class E Airspace Designated as Surface Areas.

* * * * *

ANM OR E2 Aurora, OR [Amended]

Aurora State Airport, OR
(Lat. 45°14′50″ N, long. 122°46′12″ W)

That airspace extending upward from the surface within a 4-mile radius of Aurora State Airport and within 1.8 miles each side of the 007° bearing from the airport extending from the 4-mile radius to 5.1 miles north of the airport, excluding that airspace below 1,500 feet MSL within the area bounded by lat. 45°15′37″ N, long. 122°51′14″ W; to the point where the 235° bearing from the airport intersects the 4-mile radius of the airport, thence clockwise along the airport 4-mile radius to the airport 281° bearing, thence to the point of beginning.

Paragraph 6005 Class E Airspace Areas Extending Upward From 700 Feet or More Above the Surface of the Earth.

* * * * *

ANM OR E5 Aurora, OR [Amended]

Aurora State Airport, OR
(Lat. 45°14′50″ N, long. 122°46′12″ W)

That airspace extending upward from 700 feet above the surface within a 9-mile radius of the Aurora State Airport from a 350° bearing from the airport clockwise to a 043° bearing from the airport, and within a 6.5-mile radius of the airport from the airport 043° bearing clockwise to the airport 350° bearing, and within 1.6 miles each side of a 007° bearing from the airport extending from the 9-mile radius of the airport to 20.6 miles north of the airport, and within 1.8 miles each side of a line extending from lat.

45°21′12″ N, long. 122°58′41″ W; to lat. 45°19′20″ N, long. 122°49′07″ W.

Issued in Seattle, Washington, on October 19, 2018.

Shawn M. Kozica,

Manager, Operations Support Group, Western Service Center.

[FR Doc. 2018–23479 Filed 10–26–18; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2017–1091; Airspace Docket No. 17–AWP–26]

RIN 2120–AA66

Amendment of Class D and Class E Airspace; Atwater, CA

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action modifies Class D airspace and Class E airspace extending upward from 700 feet above the surface at Castle Airport, Atwater, CA. Additionally, the airport's geographic coordinates have been updated to match the FAA's aeronautical database and the outdated term Airport/Facility Directory is replaced with Chart Supplement in Class D airspace. Airspace redesign is necessary as the FAA transitions from ground-based to satellite-based navigation for the safety and management of instrument flight rules (IFR) operations at this airport due to the decommissioning of the El Nido VHF Omnidirectional Range/Distance Measuring Equipment (VOR/DME).

DATES: Effective 0901 UTC, February 28, 2019. The Director of the Federal Register approves this incorporation by reference action under Title 1, Code of Federal Regulations, part 51, subject to the annual revision of FAA Order 7400.11 and publication of conforming amendments.

ADDRESSES: FAA Order 7400.11, Airspace Designations and Reporting Points, and subsequent amendments can be viewed on line at *http://www.faa.gov/air_traffic/publications/.* For further information, you can contact the Airspace Policy Group, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC, 20591; telephone: 202–267–8783. The Order is also available for inspection at the National Archives and Records Administration (NARA).

For information on the availability of this material at NARA, call 202–741–6030, or go to *https://www.archives.gov/federal-register/cfr/ibr-locations.html.*

FAA Order 7400.11, Airspace Designations and Reporting Points, is published yearly and effective on September 15.

FOR FURTHER INFORMATION CONTACT: Richard Roberts, Federal Aviation Administration, Operations Support Group, Western Service Center, 2200 S 216th St, Des Moines, WA 98198–6547; telephone (206) 231–2245.

SUPPLEMENTARY INFORMATION:

Authority for This Rulemaking

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. Subtitle I, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it modifies Class D and Class E airspace at Castle Airport, Atwater, CA.

History

The FAA published a notice of proposed rulemaking in the **Federal Register** (83 FR 3100; January 23, 2018) for Docket No. FAA–2017–1091 to amend Class D and Class E airspace extending upward from 700 feet above the surface, at Castle Airport, Atwater, CA. Interested parties were invited to participate in this rulemaking effort by submitting written comments on the proposal to the FAA. Fifteen comments were received, of which twelve were from local political organizations, aviation companies, and the public. In addition, two were duplicates and one was an illustration of a recommended amendment to the rulemaking proposal.

Four commenters stated the reasons for the airspace modifications were not clear. The FAA agrees and is including a clearer explanation in the final rule. The proposed modifications are required to bring the airspace into compliance with the common standards required by the FAA, in its orders, directives and guidance. The FAA initiated modifications to the Castle Airport airspace to ensure aircraft arriving Runway (RWY) 31 on the RNAV, VOR/DME, or ILS approaches descend through 1,000 feet above ground level (AGL) within the Class D airspace; that IFR departures from Castle Airport and Merced Regional/Macready Field have adequate airspace to depart and that the minimum airspace needed for safe and efficient terminal IFR and visual flight rules (VFR) operations is maintained.

Three commenters were concerned with the economic impact to local businesses in Merced and Atwater, CA. Based on those comments, the FAA considered the operational and economic advantages offered by both Castle Airport, Atwater CA. and Merced Regional/Macready Field, Merced CA., including the importance and interest to the commerce and welfare of the respective communities. The FAA made accommodations, as indicated below, in the design of the airspace.

The Aircraft Owners and Pilots Association (AOPA) in its comments stated that the Merced Regional/Macready Field Class E2 airspace fulfilled the requirement to ensure the lateral boundary of the Castle Airport Class D area is congruent with the beginning of controlled airspace. The FAA agrees. However, the Merced Regional/Macready Field Class E2 airspace does not provide the airspace needed to protect aircraft on approach to Castle Airport as they descend through 1,000 feet AGL and meet FAA criteria for extensions of less than 2 miles. Thus, the Class D airspace southwest lateral boundary, within the Merced Regional/Macready Field Class E2 area, has been expanded to coincide with the rail line and protects Castle Airport IFR arrivals. AOPA further commented, ''In determining the final configuration of the Castle Airport Class D airspace, it is important the safety and operational impacts it would have on Merced Regional/Macready Field be weighed as well.'' The FAA agrees all users have the public right of *freedom of transit* through the NAS. Accordingly, while a sincere effort was made to negotiate equitable solutions regarding the use of the NAS, preservation and safety of aviation was the primary emphasis.

We do not agree that defining the Class D lateral boundary from the 297° bearing to the 147° bearing meets the minimum FAA criteria and provides the necessary safety for arrivals and departures from Castle Airport. This configuration would not provide adequate airspace for Castle Airport departures using the Diverse Vector Area or RWY 31 Obstacle Departure Procedure, as it would not meet FAA criteria and provide 1.8 nm either side of the track to be flown.

The FAA did agree that modifying the Class D southwest lateral boundary to

the rail line will facilitate arrivals to and departures from Merced Regional/Macready Field without affecting Castle Airport departures and allow adequate airspace for the Castle Airport arrivals to RWY 31.

AOPA also stated that the NPRM did not comply with FAA guidance in Order JO 7400.2, *Procedures for Handling Airspace Matters,* because a graphic was not included in the docket. Additionally, AOPA encouraged the FAA to follow its own guidance by making the action effective date concurrent with publication of the VFR Sectional.

The FAA has determined AOPA's comments raised no substantive issues related to the proposed changes to the airspace addressed in the NPRM. To the extent the FAA failed to follow its policies related to publishing graphics in the docket and establishing the Class D and E airspace effective date coincidental to the sectional chart date, we note the following. The FAA provided graphics for this proposal on February 15, 2018.

AOPA's comment concerning the FAA creating a graphical depiction of new or modified airspace overlaid on a Sectional Chart for quality assurance purposes is not correct and the requirement to include all information in the Docket does not extend to working files. During the airspace reviews, airspace graphics may be created, if deemed necessary, to determine if there are terrain issues, or if cases are considered complex; in many cases, a graphic is not needed when developing an airspace proposal. Additionally, AOPA encouraged the FAA to follow its own guidance by making the action effective date concurrent with publication of the VFR Sectional. With respect to AOPA's comment addressing effective dates, FAA Order 7400.2L, paragraph 2–3–7.a.4. states that, to the extent practicable, Class D airspace areas and restricted areas should become effective on a sectional chart date and that consideration should be given to selecting a sectional chart date that matches a 56-day enroute chart cycle date. The FAA does consider establishing effective dates for Class D and E airspace amendments so they coincide with the publication of sectional charts, to the extent practicable, but this consideration is accomplished after the NPRM comment period ends. Substantive comments received to NPRMs, flight safety concerns, management of IFR operations at affected airports, and immediacy of requiring proposed airspace amendments are some of the factors taken into consideration when selecting the appropriate effective date. After considering all factors, the FAA may determine that selecting an effective date that conforms to a 56-day enroute chart cycle date not coincidental to sectional chart dates is better for the NAS and users rather than awaiting publication of the next VFR sectional.

Two commenters requested the boundary for Castle Airport be rotated 10–15 degrees to facilitate straight out/in departure and arrival IFR operations and maintain adequate left and right runway centerline at Merced Regional/Macready Field.

The FAA agreed and rotated that portion of the Castle Airport Class D airspace lateral boundary outside the Merced Regional/Macready Field Airport Class E2 area, 12 degrees counterclockwise from 139° True (T) to 127° (T) and that portion within 4 nm of the Merced Regional/Macready Field Airport ARP to 114° (T), coinciding with the rail line, as previously noted. In addition, two commenters requested that Highway 99 be used for the southwest lateral boundary to leave room for straight-out departures from RWY 30 at Merced. While the FAA agrees a modification to the southwest lateral boundary is appropriate, it has opted to use the rail line .2 nm west of highway 99, as requested in six other comments. This will allow aircraft departing from Castle Airport the airspace needed to operate efficiently and safely, and Merced Regional/Macready Field departures adequate airspace to operate without having to contact the Castle Airport Traffic Control Tower adequate space for stabilized approaches, and the ability to conduct VFR practice instrument approaches without additional coordination and straight-out departures from RWY 30.

Five commenters were concerned with the airspace directly over the city of Atwater, CA, describing it as congested and having reduced visibility due to hazy weather conditions much of the time. They were concerned with the infrastructure on the ground and identified controlled airspace as critical to the safety of its citizens.

The FAA agrees with the concerns voiced by local governments, the area directly over the city of Atwater, CA, underlies controlled airspace beginning at 700 feet AGL. Fixed wing aircraft in this airspace must operate at or above 1000 feet above the highest obstacle, must have 3 miles of visibility, and operate 500 feet below and 1000 feet above clouds. In addition, Air Traffic Control can issue pilots in this area control instructions. However, because of the potential for Merced Regional/Macready Field VFR arrivals and departures transiting this area without establishing communications and the potential for these aircraft mixing with Castle Airport IFR arrivals and departures, the use of the Castle Airport traffic pattern, and implementation of a DVA, the lateral boundary is established at 127° in the area outside the Merced Regional/Macready Field Class E2 area.

Class D and Class E airspace designations are published in paragraphs 5000, 6002, 6004, and 6005, respectively, of FAA Order 7400.11C, dated August 13, 2018, and effective September 15, 2018, which is incorporated by reference in 14 CFR part 71.1. The Class D and Class E airspace designation listed in this document will be published subsequently in the Order.

Availability and Summary of Documents for Incorporation by Reference

This document amends FAA Order 7400.11C, Airspace Designations and Reporting Points, dated August 13, 2018, and effective September 15, 2018. FAA Order 7400.11C is publicly available as listed in the **ADDRESSES** section of this document. FAA Order 7400.11C lists Class A, B, C, D, and E airspace areas, air traffic service routes, and reporting points.

The Rule

This amendment to Title 14, Code of Federal Regulations (14 CFR) part 71 modifies Class D airspace and Class E airspace extending upward from 700 feet above the surface, at Castle Airport, Atwater, CA.

The airspace has been redesigned by modifying Class D airspace to within a 4.6-mile (from a 4.5-mile) radius of the airport from the airport 278° bearing clockwise to the airport 148° bearing. This modification provides additional Class D airspace south of the airport and removes Class D airspace southwest and northwest of the airport, thereby containing IFR arrival aircraft descending through 1,000 feet above the surface, and removing airspace not required for IFR operations. Also, this action removes the reference to the El Nido VOR/DME in the legal description due to its planned decommissioning as the FAA transitions from ground-based to satellite-based navigation.

Class E airspace extending upward from 700 feet above the surface is modified to within a 7.2-mile (from a 7-mile) radius of the airport, and removes the 23-mile extension northwest of the airport.

Additionally, the airport's geographic coordinates are updated to match the FAA's aeronautical database for the Class D and Class E airspace areas. An editorial change is also made to the Class E surface area airspace legal description replacing ''Airport/Facility Directory'' with ''Chart Supplement''.

Regulatory Notices and Analyses

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current, is non-controversial and unlikely to result in adverse or negative comments. It, therefore: (1) Is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a Regulatory Evaluation as the anticipated impact is so minimal. Since this is a routine matter that only affects air traffic procedures and air navigation, it is certified that this rule, when promulgated, will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

Environmental Review

The FAA has determined that this action qualifies for categorical exclusion under the National Environmental Policy Act in accordance with FAA Order 1050.1F, ''Environmental Impacts: Policies and Procedures,'' paragraph 5–6.5a. This airspace action is not expected to cause any potentially significant environmental impacts, and no extraordinary circumstances exist that warrant preparation of an environmental assessment.

Lists of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

Adoption of the Amendment

In consideration of the foregoing, the Federal Aviation Administration amends 14 CFR part 71 as follows:

PART 71—DESIGNATION OF CLASS A, B, C, D, AND E AIRSPACE AREAS; AIR TRAFFIC SERVICE ROUTES; AND REPORTING POINTS

■ 1. The authority citation for part 71 continues to read as follows:

Authority: 49 U.S.C. 106(f), 106(g); 40103, 40113, 40120; E.O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389.

§ 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR 71.1 of FAA Order 7400.11C, Airspace Designations and Reporting Points, dated August 13, 2018, and effective September 15, 2018, is amended as follows:

Paragraph 5000 Class D Airspace.

* * * * *

AWP CA D Atwater, CA [Amended]

Castle Airport, CA

(Lat. 37°22′50″ N, long. 120°34′06″ W)

That airspace extending upward from the surface up to but not including 2,000 feet MSL within a 4.6-mile radius of Castle Airport beginning at the 278° bearing from the airport clockwise to the 114° bearing, thence northwest to the point where the 182° bearing intersects the Merced Regional/Macready Airport Class E2, thence to the point of beginning. This Class D airspace area is effective during the specific dates and times established in advance by a Notice to Airmen. The effective date and time will thereafter be continuously published in the Chart Supplement.

Paragraph 6005 Class E Airspace Areas Extending Upward From 700 Feet or More Above the Surface of the Earth.

* * * * *

AWP CA E5 Atwater, CA [Amended]

Castle Airport, CA

(Lat. 37°22′50″ N, long. 120°34′06″ W)

That airspace extending upward from 700 feet above the surface within a 7.2-mile radius of Castle Airport.

Issued in Seattle, Washington, on October 19, 2018.

Shawn M. Kozica,

Manager, Operations Support Group, Western Service Center.

[FR Doc. 2018–23476 Filed 10–26–18; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2017–1092; Airspace Docket No. 17–AWP–27]

RIN 2120–AA66

Amendment of Class E Airspace; Merced, CA

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action modifies Class E surface airspace and Class E airspace extending upward from 700 feet above the surface at Merced Regional/Macready Field, Merced, CA, to accommodate airspace redesign due to the decommissioning of the El Nido VHF Omnidirectional Range/Distance Measuring Equipment (VOR/DME) as the FAA transitions from ground-based to satellite-based navigation. This action also removes Class E airspace extending upward from 1,200 feet above the surface; updates the airport name to match the FAA's aeronautical database; and replaces the outdated term Airport/Facility Directory with Chart Supplement. These actions are necessary for the safety and management of instrument flight rules (IFR) operations at this airport.

DATES: Effective 0901 UTC, January 3, 2019. The Director of the Federal Register approves this incorporation by reference action under Title 1, Code of Federal Regulations, part 51, subject to the annual revision of FAA Order 7400.11 and publication of conforming amendments.

ADDRESSES: FAA Order 7400.11C, Airspace Designations and Reporting Points, and subsequent amendments can be viewed on line at *http://www.faa.gov/air_traffic/publications/*. For further information, you can contact the Airspace Policy Group, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591; telephone: 202–267–8783. The Order is also available for inspection at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to *https://www.archives.gov/federal-register/cfr/ibr-locations.html*.

FAA Order 7400.11, Airspace Designations and Reporting Points, is published yearly and effective on September 15.

FOR FURTHER INFORMATION CONTACT: Richard Roberts, Federal Aviation Administration, Operations Support Group, Western Service Center, 2200 S 216th St., Des Moines, WA 98198–6547; telephone (206) 231–2245.

SUPPLEMENTARY INFORMATION:

Authority for This Rulemaking

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. Subtitle I, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of airspace necessary to ensure the safety of aircraft and the efficient use of

airspace. This regulation is within the scope of that authority as it amends Class E airspace at Merced Regional/Macready Field, Merced, CA, to support IFR operations.

History

The FAA published a notice of proposed rulemaking (NPRM) for Docket FAA–2017–1092 in the **Federal Register** (83 FR 2574; January 18, 2018) to modify Class E airspace extending upward from 700 feet above the surface at Merced Regional/Macready Field, Merced, CA. Interested parties were invited to participate in this rulemaking effort by submitting written comments on the proposal to the FAA. Two comments were received in support of the proposal. In their comment, AOPA stated that the NPRM did not comply with FAA guidance in Order 7400.2, *Procedures for Handling Airspace Matters,* because a graphic was not included in the docket. Additionally, AOPA encouraged the FAA to follow their guidance by making the action effective date concurrent with publication of the VFR sectional chart publication date.

The FAA has determined AOPA's comments raised no substantive issues related to the proposed changes to the airspace addressed in the NPRM. To the extent the FAA failed to follow its policies related to publishing graphics in the docket and coincidental to the sectional chart date, we note the following.

The FAA provided graphics for this proposal on February 15, 2018. Nevertheless, specific to AOPA's comment regarding the FAA already creating a graphical depiction of new or modified airspace overlaid on a Sectional Chart for quality assurance purposes, this is not correct nor required in all cases. During the airspace reviews, airspace graphics may be created, if deemed necessary, to determine if there are terrain issues, or if cases are considered complex. However, in many cases, a graphic is not required when developing an airspace proposal.

With respect to AOPA's comment addressing effective dates, FAA Order 7400.2L, para 2–3–7.a.4. states that, to the extent practicable, airspace areas and restricted areas should become effective on a sectional chart date and that consideration should be given to selecting a sectional chart date that matches a 56-day en route chart cycle date. The FAA does consider Class E airspace amendment effective dates to coincide with the publication of sectional charts, to the extent practicable; however, this consideration is accomplished after the NPRM comment period ends in the Final Rule. Substantive comments received to NPRMs, flight safety concerns, management of IFR operations at affected airports, and immediacy of required proposed airspace amendments are some of the factors that must be taken into consideration when selecting the appropriate effective date. After considering all factors, the FAA may determine that selecting an effective date that conforms to a 56-day en route chart cycle date that is not coincidental to sectional chart dates is better for the NAS and its users rather than awaiting the next sectional chart date.

Class E airspace designations are published in paragraph 6005 of FAA Order 7400.11C, dated August 13, 2018, and effective September 15, 2018, which is incorporated by reference in 14 CFR part 71.1. The Class E airspace designation listed in this document will be published subsequently in the Order.

Availability and Summary of Documents for Incorporation by Reference

This document amends FAA Order 7400.11C, Airspace Designations and Reporting Points, dated August 13, 2018, and effective September 15, 2018. FAA Order 7400.11C is publicly available as listed in the **ADDRESSES** section of this document. FAA Order 7400.11C lists Class A, B, C, D, and E airspace areas, air traffic service routes, and reporting points.

The Rule

This amendment to Title 14, Code of Federal Regulations (14 CFR) part 71 amends Class E airspace extending upward from 700 feet above the surface at Merced Regional/Macready Field, Merced, CA, to within a 6.6-mile (increased from a 6.1-mile) radius of the airport, and removes the segment extending southeast of the airport (2.6 miles southeast of the El Nido VOR/DME) due to the decommissioning of the navigation aid.

Also, this action remove the Class E airspace extending upward from 1,200 feet above the surface because it is wholly contained within the Sacramento en route airspace area.

Regulatory Notices and Analyses

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current, is non-controversial and unlikely to result in adverse or negative comments. It, therefore: (1) Is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a Regulatory Evaluation as the anticipated impact is so minimal. Since this is a routine matter that only affects air traffic procedures and air navigation, it is certified that this rule, when promulgated, does not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

Environmental Review

The FAA has determined that this action qualifies for categorical exclusion under the National Environmental Policy Act in accordance with FAA Order 1050.1F, ''Environmental Impacts: Policies and Procedures,'' paragraph 5–6.5a. This airspace action is not expected to cause any potentially significant environmental impacts, and no extraordinary circumstances exist that warrant preparation of an environmental assessment.

Lists of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

Adoption of the Amendment

In consideration of the foregoing, the Federal Aviation Administration amends 14 CFR part 71 as follows:

PART 71—DESIGNATION OF CLASS A, B, C, D, AND E AIRSPACE AREAS; AIR TRAFFIC SERVICE ROUTES; AND REPORTING POINTS

■ 1. The authority citation for part 71 continues to read as follows:

Authority: 49 U.S.C. 106(f), 106(g); 40103, 40113, 40120; E.O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389.

§ 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR 71.1 of FAA Order 7400.11C, Airspace Designations and Reporting Points, dated August 13, 2018, and effective September 15, 2018, is amended as follows:

Paragraph 6002 Class E Airspace Areas Designated as Surface Areas.

* * * * *

AWP CA E2 Merced, CA [Amended]

Merced Regional/Macready Field, CA
(Lat. 37°17′05″ N, long. 120°30′50″ W)

Within a 4.3-mile radius of Merced Regional/Macready Field. This Class E airspace area is effective during the specific dates and times established in advance by a Notice to Airmen. The effective date and time will thereafter be continuously published in the Chart Supplement.

Paragraph 6005 Class E Airspace Areas Extending Upward From 700 Feet or More Above the Surface of the Earth.

* * * * *

AWP CA E5 Merced, CA [Amended]

Merced Regional/Macready Field, CA
(Lat. 37°17′05″ N, long. 120°30′ 50″ W)

That airspace extending upward from 700 feet above the surface within a 6.6-mile radius of Merced Regional/Macready Field.

Issued in Seattle, Washington, on October 19, 2018.

Shawn M. Kozica,

Manager, Operations Support Group, Western Service Center.

[FR Doc. 2018–23478 Filed 10–26–18; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2018–0464 Airspace Docket No. 18–AGL–12]

RIN 2120–AA66

Amendment of V–97 and V–422 in the Vicinity of Chicago, IL

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action modifies two VHF Omnidirectional Range (VOR) Federal airways (V–97 and V–422) in the vicinity of Chicago, IL. The FAA is taking this action due to the planned decommissioning of the Chicago O'Hare, IL, VOR/Distance Measuring Equipment (VOR/DME) navigation aid, which provides navigation guidance for portions of the affected Air Traffic Service (ATS) routes.

DATES: Effective date 0901 UTC, January 3, 2019. The Director of the Federal Register approves this incorporation by reference action under Title 1 Code of Federal Regulations part 51, subject to the annual revision of FAA Order 7400.11 and publication of conforming amendments.

ADDRESSES: FAA Order 7400.11C, Airspace Designations and Reporting Points, and subsequent amendments can be viewed online at *http://www.faa.gov/air_traffic/publications/.* For further information, you can contact the Airspace Policy Group, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591; telephone: (202) 267–8783. The Order is also available for inspection at the National Archives and Records Administration (NARA). For information on the availability of FAA Order 7400.11C at NARA, call (202) 741–6030, or go to *https://www.archives.gov/federal-register/cfr/ibr-locations.html.*

FAA Order 7400.11, Airspace Designations and Reporting Points, is published yearly and effective on September 15.

FOR FURTHER INFORMATION CONTACT: Colby Abbott, Airspace Policy Group, Office of Airspace Services, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591; telephone: (202) 267–8783.

SUPPLEMENTARY INFORMATION:

Authority for This Rulemaking

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. Subtitle I, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it supports the route structure within the National Airspace System to preserve the safe and efficient flow of air traffic.

History

The FAA published a notice of proposed rulemaking (NPRM) in the **Federal Register** for Docket No. FAA–2018–0464 (83 FR 24436; May 29, 2018), to amend VOR Federal airways V–97 and V–422 due to the planned decommissioning of the Chicago O'Hare, IL, VOR/DME. Interested parties were invited to participate in this rulemaking effort by submitting written comments on the proposal. No comments were received.

The NPRM stated that the Chicago O'Hare VOR/DME is being decommissioned to facilitate the construction of a new runway at Chicago O'Hare International Airport. In the 2005 Record of Decision (ROD) for the O'Hare Modernization Program and the Final Environmental Impact Statement, the FAA had planned to move the VOR to allow for the construction of a new runway. Subsequent to that ROD, the FAA initiated a plan for reducing the number of VORs.

On December 15, 2011, the FAA published in the **Federal Register** a notice of proposed policy and request for comments (76 FR 77939) on the FAA's proposed strategy for gradually reducing the current VOR network to a Minimum Operational Network (MON) as the National Airspace System (NAS) transitions to performance-based navigation (PBN) as part of the Next Generation Air Transportation System (NextGen). The FAA reviewed all comments received and on August 21, 2012, published in the **Federal Register** the disposition of the comments on the notice of proposed policy (77 FR 50420). In considering and disposing of the comments, the FAA noted that it would develop an initial VOR MON Plan which would be made publicly available.

On July 26, 2016, the FAA published in the **Federal Register** the VOR MON final policy statement (81 FR 48694) announcing the discontinuance selection criteria and candidate list of VOR navigational aids targeted for discontinuance as part of the VOR MON Implementation Program and NAS Efficient Streamline Services Initiative. This action is part of that national strategy.

VOR Federal airways are published in paragraph 6010(a) of FAA Order 7400.11C dated August 13, 2018, and effective September 15, 2018, which is incorporated by reference in 14 CFR 71.1. The VOR Federal airways listed in this document would be subsequently published in the Order.

Availability and Summary of Documents for Incorporation by Reference

This document amends FAA Order 7400.11C, Airspace Designations and Reporting Points, dated August 13, 2018, and effective September 15, 2018. FAA Order 7400.11C is publicly available as listed in the **ADDRESSES** section of this document. FAA Order 7400.11C lists Class A, B, C, D, and E airspace areas, air traffic service routes, and reporting points.

The Rule

The FAA is amending Title 14 Code of Federal Regulations (14 CFR) part 71 by modifying the descriptions of VOR Federal airways V–97 and V–422. The planned decommissioning of the Chicago O'Hare, IL, VOR/DME has made these actions necessary. The VOR Federal airway changes are described below.

V–97: V–97 extends between the Dolphin, FL, VOR/Tactical Air Navigation (VORTAC) and the intersection of the Chicago Heights, IL, VORTAC 358° and Chicago O'Hare, IL, VOR/DME 127° radials (BEBEE fix), and

between the intersection of the Northbrook, IL, VOR/DME 291° and Janesville, WI, VOR/DME 112° radials (KRENA fix) and the Gopher, MN, VORTAC. The airspace below 2,000 feet mean sea level (MSL) outside the United States is excluded. The airway segment between the intersection of the Chicago Heights, IL, VORTAC 358° and DuPage, IL, VOR/DME 101° radials (NILES fix) and the intersection of the Chicago Heights, IL, VORTAC 358° and Chicago O'Hare, IL, VOR/DME 127° radials (BEBEE fix) is removed. Also, the KRENA fix is redefined in its existing location using the intersection of the DuPage, IL, VOR/DME 347° and Janesville, WI, VOR/DME 112° radials. The unaffected portions of the existing airway remain as charted.

V–422: V–422 extends between the intersection of the Chicago O'Hare, IL, VOR/DME 127° and Chicago Heights, IL, VORTAC 358° radials (BEBEE fix) and the Flag City, OH, VORTAC. The airway segment between the intersection of the Chicago Heights, IL, VORTAC 358° and Chicago O'Hare, IL, VOR/DME 127° radials (BEBEE fix) and the intersection of the Chicago Heights, IL, VORTAC 358° and DuPage, IL, VOR/DME 101° radials (NILES fix) is removed. The unaffected portions of the existing airway remain as charted.

All radials in the route descriptions below are stated in True degrees.

Additionally, a minor editorial correction is made to the V–97 airway description to correct the state abbreviation for the Cincinnati, KY, VORTAC. The ''Cincinnati, OH'' airway point listed is changed to ''Cincinnati, KY''.

Regulatory Notices and Analyses

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore: (1) Is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under Department of Transportation (DOT) Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that only affects air traffic procedures and air navigation, it is certified that this rule, when promulgated, does not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

Environmental Review

The FAA has determined that this action of modifying VOR Federal airways V–97 and V–422 near Chicago, IL, qualifies for categorical exclusion under the National Environmental Policy Act and its implementing regulations at 40 CFR part 1500, and in accordance with FAA Order 1050.1F, Environmental Impacts: Policies and Procedures, paragraph 5–6.5a, which categorically excludes from further environmental impact review rulemaking actions that designate or modify classes of airspace areas, airways, routes, and reporting points (see 14 CFR part 71, Designation of Class A, B, C, D, and E Airspace Areas; Air Traffic Service Routes; and Reporting Points). As such, this action is not expected to result in any potentially significant environmental impacts. In accordance with FAA Order 1050.1F, paragraph 5–2 regarding Extraordinary Circumstances, the FAA has reviewed this action for factors and circumstances in which a normally categorically excluded action may have a significant environmental impact requiring further analysis. The FAA has determined that no extraordinary circumstances exist that warrant preparation of an environmental assessment or environmental impact study.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

The Amendment

In consideration of the foregoing, the Federal Aviation Administration proposes to amend 14 CFR part 71 as follows:

PART 71—DESIGNATION OF CLASS A, B, C, D, AND E AIRSPACE AREAS; AIR TRAFFIC SERVICE ROUTES; AND REPORTING POINTS

■ 1. The authority citation for part 71 continues to read as follows:

Authority: 49 U.S.C. 106(f), 106(g); 40103, 40113, 40120; E.O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389.

§ 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR 71.1 of FAA Order 7400.11C, Airspace Designations and Reporting Points, dated August 13, 2018 and effective September 15, 2018, is amended as follows:

Paragraph 6010(a) Domestic VOR Federal Airways

* * * * *

V–97 [Amended]

From Dolphin, FL; La Belle, FL; St. Petersburg, FL; Seminole, FL; Pecan, GA; Atlanta, GA; INT Atlanta 001° and Volunteer, TN, 197° radials; Volunteer; London, KY; Lexington, KY; Cincinnati, KY; Shelbyville, IN; INT Shelbyville 313° and Boiler, IN, 136° radials; Boiler; Chicago Heights, IL; to INT Chicago Heights 358° and DuPage, IL, 101° radials. From INT DuPage, IL, 347° and Janesville, WI, 112° radials; Janesville; Lone Rock, WI; Nodine, MN; to Gopher, MN. The airspace below 2,000 feet MSL outside the United States is excluded.

* * * * *

V–422 [Amended]

From INT DuPage, IL, 101° and Chicago Heights, IL, 358° radials; Chicago Heights; INT Chicago Heights 117° and Knox, IN, 276° radials; Knox; Webster Lake, IN; INT Webster Lake 097° and Flag City, OH, 289° radials; to Flag City.

Issued in Washington, DC, on October 24, 2018.

Rodger A. Dean Jr.,

Manager, Airspace Policy Group.

[FR Doc. 2018–23564 Filed 10–26–18; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2018–0230; Airspace Docket No. 17–AGL–26]

RIN 2120–AA66

Amendment of Air Traffic Service (ATS) Routes in the Vicinity of Chicago, IL

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action modifies two VHF Omnidirectional Range (VOR) Federal airways (V–217 and V–228) in the vicinity of the Chicago O'Hare International Airport, IL. The FAA is taking this action due to the planned decommissioning of the Chicago O'Hare, IL, VOR/Distance Measuring Equipment (VOR/DME) navigation aid (NAVAID), which provides navigation guidance for portions of the affected ATS routes.

DATES: Effective date 0901 UTC, January 3, 2019. The Director of the Federal Register approves this incorporation by reference action under Title 1 Code of Federal Regulations part 51, subject to the annual revision of FAA Order 7400.11 and publication of conforming amendments.

ADDRESSES: FAA Order 7400.11C, Airspace Designations and Reporting

Points, and subsequent amendments can be viewed online at *http://www.faa.gov/air_traffic/publications/.* For further information, you can contact the Airspace Policy Group, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591; telephone: (202) 267–8783. The Order is also available for inspection at the National Archives and Records Administration (NARA). For information on the availability of FAA Order 7400.11C at NARA, call (202) 741–6030, or go to *https://www.archives.gov/federal-register/cfr/ibr-locations.html.*

FAA Order 7400.11, Airspace Designations and Reporting Points, is published yearly and effective on September 15.

FOR FURTHER INFORMATION CONTACT: Colby Abbott, Airspace Policy Group, Office of Airspace Services, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591; telephone: (202) 267–8783.

SUPPLEMENTARY INFORMATION:

Authority for This Rulemaking

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. Subtitle I, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it would amend the route structure in the National Airspace System as necessary to preserve the safe and efficient flow of air traffic.

History

The FAA published a notice of proposed rulemaking (NPRM) in the **Federal Register** for Docket No. FAA–2018–0230 (83 FR 17327; April 19, 2018) to amend VOR Federal airways V–217 and V–228 due to the planned decommissioning of the Chicago O'Hare, IL, VOR/DME. Interested parties were invited to participate in this rulemaking effort by submitting written comments on the proposal. One substantive comment was received.

The commenter stated that based on the current navigation maps it appeared the proposed change/modification had already taken place since there were no airways connected to the Chicago O'Hare VOR. Additionally, the commenter shared that V–228 was defined by the Northbrook VOR and that the proposed change/modification was confusing since the proposed rule was scheduled to take place in June 2018, but it was their understanding that the route(s) had already changed. The commenter also stated they found the proposed regulation to be accurate and useful since space-based global navigation satellite systems (GNSS) are replacing VORs and other ground-based systems.

In response, the FAA offers the following. Review of the Instrument Flight Rules (IFR) Enroute Low Altitude Chart showing the Chicago terminal area does reflect there are no VOR Federal airways connected to the Chicago O'Hare VOR; however, that lack of airways is pre-existing and not the result of this proposed rulemaking action. The commenter is correct that V–228 uses the Northbrook VOR in its description, but the V–228 airway segment proposed for amendment was the portion between the BESIE fix and FARMM fix, which is defined using the Chicago O'Hare VOR 316°(T)/314°(M) radial and is located northwest of the Northbrook VOR. Lastly, the commenter's confusion that the proposed rule was scheduled to take place in June 2018 was a simple misunderstanding that the June 4, 2018, date listed in the NPRM identified the end of the public comment period, not the effective date of the proposed amendments.

The NPRM stated that the Chicago O'Hare VOR/DME is being decommissioned to facilitate the construction of a new runway at Chicago O'Hare International Airport. In the 2005 Record of Decision (ROD) for the O'Hare Modernization Program and the Final Environmental Impact Statement, the FAA had planned to move the VOR to allow for the construction of a new runway. Subsequent to that ROD, the FAA initiated a plan for reducing the number of VORs.

On December 15, 2011, the FAA published in the **Federal Register** a notice of proposed policy and request for comments (76 FR 77939) on the FAA's proposed strategy for gradually reducing the current VOR network to a Minimum Operational Network (MON) as the National Airspace System (NAS) transitions to performance-based navigation (PBN) as part of the Next Generation Air Transportation System (NextGen). The FAA reviewed all comments received and on August 21, 2012, published in the **Federal Register** the disposition of the comments on the notice of proposed policy (77 FR 50420). In considering and disposing of the comments, the FAA noted that it would develop an initial VOR MON Plan which would be made publicly available.

On July 26, 2016, the FAA published in the **Federal Register** the VOR MON final policy statement (81 FR 48694) announcing the discontinuance selection criteria and candidate list of VOR navigational aids targeted for discontinuance as part of the VOR MON Implementation Program and NAS Efficient Streamline Services Initiative. This action is part of that national strategy.

VOR Federal airways are published in paragraph 6010(a) of FAA Order 7400.11C dated August 13, 2018, and effective September 15, 2018, which is incorporated by reference in 14 CFR 71.1. The VOR Federal airways listed in this document would be subsequently published in the Order.

Availability and Summary of Documents for Incorporation by Reference

This document amends FAA Order 7400.11C, Airspace Designations and Reporting Points, dated August 13, 2018, and effective September 15, 2018. FAA Order 7400.11C is publicly available as listed in the **ADDRESSES** section of this document. FAA Order 7400.11C lists Class A, B, C, D, and E airspace areas, air traffic service routes, and reporting points.

The Rule

This action amends Title 14 Code of Federal Regulations (14 CFR) part 71 by modifying the descriptions of VOR Federal airways V–217 and V–228 due to the planned decommissioning of the Chicago O'Hare, IL, VOR/DME. The VOR Federal airway changes are described below.

V–217: V–217 extends between the intersection of the Chicago O'Hare, IL, 316°/DuPage, IL, 359° and Northbrook, IL, 291° radials (FARMM fix) and the Winnipeg, MB, Canada, VOR/Tactical Air Navigation (VORTAC). The airway segment between the intersection of the Chicago O'Hare, IL, 316°/DuPage, IL, 359° and Northbrook, IL, 291° radials (FARMM fix) and the intersection of the Chicago O'Hare 316° and Badger, WI, 193° radials (BESIE fix) is removed. Additionally, the BESIE fix is amended in the airway description to describe it as the intersection of the Madison, WI, 138° and the Badger, WI, 193° radials, and the spelling of the Winnipeg VORTAC name is corrected from ''Winnepeg'' to ''Winnipeg.'' The

unaffected portions of the existing airway remain as charted.

V–228: V–228 extends between the Dells, WI, VORTAC and the Gipper, MI, VORTAC. The airway segment between the intersection of the Madison, WI, 138° and Chicago O'Hare, IL, 316° radials (BESIE fix) and the intersection of the Chicago O'Hare, IL, 316° and Northbrook, IL, 291° radials (FARMM fix) is removed. Additionally, the BESIE fix is amended in the airway description to describe it as the intersection of the Madison, WI, 138° and the Badger, WI, 193° radials, and the FARMM fix will be amended in the airway description to describe it as the intersection of the DuPage, IL, 359° and the Northbrook, IL, 291° radial. The unaffected portions of the existing airway remain as charted.

All radials in the route descriptions below are stated in True degrees.

Regulatory Notices and Analyses

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore: (1) Is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under Department of Transportation (DOT) Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that only affects air traffic procedures and air navigation, it is certified that this rule, when promulgated, does not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

Environmental Review

The FAA has determined that this action of modifying VOR Federal airways V–217 and V–228 near the Chicago O'Hare International Airport, IL, qualifies for categorical exclusion under the National Environmental Policy Act and its implementing regulations at 40 CFR part 1500, and in accordance with FAA Order 1050.1F, Environmental Impacts: Policies and Procedures, Paragraph 5–6.5a, which categorically excludes from further environmental impact review rulemaking actions that designate or modify classes of airspace areas, airways, routes, and reporting points (see 14 CFR part 71, Designation of Class A, B, C, D, and E Airspace Areas; Air Traffic Service Routes; and Reporting Points). As such, this action is not expected to result in any potentially significant environmental impacts. In accordance with FAA Order 1050.1F, paragraph 5–2 regarding Extraordinary Circumstances, the FAA has reviewed this action for factors and circumstances in which a normally categorically excluded action may have a significant environmental impact requiring further analysis. The FAA has determined that no extraordinary circumstances exist that warrant preparation of an environmental assessment or environmental impact study.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

Adoption of the Amendment

In consideration of the foregoing, the Federal Aviation Administration amends 14 CFR part 71 as follows:

PART 71—DESIGNATION OF CLASS A, B, C, D, AND E AIRSPACE AREAS; AIR TRAFFIC SERVICE ROUTES; AND REPORTING POINTS

■ 1. The authority citation for part 71 continues to read as follows:

Authority: 49 U.S.C. 106(f), 106(g); 40103, 40113, 40120; E.O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389.

§ 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR 71.1 of FAA Order 7400.11C, Airspace Designations and Reporting Points, dated August 13, 2018 and effective September 15, 2018, is amended as follows:

Paragraph 6010(a) Domestic VOR Federal Airways.

* * * * *

V–217 [Amended]

From INT Madison, WI, 138° and Badger, WI, 193° radials; Badger; Green Bay, WI; Rhinelander, WI; Duluth, MN; Hibbing, MN; Baudette, MN; INT Baudette 313° and Winnipeg, MB, Canada, 117° radials; to Winnipeg. The airspace within Canada is excluded. In addition, the portion of this airway that lies within the Beaver MOA is excluded when the Beaver MOA is active.

* * * * *

V–228 [Amended]

From Dells, WI; Madison, WI; to INT Madison 138° and Badger, WI, 193° radials. From INT DuPage, IL, 359° and Northbrook, IL, 291° radials; Northbrook; INT Northbrook 110° and Gipper, MI, 290° radials; to Gipper.

Issued in Washington, DC, on October 24, 2018.

Rodger A. Dean Jr.,

Manager, Airspace Policy Group.

[FR Doc. 2018–23562 Filed 10–26–18; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 97

[Docket No. 31217; Amdt. No. 3821]

Standard Instrument Approach Procedures, and Takeoff Minimums and Obstacle Departure Procedures; Miscellaneous Amendments

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This rule establishes, amends, suspends, or removes Standard Instrument Approach Procedures (SIAPs) and associated Takeoff Minimums and Obstacle Departure Procedures (ODPs) for operations at certain airports. These regulatory actions are needed because of the adoption of new or revised criteria, or because of changes occurring in the National Airspace System, such as the commissioning of new navigational facilities, adding new obstacles, or changing air traffic requirements. These changes are designed to provide safe and efficient use of the navigable airspace and to promote safe flight operations under instrument flight rules at the affected airports.

DATES: This rule is effective October 29, 2018. The compliance date for each SIAP, associated Takeoff Minimums, and ODP is specified in the amendatory provisions.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the **Federal Register** as of October 29, 2018.

ADDRESSES: Availability of matters incorporated by reference in the amendment is as follows:

For Examination

1. U.S. Department of Transportation, Docket Ops–M30, 1200 New Jersey Avenue SE, West Bldg., Ground Floor, Washington, DC 20590–0001.

2. The FAA Air Traffic Organization Service Area in which the affected airport is located;

3. The office of Aeronautical Navigation Products, 6500 South MacArthur Blvd., Oklahoma City, OK 73169 or,

4. The National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

Availability

All SIAPs and Takeoff Minimums and ODPs are available online free of charge. Visit the National Flight Data Center at *nfdc.faa.gov* to register. Additionally, individual SIAP and Takeoff Minimums and ODP copies may be obtained from the FAA Air Traffic Organization Service Area in which the affected airport is located.

FOR FURTHER INFORMATION CONTACT: Thomas J. Nichols, Flight Procedure Standards Branch (AFS–420), Flight Technologies and Programs Divisions, Flight Standards Service, Federal Aviation Administration, Mike Monroney Aeronautical Center, 6500 South MacArthur Blvd., Oklahoma City, OK 73169 (Mail Address: P.O. Box 25082, Oklahoma City, OK 73125) Telephone: (405) 954–4164.

SUPPLEMENTARY INFORMATION: This rule amends Title 14 of the Code of Federal Regulations, Part 97 (14 CFR part 97), by establishing, amending, suspending, or removes SIAPS, Takeoff Minimums and/or ODPS. The complete regulatory description of each SIAP and its associated Takeoff Minimums or ODP for an identified airport is listed on FAA form documents which are incorporated by reference in this amendment under 5 U.S.C. 552(a), 1 CFR part 51, and 14 CFR part 97.20. The applicable FAA forms are FAA Forms 8260–3, 8260–4, 8260–5, 8260–15A, and 8260–15B when required by an entry on 8260–15A.

The large number of SIAPs, Takeoff Minimums and ODPs, their complex nature, and the need for a special format make publication in the **Federal Register** expensive and impractical. Further, airmen do not use the regulatory text of the SIAPs, Takeoff Minimums or ODPs, but instead refer to their graphic depiction on charts printed by publishers of aeronautical materials. Thus, the advantages of incorporation by reference are realized and publication of the complete description of each SIAP, Takeoff Minimums and ODP listed on FAA form documents is unnecessary. This amendment provides the affected CFR sections and specifies the types of SIAPs, Takeoff Minimums and ODPs with their applicable effective dates. This amendment also identifies the airport and its location, the procedure, and the amendment number.

Availability and Summary of Material Incorporated by Reference

The material incorporated by reference is publicly available as listed in the **ADDRESSES** section.

The material incorporated by reference describes SIAPS, Takeoff Minimums and/or ODPS as identified in the amendatory language for part 97 of this final rule.

The Rule

This amendment to 14 CFR part 97 is effective upon publication of each separate SIAP, Takeoff Minimums and ODP as Amended in the transmittal. Some SIAP and Takeoff Minimums and textual ODP amendments may have been issued previously by the FAA in a Flight Data Center (FDC) Notice to Airmen (NOTAM) as an emergency action of immediate flight safety relating directly to published aeronautical charts.

The circumstances that created the need for some SIAP and Takeoff Minimums and ODP amendments may require making them effective in less than 30 days. For the remaining SIAPs and Takeoff Minimums and ODPs, an effective date at least 30 days after publication is provided.

Further, the SIAPs and Takeoff Minimums and ODPs contained in this amendment are based on the criteria contained in the U.S. Standard for Terminal Instrument Procedures (TERPS). In developing these SIAPs and Takeoff Minimums and ODPs, the TERPS criteria were applied to the conditions existing or anticipated at the affected airports. Because of the close and immediate relationship between these SIAPs, Takeoff Minimums and ODPs, and safety in air commerce, I find that notice and public procedure under 5 U.S.C. 553(b) are impracticable and contrary to the public interest and, where applicable, under 5 U.S.C. 553(d), good cause exists for making some SIAPs effective in less than 30 days.

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

List of Subjects in 14 CFR Part 97

Air Traffic control, airports, Incorporation by reference, Navigation (Air).

Issued in Washington, DC, on October 5, 2018.

Rick Domingo,

Executive Director, Flight Standards Service.

Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me, Title 14, Code of Federal Regulations, Part 97 (14 CFR part 97) is amended by establishing, amending, suspending, or removing Standard Instrument Approach Procedures and/or Takeoff Minimums and Obstacle Departure Procedures effective at 0901 UTC on the dates specified, as follows:

PART 97—STANDARD INSTRUMENT APPROACH PROCEDURES

■ 1. The authority citation for part 97 continues to read as follows:

Authority: 49 U.S.C. 106(f), 106(g), 40103, 40106, 40113, 40114, 40120, 44502, 44514, 44701, 44719, 44721–44722.

■ 2. Part 97 is amended to read as follows:

Effective 8 November 2018

Noatak, AK, Noatak, NDB/DME RWY 1, Amdt 2, CANCELED
Noatak, AK, Noatak, RNAV (GPS) RWY 1, Orig
Noatak, AK, Noatak, RNAV (GPS) RWY 19, Orig
Noatak, AK, Noatak, Takeoff Minimums and Obstacle DP, Amdt 2
Nome, AK, Nome, ILS Y OR LOC Y RWY 28, Amdt 4B
Perryville, AK, Perryville, CILAC THREE, Graphic DP
Perryville, AK, Perryville, RNAV (GPS) RWY 2, Amdt 1
Perryville, AK, Perryville, Takeoff Minimums and Obstacle DP, Amdt 2
Casa Grande, AZ, Casa Grande Muni, ILS OR LOC RWY 5, Amdt 7A
Grass Valley, CA, Nevada County, RNAV (GPS) RWY 7, Orig-B
Monterey, CA, Monterey Rgnl, ILS OR LOC RWY 10R, Amdt 29
Mountain View, CA, Moffett Federal AFLD, RNAV (GPS) RWY 32L, Orig-A
San Francisco, CA, San Francisco Intl, ILS OR LOC RWY 28L, ILS RWY 28L (SA CAT II), Amdt 27
Fort Myers, FL, Page Field, Takeoff Minimums and Obstacle DP, Amdt 5A
Pompano Beach, FL, Pompano Beach Airpark, LOC RWY 15, Amdt 5
Pompano Beach, FL, Pompano Beach Airpark, RNAV (GPS) RWY 33, Amdt 1A
Atlanta, GA, Fulton County Airport-Brown Field, Takeoff Minimums and Obstacle DP, Amdt 8
Hazlehurst, GA, Hazlehurst, NDB RWY 14, Amdt 5
Hazlehurst, GA, Hazlehurst, RNAV (GPS) RWY 14, Amdt 1
Pittsfield, IL, Pittsfield Penstone Muni, VOR RWY 13, Amdt 4A
Richmond, IN, Richmond Muni, ILS OR LOC RWY 24, Amdt 2

Richmond, IN, Richmond Muni, RNAV (GPS) RWY 6, Amdt 1
Richmond, IN, Richmond Muni, RNAV (GPS) RWY 24, Amdt 1
Richmond, IN, Richmond Muni, RNAV (GPS) RWY 33, Amdt 1
Oscoda, MI, Oscoda-Wurtsmith, ILS OR LOC RWY 25, Amdt 4
Oscoda, MI, Oscoda-Wurtsmith, RNAV (GPS) RWY 7, Amdt 1A
Oscoda, MI, Oscoda-Wurtsmith, RNAV (GPS) RWY 25, Orig-A
Oscoda, MI, Oscoda-Wurtsmith, Takeoff Minimums and Obstacle DP, Orig-A
Oscoda, MI, Oscoda-Wurtsmith, VOR RWY 6, Amdt 1, CANCELED
Maple Lake, MN, Maple Lake Muni, RNAV (GPS) RWY 28, Orig-B, CANCELED
Thief River Falls, MN, Thief River Falls Rgnl, ILS OR LOC RWY 31, Amdt 5
Sikeston, MO, Sikeston Memorial Muni, RNAV (GPS) RWY 3, Amdt 2
Sikeston, MO, Sikeston Memorial Muni, RNAV (GPS) RWY 21, Amdt 3
Sikeston, MO, Sikeston Memorial Muni, VOR RWY 20, Amdt 4A, CANCELED
Tupelo, MS, Tupelo Rgnl, COPTER VOR 023, Orig-A
Tupelo, MS, Tupelo Rgnl, VOR RWY 18, Amdt 1B
Mount Airy, NC, Mount Airy/Surry County, RNAV (GPS) RWY 18, Amdt 1
Mount Airy, NC, Mount Airy/Surry County, RNAV (GPS) RWY 36, Amdt 1
Raleigh/Durham, NC, Raleigh-Durham Intl, ILS OR LOC RWY 5R, ILS RWY 5R SA CAT I, ILS RWY 5R SA CAT II, Amdt 30
Wilson, NC, Wilson Industrial Air Center, RNAV (GPS) RWY 3, Amdt 2
Wilson, NC, Wilson Industrial Air Center, RNAV (GPS) RWY 21, Amdt 1
Wilson, NC, Wilson Industrial Air Center, Takeoff Minimums and Obstacle DP, Amdt 1
Glen Ullin, ND, Glen Ullin Rgnl, RNAV (GPS) RWY 29, Orig
Glen Ullin, ND, Glen Ullin Rgnl, Takeoff Minimums and Obstacle DP, Orig
Buffalo, NY, Buffalo Niagara Intl, RNAV (GPS) RWY 14, Amdt 2B
Cleveland, OH, Cuyahoga County, ILS OR LOC RWY 24, Amdt 16
Cleveland, OH, Cuyahoga County, RNAV (GPS) RWY 6, Amdt 2
Cleveland, OH, Cuyahoga County, RNAV (GPS) RWY 24, Amdt 2
Cleveland, OH, Cuyahoga County, Takeoff Minimums and Obstacle DP, Amdt 2
Salem, OR, McNary Fld, RNAV (GPS) RWY 13, Orig
Waynesburg, PA, Greene County, COPTER RNAV (GPS) RWY 9, Orig-A
Columbia, SC, Columbia Metropolitan, ILS OR LOC RWY 5, Amdt 1E
Spearfish, SD, Black Hills-Clyde Ice Field, SWUNG ONE, Graphic DP
Dallas, TX, Dallas Executive, ILS OR LOC RWY 31, Amdt 9
Dallas, TX, Dallas Executive, RNAV (GPS) RWY 31, Amdt 1
Burlington, VT, Burlington Intl, RNAV (GPS) RWY 15, Amdt 1B
Burlington, VT, Burlington Intl, RNAV (GPS) Y RWY 33, Orig-B
Burlington, VT, Burlington Intl, VOR RWY 1, Orig-A
Rutland, VT, Rutland—Southern Vermont Rgnl, ILS Y OR LOC Y RWY 19, Amdt 1
Rutland, VT, Rutland—Southern Vermont Rgnl, ILS Z OR LOC Z RWY 19, Amdt 1
Rutland, VT, Rutland—Southern Vermont Rgnl, RNAV (GPS) Y RWY 19, Amdt 3
Rutland, VT, Rutland—Southern Vermont Rgnl, RNAV (GPS) Z RWY 19, Amdt 1
Rutland, VT, Rutland—Southern Vermont Rgnl, VOR/DME RWY 1, Amdt 1A, CANCELED
Puyallup, WA, Pierce County—Thun Field, Takeoff Minimums and Obstacle DP, Amdt 3
Fort Atkinson, WI, Fort Atkinson Muni, VOR–A, Amdt 1
Racine, WI, Batten Intl, ILS OR LOC RWY 4, Amdt 6

Rescinded: On September 11, 2018 (83 FR 45822), the FAA published an Amendment in Docket No. 31211, Amdt No. 3815, to Part 97 of the Federal Aviation Regulations under section 97.20, and 97.37. The following entries for Brevig Mission, AK, effective November 8, 2018, are hereby rescinded in their entirety:

Brevig Mission, AK, Brevig Mission, BREVIG TWO, Graphic DP
Brevig Mission, AK, Brevig Mission, Takeoff Minimums and Obstacle DP, Orig-A

Rescinded: On September 25, 2018 (83 FR 48368), the FAA published an Amendment in Docket No. 31213, Amdt No. 3817, to Part 97 of the Federal Aviation Regulations under section 97.33, and 97.37. The following entries for Reedley, CA, effective November 8, 2018, are hereby rescinded in their entirety:

Reedley, CA, Reedley Muni, RNAV (GPS) RWY 16, Orig
Reedley, CA, Reedley Muni, RNAV (GPS) RWY 34, Orig
Reedley, CA, Reedley Muni, Takeoff Minimums and Obstacle DP, Orig

[FR Doc. 2018–23143 Filed 10–26–18; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 97

[Docket No. 31218; Amdt. No. 3822]

Standard Instrument Approach Procedures, and Takeoff Minimums and Obstacle Departure Procedures; Miscellaneous Amendments

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This rule amends, suspends, or removes Standard Instrument Approach Procedures (SIAPs) and associated Takeoff Minimums and Obstacle Departure Procedures for operations at certain airports. These regulatory actions are needed because of the adoption of new or revised criteria, or because of changes occurring in the National Airspace System, such as the commissioning of new navigational facilities, adding new obstacles, or changing air traffic requirements. These changes are designed to provide for the safe and efficient use of the navigable airspace and to promote safe flight operations under instrument flight rules at the affected airports.

DATES: This rule is effective October 29, 2018. The compliance date for each SIAP, associated Takeoff Minimums, and ODP is specified in the amendatory provisions.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of October 29, 2018.

ADDRESSES: Availability of matter incorporated by reference in the amendment is as follows:

For Examination

1. U.S. Department of Transportation, Docket Ops–M30, 1200 New Jersey Avenue SE, West Bldg., Ground Floor, Washington, DC 20590–0001;
2. The FAA Air Traffic Organization Service Area in which the affected airport is located;
3. The office of Aeronautical Navigation Products, 6500 South MacArthur Blvd., Oklahoma City, OK 73169 or,
4. The National Archives and Records Administration (NARA).

For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

Availability

All SIAPs and Takeoff Minimums and ODPs are available online free of charge. Visit the National Flight Data Center online at *nfdc.faa.gov* to register. Additionally, individual SIAP and Takeoff Minimums and ODP copies may be obtained from the FAA Air Traffic Organization Service Area in which the affected airport is located.

FOR FURTHER INFORMATION CONTACT: Thomas J. Nichols, Flight Procedure Standards Branch (AFS–420)Flight Technologies and Procedures Division, Flight Standards Service, Federal Aviation Administration, Mike Monroney Aeronautical Center, 6500 South MacArthur Blvd., Oklahoma City, OK 73169 (Mail Address: P.O. Box 25082 Oklahoma City, OK 73125) telephone: (405) 954–4164.

SUPPLEMENTARY INFORMATION: This rule amends Title 14, Code of Federal Regulations, Part 97 (14 CFR part 97) by

amending the referenced SIAPs. The complete regulatory description of each SIAP is listed on the appropriate FAA Form 8260, as modified by the National Flight Data Center (NFDC)/Permanent Notice to Airmen (P–NOTAM), and is incorporated by reference under 5 U.S.C. 552(a), 1 CFR part 51, and 14 CFR 97.20. The large number of SIAPs, their complex nature, and the need for a special format make their verbatim publication in the **Federal Register** expensive and impractical. Further, airmen do not use the regulatory text of the SIAPs, but refer to their graphic depiction on charts printed by publishers of aeronautical materials. Thus, the advantages of incorporation by reference are realized and publication of the complete description of each SIAP contained on FAA form documents is unnecessary.

This amendment provides the affected CFR sections, and specifies the SIAPs and Takeoff Minimums and ODPs with their applicable effective dates. This amendment also identifies the airport and its location, the procedure and the amendment number.

Availability and Summary of Material Incorporated by Reference

The material incorporated by reference is publicly available as listed in the **ADDRESSES** section.

The material incorporated by reference describes SIAPs, Takeoff Minimums and ODPs as identified in the amendatory language for part 97 of this final rule.

The Rule

This amendment to 14 CFR part 97 is effective upon publication of each separate SIAP and Takeoff Minimums and ODP as amended in the transmittal. For safety and timeliness of change considerations, this amendment incorporates only specific changes contained for each SIAP and Takeoff Minimums and ODP as modified by FDC permanent NOTAMs.

The SIAPs and Takeoff Minimums and ODPs, as modified by FDC permanent NOTAM, and contained in this amendment are based on the criteria contained in the U.S. Standard for Terminal Instrument Procedures (TERPS). In developing these changes to SIAPs and Takeoff Minimums and ODPs, the TERPS criteria were applied only to specific conditions existing at the affected airports. All SIAP amendments in this rule have been previously issued by the FAA in a FDC NOTAM as an emergency action of immediate flight safety relating directly to published aeronautical charts.

The circumstances that created the need for these SIAP and Takeoff Minimums and ODP amendments require making them effective in less than 30 days.

Because of the close and immediate relationship between these SIAPs, Takeoff Minimums and ODPs, and safety in air commerce, I find that notice and public procedure under 5 U.S.C. 553(b) are impracticable and contrary to the public interest and, where applicable, under 5 U.S.C. 553(d), good cause exists for making these SIAPs effective in less than 30 days.

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

List of Subjects in 14 CFR Part 97

Air Traffic Control, Airports, Incorporation by reference, Navigation (Air).

Issued in Washington, DC, on October 5, 2018.

Rick Domingo,

Executive Director, Flight Standards Service.

Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me, Title 14, Code of Federal regulations, Part 97, (14 CFR part 97), is amended by amending Standard Instrument Approach Procedures and Takeoff Minimums and ODPs, effective at 0901 UTC on the dates specified, as follows:

PART 97—STANDARD INSTRUMENT APPROACH PROCEDURES

■ 1. The authority citation for part 97 continues to read as follows:

Authority: 49 U.S.C. 106(f), 106(g), 40103, 40106, 40113, 40114, 40120, 44502, 44514, 44701, 44719, 44721–44722.

■ 2. Part 97 is amended to read as follows:

By amending: § 97.23 VOR, VOR/DME, VOR or TACAN, and VOR/DME or TACAN; § 97.25 LOC, LOC/DME, LDA, LDA/DME, SDF, SDF/DME; § 97.27 NDB, NDB/DME; § 97.29 ILS, ILS/DME, MLS, MLS/DME, MLS/RNAV; § 97.31 RADAR SIAPs; § 97.33 RNAV SIAPs; and § 97.35 COPTER SIAPs, Identified as follows:

. . . Effective Upon Publication

AIRAC date	State	City	Airport	FDC number	FDC date	Subject
8–Nov–18	SC	Pelion	Lexington County at Pelion	8/0168	9/19/18	VOR–A, Amdt 3.
8–Nov–18	SC	Pelion	Lexington County at Pelion	8/0169	9/19/18	RNAV (GPS) RWY 18, Orig-A.
8–Nov–18	SC	Pelion	Lexington County at Pelion	8/0170	9/19/18	Takeoff Minimums and Obstacle DP, Orig.
8–Nov–18	SC	Pelion	Lexington County at Pelion	8/0171	9/19/18	RNAV (GPS) RWY 36, Orig-A.
8–Nov–18	IN	Crawfordsville	Crawfordsville Muni	8/0181	9/19/18	NDB RWY 4, Amdt 6.
8–Nov–18	IN	Crawfordsville	Crawfordsville Muni	8/0182	9/19/18	RNAV (GPS) RWY 4, Amdt 1A.
8–Nov–18	IN	Crawfordsville	Crawfordsville Muni	8/0185	9/19/18	Takeoff Minimums and Obstacle DP, Amdt 1.
8–Nov–18	IN	Crawfordsville	Crawfordsville Muni	8/0188	9/19/18	RNAV (GPS) RWY 22, Amdt 1.
8–Nov–18	MI	Hancock	Houghton County Memorial	8/0388	9/19/18	Takeoff Minimums and Obstacle DP, Amdt 3.
8–Nov–18	MT	Baker	Baker Muni	8/0538	9/24/18	RNAV (GPS) RWY 31, Orig.
8–Nov–18	MN	Fosston	Fosston Muni	8/0668	9/19/18	NDB RWY 34, Amdt 4A.
8–Nov–18	MN	Fosston	Fosston Muni	8/0669	9/19/18	RNAV (GPS) RWY 34, Orig-C.
8–Nov–18	DE	Dover/Cheswold	Delaware Airpark	8/0679	9/12/18	RNAV (GPS) RWY 9, Orig.
8–Nov–18	DE	Dover/Cheswold	Delaware Airpark	8/0683	9/12/18	VOR RWY 27, Orig-A.
8–Nov–18	MI	Ionia	Ionia County	8/1085	9/19/18	Takeoff Minimums and Obstacle DP, Orig.
8–Nov–18	MN	Fosston	Fosston Muni	8/1258	9/19/18	Takeoff Minimums and Obstacle DP, Amdt 2.
8–Nov–18	WY	Rock Springs	Rock Springs-Sweetwater County	8/1580	9/19/18	VOR/DME RWY 27, Amdt 2.
8–Nov–18	AS	Pago Pago	Pago Pago Intl	8/1800	10/1/18	VOR OR TACAN–B, Amdt 6.

AIRAC date	State	City	Airport	FDC number	FDC date	Subject
8–Nov–18	AS	Pago Pago	Pago Pago Intl	8/1802	10/1/18	ILS OR LOC RWY 5, Amdt 14.
8–Nov–18	AS	Pago Pago	Pago Pago Intl	8/1803	10/1/18	RNAV (GPS) RWY 5, Orig.
8–Nov–18	AS	Pago Pago	Pago Pago Intl	8/1804	10/1/18	RNAV (GPS) RWY 23, Orig.
8–Nov–18	AS	Pago Pago	Pago Pago Intl	8/1805	10/1/18	VOR/DME OR TACAN–A, Amdt 4A.
8–Nov–18	AS	Pago Pago	Pago Pago Intl	8/1806	10/1/18	NDB–C, Amdt 6B.
8–Nov–18	AS	Pago Pago	Pago Pago Intl	8/1821	10/1/18	VOR–D, Amdt 6A.
8–Nov–18	GA	Atlanta	Hartsfield—Jackson Atlanta Intl	8/1834	9/19/18	RNAV (GPS) RWY 8R, Amdt 4.
8–Nov–18	GA	Atlanta	Hartsfield—Jackson Atlanta Intl	8/1837	9/19/18	RNAV (GPS) PRM RWY 8R (Simultaneous Close Parallel), Orig.
8–Nov–18	AZ	Goodyear	Phoenix Goodyear	8/2535	9/27/18	RNAV (GPS) RWY 3, Amdt 1.
8–Nov–18	WI	Rice Lake	Rice Lake Rgnl—Carl's Field	8/4583	9/24/18	Takeoff Minimums and Obstacle DP, Orig.
8–Nov–18	CO	Denver	Centennial	8/5680	9/19/18	RNAV (GPS) RWY 28, Amdt 1B.
8–Nov–18	DE	Dover/Cheswold	Delaware Airpark	8/5855	9/24/18	RNAV (GPS) RWY 27, Orig.
8–Nov–18	MI	Sault Ste Marie	Sault Ste Marie Muni/Sanderson Field.	8/6503	9/19/18	RNAV (GPS) RWY 32, Orig-A.
8–Nov–18	MI	Sault Ste Marie	Sault Ste Marie Muni/Sanderson Field.	8/6505	9/19/18	RNAV (GPS) RWY 14, Orig-A.
8–Nov–18	MI	Sault Ste Marie	Sault Ste Marie Muni/Sanderson Field.	8/6506	9/19/18	VOR RWY 32, Amdt 3A.
8–Nov–18	AZ	Casa Grande	Casa Grande Muni	8/6795	9/24/18	RNAV (GPS) RWY 5, Amdt 1.
8–Nov–18	TX	Laredo	Laredo Intl	8/7275	9/27/18	Takeoff Minimums and Obstacle DP, Amdt 4A.
8–Nov–18	ME	Fryeburg	Eastern Slopes Rgnl	8/8037	9/27/18	RNAV (GPS) RWY 32, Amdt 1.
8–Nov–18	AR	Mountain Home	Baxter County	8/8475	9/19/18	RNAV (GPS) RWY 5, Orig-B.
8–Nov–18	AR	Mountain Home	Baxter County	8/8478	9/19/18	RNAV (GPS) RWY 23, Orig.
8–Nov–18	MN	Fosston	Fosston Muni	8/8483	9/19/18	RNAV (GPS) RWY 16, Orig-C.

[FR Doc. 2018–23142 Filed 10–26–18; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[Docket No. USCG–2018–0181]

RIN 1625–AA09

Drawbridge Operation Regulation; Duluth Ship Canal, Duluth-Superior Harbor, MN

AGENCY: Coast Guard, DHS.

ACTION: Final rule.

SUMMARY: The Coast Guard is modifying the operating schedule that governs Duluth Aerial Lift Bridge for vessels under 300 gross tons. The City of Duluth has requested that the current summer bridge schedule (Memorial Day to Labor Day) be extended to include the spring and fall.

DATES: This rule is effective November 28, 2018.

ADDRESSES: To view documents mentioned in this preamble as being available in the docket, go to *http://www.regulations.gov.* Type USCG–2018–0181 in the ''SEARCH'' box and click ''SEARCH.'' Click on Open Docket Folder on the line associated with this rulemaking.

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call or email Mr. Lee D. Soule, Bridge Management Specialist, Ninth Coast Guard District; telephone 216–902–6085, email *Lee.D.Soule@uscg.mil.*

SUPPLEMENTARY INFORMATION:

I. Table of Abbreviations

CFR Code of Federal Regulations
DHS Department of Homeland Security
FR Federal Register
IGLD85 International Great Lakes Datum of 1985 LWD Low Water Datum based on IGLD85
OMB Office of Management and Budget
NPRM Notice of Proposed Rulemaking
§ Section
U.S.C. United States Code

II. Background Information and Regulatory History

On August 3, 2018, we published a Notice of Proposed Rulemaking entitled Drawbridge Operation Regulation; Duluth Ship Canal, Duluth-Superior Harbor, MN in the **Federal Register** (83 FR 38099). We did not receive any comments on this rule.

III. Legal Authority and Need for Rule

The Coast Guard is issuing this rule under authority 33 U.S.C. 499. The Duluth Aerial Bridge is located 0.25 miles from Duluth Harbor North Pier Light at the lakeward end of the Duluth Ship Canal. It is a vertical lift type bridge that provides 15 feet of vertical clearance in the down position and up to 141 feet in the open position. Currently the bridge opens on signal except that, from the Friday before Memorial Day through the Tuesday after Labor Day each year, between the hours of 7 a.m. and 9 p.m., seven days a week, the drawbridge opens on the hour and half-hour for vessels under 300 gross tons, if needed; and the bridge will open on signal for all vessels from 9 p.m. to 7 a.m., seven days a week, and at all times for Federal, state, and local government vessels, vessels in distress, commercial vessels engaged in rescue or emergency salvage operations, commercial-assist towing vessels engaged in towing or port operations, vessels engaged in pilot duties, vessels seeking shelter from severe weather, and all commercial vessels 300 gross tons or greater. From January 1 through March 15, the draw opens on signal if at least 12 hour notice is given.

The City of Duluth, operator of the Duluth Aerial Lift Bridge, has requested that the current schedule be extended to include the spring and fall. This is due to increased traffic and community growth in the region.

IV. Discussion of Comments, Changes and the Final Rule

The Coast Guard provided a comment period of 30 days and no comments were received. The regulation only affects recreational vessels and commercial vessels under 300 gross tons. The drawbridge will continue to open at all times for commercial vessels over 300 gross tons. The only change to the regulation will be to extend the dates of the scheduled bridge openings from the Friday before Memorial Day through the Tuesday after Labor Day to March 16 through December 31 each year.

V. Regulatory Analyses

We developed this 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 protesters.

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 rule has not been designated a ''significant regulatory action,'' under Executive Order 12866. Accordingly, it 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 expected improvement to all modes of traffic using the drawbridge, and the proven improvement realized by the previous change to the bridge schedule implemented in the last rulemaking.

B. Impact on Small Entities

The Regulatory Flexibility Act of 1980 (RFA), 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 did not receive any comments from the Small Business Administration on this rule. 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 bridge may be small entities, for the reasons stated in section IV.A above this final rule would not have a significant economic impact on any vessel owner or operator.

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**, above.

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

C. Collection of Information

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

D. Federalism and Indian Tribal Government

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

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 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 rule under Department of Homeland Security Management Directive 023–01 and Commandant Instruction M16475.lD, which guides the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have made a determination that this action is one of a category of actions which do not individually or cumulatively have a significant effect on the human environment. This rule simply promulgates the operating regulations or procedures for drawbridges. This action is categorically excluded from further review, under figure 2–1, paragraph (32)(e), of the Instruction.

A Record of Environmental Consideration and a Memorandum for the Record are not required for 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.

List of Subjects in 33 CFR Part 117

Bridges.

For the reasons discussed in the preamble, the Coast Guard amends 33 CFR part 117 as follows:

PART 117—DRAWBRIDGE OPERATION REGULATIONS

■ 1. The authority citation for part 117 continues to read as follows:

Authority: 33 U.S.C. 499; 33 CFR 1.05–1; Department of Homeland Security Delegation No. 0170.1.

■ 2. Revise § 117.661 to read as follows:

§ 117.661 Duluth Ship Canal (Duluth-Superior Harbor).

The draw of the Duluth Ship Canal Aerial bridge, mile 0.25 at Duluth, shall open on signal; except that, from March 16 through December 31, between the hours of 7 a.m. and 9 p.m., seven days a week, the drawbridge shall open on the hour and half-hour for vessels under 300 gross tons, if needed; and the bridge will open on signal for all vessels from 9 p.m. to 7 a.m., seven days a week, and at all times for Federal, state, and local government vessels, vessels in distress, commercial vessels engaged in rescue or

emergency salvage operations, commercial-assist towing vessels engaged in towing or port operations, vessels engaged in pilot duties, vessels seeking shelter from severe weather, and all commercial vessels 300 gross tons or greater. From January 1 through March 15, the draw shall open on signal if at least 12 hour notice is given. The opening signal is one prolonged blast, one short blast, one prolonged blast, one short blast. If the drawbridge is disabled, the bridge authorities shall give incoming and outgoing vessels timely and dependable notice, by tug service if necessary, so that the vessels do not attempt to enter the canal.

Dated: October 22, 2018.

J.M. Nunan,

Rear Admiral, U.S. Coast Guard, Commander, Ninth Coast Guard District.

[FR Doc. 2018–23504 Filed 10–26–18; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[Docket No. USCG 2018–0473]

RIN 1625–AA09

Drawbridge Operation Regulation; Anacostia River, Washington, DC

AGENCY: Coast Guard, DHS.

ACTION: Final rule.

SUMMARY: The Coast Guard is modifying the existing drawbridge operating regulation for the Frederick Douglass Memorial Bridge across Anacostia River, mile 1.2, in Washington, DC. The modified rule allows the existing drawbridge to remain in the closed-to-navigation position, and is necessary to accommodate the construction of a new fixed bridge on an alignment 18 feet south of the existing drawbridge, and the removal of the existing drawbridge.

DATES: This rule is effective November 28, 2018.

ADDRESSES: To view documents mentioned in this preamble as being available in the docket, go to *http://www.regulations.gov.* Type USCG–2018–0473 in the ''SEARCH'' box and click ''SEARCH.'' Click on Open Docket Folder on the line associated with this rulemaking.

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call or email Mr. Martin A. Bridges, Fifth Coast Guard District (dpb), at (757) 398–6422, email *Martin.A.Bridges@uscg.mil.*

SUPPLEMENTARY INFORMATION:

I. Table of Abbreviations

CFR Code of Federal Regulations
DHS Department of Homeland Security
FR Federal Register
NPRM Notice of proposed rulemaking
§ Section
U.S.C. United States Code

II. Background Information and Regulatory History

On February 2, 2018, we published a notice of temporary deviation from drawbridge regulation entitled ''Drawbridge Operation Regulation; Anacostia River, Washington, DC,'' in the **Federal Register** (83 FR 4845). The temporary deviation was necessary to accommodate the construction and replacement of the existing Frederick Douglass Memorial Bridge with a fixed bridge on an alignment 18 feet south of the existing drawbridge. This temporary deviation allowed the existing drawbridge to remain in the closed-to-navigation position during construction of the new fixed bridge and was effective from 6 a.m. on February 2, 2018, through 6 a.m. on August 1, 2018.

On June 25, 2018, the Coast Guard published a notice of public rule making entitled Drawbridge Regulation, Anacostia River, Washington, DC, in the **Federal Register** (83 FR 32602). We received no comments on this rule.

III. Legal Authority and Need for Rule

The Coast Guard is issuing this rule under authority 33 U.S.C 499. The Frederick Douglass Memorial Bridge across the Anacostia River, mile 1.2, in Washington, DC has a vertical clearance of 40 feet above mean high water in the closed-to-navigation position and unlimited clearance in the open-to-navigation position. The current operating regulation is published in 33 CFR 117.253 (a).

On December 4, 2017, the Coast Guard signed Bridge Permit (2–17–5) authorizing the replacement of the existing drawbridge with a fixed bridge with a vertical clearance of 42 feet above mean high water on an alignment 18 feet south of the existing drawbridge. Issuance of the bridge permit followed a multi-year process involving completion of an environmental impact statement, Coast Guard Record of Decision, and a navigation impact report; public meetings held on March 4, 2008, April 28, 2011, July 30, 2013, May 5, 2014, and January 22, 2015; publishing of a preliminary public notice for navigation on November 4, 2013, and public notice for the bridge permit application on October 20, 2017.

This modification of the operating regulation of the existing drawbridge is designed to mitigate vehicular congestion, maintain public safety, and provide for safe and effective bridge construction and removal, while also meeting the existing and future needs of navigation. The District Department of Transportation, owner and operator of the Frederick Douglass Memorial Bridge, requested this change in the operating regulation. Given the small difference in vertical clearances above mean high water between the existing drawbridge at 40 feet and new fixed bridge at 42 feet, placing the existing drawbridge in the closed-to-navigation position will not restrict present navigation from transiting through the bridge. There have been no requests for an opening of the existing drawbridge aside from vessels engaged in bridge construction and removal since the temporary deviation published on February 2, 2018.

IV. Discussion of Comments, Changes and the Final Rule

The Coast Guard provided a comment period of 30 days and no comments were received. No changes were made in the regulatory text between the NPRM and this final rule.

V. Regulatory Analysis

We developed this 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 protesters.

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 rule has not been designated a ''significant regulatory action,'' under Executive Order 12866. Accordingly, it 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 is not considered a significant regulatory action. This determination is based on the findings that: (1) The potential impact is small, given the limited number of vessels that required a bridge opening over the past 10 years, including zero requests since 2013; (2) the small difference in vertical clearances above mean high water between the existing drawbridge at 40

feet and the new fixed bridge at 42 feet; and (3) vessels will be able to transit through the drawbridge following removal of the draw span, after the new bridge opens to vehicular traffic.

B. Impact on Small Entities

The Regulatory Flexibility Act of 1980 (RFA), 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 received zero comments from the Small Business Administration on this rule. 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 bridge may be small entities, for the reasons stated in section IV.A above, this rule will not have a significant economic impact on any vessel owner or operator.

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**, above.

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

C. Collection of Information

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

D. Federalism and Indian Tribal Government

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 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 rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it does not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes. We received zero comments concerning this section of this rule.

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 proposed rule elsewhere in this preamble. We received zero comments concerning this section of this rule.

F. Environment

We have analyzed this rule under Department of Homeland Security Management Directive 023–01 and Commandant Instruction M16475.lD, which guides the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have made a determination that this action is one of a category of actions which do not individually or cumulatively have a significant effect on the human environment. This rule simply promulgates the operating regulations or procedures for drawbridges. This action is categorically excluded from further review, under figure 2–1, paragraph (32)(e), of the Instruction. A Record of Environmental Consideration and a Memorandum for the Record are not required for 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.

List of Subjects in 33 CFR Part 117

Bridges.

For the reasons discussed in the preamble, the Coast Guard amends 33 CFR part 117 as follows:

PART 117—DRAWBRIDGE OPERATION REGULATIONS

■ 1. The authority citation for part 117 continues to read as follows:

Authority: 33 U.S.C. 499; 33 CFR 1.05–1; Department of Homeland Security Delegation No. 0170.1.

■ 2. Revise § 117.253 (a) to read as follows:

§ 117.253 Anacostia River.

(a) The draw of the Frederick Douglass Memorial (South Capitol Street) bridge, mile 1.2, need not be opened for the passage of vessels.

* * * * *

Dated: October 15, 2018.

K.M. Smith,

Rear Admiral, U.S. Coast Guard, Commander, Fifth Coast Guard District.

[FR Doc. 2018–23598 Filed 10–26–18; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[Docket No. USCG–2018–0110]

RIN 1625–AA09

Drawbridge Operation Regulation; Hackensack River, Jersey City, NJ

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is temporarily modifying the operating schedule that governs the PATH Bridge across the Hackensack River, mile 3.0, at Jersey City, New Jersey. This action is necessary to allow for an unexpected delay in the replacement of rails and timbers across the length of the span of the bridge. This temporary final rule is necessary to allow the bridge owner to

complete the remaining replacements and repairs.

DATES: This temporary final rule is effective from October 29, 2018 through 12:01 a.m. on December 31, 2018.

ADDRESSES: To view documents mentioned in this preamble as being available in the docket, go to *http://www.regulations.gov,* type USCG–2018–0110 in the ''SEARCH'' box and click ''SEARCH.'' Click on Open Docket Folder on the line associated with this rulemaking.

FOR FURTHER INFORMATION CONTACT: If you have questions on this interim rule, call or email Judy Leung-Yee, Bridge Management Specialist, U.S. Coast Guard; telephone 212–514–4336, email *Judy.K.Leung-Yee@uscg.mil.*

SUPPLEMENTARY INFORMATION:

I. Table of Abbreviations

CFR Code of Federal Regulations
DHS Department of Homeland Security
FR Federal Register
OMB Office of Management and Budget
NPRM Notice of Proposed Rulemaking
§ Section
U.S.C. United States Code

II. Background Information and Regulatory History

On April 2, 2018, we published a temporary deviation entitled, ''Drawbridge Operation Regulation; Hackensack River, Jersey City, New Jersey'' in the **Federal Register** (83 FR 13865). Outreach conducted with mariners utilizing the waterway indicated no objections to the temporary deviation. No complaints have been submitted during the current temporary deviation. This deviation allowed the bridge to remain in the closed to navigation position on 12:01 a.m. Saturday to 12:01 a.m. on Monday from March 31, 2018, to September 26, 2018, to facilitate the replacement of rails and timbers across the length of the span of the bridge.

The Coast Guard is issuing this temporary final rule without prior notice and opportunity to comment pursuant to authority under section 4(a) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)). This provision authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency for good cause finds that those procedures are ''impracticable, unnecessary, or contrary to the public interest.'' Under 5 U.S.C. 553(b), the Coast Guard finds that good cause exists for not publishing a notice of proposed rulemaking (NPRM) with respect to this rule because it is impracticable. Due to unanticipated severe weather delays impacting the schedule and pace of replacement of rails and timbers across the length of the span of the bridge, additional time is required to finalize and complete the work necessary to restore the bridge to full operation. We must modify the operation schedule of the bridge by date of publication, to allow the bridge owner to perform remaining work items. Delaying the effective date of this temporary final rule would be impracticable because it would delay repairs to the bridge and efforts to restore it to full operation.

We are issuing this temporary final rule and under 5 U.S.C. 553(d)(3), and for the reasons stated above, the Coast Guard finds that good cause exists for making it effective in less than 30 days after publication in the **Federal Register**. Delaying the effective date of this temporary final rule would be impracticable and contrary to the public interest given that need to complete repairs to the bridge which are already underway and preventing full operation

III. Legal Authority and Need for the Rule

The Coast Guard is issuing this rule under authority 33 U.S.C. 499. The Coast Guard is modifying the operating schedule that governs the PATH Bridge across Hackensack River, mile 3.0, at Jersey City, New Jersey. The PATH Bridge is a vertical lift bridge offering mariners a vertical clearance of 40 feet at mean high water and 45 feet at mean low water in the closed position.

The existing drawbridge regulations are listed at 33 CFR 117.723(b). The Port Authority Trans-Hudson Corporation, the bridge owner, has requested this modification as additional time is required to perform the replacement of rails and timbers as described above.

The waterway is transited by recreational and commercial vessels. Coordination with known waterway users has indicated no objection to the closure of the draw. Vessels able to pass under the bridge in the closed position may do so at anytime. The bridge will not be able to open for emergencies. There is no immediate alternate route for vessels to pass.

IV. Discussion of the Rule

The Coast Guard is issuing this temporary final rule, which permits a deviation from the operating schedule that governs the PATH Bridge across Hackensack River, mile 3.0, at Jersey City, New Jersey. The draw shall open on signal provided at least a two-hour advance notice is provided by calling the number posted at the bridge. However, the draw need not open for the passage of vessel traffic Monday through Friday, except Federal holidays, from 6 a.m. to 10 a.m. and from 4 p.m. to 8 p.m.; and from 12:01 a.m. Saturday to 12:01 a.m. Monday.

Weekdays additional bridge openings shall be provided for commercial vessels from 6 a.m. to 7:20 a.m.; 9:20 a.m. to 10 a.m.; 4 p.m. to 4:30 p.m. and from 6:50 p.m. to 8 p.m. provided at least a two-hour advance notice is given by calling the number posted at the bridge.

The rule is necessary to accommodate the completion of replacement of rails and timbers across the length of the span of the bridge

V. Regulatory Analyses

We developed this 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 protesters.

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 rule has not been designated a ''significant regulatory action,'' under Executive Order 12866. Accordingly, it 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 historically low volume of vessel traffic during the period of this rule, and that vessel traffic able to pass under the bridge in the closed position will be able to safely transit. For the weekends between date of publication and December 31, there were six bridge openings in 2016 and one bridge opening in 2017.

B. Impact on Small Entities

The Regulatory Flexibility Act of 1980 (RFA), 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 bridge 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.

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**, above.

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

C. Collection of Information

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

D. Federalism and Indian Tribal Government

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

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 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 rule under Department of Homeland Security Management Directive 023–01 and Commandant Instruction M16475.lD, which guides the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have made a determination that this action is one of a category of actions which do not individually or cumulatively have a significant effect on the human environment. This rule simply promulgates the operating regulations or procedures for drawbridges. This action is categorically excluded from further review, under figure 2–1, paragraph (32)(e), of the Instruction. A preliminary Record of Environmental Consideration and a Memorandum for the Record are not required for 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.

List of Subjects in 33 CFR Part 117

Bridges.

For the reasons discussed in the preamble, the Coast Guard amends 33 CFR part 117 as follows:

PART 117—DRAWBRIDGE OPERATION REGULATIONS

■ 1. The authority citation for part 117 continues to read as follows:

Authority: 33 U.S.C. 499; 33 CFR 1.05–1; Department of Homeland Security Delegation No. 0170.1.

■ 2. From 12:01 a.m. on date of publication, through 12:01 a.m. on December 31, 2018, in § 117.723, suspend paragraph (b) and temporarily add paragraph (k) to read as follows:

§ 117.723 Hackensack River.

* * * * *

(k) The draw of the PATH Bridge, mile 3.0, at Jersey City, shall open on signal provided at least a two-hour advance notice is provided by calling the number posted at the bridge. The draw need not open for the passage of vessel traffic Monday through Friday, except Federal holidays, from 6 a.m. to 10 a.m. and from 4 p.m. to 8 p.m.; and from 12:01 a.m. Saturday to 12:01 a.m. Monday. Weekdays additional bridge openings shall be provided for commercial vessels from 6 a.m. to 7:20 a.m.; 9:20 a.m. to 10 a.m.; 4 p.m. to 4:30 p.m. and from 6:50 p.m. to 8 p.m. provided at least a two-hour advance notice is given by calling the number posted at the bridge.

Dated: October 12, 2018.

A.J. Tiongson,

Rear Admiral, U.S. Coast Guard, Commander, First Coast Guard District.

[FR Doc. 2018–23596 Filed 10–26–18; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 4

RIN 2900–AO19

Schedule for Rating Disabilities: The Hematologic and Lymphatic Systems

AGENCY: Department of Veterans Affairs.

ACTION: Final rule.

SUMMARY: This document amends the Department of Veterans Affairs (VA) Schedule for Rating Disabilities (VASRD) by revising the section of the Rating Schedule that addresses the hematologic and lymphatic systems. This action will ensure VA uses current medical terminology and provides detailed and updated criteria for evaluating conditions pertaining to the hematologic and lymphatic systems.

DATES: This rule is effective on December 9, 2018.

FOR FURTHER INFORMATION CONTACT: Ioulia Vvedenskaya, M.D., M.B.A., Medical Officer, Part 4 VASRD Regulations Staff (211C), Compensation Service, Veterans Benefits Administration, Department of Veterans Affairs, 810 Vermont Avenue NW, Washington, DC 20420, (202) 461–9700. (This is not a toll-free telephone number.)

SUPPLEMENTARY INFORMATION: VA published a proposed rule in the **Federal Register** at 80 FR 46888 on August 6, 2015, to amend the portion of the VASRD dealing with the hematologic and lymphatic systems. VA provided a 60-day public comment period and invited interested persons to submit written comments, suggestions, or objections on or before October 5, 2015. VA received 11 comments.

I. Purpose of the Final Rule

VA revises the section of the VASRD that addresses the hematologic and lymphatic systems. This final rule updates medical terminology, adds certain hematologic diseases, and provides detailed and updated criteria for evaluating conditions pertaining to the hematologic and lymphatic systems.

II. Technical Corrections

In the proposed rule, VA proposed a new diagnostic code (DC) 7720, Iron deficiency anemia. In its review of the final rule, VA realized that the proposed text for 10 percent disability rating contained an error. Namely, VA required continuous treatment with high-dose oral supplementation for a 10 percent disability rating, rather than intravenous iron infusions at least 1 time but less than 4 times per 12-month period, or continuous treatment with oral supplementation. This document corrects this error by amending the proposed text to read as follows: ''Requiring intravenous iron infusions at least 1 time but less than 4 times per 12-month period, or requiring continuous treatment with oral supplementation.'' The proposed rule specified that a zero-percent rating would be warranted if the condition is asymptomatic or treatable by dietary restrictions only. Implicit in the proposed rule was the premise that, if the condition requires intravenous treatment less often than required for a 30-percent rating, then a 10 percent rating would be warranted. This final rule makes that premise explicit in DC 7720.

In the proposed rule, VA introduced amended criteria for the 100 percent evaluation in DC 7702 based on the requirement for bone marrow transplant or infections recurring at least once every six weeks per 12-month period. Upon further review, VA inadvertently omitted a semicolon between these two criteria, which could lead to confusion as to the application of the 100 percent criteria. To clarify that these two criteria are separate and distinct and that only one is required to establish a 100 percent evaluation, VA is inserting a semicolon after ''transplant'';

In the proposed rule, VA introduced criteria for DCs 7714, 7720, 7723, and 7725 which measured the occurrence of infections (7725), painful episodes (7714), transfusions (7725), infusions (7720), or medication usage (7723) based on the ''average'' number of episodes per 12-month period. Upon further review, VA determined that including ''average'' in calculating the number of episodes required by the given criteria will result in unclear guidance and inconsistent application of the VASRD, in direct conflict with one of the stated goals of the VASRD revisions. Additionally, references to the average number of episodes per 12-month period might suggest that evaluations should in all instances be based on the average frequency of the episodes over an unspecified number of years. Although VA must evaluate conditions ''in relation to [their] history,'' 38 CFR 4.1, there may be instances where there has been a discernible change in the severity of a condition and it is more appropriate to evaluate the disability primarily on current manifestations than on an average of the manifestations over a number of prior years. Accordingly, to increase consistency in the application of the criteria, promote clarity in the requirements for each evaluation level, and to ensure that evaluations may reflect changes in a condition's severity and the frequency of episodes, VA will remove the reference to ''average'' from the criteria in DCs 7714, 7720, 7723, and 7725 and replace it with a quantifiable range at each criteria level. This change to the language does not result to any substantive changes to the criteria in the identified DCs.

Additionally, in DC 7705, VA inadvertently omitted semicolons between these distinct criteria in the 100, 70, and 0 percent evaluations, which could lead to confusion as to the application of these evaluation levels. To reiterate and clarify that the criteria in these evaluation levels are separate and distinct, and that only one is required to establish a given evaluation, VA is inserting a semicolon between the criteria for clarification purposes. No substantive change to the evaluation criteria results from this change.

In the proposed rule, VA introduced several changes to DC 7704, Polycythemia vera, including a revision for a 30 percent disability rating. Namely, for a 30 percent disability rating, VA required phlebotomy 4–5 times per 12-month period or continuous biologic therapy or myelosuppressive agents to maintain platelets <200,000 or white blood cells (WBC) <12,000. VA would like to clarify that myelosuppressive agents, which are used to maintain platelets <200,000 or white blood cells (WBC) <12,000, include interferon. This document includes this clarification by amending the proposed text to read as follows: ''Requiring phlebotomy 4–5 times per 12-month period, or if requiring continuous biologic therapy or myelosuppressive agents, to include interferon, to maintain platelets <200,000 or white blood cells (WBC) <12,000.'' VA also makes a clarifying change in the proposed text for 60 percent disability amending the reference to ''targeted agents such as imatinib or ruxolitinib'' to ''molecularly targeted therapy,'' which includes imatinib, ruxolitinib, and other agents. Upon further review, VA has determined that including the ''chemotherapy'' reference in the evaluation criteria at both the 60 percent and 100 percent levels in the proposed rule would create a conflict such that the criteria could not be applied consistently and accurately, potentially resulting in over- and under-evaluation. Accordingly, to increase consistency in the application of the criteria, promote clarity in the requirements for each evaluation level, and to ensure the VASRD criteria do not conflict with the guidance set forth in Note 3, VA will remove the reference to ''chemotherapy'' from the criteria in proposed DC 7704 for the 60 percent rating criteria. Because the requirement for chemotherapy supports a 100 percent rating, this change to the criteria for the lower 60 percent rating will not affect any claims but will eliminate potential confusion. Additionally, VA made an editorial change to the proposed language. Namely, VA clarified the 60 percent disability rating criteria to read as follows: ''Requiring phlebotomy 6 or more times per 12-month period or molecularly targeted therapy for the purpose of controlling RBC count.'' This change to the language does not result in any substantive changes to the criteria in the identified DC.

VA also corrects the spelling of ''myelosuppressive,'' which was misspelled in the proposed regulatory text.

Additionally, VA realized that the proposed text for 10 percent disability rating under DC 7704 contained a grammatical error that would have made the rule more confusing and difficult to apply than VA intended. Namely, VA identified a 10 percent disability rating in the proposed rule as: ''Requiring phlebotomy, biologic therapy, or interferon on an intermittent basis, as needed, 3 or fewer times per 12-month

period.'' VA did not intend to apply two different frequency standards—*i.e.,* ''on an intermittent basis'' and ''3 or fewer times per 12-month period''—to the same events, but the proposed text could suggest that both standards apply to each of the listed events. Rather, consistent with the requirements for the 60 percent and 30 percent ratings, VA intended that the ''3 or fewer times per 12-month period'' requirement would apply only to phlebotomy, and that the ''on an intermittent basis'' requirement would apply to the other listed treatments. In order to increase consistency in the application of the criteria and promote clarity in the requirements for each evaluation level, VA has included additional reference to the outcome of the treatment for polycythemia vera for 10 percent and 100 percent evaluation levels. This document corrects the above-referenced grammatical error and includes additional guidance by amending the proposed text for 10 percent evaluation to read as follows: ''Requiring phlebotomy 3 or fewer times per 12-month period or if requiring biologic therapy or interferon on an intermittent basis as needed to maintain all blood levels at reference range levels.'' Additionally, VA amends the proposed text for 100 percent evaluation to read as follows: ''Requiring peripheral blood or bone marrow stem-cell transplant or chemotherapy (including myelosuppressants) for the purpose of ameliorating the symptom burden.''

In the proposed rule, VA proposed several changes to DC 7705, including criteria based on platelet counts. VA specifically proposed to assign a 100 percent evaluation for platelet count below 30,000. However, for the 70 percent criteria, which apply in circumstances involving a platelet count higher than 30,000, VA omitted criteria for when platelet count is at 30,000. Accordingly, VA has changed the 100 percent criteria to read ''platelet count 30,000 or below'' to avoid a gap in the platelet count range considered in the evaluation criteria.

In the proposed rule, VA introduced several changes to DC 7716, Aplastic anemia, including a revision for a 60 percent disability rating. Namely, for a 60 percent rating, VA required the use of continuous immunosuppressive therapy. In order to capture the full range of therapeutic agents that are used to treat this condition, VA makes a clarifying change that amends the proposed text to reference the use of ''newer platelet stimulating factors'' in the evaluation criteria. Additionally, VA has added an explanatory note (2) regarding the definition of ''newer platelet stimulating factors'' for clarification purposes and redesignated the existing note as note (1).

In the proposed rule, VA introduced several changes to DC 7718, Essential thrombocythemia and primary myelofibrosis, including revisions for 70 and 30 percent disability ratings. Namely, for 70 and 30 percent ratings, VA required the use of continuous or intermittent myelosuppressive therapy. In order to capture the full range of therapeutic agents that are used to treat these conditions, VA makes a clarifying change that amends the proposed text for 70 percent disability rating to read as follows: ''Requiring continuous or intermittent myelosuppressive therapy, or chemotherapy, or interferon treatment to maintain platelet count $< 500 \times 10^9$/L.'' VA makes a clarifying change that amends the proposed text for 30 percent disability rating to read as follows: ''Requiring continuous or intermittent myelosuppressive therapy, or chemotherapy, or interferon treatment to maintain platelet count of 200,000–400,000, or white blood cell (WBC) count of 4,000–10,000.''

In the proposed rule, VA introduced several changes to DC 7719, Chronic myelogenous leukemia (CML) (chronic myeloid leukemia or chronic granulocytic leukemia), including revisions for 60 and 30 percent disability ratings. Namely, for 60 and 30 percent ratings, VA required the use of targeted therapy with tyrosine kinase inhibitors. In order to capture the full range of targeted therapy agents that are used to treat these conditions, VA makes a clarifying change that amends the proposed text for 60 percent disability rating to read as follows: ''Requiring intermittent myelosuppressive therapy, or molecularly targeted therapy with tyrosine kinase inhibitors, or interferon treatment when not in apparent remission.'' VA makes a clarifying change that amends the proposed text for 30 percent disability rating to read as follows: ''In apparent remission on continuous molecularly targeted therapy with tyrosine kinase inhibitors.''

III. Public Comments

One commenter asked why the hematological system did not include Lyme disease. Lyme disease is an infectious disease evaluated under 38 CFR 4.88b. DC 6319 specifically addresses Lyme disease and its residuals. Therefore, VA makes no changes based on this comment.

One commenter urged VA to include in the rating schedule the debilitating side effects of daily tyrosine kinase inhibitors (TKIs) therapy for chronic myelogenous leukemia (CML). In the proposed rule, DC 7719 assigns a 60 percent evaluation for intermittent myelosuppressive therapy, or targeted therapy with TKIs, such as ruxolitinib, and a 100 percent evaluation for continuous myelosuppressive or immunosuppressive therapy. However, in cases of debilitating side effects of therapy for a service-connected disease, such as CML, VA may grant service connection on a secondary basis for disabilities that are proximately due to, or aggravated by, service-connected disease or injury pursuant to 38 CFR 3.310. Therefore, VA makes no changes based on this comment.

Another commenter suggested separating evaluations for pernicious anemia from evaluations for Vitamin B_{12} deficiency anemia. Pernicious anemia is caused by too little Vitamin B_{12}; it is one form of Vitamin B_{12} deficiency anemia. VA recognizes the importance of separating pernicious anemia from Vitamin B_{12} deficiency anemia for diagnosis and treatment. However, for disability compensation, VA evaluates common signs and symptoms and functional impairment of Vitamin B_{12} deficiency, also seen in pernicious anemia, under one diagnostic code. Therefore, VA makes no changes based on this comment.

The same commenter noted that anemia secondary to autoimmune pernicious anemia is not corrected but maintained by Vitamin B_{12} injections. VA agrees. In the proposed rule, DC 7722 provides a 10 percent evaluation for pernicious anemia and other forms of severe Vitamin B_{12} deficiency if it requires continuous treatment with Vitamin B_{12} injections, Vitamin B_{12} sublingual or high-dose oral tablets, or Vitamin B_{12} nasal spray or gel. Therefore, VA makes no changes based on this comment.

The same commenter suggested including all body systems sequelae of pernicious anemia into hematologic system evaluations. In cases when debilitating effects of pernicious anemia affect other body systems, VA may grant service connection on a secondary basis for disabilities that are proximately due to, or aggravated by, service-connected disease or injury, pursuant to 38 CFR 3.310. Therefore, VA makes no changes based on this comment.

The same commenter suggested VA conduct a study to determine whether the degree of neurologic or gastrointestinal residuals correlates with treatment variations. While VA appreciates this comment, it is beyond the scope of this rulemaking. Therefore, VA makes no changes based on it.

The same commenter expressed concern regarding the application of 38 CFR 3.105(e), which governs reduction in evaluation, to evaluate the debilitating residual effects of pernicious anemia. However, VA may grant service connection on a secondary basis for disabilities that are proximately due to, or aggravated by, service-connected disease or injury pursuant to 38 CFR 3.310. Therefore, VA makes no changes based on this comment.

One commenter discussed his current treatment for chronic myeloid leukemia and its side effects. The commenter did not offer any specific suggestions or recommendations for this rulemaking. Therefore, VA makes no changes based on this comment.

Another commenter urged the Federal Communications Commission (FCC) to reconsider regulating open-source software. This comment is beyond the scope of this rulemaking, so VA makes no changes based on it.

Two commenters indicated that security and privacy issues are important to them. The commenters did not offer any specific suggestions or recommendations for this rulemaking. Therefore, VA makes no changes based on these comments.

One commenter discussed his brother's diagnosis of chronic myeloid leukemia and military service in Vietnam. The commenter did not offer any specific suggestions or recommendations for this rulemaking. Therefore, VA makes no changes based on this comment.

Another commenter discussed his diagnosis of chronic myeloid leukemia, its side effects, and his military service in Vietnam. The commenter expressed his satisfaction with updates to the hematologic section of the rating schedule, which includes evaluations for chronic myeloid leukemia. The commenter did not offer any specific suggestions or recommendations for this rulemaking. Therefore, VA makes no changes based on this comment.

One commenter was supportive of many of the changes and additions made to the hematologic and lymphatic sections of the VASRD, which include new diagnostic codes for common disorders, clarifying notes on residuals affecting other body systems, and recognizing common side effects of various treatments. The commenter offered two minor suggestions regarding rating criteria for multiple myeloma (DC 7712) and acquired hemolytic anemia (DC 7723).

The commenter suggests deleting Note 2, Note 3, and part of Note 1 under DC 7712 in order to simplify the rating process. VA agrees and removes the references to specific laboratory values by deleting Note (2) and Note (3). VA edits Note (1) by removing the references to specific laboratory values and replaces them with more general references to what are acceptable for the diagnosis of multiple myeloma as defined by the American Society of Hematology (ASH) and International Myeloma Working Group. Lastly, VA renumbers the proposed Note (4) to become Note (2).

The same commenter suggested including two additional treatment modalities for acquired hemolytic anemia under DC 7723. The commenter noted that, according to guidelines of the National Institutes of Health, the National Heart, Lung, and Blood Institute, and ASH, treatments for symptomatic acquired hemolytic anemia may include blood transfusion or plasmapheresis. VA identifies four levels of disability for symptomatic acquired hemolytic anemia, each of which includes blood transfusion or plasmapheresis. The defining feature for each level of disability is the frequency of immunosuppressive therapy or the need for a bone marrow transplant. Therefore, VA makes no changes based on this comment.

Another commenter noted that further revisions are needed for hematologic and lymphatic section of the VASRD to ensure its congruency with current understanding of hematologic diseases. The commenter offered multiple recommendations on selected diagnostic codes.

The commenter recommended deleting the references to obsolete or never used treatments. VA agrees and removes all references to treatment with radioactive phosphorus (DCs 7704, 7718, 7719, and 7725), imantib (DC 7704), interferon alpha (DC 7725), and multiple references to outdated laboratory values under DCs 7705 and 7712, Note (1). Proposed DC 7705 referred to a platelet count range from 20,000 to 30,000 despite treatment under a 100-percent rating level. The final rule revises this value to include all platelet counts of 30,000 or below.

The commenter noted that various anemia sections (DCs 7714, 7716, 7720, 7722, and 7723) did not link to comorbidities, such as cardiac disease and chronic obstructive pulmonary disease. The commenter advised VA to revise anemia DCs to include comorbidities because different hemoglobin levels might have vastly different implications in patients with cardiac disease, chronic obstructive pulmonary disease, or other significant comorbid conditions. As the hematopoietic system supports other cells or organs of the body, VA assigns disability ratings resulting from identifiable defects in these organs due to hematologic disease. The hematologic rating does not generally include the physiologic effects on the function of other end-organs. For example, very severe anemia can reduce oxygen delivery to the point where the individual suffers a myocardial infarction. The disability ratings for both the anemia and the myocardial infarction would be rated separately and then combined. VA may grant service connection on a secondary basis for disabilities that are proximately due to, or aggravated by, service connected disease or injury pursuant to 38 CFR 3.310. Therefore, VA makes no changes based on this comment.

The commenter noted that current practice infrequently transplants bone marrow to treat agranulocytosis (DC 7702). Additionally, current medical protocol never uses platelet and red cell transfusions. Even though use of bone marrow transplants may be infrequent, the fact that it is still used for cases that do not respond to other types of treatment justifies including it as part of the 100 percent rating criteria. Additionally, the proposed rule does not refer to platelet and red cell transfusions for the treatment of agranulocytosis. Therefore, VA makes no changes based on this comment.

The commenter indicated that current practice does not use radioactive phosphorus or interferon alpha to treat myelodysplastic syndromes (DC 7725). VA agrees and removes all references to such treatment from this DC.

The commenter suggested editing platelet count reference for a 100 percent evaluation under DC 7705, Immune thrombocytopenia. ASH guidelines for immune thrombocytopenia recommend treatment for patients with platelet counts below 30,000. VA agrees and replaces the reference to ''a platelet count from 20,000 to 30,000'' under DC 7705 with ''a platelet count 30,000 or below despite treatment''.

The commenter noted that the 100 percent evaluation under DC 7705 included chemotherapy but the relevance of immunosuppressive therapy to this evaluation was unclear. However, VA did not intend to include immunosuppressive therapy as part of a 100 percent evaluation. VA includes immunosuppressive therapy as part of a 70 percent evaluation. Therefore, VA makes no changes based on this comment.

The commenter noted that recent advances in medicine have identified

conditions called monoclonal gammopathy of undetermined significance (MGUS) and smoldering myeloma, which are not acute myeloma but may indicate a future need for treatment. The commenter suggested removing an outdated reference to indolent myeloma from DC 7712 and replacing it with MGUS. VA agrees and removes the reference to indolent myeloma from DC 7712 and replaces the reference with MGUS.

VA appreciates the comments submitted in response to the proposed rule. Based on the rationale stated in the proposed rule and in this document, the final rule is adopted with the changes noted.

We are additionally adding updates to 38 CFR part 4, Appendices A, B, and C, to reflect changes to the hematologic and lymphatic systems rating criteria made by this rulemaking. VA designs the appendices for users of the VASRD. They do not contain substantive content regarding disability evaluations.

Executive Orders 12866, 13563 and 13771

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, and other advantages; distributive impacts; and equity). Executive Order 13563 (Improving Regulation and Regulatory Review) emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. Executive Order 12866 (Regulatory Planning and Review) defines a ''significant regulatory action'' requiring review by the Office of Management and Budget (OMB), unless OMB waives such review, as ''any regulatory action that is likely to result in a rule that may: (1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive Order.''

The economic, interagency, budgetary, legal, and policy implications of this regulatory action have been examined, and it has been determined not to be a significant regulatory action under Executive Order 12866. VA's impact analysis can be found as a supporting document at *http://www.regulations.gov,* usually within 48 hours after the rulemaking document is published. Additionally, a copy of this rulemaking and its impact analysis are available on VA's website at *http://www.va.gov/orpm/,* by following the link for ''VA Regulations Published From FY 2004 Through Fiscal Year to Date.''

This rule is not an Executive Order 13771 regulatory action because this rule is not significant under Executive Order 12866.

Regulatory Flexibility Act

The Secretary hereby certifies that this final rule will not have a significant economic impact on a substantial number of small entities as defined in the Regulatory Flexibility Act, 5 U.S.C. 601–612. This final rule will not affect any small entities. Only certain VA beneficiaries could be directly affected. Therefore, pursuant to 5 U.S.C. 605(b), this rulemaking is exempt from the initial and final regulatory flexibility analysis requirements of sections 603 and 604.

Unfunded Mandates

The Unfunded Mandates Reform Act of 1995 requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before issuing any rule that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more (adjusted annually for inflation) in any one year. This final rule will have no such effect on State, local, and tribal governments, or on the private sector.

Paperwork Reduction Act

This final rule contains provisions constituting a collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3521). Specifically, this final rule is associated with information collections related to the filing of disability claims (VA Form 21–526EZ) as well as Disability Benefits Questionnaires (DBQs) which enable a claimant to gather the necessary information from his or her treating physician as to the current symptoms and severity of a disability. Both information collections are currently approved by the Office of Management and Budget (OMB) and have been assigned OMB control Numbers 2900–0749 and 2900–0779, respectively. There are no changes to any of these information collections and, thus, no incremental costs associated with this rulemaking.

Catalog of Federal Domestic Assistance

The Catalog of Federal Domestic Assistance program numbers and titles for this rule are 64.104, Pension for Non-Service-Connected Disability for Veterans; 64.109, Veterans Compensation for Service-Connected Disability; and 64.110, Veterans Dependency and Indemnity Compensation for Service-Connected Death.

List of Subjects in 38 CFR Part 4

Disability benefits, Pensions, Veterans.

Signing Authority

The Secretary of Veterans Affairs approved this document and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs. Robert L. Wilkie, Secretary, Department of Veterans Affairs, approved this document on October 23, 2018, for publication.

Dated: October 23, 2018.

Jeffrey M. Martin,

Assistant Director, Office of Regulation Policy & Management, Office of the Secretary, Department of Veterans Affairs.

For the reasons set out in the preamble, the Department of Veterans Affairs amends 38 CFR part 4, subpart B as follows:

PART 4—SCHEDULE FOR RATING DISABILITIES

Subpart B—Disability Ratings

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

Authority: 38 U.S.C. 1155, unless otherwise noted.

■ 2. Revise the undesignated center heading preceding § 4.117 to read as follows:

The Hematologic and Lymphatic Systems

■ 3. Amend § 4.117 by:

■ a. Removing the entry for diagnostic code 7700;

■ b. Revising the entries for diagnostic codes 7702 through 7706, 7709, 7710 and 7714 through 7716;

■ c. Adding, in numerical order, an entry for diagnostic code 7712 and 7718 through 7725.

The revisions, and additions to read as follows:

§ 4.117 Schedule of ratings—hematologic and lymphatic systems

	Rating
7702 Agranulocytosis, acquired:	
Requiring bone marrow transplant; or infections recurring, on average, at least once every six weeks per 12-month period	100
Requiring intermittent myeloid growth factors (granulocyte colony-stimulating factor (G–CSF) or granulocyte-macrophage colony-stimulating factor (GM–CSF) or continuous immunosuppressive therapy such as cyclosporine to maintain absolute neutrophil count (ANC) greater than 500/microliter (μl) but less than 1000/μl; or infections recurring, on average, at least once every three months per 12-month period	60
Requiring intermittent myeloid growth factors to maintain ANC greater than 1000/μl; or infections recurring, on average, at least once per 12-month period but less than once every three months per 12-month period	30
Requiring continuous medication (e.g., antibiotics) for control; or requiring intermittent use of a myeloid growth factor to maintain ANC greater than or equal to 1500/μl	10
Note: A 100 percent evaluation for bone marrow transplant shall be assigned as of the date of hospital admission and shall continue with a mandatory VA examination six months following hospital discharge. Any change in evaluation based upon that or any subsequent examination shall be subject to the provisions of § 3.105(e) of this chapter.	
7703 Leukemia (except for chronic myelogenous leukemia):	
When there is active disease or during a treatment phase	100
Otherwise rate residuals under the appropriate diagnostic code(s).	
Chronic lymphocytic leukemia or monoclonal B-cell lymphocytosis (MBL), asymptomatic, Rai Stage	0
Note (1): A 100 percent evaluation shall continue beyond the cessation of any surgical therapy, radiation therapy, antineoplastic chemotherapy, or other therapeutic procedures. Six months after discontinuance of such treatment, the appropriate disability rating shall be determined by mandatory VA examination. Any change in evaluation based upon that or any subsequent examination shall be subject to the provisions of § 3.105(e) of this chapter. If there has been no recurrence, rate on residuals.	
Note (2): Evaluate symptomatic chronic lymphocytic leukemia that is at Rai Stage I, II, III, or IV the same as any other leukemia evaluated under this diagnostic code.	
Note (3): Evaluate residuals of leukemia or leukemia therapy under the appropriate diagnostic code(s). Myeloproliferative Disorders: (Diagnostic Codes 7704, 7718, 7719).	
7704 Polycythemia vera:	
Requiring peripheral blood or bone marrow stem-cell transplant or chemotherapy (including myelosuppressants) for the purpose of ameliorating the symptom burden	100
Requiring phlebotomy 6 or more times per 12-month period or molecularly targeted therapy for the purpose of controlling RBC count	60
Requiring phlebotomy 4–5 times per 12-month period, or if requiring continuous biologic therapy or myelosuppressive agents, to include interferon, to maintain platelets <200,000 or white blood cells (WBC) <12,000	30
Requiring phlebotomy 3 or fewer times per 12-month period or if requiring biologic therapy or interferon on an intermittent basis as needed to maintain all blood values at reference range levels	10
Note (1): Rate complications such as hypertension, gout, stroke, or thrombotic disease separately.	
Note (2): If the condition undergoes leukemic transformation, evaluate as leukemia under diagnostic code 7703.	
Note (3): A 100 percent evaluation shall be assigned as of the date of hospital admission for peripheral blood or bone marrow stem cell transplant; or during the period of treatment with chemotherapy (including myelosuppressants). Six months following hospital discharge or, in the case of chemotherapy treatment, six months after completion of treatment, the appropriate disability rating shall be determined by mandatory VA examination. Any reduction in evaluation based upon that or any subsequent examination shall be subject to the provisions of § 3.105(e) of this chapter.	
7705 Immune thrombocytopenia:	
Requiring chemotherapy for chronic refractory thrombocytopenia; or a platelet count 30,000 or below despite treatment	100
Requiring immunosuppressive therapy; or for a platelet count higher than 30,000 but not higher than 50,000, with history of hospitalization because of severe bleeding requiring intravenous immune globulin, high-dose parenteral corticosteroids, and platelet transfusions	70
Platelet count higher than 30,000 but not higher than 50,000, with either immune thrombocytopenia or mild mucous membrane bleeding which requires oral corticosteroid therapy or intravenous immune globulin	30
Platelet count higher than 30,000 but not higher than 50,000, not requiring treatment	10
Platelet count above 50,000 and asymptomatic; or for immune thrombocytopenia in remission	0
Note (1): Separately evaluate splenectomy under diagnostic code 7706 and combine with an evaluation under this diagnostic code.	
Note (2): A 100 percent evaluation shall continue beyond the cessation of chemotherapy. Six months after discontinuance of such treatment, the appropriate disability rating shall be determined by mandatory VA examination. Any reduction in evaluation based upon that or any subsequent examination shall be subject to the provisions of § 3.105(e) of this chapter.	
7706 Splenectomy	20
Note: Separately rate complications such as systemic infections with encapsulated bacteria.	
* * * * * * *	
7709 Hodgkin's lymphoma:	
With active disease or during a treatment phase	100
Note: A 100 percent evaluation shall continue beyond the cessation of any surgical therapy, radiation therapy, antineoplastic chemotherapy, or other therapeutic procedures. Six months after discontinuance of such treatment, the appropriate disability rating shall be determined by mandatory VA examination. Any reduction in evaluation based upon that or any subsequent examination shall be subject to the provisions of § 3.105(e) of this chapter. If there has been no local recurrence or metastasis, rate on residuals under the appropriate diagnostic code(s).	
7710 Adenitis, tuberculous, active or inactive:	
Rate under § 4.88c or 4.89 of this part, whichever is appropriate.	
7712 Multiple myeloma:	
Symptomatic multiple myeloma	100

	Rating
Asymptomatic, smoldering, or monoclonal gammopathy of undetermined significance (MGUS)	0
Note (1): Current validated biomarkers of symptomatic multiple myeloma and asymptomatic multiple myeloma, smoldering, or monoclonal gammopathy of undetermined significance (MGUS) are acceptable for the diagnosis of multiple myeloma as defined by the American Society of Hematology (ASH) and International Myeloma Working Group (IMWG).	
Note (2): The 100 percent evaluation shall continue for five years after the diagnosis of symptomatic multiple myeloma, at which time the appropriate disability evaluation shall be determined by mandatory VA examination. Any reduction in evaluation based upon that or any subsequent examination shall be subject to the provisions of § 3.105(e) and § 3.344 (a) and (b) of this chapter.	
7714 Sickle cell anemia:	
With at least 4 or more painful episodes per 12-month period, occurring in skin, joints, bones, or any major organs, caused by hemolysis and sickling of red blood cells, with anemia, thrombosis, and infarction, with residual symptoms precluding even light manual labor	100
With 3 painful episodes per 12-month period or with symptoms precluding other than light manual labor	60
With 1 or 2 painful episodes per 12-month period	30
Asymptomatic, established case in remission, but with identifiable organ impairment	10
Note: Sickle cell trait alone, without a history of directly attributable pathological findings, is not a ratable disability. Cases of symptomatic sickle cell trait will be forwarded to the Director, Compensation Service, for consideration under § 3.321(b)(1) of this chapter.	
7715 Non-Hodgkin's lymphoma:	
When there is active disease, during treatment phase, or with indolent and non-contiguous phase of low grade NHL	100
Note: A 100 percent evaluation shall continue beyond the cessation of any surgical therapy, radiation therapy, antineoplastic chemotherapy, or other therapeutic procedures. Two years after discontinuance of such treatment, the appropriate disability rating shall be determined by mandatory VA examination. Any reduction in evaluation based upon that or any subsequent examination shall be subject to the provisions of § 3.105(e) of this chapter. If there has been no recurrence, rate on residuals under the appropriate diagnostic code(s).	
7716 Aplastic anemia:	
Requiring peripheral blood or bone marrow stem cell transplant; or requiring transfusion of platelets or red cells, on average, at least once every six weeks per 12-month period; or infections recurring, on average, at least once every six weeks per 12-month period	100
Requiring transfusion of platelets or red cells, on average, at least once every three months per 12-month period; or infections recurring, on average, at least once every three months per 12-month period; or using continuous therapy with immunosuppressive agent or newer platelet stimulating factors	60
Requiring transfusion of platelets or red cells, on average, at least once per 12-month period; or infections recurring, on average, at least once per 12-month period	30
Note (1): A 100 percent evaluation for peripheral blood or bone marrow stem cell transplant shall be assigned as of the date of hospital admission and shall continue with a mandatory VA examination six months following hospital discharge. Any change in evaluation based upon that or any subsequent examination shall be subject to the provisions of § 3.105(e) of this chapter.	
Note (2): The term ''newer platelet stimulating factors'' includes medication, factors, or other agents approved by the United States Food and Drug Administration.	
* * * * * * *	
7718 Essential thrombocythemia and primary myelofibrosis:	
Requiring either continuous myelosuppressive therapy or, for six months following hospital admission, peripheral blood or bone marrow stem cell transplant, or chemotherapy, or interferon treatment	100
Requiring continuous or intermittent myelosuppressive therapy, or chemotherapy, or interferon treatment to maintain platelet count $<500 \times 10^9$/L	70
Requiring continuous or intermittent myelosuppressive therapy, or chemotherapy, or interferon treatment to maintain platelet count of 200,000–400,000, or white blood cell (WBC) count of 4,000–10,000	30
Asymptomatic	0
Note (1): If the condition undergoes leukemic transformation, evaluate as leukemia under diagnostic code 7703.	
Note (2): A 100 percent evaluation shall be assigned as of the date of hospital admission for peripheral blood or bone marrow stem cell transplant; or during the period of treatment with chemotherapy (including myelosuppressants). Six months following hospital discharge or, in the case of chemotherapy treatment, six months after completion of treatment, the appropriate disability rating shall be determined by mandatory VA examination. Any reduction in evaluation based upon that or any subsequent examination shall be subject to the provisions of § 3.105(e) of this chapter.	
7719 Chronic myelogenous leukemia (CML) (chronic myeloid leukemia or chronic granulocytic leukemia):	
Requiring peripheral blood or bone marrow stem cell transplant, or continuous myelosuppressive or immunosuppressive therapy treatment	100
Requiring intermittent myelosuppressive therapy, or molecularly targeted therapy with tyrosine kinase inhibitors, or interferon treatment when not in apparent remission	60
In apparent remission on continuous molecularly targeted therapy with tyrosine kinase inhibitors	30
Note (1): If the condition undergoes leukemic transformation, evaluate as leukemia under diagnostic code 7703.	
Note (2): A 100 percent evaluation shall be assigned as of the date of hospital admission for peripheral blood or bone marrow stem cell transplant; or during the period of treatment with chemotherapy (including myelosuppressants). Six months following hospital discharge or, in the case of chemotherapy treatment, six months after completion of treatment, the appropriate disability rating shall be determined by mandatory VA examination. Any reduction in evaluation based upon that or any subsequent examination shall be subject to the provisions of § 3.105 of this chapter.	
7720 Iron deficiency anemia:	
Requiring intravenous iron infusions 4 or more times per 12-month period	30
Requiring intravenous iron infusions at least 1 time but less than 4 times per 12-month period, or requiring continuous treatment with oral supplementation	10
Asymptomatic or requiring treatment only by dietary modification	0

	Rating
Note: Do not evaluate iron deficiency anemia due to blood loss under this diagnostic code. Evaluate iron deficiency anemia due to blood loss under the criteria for the condition causing the blood loss.	
7721 Folic acid deficiency:	
Requiring continuous treatment with high-dose oral supplementation	10
Asymptomatic or requiring treatment only by dietary modification	0
7722 Pernicious anemia and Vitamin B_{12} deficiency anemia:	
For initial diagnosis requiring transfusion due to severe anemia, or if there are signs or symptoms related to central nervous system impairment, such as encephalopathy, myelopathy, or severe peripheral neuropathy, requiring parenteral B_{12} therapy	100
Requiring continuous treatment with Vitamin B_{12} injections, Vitamin B_{12} sublingual or high-dose oral tablets, or Vitamin B_{12} nasal spray or gel	10
Note: A 100 percent evaluation for pernicious anemia and Vitamin B_{12} deficiency shall be assigned as of the date of the initial diagnosis requiring transfusion due to severe anemia or parenteral B_{12} therapy and shall continue with a mandatory VA examination six months following hospital discharge or cessation of parenteral B_{12} therapy. Any reduction in evaluation based upon that or any subsequent examination shall be subject to the provisions of § 3.105(e) of this chapter. Thereafter, evaluate at 10 percent and separately evaluate any residual effects of pernicious anemia, such as neurologic involvement causing peripheral neuropathy, myelopathy, dementia, or related gastrointestinal residuals, under the most appropriate diagnostic code.	
7723 Acquired hemolytic anemia:	
Requiring a bone marrow transplant or continuous intravenous or immunosuppressive therapy (e.g., prednisone, Cytoxan, azathioprine, or rituximab)	100
Requiring immunosuppressive medication 4 or more times per 12-month period	60
Requiring at least 2 but less than 4 courses of immunosuppressive therapy per 12-month period	30
Requiring one course of immunosuppressive therapy per 12-month period	10
Asymptomatic	0
Note (1): A 100 percent evaluation for bone marrow transplant shall be assigned as of the date of hospital admission and shall continue for six months after hospital discharge with a mandatory VA examination six months following hospital discharge. Any reduction in evaluation based upon that or any subsequent examination shall be subject to the provisions of § 3.105(e) of this chapter.	
Note (2): Separately evaluate splenectomy under diagnostic code 7706 and combine with an evaluation under diagnostic code 7723.	
7724 Solitary plasmacytoma:	
Solitary plasmacytoma, when there is active disease or during a treatment phase	100
Note (1): A 100 percent evaluation shall continue beyond the cessation of any surgical therapy, radiation therapy, antineoplastic chemotherapy, or other therapeutic procedures (including autologous stem cell transplantation). Six months after discontinuance of such treatment, the appropriate disability rating shall be determined by mandatory VA examination. Any change in evaluation based upon that or any subsequent examination shall be subject to the provisions of § 3.105(e) of this chapter. If there has been no recurrence, rate residuals under the appropriate diagnostic codes.	
Note (2): Rate a solitary plasmacytoma that has developed into multiple myeloma as symptomatic multiple myeloma.	
Note (3): Rate residuals of plasma cell dysplasia (e.g., thrombosis) and adverse effects of medical treatment (e.g., neuropathy) under the appropriate diagnostic codes.	
7725 Myelodysplastic syndromes:	
Requiring peripheral blood or bone marrow stem cell transplant; or requiring chemotherapy	100
Requiring 4 or more blood or platelet transfusions per 12-month period; or infections requiring hospitalization 3 or more times per 12-month period	60
Requiring at least 1 but no more than 3 blood or platelet transfusions per 12-month period; infections requiring hospitalization at least 1 but no more than 2 times per 12-month period; or requiring biologic therapy on an ongoing basis or erythropoiesis stimulating agent (ESA) for 12 weeks or less per 12-month period	30
Note (1): If the condition progresses to leukemia, evaluate as leukemia under diagnostic code 7703.	
Note (2): A 100 percent evaluation shall be assigned as of the date of hospital admission for peripheral blood or bone marrow stem cell transplant, or during the period of treatment with chemotherapy, and shall continue with a mandatory VA examination six months following hospital discharge or, in the case of chemotherapy treatment, six months after completion of treatment. Any reduction in evaluation based upon that or any subsequent examination shall be subject to the provisions of § 3.105(e) of this chapter. If there has been no recurrence, residuals will be rated under the appropriate diagnostic codes.	

■ 3. Amend Appendix A to Part 4 by:

■ a. Revising the entries for diagnostic codes 7700, 7702 through 7706, 7709 through 7710, and 7714 through 7716;

■ b. Adding, in numerical order, an entry for diagnostic code 7712 and 7718 through 7725.

The revisions and additions read as follows:

Appendix A to Part 4—Table of Amendments and Effective Dates Since 1946

Sec.	Diagnostic code No.	
*	*	*
4.117	7700	Removed December 9, 2018.
*	*	*
	7702	Evaluation October 23, 1995; title December 9, 2018; evaluation December 9, 2018.

Sec.	Diagnostic code No.	
	7703	Evaluation August 23, 1948; criterion October 23, 1995; evaluation December 9, 2018; criterion December 9, 2018.
	7704	Evaluation October 23, 1995; evaluation December 9, 2018.
	7705	Evaluation October 23, 1995; title December 9, 2018; evaluation December 9, 2018; criterion December 9, 2018.
	7706	Evaluation October 23, 1995; note December 9, 2018; criterion October 23, 1995.
*	*	* * * * *
	7709	Evaluation March 10, 1976; criterion October 23, 1995; title December 9, 2018; criterion December 9, 2018.
	7710	Criterion October 23, 1995; criterion December 9, 2018.
	7712	Added December 9, 2018.
	7714	Added September 9, 1975; criterion October 23, 1995; criterion December 9, 2018.
	7715	Added October 26, 1990; criterion December 9, 2018.
	7716	Added October 23, 1995; evaluation December 9, 2018; criterion December 9, 2018.
*	*	* * * * *
	7718	Added December 9, 2018.
	7719	Added December 9, 2018.
	7720	Added December 9, 2018.
	7721	Added December 9, 2018.
	7722	Added December 9, 2018.
	7723	Added December 9, 2018.
	7724	Added December 9, 2018.
	7725	Added December 9, 2018.
*	*	* * * * *

■ 4. Amend Appendix B to Part 4 by:

■ a. Revising the undesignated center heading immediately preceding diagnostic code 7700.

■ b. Revising the entries for diagnostic codes 7700, 7702, 7705, and 7709.

■ c. Adding, in numerical order, entries for diagnostic codes 7712 and 7718 through 7725.

The revisions and additions read as follows:

Appendix B to Part 4—Numerical Index of Disabilities

Diagnostic code No.	
*	* * * * *
	The Hematologic and Lymphatic Systems
7700	[Removed]
*	* * * * *
7702	Agranulocytosis, acquired.
*	* * * * *
7705	Immune thrombocytopenia.
*	* * * * *
7709	Hodgkin's lymphoma.
*	* * * * *
7712	Multiple myeloma.
*	* * * * *
7718	Essential thrombocythemia and primary myelofibrosis.
7719	Chronic myelogenous leukemia (CML) (chronic myeloid leukemia or chronic granulocytic leukemia).
7720	Iron deficiency anemia.
7721	Folic acid deficiency.
7722	Pernicious anemia and Vitamin B_{12} deficiency anemia.
7723	Acquired hemolytic anemia.
7724	Solitary plasmacytoma.
7725	Myelodysplastic syndromes.
*	* * * * *

■ 5. Amend Appendix C to Part 4 by revising the entries for Agranulocytosis, Anemia, Hodgkin's lymphoma, and Leukemia and adding in alphabetical order, a new entry for Hematologic to read as follows:.

Appendix C to Part 4—Alphabetical Index of Disabilities

	Diagnostic code No.
* * * * * * *	
Agranulocytosis, acquired	7702
* * * * * * *	
Anemia:	
Acquired hemolytic anemia	7723
Folic acid deficiency	7721
Iron deficiency anemia	7720
Pernicious anemia and Vitamin B_{12} deficiency anemia	7722
* * * * * * *	
Hematologic:	
Essential thrombocythemia and primary myelofibrosis	7718
Immune thrombocytopenia	7705
Multiple myeloma	7712
Myelodysplastic syndromes	7725
Solitary plasmacytoma	7724
* * * * * * *	
Hodgkin's lymphoma	7709
* * * * * * *	
Leukemia:	
Chronic myelogenous leukemia (CML) (chronic myeloid leukemia or chronic granulocytic leukemia)	7719
Leukemia	7703
* * * * * * *	

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2017–0334; FRLc–9983–29]

Pyroxasulfone; Pesticide Tolerances

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes tolerances for residues of pyroxasulfone in or on multiple commodities which are identified and discussed later in this document. In addition, the established pyroxasulfone tolerance on cotton, undelinted seed is removed. Interregional Research Project Number 4 (IR–4) requested these tolerances under the Federal Food, Drug, and Cosmetic Act (FFDCA).

DATES: This regulation is effective October 29, 2018. Objections and requests for hearings must be received on or before December 28, 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–2017–0334, 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: Michael L. Goodis, Registration Division (7505P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001; main telephone number: (703) 305–7090; email address: *RDFRNotices@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 EPA's tolerance regulations at 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.*

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–2017–0334 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 December 28, 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–2017–0334, 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. Summary of Petitioned-For Tolerance

In the **Federal Register** of October 23, 2017 (82 FR 49020) (FRL–9967–37), EPA issued a document pursuant to FFDCA section 408(d)(3), 21 U.S.C. 346a(d)(3), announcing the filing of a pesticide petitions (PP 7E8570 & 7E8585) by IR–4 Headquarters, Rutgers, The State University of New Jersey, 500 College Road East, Suite 201 W, Princeton, NJ 08540. The petitions requested that 40 CFR 180.659 be amended as follows:

a. Amend 180.659(a)(1), by establishing a tolerance for residues of the herbicide pyroxasulfone, including its metabolites and degradates, determined by measuring only the sum of pyroxasulfone, 3-[[[5-(difluoromethoxy)-1-methyl-3-(trifluoromethyl)-1 H-pyrazol-4-yl]methyl]sulfonyl]-4,5-dihydro-5,5-dimethylisoxazole, and its metabolite, 5-(difluoromethoxy)-1-methyl-3-(trifluoromethyl)-1 H-pyrazol-4-carboxylic acid (M-3), calculated as the stoichiometric equivalent of pyroxasulfone, in or on the commodity: Cottonseed subgroup 20C at 0.04 parts per million (ppm). In addition, the petitioner requested removal of the established tolerance on Cotton, undelinted seed at 0.04 ppm (PP 7E8585).

b. Amend 180.659(a)(5) by establishing a tolerance for residues of the herbicide pyroxasulfone, including its metabolites and degradates, determined by measuring only the sum of pyroxasulfone, (3-[(5-difluoromethoxy-1-methyl-3-(trifluoromethyl)pyrazol-4-ylmethylsulfonyl]-4,5-dihydro-5,5-dimethyl-1,2-oxazole), and its metabolites, M-1 (5-difluoromethoxy-1-methyl-3-trifluoromethyl-1H-pyrazol-4-yl) methanesulfonic acid), M-3 (5-difluoromethoxy-1-methyl-3-trifluoromethyl-1H-pyrazol-4-carboxylic acid), M-25 (5-difluoromethoxy-3-trifluoromethyl-1H-pyrazol-4-yl)methanesulfonic acid) and M-28 (3-[1-carboxy-2-(5,5-dimethyl-4,5-dihydroisoxazol-3-ylthio)ethylamino]-3-oxopropanoic acid) calculated as the stoichiometric equivalent of pyroxasulfone, in or on the commodities: Peppermint, oil at 0.48 ppm; peppermint, tops at 0.15 ppm; spearmint, oil at 0.48 ppm; spearmint, tops at 0.15 ppm; soybean, vegetable, succulent at 0.2 ppm (PP 7E8570); and Leaf petiole vegetable subgroup 22B at 0.3 ppm (PP 7E8585).

c. Amend 180.659(c) Tolerances with regional registrations, by establishing a tolerance for residues of the herbicide pyroxasulfone, including its metabolites and degradates, determined by measuring only the sum of pyroxasulfone, (3-[(5-difluoromethoxy-1-methyl-3-(trifluoromethyl)pyrazol-4-ylmethylsulfonyl]-4,5-dihydro-5,5-dimethyl-1,2-oxazole), and its metabolites, M-1 (5-difluoromethoxy-1-methyl-3-trifluoromethyl-1H-pyrazol-4-yl) methanesulfonic acid), M-3 (5-difluoromethoxy-1-methyl-3-trifluoromethyl-1H-pyrazol-4-carboxylic acid), M-25 (5-difluoromethoxy-3-trifluoromethyl-1H-pyrazol-4-yl)methanesulfonic acid) and M-28 (3-[1-carboxy-2-(5,5-dimethyl-4,5-dihydroisoxazol-3-ylthio)ethylamino]-3-oxopropanoic acid) calculated as the stoichiometric equivalent of pyroxasulfone, in or on the commodities: Grass, forage at 0.5 ppm and grass, hay at 1.0 ppm (PP 7E8570).

These documents referenced a summary of each petition prepared by K–1 Chemical, USA Inc., the registrant, that are available in the docket, *http://www.regulations.gov.*

One comment was received on the notice of filings. EPA's response to the comment is discussed in Unit IV.C.

Consistent with the authority in FFDCA 408(d)(4)(A)(i), EPA is issuing tolerances that vary from what the petitioner sought. The reasons for these changes are explained in Unit IV.D.

III. Aggregate Risk Assessment and Determination of Safety

Section 408(b)(2)(A)(i) of FFDCA allows EPA to establish a tolerance (the legal limit for a pesticide chemical residue in or on a food) only if EPA determines that the tolerance is ''safe.'' Section 408(b)(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. Section 408(b)(2)(C) of FFDCA requires 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. . . .''

Consistent with FFDCA section 408(b)(2)(D), and the factors specified in FFDCA section 408(b)(2)(D), EPA has reviewed the available scientific data and other relevant information in support of this action. EPA has sufficient data to assess the hazards of and to make a determination on aggregate exposure for pyroxasulfone including exposure resulting from the tolerances established by this action. EPA's assessment of exposures and risks associated with pyroxasulfone follows.

A. Toxicological Profile

EPA has evaluated the available toxicity data and considered their validity, completeness, and reliability as

well as the relationship of the results of the studies to human risk. EPA has also considered available information concerning the variability of the sensitivities of major identifiable subgroups of consumers, including infants and children.

The toxicology database for pyroxasulfone is adequate for evaluating and characterizing toxicity and selecting endpoints for purposes of this risk assessment. Pyroxasulfone acute toxicity to mammals is low by all routes of exposure. Subchronic and chronic oral studies in mice, rats and dogs produced a variety of effects including cardiac toxicity (increased cardiomyopathy), liver toxicity (centrilobular hepatocellular hypertrophy, histopathological and/or clinical pathological indicators), kidney toxicity (nephropathy), neurotoxicity (impaired hind limb function, ataxia, tremors, sciatic nerve lesions, axonal/myelin degeneration in the sciatic nerve and spinal cord sections), skeletal muscle myopathy, urinary bladder mucosal hyperplasia, and urinary bladder transitional cell papillomas. Dogs appear to be the most sensitive species in regard to neurotoxic effects of pyroxasulfone via the oral route. Cardiac toxicity (myofiber degeneration and local inflammation) were also seen in a rat dermal toxicity study. Pyroxasulfone did not elicit immunotoxic effects in rats or mice. Neurotoxicity was seen in a developmental neurotoxicity study in offspring rats (decreased brain weight, decreased thickness of the hippocampus, corpus callosum and cerebellum). There is evidence of fetal and offspring quantitative susceptibility in the developmental neurotoxicity study in rats as effects occurred in the absence of maternal toxicity. There is no concern for reproductive toxicity.

Pyroxasulfone is classified as ''Not Likely to be Carcinogenic to Humans'' at doses that do not cause crystals with subsequent calculi formation resulting in cellular damage of the urinary tract. The Agency has determined that the quantification of risk using a non-linear approach (*i.e.,* reference dose (RfD)) will adequately account for all chronic toxicity, including carcinogenicity, that could result from exposure to pyroxasulfone.

Specific information on the studies received and the nature of the adverse effects caused by pyroxasulfone as well as the no-observed-adverse-effect-level (NOAEL) and the lowest-observed-adverse-effect-level (LOAEL) from the toxicity studies can be found at *http://www.regulations.gov* in document titled, ''SUBJECT: Pyroxasulfone Human Health Risk Assessment for the Section 3 New Uses of Pyroxasulfone on Mint, Edamame (vegetable soybean), Grass (seed crop) for the Pacific Northwest only, Leaf Petiole Vegetable Subgroup 22B and Expansion of Cottonseed Subgroup 20C,'' at pages 34–79 in docket ID number EPA–HQ–OPP–2017–0334.

B. Toxicological Points of Departure/Levels of Concern

Once a pesticide's toxicological profile is determined, EPA identifies toxicological points of departure (POD) and levels of concern to use in evaluating the risk posed by human exposure to the pesticide. For hazards that have a threshold below which there is no appreciable risk, the toxicological POD is used as the basis for derivation of reference values for risk assessment. PODs are developed based on a careful analysis of the doses in each toxicological study to determine the dose at which no adverse effects are observed (the NOAEL) and the lowest dose at which adverse effects of concern are identified (the LOAEL). Uncertainty/safety factors are used in conjunction with the POD to calculate a safe exposure level—generally referred to as a population-adjusted dose (PAD) or a reference dose (RfD)—and a safe margin of exposure (MOE). For non-threshold risks, the Agency assumes that any amount of exposure will lead to some degree of risk. Thus, the Agency estimates risk in terms of the probability of an occurrence of the adverse effect expected in a lifetime. For more information on the general principles EPA uses in risk characterization and a complete description of the risk assessment process, see *http://www2.epa.gov/pesticide-science-and-assessing-pesticide-risks/assessing-human-health-risk-pesticides.*

A summary of the toxicological endpoints for pyroxasulfone used for human risk assessment is discussed in Unit III of the final rule published in the **Federal Register** of May 17, 2018 (83 FR 22854) (FRL–9977–25).

C. Exposure Assessment

1. *Dietary exposure from food and feed uses.* In evaluating dietary exposure to pyroxasulfone, EPA considered exposure under the petitioned-for tolerances as well as all existing pyroxasulfone tolerances in 40 CFR 180.659. EPA assessed dietary exposures from pyroxasulfone in food as follows:

i. *Acute exposure.* Quantitative acute dietary exposure and risk assessments are performed for a food-use pesticide, if a toxicological study has indicated the possibility of an effect of concern occurring as a result of a 1-day or single exposure.

Such effects were identified for pyroxasulfone. In estimating acute dietary exposure, EPA used 2003–2008 food consumption data from the United States Department of Agriculture's (USDA) National Health and Nutrition Survey/What We Eat in America (NHANES/WWEIA). As to residue levels in food, EPA assumed 100 percent crop treated (PCT) and tolerance-level residues adjusted for metabolites that are not in the tolerance expression, except for soybean and subgroup 22B commodities, for which EPA used anticipated residues from field trial data.

ii. *Chronic exposure.* In conducting the chronic dietary exposure assessment EPA used the 2003–2008 food consumption data from the USDA's NHANES/WWEIA. As to residue levels in food, EPA assumed 100 PCT and tolerance level residues that were adjusted for metabolites not in the tolerance expression, except for soybean and subgroup 22B commodities, for which EPA used anticipated residues from field trial data.

iii. *Cancer.* Based on the data summarized in Unit III.A., EPA has concluded that a nonlinear RfD approach is appropriate for assessing cancer risk to pyroxasulfone. Cancer risk was assessed using the same exposure estimates as discussed in Unit III.C.1.ii., chronic exposure.

iv. *Anticipated residue and percent crop treated (PCT) information.* EPA did not use PCT information in the dietary assessment for pyroxasulfone; 100% CT was assumed for all food commodities. Tolerance-level residues were used for all commodities except soybean and subgroup 22B commodities, for which EPA used anticipated residues from field trial data.

Section 408(b)(2)(E) of FFDCA authorizes EPA to use available data and information on the anticipated residue levels of pesticide residues in food and the actual levels of pesticide residues that have been measured in food. If EPA relies on such information, EPA must require pursuant to FFDCA section 408(f)(1) that data be provided 5 years after the tolerance is established, modified, or left in effect, demonstrating that the levels in food are not above the levels anticipated. For the present action, EPA will issue such data call-ins as are required by FFDCA section 408(b)(2)(E) and authorized under FFDCA section 408(f)(1). Data will be required to be submitted no later than 5 years from the date of issuance of these tolerances.

2. *Dietary exposure from drinking water.* The Agency used screening level water exposure models in the dietary exposure analysis and risk assessment for pyroxasulfone in drinking water. These simulation models take into account data on the physical, chemical, and fate/transport characteristics of pyroxasulfone. Further information regarding EPA drinking water models used in pesticide exposure assessment can be found at *http://www2.epa.gov/pesticide-science-and-assessing-pesticide-risks/about-water-exposure-models-used-pesticide.*

Based on the Pesticide Root Zone Model/Exposure Analysis Modeling System (PRZM/EXAMS) and Pesticide Root Zone Model Ground Water (PRZM GW), the estimated drinking water concentrations (EDWCs) of pyroxasulfone for acute exposures are estimated to be 16.7 parts per billion (ppb) for surface water and 210 ppb for ground water. EDWCs of pyroxasulfone for chronic exposures for non-cancer assessments are estimated to be 4.5 ppb for surface water and 174 ppb for ground water.

Modeled estimates of drinking water concentrations were directly entered into the dietary exposure model. For acute dietary risk assessment, the water concentration value of 210 ppb was used to assess the contribution to drinking water. For chronic dietary risk assessment, the water concentration value of 174 ppb was used to assess the contribution to drinking water.

3. *From non-dietary exposure.* The term ''residential exposure'' is used in this document to refer to non-occupational, non-dietary exposure (*e.g.,* for lawn and garden pest control, indoor pest control, termiticides, and flea and tick control on pets).

Pyroxasulfone is not registered for any specific use patterns that would result in residential exposure.

Further information regarding EPA standard assumptions and generic inputs for residential exposures may be found at *http://www2.epa.gov/pesticide-science-and-assessing-pesticide-risks/standard-operating-procedures-residential-pesticide.*

4. *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 particular pesticide's residues and ''other substances that have a common mechanism of toxicity.''

EPA has not found pyroxasulfone to share a common mechanism of toxicity with any other substances, and pyroxasulfone does not appear to produce a toxic metabolite produced by other substances. For the purposes of this tolerance action, therefore, EPA has assumed that pyroxasulfone 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 EPA's website at *http://www2.epa.gov/pesticide-science-and-assessing-pesticide-risks/cumulative-assessment-risk-pesticides.*

D. Safety Factor for Infants and Children

1. *In general.* Section 408(b)(2)(C) of FFDCA 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 based on reliable data that a different margin of safety will be safe for infants and children. This additional margin of safety is commonly referred to as the FQPA Safety Factor (SF). In applying this provision, EPA either retains the default value of 10X, or uses a different additional safety factor when reliable data available to EPA support the choice of a different factor.

2. *Prenatal and postnatal sensitivity.* Pyroxasulfone did not exhibit developmental toxicity in the rat guideline study at the limit dose of 1,000 mg/kg/day and it exhibited slight developmental toxicity in rabbits (reduced fetal weight and resorptions) at the limit dose of 1,000 mg/kg/day. However, developmental effects (decreased brain weight and morphometric changes) were noted in offspring at 300 mg/kg/day in the rat developmental neurotoxicity (DNT) study compared to no maternal toxicity at 900 mg/kg/day. In a reproductive toxicity in rats, reduced pup weight and body weight gains during lactation occurred at similar or higher doses causing pronounced maternal toxicity (reduced body weight, body weight gain and food consumption and increased kidney weight, cardiomyopathy and urinary bladder mucosal hyperplasia with inflammation).

3. *Conclusion.* EPA has determined that reliable data show the safety of infants and children would be adequately protected if the FQPA SF were reduced to 1x. That decision is based on the following findings:

i. The toxicity database for pyroxasulfone is complete.

ii. The neurotoxicity database, including acute, subchronic and chronic studies, shows adverse effects from pyroxasulfone exposure in mice, rats and dogs, with the latter species showing greatest sensitivity. Although the DNT study indicated offspring are more sensitive to neurotoxic effects of pyroxasulfone, the dose-response is well characterized for neurotoxicity and a NOAEL is identified; therefore, there is no residual uncertainty with regard to neurotoxic effects for which a 10X must be retained.

iii. As noted in Unit III.D.2., the available database shows evidence of increased susceptibility of fetuses and offspring in a DNT study in rats and in a developmental study in rabbits following *in utero* or post-natal exposure to pyroxasulfone. The Agency concludes, however, that there is no residual uncertainty concerning these effects. The available studies show clear NOAELs and LOAELs for these effects, which are occurring only at doses much higher than the endpoints on which the Agency is regulating.

iv. There are no residual uncertainties in the exposure databases. The dietary food exposure assessments were performed based on 100 PCT and tolerance-level residues or residues based on field trials. EPA made conservative (protective) assumptions in the ground and surface water modeling used to assess exposure to pyroxasulfone in drinking water. These assessments will not underestimate the exposure and risks posed by pyroxasulfone.

E. Aggregate Risks and Determination of Safety

EPA determines whether acute and chronic dietary pesticide exposures are safe by comparing aggregate exposure estimates to the acute PAD (aPAD) and chronic PAD (cPAD). For linear cancer risks, EPA calculates the lifetime probability of acquiring cancer given the estimated aggregate exposure. Short-, intermediate-, and chronic-term risks are evaluated by comparing the estimated aggregate food, water, and residential exposure to the appropriate PODs to ensure that an adequate MOE exists.

1. *Acute risk.* Using the exposure assumptions discussed in this unit for acute exposure analysis, the risk estimate for acute dietary exposure from food and water to pyroxasulfone is at 3.7% of the aPAD for all infants less than 1 year old, the population group receiving the greatest exposure. The

acute dietary risk is not of concern (<100% aPAD).

2. *Chronic risk.* Using the exposure assumptions described in this unit for chronic exposure analysis, EPA has concluded that risk estimates for chronic exposure to pyroxasulfone from food and water are not of concern (<100% cPAD) with a risk estimate at 50% of the cPAD for all infants less than 1 year old, the population group receiving the greatest exposure. There are no residential uses for pyroxasulfone.

3. *Short-and intermediate term risk.* Short- and intermediate-term adverse effects were identified; however, pyroxasulfone is not registered for any use patterns that would result in short- or intermediate-term residential exposure. Short- and intermediate-term risk is assessed based on short- and intermediate-term residential exposure plus chronic dietary exposure. Because there is no short- or intermediate-term residential exposure and chronic dietary exposure has already been assessed under the appropriately protective cPAD (which is at least as protective as the POD used to assess short-term risk), no further assessment of short- or intermediate-term risk is necessary, and EPA relies on the chronic dietary risk assessment for evaluating short- and intermediate-term risk for pyroxasulfone.

4. *Aggregate cancer risk for U.S. population.* As explained in Unit III.A., the Agency has determined that the quantification of risk using a non-linear (*i.e.,* RfD) approach will adequately account for all chronic toxicity, including carcinogenicity, that could result from exposure to pyroxasulfone. Therefore, based on the results of the chronic risk assessment discussed in Unit III.E.2., pyroxasulfone is not expected to pose a cancer risk to humans.

5. *Determination of safety.* Based on these risk assessments, 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 pyroxasulfone residues.

IV. Other Considerations

A. Analytical Enforcement Methodology

Adequate enforcement methodology (high performance liquid chromatography/triple quadrupole mass spectrometry (LC/MS/MS)) is available to enforce the tolerance expression.

The method may be requested from: Chief, Analytical Chemistry Branch, Environmental Science Center, 701 Mapes Rd., Ft. Meade, MD 20755–5350; telephone number: (410) 305–2905; email address: *residuemethods@epa.gov.*

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 residues of pyroxasulfone in or on any of the petitioned-for commodities associated with this regulatory action.

C. Response to Comments

One anonymous public comment was received that expressed concerns about the cost of EPA regulations to tax payers and corporations. This comment did not raise any issue relevant to the Agency's safety determination for this tolerance action. Section 408 of the Federal Food, Drug and Cosmetic Act (FFDCA) allows EPA to set tolerances for residues of pesticide chemicals when it determines that the tolerance meets the safety standard imposed by that statute. EPA has made that determination for the pyroxasulfone tolerances established by this final rule.

D. Revisions to Petitioned-For Tolerances

EPA calculated tolerance levels using the Organization for Economic Cooperation and Development (OECD) tolerance calculation procedures, available field trial residue data, and metabolite concentrations covered to parent equivalents. The Agency is also harmonizing with relevant Canadian MRLs. In addition, the Agency is using commodity terminology consistent with the terms generally used for tolerances.

As a result, the Agency is establishing tolerances that differ from the petitioned-for tolerances as follows: (1) The proposed pyroxasulfone tolerances on both Peppermint, oil and Spearmint, oil at 0.48 ppm are being established at 0.70 ppm; (2) the proposed pyroxasulfone tolerances on both Peppermint, fresh leaves and Spearmint, fresh leaves at 0.15 ppm are being each established at 0.20 ppm; and (3) the proposed tolerance on Leaf petiole vegetable subgroup 22B at 0.3 ppm is being established at 0.80 ppm.

In addition, although the petitioner requested a tolerance on Soybean, vegetable, succulent at 0.2 ppm, this term is broad and covers two forms of vegetable soybean—Soybean, vegetable, succulent shelled, and Vegetable, soybean, edible podded; therefore, to conform to the Agency's commodity terminology for soybeans, the Agency is establishing the tolerance requested as separate tolerances at 0.40 ppm for both forms of succulent soybean vegetable.

V. Conclusion

Therefore, tolerances are established for residues of pyroxasulfone, including its metabolites and degradates, in or on Cottonseed subgroup 20C at 0.04 ppm; Leaf petiole vegetable subgroup 22B at 0.80 ppm; Peppermint, fresh leaves at 0.20 ppm; Peppermint, oil at 0.70 ppm; Soybean, vegetable, succulent shelled at 0.40 ppm; Spearmint, fresh leaves at 0.20 ppm; Spearmint, oil at 0.70 ppm; and Vegetable, soybean, edible podded at 0.40 ppm. In addition, tolerances with regional registrations are established in or on Grass, forage at 0.50 ppm and Grass, hay 1.0 ppm. Lastly, the Agency is removing the existing pyroxasulfone tolerance on Cotton, undelinted seed that is superseded by this final rule.

VI. Statutory and Executive Order Reviews

This action establishes tolerances 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); or Executive Order 13771, entitled ''Reducing Regulations and Controlling Regulatory Costs'' (82 FR 9339, February 3, 2017). 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).

VII. Congressional Review Act

Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. 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: October 9, 2018.

Michael L. Goodis,

Director, Registration Division, 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. In § 180.659:

■ a. In the table in paragraph (a)(1):

■ i. Remove the entry ''Cotton, undelinted seed'';

■ ii. Add alphabetically the commodity, ''Cottonseed subgroup 20C'';

■ b. In the table in paragraph (a)(5), add alphabetically the commodities, ''Leaf petiole vegetable subgroup 22B''; ''Peppermint, fresh leaves''; ''Peppermint, oil''; ''Soybean, vegetable, succulent shelled''; ''Spearmint fresh leaves''; ''Spearmint, oil''; and ''Vegetable, soybean, edible podded''; and

■ c. Revise paragraph (c).

The additions and revisions read as follows:

§ 180.659 Pyroxasulfone; tolerances for residues.

(a) * * *

(1) * * *

Commodity	Parts per million
* * * * *	
Cottonseed, subgroup 20C	0.04
* * * * *	

* * * * *

(5) * * *

Commodity	Parts per million
* * * * *	
Leaf petiole vegetable subgroup 22B	0.80
* * * * *	
Peppermint, fresh leaves	0.20
Peppermint, oil	0.70
* * * * *	
Soybean, vegetable, succulent shelled	0.40
Spearmint, fresh leaves	0.20
Spearmint, oil	0.70
* * * * *	
Vegetable, soybean, edible podded	0.40
* * * * *	

* * * * *

(c) *Tolerance with regional registrations.* Tolerances are established for residues of the herbicide pyroxasulfone, including its metabolites and degradates, in or on the commodities in the table below. Compliance with the tolerance levels specified below is to be determined by measuring only the sum of pyroxasulfone (3-[(5-difluoromethoxy-1-methyl-3-(trifluoromethyl)pyrazol-4-ylmethylsulfonyl]-4,5-dihydro-5,5-dimethyl-1,2-oxazole), and its metabolites, M–1 (5-difluoromethoxy-1-methyl-3-trifluoromethyl-1H-pyrazol-4-yl)methanesulfonic acid), M–3 (5-difluoromethoxy-1-methyl-3-trifluoromethyl-1H-pyrazol-4-carboxylic acid), M–25 (5-difluoromethoxy-3-trifluoromethyl-1H-pyrazol-4-yl)methanesulfonic acid) and M–28 (3-[1-carboxy-2-(5,5-dimethyl-4,5-dihydroisoxazol-3-ylthio)ethylamino]-3-oxopropanoic acid) calculated as the stoichiometric equivalent of pyroxasulfone, in or on the commodity.

Commodity	Parts per million
Grass, forage	0.50
Grass, hay	1.0

* * * * *

[FR Doc. 2018–23002 Filed 10–26–18; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 170828822–70999–04]

RIN 0648–XG574

Fisheries of the Northeastern United States; Summer Flounder Fishery; Quota Transfer

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

ACTION: Temporary rule; quota transfer.

SUMMARY: NMFS announces that the State of North Carolina is transferring a portion of its 2018 commercial summer flounder quota to the State of New York. This quota adjustment is necessary to comply with the Summer Flounder, Scup, and Black Sea Bass Fishery Management Plan quota transfer provisions. This announcement informs the public of the revised commercial quotas for North Carolina and New York.

DATES: Effective October 24, 2018, through December 31, 2018.

FOR FURTHER INFORMATION CONTACT: Cynthia Ferrio, Fishery Management Specialist, (978) 281–9180.

SUPPLEMENTARY INFORMATION: Regulations governing the summer flounder fishery are found in 50 CFR 648.100 through 648.110. These regulations require annual specification of a commercial quota that is apportioned among the coastal states from Maine through North Carolina. The process to set the annual commercial quota and the percent allocated to each state is described in § 648.102, and the initial 2018 allocations were published on December 22, 2017 (82 FR 60682), and corrected January 30, 2018 (83 FR 4165).

The final rule implementing Amendment 5 to the Summer Flounder Fishery Management Plan, as published in the **Federal Register** on December 17, 1993 (58 FR 65936), provided a mechanism for transferring summer flounder commercial quota from one state to another. Two or more states, under mutual agreement and with the concurrence of the NMFS Greater Atlantic Regional Administrator, can transfer or combine summer flounder commercial quota under § 648.102(c)(2). The Regional Administrator is required to consider the criteria in § 648.102(c)(2)(i)(A) through (C) in the evaluation of requests for quota transfers or combinations.

North Carolina is transferring 3,844 lb (1,744 kg) of summer flounder commercial quota to New York through mutual agreement of the states. This transfer was requested to repay landings by a North Carolina-permitted vessel that landed in New York under a safe harbor agreement. Based on the initial quotas published in the 2018 Summer Flounder, Scup, and Black Sea Bass Specifications and subsequent adjustments, the revised summer flounder quotas for calendar year 2018 are now: North Carolina, 1,752,145 lb (794,760 kg); and New York, 496,013 lb (224,988 kg).

Classification

This action is taken under 50 CFR part 648 and is exempt from review under Executive Order 12866.

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

Dated: October 24, 2018.

Karen H. Abrams

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

[FR Doc. 2018–23571 Filed 10–24–18; 4:15 pm]

BILLING CODE 3510–22–P

Proposed Rules

Federal Register
Vol. 83, No. 209
Monday, October 29, 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.

OFFICE OF PERSONNEL MANAGEMENT

5 CFR Part 337

RIN 3206–AN65

Examining System

AGENCY: U.S. Office of Personnel Management.

ACTION: Proposed rule.

SUMMARY: The U.S. Office of Personnel Management (OPM) is issuing a proposed regulation to revise its direct-hire authority (DHA) regulations. The revision is necessary to implement Executive Order (E.O.) 13833 titled, ''Enhancing the Effectiveness of Agency Chief Information Officers'' which requires OPM to issue proposed regulations delegating to the head of a covered agency authority necessary to determine whether there is a severe shortage of candidates or a critical hiring need for information technology (IT) positions under certain conditions, sufficient to justify a DHA. The intended effect of this change is to enhance the Government's ability to recruit needed IT professionals.

DATES: OPM must receive comments on or before December 28, 2018.

ADDRESSES: You may submit comments, identified by docket number and/or Regulatory Information Number (RIN) and title, by any of the following methods:

- *Federal Rulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Mail:* Ms. Kimberly A. Holden, Deputy Associate Director for Talent Acquisition and Workforce Shaping, U.S. Office of Personnel Management, Room 6500–AJ, 1900 E Street NW, Washington, DC 20415–9700; email at *employ@opm.gov;* or fax at (202) 606–4430.

All submissions received must include the agency name and docket number or RIN for this document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: Darlene Phelps at (202) 606–0960, by fax at (202) 606–4430, TDD at (202) 418–3134, or by email at *Darlene.Phelps@opm.gov.*

SUPPLEMENTARY INFORMATION: On May 15, 2018, the President signed E.O. 13833, titled, ''Enhancing the Effectiveness of Agency Chief Information Officers'' (83 FR 23345). The E.O. is aimed at modernizing the Federal Government's information technology infrastructure and improving the delivery of digital services and the management, acquisition, and oversight of Federal IT. Section 9 of the E.O. directs OPM to propose regulations pursuant to which OPM may delegate to the heads of certain agencies (other than the Secretary of Defense) authority to determine, under regulations prescribed by OPM, whether a severe shortage of candidates (or, for the U.S. Department of Veterans Affairs (VA) a severe shortage of highly qualified candidates) or a critical hiring need exists for positions in the Information Technology Management (IT) Series, general schedule (GS)–2210 or equivalent, for purposes of an entitlement to a direct hire authority (DHA). The agencies covered by the E.O. are those listed in 31 U.S.C. 901(b), or independent regulatory agencies defined in 44 U.S.C. 3502(5).

OPM is proposing to amend its regulations to delegate to the heads of covered agencies the authority to determine whether a severe shortage of candidates (VA need only determine the existence of a severe shortage of highly qualified candidates) or a critical hiring need exists for IT positions. The current rules do not provide for a delegation of authority in relation to direct hire authorities; only OPM may make these determinations. When determining the existence of a severe shortage of qualified candidates for IT positions, an agency exercising such a delegation would be required to justify its determination using the supporting evidence prescribed in section 337.204(b) of title 5, Code of Federal Regulations (CFR). When determining the presence of a critical hiring need, an agency exercising such a delegation would be required to justify its determination in accordance with the criteria prescribed in 5 CFR 337.205(b). OPM has further developed these criteria in Direct Hire templates available at *https://www.opm.gov/policy-data-oversight/hiring-information/direct-hire-authority/templates.pdf.* Agency heads would be expected to make use of these templates in making their findings. The supporting evidence used for either determination would be required to be kept in a file for documentation and auditing purposes in accordance with 5 CFR 337.206.

Under the current DHA provisions at 5 U.S.C. 3304(a)(3) and 5 CFR part 337 subpart B, OPM determines the existence of a severe shortage of candidates or a critical hiring need and may grant DHA to one or more agencies pursuant to this determination. Thus OPM is responsible for making both a determination that the DHA is warranted and for granting the actual DHA. While E.O. 13833 authorizes OPM to submit a proposed regulation that would sever these actions for IT positions (in other words, permit the heads of agencies to make the determination, but preserve OPM's responsibility for granting DHA based on an agency's determination), OPM is choosing to delegate to agency heads its authority to actually issue the DHA under 5 U.S.C. 1104(a)(2) in the circumstances specified. OPM will, however, maintain oversight of the use of this authority as provided in 5 U.S.C. 1104(b). Therefore, after the determination is made, the deciding agency is required to provide the determination and a description of the supporting evidence to OPM. OPM may request access to the underlying documentation at any time, and may require corrective action in accordance with 5 U.S.C. 1104(c) and section 337.206 of the regulation.

The proposed rules contemplate that, after an agency head has authorized DHA under these rules, the agency could use this authority to hire needed individuals for initial appointments lasting longer than 1 year, but not to exceed 4 years. The hiring agency, at its discretion, could extend the initial appointment up to an additional 4 years. No individual hired under these provisions could serve in excess of 8

years at the same agency. No individual hired under these provisions could be transferred to positions that are not IT positions. An agency would be required to use this authority in accordance with the provisions of 5 CFR part 337 subpart B and in the same manner it would for filling other positions under DHA. Generally speaking, this would entail providing applicants with public notice consistent with the provisions of 5 CFR 337.203, assessing applicants to determine whether they have the level of proficiency required to perform the duties of the position being filled, and giving selection priority to qualified applicants eligible under the agency's Reemployment Priority List (RPL), Career Transition Assistance Plan (CTAP), and the Interagency Career Transition Assistance Plan (ICTAP) in accordance with 5 CFR part 330 subparts B, F, and G before selecting other qualified applicants. An agency would not be able to assess applicants in order to make more meaningful or relative distinctions as to the quality of the applicant pool; *i.e.,* an agency could not rate and rank applicants and select them based on a numerical rating or categorize and select them in terms of ''good, better, best'' or similar quality designations. Applicants who met the required proficiency level would be deemed to be equally qualified for these purposes. Each agency would then be expected to select qualified applicants in the order in which their applications were received and processed.

OPM is revising its regulations to:

a. Add new subsections, 337.204(d), and 337.205(b) titled, ''Information Technology Positions'' to propose implementing rules with respect to covered agencies, agency authority, conditions for using these provisions, and duration of appointments.

E.O. 12866, Regulatory Review

This rule has been reviewed by the Office of Management and Budget in accordance with Executive Order 12866.

Regulatory Flexibility Act

I certify that this regulation will not have a significant impact on a substantial number of small entities because it applies only to Federal agencies and employees.

E.O. 13563 and E.O. 12866, Regulatory Review

Executive Orders 13563 and 12866 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rule has been designated a ''significant regulatory action,'' under Executive Order 12866.

Executive Order 13771: Reducing Regulation and Controlling Regulatory Costs

This proposed rule is not expected to be subject to the requirements of E.O. 13771 (82 FR 9339, February 3, 2017) because this proposed rule is expected to be related to agency organization, management, or personnel

E.O. 13132, Federalism

This regulation will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 13132, it is determined that this rule does not have sufficient federalism implications to warrant preparation of a Federalism Assessment.

E.O. 12988, Civil Justice Reform

This regulation meets the applicable standard set forth in section 3(a) and (b)(2) of Executive Order 12988.

Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by State, local or tribal governments of more than $100 million annually. Thus, no written assessment of unfunded mandates is required.

Congressional Review Act

This action pertains to agency management, personnel and organization and does not substantially affect the rights or obligations of nonagency parties and, accordingly, is not a ''rule'' as that term is used by the Congressional Review Act (Subtitle E of the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA)). Therefore, the reporting requirement of 5 U.S.C. 801 does not apply.

Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35)

This proposed regulatory action will not impose any additional reporting or recordkeeping requirements under the Paperwork Reduction Act.

List of Subjects in 5 CFR Part 337

Government employees.

U.S. Office of Personnel Management.

Alexys Stanley,

Regulatory Affairs Analyst.

Accordingly, we propose to amend 5 CFR part 337 as follows:

PART 337—EXAMINING SYSTEM

■ 1. Revise the authority citation for part 337 to read as follows:

Authority: 5 U.S.C. 1104(a), 1302, 2302, 3301, 3302, 3304, 3319, 5364; E.O. 10577, 3 CFR 1954–1958 Comp., p. 218; 33 FR 12423, Sept. 4, 1968; and 45 FR 18365, Mar. 21, 1980; 116 Stat. 2135, 2290; 117 Stat 1392, 1665; and E.O. 13833.

Subpart B—Direct Hire Authority

■ 2. Add paragraph (d) to § 337.204 to read as follows:

§ 337.204 Severe shortage of candidates.

* * * * *

(d) *Information Technology (IT) positions.* (1) The head of a covered agency, as defined in paragraph (d)(2) of this section, may determine whether a severe shortage of candidates exists at that agency for any position in the information technology management series, general schedule (GS)-2210 or equivalent. In making such a determination, a covered agency must adhere to and use the supporting evidence prescribed in 5 CFR 337.204(b)(1)–(8). For purposes of paragraph (b)(5) of this section, the U.S. Department of Veterans Affairs (VA) need only determine whether a severe shortage of highly qualified candidates exists. In addition, a covered agency must maintain a file of the supporting evidence for documentation and reporting purposes. Upon determination of such a finding, an agency head may approve a direct hire authority for covered positions within the agency.

(2) *Covered agency.* A covered agency is an entity listed in 31 U.S.C. 901(b) (except the Department of Defense), or an independent regulatory agency defined in 44 U.S.C. 3502(5).

(3) *Notification to the U.S. Office of Personnel Management (OPM).* Once the head of a covered agency affirmatively determines the presence of a severe shortage and the direct hire authority is approved by the agency head, he or she must notify OPM within 10 business days. Such notification must include a description of the supporting evidence relied upon in making the determination.

(4) *Using this authority.* A covered agency must adhere to all provisions of subpart B of this part.

(5) *Length of appointments.* A covered agency may use this authority to appoint individuals for a period of more than 1 year, but not more than 4 years.

(i) A covered agency may extend any appointment under this authority for up to 4 additional years, if the direct hire authority remains in effect.

(ii) No individual may serve more than 8 years on an appointment made under these provisions for information technology positions.

(iii) No individual hired under these provisions may be transferred to positions that are not IT positions.

■ 3. Add paragraph (c) to § 337.205 to read as follows:

§ 337.205 Critical hiring needs.

* * * * *

(c) *Information Technology (IT) positions.* (1) The head of a covered agency, as defined in paragraph (c)(2) of this section, may determine whether a critical hiring need exists for any position in the information technology management series, general schedule (GS)–2210 or equivalent. In making such a determination, a covered agency must adhere to and use the supporting evidence criteria prescribed in paragraphs (b)(1)–(4) of this section. In addition, a covered agency must maintain a file of the supporting evidence for documentation and reporting purposes. Upon determination of such a finding, an agency head may approve a direct hire authority for covered positions within the agency.

(2) *Covered agency.* A covered agency is an entity listed in 31 U.S.C. 901(b) (excluding the Department of Defense), or an independent regulatory agency defined in 44 U.S.C. 3502(5).

(3) *Notification to the U.S. Office of Personnel Management (OPM).* Once the head of a covered agency affirmatively determines the presence of a critical hiring need and the direct hire authority is approved by the agency head, he or she must notify OPM within 10 business days. Such notification must include a description of the supporting evidence relied upon in making the determination.

(4) *Using this authority.* A covered agency must adhere to all provisions of subpart B of this part.

(5) *Length of appointments.* A covered agency may use this authority to appoint individuals for a period of more than 1 year, but not more than 4 years, if the direct hire authority remains in effect.

(i) A covered agency may extend any appointment under this authority for up to 4 additional years.

(ii) No individual may serve more than 8 years on an appointment made under these provisions for information technology positions.

(iii) No individual hired under these provisions may be transferred to positions that are not IT positions.

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DEPARTMENT OF ENERGY

10 CFR Part 1004

RIN 1901–AB44

Critical Electric Infrastructure Information; New Administrative Procedures

AGENCY: Office of Electricity, U.S. Department of Energy.

ACTION: Notice of proposed rulemaking and opportunity for comment.

SUMMARY: The Department of Energy (DOE or Department) publishes a proposed rule for public comment to implement DOE's critical electric infrastructure information (CEII) designation authority under the Federal Power Act. The proposed administrative procedures are intended to ensure that stakeholders and the public understand how the Department would designate, protect, and share CEII under the Federal Power Act.

DATES: Public comment on this proposed rule will be accepted until December 28, 2018.

ADDRESSES: You may submit comments, identified by RIN 1901–AB44, by any of the following methods:

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

2. *Email:* Send email to *oeregs@hq.doe.gov.* Include RIN 1901–AB44 in the subject line of the email. Please include the full body of your comments in the text of the message or as an attachment.

3. *Mail:* Address postal mail to U.S. Department of Energy, Office of Electricity, Mailstop OE–20, Room 8E–030, 1000 Independence Avenue SW, Washington, DC 20585.

Due to potential delays in the delivery of postal mail, we encourage respondents to submit comments electronically to ensure timely receipt.

This notice of proposed rulemaking and any comments that DOE receives will be made available on regulations.gov or the DOE Office of Electricity website at: *https://www.energy.gov/oe/office-electricity.*

FOR FURTHER INFORMATION CONTACT: Julie Ann Smith, Ph.D., U.S. Department of Energy, Office of Electricity, Mailstop OE–20, Room 8E–030, 1000 Independence Avenue SW, Washington, DC 20585; 202–586–7668; or *oeregs@hq.doe.gov.*

SUPPLEMENTARY INFORMATION:

Acronyms and Abbreviations. A number of acronyms and abbreviations are used in this preamble. While this may not be an exhaustive list, to ease the reading of this preamble and for reference purposes, the following terms, acronyms, and abbreviations are defined as follows:

DHS Department of Homeland Security
DOE Department of Energy
CEII Critical Electric Infrastructure Information
FAST Act Fixing America's Surface Transportation Act
FERC Federal Energy Regulatory Commission
FOIA Freedom of Information Act
FPA Federal Power Act
NTIA National Telecommunications and Information Administration
OE Office of Electricity (office within DOE)
PMA Power Marketing Administration

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I. Introduction and Background

In this proposed rule, DOE proposes to establish procedures for the designation of critical electric infrastructure information (CEII) under the Fixing America's Surface Transportation Act (FAST Act), Public Law 114–94. The FAST Act contains

several provisions designed to protect and enhance the Nation's electric power delivery infrastructure. Section 61003 of that Act added a new section 215A, entitled ''Critical Electric Infrastructure Security,'' to Part II of the Federal Power Act (FPA), codified at 16 U.S.C. 824o–1. FPA section 215A authorizes both the Secretary of Energy (the Secretary) and the Federal Energy Regulatory Commission (FERC) independently to designate CEII. The FAST Act required FERC, after consultation with the Secretary, to ''promulgate such regulations as necessary to . . . establish criteria and procedures to designate information as [CEII]''. 16 U.S.C. 824o–1(d)(2). While FERC's 2016 rulemaking established criteria for designating CEII applicable to both FERC and the Department, the designation procedures in the rulemaking were limited to FERC. Thus, the Department proposes to establish its own designation procedures.

The Department has sought to harmonize its procedures with the FERC procedures as much as possible. Some small variations are the result of the different roles of each agency. Specifically, the Department anticipates receiving a smaller volume of CEII materials, due to DOE's non-regulatory role, which gives DOE the flexibility to engage in more proactive designations. Additionally, the Department's procedures reflect informal input from industry representatives, who are the submitters of CEII, regarding enhancements the DOE could make when adapting CEII procedures to the unique role of DOE as the Sector-Specific Agency for the Energy Sector. For example, DOE has designed proposed procedures that anticipate designation before a FOIA request is received and allow for longer industry response times before materials are released.

According to the statutory definition, CEII includes information that qualifies as ''critical energy infrastructure information'' under existing FERC regulations, which are codified at 18 CFR 388.113(c). These proposed CEII regulations align with DOE's role as the lead Sector-Specific Agency for cybersecurity for the energy sector under section 61003(c)(2)(A) of the FAST Act, and the Sector-Specific Agency for Energy (Critical Infrastructure) under Presidential Policy Directive 21, ''Critical Infrastructure Security and Resilience'' (Feb. 12, 2013). In those roles and in coordination with DHS, DOE coordinates interagency sharing of information concerning the energy sector.

II. Discussion of Proposed Rule

General

Through this proposed rule, DOE would establish a set of procedures by which the Secretary of Energy would designate, protect, and share CEII under new section 215A of the FPA, according to criteria FERC has established and codified at 18 CFR 388.113. This proposed rule would also set forth provisions concerning the type of information that DOE would designate as CEII, when that information has been submitted in response to a request from DOE. The proposed procedures apply to both Federal entities and non-Federal entities that may submit or request information designated, protected, and shared as CEII. The procedures do not contemplate any new collection or storage techniques, but instead describe marking protocols for physical and electronic materials to indicate that they are to be treated as CEII. These procedures better facilitate the use of the CEII FOIA exemption for material shared with the Department for reasons outside the scope of this proposed rule.

In this proposed rule, DOE also intends to address stakeholder concerns about the protection of critical infrastructure information from public release.[1] For example, DOE is proposing a process for immediate CEII designation (pre-designation) of information marked ''Defense Critical Electric Infrastructure Information,'' and for information provided by industry in response to certain Federal agency reporting requirements. DOE also proposes to address concerns about the format required and time allotted for communications with DOE regarding its CEII designation actions. DOE further proposes increased coordination between DOE and submitters of potential CEII-designated materials to facilitate voluntary sharing of CEII with, between, and by Federal and non-Federal entities, as appropriate.[2]

Finally, DOE is proposing that the Department convene on occasion with other Federal agencies, in order to facilitate mutual understanding among Federal information classification programs as it may relate to CEII.

Note that as a general principle, DOE does not intend to designate information as CEII if it has been made publicly available by the owner or generator of the CEII previously.

Definitions

Section 1004.13(c) of the proposed rule would define terms applicable to the proposed procedures in this notice for the designation of critical electric infrastructure information. Some terms are adopted from those used in the existing procedures. Other terms are proposed for the first time in this context.

''Bulk-power system'' means the facilities and control systems necessary for operating an interconnected electric energy transmission network (and any portion thereof) and electric energy from generation facilities needed to maintain transmission system reliability. The term excludes facilities used in local electric distribution.

''Critical electric infrastructure'' means a system or asset of the bulk-power system, whether physical or virtual, the incapacity or destruction of which would negatively affect national security, economic security, public health or safety, or any combination of such matters.

''Critical electric infrastructure information'' or ''CEII'' means information related to critical electric infrastructure, or proposed critical electrical infrastructure, generated by or provided to FERC or another Federal agency, other than classified national security information, that is designated as critical electric infrastructure information by FERC or the Secretary pursuant to section 215A(d) of the FPA.[3] CEII-designated material would include information related to Defense

[1] On February 14–15, 2018, DOE's Office of Electricity (OE) (known at the time as DOE's Office of Electricity Delivery and Energy Reliability) and Office of Policy convened representatives from energy industry, local, state, and Federal government agencies to discuss issues, challenges, and opportunities in CEII-sharing frameworks and optional information sharing protections and protocols leading up to the development of this proposed rule. A memorandum summarizing this meeting is available at *https://www.energy.gov/oe/office-electricity.*

[2] New Section 215A(d) of the Federal Power Act (FPA) requires DOE to develop its proposed CEII procedures necessary to, ''taking into account standards of the Electric Reliability Organization, facilitate voluntary sharing of critical electric infrastructure information with, between, and by: (i) Federal, State, political subdivision, and tribal authorities; (ii) the Electric Reliability Organization; (iii) regional entities; (iv) information sharing and analysis centers established pursuant to Presidential Decision Directive 63; (v) owners, operators, and users of critical electric infrastructure in the United States; and (vi) other entities determined appropriate by the [Federal Energy Regulatory] Commission.'' 16 U.S.C. 824o–1(d)(2)(D).

[3] Section 215A of the FPA defines critical electric infrastructure information to include information that is (i) ''related to critical electric infrastructure, or proposed critical electric infrastructure,'' (ii) ''generated by or provided to the Commission or other Federal agency'' and (iii) ''designated as critical electric infrastructure information by the Commission or the Secretary.'' The definition then notes that ''[s]uch term includes information that qualifies as critical energy infrastructure information under the Commission's regulations.'' 16 U.S.C. 824o–1(a)(3).

Critical Electric Infrastructure, consistent with section 215A(a)(4) of the FPA. DOE would also include the following in the definition of CEII: (1) ''critical energy infrastructure information'' as described in 18 CFR 388.113(c);[4] (2) information reported to DOE through the Electric Emergency Incident and Disturbance Report (Form OE–417); and (3) Federal spectrum information managed by the National Telecommunications and Information Administration (NTIA) as CEII-designated material.

''CEII coordinator'' means the Assistant Secretary or Principal Deputy Assistant Secretary of the DOE Office of Electricity, who shall provide coordination for and oversight of the implementation of DOE's program for CEII designation authority under Section 215A of the FPA and shall assist all DOE Offices in determining whether particular information meets the definition of CEII, as well as managing DOE's protection, storage, and sharing of CEII materials to ensure that CEII materials are shielded from disclosure in accordance with the Federal Power Act and the Freedom of Information Act. The CEII coordinator may delegate the daily implementation of the CEII coordinator function as described in this proposed rule to an appropriate official in the DOE Office of Electricity, Bonneville Power Administration, Energy Information Administration, Southeastern Power Administration, Southwestern Power Administration, or Western Area Power Administration (''Coordinator's designee'').

Summary of Proposed Procedural Rules for CEII Designation

Proposed § 1004.13(a) provides interested stakeholders with the location of information regarding CEII filing procedures and guidance.

As described in proposed § 1004.13(b), procedures for the designation, protection, and sharing of CEII developed under section 215A of the FPA would apply to anyone who provides CEII to DOE or who receives CEII from DOE, including DOE employees, DOE contractors, agents of DOE, and individuals or organizations who have been permitted access to CEII, as well as non-DOE entities submitting CEII to DOE or receiving CEII from DOE. These proposed procedures would also apply to other Federal agencies seeking CEII designation and protection of information agencies may submit to DOE.

Proposed § 1004.13(c) defines the terms Critical Electric Infrastructure, Critical Electric Infrastructure Information (CEII), CEII Coordinator, Defense Critical Electric Infrastructure, Department of Energy (DOE), DOE Office, and Secretary, as used throughout proposed § 1004.13. Where the terms are defined by statute or by FERC's CEII regulations, the definitions track those corresponding definitions, either verbatim or with maximum consistency.

The procedures, as described in proposed § 1004.13(d), are designed to allow the Secretary, or DOE Offices with authority delegated by the Secretary, to receive and designate CEII in a manner ensuring that the Department can access the critical information it needs to execute its responsibilities as the lead Sector-Specific Agency for cybersecurity for the energy sector and the Sector-Specific Agency for Energy (Critical Infrastructure). The FAST Act protects CEII by exempting CEII-designated information from disclosure under the Freedom of Information Act (FOIA), as codified at 5 U.S.C. 552(b)(3), or any Federal, State, political subdivision, or tribal law requiring disclosure of information or records. The proposed rules set out a standardized process to request CEII designation, and requirements for treatment of CEII following a CEII determination. The following sections provide greater detail regarding the proposed revisions to the Department's FOIA regulations.

Proposed § 1004.13(e) sets out the functions of the CEII Coordinator and the Coordinator's designee. The CEII coordinator may apply immediate CEII designation (pre-designation) to information such as that marked as ''Defense Critical Electric Infrastructure Information,'' or to information provided by industry in response to certain Federal agency reporting requirements or requests, as appropriate. However, final CEII designation authority would reside with the DOE Office exercising its delegated CEII designation authority. The CEII Coordinator, in consultation with the DOE Office with CEII designation authority, would be the responsible DOE official to make a final determination regarding the release of CEII to any non-Federal entity requesting the release of CEII-designated materials from the Department. The proposed subsection also provides that DOE entities with authority to designate CEII would meet to calibrate their approaches to CEII designation, and would meet with representatives of other Federal agencies, as needed and at the discretion of the Coordinator or designee, to ensure consistent understanding of CEII designation processes.

Proposed § 1004.13(f) states that CEII is exempt from disclosure under FOIA, as provided by the FAST Act amendments to the FPA.

Proposed § 1004.13(g) sets out criteria and procedures the Department would follow to designate CEII. The subsection covers requesting designation for information submitted to or generated by DOE, how DOE would treat submitted information and apply the CEII designation criteria, how DOE would treat information once it has decided whether to designate the information as CEII, and how DOE would protect designated CEII.

Proposed § 1004.13(h) states that CEII designations can last up to five years and are renewable, and describes how designation may be removed and how DOE would treat and return the information should its designation be removed.

Proposed § 1004.13(i) describes how a submitter may request reconsideration of a decision not to designate CEII, not to release CEII in response to a request for release, or not to maintain an existing CEII designation, and discusses eligibility for judicial review. The subsection also notes that, with several exceptions, a reconsideration request triggers a stay of the underlying decision.

Proposed § 1004.13(j) discusses tightly-controlled sharing of CEII among Federal and non-Federal Entities, taking into account International Sharing Protocols when appropriate. The subsection notes that when the Department plans to share CEII it did not generate, it would notify the submitter well in advance unless circumstances dictate otherwise and would speak directly with the submitter before sharing any of the information to discuss any concerns and make a well-informed determination.

Proposed § 1004.13(k) describes procedural requirements for requesting CEII. A request must include contact information, an explanation of the need for and intended use of the CEII, and a signed Non-Disclosure Acknowledgment or Agreement, as applicable.

Proposed § 1004.13(*l*) sets out penalties and sanctions for unauthorized disclosure of CEII, emphasizing that statutory whistleblower protections still apply.

[4] FERC's regulations at 18 CFR 388.113(c) define ''critical energy infrastructure information'' to include information that: ''(i) Relates details about the production, generation, transportation, transmission, or distribution of energy; (ii) Could be useful to a person in planning an attack on critical infrastructure; (iii) Is exempt from mandatory disclosure under the Freedom of Information Act, 5 U.S.C. 552; and (iv) Does not simply give the general location of the critical infrastructure.''

(a) Criteria and Procedure for Designating CEII

Proposed § 1004.13 outlines criteria and procedures for designating CEII. The Department understands that the energy sector, including electric entities, requires assurance that certain critical information will be protected from public disclosure. DOE would take appropriate measures related to the treatment of submitted information as CEII, including designation of a central Departmental point of contact for all CEII matters—the DOE CEII Coordinator as defined in § 1004.13(c)(3)—who would provide oversight and assistance to DOE Offices in the implementation of the proposed procedures as described in § 1004.13(e).

In cases where information concerns ''Defense Critical Electric Infrastructure,'' as defined by Section 215A(a)(4) of the FPA, DOE proposes to designate such information as CEII automatically upon receipt by the DOE CEII Coordinator. In cases where information concerning Federal government agency spectrum use managed by the NTIA is submitted,[5] or in cases in which information on electric incidents and emergencies reported to DOE through Form OE–417 is submitted as a part of a CEII-designation request, DOE also proposes to designate such information as CEII automatically upon receipt by the DOE CEII Coordinator.[6] In communications to the submitter, or DOE Office and/or Federal agency generating the information, DOE may ''pre-designate'' such information as CEII, noting why it considers the material to fall within the statutory and regulatory definition of CEII.

The proposed procedures outline how the Department would provide protection for information where CEII designation has been requested but a final determination on CEII status has not yet been made by the Secretary or the designating DOE Office. After submission, DOE would evaluate whether the submitted information or portions of information meet the criteria established for designation prior to making a CEII determination. DOE would subsequently communicate the decision to the submitter as soon as practicable. If designated as CEII, information would be labeled as such and would be stored in a manner affording protection as CEII. Information voluntarily supplied by submitter that is not designated as CEII by DOE would be returned or destroyed at the request of the submitter. If a submitter is required to provide information and DOE denies CEII designation, the submitter may file a request for review under the proposed procedures.

Power Marketing Administrations (PMAs) generate copious data, a great deal of which may be CEII. To accommodate the practical difficulties of making CEII designation decisions about such data, proposed section (g)(2)(iv) states that all organizational entities that are a part of the Executive Department created by Title II of the DOE Organization Act may make CEII determination decisions at any time, regardless of when such information was generated. The proposed procedures are also intended for use by other Federal agencies that may also want to request CEII protection for information generated, collected, managed, or potentially released that fits into the definition of CEII in § 1004.13(c). These procedures create no new burdens in the existing FOIA response process.

(b) Duration of CEII Designation

Proposed § 1004.13(h) outlines procedures governing the duration of CEII designation, to include re-applications for CEII designation, expiration of designation, removal of designation, and treatment and return of information no longer designated as CEII.

(c) Review or Requests for Reconsideration of Designation

Proposed § 1004.13(i) establishes procedures that would allow any person who has submitted information requested to be CEII to request reconsideration of a DOE decision to not designate that information as CEII, to remove an existing CEII designation, or to deny a request for the release or change of designation of CEII.

(d) Sharing of CEII

As indicated in proposed § 1004.13(j), DOE may share CEII as necessary to carry out its specific jurisdictional duties pursuant to section 215A of the FPA and as the lead Sector-Specific Agency for cybersecurity for the energy sector under section 61003(c)(2)(A) of the FAST Act, and the Sector-Specific Agency for Energy (Critical Infrastructure) under Presidential Policy Directive 21, ''Critical Infrastructure Security and Resilience'' (Feb. 12, 2013). Those submitting CEII would have DOE's assurance that the information will be protected from unauthorized disclosure. The Department would follow standardized procedures when sharing CEII with Federal and non-Federal entities to ensure the protection of CEII. Non-Federal entities would be required to enter into a Non-Disclosure Agreement with the Department, meeting minimum standards outlined in the proposed rule, prior to receiving CEII from DOE. When a non-Federal entity requests such information, the DOE CEII coordinator would notify the submitter of the CEII and the appropriate DOE Office(s), to facilitate coordination and allow the submitter to raise concerns related to a requesting entity. The DOE CEII coordinator would, in consultation with the appropriate DOE Office(s), make a final determination on whether to release any CEII-designated material in response to such a request.

(e) Procedures for Requesting CEII

Proposed § 1004.13(k) delineates procedures for requesting CEII designation and sharing CEII-designated materials.

III. Public Comment Procedures

Interested persons are invited to participate in this proceeding by submitting data, views, or arguments. Written comments should be submitted to the address, and in the form, indicated in the **ADDRESSES** section of this notice of proposed rulemaking. To help DOE's review of the comments, interested persons are asked to refer to specific proposed rule provisions, if possible.

Written comments must be submitted by 4:00 p.m., December 28, 2018, electronically via *Regulations.gov*, via email to *oeregs@hq.doe.gov,* or to the address indicated in the **ADDRESSES** section of this preamble and should be identified on the outside envelope and

[5] *See* Executive Order No. 12046, as amended, 3 CFR (1978 comp.) 158, *reprinted in* 47 U.S.C. 305 app. at 127 (1989); U.S. Department of Commerce, Department Organization Orders 10–10 and 25–7. Executive Order No. 12046, as amended, requires that NTIA, on behalf of the Secretary of Commerce, act as Federal spectrum manager for Federal government agency spectrum users, and as the principal Executive branch advisor on telecommunications policy. Information concerned with Federal agency spectrum frequency assignments includes data about critical electric infrastructure owned and/or operated by Federal Power Marketing Administrations.

[6] Electric utilities that operate as Balancing Authority Area and/or Reliability Coordinator as well as other electric utilities, as appropriate, are required to file the Form OE–417. This form is a mandatory filing whenever an electrical incident or disturbance is large enough to cross the reporting thresholds. Reporting coverage for the Form OE–417 includes all 50 States, the District of Columbia, Puerto Rico, the U.S. Virgin Islands, and the U.S. Trust Territories. The Department of Energy uses the information to fulfill its overall national security and other energy emergency management responsibilities, as well as for analytical purposes. The incidence and disturbance data reported on Schedule 1 of the form are not confidential. However, all data reported on Schedule 2 of the Form (information on the official to contact for follow-up and the narrative description of the incident and disturbance) will be protected.

on the document with the designation: ''Proposed Rulemaking Critical Electric Infrastructure Information Designation Procedures (Docket #OE–1901–AB44).'' All comments received will be available for public inspection via *http://www:regulations.gov.* All comments received by 4:00 p.m., December 28, 2018, and all other relevant information will be considered by DOE before final action is taken on this proposed regulation.

If you submit information that you believe to be exempt by law from public disclosure, you should submit one complete copy, as well as one copy from which the information requested to be exempt by law from public disclosure has been redacted. DOE is responsible for the final determination regarding disclosure or nondisclosure of the information, and for treating the information accordingly under FOIA and DOE implementing regulations at 10 CFR 1004.11.

IV. Regulatory Review

A. Executive Order 12866

This action was determined to be a significant regulatory action subject to review under Executive Order 12866, ''Regulatory Planning and Review,'' 58 FR 51735 (Oct. 4, 1993) by the Office of Information and Regulatory Affairs (OIRA) of the Office of Management and Budget (OMB).

B. Executive Orders 13771, 13777, and 13783

On January 30, 2017, the President issued Executive Order 13771, ''Reducing Regulation and Controlling Regulatory Costs.'' That Order stated the policy of the executive branch is to be prudent and financially responsible in the expenditure of funds, from both public and private sources. The Order stated it is essential to manage the costs associated with the governmental imposition of private expenditures required to comply with Federal regulations.

Additionally, on February 24, 2017, the President issued Executive Order 13777, ''Enforcing the Regulatory Reform Agenda.'' The Order required the head of each agency to designate an agency official as its Regulatory Reform Officer (RRO). Each RRO oversees the implementation of regulatory reform initiatives and policies to ensure that agencies effectively carry out regulatory reforms, consistent with applicable law. Further, Executive Order 13777 requires the establishment of a regulatory task force at each agency. The regulatory task force is required to make recommendations to the agency head regarding the repeal, replacement, or modification of existing regulations, consistent with applicable law. At a minimum, each regulatory reform task force must attempt to identify regulations that:

(i) Eliminate jobs, or inhibit job creation;

(ii) Are outdated, unnecessary, or ineffective;

(iii) Impose costs that exceed benefits;

(iv) Create a serious inconsistency or otherwise interfere with regulatory reform initiatives and policies;

(v) Are inconsistent with the requirements of the Information Quality Act, or the guidance issued pursuant to that Act, in particular those regulations that rely in whole or in part on data, information, or methods that are not publicly available or that are insufficiently transparent to meet the standard for reproducibility; or

(vi) Derive from or implement Executive Orders or other Presidential directives that have been subsequently rescinded or substantially modified.

Finally, on March 28, 2017, the President signed Executive Order 13783, entitled ''Promoting Energy Independence and Economic Growth.'' Among other things, Executive Order 13783 requires the heads of agencies to review all existing regulations, orders, guidance documents, policies, and any other similar agency actions (collectively, agency actions) that potentially burden the development or use of domestically produced energy resources, with particular attention to oil, natural gas, coal, and nuclear energy resources. Such review does not include agency actions that are mandated by law, necessary for the public interest, and consistent with the policy set forth elsewhere in that order. Executive Order 13783 defined ''burden'' for purposes of the review of existing regulations to mean ''to unnecessarily obstruct, delay, curtail, or otherwise impose significant costs on the siting, permitting, production, utilization, transmission, or delivery of energy resources.

The development and implementation of the proposed procedures, as laid out in Section 215A(d) of the FPA, are designed to protect the security and reliability of the nation's bulk-power system, distribution facilities, and other forms of energy infrastructure. The procedures relate solely to marking information that would facilitate voluntary sharing of CEII among DOE and other appropriate Federal, state, or local entities to address emergencies, accidents, or intentional destructive acts affecting the production, transmission and delivery of energy resources. There is no new reporting requirement nor new program created as a result of the proposed procedures. This information will be stored on currently existing DOE systems. DOE concludes that this proposed rule is consistent with the directives set forth in these Executive Orders.

C. National Environmental Policy Act

DOE has determined that this proposed rule is covered under the Categorical Exclusion found in the DOE's National Environmental Policy Act regulations at paragraph A6 Rulemakings, procedural of Appendix A to Subpart D, 10 CFR part 1021, which applies to Rulemakings that are strictly procedural, such as rulemaking (under 48 CFR part 9) establishing procedures for technical and pricing proposals and establishing contract clauses and contracting practices for the purchase of goods and services, and rulemaking (under 10 CFR part 600) establishing application and review procedures for, and administration, audit, and closeout of, grants and cooperative agreements. Accordingly, neither an environmental assessment nor an environmental impact statement is required.

D. Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires preparation of an initial regulatory flexibility analysis for any rule that by law must be proposed for public comment, unless the agency certifies that the rule, if promulgated, will not have a significant economic impact on a substantial number of small entities. As required by Executive Order 13272, ''Proper Consideration of Small Entities in Agency Rulemaking,'' 67 FR 53461 (Aug. 16, 2002), DOE published procedures and policies on February 19, 2003, to ensure that the potential impacts of its rules on small entities are properly considered during the rulemaking process (68 FR 7990). DOE's procedures and policies are available on the Office of General Counsel's website: *https://energy.gov/gc/office-general-counsel.*

DOE has reviewed this proposed rule under the provisions of the Regulatory Flexibility Act and the procedures and policies published on February 19, 2003. This proposed rule sets forth agency procedures for the designation, sharing, and protection of CEII, and applies to DOE employees, DOE contractors, agents of DOE, and individuals or organizations submitting a request for CEII designation or who have requested or been permitted access to CEII. The proposed procedures for marking incoming requests and/or submissions, which are expected to

facilitate voluntary sharing of CEII among DOE and other appropriate Federal, state, or local entities to address emergencies, accidents, or intentional destructive acts to the production, transmission, and delivery of energy resources, are not expected to result in a significant impact. FERC's regulations already require entities requesting CEII designation to mark the subject information. DOE's procedures would provide consistency and would also help avoid unauthorized disclosure or release. DOE therefore expects that these procedures, if adopted, would not affect DOE's decision to designate submitted information as CEII, nor any decision to withhold or release information to requesters of energy infrastructure information under FOIA. On the basis of the foregoing, DOE certifies that this proposed rule will not have a significant economic impact on a substantial number of small entities. Accordingly, DOE has not prepared a regulatory flexibility analysis for this rulemaking. DOE's certification and supporting statement of factual basis will be provided to the Chief Counsel for Advocacy of the Small Business Administration pursuant to 5 U.S.C. 605(b).

E. Paperwork Reduction Act

Proposed §§ 1004.13(g), 1004.13(h), 1004.13(i), and 1004.13(k) contain information collection requirements. DOE has submitted the proposed collection of information to the OMB for approval pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) and the procedures implementing that Act at 5 CFR part 1320. A person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

DOE invites public comment on (1) whether the proposed information collection requirements are necessary for the performance of DOE's functions, including whether the information will have practical utility; (2) the accuracy of DOE's estimates of the burden of the proposed information collection requirements; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the information collection requirements on respondents. Comments should be addressed to the DOE Desk Officer, OIRA, OMB, 725 17th Street NW, Washington, DC 20503. Persons submitting comments to OMB also are requested to send a copy to the contact person at the address given in the **ADDRESSES** section of this notice of proposed rulemaking. Interested persons may obtain a copy of DOE's Paperwork Reduction Act Submission to OMB from the contact person named in this notice of proposed rulemaking.

F. Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4) generally requires Federal agencies to examine closely the impacts of regulatory actions on State, local, and tribal governments. Section 101(5) of title I of that law defines a Federal intergovernmental mandate to include any regulation that would impose upon State, local, or tribal governments an enforceable duty, except a condition of Federal assistance or a duty arising from participating in a voluntary Federal program. Title II of that law requires each Federal agency to assess the effects of Federal regulatory actions on State, local, and tribal governments, in the aggregate, or to the private sector, other than to the extent such actions merely incorporate requirements specifically set forth in a statute. Section 202 of that title requires a Federal agency to perform a detailed assessment of the anticipated costs and benefits of any rule that includes a Federal mandate which may result in costs to State, local, or tribal governments, or to the private sector, of $100 million or more in any one year (adjusted annually for inflation). 2 U.S.C. 1532(a) and (b). Section 204 of that title requires each agency that proposes a rule containing a significant Federal intergovernmental mandate to develop an effective process for obtaining meaningful and timely input from elected officers of State, local, and tribal governments. 2 U.S.C. 1534.

The proposed rule will not result in the expenditure by State, local, and tribal governments in the aggregate, or by the private sector, of $100 million or more in any one year. Accordingly, no assessment or analysis is required under the Unfunded Mandates Reform Act of 1995.

G. Treasury and General Government Appropriations Act, 1999

Section 654 of the Treasury and General Government Appropriations Act, 1999 (Pub. L. 105–277) requires Federal agencies to issue a Family Policymaking Assessment for any proposed rule that may affect family well-being. The proposed rule will not have any impact on the autonomy or integrity of the family as an institution. Accordingly, DOE has concluded that it is not necessary to prepare a Family Policymaking Assessment.

H. Executive Order 13132

Executive Order 13132, ''Federalism,'' 64 FR 43255 (Aug. 4, 1999) imposes certain requirements on agencies formulating and implementing policies or regulations that preempt State law or that have federalism implications. Agencies are required to examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States and carefully assess the necessity for such actions. DOE has examined this proposed rule and has determined that it will not preempt State law and will not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. No further action is required by Executive Order 13132.

I. Executive Order 12988

With respect to the review of existing regulations and the promulgation of new regulations, section 3(a) of Executive Order 12988, ''Civil Justice Reform,'' 61 FR 4729 (Feb. 7, 1996), imposes on Executive agencies the general duty to adhere to the following requirements: (1) Eliminate drafting errors and ambiguity; (2) write regulations to minimize litigation; and (3) provide a clear legal standard for affected conduct rather than a general standard and promote simplification and burden reduction. With regard to the review required by section 3(a), section 3(b) of Executive Order 12988 specifically requires that Executive agencies make every reasonable effort to ensure that the regulation: (1) Clearly specifies the preemptive effect, if any; (2) clearly specifies any effect on existing Federal law or regulation; (3) provides a clear legal standard for affected conduct while promoting simplification and burden reduction; (4) specifies the retroactive effect, if any; (5) adequately defines key terms; and (6) addresses other important issues affecting clarity and general draftsmanship under any guidelines issued by the Attorney General. Section 3(c) of Executive Order 12988 requires Executive agencies to review regulations in light of applicable standards in section 3(a) and section 3(b) to determine whether they are met or whether it is unreasonable to meet one or more of them. DOE has completed the required review and determined that, to the extent permitted by law, the proposed rule meets the relevant standards of Executive Order 12988.

J. Treasury and General Government Appropriations Act, 2001

The Treasury and General Government Appropriations Act, 2001 (44 U.S.C. 3516 note) provides for agencies to review most disseminations of information to the public under guidelines established by each agency pursuant to general guidelines issued by OMB.

OMB's guidelines were published at 67 FR 8452 (Feb. 22, 2002), and DOE's guidelines were published at 67 FR 62446 (Oct. 7, 2002). DOE has reviewed this proposed rule under the OMB and DOE guidelines and has concluded that it is consistent with applicable policies in those guidelines.

K. Executive Order 13211

Executive Order No. 13,211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use,'' 66 FR 28355 (May 22, 2001) requires Federal agencies to prepare and submit to the OMB a Statement of Energy Effects for any proposed significant energy action. A ''significant energy action'' is defined as any action by an agency that promulgated or is expected to lead to promulgation of a final rule, and that (1) is a significant regulatory action under Executive Order 12866, or any successor order; and (2) is likely to have a significant adverse effect on the supply, distribution, or use of energy, or (3) is designated by the Administrator of the OIRA as a significant energy action. For any proposed significant energy action, the agency must give a detailed statement of any adverse effects on energy supply, distribution, or use should the proposal be implemented, and of reasonable alternatives to the action and their expected benefits on energy supply, distribution, and use. This regulatory action will not have a significant adverse effect on the supply, distribution, or use of energy because it is concerned primarily with the procedures for designating, protecting, and sharing information. As the FAST Act highlighted, protection of CEII will have a positive effect on the energy supply, and is therefore not a significant energy action. Accordingly, DOE has not prepared a Statement of Energy Effects.

V. Approval of the Office of the Secretary

The Secretary of Energy has approved publication of this notice of proposed rulemaking.

List of Subjects in 10 CFR Part 1004

Freedom of Information.

Signed in Washington, DC, on October 19, 2018.

Bruce J. Walker,

Assistant Secretary, Office of Electricity.

For the reasons set out in the preamble, the DOE proposes to amend part 1004 of title 10, Code of Federal Regulations as set forth below:

PART 1004—FREEDOM OF INFORMATION ACT (FOIA)

■ 1. The authority citation for part 1004 is revised to read as follows:

Authority: 5 U.S.C. 552; 16 U.S.C. 824o–1.

■ 2. Add § 1004.13 to read as follows:

§ 1004.13 Critical electric infrastructure information.

(a) *Filing Procedures and Guidance.* Information regarding critical electric infrastructure information (CEII) filing procedures and further guidance for submitters and requesters is available on the website of the DOE Office of Electricity at *https://www.energy.gov/oe/office-electricity*.

(b) *Purpose and Scope.* This part sets forth the regulations of the Department of Energy (DOE) that implement section 215A(d) of the Federal Power Act (FPA), codified at 16 U.S.C. 824o–1(d). The regulations in this part set forth the DOE procedures for the designation, sharing, and protection of CEII. This section applies to anyone who provides CEII to DOE or who receives CEII from DOE, including DOE employees, DOE contractors, and agents of DOE or of other Federal agencies, as well as individuals or organizations providing CEII or submitting a request for CEII designation to DOE or who have requested or have been permitted access to CEII by DOE.

(c) *Definitions.*

(1) *Bulk-Power System* means the facilities and control systems necessary for operating an interconnected electric energy transmission network (and any portion thereof), and electric energy from generation facilities needed to maintain transmission system reliability. The term does not include facilities used in the local distribution of electric energy.

(2) *Critical Electric Infrastructure* means a system or asset of the bulk-power system, whether physical or virtual, the incapacity or destruction of which would negatively affect national security, economic security, public health or safety, or any combination of such matters.

(3) *Critical Electric Infrastructure Information (CEII)* is defined at FPA section 215A(a)(3), with designation criteria codified at 18 CFR 388.113(c). CEII means information related to critical electric infrastructure, or proposed critical electrical infrastructure, generated by or provided to FERC or another Federal agency, other than classified national security information, that is designated as CEII by FERC or the Secretary pursuant to section 215A(d) of the FPA. Such term includes information that qualifies as critical energy infrastructure information under FERC's regulations. CEII-designated material may include information related to Defense Critical Electric Infrastructure, consistent with section 215A(a)(4) of the FPA; information on electric incidents and emergencies reported to DOE through the Electric Emergency Incident and Disturbance Report (Form OE–417); and/or Federal spectrum information managed by the National Telecommunications and Information Administration (NTIA), to the extent such information also qualifies as CEII.

(4) *CEII Coordinator* means the Assistant Secretary or Principal Deputy Assistant Secretary of the DOE Office of Electricity, who shall coordinate and oversee the implementation of DOE's program for CEII-designation authority under section 215A of the FPA, assist all DOE Office(s) with respect to requests for CEII designation in determining whether particular information fits within the definition of CEII, and manage DOE's protection, storage, and sharing of CEII materials and oversight of the development of CEII international sharing protocols. The CEII Coordinator may delegate the daily implementation of the CEII Coordinator function as described in this proposed rule to an appropriate DOE Office of Electricity official, and to an appropriate official in the Bonneville Power Administration, the Energy Information Administration, the Southeastern Power Administration, the Southwestern Power Administration, or the Western Area Power Administration (''Coordinator's designee'').

(5) *Defense Critical Electric Infrastructure* means any electric infrastructure located in any of the 48 contiguous States or the District of Columbia that serves a facility designated by the Secretary as critical to the defense of the United States and vulnerable to a disruption of the supply of electric energy provided to such facility by an external provider, but that is not owned or operated by the owner or operator of such facility.

(6) *Department* means the United States Department of Energy.

(7) *Department of Energy (DOE)* means all organizational entities that are part of the Executive Department

created by Title II of the DOE Organization Act (Pub. L. 95–91, 91 Stat. 565, 42 U.S.C. 7101 *et seq.*). For purposes of this part, the definition of DOE specifically excludes the Federal Energy Regulatory Commission, which has promulgated its own CEII procedures at 18 CFR 388.113.

(8) *DOE Office* means any administrative or operating unit of DOE with authority at or above the level of Assistant Secretary, Principal Deputy Assistant Secretary, or Administrator.

(9) *Secretary* means the Secretary of Energy.

(d) *Authority to designate information as CEII.* The Secretary has the authority to designate information as CEII, in accordance with FPA section 215A. The Secretary may delegate the authority to designate information as CEII to any DOE Office.

(e) *Coordination among DOE Office designators.* The DOE CEII Coordinator shall be the primary point of contact for the submission of all requests for designation of information as CEII by DOE, as well as for requests made to DOE by organizations or individuals for information that may be protected, in whole or in part, as CEII.

(1) The CEII Coordinator or Coordinator's designee shall:

(i) Receive and review all incoming requests for CEII as defined in § 1004.13(c) and in accordance with § 1004.13(g);

(ii) Make initial determinations as to whether particular information fits within the definition of CEII found at § 1004.13(c), including but not limited to those considerations related to pre-designation of information related to Defense Critical Electric Infrastructure as defined in § 1004.13(c), NTIA-managed Federal agency spectrum use information, and/or accident and emergency information provided to DOE through Form OE–417;

(iii) Assist any DOE Offices with delegated CEII designation authority to make determinations as to whether a particular requester's need for and ability and willingness to protect CEII warrants limited disclosure of the information to the requester;

(iv) Establish reasonable conditions for considering requests for release of CEII-designated material in accordance with § 1004.13(g)(5) through (6);

(v) Make the Department's final determination regarding request by any non-Federal entity (organization or individual) for CEII-designated materials, in consultation with the appropriate DOE Office(s);

(vi) Notify a CEII submitter of a request for such information by a non-Federal entity;

(vii) Convene a conference call within no more than five (5) business days between an affected DOE Office and a CEII submitter to discuss concerns related to a non-Federal entity requesting release of CEII; and

(viii) Perform oversight of the DOE CEII program and establish guidance for the treatment, handling, and storage of all CEII materials in the Department in accordance with § 1004.13(g)(6), including those related to CEII international sharing protocols.

(2) DOE Offices with delegated authority to designate CEII in accordance with § 1004.13(d), as well as any CEII Coordinator designee(s) from the Bonneville Power Administration, the Energy Information Administration, the Southeastern Power Administration, the Southwestern Power Administration, and the Western Area Power Administration, will meet regularly, at the discretion of the CEII Coordinator, but not less than once per year, to ensure coordinated implementation of DOE's CEII designation authority.

(3) DOE, at the discretion of the CEII Coordinator, shall meet with representatives from FERC semi-annually (or more often, as necessary) to ensure that both agencies are applying CEII designation criteria consistently and to share best practices.

(4) DOE, at the discretion of the CEII Coordinator, shall meet annually with representatives from Department of Commerce, NTIA, or other Federal agencies, as needed, to ensure shared understanding and consistent communication among Federal agencies that collect, maintain and potentially release information that DOE may consider designating as CEII as defined in § 1004.13(c).

(f) *Criteria and procedures for designating CEII.*

(1) *Requesting CEII designation of information submitted to DOE.* Any person or entity requesting that information submitted to DOE be designated as CEII must submit such request to the DOE CEII Coordinator or Coordinator's designee according to the following procedures:

(i) The submitter must clearly label the cover page and pages or portions of the information for which CEII treatment is requested in bold, capital lettering, indicating that it contains CEII, as appropriate, and marked ''CEII—DO NOT RELEASE.''

(ii) The submitter must also clearly indicate the DOE Office(s) from which the CEII designation is being requested in bold, capital lettering on the cover page.

(iii) The submitter must also segregate those portions of the information that contain CEII (or information that reasonably could be expected to lead to the disclosure of the CEII) wherever feasible.

(iv) The submitter must submit a public version of the information where information designated CEII and information for which CEII designation is requested is redacted or otherwise protected through extraction from the non-CEII to the DOE CEII Coordinator and the Coordinator's designee in an appropriate DOE Office.

(2) *Requesting CEII designation for information generated by DOE.* Any DOE employees, DOE contractors, or agents of DOE requesting that information generated by the Department be designated as CEII must submit such request to the DOE CEII Coordinator and the Coordinator's designee in an appropriate DOE Office according to the following procedures:

(i) The submitter must clearly label the cover page and pages or portions of the information for which CEII treatment is requested in bold, capital lettering, indicating that it contains CEII, as appropriate, and marked ''CEII—DO NOT RELEASE.''

(ii) The submitter must also segregate those portions of the information that contain CEII (or information that reasonably could be expected to lead to the disclosure of the CEII) wherever feasible.

(iii) The submitter must submit to DOE a public version of the information where information designated CEII and information for which CEII designation is requested is redacted or otherwise protected through extraction from non-CEII to the DOE CEII Coordinator and Coordinator's designee.

(iv) CEII designation for information generated by DOE, to include, all organizational entities that are a part of the Executive Department created by Title II of the DOE Organization Act, may be executed at any time, regardless of when such information was generated.

(3) *Treatment of Submitted Information as CEII.*

(i) Upon receiving a request for CEII designation of information submitted to DOE, the DOE CEII Coordinator or Coordinator's designee shall review the submission made in accordance with § 1004.13(g)(2) for information about ''Defense Critical Electric Infrastructure,'' as defined by section 215A(a)(4) of the FPA; information on electric incidents and emergencies reported to DOE through Form OE–417; and/or Federal spectrum information managed by the NTIA, for immediate

pre-designation as CEII. If the CEII Coordinator determines that the information submitted does not qualify for immediate pre-designation, such information shall be evaluated for designation as CEII under this part.

(ii) Information for which CEII treatment is requested will be maintained by the CEII Coordinator or Coordinator's designee in DOE's files as non-public unless and until DOE completes its determination that the information is not entitled to CEII treatment. The interim treatment of the information as CEII does not mean that DOE has made a determination regarding CEII designation. DOE will endeavor to make a determination as soon as practicable. The Department retains the right to make determinations about any request for CEII designation at any time, including the removal of a previously granted CEII designation. At such time that a determination is made that information is not entitled to CEII treatment, DOE will follow the procedures for return of information not designated as CEII outlined in § 1004.13(g)(5)(iii).

(iii) When a requester seeks information for which CEII status has been requested but not designated, or when DOE itself is considering release of such information, DOE will render a decision on designation before responding to the requester or releasing such information. Subsequently, the release of information will be treated in accordance with the procedures established for CEII-designated material, or the return of information not designated as CEII.

(4) *Evaluation of CEII designation criteria to inform CEII designation determination.*

(i) The DOE CEII Coordinator, or a Coordinator's designee, will execute the Department's evaluation as to whether the submitted information or portions of the information meets the definition of CEII, as described at section (c)(2) of this Part, with the appropriate DOE Office with delegated CEII designation authority. The DOE Office will designate submitted information as soon as practicable and will inform submitters of the designation date if requested at the time of submission.

(ii) Reserved.

(5) *CEII Determination.*

(i) The Secretary or delegated DOE Office will make a determination regarding CEII designation after considering the information against the criteria for CEII designation. Upon making the determination, the DOE CEII Coordinator or Coordinator's designee shall communicate the decision to the submitter.

(ii) *Review of determination.* DOE reserves the right to review at any time information designated by DOE as CEII to determine whether the information is properly designated. The designation of information as CEII, or the removal of such designation, must be reviewed when:

(A) A FOIA request is submitted for the information under section 1004.10, or

(B) A request is made for reconsideration of the designation or removal of the designation under § 1004.13(i)(1).

(iii) *Return of Information not designated as CEII.* If the submitter voluntarily provided the information to DOE, at the request of the submitter, DOE will return or destroy information for which CEII designation was requested but not granted, and will attempt to remove all copies of such information from DOE files, both physical and electronic. DOE shall not remove electronic files in the ordinary course of business. If a submitter is required to provide information and DOE denies CEII designation, the submitter may file a request for review under the procedures.

(6) *Protection of CEII.*

(i) *Marking of CEII.* All information designated by DOE as CEII, whether submitted to or generated by DOE, shall be clearly labeled as such, and shall include the date on which the information was designated as CEII. For information that meets the definition of CEII but cannot be physically labeled, such as electronic information, the information shall be stored in a secure electronic environment that identifies the stored information as CEII.

(ii) *Protection and Exemption from Disclosure.* All information designated by DOE as CEII:

(A) Shall be exempt from disclosure under the FOIA exemption codified at 5 U.S.C. 552(b)(3); and

(B) Shall not be made available by any Federal, State, political subdivision or tribal authority under any Federal, State, political subdivision or tribal law requiring public disclosure of information or records, in accordance with FPA section 215A(d)(1).

(iii) *Secure Storage.* DOE will store information for which CEII treatment is requested in a secure place in a manner that would prevent unauthorized access.

(h) *Duration of designation.* Designation of information as CEII may last up to a five-year period, unless re-designated.

(1) *Expiration of designation.*

(i) The Secretary or delegated DOE Office will determine the duration of designation at the time of designation.

(ii) A submitter may re-apply for CEII designation no earlier than one year prior to the date of expiration of the prior designation or re-designation in accordance with the application procedures in § 1004.13(g)(1).

(2) *Removal of designation.* The designation of information as CEII may be removed at any time, by the Secretary or the DOE CEII Coordinator in consultation with the DOE Office to which the Secretary has delegated the authority, in whole or in part, upon determination that the unauthorized disclosure of such information could no longer be used to impair the security or reliability of the bulk-power system or distribution facilities or any other form of energy infrastructure. If the CEII designation is to be removed, the submitter and the DOE Office that produced or maintains the CEII will receive notice and an opportunity to comment. The CEII Coordinator or Coordinator's designee will notify the submitter and the DOE Office that produced or maintains the CEII, and will give the submitter an opportunity (at least ten (10) business days) in which to comment in writing prior to the removal of the designation. The CEII Coordinator or Coordinator's designee will provide notice of a removal decision to any submitter claiming that the information is CEII no less than twenty (20) business days before disclosure. The notice will briefly explain DOE's determination of why the submitter's objections do not support a decision to retain the CEII designation.

(3) *Treatment and return of information no longer designated as CEII.* At the request of the submitter, DOE will return or destroy information for which CEII designation has expired or has been removed and will attempt to remove all copies of it from DOE files, both physical and electronic; however, DOE shall not remove electronic files that have been backed up in the ordinary course of business. Such backed up electronic files shall be treated as CEII until they are destroyed under the normal electronic backup retention schedules. If a FOIA request is received for the non-CEII prior to its return or destruction, DOE will work with the submitter to review whether the information is subject to other FOIA exemptions.

(i) *Review or requests for reconsideration of designation.*

(1) *Request for Reconsideration.*

(i) Any person who has submitted information and requested such information to be designated as CEII may request reconsideration of a DOE decision not to designate that information as CEII or to remove an

existing CEII designation. Within ten (10) business days of notification by DOE of its CEII decision, the person must file a request for reconsideration. The request must be sent to the DOE CEII Coordinator and Coordinator's designee in electronic format at: CEII COORDINATOR MAILBOX. The request must also be sent to the DOE Office that made the decision at issue and to DOE's Office of General Counsel in Washington, DC, according to the instructions at 10 CFR 205.12. A statement in support of the request for reconsideration must be submitted within twenty (20) business days of the date of the determination. The request and the supporting statement will be considered submitted upon receipt by the Office of General Counsel.

(ii) Any person who has received a decision denying a request for the release of CEII, in whole or in part, or a decision denying a request to change the designation of CEII, may request reconsideration of that decision. A statement in support of the request for reconsideration must be submitted to the Office of General Counsel within twenty (20) business days of the date of the determination.

(iii) The Secretary or the DOE Office that made the decision at issue will make a determination, in coordination with the DOE CEII Coordinator or Coordinator's designee, with respect to any request for reconsideration within twenty (20) business days after the receipt of the request and will notify the person submitting the request of the determination and the availability of judicial review.

(iv) Before seeking judicial review in Federal District Court under section 215A(d)(11) of the Federal Power Act, a person who received a determination from DOE concerning a CEII designation must first request reconsideration of that determination.

(v) A request for reconsideration triggers a stay of the underlying decision, except in instances where voluntary sharing of the disputed information is necessary for law enforcement purposes, to ensure reliable operation or maintenance of electric or energy infrastructure, to maintain infrastructure security, to address potential threats, or to address an urgent need to disseminate the information quickly due to an emergency or other unforeseen circumstance.

(j) *Sharing of CEII.*

(1) *Federal Entities.* DOE will require those Federal entities requesting CEII to follow the procedures specified in § 1004.13(k). DOE may share CEII with affected agencies for those agencies to carry out their specific jurisdictional responsibilities, but may impose additional restrictions on how the information may be used and maintained, if shared.

(2) *Non-Federal Entities.* The Secretary or the DOE Coordinator shall make a final determination whether to share CEII materials requested by non-Federal entities that are within the categories specified in section 215A(d)(2)(D) of the FPA. A request by such a non-Federal entity shall not be entertained unless the requesting non-Federal entity has entered into a Non-Disclosure Agreement with DOE that ensures, at a minimum:

(i) Use of the information only for authorized purposes and by authorized recipients and under the conditions prescribed by the Secretary or CEII Coordinator;

(ii) Protection of the information in a secure manner to prevent unauthorized access;

(iii) Destruction or return of the information after the intended purposes of receiving the information have been fulfilled;

(iv) Prevention of viewing or access by individuals or organizations that have been prohibited or restricted by the United States or the Department from viewing or accessing CEII;

(v) Compliance with the provisions of the Non-Disclosure Agreement, subject to DOE audit; and

(vi) No further sharing of the information without DOE's permission.

(3) *Security and Reliability Coordination.* In accordance with section 215A(d)(2)(D) of the FPA, DOE may, taking into account standards of the Electric Reliability Organization, facilitate voluntary sharing of CEII with, between, and by Federal, State, political subdivision, and tribal authorities; the Electric Reliability Organization; regional entities; information sharing and analysis centers established pursuant to Presidential Decision Directive 63; reliability coordinators, balancing authorities areas, owners, operators, and users of critical electric infrastructure in the United States; and other entities determined appropriate. All entities receiving CEII must execute either a Non-Disclosure Agreement or an Acknowledgement and Agreement or participate in an Electric Reliability Organization or Regional Entity information sharing program that ensures the protection of CEII. A copy of each agreement or program will be maintained by the DOE Office with a copy to the CEII Coordinator or the Coordinator's designee. If DOE facilitates voluntary sharing of CEII under this subsection, DOE may impose additional restrictions on how the information may be used and maintained.

(4) *International Sharing Protocols.* The Secretary may delegate authority to DOE Offices to develop, after consultation with Canadian and Mexican authorities, protocols for the voluntary sharing of CEII with Canadian and Mexican authorities and owners, operators, and users of the bulk-power system outside the United States. The DOE CEII Coordinator or Coordinator's designee would provide assistance and advice to DOE Offices in the development of the international sharing protocols.

(5) *Notice for Sharing of CEII not Generated by DOE.* The DOE CEII Coordinator or Coordinator's designee will provide electronic notice to the CEII submitter no less than ten (10) business days before DOE releases CEII submitted to and not generated by DOE, except in instances where voluntary sharing is necessary for law enforcement purposes, to ensure reliable operation or maintenance of electric or energy infrastructure, to maintain infrastructure security, or to address potential threats; where there is an urgent need to quickly disseminate the information; or where prior notice is not practicable due to an emergency or other unforeseen circumstance. If prior notice is not given, DOE will provide notice as soon as practicable. The DOE CEII Coordinator or Coordinator's designee would convene a phone call, within five (5) days of electronic notice with the CEII submitter, to discuss concerns about the proposed release of CEII-designated materials to the requester. DOE would make the final determination as to whether to share CEII not generated by DOE.

(k) *Procedures for requesting CEII.* Any person requesting CEII must include the following material with the request:

(1) *Contact Information.* Provide your name, title and employer, work address, work phone number, and work email. If you are requesting the information on behalf of a person or entity other than yourself, you must also list that person's or entity's work contact information, including name, title, address, phone number, and email.

(2) *Explanation of Need.* Provide a detailed statement explaining the particular need for and intended use of the information.

(3) *Signed Non-Disclosure Acknowledgement/Agreement.* Provide an executed Non-Disclosure Acknowledgement (if the requester is a Federal entity) or an executed Non-Disclosure Agreement (if the requester is not a Federal entity) requiring

adherence to limitations on the use and disclosure of the information requested.

(4) *DOE evaluation.* Upon receiving a request for CEII, the CEII Coordinator shall contact the DOE Office or Federal agency that created or maintains the CEII. In consultation with the DOE Office, the CEII Coordinator shall determine if the need for CEII and the protection afforded to the CEII should result in sharing CEII for the limited purpose made in the request. In the event the CEII Coordinator or Coordinator's designee denies the request, the requestor may seek request for reconsideration, as provided in § 1004.13(i).

(l) *Unauthorized Disclosure.*

(1) *Disclosure by submitter of information.* If the submitter of information discloses to the public information that has received a CEII designation, then the Department reserves the right to remove its CEII designation.

(2) *Disciplinary Action for Unauthorized Disclosure.* DOE employees or contractors who knowingly or willfully disclose CEII in an unauthorized manner will be subject to appropriate sanctions, including disciplinary action under DOE or DOE Office personnel rules or referral to the DOE Inspector General.

(3) In accordance with the Whistleblower Protection Enhancement Act of 2012 (Pub. L. 112–199, 126 Stat. 1465), these provisions are consistent with and do not supersede, conflict with, or otherwise alter the employee obligations, rights, or liabilities created by existing statute relating to:

(i) Classified information,

(ii) Communications to Congress,

(iii) The reporting to an Inspector General of a violation of any law, rule, or regulation, or mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, or

(iv) Any other whistleblower protection. The definitions, requirements, obligations, rights, sanctions, and liabilities created by controlling statutory provisions are incorporated into this agreement and are controlling.

[FR Doc. 2018–23459 Filed 10–26–18; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 91

[Docket No.: FAA–2010–0289; SFAR No. 110]

RIN 2120–AJ69

Prohibition Against Certain Flights Within the Territory and Airspace of Afghanistan; Withdrawal

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

ACTION: Notice of proposed rulemaking; withdrawal.

SUMMARY: The Federal Aviation Administration (FAA) is withdrawing a previously published notice of proposed rulemaking that proposed to restrict U.S. civil flight operations below flight level (FL) 160 within the territory and airspace of Afghanistan.

DATES: The notice of proposed rulemaking published on May 26, 2010 (75 FR 29466) is withdrawn as of October 29, 2018.

FOR FURTHER INFORMATION CONTACT: Michael Filippell, Air Transportation Division, Flight Standards Service, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591; telephone 202–267–8166; email *michael.e.filippell@faa.gov*.

SUPPLEMENTARY INFORMATION:

Background

On May 26, 2010, the FAA published a notice of proposed rulemaking (NPRM) titled ''Prohibition against Certain Flights within the Territory and Airspace of Afghanistan'' (75 FR 29466). The NPRM proposed to restrict U.S. civil flight operations below FL 160 within the territory and airspace of Afghanistan, unless the operations are authorized by another U.S. Government department or agency (hereinafter referred to as ''department or agency'') and approved by the FAA, or subject to an exemption granted by the FAA. The preamble to the NPRM explained the process for a department or agency to apply for FAA approval for operations to be conducted under contract to that department or agency and for operators to apply for exemption.

The situation in Afghanistan presented a unique environment relative to other situations where the FAA had imposed similar regulations to address the safety of U.S. operators while in foreign territories and airspace. The presence of the U.S. military forces in Afghanistan had required a large presence of U.S. civil aircraft operations to support the warfighting, nation building, and humanitarian efforts. The level of these operations occurring in Afghanistan warranted the FAA to provide notice of the proposed regulation to limit flight in this area and a limited opportunity for comment from operators or other individuals that might have been affected by such action. The FAA found that good cause existed to limit the notice and public comment period required by 5 U.S.C. 553(d)(3) to 15 days. The comment period closed on June 10, 2010.

Discussion of Comments Received

The FAA received 22 submissions containing multiple comments from air carriers, associations, labor organizations, humanitarian organizations, and individuals. All of the commenters acknowledged the risks associated with conducting aviation operations in Afghanistan. Several commenters fully supported the provisions in the NPRM, while others requested clarification of certain elements in the proposal. The majority of commenters, however, asserted that the proposed rule would place unnecessary restrictions and burdens on U.S. civil aviation operations in Afghanistan. They contended that the proposed rule would result in an adverse economic impact for U.S. operators and limit their ability to support the ongoing U.S. military activities, nation building, and humanitarian efforts.

Following publication of the NPRM, several commenters, including Kalitta Air, Pactec International, and Atlas Air Worldwide Holdings submitted comments that questioned the FAA's determination of the costs of implementing the NPRM if adopted as proposed. Kalitta Air specifically requested that the FAA complete a regulatory impact analysis to accurately account for the costs associated with the proposal. In response, the FAA published a Supplemental Regulatory Flexibility Analysis on July 20, 2010 (75 FR 42015) for a 15-day comment period that closed on August 4, 2010. No comments were submitted to the supplemental regulatory flexibility analysis.

Conclusion

After considering the comments, the FAA has determined the unique environment in Afghanistan continues. There is no scheduled U.S. air service in Afghanistan, and the only operations by U.S. operators or airmen currently conducted there are in support of U.S. Government activities. Additionally, the

FAA has issued an advisory notice to airmen (NOTAM KICZ A0031/17) advising U.S. operators in Afghanistan airspace to operate, to the maximum extent possible, only on established air routes and at altitudes at or above FL 330 due to the risk to civil aviation.

Accordingly, the FAA has decided to withdraw this proposal. Withdrawal of proposed SFAR No. 110 does not preclude the FAA from issuing another notice on this subject matter in the future and does not commit the agency to any future course of action. The FAA continues to assess the circumstances in Afghanistan and intends to take action as appropriate to mitigate risks to aviation safety.

The FAA withdraws Notice No. 2010–12670, published at 75 FR 29466 on May 26, 2010.

Issued in Washington, DC, under the authority of 49 U.S.C. 106(f) and (g), 40101(d)(1), 40105(b)(1), and 44701(a)(5), on October 16, 2018.

Rick Domingo,

Executive Director, Flight Standards Service.

[FR Doc. 2018–23400 Filed 10–26–18; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TREASURY

Internal Revenue Service

26 CFR Part I

[REG–115420–18]

RIN 1545–BP03

Investing in Qualified Opportunity Funds

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking and notice of public hearing.

SUMMARY: This document contains proposed regulations that provide guidance under new section 1400Z–2 of the Internal Revenue Code (Code) relating to gains that may be deferred as a result of a taxpayer's investment in a qualified opportunity fund (QOF). Specifically, the proposed regulations address the type of gains that may be deferred by investors, the time by which corresponding amounts must be invested in QOFs, and the manner in which investors may elect to defer specified gains. This document also contains proposed regulations applicable to QOFs, including rules for self-certification, valuation of QOF assets, and guidance on qualified opportunity zone businesses. The proposed regulations affect QOFs and their investors. This document also provides notice of a public hearing on these proposed regulations.

DATES: Written (including electronic) comments must be received by December 28, 2018. Outlines of topics to be discussed at the public hearing scheduled for January 10, 2019 at 10 a.m. must be received by December 28, 2018.

ADDRESSES: Send submissions to: CC:PA:LPD:PR (REG–115420–18), Room 5203, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to CC:PA:LPD:PR (REG–115420–18), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue NW, Washington, DC 20224. Alternatively, taxpayers may submit comments electronically via the Federal Rulemaking Portal at *www.regulations.gov* (IRS REG–115420–18). The public hearing will be held in the IRS auditorium, Internal Revenue Building, 1111 Constitution Avenue NW, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations, Erika C. Reigle of the Office of Associate Chief Counsel (Income Tax and Accounting), (202) 317–7006 and Kyle C. Griffin of the Office of Associate Chief Counsel (Income Tax and Accounting), (202) 317–4718; concerning the submission of comments, the hearing, or to be placed on the building access list to attend the hearing, Regina L. Johnson, (202) 317–6901 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background

This document contains proposed regulations under section 1400Z–2 of the Code that amend the Income Tax Regulations (26 CFR part 1). Section 13823 of the Tax Cuts and Jobs Act, Public Law 115–97, 131 Stat. 2054, 2184 (2017) (TCJA), amended the Code to add sections 1400Z–1 and 1400Z–2. Section 1400Z–1 provides procedural rules for designating qualified opportunity zones and related definitions. Section 1400Z–2 allows a taxpayer to elect to defer certain gains to the extent that corresponding amounts are timely invested in a QOF.

Section 1400Z–2, in conjunction with section 1400Z–1, seeks to encourage economic growth and investment in designated distressed communities (qualified opportunity zones) by providing Federal income tax benefits to taxpayers who invest in businesses located within these zones. Section 1400Z–2 provides two main tax incentives to encourage investment in qualified opportunity zones. First, it allows for the deferral of inclusion in gross income for certain gains to the extent that corresponding amounts are reinvested in a QOF. Second, it excludes from gross income the post-acquisition gains on investments in QOFs that are held for at least 10 years.

As is more fully explained in the Explanation of Provisions, these proposed regulations describe and clarify the requirements that must be met by a taxpayer in order properly to defer the recognition of gains by investing in a QOF. In addition, the proposed regulations provide rules permitting a corporation or partnership to self-certify as a QOF. Finally, the proposed regulations provide initial proposed rules regarding some of the requirements that must be met by a corporation or partnership in order to qualify as a QOF.

Contemporaneous with the issuance of these proposed regulations, the IRS is releasing a revenue ruling addressing the application to real property of the ''original use'' requirement in section 1400Z–2(d)(2)(D)(i)(II) and the ''substantial improvement'' requirement in section 1400Z–2(d)(2)(D)(i)(II) and 1400Z–2(d)(2)(D)(ii).

In addition, these proposed regulations address the substantial-improvement requirement with respect to a purchased building located in a qualified opportunity zone. They provide that for purposes of this requirement, the basis attributable to land on which such a building sits is not taken into account in determining whether the building has been substantially improved. Excluding the basis of land from the amount that needs to be doubled under section 1400Z–2(d)(2)(D)(ii) for a building to be substantially improved facilitates repurposing vacant buildings in qualified opportunity zones. Similarly, an absence of a requirement to increase the basis of land itself would address many of the comments that taxpayers have made regarding the need to facilitate repurposing vacant or otherwise unutilized land.

In connection with soliciting comments on these proposed regulations the Department of the Treasury (Treasury Department) and the IRS are soliciting comments on all aspects of the definition of ''original use'' and ''substantial improvement.'' In particular, they are seeking comments on possible approaches to defining the ''original use'' requirement, for both real property and other tangible property. For example, what metrics would be appropriate for determining whether

tangible property has ''original use'' in an opportunity zone? Should the use of tangible property be determined based on its physical presence within an opportunity zone, or based on some other measure? What if the tested tangible property is a vehicle or other movable tangible property that was previously used within the opportunity zone but acquired from a person outside the opportunity zone? Should some period of abandonment or under-utilization of tangible property erase the property's history of prior use in the opportunity zone? If so, should such a fallow period enable subsequent productive utilization of the tangible property to qualify as ''original use''? Should the rules appropriate for abandonment and underutilization of personal tangible property also apply to vacant real property that is productively utilized after some period? If so, what period of abandonment, underutilization, or vacancy would be consistent with the statute? In addition, comments are requested on whether any additional rules regarding the ''substantial improvement'' requirement for tangible property are warranted or would be useful.

The Treasury Department and the IRS are working on additional published guidance, including additional proposed regulations expected to be published in the near future. The Treasury Department and the IRS expect the forthcoming proposed regulations to incorporate the guidance contained in the revenue ruling to facilitate additional public comment. The forthcoming proposed regulations are expected to address other issues under section 1400Z–2 that are not addressed in these proposed regulations. Issues expected to be addressed include: The meaning of ''substantially all'' in each of the various places where it appears in section 1400Z–2; the transactions that may trigger the inclusion of gain that has been deferred under a section 1400Z–2(a) election; the ''reasonable period'' (see section 1400Z–2(e)(4)(B)) for a QOF to reinvest proceeds from the sale of qualifying assets without paying a penalty; administrative rules applicable under section 1400Z–2(f) when a QOF fails to maintain the required 90 percent investment standard; and information-reporting requirements under section 1400Z–2.

The Treasury Department and the IRS welcome comments on what other additional issues should be addressed in forthcoming proposed regulations or guidance.

Explanation of Provisions

I. Deferring Tax on Capital Gains by Investing in Opportunity Zones

A. Gains Eligible for Deferral

The proposed regulations clarify that only capital gains are eligible for deferral under section 1400Z–2(a)(1). In setting forth the gains that are subject to deferral, the text of section 1400Z–2(a)(1) specifies ''*gain* from the sale to, or exchange with, an unrelated person of any property held by the taxpayer,'' to the extent that such gain does not exceed the aggregate amount invested by the taxpayer in a QOF during the 180-day period beginning on the date of the sale or exchange (emphasis added). The statutory text is silent as to whether Congress intended both ordinary and capital gains to be eligible for deferral under section 1400Z–2. (Sections 1221 and 1222 define these two kinds of gains.) However, the statute's legislative history explicitly identifies ''capital gains'' as the gains that are eligible for deferral. The Treasury Department and the IRS believe, based on the legislative history as well as the text and structure of the statute, that section 1400Z–2 is best interpreted as making deferral available only for capital gains. The proposed regulations provide that a gain is eligible for deferral if it is treated as a capital gain for Federal income tax purposes. Eligible gains, therefore, generally include capital gain from an actual, or deemed, sale or exchange, or any other gain that is required to be included in a taxpayer's computation of capital gain.

The proposed regulations address two additional gain deferral requirements. First, the gain to be deferred must be gain that would be recognized, if deferral under section 1400Z–2(a)(1) were not permitted, not later than December 31, 2026, the final date under section 1400Z–2(a)(2)(B) for the deferral of gain. Second, the gain must not arise from a sale or exchange with a related person as defined in section 1400Z–2(e)(2). Section 1400Z–2(e)(2) incorporates the related person definition in sections 267(b) and 707(b)(1) but substitutes ''20 percent'' in place of ''50 percent'' each place it occurs in section 267(b) or section 707(b)(1).

B. Types of Taxpayers Eligible To Elect Gain Deferral

The proposed regulations clarify that taxpayers eligible to elect deferral under section 1400Z–2 are those that recognize capital gain for Federal income tax purposes. These taxpayers include individuals, C corporations (including regulated investment companies (RICs) and real estate investment trusts (REITs)), partnerships, and certain other pass-through entities, including common trust funds described in section 584, as well as, qualified settlement funds, disputed ownership funds, and other entities taxable under § 1.468B of the Income Tax Regulations.

In order to address the numerous issues raised by new section 1400Z–2 for pass-through entities, the proposed regulations include special rules for partnerships and other pass-through entities, and for taxpayers to whom these entities pass through income and other tax items. Under these rules, the entities and taxpayers can invest in a QOF and thus defer recognition of eligible gain. The Treasury Department and the IRS request comments on whether the rules are sufficient and whether more detailed rules are required to provide additional certainty for investors in pass-through entities that are not partnerships.

C. Investments in a QOF

The proposed regulations clarify that, to qualify under section 1400Z–2(a)(1)(A), (that is, to be an eligible interest in a QOF), an investment in the QOF must be an equity interest in the QOF, including preferred stock or a partnership interest with special allocations. Thus, an eligible interest cannot be a debt instrument within the meaning of section 1275(a)(1) and § 1.1275–1(d). Provided that the eligible taxpayer is the owner of the equity interest for Federal income tax purposes, status as an eligible interest is not impaired by the taxpayer's use of the interest as collateral for a loan, whether a purchase-money borrowing or otherwise. The proposed regulations also clarify that deemed contributions of money under section 752(a) do not result in the creation of an investment in a QOF.

D. 180-Day Rule for Deferring Gain by Investing in a QOF

Under section 1400Z–2(a)(1)(A), to be able to elect to defer gain, a taxpayer must generally invest in a QOF during the 180-day period beginning on the date of the sale or exchange giving rise to the gain. Some capital gains, however, are the result of Federal tax rules deeming an amount to be a gain from the sale or exchange of a capital asset, and, in many cases, the statutory language providing capital gain treatment does not provide a specific date for the deemed sale. The proposed regulations address this issue by providing that, except as specifically provided in the proposed regulations,

the first day of the 180-day period is the date on which the gain would be recognized for Federal income tax purposes, without regard to the deferral available under section 1400Z–2. The proposed regulations include examples that illustrate the general rule by applying it to capital gains in a variety of situations (including, for example, gains from the sale of exchange-traded stock and capital gain dividend distributions).

If a taxpayer acquires an original interest in a QOF in connection with a gain-deferral election under section 1400Z–2(a)(1)(A), if a later sale or exchange of that interest triggers an inclusion of the deferred gain, and if the taxpayer makes a qualifying new investment in a QOF, then the proposed regulations provide that the taxpayer is eligible to make a section 1400Z–2(a)(2) election to defer the inclusion of the previously deferred gain. Deferring an inclusion otherwise mandated by section 1400Z–2(a)(1)(B) in this situation is permitted only if the taxpayer has disposed of the entire initial investment without which the taxpayer could not have made the previous deferral election under section 1400Z–2. The complete disposition is necessary because section 1400Z–2(a)(2)(A) expressly prohibits the making of a deferral election under section 1400Z–2(a)(1) with respect to a sale or exchange if an election previously made with respect to the same sale or exchange remains in effect. The general 180-day rule described above determines when this second investment must be made to support the second deferral election. Under that rule, the first day of the 180-day period for the new investment in a QOF is the date that section 1400Z–2(b)(1) provides for inclusion of the previously deferred gain .

Comments are requested as to whether the final regulations should contain exceptions to the general 180-day rule and whether it would be helpful for either the final regulations or other guidance to illustrate the application of the general 180-day rule to additional circumstances, and what those circumstances are.

E. Attributes of Included Income When Gain Deferral Ends

Section 1400Z–2(a)(1)(B) and (b) require taxpayers to include in income previously deferred gains. The proposed regulations provide that all of the deferred gain's tax attributes are preserved through the deferral period and are taken into account when the gain is included. The preserved tax attributes include those taken into account under sections 1(h), 1222, 1256, and any other applicable provisions of the Code. Furthermore, the proposed regulations address situations in which separate investments providing indistinguishable property rights (such as serial purchases of common stock in a corporation that is a QOF) are made at different times or are made at the same time with separate gains possessing different attributes (such as different holding periods). If a taxpayer disposes of less than all of its fungible interests in a QOF, the proposed regulations provide that the QOF interests disposed of must be identified using a first-in, first-out (FIFO) method. Where the FIFO method does not provide a complete answer, such as where gains with different attributes are invested in indistinguishable interests at the same time, the proposed regulations provide that a pro-rata method must be used to determine the character, and any other attributes, of the gain recognized. Examples in the proposed regulations illustrate this rule.

Comments are requested as to whether different methods should be used. Any such alternative methods must both provide certainty as to which fungible interest a taxpayer disposes of and allow taxpayers to comply easily with the requirements of section 1400Z–2(a)(1)(B) and (b),which require that certain dispositions of an interest in a QOF cause deferred gain be included in a taxpayer's income.

II. Special Rules

A. Gain Not Already Subject to an Election

Under section 1400Z–2(a)(2)(A), no election may be made under section 1400Z–2(a)(1) with respect to a sale or exchange if an election previously made with respect to that sale or exchange is in effect. There has been some confusion as to whether this language bars a taxpayer from making multiple elections within 180-days for various parts of the gain from a single sale or exchange of property held by the taxpayer. This rule in section 1400Z–2(a)(2)(A) is meant to exclude from the section 1400Z–2(a)(1) election multiple purported elections with respect to the same gain. (Although the gain itself can be deferred only once, a taxpayer might be seeking to multiply the investments eligible for various increases in basis.) Thus, the proposed regulations clarify that in the case of a taxpayer who has made an election under section 1400Z–2(a) with respect to some but not all of an eligible gain, the term ''eligible gain'' includes the portion of that eligible gain as to which no election has been made. (All elections with respect to portions of the same gain would, of course, be subject to the same 180-day period.)

B. Section 1256 Contracts

The proposed regulations provide rules for capital gains arising from section 1256 contracts. Under section 1256, a taxpayer generally ''marks to market'' each section 1256 contract at the termination or transfer of the taxpayer's position in the contract or on the last business day of the taxable year if the contract is still held by the taxpayer at that time. The mark causes the taxpayer to take into account in the taxable year any not-yet recognized appreciation or depreciation in the position. This gain or loss, if capital, is treated as 60 percent long-term capital gain or loss and 40 percent short-term capital gain or loss. Currently, for federal income tax purposes, the only relevant information required to be reported by a broker to the IRS and to individuals and certain other taxpayers holding section 1256 contracts, is the taxpayer's net recognized gain or loss from all of the taxpayer's section 1256 contracts held during the taxable year. Some taxpayers holding section 1256 contracts, however, report the gain or loss from section 1256 contracts to the IRS on a per contract basis rather than on an aggregate basis. To minimize the burdens on taxpayers, brokers, and the IRS from tax compliance and tax administration, the proposed regulations allow deferral under section 1400Z–2(a)(1) only for a taxpayer's capital gain net income from section 1256 contracts for a taxable year. In addition, because the capital gain net income from section 1256 contracts for a taxable year is determinable only as of the last day of the taxable year, the proposed regulations provide that the 180-day period for investing capital gain net income from section 1256 contracts in a QOF begins on the last day of the taxable year.

Finally, the proposed regulations do not allow any deferral of gain from a section 1256 contract in a taxable year if, at any time during the taxable year, one of the taxpayer's section 1256 contracts was part of an offsetting-positions transaction (as defined later in the proposed regulations and described later in this preamble) in which any of the other positions was not also a section 1256 contract.

Comments are requested on this limitation and on whether capital gain from a section 1256 contract should be eligible for deferral under section 1400Z–2 on a per contract basis rather than on an aggregate net basis. Reporting on a per contract basis might

require a significant increase in the number of information returns that taxpayers would need to file with the IRS as compared to the number of information returns that are currently filed on an aggregate net basis. Comments are requested on how to minimize the burdens and complexity that may be associated with reporting on a per contract basis for section 1256 contracts.

C. Offsetting-Positions Transactions, Including Straddles

The Treasury Department and the IRS considered allowing deferral under section 1400Z–2(a)(1) for a net amount of capital gain related to a straddle (as defined in section 1092(c)(1)) after the disposition of all positions in the straddle. However, such a rule would pose significant administrative challenges. For example, additional rules would be needed for a taxpayer to defer such a net amount of capital gain when positions are disposed of in different taxable years (and likely would require affected taxpayers to file amended tax returns). Further, additional rules might be needed to take into account the netting requirements for identified mixed straddles described in § 1.1092(b)–3T or 1.1092(b)–6 and for mixed straddle accounts described in § 1.1092(b)–4T. Accordingly, in the interest of sound tax administration and to provide consistent treatment for transactions involving offsetting positions in personal property, the proposed regulations provide that any capital gain from a position that is or has been part of an offsetting-positions transaction (other than an offsetting-positions transaction in which all of the positions are section 1256 contracts) is not eligible for deferral under section 1400Z–2.

An offsetting-positions transaction is defined in the proposed regulations as a transaction in which a taxpayer has substantially diminished the taxpayer's risk of loss from holding one position with respect to personal property by holding one or more other positions with respect to personal property (whether or not of the same kind). It does not matter whether either of the positions is with respect to actively traded personal property. An offsetting-positions transaction includes a straddle as defined in section 1092 and the regulations thereunder, including section 1092(d)(4), which provides rules for positions held by related persons and certain flow-through entities (for example, a partnership). An offsetting-positions transaction also includes a transaction that would be a straddle (taking into account the principles referred to in the preceding sentence) if the straddle definition did not contain the active trading requirement in section 1092(d)(1).

III. Gains of Partnerships and Other Pass-Through Entities

Commenters have requested clarification regarding whether deferral is possible under section 1400Z–2 any time a partnership would otherwise recognize capital gain. The proposed regulations provide rules that permit a partnership to elect deferral under section 1400Z–2 and, to the extent that the partnership does not elect deferral, provide rules that allow a partner to do so. These rules both clarify the circumstances under which each can elect and clarify when the applicable 180-day period begins.

Proposed § 1.1400Z2(a)–1(c)(1) provides that a partnership may elect to defer all or part of a capital gain to the extent that it makes an eligible investment in a QOF. Because the election provides for deferral, if the election is made, no part of the deferred gain is required to be included in the distributive shares of the partners under section 702, and the gain is not subject to section 705(a)(1). Proposed § 1.1400Z2(a)–1(c)(2) provides that, to the extent that a partnership does not elect to defer capital gain, the capital gain is included in the distributive shares of the partners under section 702 and is subject to section 705(a)(1). If all or any portion of a partner's distributive share satisfies all of the rules for eligibility under section 1400Z–2(a)(1) (including not arising from a sale or exchange with a person that is related either to the partnership or to the partner), then the partner generally may elect its own deferral with respect to the partner's distributive share. The partner's deferral is potentially available to the extent that the partner makes an eligible investment in a QOF.

Consistent with the general rule for the beginning of the 180-day period, the partner's 180-day period generally begins on the last day of the partnership's taxable year, because that is the day on which the partner would be required to recognize the gain if the gain is not deferred. The proposed regulations, however, provide an alternative for situations in which the partner knows (or receives information) regarding both the date of the partnership's gain and the partnership's decision not to elect deferral under section 1400Z–2. In that case, the partner may choose to begin its own 180-day period on the same date as the start of the partnership's 180-day period.

The proposed regulations state that rules analogous to the rules provided for partnerships and partners apply to other pass-through entities (including S corporations, decedents' estates, and trusts) and to their shareholders and beneficiaries. Comments are requested regarding whether taxpayers need additional details regarding analogous treatment for pass-through entities that are not partnerships.

IV. How To Elect Deferral

These proposed regulations require deferral elections to be made at the time and in the manner provided by the Commissioner of Internal Revenue (Commissioner). The Commissioner may prescribe in regulations, revenue procedures, notices, or other guidance published in the Internal Revenue Bulletin or in forms and instructions the time, form, and manner in which an eligible taxpayer may elect to defer eligible gains under section 1400Z–2(a). It is currently anticipated that taxpayers will make deferral elections on Form 8949, which will be attached to their Federal income tax returns for the taxable year in which the gain would have been recognized if it had not been deferred. Form instructions to this effect are expected to be released very shortly after these proposed regulations are published. Comments are requested whether additional proposed regulations or other guidance are needed to clarify the required procedures. In addition IRS releases draft forms for public review and comments. These drafts are posted to *www.IRS.gov/DraftForms* and include a cover sheet that indicates how to submit comments.

V. Section 1400Z–2(c) Election for Investments Held at Least 10 Years

A. In General

Under section 1400Z–2(c), a taxpayer that holds a QOF investment for at least ten years may elect to increase the basis of the investment to the fair market value of the investment on the date that the investment is sold or exchanged.

The basis step-up election under section 1400Z–2(c) is available only for gains realized upon investments that were made in connection with a proper deferral election under section 1400Z–2(a). It is possible for a taxpayer to invest in a QOF in part with gains for which a deferral election under section 1400Z–2(a) is made and in part with other funds (for which no section 1400Z–2(a) deferral election is made or for which no such election is available). Section 1400Z–2(e) requires that these two types of QOF investments be treated

as separate investments, which receive different treatment for Federal income tax purposes. Pursuant to section 1400Z–2(e)(1)(B), the proposed regulations reiterate that a taxpayer may make the election to step-up basis in an investment in a QOF that was held for 10 years or more only if a proper deferral election under section 1400Z–2(a) was made for the investment.

B. QOF Investments and the 10-Year Zone Designation Period

Section 1400Z–2(c), as stated above, permits a taxpayer to elect to increase the basis in its investment in a QOF if the investment is held for at least ten years from the date of the original investment in the QOF. However, under section 1400Z–1(f), the designations of all qualified opportunity zones now in existence will expire on December 31, 2028. The loss of qualified opportunity zone designation raises numerous issues regarding gain deferral elections that are still in effect when the designation expires. Among the issues that the zone expiration date raises is whether, after the relevant qualified opportunity zone loses its designation, investors may still make basis step-up elections for QOF investments from 2019 and later.

Section 1400Z–2 does not contain specific statutory language like that in some other provisions, such as the DC enterprise zones provision in section 1400B(b)(5), that expressly permits a taxpayer to satisfy the requisite holding period after the termination of the designation of a zone. Commenters have raised the question described in the preceding paragraph—whether a taxpayer whose investment in a QOF has its 10-year anniversary after the 2028 calendar year will be able to take advantage of the basis step-up election provided in section 1400Z–2(c). The incentive provided by this benefit is integral to the primary purpose of the provision (*see* H.R. Rept. 115–466, 537, which describes the intent to attract an influx of capital to designated low income communities). For this reason, the proposed regulations permit taxpayers to make the basis step-up election under section 1400Z–2(c) after a qualified opportunity zone designation expires.

The ability to make this election is preserved under these proposed regulations until December 31, 2047, 20½ years after the latest date that an eligible taxpayer may properly make an investment that is part of an election to defer gain under section 1400Z–2(a). Because the latest gain subject to deferral would be at the end of 2026, the last day of the 180-day period for that gain would be in late June 2027. A taxpayer deferring such a gain would achieve a 10-year holding period in a QOF investment only in late June 2037. Thus, this proposed rule would permit an investor in a QOF that makes an investment as late as the end of June 2027 to hold the investment in the QOF for the entire 10-year holding period described in section 1400Z–2(c), plus another 10 years.

The additional ten year period is provided to avoid situations in which, in order to enjoy the benefits provided by section 1400Z–2(c), a taxpayer would need to dispose of an investment in a QOF shortly after completion of the required 10-year holding period. There may be cases in which disposal shortly after the 10-year holding period would diverge from otherwise desirable business conduct, and, absent the additional time, some taxpayers may lose the statutory benefit.

The Treasury Department and the IRS request comments on this proposed fixed 20½-year end date for the section 1400Z–2(c) basis step-up election. In particular, whether some other time period would better align with taxpayers' economic interests and the purposes of the statute. Comments may also include an alternative to incentivizing investors to disinvest shortly before any such a fixed end date for the section 1400Z–2(c) basis step-up election. For example, should the regulations provide for a presumed basis step-up election immediately before the ability to elect a step-up upon disposition expires? If such a basis step-up without disposition is allowed, how should a QOF investment be properly valued at the time of the step-up?

VI. Rules for a Qualified Opportunity Fund

A. Certification of an Entity as a QOF

Section 1400Z–2(e)(4) allows the Secretary of the Treasury to prescribe regulations for the certification of QOFs for purposes of section 1400Z–2. In order to facilitate the certification process and minimize the information collection burden placed on taxpayers, the proposed regulations generally permit any taxpayer that is a corporation or partnership for tax purposes to self-certify as a QOF, provided that the entity self-certifying is statutorily eligible to do so. The proposed regulations permit the Commissioner to determine the time, form, and manner of the self-certification in IRS forms and instructions or in guidance published in the Internal Revenue Bulletin. It is expected that taxpayers will use Form 8996, Qualified Opportunity Fund, both for initial self-certification and for annual reporting of compliance with the 90-Percent Asset Test in section 1400Z–2(d)(1). It is expected that the Form 8996 would be attached to the taxpayer's Federal income tax return for the relevant tax years. The IRS expects to release this form contemporaneous with the release of these proposed regulations.

B. Designating When a QOF Begins

The proposed regulations allow a QOF both to identify the taxable year in which the entity becomes a QOF and to choose the first month in that year to be treated as a QOF. If an eligible entity fails to specify the first month it is a QOF, then the first month of its initial taxable year as a QOF is treated as the first month that the eligible entity is a QOF. A deferral election under section 1400Z–2(a) may only be made for investments in a QOF. Therefore, a proper deferral election under section 1400Z–2(a) may not be made for an otherwise qualifying investment that is made before an eligible entity is a QOF.

C. Becoming a QOF in a Month Other Than the First Month of the Taxable Year

The proposed regulations provide guidance regarding application of the 90-Percent Asset Test in section 1400Z–2(d)(1) with respect to an entity's first year as a QOF, if the entity chooses to become a QOF beginning with a month other than the first month of its first taxable year. The phrase ''first 6-month period of the taxable year of the fund'' means the first 6-month period composed entirely of months which are within the taxable year and during which the entity is a QOF. For example, if a calendar-year entity that was created in February chooses April as its first month as a QOF, then the 90-Percent-Asset-Test testing dates for the QOF are the end of September and the end of December. Moreover, if the calendar-year QOF chooses a month after June as its first month as a QOF, then the only testing date for the taxable year is the last day of the QOF's taxable year. Regardless of when an entity becomes a QOF, the last day of the taxable year is a testing date.

The proposed regulations clarify that the penalty in section 1400Z–2(f)(1) does not apply before the first month in which the entity qualifies as a QOF. The Treasury Department and the IRS intend to publish additional proposed regulations that will address, among other issues, the applicability of the section 1400Z–2(f)(1) penalty and conduct that may lead to potential decertification of a QOF.

Section 1400Z–2(e)(4)(B) authorizes regulations to ensure that a QOF has ''a reasonable period of time to reinvest the return of capital from investments in qualified opportunity zone stock and qualified opportunity zone partnership interests, and to reinvest proceeds received from the sale or disposition of qualified opportunity zone business property.'' For example, if a QOF shortly before a testing date sells qualified opportunity zone property, that QOF should have a reasonable amount of time in which to bring itself into compliance with the 90-Percent Asset Test. Soon-to-be-released proposed regulations will provide guidance on these reinvestments by QOFs. Many stakeholders have requested guidance not only on the length of a ''reasonable period of time to reinvest'' but also on the Federal income tax treatment of any gains that the QOF reinvests during such a period. In the forthcoming notice of proposed rulemaking, the Treasury Department and the IRS will invite additional public comment on the scope of statutorily permissible policy alternatives. The Treasury Department and the IRS will carefully consider those comments in evaluating the widest range of statutorily permissible possibilities.

D. Pre-Existing Entities

Commenters have inquired whether a pre-existing entity may qualify as a QOF or as the issuer of qualified opportunity zone stock or of a qualified opportunity zone partnership. For example, commenters have asked whether a pre-existing entity may self-certify as a QOF or whether, after 2017, a QOF may acquire an equity interest in a pre-existing operating partnership or corporation. The proposed regulations clarify that there is no prohibition to using a pre-existing entity as a QOF or as a subsidiary entity operating a qualified opportunity business, provided that the pre-existing entity satisfies the requirements under section 1400Z–2(d).

As previously discussed, section 1400Z–2(d)(1) requires that a QOF must undergo semi-annual tests to determine whether its assets consist on average of at least 90 percent qualified opportunity zone property. For purposes of these semi-annual tests, section 1400Z–2(d)(2) requires that a tangible asset can be qualified opportunity zone business property by an entity that has self-certified as a QOF or an operating subsidiary entity only if it acquired the asset after 2017 by purchase. The Treasury Department and the IRS request comments on whether there is a statutory basis for additional flexibilities that might facilitate qualification of a greater number of pre-existing entities across broad categories of industries.

E. Valuation Method for Applying the 90-Percent Asset Test

For purposes of the calculation of the 90-Percent Asset Test in section 1400Z–2(d)(1) by the QOF, the proposed regulations require the QOF to use the asset values that are reported on the QOF's applicable financial statement for the taxable year, as defined in § 1.475(a)–4(h) of the Income Tax Regulations. If a QOF does not have an applicable financial statement, the proposed regulations require the QOF to use the cost of its assets. The Treasury Department and the IRS request comments on the suitability of both of these valuation methods, and whether another method, such as tax adjusted basis, would be better for purposes of assurance and administration.

F. Nonqualified Financial Property

Commenters have recommended that the Treasury Department and the IRS adopt a rule that provides that cash be an appropriate QOF property for purposes of the 90-Percent Asset Test, if the cash is held with the intent of investing in qualified opportunity zone property. Specifically, commenters indicated that, because developing a new business or the construction or rehabilitation of real estate may take longer than six months, QOFs should be given longer than the six months provided under section 1400Z–2(d)(1) to invest in qualifying assets.

In response to these comments, the proposed regulations provide a working capital safe harbor for QOF investments in qualified opportunity zone businesses that acquire, construct, or rehabilitate tangible business property, which includes both real property and other tangible property used in a business operating in an opportunity zone. The safe harbor allows qualified opportunity zone businesses to apply the definition of working capital provided in section 1397C(e)(1) to property held by the business for a period of up to 31 months, if there is a written plan that identifies the financial property as property held for the acquisition, construction, or substantial improvement of tangible property in the opportunity zone, there is written schedule consistent with the ordinary business operations of the business that the property will be used within 31-months, and the business substantially complies with the schedule. Taxpayers would be required to retain any written plan in their records.

This expansion of the term ''working capital'' reflects the fact that section 1400Z–2(d)(iii) anticipates situations in which a QOF or operating subsidiary may need up to 30 months after acquiring a tangible asset in which to improve the asset substantially. In seeking relief, some commenters based their requests on administrative practices that have developed under other sections of the Code that these commenters believe are analogous. The Treasury Department and the IRS request comments on the adequacy of the working-capital safe harbor and of ancillary safe harbors that protect a business during the working capital period, and on whether there is a statutory basis for any additional relief. Comments are also requested about the appropriateness of any further expansion of the ''working capital'' concept beyond the acquisition, construction, or rehabilitation of tangible business property to the development of business operations in the opportunity zone.

G. Qualified Opportunity Zone Business

Under section 1400Z–2(d)(1), a QOF is any investment vehicle organized as a corporation or partnership for the purpose of investing in qualified opportunity zone property (other than another QOF). A QOF must hold at least 90 percent of its assets in qualified opportunity zone property. Compliance with the 90 Percent Asset Test is determined by the average of the percentage of the qualified opportunity zone property held in the QOF as measured on the last day of the first 6-month period of the taxable year of the QOF and on the last day of the taxable year of the QOF.

Under section 1400Z–2(d)(2)(A), the term qualified opportunity zone property includes qualified opportunity zone business property. Qualified opportunity zone property may also include certain equity interests in an operating subsidiary entity (either a corporation or a partnership) that qualifies as a qualified opportunity zone business by satisfying certain requirements pursuant to section 1400Z–2(d)(2)(B) and (C).

Consequently, if a QOF operates a trade or business directly and does not hold any equity in a qualified opportunity zone business, at least 90 percent of the QOF's assets must be qualified opportunity zone property.

The definition of qualified opportunity zone business property requires property to be used in a QOZ and also requires new capital to be employed in a QOZ. Under section 1400Z–2(d)(2)(D)(i), qualified

opportunity zone business property means tangible property used in a trade or business of a QOF, but only if (1) the property was acquired by purchase after December 31, 2017; (2) the original use of the property in the QOZ commences with the QOF, or the QOF substantially improves the property; and (3) during substantially all of the QOF's holding period for the property, substantially all of the use of the property was in a QOZ.

Under section 1400Z–2(d)(2)(B)(i) and (C), to qualify as a qualified opportunity zone business, an entity must be a qualified opportunity zone business both (a) when the QOF acquires its equity interest in the entity and (b) during substantially all of the QOF's holding period for that interest. The manner of the QOF's acquisition of the equity interest must comply with certain additional requirements.

Under section 1400Z–2(d)(3)(A), for a trade or business to qualify as a qualified opportunity zone business, it must (among other requirements) be one in which *substantially all* of the tangible property owned or leased by the taxpayer is qualified opportunity zone business property.

If an entity qualifies as a qualified opportunity zone business, the value of the QOF's entire interest in the entity counts toward the QOF's satisfaction of the 90 Percent Asset Test. Thus, if a QOF operates a trade or business (or multiple trades or businesses) through one or more entities, then the QOF can satisfy the 90 Percent Asset Test if each of the entities qualifies as a qualified opportunity zone business. The minimum amount of qualified opportunity zone business property owned or leased by a business for it to qualify as a qualified opportunity zone business is controlled by the meaning of the phrase *substantially all* in section 1400Z–2(d)(3)(A)(i).

In determining whether an entity is a qualified opportunity zone business, these proposed regulations propose a threshold to determine whether a trade or business satisfies the *substantially all* requirement in section 1400Z–2(d)(3)(A)(i).

If at least 70 percent of the tangible property owned or leased by a trade or business is qualified opportunity zone business property (as defined section 1400Z–2(d)(3)(A)(i)), the trade or business is treated as satisfying the *substantially all* requirement in section 1400Z–2(d)(3)(A)(i). The 70 percent threshold provided in these proposed regulations is intended to apply only to the term ''substantially all'' as it is used in section 1400Z–2(d)(3)(A)(i).

The phrase *substantially all* is also used in several other places in section 1400Z–2. That phrase appears in section 1400Z–2(d)(3)(A)(i), in which a qualified opportunity zone business is generally defined as a trade or business ''in which substantially all of the tangible property owned or leased by the taxpayer is qualified opportunity zone business property (determined by substituting 'qualified opportunity zone business' for 'qualified opportunity fund' each place it appears in section 1400Z–2(d)](2)(D)).'' In addition, *substantially all* appears in section 1400Z–2(d)(2)(D)(i)(III), which establishes the conditions for qualifying as an opportunity zone business property ''during *substantially all* of the qualified opportunity fund's holding period for such property, *substantially all* of the use of such property was in a qualified opportunity zone'' and section 1400Z–2(d)(2)(B)(ii)(III).

Several requirements of section 1400Z–2(d) use *substantially all* multiple times in a row (that is, ''substantially all of . . . substantially all of . . . substantially all of . . .''). This compounded use of *substantially all* must be interpreted in a manner that does not result in a fraction that is too small to implement the intent of Congress.

The Treasury Department and the IRS request comments regarding the proposed meaning of the phrase *substantially all* in section 1400Z–2(d)(3)(A)(i) as well as in the various other locations in section 1400Z–2(d) where that phrase is used.

H. Eligible Entities

The proposed regulations clarify that a QOF must be an entity classified as a corporation or partnership for Federal income tax purposes. In addition, it must be created or organized in one of the 50 States, the District of Columbia, or a U.S. possession. In addition, if an entity is organized in a U.S. possession but not in one of the 50 States or in the District of Columbia, then it may be a QOF only if it is organized for the purpose of investing in qualified opportunity zone property that relates to a trade or business operated in the possession in which the entity is organized.

The proposed regulations further clarify that qualified opportunity zone property may include stock or a partnership interest in an entity classified as a corporation or partnership for Federal income tax purposes. In addition, it must be a corporation or partnership created or organized in, or under the laws of, one of the 50 States, the District of Columbia, or a U.S. possession. Specifically, if an entity is organized in a U.S. possession but not in one of the 50 States or the District of Columbia, an equity interest in the entity may be qualified opportunity zone stock or a qualified opportunity zone partnership interest, as the case may be, only if the entity conducts a qualified opportunity zone business in the U.S. possession in which the entity is organized.

The proposed regulations further define a U.S. possession to mean any jurisdiction outside of the 50 States and the District of Columbia in which a designated qualified opportunity zone exists under section 1400Z–1. This definition may include the following U.S. territories: American Samoa, Guam, the Commonwealth of the Northern Mariana Islands, Puerto Rico, and the U.S. Virgin Islands. A complete list of designated qualified opportunity zones is found in Notice 2018–48, 2018–28 I.R.B. 9.

VII. Section 1400Z–2(e) Investments From Mixed Funds

If only a portion of a taxpayer's investment in a QOF is subject to the deferral election under section 1400Z–2(a), then section 1400Z–2(e) requires the investment to be treated as two separate investments, which receive different treatment for Federal income tax purposes. Pursuant to section 1400Z–2(e)(1)(B), the proposed regulations reiterate that a taxpayer may make the election to step-up basis in an investment in a QOF that was held for 10 years or more only if a proper deferral election under section 1400Z–2(a) was made for the investment.

Commenters have questioned whether section 752(a) could result in investments with mixed funds under section 1400Z–2(e)(1). Section 1400Z–2(e)(1) requires a taxpayer to treat as two separate investments the combination of an investment to which a section 1400Z–2(a) gain-deferral election applies and an investment of any amount to which such an election does not apply. As previously noted, these proposed regulations clarify that deemed contributions of money under section 752(a) do not constitute an investment in a QOF; therefore, such a deemed contribution does not result in the partner having a separate investment under section 1400Z–2(e)(1). Thus, a partner's increase in outside basis is not taken into account in determining what portion of the partner's interest is subject to the deferral election under section 1400Z–2(a) or what portion is not subject to the deferral election under section 1400Z–2(a). Comments are requested on whether other pass-through entities require similar treatment. Comments are also requested

on whether there may be certain circumstances in which not treating the deemed contribution under section 752(a) as creating a separate investment for purposes of section 1400Z–2(e)(1) may be considered abusive or otherwise problematic.

Proposed Effective Date

These regulations generally are proposed to be effective on or after the date of publication in the **Federal Register** of a Treasury decision adopting these proposed rules as final regulations (final regulations publication date). However—

- An eligible taxpayer may rely on the rules of proposed § 1.1400Z2(a)–1 with respect to eligible gains that would be recognized before the final regulations' date of applicability, but only if the taxpayer applies the rules in their entirety and in a consistent manner.
- A taxpayer may rely on the rules in proposed § 1.1400Z2(c)–1 with respect to dispositions of investment interests in QOFs in situations where the investment was made in connection with an election under section 1400Z–2(a) that relates to the deferral of a gain such that the first day of 180-day period for the gain was before the final regulations' date of applicability. This reliance is dependent on the taxpayer's applying the rules of § 1.1400Z2(c)–1 in their entirety and in a consistent manner.
- A QOF may rely on the rules in proposed § 1.1400Z2(d)–1 with respect to taxable years that begin before the final regulations' date of applicability, but only if the QOF applies the rules in their entirety and in a consistent manner.
- A taxpayer may rely on the rules in proposed § 1.1400Z2(e)–1 with respect to investments and deemed contributions of money that occur before the final regulations' date of applicability, but only if the taxpayer applies the rules in their entirety and in a consistent manner.

Special Analyses

I. Regulatory Planning and Review

Executive Orders 13771, 13563, and 12866 direct agencies to assess costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility.

These proposed regulations have been designated by the Office of Management and Budget's Office of Information and Regulatory Affairs (OIRA) as subject to review under Executive Order 12866 pursuant to the Memorandum of Agreement (April 11, 2018) between the Treasury Department and the Office of Management and Budget regarding review of tax regulations. OIRA has determined that the proposed rulemaking is economically significant and subject to review under E.O. 12866 and section 1(c) of the Memorandum of Agreement. The Treasury Department and the IRS believe that significant investment will flow into qualified opportunity zones as a result of the TCJA legislation and proposed regulation. This investment is likely to be primarily from other areas of the United States. Accordingly, the proposed regulations have been reviewed by the Office of Management and Budget. In addition, the Treasury Department and the IRS expect the proposed regulation, when final, to be an Executive Order 13771 deregulatory action and request comment on this designation. Details on the costs of the proposed regulations can be found in this economic analysis.

A. Background and Overview

Congress enacted section 1400Z–2, in conjunction with section 1400Z–1, as a temporary provision to encourage private sector investment in certain lower-income communities designated as qualified opportunity zones (see Senate Committee on Finance, Explanation of the Bill, at 313 (November 22, 2017)). Taxpayers may elect to defer the recognition of capital gain to the extent of amounts invested in a QOF, provided that the corresponding amounts are invested during the 180-day period beginning on the date such capital gain would have been recognized by the taxpayer. Inclusion of the deferred capital gain in income occurs on the date the investment in the QOF is sold or exchanged, or on December 31, 2026, whichever comes first. For investments in a QOF held longer than five years, taxpayers may exclude 10 percent of the deferred gain from inclusion in income, and for investment held longer than seven years, taxpayers may exclude a total of 15 percent of the deferred gain from inclusion in income. In addition, for investments held longer than 10 years, the post-acquisition gain on the qualifying investment in the QOF may also be excluded from income. In turn, a QOF must hold at least 90 percent of its assets in qualified opportunity zone property, as measured by the average percentage held at the last day of the first 6-month period of the taxable year of the fund and the last day of the taxable year. The statute requires a QOF that fails this 90 percent test to pay a penalty for each month it fails to maintain the 90-percent asset requirement.

The proposed regulations clarify several terms used in the statute, such as what type of gains are eligible for this preferential treatment, what type of taxpayers are eligible, the timing of transactions necessary for satisfying the requirements of the statute, including the time period for which the exclusion on gains for investments held longer than 10 years applies, and certain rules related to the creation and continued qualification of a fund as a QOF.

B. Need for the Proposed Regulations

Taxpayers may be unwilling to make investments in QOFs without first having additional clarity on which investments in a QOF would qualify to receive the preferential tax treatment specified by the TCJA. This uncertainty could reduce the amount of investment flowing into lower-income communities designated as qualified opportunity zones below the congressionally intended effect. The lack of additional clarity could also lead to different taxpayers interpreting, and therefore applying, the same statute differently, which could distort the allocation of investment across the qualifying opportunity zones.

C. Economic Analysis

1. Baseline

The Treasury Department and the IRS have assessed the benefits and costs of the proposed regulations relative to a no-action baseline reflecting anticipated Federal income tax-related behavior in the absence of these proposed regulations.

2. Anticipated Benefits

a. In General

The Treasury Department and the IRS expect that the certainty and clarity provided by these proposed regulations, relative to the baseline, will enhance U.S. economic performance under the statute. Under the proposed regulations, taxpayers are provided clarity on the type and timing of transactions that would qualify for the beneficial tax treatment provided for investments in QOFs. As a primary benefit, the clarity provided by these proposed regulations would reduce planning costs for taxpayers and make it easier for

taxpayers to make investment decisions that more precisely conform to the statutory requirements for QOFs. In addition, the reduction in uncertainty should encourage investment to flow into qualified opportunity zones, consistent with the intent of the TCJA.

The Treasury Department and the IRS considered various alternatives in the promulgation of the proposed regulations, with the major ones described in the following paragraphs. These alternatives included not issuing the proposed regulations under section 1400Z–2. This path was not chosen for several reasons. The TCJA provides both a reward in terms preferential tax treatment of deferred gains, but also a penalty if a QOF does not maintain compliance with the 90-percent asset test. Without the proposed regulations, some taxpayers may have foregone making promising investments within a qualifying opportunity zone out of concern that the investment may later be determined to not be a qualifying investment. As described in the following paragraphs, the proposed regulations help clarify several areas in which the statutory language was either ambiguous or not very specific. Overall, the clarity provided by the proposed regulations should reduce planning costs by taxpayers and enable taxpayers to make economically efficient decisions given the context of the whole Code.

b. Clarity Regarding Eligible Gains

The proposed regulations specify that only capital gains are eligible for deferral and potential exclusion under section 1400Z–2. As discussed in section I.A of the Explanation of Provisions, there is ambiguity that results from the variation between the operative statutory text and the section heading in the statute regarding what type of gains would be eligible for deferral. The Treasury Department and the IRS determined that Congress intended deferral only to be available to capital gains. This clarity provided in the proposed regulations would reduce uncertainty for taxpayers regarding what transactions would qualify for the preferential tax treatment and also reduce administrative and compliance costs.

c. Clarity Regarding Application to Eligible Taxpayers

The proposed regulations also clarify which taxpayers are eligible to defer the recognition of capital gain through investing in a QOF and describe how different types of taxpayers may satisfy the requirements for electing to defer capital gain consistent with the rules of section 1400Z–2 and the overall Code. In particular, the proposed regulations describe rules for how partnerships and partners in a partnership may invest in a QOF and elect to defer recognition of capital gains. Partnerships are expected to be a significant source of funds invested in QOFs. Without these proposed rules clarifying how partnerships and partners may satisfy the requirements for the preferential treatment of capital gains, partners may be less willing to invest in a QOF. The proposed regulations help provide a uniform signal to different types of taxpayers of the availability of this preferential treatment of capital gains and provide the mechanics of how these different taxpayers may satisfy the requirements imposed by the statute. Thus these different types of taxpayers may make decisions that are more economically efficient contingent on the overall Code.

d. Clarity Regarding Electing Post-10-Year Gain Exclusion if Zone Designation Expires

Proposed § 1.1400Z2(c)–1 specifies that expiration of a zone designation would not impair the ability of a taxpayer to elect the exclusion from gains for investments held for at least 10 years, provided the disposition of the investment occurs prior to January 1, 2048. The Treasury Department and the IRS considered four alternatives regarding the interaction between the expiration of the designated zones and the election to exclude gain for investments held more than 10 years. A discussion of the economic costs and benefits of the four options follows.

i. Remaining Silent on Electing Post-10-Year Gain Exclusion

The first alternative would be for the proposed regulations to remain silent on this issue. Section 1400Z–2(c) permits a taxpayer to increase the basis in the property held in a QOF longer than 10 years to be equal to the fair market value of that property on the date that the investment is sold or exchanged, thus excluding post-acquisition capital gain on the investment from tax. However, the statutory expiration of the designation of qualified opportunity zones on December 31, 2028, makes it unclear to what extent investments in a QOF made after 2018 would qualify for this exclusion.

Some taxpayers may believe that only investments in a QOF made prior to January 1, 2019, would be eligible for the exclusion from gain if held greater than 10 years. Such taxpayers may rush to complete transactions within 2018, while others may choose to hold off indefinitely from investing in a QOF until they received clarity on the availability of the 10-year exclusion from gain for investments made later than 2018. Other taxpayers may plan to invest in a QOF after 2018 with the expectation that future regulations would be provided or the statute would be amended to make it clear that dispositions of assets within a QOF after 2028 would be eligible for exclusion if held longer than 10 years. The ambiguity of the statute is likely to lead to uneven response by different taxpayers, dependent on the taxpayer's interpretation of the statute, which may lead to an inefficient allocation of investment across qualified opportunity zones.

ii. Providing a Clear Deadline for Electing Post-10-Year Gain Exclusion

The alternative adopted by the proposed regulations clarifies that as long as the investment in the QOF was made with funds subject to a proper deferral election under section 1400Z–2(a), which requires the investment to be made prior to June 29, 2027, then the 10-year gain exclusion election is allowed as long as the disposition of the investment occurs before January 1, 2048. This proposed rule would provide certainty to taxpayers regarding the timing of investments eligible for the 10-year gain exclusion. Taxpayers would have a more uniform understanding of what transactions would be eligible for the favorable treatment on capital gains. This would help taxpayers determine which investments provide a sufficient return to compensate for the extra costs and risks of investing in a QOF. This proposed rule would likely lead to an increase in investment within QOFs compared the proposed regulations remaining silent on this issue.

However, setting a fixed date for the disposition of eligible QOFs investments could introduce economic inefficiencies. Some taxpayers may dispose of their investment in a QOF by the deadline in the proposed regulation primarily in order to receive the benefit of the gain exclusion, but that selling date may not be optimal for the taxpayer in terms of the portfolio of assets that the taxpayer could have chosen to invest in were there no deadline. Setting a fixed deadline may also generate an overall decline in asset values in some qualified opportunity zones if many investors in QOFs seek to sell their portion of the fund within the same time period. This decline in asset values may affect the broader level of economic activity within some qualified opportunity zones or affect other investors in such zones that did not

invest through a QOF. In anticipation of this fixed deadline, some taxpayers may choose to dispose of QOF assets earlier than the deadline to avoid an anticipated ''rush to the exits,'' but this would seem to conflict with the purpose of the incentives in the statute to encourage ''patient'' capital investment within qualified opportunity zones. While the proposed regulations may produce these inefficiencies, by providing a long time period for which taxpayers may dispose of their investment within a QOF and still qualify for the exclusion the proposed regulations will lead any such inefficiencies to be minor.

iii. Providing No Deadline for Electing Gain Exclusion

As an alternative, the proposed regulations could have provided no deadline for electing the 10-year gain exclusion for investments in a QOF, while still stating that the ability to make the election is not impaired solely because the designation of one or more qualified opportunity zones ceases to be in effect. While this alternative would eliminate the economic inefficiencies associated with a fixed deadline and would likely lead to greater investment in QOFs, it could introduce substantial additional administrative and compliance costs. Taxpayers would also need to maintain records and make efforts to maintain compliance with the rules of section 1400Z–2 on an indefinite basis.

iv. Providing Fair Market Value Basis Without Disposition of Investment

Another alternative considered would allow taxpayers to elect to increase the basis in their investment in the QOF if held at least 10 years to the fair market value of the investment without disposing of the property, as long as the election was made prior to January 1, 2048. (Analogously, the proposed regulations could have provided that, at the close of business of the day on which a taxpayer first has the ability to make the 10-year gain exclusion election, the basis in the investment automatically sets to the greater of current basis or the fair market value of the investment.) This alternative would minimize the economic inefficiencies of the proposed regulations resulting from taxpayers needing to dispose of their investment in the opportunity zone at a fixed date not related to any factor other than the lapse of time. However, this approach would require a method of valuing assets that could raise administrative and compliance costs. It may also require the maintenance of records and trained compliance personnel for over two decades.

v. Summary

As discussed in section V.B of the Explanation of Provisions, the Treasury Department and the IRS have determined the ability to exclude gains for investment held at least 10 years in a QOF is integral to the TCJA's purpose of creating qualified opportunity zones. The proposed regulations provide a uniform signal to all taxpayers on the availability of this tax incentive, which should encourage greater investment, and a more efficient distribution of investment, in QOFs than in the absence of these proposed regulations. The relative costs and benefits of the various alternatives are difficult to measure and compare. The proposed regulations would likely produce the lowest compliance and administrative costs among the alternatives and any associated economic inefficiencies are likely to be small.

e. Safe Harbors for Statutory Qualifying Property Tests

Section 1400Z–2 contains several rules limiting taxpayers from benefitting from the deferral and exclusion of capital gains from income offered by that section without also locating investment within a qualifying opportunity zone. The proposed regulations clarify the rules related to nonqualified financial property and what amounts can be held in cash and cash equivalents as working capital. The statute requires that a QOF must hold 90 percent of its assets in qualified opportunity zone property, such as owning stock or a partnership interest in a qualified opportunity zone business. A qualifying opportunity zone business is subject to the requirements of section 1397C(b)(8), that less than 5 percent of the aggregate adjusted basis of the entity is attributable to nonqualified financial property. The proposed regulations establish a working capital safe harbor consistent with section 1397C(e)(1), under which a qualified opportunity zone business may hold cash or cash equivalents for a period not longer than 31 months and not violate section 1397C(b)(8).

The Treasury Department and the IRS expect that the establishment of safe harbors under these parameters will provide net economic benefits. Without specification of the working capital safe harbor, some taxpayers would not invest in a QOF for fear that the QOF would not be able to deploy the funds soon enough to satisfy the 90-percent asset test. Thus, this part of the proposed regulations would generally encourage investment in QOFs by providing greater specificity to how an entity may consistently satisfy the statutory requirements for maintaining a QOF without penalty. In addition, this part of the proposed regulations minimizes the distortion that may arise between purchasing existing property and sufficiently rehabilitating that property versus constructing new property, as the time frame specified under the statute and proposed regulations are similar (30 months after acquisition for rehabilitating existing property versus 31 months for acquiring and rehabilitating existing property or for constructing new property).

A longer or a shorter period could have been chosen for the working capital safe harbor. A shorter time period would minimize the ability of taxpayers to use the investment in a QOF as a way to lower taxes without actually investing in tangible assets within a qualified opportunity zone, but taxpayers may also forego legitimate investments within an opportunity zone out of concern of not being able to deploy the working capital fast enough to meet the requirements. A longer period would have the opposite effects. Taxpayers could potentially invest in a QOF and receive the benefits of the tax incentive for multiple years before the money is invested into a qualified opportunity zone.

f. Definition of Substantially All

The proposed regulations specify that if at least 70 percent of the tangible property owned or leased by a trade or business is qualified opportunity zone business property, then the trade or business is treated as satisfying the substantially all requirement of section 1400Z–2(d)(3)(A)(i). This clarity would provide taxpayers greater certainty when evaluating potential investment opportunities as to whether the potential investment would satisfy the statutory requirements.

However, the 70 percent requirement for a trade or business will give QOFs an incentive to invest in a qualified opportunity zone business rather than owning qualified opportunity zone business property directly. For example, consider a QOF with $10 million in assets that plans to invest 100 percent of its assets in real property. If it held the real property directly, then at least $9 million (90 percent) of the property must be located within an opportunity zone to satisfy the 90 percent asset test for the QOF. If instead, it invests in a subsidiary that then holds real property, then only $7 million (70 percent) of the property must be located within an opportunity zone. In addition, if the

QOF only invested $9 million into the subsidiary, which then held 70 percent of its property within an opportunity zone, the investors in the QOF could receive the statutory tax benefits while investing only $6.3 million (63 percent) of its assets within a qualified opportunity zone.

The Treasury Department and the IRS also considered setting this ''substantially all'' threshold at 90 percent. This would reduce, but not eliminate, the incentive the QOF has to invest in a qualified opportunity zone business rather than directly owning qualified opportunity zone business property compared to the 70 percent threshold. Please see earlier discussion and request for comment regarding this definition for additional detail.

3. Anticipated Impacts on Administrative and Compliance Costs

The Treasury Department and the IRS anticipate decreased taxpayer compliance costs resulting from the proposed regulations due to the greater taxpayer certainty regarding how to comply with the requirements set forth in the statute. The Treasury Department also anticipates decreased administrative and enforcement costs for the IRS.

D. Paperwork Reduction Act

The collection of information in these proposed regulations with respect to QOFs is in proposed § 1.1400Z2(d)–1. The collection of information in proposed § 1.1400Z2(d)–1 is satisfied by submitting a new reporting form, Form 8996, Qualified Opportunity Fund, with an income tax return. For purposes of the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)) (PRA), the reporting burden associated with proposed § 1.1400Z2(d)–1 will be reflected in the Paperwork Reduction Act submission associated with new Form 8996 (OMB control number 1545–0123). Notice of the availability of the draft Form 8996 and request for comment will be available at *IRS.gov/DraftForms*. In addition, the Treasury Department and the IRS request comments on any aspect of this collection in this proposed rulemaking.

The collection of information in proposed § 1.1400Z2(d)–1 requires each QOF, be it a corporation or partnership, to file a Form 8996 to certify that it is organized to invest in qualified opportunity zone property. In addition, a QOF files Form 8996 annually to certify that the qualified opportunity fund meets the investment standards of section 1400Z–2 or to figure the penalty if it fails to meet the investment standards.

II. Regulatory Flexibility Act

Under the Regulatory Flexibility Act (RFA) (5 U.S.C. chapter 6), it is hereby certified that these proposed regulations, if adopted, would not have a significant economic impact on a substantial number of small entities that are directly affected by the proposed regulations. Therefore, a regulatory flexibility analysis under the Regulatory Flexibility Act (5 U.S.C. chapter 6) is not required. Although there is a lack of available data regarding the extent to which small entities invest in QOFs, this certification is based on the belief of the Treasury Department and the IRS that these funds will generally involve investments made by larger entities and investments are entirely voluntary. The Treasury Department and the IRS specifically solicit comment from any party, particularly affected small entities, on the accuracy of this certification.

Pursuant to section 7805(f), this notice of proposed rulemaking has been submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

III. Unfunded Mandates Reform Act

Section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA) requires that agencies assess anticipated costs and benefits and take certain other actions before issuing a final rule that includes any Federal mandate that may result in expenditures in any one year by a state, local, or tribal government, in the aggregate, or by the private sector, of $100 million in 1995 dollars, updated annually for inflation. In 2018, that threshold is approximately $150 million. This rule does not include any Federal mandate that may result in expenditures by state, local, or tribal governments, or by the private sector in excess of that threshold.

IV. Executive Order 13132: Federalism

Executive Order 13132 (entitled ''Federalism'') prohibits an agency from publishing any rule that has federalism implications if the rule either imposes substantial, direct compliance costs on state and local governments, and is not required by statute, or preempts state law, unless the agency meets the consultation and funding requirements of section 6 of the Executive Order. This proposed rule does not have federalism implications and does not impose substantial direct compliance costs on state and local governments or preempt state law within the meaning of the Executive Order.

Statement of Availability of IRS Documents

IRS Revenue Procedures, Revenue Rulings, and Notices cited in this preamble are published in the Internal Revenue Bulletin (or Cumulative Bulletin) and are available from the Superintendent of Documents, U.S. Government Publishing Office, Washington, DC 20402, or by visiting the IRS website at *http://www.irs.gov*.

Comments

Before these proposed regulations are adopted as final regulations, consideration will be given to any electronic and written comments that are submitted timely to the IRS as prescribed in this preamble under the **ADDRESSES** heading. The Treasury Department and the IRS request comments on all aspects of the proposed rules. All comments will be available at *http://www.regulations.gov* or upon request.

Drafting Information

The principal author of these proposed regulations is Erika C. Reigle, Office of Associate Chief Counsel (Income Tax & Accounting). However, other personnel from the Treasury Department and the IRS participated in their development.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Proposed Amendments to the Regulations

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

PART 1—INCOME TAX

■ **Paragraph 1.** The authority citation for part 1 is amended by adding entries in numerical order to read in part as follows:

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

Section 1.1400Z2(a)–1 also issued under 26 U.S.C. 1400Z–2(e)(4).

Section 1.1400Z2(c)–1 also issued under 26 U.S.C. 1400Z–2(e)(4).

Section 1.1400Z2(d)–1 also issued under 26 U.S.C. 1400Z–2(e)(4).

Section 1.1400Z2(e)–1 also issued under 26 U.S.C. 1400Z–2(e)(4).

* * * * *

■ **Par. 2.** Section 1.1400Z2(a)–1 is added to read as follows:

§ 1.1400Z2(a)–1 Deferring tax on capital gains by investing in opportunity zones.

(a) *In general.* Under section 1400Z–2(a) of the Internal Revenue Code (Code) and this section, an eligible taxpayer may elect to defer recognition of some or all of its eligible gains to the extent

that the taxpayer timely invests (as provided for by section 1400Z–2(a)(1)(A)) in eligible interests of a qualified opportunity fund (QOF), as defined in section 1400Z–2(d)(1). Paragraph (b) of this section defines eligible taxpayers, eligible gains, and eligible interests and contains related operational rules. Paragraph (c) of this section provides rules for applying section 1400Z–2 to a partnership, S corporation, trust, or estate that recognizes an eligible gain or would recognize such a gain if it did not elect to defer the gain under section 1400Z–2(a).

(b) *Definitions and related operating rules.* The following definitions and rules apply for purposes of section 1400Z–2:

(1) *Eligible taxpayer.* An *eligible taxpayer* is a person that may recognize gains for purposes of Federal income tax accounting. Thus, eligible taxpayers include individuals; C corporations, including regulated investment companies (RICs) and real estate investment trusts (REITs); partnerships; S corporations; trusts and estates. An eligible taxpayer may elect to defer recognition of one or more eligible gains in accordance with the requirements of section 1400Z–2.

(2) *Eligible gain*—(i) *In general.* An amount of gain is an *eligible gain,* and thus is eligible for deferral under section 1400Z–2(a), if the gain—

(A) Is treated as a capital gain for Federal income tax purposes;

(B) Would be recognized for Federal income tax purposes before January 1, 2027, if section 1400Z–2(a)(1) did not apply to defer recognition of the gain; and

(C) Does not arise from a sale or exchange with a person that, within the meaning of section 1400Z–2(e)(2), is related to the taxpayer that recognizes the gain or that would recognize the gain if section 1400Z–2(a)(1) did not apply to defer recognition of the gain.

(ii) *Gain not already subject to an election.* In the case of a taxpayer who has made an election under section 1400Z–2(a) with respect to some but not all of an eligible gain, the term ''eligible gain'' includes the portion of that eligible gain with respect to which no election has yet been made.

(iii) *Gains under section 1256 contracts*—(A) *General rule.* The only gain arising from section 1256 contracts that is eligible for deferral under section 1400Z–2(a)(1) is capital gain net income for a taxable year. This net amount is determined by taking into account the capital gains and losses for a taxable year on all of a taxpayer's section 1256 contracts, including all amounts determined under section 1256(a), both those determined on the last business day of a taxable year and those that section 1256(c) requires to be determined under section 1256(a) because of the termination or transfer during the taxable year of the taxpayer's position with respect to a contract. The 180-day period with respect to any capital gain net income from section 1256 contracts for a taxable year begins on the last day of the taxable year, and the character of that gain when it is later included under section 1400Z–2(a)(1)(B) and (b) is determined under the general rule in paragraph (b)(5) of this section. See paragraph (b)(2)(iii)(B) of this section for limitations on the capital gains eligible for deferral under this paragraph (b)(2)(iii)(A).

(B) *Limitation on deferral for gain from 1256 contracts.* If, at any time during the taxable year, any of the taxpayer's section 1256 contracts was part of an offsetting positions transaction (as defined in paragraph (b)(2)(iv) of this section) and any other position in that transaction was not a section 1256 contract, then no gain from any section 1256 contract is an eligible gain with respect to that taxpayer in that taxable year.

(iv) *No deferral for gain from a position that is or has been part of an offsetting-positions transaction.* If a capital gain is from a position that is or has been part of an offsetting-positions transaction, the gain is not eligible for deferral under section 1400Z–2(a)(1). For purposes of this paragraph (b)(2)(iv), an offsetting-positions transaction is a transaction in which a taxpayer has substantially diminished the taxpayer's risk of loss from holding one position with respect to personal property by holding one or more other positions with respect to personal property (whether or not of the same kind). It does not matter whether either of the positions is with respect to actively traded personal property. An offsetting-positions transaction includes a straddle within the meaning of section 1092 and the regulations under section 1092, including section 1092(d)(4), which provides rules for positions held by related persons and certain flow-through entities (for example, a partnership). An offsetting-positions transaction also includes a transaction that would be a straddle (taking into account the principles referred to in the preceding sentence) if the straddle definition did not contain the active trading requirement in section 1092(d)(1). For example, an offsetting-positions transaction includes positions in closely held stock or other non-traded personal property and substantially offsetting derivatives.

(3) *Eligible interest*—(i) *In general.* For purposes of section 1400Z–2, an *eligible interest* in a QOF is an equity interest issued by the QOF, including preferred stock or a partnership interest with special allocations. Thus, the term eligible interest excludes any debt instrument within the meaning of section 1275(a)(1) and § 1.1275–1(d).

(ii) *Use as collateral permitted.* Provided that the eligible taxpayer is the owner of the equity interest for Federal income tax purposes, status as an eligible interest is not impaired by using the interest as collateral for a loan, whether as part of a purchase-money borrowing or otherwise.

(iii) *Deemed contributions not constituting investment. See* § 1.1400Z2(e)–1(a)(2) for rules regarding deemed contributions of money to a partnership pursuant to section 752(a).

(4) *180-day period*—(i) *In general.* Except as otherwise provided elsewhere in this section, the 180-day period referred to in section 1400Z–2(a)(1)(A) with respect to any eligible gain (180-day period) begins on the day on which the gain would be recognized for Federal income tax purposes if the taxpayer did not elect under section 1400Z–2 to defer recognition of that gain.

(ii) *Examples.* The following examples illustrate the principles of paragraph (b)(4)(i) of this section.

(A) *Example 1. Regular-way trades of stock.* If stock is sold at a gain in a regular-way trade on an exchange, the 180-day period with respect to the gain on the stock begins on the trade date.

(B) *Example 2. Capital gain dividends received by RIC and REIT shareholders.* If an individual RIC or REIT shareholder receives a capital gain dividend (as described in section 852(b)(3) or section 857(b)(3)), the shareholder's 180-day period with respect to that gain begins on the day on which the dividend is paid.

(C) *Example 3. Undistributed capital gains received by RIC and REIT shareholders.* If section 852(b)(3)(D) or section 857(b)(3)(D) (concerning undistributed capital gains) requires the holder of shares in a RIC or REIT to include an amount in the shareholder's long-term capital gains, the shareholder's 180-day period with respect to that gain begins on the last day of the RIC or REIT's taxable year.

(D) *Example 4. Additional deferral of previously deferred gains*—(*1*) *Facts.* Taxpayer A invested in a QOF and properly elected to defer realized gain. During 2025, taxpayer A disposes of its entire investment in the QOF in a transaction that, under section 1400Z–2(a)(1)(B) and (b), triggers an inclusion of gain in A's gross income. Section 1400Z–2(b) determines the date and amount of the gain included in A's income. That date is the date on which A disposed of its entire

interest in the QOF. A wants to elect under section 1400Z–2 to defer the amount that is required to be included in income.

(*2*) *Analysis.* Under paragraph (b)(4)(i) of this section, the 180-day period for making another investment in a QOF begins on the day on which section 1400Z–2(b) requires the prior gain to be included. As prescribed by section 1400Z–2(b)(1)(A), that is the date of the inclusion-triggering disposition. Thus, in order to make a deferral election under section 1400Z–2, A must invest the amount of the inclusion in the original QOF or in another QOF during the 180-day period beginning on the date when A disposed of its entire investment in the QOF.

(5) *Attributes of gains that section 1400Z–2(a)(1)(B) includes in income.* If section 1400Z–2(a)(1)(B) and (b) require a taxpayer to include in income some or all of a previously deferred gain, the gain so included has the same attributes in the taxable year of inclusion that it would have had if tax on the gain had not been deferred. These attributes include those taken into account by sections 1(h), 1222, 1256, and any other applicable provisions of the Code.

(6) *First-In, First-Out (FIFO) method to identify which interest in a QOF has been disposed of*—(i) *FIFO requirement.* If a taxpayer holds investment interests with identical rights (fungible interests) in a QOF that were acquired on different days and if, on a single day, the taxpayer disposes of less than all of these interests, then the first-in-first-out (FIFO) method must be used to identify which interests were disposed of. Fungible interests may be equivalent shares of stock in a corporation or partnership interests with identical rights.

(ii) *Consequences of identification.* The FIFO method determines—

(A) Whether an investment is described in section 1400Z–2(e)(1)(A)(i) (an investment to which a gain deferral election under section 1400Z–2(a) applies) or section 1400Z–2(e)(1)(A)(ii) (an investment which was not part of a gain deferral election under section 1400Z–2(a));

(B) In the case of investments described in section 1400Z–2(e)(1)(A)(i), the attributes of the gain subject to a deferral election under section 1400Z–2(a), at the time the gain is included in income (the attributes addressed in paragraph (b)(5) of this section); and

(C) The extent, if any, of an increase under section 1400Z–2(b)(2)(B) in the basis of an investment interest that is disposed of.

(7) *Pro-rata method.* If, after application of the FIFO method, a taxpayer is treated as having disposed of less than all of the investment interests that the taxpayer acquired on one day and if the interests acquired on that day vary with respect to the characteristics described in paragraph (b)(6)(ii) of this section, then a proportionate allocation must be made to determine which interests were disposed of (pro-rata method).

(8) *Examples.* The following examples illustrate the rules of paragraph (b)(5) through (7) of this section.

(i) *Example 1. Short-term gain.* For 2018, taxpayer B properly made an election under section 1400Z–2 to defer $100 of gain that, if not deferred, would have been recognized as short-term capital gain, as defined in section 1222(1). In 2022, section 1400Z–2(a)(1)(B) and (b) requires taxpayer B to include the gain in gross income. Under paragraph (b)(5) of this section, the gain included is short-term capital gain.

(ii) *Example 2. Collectibles gain.* For 2018, taxpayer C properly made an election under section 1400Z–2 to defer a gain that, if not deferred, would have been collectibles gain as defined in IRC section 1(h)(5). In a later taxable year, section 1400Z–2(a)(1)(B) and (b) requires some or all of that deferred gain to be included in gross income. The gain included is collectibles gain.

(iii) *Example 3. Net gains from section 1256 contracts.* For 2019, taxpayer D had $100 of capital gain net income from section 1256 contracts. D timely invested $100 in a QOF and properly made an election under section 1400Z–2 to defer that $100 of gain. In 2023, section 1400Z–2(a)(1)(B) and (b) requires taxpayer D to include that deferred gain in gross income. Under paragraph (b)(5) of this section, the character of the inclusion is governed by section 1256(a)(3) (which requires a 40:60 split between short-term and long-term capital gain). Accordingly, $40 of the inclusion is short-term capital gain and $60 of the inclusion is long-term capital gain.

(iv) *Example 4. FIFO method.* For 2018, taxpayer E properly made an election under section 1400Z–2 to defer $300 of short-term capital gain. For 2020, E properly made a second election under section 1400Z–2 to defer $200 of long-term capital gain. In both cases, E properly invested in QOF Q the amount of the gain to be deferred. The two investments are fungible interests and the price of the interests was the same at the time of the two investments. E did not purchase any additional interest in QOF Q or sell any of its interest in QOF Q until 2024, when E sold for a gain 60 percent of its interest in QOF Q. Under paragraph (b)(6)(i) of this section, E must apply the FIFO method to identify which investments in QOF Q that E disposed of. As determined by this identification, E sold the entire 2018 initial investment in QOF Q. Under section 1400Z–2(a)(1)(B) and (b), the sale triggered an inclusion of deferred gain. Because the inclusion has the same character as the gain that had been deferred, the inclusion is short-term capital gain.

(v) *Example 5. FIFO method.* In 2018, before Corporation R became a QOF, Taxpayer F invested $100 cash to R in exchange for 100 R common shares. Later in 2018, after R was a QOF, F invested $500 cash to R in exchange for 400 R common shares and properly elected under section 1400Z–2 to defer $500 of independently realized short-term capital gain. Even later in 2018, on different days, F realized $300 of short-term capital gain and $700 of long-term capital gain. On a single day that fell during the 180-day period for both of those gains, F invested $1,000 cash in R in exchange for 800 R common shares and properly elected under section 1400Z–2 to defer the two gains. In 2020, F sold 100 R common shares. Under paragraph (b)(6)(i) of this section, F must apply the FIFO method to identify which investments in R F disposed of. As determined by that identification, F sold the initially acquired 100 R common shares, which were not part of a deferral election under section 1400Z–2. R must recognize gain or loss on the sale of its R shares under the generally applicable Federal income tax rules, but the sale does not trigger an inclusion of any deferred gain.

(vi) *Example 6. FIFO method.* The facts are the same as example 5, except that, in addition, during 2021 F sold an additional 400 R common shares. Under paragraph (b)(6)(i) of this section, F must apply the FIFO method to identify which investments in R were disposed of. As determined by this identification, F sold the 400 common shares which were associated with the deferral of $500 of short-term capital gain. Thus, the deferred gain that must be included upon sale of the 400 R common shares is short-term capital gain.

(vii) *Example 7. Pro-rata method.* The facts are the same as in examples 5 and 6, except that, in addition, during 2022 F sold an additional 400 R common shares. Under paragraph (b)(6)(i) of this section, F must apply the FIFO method to identify which investments in R were disposed of. In 2022, F is treated as holding only the 800 R common shares purchased on a single day, and the section 1400Z–2 deferral election associated with these shares applies to gain with different characteristics (described in paragraph (b)(6)(ii) of this section). Under paragraph (b)(7) of this section, therefore, R must use the pro-rata method to determine which of the characteristics pertain to the deferred gain required to be included as a result of the sale of the 400 R common shares. Under the pro-rata method, $150 of the inclusion is short-term capital gain ($300 × 400/800) and $350 is long-term capital gain ($700 × 400/800).

(c) *Special rules for pass-through entities*—(1) *Eligible gains that a partnership elects to defer.* A partnership is an eligible taxpayer under paragraph (b)(1) of this section and may elect to defer recognition of some or all of its eligible gains under section 1400Z–2(a)(2).

(i) *Partnership election.* If a partnership properly makes an election under section 1400Z–2(a)(2), then—

(A) The partnership defers recognition of the gain under the rules of section 1400Z–2 (that is, the partnership does not recognize gain at the time it otherwise would have in the absence of the election to defer gain recognition);

(B) The deferred gain is not included in the distributive shares of the partners under section 702 and is not subject to section 705(a)(1); and

(ii) *Subsequent recognition.* Absent any additional deferral under section 1400Z–2(a)(1)(A), any amount of deferred gain that an electing partnership subsequently must include in income under sections 1400Z–2(a)(1)(B) and (b) is recognized by the electing partnership at the time of inclusion and is subject to sections 702 and 705(a)(1) in a manner consistent with recognition at that time.

(2) *Eligible gains that the partnership does not defer*—(i) *Tax treatment of the partnership.* If a partnership does not elect to defer some, or all, of the gains for which it could make a deferral election under section 1400Z–2, the partnership's treatment of any such amounts is unaffected by the fact that the eligible gain could have been deferred under section 1400Z–2.

(ii) *Tax treatment by the partners.* If a partnership does not elect to defer some, or all, of the gains for which it could make a deferral election under section 1400Z–2—

(A) The gains for which a deferral election are not made are included in the partners' distributive shares under section 702 and are subject to section 705(a)(1);

(B) If a partner's distributive share includes one or more gains that are eligible gains with respect to the partner, the partner may elect under section 1400Z–2(a)(1)(A) to defer some or all of its eligible gains; and

(C) A gain in a partner's distributive share is an eligible gain with respect to the partner only if it is an eligible gain with respect to the partnership and it did not arise from a sale or exchange with a person that, within the meaning of section 1400Z–2(e)(2), is related to the partner.

(iii) *180-day period for a partner electing deferral*—(A) *General rule.* If a partner's distributive share includes a gain that is described in paragraph (c)(2)(ii)(C) of this section (gains that are eligible gains with respect to the partner), the 180-day period with respect to the partner's eligible gains in the partner's distributive share generally begins on the last day of the partnership taxable year in which the partner's allocable share of the partnership's eligible gain is taken into account under section 706(a).

(B) *Elective rule.* Notwithstanding the general rule in paragraph (c)(2)(iii)(A) of this section, if a partnership does not elect to defer all of its eligible gain, the partner may elect to treat the partner's own 180-day period with respect to the partner's distributive share of that gain as being the same as the partnership's 180-day period.

(C) The following example illustrates the principles of this paragraph (c)(2)(iii).

(1) *Example.* Five individuals have identical interests in partnership P, there are no other partners, and P's taxable year is the calendar year. On January 17, 2019, P realizes a capital gain of $1000*x* that it decides not to elect to defer. Two of the partners, however, want to defer their allocable portions of that gain. One of these two partners invests $200*x* in a QOF during February 2020. Under the general rule in paragraph (c)(2)(iii)(A) of this section, this investment is within the 180-day period for that partner (which begins on December 31, 2019). The fifth partner, on the other hand, decides to make the election provided in paragraph (c)(2)(iii)(B) of this section and invests $200*x* in a QOF during February 2019. Under that elective rule, this investment is within the 180-day period for that partner (which begins on January 17, 2019).

(2) [Reserved]

(3) *Pass-through entities other than partnerships.* If an S corporation; a trust; or a decedent's estate recognizes an eligible gain, or would recognize an eligible gain if it did not elect to defer recognition of the gain under section 1400Z–2(a), then rules analogous to the rules of paragraph (c)(1) and (2) of this section apply to that entity and to its shareholders or beneficiaries, as the case may be.

(d) *Elections.* The Commissioner may prescribe in guidance published in the Internal Revenue Bulletin or in forms and instructions (*see* §§ 601.601(d)(2) and 601.602 of this chapter), both the time, form, and manner in which an eligible taxpayer may elect to defer eligible gains under section 1400Z–2(a) and also the time, form, and manner in which a partner may elect to apply the elective 180-day period provided in paragraph (c)(2)(iii)(B) of this section.

(e) *Applicability date.* This section applies to eligible gains that would be recognized in the absence of deferral on or after the date of publication in the **Federal Register** of a Treasury decision adopting these proposed rules as final regulations. An eligible taxpayer, however, may rely on the proposed rules in this section with respect to eligible gains that would be recognized before that date, but only if the taxpayer applies the rules in their entirety and in a consistent manner.

■ **Par. 3.** Section 1.1400Z2(c)–1 is added to read as follows:

§ 1.1400Z2(c)–1 Investments held for at least 10 years.

(a) *Limitation on the 10-year rule.* As required by section 1400Z–2(e)(1)(B) (treatment of investments with mixed funds), section 1400Z–2(c) (special rule for investments held for at least 10 years) applies only to the portion of an investment in a QOF with respect to which a proper election to defer gain under section 1400Z–2(a)(1) is in effect.

(b) *Extension of availability of the election described in section 1400Z–2(c).* The ability to make an election under section 1400Z–2(c) for investments held for at least 10 years is not impaired solely because, under section 1400Z–1(f), the designation of one or more qualified opportunity zones ceases to be in effect. The preceding sentence does not apply to elections under section 1400Z–2(c) that are related to dispositions occurring after December 31, 2047.

(c) *Examples.* The following examples illustrate the principles of paragraphs (a) and (b) of this section.

(1) Example 1. (i) *Facts.* In 2020, taxpayer G invests $100 in QOF S in exchange for 100 common shares of QOF S and properly makes an election under section 1400Z–2(a) to defer $100 of gain. G also acquires 200 additional common shares in QOF in exchange for $z. G does not make a section 1400Z–2(a) deferral election with respect to any of the $z investments. At the end of 2028, the qualified opportunity zone designation expires for the population census tract in which QOF S primarily conducts its trade or business. In 2031, G sells all of its 300 QOF S shares, realizes gain, and makes an election to increase the qualifying basis in G's QOF S shares to fair market value. But for the expiration of the designated zones in section 1400Z–1(f), QOF S and G's conduct is consistent with continued eligibility to make the election under section 1400Z–2(c).

(ii) *Analysis.* Under paragraph (b) of this section, although the designation expired on December 31, 2028, the expiration of the zone's designation does not, without more, invalidate G's ability to make an election under section 1400Z–2(c). Accordingly, pursuant to that election, G's basis is increased in the one-third portion of G's investment in QOF S with respect to which G made a proper deferral election under section 1400Z–2(a)(2) (100 common shares/300 common shares). Under section 1400Z–2(e)(1) and paragraph (a) of this section, however, the election under section 1400Z–2(c) is unavailable for the remaining two-thirds portion of G's investment in QOF S because G did not make a deferral election under section 1400Z–2(a)(2) for this portion of its investment in QOF S (200 common shares/300 common shares).

(2) [Reserved]

(d) *Applicability date.* This section applies to an election under section 1400Z–2(c) related to dispositions made after the date of publication in the **Federal Register** of a Treasury decision adopting these proposed rules as final regulations. A taxpayer, however, may rely on the proposed rules in this

section with respect to dispositions of investment interests in QOFs in situations where the investment was made in connection with an election under section 1400Z–2(a) that relates to the deferral of a gain such that the first day of 180-day period for the gain was before the date of applicability of that section. The preceding sentence applies only if the taxpayer applies the rules of this section in their entirety and in a consistent manner.

■ **Par. 4.** Section 1.1400Z2(d)–1 is added to read as follows:

§ 1.1400Z2(d)–1 Qualified Opportunity Funds.

(a) *Becoming a Qualified Opportunity Fund (QOF)*–(1) *Self-certification.* Except as provided in paragraph (e)(1) of this section, if a taxpayer that is classified as a corporation or partnership for Federal tax purposes is eligible to be a QOF, the taxpayer may self-certify that it is QOF. This section refers to such a taxpayer as an *eligible entity.* The following rules apply to the self-certification:

(i) *Time, form, and manner.* The self-certification must be effected at such time and in such form and manner as may be prescribed by the Commissioner in IRS forms or instructions or in publications or guidance published in the Internal Revenue Bulletin (*see* §§ 601.601(d)(2) and 601.602 of this chapter).

(ii) *First taxable year.* The self-certification must identify the first taxable year that the eligible entity wants to be a QOF.

(iii) *First month.* The self-certification may identify the first month (in that initial taxable year) in which the eligible entity wants to be a QOF.

(A) *Failure to specify first month.* If the self-certification fails to specify the month in the initial taxable year that the eligible entity first wants to be a QOF, then the first month of the eligible entity's initial taxable year as a QOF is the first month that the eligible entity is a QOF.

(B) *Investments before first month not eligible for deferral.* If an investment in eligible interests of an eligible entity occurs prior to the eligible entity's first month as a QOF, any election under section 1400Z–2(a)(1) made for that investment is invalid.

(2) *Becoming a QOF in a month that is not the first month of the taxable year.* If an eligible entity's self-certification as a QOF is first effective for a month that is not the first month of that entity's taxable year—

(i) For purposes of section 1400Z–2(d)(1)(A) and (B) in the first year of the QOF's existence, the phrase *first 6-month period of the taxable year of the fund* means the first 6 months each of which is in the taxable year and in each of which the entity is a QOF. Thus, if an eligible entity becomes a QOF in the seventh or later month of a 12-month taxable year, the 90-percent test in section 1400Z–2(d)(1) takes into account only the QOF's assets on the last day of the taxable year.

(ii) The computation of any penalty under section 1400Z–2(f)(1) does not take into account any months before the first month in which an eligible entity is a QOF.

(3) *Pre-existing entities.* There is no legal barrier to a pre-existing eligible entity becoming a QOF, but the eligible entity must satisfy all of the requirements of section 1400Z–2, including the requirements regarding qualified opportunity zone property, as defined in section 1400Z–2(d)(2). In particular, that property must be acquired after December 31, 2017.

(b) *Valuation of assets for purposes of the 90-percent asset test*—(1) *In general.* For a taxable year, if a QOF has an applicable financial statement within the meaning of § 1.475(a)–4(h), then the value of each asset of the QOF for purposes of the 90-percent asset test in section 1400Z–2(d)(1) is the value of that asset as reported on the QOF's applicable financial statement for the relevant reporting period.

(2) *QOF without an applicable financial statement.* If paragraph (b)(1) of this section does not apply to a QOF, then the value of each asset of the QOF for purposes of the 90-percent asset test in section 1400Z–2(d)(1) is the QOF's cost of the asset.

(c) *Qualified opportunity zone property*—(1) *In general.* Pursuant to section 1400Z–2(d)(2)(A), the following property is *qualified opportunity zone property:*

(i) Qualified opportunity zone stock as defined in paragraph (c)(2) of this section,

(ii) Qualified opportunity zone partnership interest as defined in paragraph (c)(3) of this section, and

(iii) Qualified opportunity zone business property as defined in paragraph (c)(4) of this section.

(2) *Qualified opportunity zone stock*—(i) *In general.* Except as provided in paragraphs (c)(2)(ii) and (e)(2) of this section, if an entity is classified as a corporation for Federal tax purposes (corporation), then an equity interest (stock) in the entity is *qualified opportunity zone stock* if—

(A) The stock is acquired by a QOF after December 31, 2017, at its original issue (directly or through an underwriter) from the corporation solely in exchange for cash,

(B) As of the time the stock was issued, the corporation was a qualified opportunity zone business as defined in section 1400Z–2(d)(3) and paragraph (d) of this section (or, in the case of a new corporation, the corporation was being organized for purposes of being such a qualified opportunity zone business), and

(C) During substantially all of the QOF's holding period for the stock, the corporation qualified as a qualified opportunity zone business as defined in section 1400Z–2(d)(3) and paragraph (d) of this section.

(ii) *Redemptions of stock.* Pursuant to section 1400Z–2(d)(2)(B)(ii), rules similar to the rules of section 1202(c)(3) apply for purposes of determining whether stock in a corporation qualifies as qualified opportunity zone stock.

(A) *Redemptions from taxpayer or related person.* Stock acquired by a QOF is not treated as qualified opportunity zone stock if, at any time during the 4-year period beginning on the date 2 years before the issuance of the stock, the corporation issuing the stock purchased (directly or indirectly) any of its stock from the QOF or from a person related (within the meaning of section 267(b) or 707(b)) to the QOF. Even if the purchase occurs after the issuance, the stock was never qualified opportunity zone stock.

(B) *Significant redemptions.* Stock issued by a corporation is not treated as qualified opportunity zone stock if, at any time during the 2-year period beginning on the date 1 year before the issuance of the stock, the corporation made 1 or more purchases of its stock with an aggregate value (as of the time of the respective purchases) exceeding 5 percent of the aggregate value of all of its stock as of the beginning of the 2-year period. Even if one or more of the disqualifying purchases occurs after the issuance, the stock was never qualified opportunity zone stock.

(C) *Treatment of certain transactions.* If any transaction is treated under section 304(a) as a distribution in redemption of the stock of any corporation, for purposes of paragraphs (c)(2)(ii)(A) and (B) of this section, that corporation is treated as purchasing an amount of its stock equal to the amount that is treated as such a distribution under section 304(a).

(3) *Qualified opportunity zone partnership interest.* Except as provided in paragraph (e)(2) of this section, if an entity is classified as a partnership for Federal tax purposes (partnership), any capital or profits interest (partnership interest) in the entity is a *qualified*

opportunity zone partnership interest if—

(i) The partnership interest is acquired by a QOF after December 31, 2017, from the partnership solely in exchange for cash,

(ii) As of the time the partnership interest was acquired, the partnership was a qualified opportunity zone business as defined in section 1400Z–2(d)(3) and paragraph (d) of this section (or, in the case of a new partnership, the partnership was being organized for purposes of being a qualified opportunity zone business), and

(iii) During substantially all of the QOF's holding period for the partnership interest, the partnership qualified as a qualified opportunity zone business as defined in section 1400Z–2(d)(3) and paragraph (d) of this section.

(4) *Qualified opportunity zone business property of a QOF.* Tangible property used in a trade or business of a QOF is qualified opportunity zone business property for purposes of paragraph (c)(1)(iii) of this section if—

(i) The tangible property satisfies section 1400Z–2(d)(2)(D)(i)(I);

(ii) The original use of the tangible property in the qualified opportunity zone, within the meaning of paragraph (c)(7) of this section, commences with the QOF, or the QOF substantially improves the tangible property within the meaning of paragraph (c)(8) of this section (which defines substantial improvement in this context); and

(iii) During substantially all of the QOF's holding period for the tangible property, substantially all of the use of the tangible property was in a qualified opportunity zone.

(5) *Substantially all of a QOF's holding period for property described in paragraphs (c)(2), (3), and (4) of this section.* [Reserved]

(6) *Substantially all of the usage of tangible property by a QOF in a qualified opportunity zone.* [Reserved]

(7) *Original use of tangible property.* [Reserved]

(8) *Substantial improvement of tangible property*—(i) *In general.* Except as provided in paragraph (c)(8)(ii) of this section, for purposes of paragraph (c)(4)(ii) of this section, tangible property is treated as substantially improved by a QOF only if, during any 30-month period beginning after the date of acquisition of the property, additions to the basis of the property in the hands of the QOF exceed an amount equal to the adjusted basis of the property at the beginning of the 30-month period in the hands of the QOF.

(ii) *Special rules for land and improvements on land*—(A) *Buildings located in the zone.* If a QOF purchases a building located on land wholly within a QOZ, under section 1400Z–2(d)(2)(D)(ii) a substantial improvement to the purchased tangible property is measured by the QOF's additions to the adjusted basis of the building. Under section 1400Z–2(d), measuring a substantial improvement to the building by additions to the QOF's adjusted basis of the building does not require the QOF to separately substantially improve the land upon which the building is located.

(B) [Reserved]

(d) *Qualified opportunity zone business*—(1) *In general.* A trade or business is a *qualified opportunity zone business* if—

(i) Substantially all of the tangible property owned or leased by the trade or business is qualified opportunity zone business property as defined in paragraph (d)(2) of this section,

(ii) Pursuant to section 1400Z–2(d)(3)(A)(iii), the trade or business satisfies the requirements of section 1397C(b)(2), (4), and (8) as defined in paragraph (d)(5) of this section, and

(iii) Pursuant to section 1400Z–2(d)(3)(A)(iii), the trade or business is not described in section 144(c)(6)(B) as defined in paragraph (d)(6) of this section.

(2) *Qualified opportunity zone business property of the qualified opportunity zone business for purposes of paragraph (d)(1)(i) of this section*—(i) *In general.* The tangible property used in a trade or business of an entity is qualified opportunity zone business property for purposes of paragraph (d)(1)(i) of this section if—

(A) The tangible property satisfies section 1400Z–2(d)(2)(D)(i)(l);

(B) The original use of the tangible property in the qualified opportunity zone commences with the entity or the entity substantially improves the tangible property within the meaning of paragraph (d)(4) of this section (which defines substantial improvement in this context); and

(C) During substantially all of the entity's holding period for the tangible property, substantially all of the use of the tangible property was in a qualified opportunity zone.

(ii) *Substantially all of a qualified opportunity zone business's holding period for property described in paragraph (d)(2)(i)(C) of this section.* [Reserved]

(iii) *Substantially all of the usage of tangible property by a qualified opportunity zone business in a qualified opportunity zone.* [Reserved]

(3) *Substantially all requirement of paragraph (d)(1)(i) of this section*—(i) *In general.* A trade or business of an entity is treated as satisfying the *substantially all* requirement of paragraph (d)(1)(i) of this section if at least 70 percent of the tangible property owned or leased by the trade or business is qualified opportunity zone business property as defined in paragraph (d)(2) of this section.

(ii) *Calculating percent of tangible property owned or leased in a trade or business*—(A) *In general.* If an entity has an applicable financial statement within the meaning of § 1.475(a)–4(h), then the value of each asset of the entity as reported on the entity's applicable financial statement for the relevant reporting period is used for determining whether a trade or business of the entity satisfies the first sentence of paragraph (d)(3)(i) of this section (concerning whether the trade or business is a qualified opportunity zone business).

(B) *Entity without an applicable financial statement.* If paragraph (d)(3)(ii)(A) of this section does not apply to an entity and a taxpayer both holds an equity interest in the entity and has self-certified as a QOF, then that taxpayer may value the entity's assets using the same methodology under paragraph (b) of this section that the taxpayer uses for determining its own compliance with the 90-percent asset requirement of section 1400Z–2(d)(1) (Compliance Methodology), provided that no other equity holder in the entity is a Five-Percent Zone Taxpayer. If paragraph (d)(3)(ii)(A) of this section does not apply to an entity and if two or more taxpayers that have self-certified as QOFs hold equity interests in the entity and at least one of them is a Five-Percent Zone Taxpayer, then the values of the entity's assets may be calculated using the Compliance Methodology that both is used by a Five-Percent Zone Taxpayer and that produces the highest percentage of qualified opportunity zone business property for the entity.

(C) *Five Percent Zone Taxpayer.* A *Five-Percent Zone Taxpayer* is a taxpayer that has self-certified as a QOF and that holds stock in the entity (if it is a corporation) representing at least 5 percent in voting rights and value or holds an interest of at least 5 percent in the profits and capital of the entity (if it is a partnership).

(iii) *Example.* The following example illustrates the principles of paragraph (d)(3)(ii) of this section.

(A) Example. Entity ZS is a corporation that has issued only one class of stock and that conducts a trade or business. Taxpayer X holds 94% of the ZS stock, and Taxpayer Y holds the remaining 6% of that stock. (Thus, both X and Y are Five Percent Zone

Taxpayers within the meaning of paragraph (d)(3)(ii)(C) of this section.) ZS does not have an applicable financial statement, and, for that reason, a determination of whether ZS is conducting a qualified opportunity zone business may employ the Compliance Methodology of X or Y. X and Y use different Compliance Methodologies permitted under paragraph (d)(3)(ii)(B) of this section for purposes of satisfying the 90-percent asset test of section 1400Z–2(d)(1). Under X's Compliance Methodology (which is based on X's applicable financial statement), 65% of the tangible property owned or leased by ZS's trade or business is qualified opportunity zone business property. Under Y's Compliance Methodology (which is based on Y's cost), 73% of the tangible property owned or leased by ZS's trade or business is qualified opportunity zone business property. Because Y's Compliance Methodology would produce the higher percentage of qualified opportunity zone business property for ZS (73%), both X and Y may use Y's Compliance Methodology to value ZS's owned or leased tangible property. If ZS's trade or business satisfies all additional requirements in section 1400Z–2(d)(3), the trade or business is a qualified opportunity zone business. Thus, if all of the additional requirements in section 1400Z–2(d)(2)(B) are satisfied, stock in ZS is qualified opportunity zone stock in the hands of a taxpayer that has self-certified as a QOF.

(B) [Reserved]

(4) *Substantial improvement of tangible property for purposes of paragraph (d)(2)(i)(B) of this section*—(i) *In general.* Except as provided in paragraph (d)(4)(ii) of this section, for purposes of paragraph (d)(2)(i)(B) of this section, tangible property is treated as substantially improved by a qualified opportunity zone business only if, during any 30-month period beginning after the date of acquisition of such tangible property, additions to the basis of such tangible property in the hands of the qualified opportunity zone business exceed an amount equal to the adjusted basis of such tangible property at the beginning of such 30-month period in the hands of the qualified opportunity zone business.

(ii) *Special rules for land and improvements on land*—(A) *Buildings located in the zone.* If a QOF purchases a building located on land wholly within a QOZ, under section 1400Z–2(d)(2)(D)(ii) a substantial improvement to the purchased tangible property is measured by the QOF's additions to the adjusted basis of the building. Under section 1400Z–2(d), measuring a substantial improvement to the building by additions to the QOF's adjusted basis of the building does not require the QOF to separately substantially improve the land upon which the building is located.

(B) [Reserved]

(5) *Operation of section 1397C requirements incorporated by reference*—(i) *Gross income requirement.* Section 1400Z–2(d)(3)(A)(iii) incorporates section 1397C(b)(2), requiring that for each taxable year at least 50 percent of the gross income of a qualified opportunity zone business is derived from the active conduct of a trade or business in the qualified opportunity zone.

(ii) *Use of intangible property requirement*—(A) *In general.* Section 1400Z–2(d)(3) incorporates section 1397C(b)(4), requiring that, with respect to any taxable year, a substantial portion of the intangible property of an opportunity zone business is used in the active conduct of a trade or business in the qualified opportunity zone.

(B) *Active conduct of a trade or business.* [Reserved]

(iii) *Nonqualified financial property limitation.* Section 1400Z–2(d)(3) incorporates section 1397C(b)(8), limiting in each taxable year the average of the aggregate unadjusted bases of the property of a qualified opportunity zone business that may be attributable to nonqualified financial property. Section 1397C(e)(1), which defines the term *nonqualified financial property* for purposes of section 1397C(b)(8), excludes from that term reasonable amounts of working capital held in cash, cash equivalents, or debt instruments with a term of 18 months or less (working capital assets).

(iv) *Safe harbor for reasonable amount of working capital.* Solely for purposes of applying section 1397C(e)(1) to the definition of a qualified opportunity zone business under section 1400Z–2(d)(3), working capital assets are treated as reasonable in amount for purposes of sections 1397C(b)(2) and 1400Z–2(d)(3)(A)(ii), if all of the following three requirements are satisfied:

(A) *Designated in writing.* These amounts are designated in writing for the acquisition, construction, and/or substantial improvement of tangible property in a qualified opportunity zone, as defined in section 1400Z–1(a).

(B) *Reasonable written schedule.* There is a written schedule consistent with the ordinary start-up of a trade or business for the expenditure of the working capital assets. Under the schedule, the working capital assets must be spent within 31 months of the receipt by the business of the assets.

(C) *Property consumption consistent.* The working capital assets are actually used in a manner that is substantially consistent with paragraph (d)(5)(iv)(A) and (B) of this section.

(v) *Safe harbor for gross income derived from the active conduct of business.* Solely for purposes of applying the 50-percent test in section 1397C(b)(2) to the definition of a qualified opportunity zone business in section 1400Z–2(d)(3), if any gross income is derived from property that paragraph (d)(5)(iv) of this section treats as a reasonable amount of working capital, then that gross income is counted toward satisfaction of the 50-percent test.

(vi) *Safe harbor for use of intangible property.* Solely for purposes of applying the use requirement in section 1397C(b)(4) to the definition of a qualified opportunity zone business under section 1400Z–2(d)(3), the use requirement is treated as being satisfied during any period in which the business is proceeding in a manner that is substantially consistent with paragraphs (d)(5)(iv)(A) through (C) of this section.

(vii) *Safe harbor for property on which working capital is being expended.* If paragraph (d)(5)(iv) of this section treats some financial property as being a reasonable amount of working capital because of compliance with the three requirements of paragraph (d)(5)(iv)(A)–(C) and if the tangible property referred to in paragraph (d)(5)(iv)(A) is expected to satisfy the requirements of section 1400Z–2(d)(2)(D)(1) as a result of the planned expenditure of those working capital assets, then that tangible property is not treated as failing to satisfy those requirements solely because the scheduled consumption of the working capital is not yet complete.

(viii) *Example.* The following example illustrates the rules of this paragraph (d)(5):

(A) *Facts.* In 2019, Taxpayer H realized $w million of capital gains and within the 180-day period invested $w million in QOF T, a qualified opportunity fund. QOF T immediately acquired from partnership P a partnership interest in P, solely in exchange for $w million of cash. P immediately placed the $w million in working capital assets, which remained in working capital assets until used. P had written plans to acquire land in a qualified opportunity zone on which it planned to construct a commercial building. Of the $w million, $x million was dedicated to the land purchase, $y million to the construction of the building, and $z million to ancillary but necessary expenditures for the project. The written plans provided for purchase of the land within a month of receipt of the cash from QOF T and for the remaining $y and $z million to be spent within the next 30 months on construction of the building and on the ancillary expenditures. All expenditures were made on schedule, consuming the $w million. During the taxable years that overlap with the first 31-

month period, P had no gross income other than that derived from the amounts held in those working capital assets. Prior to completion of the building, P's only assets were the land it purchased, the unspent amounts in the working capital assets, and P's work in process as the building was constructed.

(B) *Analysis of construction*—(*1*) P met the three requirements of the safe harbor provided in paragraph (d)(5)(iv) of this section. P had a written plan to spend the $w received from QOF T for the acquisition, construction, and/or substantial improvement of tangible property in a qualified opportunity zone, as defined in section 1400Z–1(a). P had a written schedule consistent with the ordinary start-up for a business for the expenditure of the working capital assets. And, finally, P's working capital assets were actually used in a manner that was substantially consistent with its written plan and the ordinary start-up of a business. Therefore, the $x million, the $y million, and the $z million are treated as reasonable in amount for purposes of sections 1397C(b)(2) and 1400Z–2(d)(3)(A)(ii).

(*2*) Because P had no other gross income during the 31 months at issue, 100 percent of P's gross income during that time is treated as derived from an active trade or business in the qualified opportunity zone for purposes of satisfying the 50-percent test of section 1397C(b)(2).

(*3*) For purposes of satisfying the requirement of section 1397C(b)(4), during the period of land acquisition and building construction a substantial portion of P's intangible property is treated as being used in the active conduct of a trade or business in the qualified opportunity zone.

(*4*) All of the facts described are consistent with QOF T's interest in P being a qualified opportunity zone partnership interest for purposes of satisfying the 90-percent test in section 1400Z–2(d)(1).

(C) *Analysis of substantial improvement.* The above conclusions would also apply if P's plans had been to buy and substantially improve a pre-existing commercial building. In addition, the fact that P's basis in the building has not yet doubled does not cause the building to fail to satisfy section 1400Z–2(d)(2)(D)1)(III).

(6) *Trade or businesses described in section 144(c)(6)(B) not eligible.* Pursuant to section 1400Z–2(d)(3)(A)(iii), the following trades or businesses described in section 144(c)(6)(B) cannot qualify as a qualified opportunity zone business:

(i) Any private or commercial golf course,

(ii) Country club,

(iii) Massage parlor,

(iv) Hot tub facility,

(v) Suntan facility,

(vi) Racetrack or other facility used for gambling, or

(vii) Any store the principal business of which is the sale of alcoholic beverages for consumption off premises.

(e) *Exceptions based on where an entity is created, formed, or organized*—(1) *QOFs.* If a partnership or corporation (an entity) is not organized in one of the 50 states, the District of Columbia, or the U.S. possessions, it is ineligible to be a QOF. If an entity is organized in a U.S. possession but not in one of the 50 States or the District of Columbia, it may be a QOF only if it is organized for the purpose of investing in qualified opportunity zone property that relates to a trade or business operated in the U.S. possession in which the entity is organized.

(2) *Entities that can issue qualified opportunity zone stock or qualified opportunity zone partnership interests.* If an entity is not organized in one of the 50 states, the District of Columbia, or the U.S. possessions, an equity interest in the entity is neither qualified opportunity zone stock nor a qualified opportunity zone partnership interest. If an entity is organized in a U.S. possession but not in one of the 50 States or the District of Columbia, an equity interest in the entity may be qualified opportunity zone stock or a qualified opportunity zone partnership interest, as the case may be, only if the entity conducts a qualified opportunity zone business in the U.S. possession in which the entity is organized. An entity described in the preceding sentence is treated as satisfying the ''domestic'' requirement in section 1400Z–2(d)(2)(B)(i) or section 1400Z–2(C)(i).

(3) *U.S. possession defined.* For purposes of this paragraph (e), a U.S. possession means any jurisdiction other than the 50 States and the District of Columbia where a designated qualified opportunity zone exists under section 1400Z–1.

(f) *Applicability date.* This section applies for QOF taxable years that begin on or after the date of publication in the **Federal Register** of a Treasury decision adopting these proposed rules as final regulations. A QOF, however, may rely on the proposed rules in this section with respect to taxable years that begin before the date of applicability of this section, but only if the QOF applies the rules in their entirety and in a consistent manner.

■ **Par. 5.** Section 1.1400Z2(e)–1 is added to read as follows:

§ 1.1400Z2(e)–1 Applicable rules.

(a) *Treatment of investments with mixed funds*—(1) *Investments to which no election under section 1400Z–2(a) applies.* If a taxpayer invests money in a QOF and does not make an election under section 1400Z–2(a) with respect to that investment, the investment is one described in section 1400Z–2(e)(1)(A)(ii) (a separate investment to which section 1400Z–2(a), (b), and (c) do not apply).

(2) *Treatment of deemed contributions of money under 752(a).* In the case of a QOF classified as a partnership for Federal income tax purposes, the deemed contribution of money described in section 752(a) does not create or increase an investment in the fund described in section 1400Z–2(e)(1)(A)(ii). Thus, any basis increase resulting from a deemed section 752(a) contribution is not taken into account in determining the portion of a partner's investment subject to section 1400Z–2(e)(1)(A)(i) or (ii).

(3) Example. The following example illustrates the rules of this paragraph (a):

(i) Taxpayer A owns a 50 percent capital interest in Partnership P. Under section 1400Z 2(e)(1), 90 percent of A's investment is described in section 1400Z–2(e)(1)(A)(i) (an investment that only includes amounts to which the election under section 1400Z–2(a) applies), and 10 percent is described in section 1400Z–2(e)(1)(A)(ii) (a separate investment consisting of other amounts). Partnership P borrows $8 million. Under § 1.752–3(a), taking into account the terms of the partnership agreement, $4 million of the $8 million liability is allocated to A. Under section 752(a), A is treated as contributing $4 million to Partnership P. Under paragraph (2) of this section, A's deemed $4 million contribution to Partnership P is ignored for purposes of determining the percentage of A's investment in Partnership P subject to the deferral election under section 1400Z–2(a) or the portion not subject to such the deferral election under section 1400Z–2(a). As a result, after A's section 752(a) deemed contribution, 90 percent of A's investment in Partnership P is described in section 1400Z–2(e)(1)(A)(i) and 10 percent is described in section 1400Z–2(e)(1)(A)(ii).

(ii) [Reserved]

(b) [Reserved]

(c) *Applicability date.* This section applies to investments in, and deemed contributions of money to, a QOF that occur on or after the date of publication in the **Federal Register** of a Treasury decision adopting these proposed rules as final regulations. An eligible taxpayer, however, may rely on the proposed rules in this section with respect to investments, and deemed contributions, before the date of applicability of this section, but only if the taxpayer applies the rules in their entirety and in a consistent manner.

Kirsten B. Wielobob,

Deputy Commissioner for Services and Enforcement.

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DEPARTMENT OF DEFENSE

Office of the Secretary

32 CFR Part 275

[Docket ID: DOD–2018–OS–0026]

RIN 0790–AK01

Right to Financial Privacy Act

AGENCY: Department of Defense.

ACTION: Proposed rule.

SUMMARY: This proposed rule describes the procedures that the Department of Defense (DoD) is proposing to follow when seeking access to customer records maintained by financial institutions. These updates are required to fulfill DoD's responsibilities under the Right to Financial Privacy Act.

DATES: Comments must be received by December 28, 2018.

ADDRESSES: You may submit comments, identified by docket number and/or RIN number and title, by any of the following methods:

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

• *Mail:* Department of Defense, Office of the Chief Management Officer, Directorate of Oversight and Compliance, 4800 Mark Center Drive, Mailbox #24, Suite 08D09, Alexandria, VA 22350–1700.

Instructions: All submissions received must include the agency name and docket number or Regulatory Information Number (RIN) for this document. The general policy is for submissions to be made available for public viewing at *http://www.regulations.gov* without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: Cindy Allard, (703) 571–0086.

SUPPLEMENTARY INFORMATION:

Authority and Background

The Right to Financial Privacy Act of 1978, Public Law. No. 95–630, was enacted to provide the financial records of financial institution customers a reasonable amount of privacy from federal government scrutiny. The Act, which became effective in March 1979, establishes specific procedures that government authorities must follow when requesting a customer's financial records from a bank or other financial institution. It also imposes duties and limitations on financial institutions prior to the release of information sought by government agencies. In addition, the act generally requires that customers receive:

—A written notice of the federal authority's intent to obtain financial records

—An explanation of the purpose for which the records are sought

—A statement describing procedures to follow if the customer does not wish such records or information to be made available

Certain exceptions allow for delayed notice or no customer notice at all. Prior to passage of the Act, bank customers were not informed that their personal financial records were being turned over to a government authority and could not challenge government access to the records. In United States v. Miller (425 U.S. 435 (1976)), the Supreme Court held that because financial records are maintained by a financial institution, the records belong to the institution rather than the customer; therefore, the customer has no protectable legal interest in the bank's records and cannot limit government access to those records. It was principally in response to this decision that the Right to Financial Privacy Act was enacted.

Coverage

Coverage under the Act specifically extends to customers of financial institutions. A customer is defined as any person or authorized representative of that person who uses or has used any service of a financial institution. The definition also includes any person for whom the financial institution acts as a fiduciary. Corporations and partnerships of six or more individuals are not considered customers for purposes of the Act.

Requirements

To obtain access to, copies of, or information contained in a customer's financial records, a government authority, generally, must first obtain one of the following:

—An authorization, signed and dated by the customer, that identifies the records, the reasons the records are being requested, and the customer's rights under the Act

—An administrative subpoena or summons

—A search warrant

—A judicial subpoena

—A formal written request by a government agency (to be used only if no administrative summons or subpoena authority is available)

A financial institution may not release a customer's financial records until the government authority seeking the records certifies in writing that it has complied with the applicable provision of the Act. In addition, the institution must maintain a record of all instances in which a customer's records are disclosed to a government authority pursuant to customer authorization. The records should include the date, the name of the government authority, and an identification of the records disclosed. Generally, the customer has a right to inspect the records. Although there are no specific record-retention requirements in the act, financial institutions should retain copies of all administrative and judicial subpoenas, search warrants, and formal written requests given to them by federal government agencies or departments along with the written certification required. A financial institution must begin assembling the required information upon receipt of the agency's summons or subpoena or a judicial subpoena and must be prepared to deliver the records upon receipt of the written certificate of compliance.

Cost Reimbursement

With certain exceptions, government entities must reimburse financial institutions for the cost of providing the information. This reimbursement may include costs for assembling or providing records, reproduction and transportation costs, or any other costs reasonably necessary or incurred in gathering and delivering the requested information. The Federal Reserve Board's Regulation S establishes rates and the conditions under which these payments may be made *https://www.gpo.gov/fdsys/pkg/FR-2009-09-30/pdf/E9-23407.pdf.*

Exceptions to Notice and Certification Requirements

In general, exceptions to the notice and certification requirements cover situations pertinent to routine banking business, information requested by supervisory agencies, and requests subject to other statutory requirements. Specific exceptions include records:

—Submitted by financial institutions to any court or agency when perfecting a security interest, proving a claim in bankruptcy, or collecting a debt for itself or a fiduciary

—Requested by a supervisory agency in connection with its supervisory, regulatory, or monetary functions.

—Sought in accordance with procedures authorized by the Internal Revenue Code (records that are intended to be accessed by procedures authorized by the Tax Reform Act of 1976)

—Required to be reported in accordance with any federal statute (or rule promulgated thereunder, such as the Bank Secrecy Act)

—Requested by the Government Accountability Office for an authorized proceeding, investigation, examination, or audit directed at a federal agency
—Subject to a subpoena issued in conjunction with proceedings before a grand jury (with the exception of cost reimbursement and the restricted use of grand jury information)
—Requested by a government authority subject to a lawsuit involving the bank customer (the records may be obtained under the Federal Rules of Civil and Criminal Procedure)

The Act also allows financial institutions to:

—Release records that are not individually identifiable with a particular customer
—Notify law enforcement officials if it has information relevant to a violation of the law

Exceptions to Notice Requirements but Not to Certification Requirements

In certain cases, the Act does not require the customer to be notified of the request but still requires the federal agency requesting the information to certify in writing that it has complied with all applicable provisions of the act. Exceptions to the notice provisions include:

—Instances in which a financial institution, rather than a customer, is being investigated
—Requests for records incidental to the processing of a government loan, loan guaranty, loan insurance agreement, or default on a government guaranteed or government-insured loan (in this case, the federal agency must give the loan applicant a notice of the government's rights to access financial records when the customer initially applies for the loan. The financial institution is then required to keep a record of all disclosures made to government authorities, and the customer is entitled to inspect this record).
—Instances in which the government is engaging in authorized foreign intelligence activities or the Secret Service is carrying out its protective functions

Although the Securities and Exchange Commission is covered by the Act, it can obtain customer records from an institution without prior notice to the customer by obtaining an order from a U.S. district court. The agency must, however, provide the certificate of compliance to the institution along with the court order prohibiting disclosure of the fact that the documents have been obtained. The court order will set a delay-of-notification date, after which the customer will be notified by the institution that the SEC has obtained his or her records.

Delayed-Notice Requirements

Under certain circumstances, a government entity may request a court order delaying the customer notice for up to ninety days. This delay may be granted if the court finds that earlier notice would result in endangering the life or physical safety of any person, flight from prosecution, destruction of or tampering with evidence, or intimidation of potential witnesses or would otherwise seriously jeopardize or unduly delay an investigation, trial, or official proceeding. Delayed notice of up to ninety days is also allowed for search warrants.

Civil Liability

A customer may collect civil penalties from any government agency or department that obtains, or any financial institution or employee of the institution who discloses, information in violation of the act. These penalties include:

—Actual damages,
—$100, regardless of the volume of records involved,
—Court costs and reasonable attorney's fees, and
—Such punitive damages as the court may allow for willful or intentional violations. An action may be brought up to three years after the date of the violation or the date the violation was discovered. A financial institution that relies in good faith on a federal agency's certification may not be held liable to a customer for the disclosure of financial records.

Description of Proposed Changes

DoD's current rule was last updated on May 4, 2006 (71 FR 26221). DoD's proposed revisions seek to only include content relating to those instances when the Department submits ''formal written requests'' to financial institutions for customer records, as described by 12 U.S.C. 3408. The final rule will apply DoD-wide to provide consistent implementation across all components. When the final rule is published one component-level rule at 32 CFR part 504 will be rescinded.

Expected Costs and Benefits

The primary benefit to a DoD-wide rule is consistent implementation across the DoD's responsibilities under the Act. The Act requires DoD to reimburse a financial institution for such costs as are reasonably necessary and which have been directly incurred based on the rates of reimbursement established by the Federal Reserve Board in 12 CFR part 219.3. The average cost of reimbursement from DoD to financial institutions over the past five years is $4,328 and the Department does not anticipate an increase with the finalization of this rule. DoD has not paid any civil penalties associated with this rule as discussed in the Civil Liability section of the rule. DoD welcomes comments on the costs associated with implementation of the Act.

Regulatory Procedures

Executive Order 12866, ''Regulatory Planning and Review'' and Executive Order 13563, ''Improving Regulation and Regulatory Review''

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distribute impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rulemaking has been designated a ''significant regulatory action,'' although not economically significant, under section 3(f) of Executive Order 12866. Accordingly, the proposed rule has been reviewed by the Office of Management and Budget (OMB).

Executive Order 13771, ''Reducing Regulation and Controlling Regulatory Costs''

This proposed rule is not expected to be subject to the requirements of E.O. 13771 (82 CFR 9339, February 3, 2017) because this proposed rule is expected to result in no more than *de minimis* costs.

Public Law 104–4, ''Unfunded Mandates Reform Act'' (2 U.S.C. Ch. 25)

This proposed rule is not subject to the Unfunded Mandates Reform Act because it does not contain a federal mandate that may result in the expenditure by state, local, and tribal governments, in the aggregate, or by the private sector, of $100M or more in any one year.

Public Law 96–354, ''Regulatory Flexibility Act'' (5 U.S.C. Ch. 6)

It has been certified that 32 CFR part 275 is not subject to the Regulatory Flexibility Act (5 U.S.C. 601) because it does not have a significant economic

impact on a substantial number of small entities.

Public Law 96–511, ''Paperwork Reduction Act'' (44 U.S.C. Ch. 35)

It has been certified that 32 CFR part 275 does not impose reporting or recordkeeping requirements under the Paperwork Reduction Act of 1995.

Executive Order 13132, ''Federalism''

Executive Order 13132 establishes certain requirements that an agency must meet when it promulgates a proposed rule (and subsequent final rule) that imposes substantial direct requirement costs on state and local governments, preempts state law, or otherwise has federalism implications. This proposed rule will not have a substantial effect on state and local governments, or otherwise have federalism implications.

List of Subjects in 32 CFR Part 275

Banks, banking; credit; Privacy.

Accordingly, 32 CFR part 275 is proposed to be revised to read as follows:

PART 275—RIGHT TO FINANCIAL PRIVACY ACT

Sec.
275.1 Purpose.
275.2 Definitions.
275.3 Authorization.
275.4 Formal written request.
275.5 Certification.
275.6 Cost reimbursement.

Authority: 12 U.S.C. 3401, *et seq.*

§ 275.2 Purpose.

The purpose of this regulation is to authorize DoD Components to request financial records from a financial institution pursuant to the formal written request procedure authorized by section 1108 of the Act and to set forth the conditions under which such requests may be made.

§ 275.2 Definitions.

The terms used in this part have the same meaning as similar terms used in the Right to Financial Privacy Act of 1978, Title XI of Public Law 95–630.

Act means the *Right to Financial Privacy Act of 1978.*

DoD Components means the law enforcement activities of the Office of the Secretary of Defense, the Military Departments, the Office of the Chairman of the Joint Chiefs of Staff, the Joint Staff, the Combatant Commands, the Office of the Inspector General of the Department of Defense, the Defense Agencies, the DoD Field Activities, and all other organizational entities in the Department of Defense (hereafter referred to as the ''DoD Components'').

§ 275.3 Authorization.

The DoD Components are authorized to request financial records of any customer from a financial institution pursuant to a formal written request under the Act only if:

(a) No administrative summons or subpoena authority reasonably appears to be available to the DoD Component to obtain financial records for the purpose for which the records are sought;

(b) There is reason to believe that the records sought are relevant to a legitimate law enforcement inquiry and will further that inquiry;

(c) The request is issued by a supervisory official of a grade designated by the head of the DoD Component. Officials so designated shall not delegate this authority to others;

(d) The request adheres to the requirements set forth in § 275.4 of this part; and

(e) The notice requirements required by section 1108(4) of the Act, or the requirements pertaining to the delay of notice in section 1109 of the Act, and described in 275.3(e) (1) through (e)(5) are satisfied, except in situations (*e.g.,* section 1113(g)) where no notice is required.

(1) The notice requirements are satisfied when a copy of the request has been served on the customer or mailed to the customer's last known address on or before the date on which the request was made to the financial institution together with the following notice which shall state with reasonable specificity the nature of the law enforcement inquiry: ''Records or information concerning your transactions held by the financial institution named in the attached request are being sought by the Department of Defense [or the specific DoD Component] in accordance with the Right to Financial Privacy Act of 1978 for the following purpose:''

(2) Within ten days of service or within fourteen days of mailing of a subpoena, summons, or formal written request, a customer may file a motion to quash an administrative summons or judicial subpoena, or an application to enjoin a Government authority from obtaining financial records pursuant to a formal written request, with copies served upon the Government authority. A motion to quash a judicial subpoena shall be filed in the court that issued the subpoena. A motion to quash an administrative summons or an application to enjoin a Government authority from obtaining records pursuant to a formal written request shall be filed in the appropriate United States District Court. Such motion or application shall contain an affidavit or sworn statement stating:

(i) That the applicant is a customer of the financial institution from which financial records pertaining to said customer have been sought; and

(ii) the applicant's reasons for believing that the financial records sought are not relevant to the legitimate law enforcement inquiry stated by the Government authority in its notice, or that there has not been substantial compliance within the provisions of Public Law 95–630.

Service shall be made upon a Government authority by delivering or mailing by registered or certified mail a copy of the papers to the person, office, or department specified in the notice which the customer has received a request.

(3) If you desire that such records or information not be made available you must:

(i) Fill out the accompanying motion paper and sworn statement or write one of your own, stating that you are the customer whose records are being requested by the Government and either giving the reasons you believe that the records are not relevant to the legitimate law enforcement inquiry stated in this notice or any other legal basis for objecting to the release of the records.

(ii) File the motion and statement by mailing or delivering them to the clerk at an appropriate United States District Court.

(iii) Serve the Government authority requesting the records by mailing or delivering a copy of your motion and statement to the Government authority.

(iv) Be prepared to go to court and present your position in further detail.

(v) You do not need to have a lawyer, although you may wish to employ one to represent you and protect your rights.

(4) If you do not follow the above procedures, upon the expiration of ten days from the date of service or fourteen days from the date of mailing of the notice, the records or information requested therein may be made available. The records may be transferred to other Government authorities for legitimate law enforcement inquiries, in which event you will be notified after the transfer.

(5) Also, the records or information requested therein may be made available if ten days have expired from the date of service or fourteen days from the date of mailing of the notice and within such time period you have not filed a sworn statement and an

application to enjoin the Government authority in an appropriate court, or the customer challenge provisions.

§ 275.4 Formal written request.

(a) The formal written request must be in the form of a letter or memorandum to an appropriate official of the financial institution from which financial records are requested. The request shall be signed by the issuing official, and shall set forth that official's name, title, business address, and business phone number. The request shall also contain the following:

(1) The identity of the customer or customers to whom the records pertain;

(2) A reasonable description of the records sought; and

(3) Such additional information which may be appropriate—*e.g.,* the date when the opportunity for the customer to challenge the formal written request expires, the date on which the DoD Component expects to present a certificate of compliance with the applicable provisions of the Act, the name and title of the individual (if known) to whom disclosure is to be made.

(b) In cases where customer notice is delayed by court order, a copy of the court order must be attached to the formal written request.

§ 275.5 Certification.

Before obtaining the requested records pursuant to a formal written request described in § 275.4 of this part, an official of a rank designated by the head of the requesting DoD Component shall certify in writing to the financial institution that the DoD Component has complied with the applicable provisions of the Act.

§ 275.6 Cost reimbursement.

Cost reimbursement to financial institutions for providing financial records will be made consistent with title 12, Code of Federal Regulations, part 219.3, subpart A.

Dated: October 22, 2018.

Shelly E. Finke,

Alternate OSD Federal Register, Liaison Officer, Department of Defense.

[FR Doc. 2018–23396 Filed 10–26–18; 8:45 am]

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R02–OAR–2018–0621, FRL–9985–87–Region 2]

Approval of Source-Specific Air Quality Implementation Plans; New Jersey

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to approve source-specific revisions to the New Jersey State Implementation Plan (SIP) for 8-hour ozone for Paulsboro Refining, Buckeye Port Reading Terminal, Buckeye Pennsauken Terminal, and Phillips 66 Company's Linden facility. The source-specific SIPs address the Reasonably Available Control Technology for volatile organic compounds (VOCs) for external floating roof tanks. The intended effect of these revisions is to address how facilities should meet state regulatory obligations for external floating roof tanks that store VOCs with vapor pressure three (3) or more pounds per square inch absolute to be equipped with a domed roof.

DATES: Comments must be received on or before November 28, 2018.

ADDRESSES: Submit your comments, identified by Docket ID number EPA–R02–OAR–2018–0621, at *http://www.regulations.gov.* Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or withdrawn. The EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.,* on the web, cloud, or other file sharing system). For additional submission methods, such as 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: Linda Longo, Air Programs Branch, Environmental Protection Agency, 290 Broadway, 25th Floor, New York, New York 10007–1866, (212) 637–3565, or by email at *longo.linda@epa.gov.*

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I. Background

The Environmental Protection Agency (EPA) proposes to approve revisions to the New Jersey State Implementation Plan (SIP) for attainment and maintenance of the 8-hour ozone National Ambient Air Quality Standards (NAAQS) for the following major volatile organic compound (VOC) facilities: Paulsboro Refining, Buckeye Port Reading Terminal, Buckeye Pennsauken Terminal, and Phillips 66 Company's Linden facility. Specifically, under New Jersey Administrative Code (NJAC), Title 7, Chapter 27, Subchapter 16 (''Control and Prohibition of Air Pollution by Volatile Organic Compound''), Section 2 (''VOC Stationary Storage Tanks''), all external floating roof tanks (EFRTs) in Range III with vapor pressure three (3) or more pounds per square inch absolute (psia) and that were in existence on May 18, 2009 must be equipped with a domed roof the first time the tank is degassed after May 19, 2009, and by no later than May 1, 2020. *See* NJAC 7:27–16.2(*l*)(4). In addition, NJAC 7:27–16.17(a–q) establishes procedures and standards for alternative and facility-specific VOC control requirements. The four relevant facilities were in existence on May 18, 2009, and so absent the currently proposed SIP revisions would be required to dome all EFRTs in accordance with NJAC 7:27–16.2(*l*)(4), which has already been approved by the EPA into the New Jersey SIP. *See* 75 FR 45483 (August 3, 2010). However, the New Jersey Department of Environmental Protection (NJDEP) reviewed and approved for these facilities alternative VOC control plans and respective Reasonably Available Control Technology (RACT), *i.e.,* analysis of the lowest economically feasible emission limitation, for their EFRTs.

Following NJDEP's review and approval, the EPA reviewed the four facilities' alternative VOC control plans and RACT analyses that include (1)

installing domes on 25 out of the 51 EFRTs, and leaving the remaining 26 EFRTs without domes based on the facilities' RACT cost analysis despite the NJAC 7:27–16.2(*l*)(4) requirements, and (2) installing eight domes after the regulatory due date.

In its SIP revision submittals from all four facilities, NJDEP also identified alternative, non-doming emission reduction strategies for VOC and nitrogen oxides (NO_X) beyond what would be achieved by doming the 26 EFRTs that would not receive domes under this SIP revision. However, NJDEP did not request that the EPA approve these additional non-doming measures into the New Jersey SIP revision, and therefore the EPA did not evaluate them for approvability. A full summary of doming and non-doming measures is included in the technical support document (TSD) that is contained in the EPA's docket assigned to this **Federal Register** notice.

Ozone Requirements

In 1997, the EPA revised the health-based NAAQS for 8-hour ozone, setting it at 0.084 parts per million (ppm) averaged over an 8-hour time frame. *See* 62 FR 38856 (July 18, 1997). The EPA revised the 8-hour ozone standard twice since 1997; in March 2008, the EPA revised the standard to 0.075 ppm, and in October 2015 the EPA revised it to 0.070 ppm while retaining the 2008 ozone indicators. *See* 73 FR 16436 (March 27, 2008); 80 FR 65292 (October 26, 2015). After the EPA establishes a new or revised NAAQS, the Clean Air Act directs the EPA and the states to take steps to ensure that the new or revised NAAQS are met. One of the first steps, known as the initial area designations, involves identifying areas of the country that are not meeting the new or revised NAAQS, as well as the nearby areas that contain emissions sources that contribute emissions to the areas not meeting the NAAQS.

The entire State of New Jersey has been designated as nonattainment since the adoption of the 1997 8-hour ozone NAAQS and is divided into two nonattainment areas. The two nonattainment areas in New Jersey are Philadelphia-Wilmington-Atlantic City (PA–NJ–MD–DE) and New York-Northern New Jersey-Long Island (NY–NJ–CT). These areas are designated as marginal nonattainment and as moderate nonattainment, respectively, for the newest 0.070 ppm 8-hour ozone NAAQS.[1] As such, New Jersey has developed ozone SIPs to attain the standards and will consider source-specific SIPs as necessary. A source-specific SIP is submitted by a facility to request approval for source-specific emission limitations, and if approved by the state and the EPA, is incorporated into the state's ozone SIP.

RACT Requirements

RACT is defined as the lowest emission limit that a source is capable of meeting by the application of control technology that is reasonably available considering technological and economic feasibility. Clean Air Act (CAA) sections 172(c)(1), 182(b)(2) and 182(f) require nonattainment areas that are designated as moderate or above to adopt RACT. The entire State of New Jersey is subject to this requirement (1) due to nonattainment area designations for the 8-hour ozone standards (40 CFR 81.331), and (2) because the State of New Jersey is located within the Ozone Transport Region (OTR), a region in which the Clean Air Act requires that state SIPs implement RACT requirements. *See* CAA § 184(b)(1)(B).

In November 2005, the EPA published the final rule that discusses the RACT requirements for the 1997 8-hour ozone standard, and outlined the SIP requirements and deadlines for various areas designated as moderate nonattainment. *See* 70 FR 71612 (November 29, 2005) (the ''Phase 2 Rule'').

On August 1, 2007, the NJDEP finalized RACT revisions to its SIP to address the 8-hour ozone NAAQS, and the EPA approved those revisions on May 15, 2009. *See* ''RACT for the Eight-Hour Ozone NAAQS and other Associated SIP Revisions for the Fine Particulate Matter, Regional Haze, and Transport of Air Pollution,'' available at *http://www.nj.gov/dep/baqp/sip/8-hrRACT-Final.pdf;* ''Approval and Promulgation of Implementation Plans; New Jersey Reasonable Further Progress Plans, Reasonably Available Control Technology, Reasonably Available Control Measures and Conformity Budgets; Final Rule'', 74 FR 22837. The NJDEP believes that significantly higher costs are warranted and should be considered reasonable with respect to available technology than were discussed in the Phase 2 Rule. Although no dollar amount is suggested, the NJDEP identifies five considerations it plans to apply to sources when determining RACT:

(1) Past New Jersey costs for retrofitting a given control;

(2) Average RACT cost (dollars per tons reduced) for a control technology and maximum RACT cost. Once a reasonable number of sources in a source category achieve a lower emission level, other sources should do the same;

(3) The seriousness of the Region's ozone air quality exceedance. For nonattainment areas with higher ozone levels, higher costs for controls are reasonable;

(4) The seriousness of the need to reduce transported air pollution. As an OTR state, higher costs for RACT are justified; and

(5) The NJDEP plan for addressing economic feasibility in RACT rules.

The NJDEP's intent is to specify RACT at the lowest emission limit that a reasonable number of similar facilities have already successfully implemented for each source category.

II. The EPA's Evaluation of New Jersey's Submittals

New Jersey regulations at NJAC 7:27–16.2(*l*)(4), already approved into the ozone SIP, set forth requirements to dome existing EFRTs in Range III on or before May 1, 2020. *See* 75 FR 45483 (August 3, 2010). The four facilities' source-specific SIP revisions are before the EPA for approval because they would allow 26 EFRTs to avoid doming and would extend the deadline for installing eight domes. The NJDEP submittal relies on documents submitted by the four facilities to New Jersey reviewing the cost, feasibility, and projected emissions reductions of doming tanks similar in diameter when deciding which tanks are optimal for doming. Some of the facilities' tanks are smaller in dimension and contain organic liquids of lower VOC concentrations, and thus doming these tanks would result in spending comparatively much more for a substantially smaller reduction in VOC emissions.

The EPA has determined that the doming analyses identified in the source-specific SIP revisions are consistent with the NJDEP's VOC RACT regulation, which is incorporated into the NJ SIP. The reader is referred to the TSD for a detailed discussion of the EPA's evaluation of the source-specific SIP submittal. Below is a summary:

a. Paulsboro Refining

On December 10, 2015, the NJDEP submitted to the EPA proposed revisions to the New Jersey SIP for ozone specifically providing an alternative VOC control plan for the Paulsboro Refining facility located at 800 Billingsport Road, Paulsboro, New Jersey. Paulsboro Refining owns and operates 21 EFRTs in Range III with vapor pressure three (3) or more psia.

[1] Classifications of these areas for the current and previous ozone NAAQS can be found at 40 CFR 81.331.

According to the facility's RACT analysis, doming the total inventory of 21 EFRT is estimated to cost between $19,000 and $149,000 per ton of VOC emissions reduced. The cost per ton to dome all 21 EFRTs exceeds what the state defines as economically feasible for RACT.

Proposed Paulsboro Refining Source-Specific Doming Requirements

The EPA is proposing to approve a source-specific SIP revision allowing the facility not to dome eleven of its 21 EFRTs that are in Range III, and to allow the facility to complete doming of five EFRTs beyond the regulatory deadline of May 1, 2020. Paulsboro Refining has already installed three domes (Tanks 724, 1319, and 1115), and will install two additional domes (Tanks 2173 and 1064 [2]) by the regulatory deadline. The facility is scheduled to install five more domes by 2028 according to the following schedule:

- Tank 1063 by Dec. 31, 2021
- Tank 1116 by Dec. 31, 2023
- Tank 1320 by Dec. 31, 2025
- Tank 1065 by Dec. 31, 2026
- Tank 1066 by Dec. 31, 2028

In total, under the proposed source-specific SIP revision, the facility will dome ten out of 21 EFRTs in Range III, including Tanks 724, 1319, 1115, 2173, 1064, 1063, 1116, 1320, 1065 and 1066. The eleven EFRTs not to be domed are Tanks 725, S02, 1023, 1027, 2869, 2940, 2941, 3174, SSO, SSI, and SS2.

b. Buckeye Port Reading Terminal and Buckeye Pennsauken Terminal

On August 15, 2014, the NJDEP submitted to the EPA proposed revisions to the New Jersey SIP for ozone specifically providing an alternative VOC control plan for both the Buckeye Port Reading Terminal and Pennsauken Terminal, located at 750 Cliff Road, Woodbridge, New Jersey and 123 Derousse Avenue, Pennsauken, New Jersey respectively. Buckeye owns and operates eight EFRTs in Range III with vapor pressure three (3) or more psia at its Port Reading Terminal that are part of this proposed SIP revision,[3] and one such EFRT at its Pennsauken Terminal. According to company's Port Reading RACT analysis, doming the facility's total inventory of eight EFRTs is estimated at $60,000 per ton of VOC emissions reduced, which exceeds what the state defines as economically feasible for RACT. The company's Pennsauken RACT analysis likewise estimated the cost of doming its single EFRT at $60,000 per ton of VOC emissions reduced.

Proposed Buckeye Source-Specific Doming Requirements

The EPA is proposing to approve a source-specific SIP revision allowing the Port Reading facility not to dome four EFRTs that are in Range III and to complete doming of two EFRTs beyond the regulatory deadline of May 1, 2020.[4] Of the eight relevant Port Reading EFRTs, Buckeye has already domed one EFRT (Tank 7935) and will install one additional dome (Tank 1222) by the regulatory deadline. Under this SIP revision, the Buckeye facilities are scheduled to install domes on the following EFRTs in Range III by 2028 according to the following schedule:

- Tank 1219 by March 8, 2027
- Tank 1178 by Sept. 25, 2028

In addition, the EPA is proposing to approve a source-specific SIP revision allowing the Pennsauken facility not to dome its single relevant EFRT (Tank 2018).

In total, the two facilities will dome four out of nine EFRTs in Range III, including Tanks 7935, 1222, 1219, and 1178. The 5 EFRTs not to be domed are Tanks 7930, 7934, 7937, 7945, and 2018.

c. Phillips 66 Company

On June 15, 2016, the NJDEP submitted to the EPA proposed revisions to the New Jersey SIP for ozone specifically providing an alternative VOC control plan for the Phillips 66 Company facility located at 1400 Park Avenue, Linden, New Jersey (the Linden facility). At the Linden facility, Phillips 66 Company owns and operates 21 EFRTs in Range III with vapor pressure three (3) or more psia. According to the facility's RACT analysis, doming the total inventory of 21 EFRTs is estimated to cost between $29,000 and $440,000 per ton of VOC emissions reduced, which exceeds what the state defines as economically feasible for RACT.

Proposed Phillips 66 Company's Linden Facility Source-Specific Doming Requirements

The EPA is proposing to approve a source-specific SIP revision allowing the Linden facility not to dome ten EFRTs that are in Range III and to complete doming of one EFRT beyond the regulatory deadline of May 1, 2020. The Linden facility has already installed domes on two EFRTs (Tanks T233 and T239); three additional EFRTs are currently out of service and ready for doming (Tanks T243, T351, and T250) and the facility will install five additional domes (Tanks T241, T352, T235, T249, and T353) by the regulatory deadline. The Linden facility is scheduled to install a dome on one additional tank (Tank T234) by December 31, 2024, beyond the regulatory due date.

In total, the facility will dome a total of eleven out of 21 EFRTs in Range III, including Tanks T233, T239, T243, T351, T250, T241, T352, T235, T249, T353 and T234. The 10 EFRTs not to be domed are Tanks T52, TI05, TI19, TI43, T224, T349, T350, T354, T355, and T356.

III. Proposed Action

The NJDEP determined that the four facilities discussed above could avoid doming 26 EFRTs because it was not economically feasible to dome the four facilities' total inventory of 51 EFRTs. Specifically, the EPA proposes to approve the NJDEP SIP revisions for 8-hour ozone to allow the Paulsboro facility not to dome eleven EFRTs; the Buckeye facilities not to dome five EFRTs; and the Phillips 66 Company facility not to dome ten EFRTs. The EPA is also proposing to approve a deadline extension for doming nine EFRTs, as previously discussed. This SIP revision would still require the facilities to dome 25 EFRTs (and convert one EFRT to an internal floating roof tank).

Additional non-doming measures will be implemented to make up the foregone VOC emission reductions that would have occurred in doming the full inventory of EFRTs. However, the NJDEP did not request that the EPA approve the additional non-doming measures into the New Jersey SIP, therefore the EPA did not evaluate them for approvability and proposes no action on these measures today.

IV. Incorporation by Reference

In this rule, we are proposing to include in a final rule regulatory text that includes incorporation by

[2] At the time NJDEP submitted its source-specific SIP revision for Paulsboro Refining, Tank 1064 was scheduled for doming by December 31, 2024. However, recent facility developments confirmed by NJDEP indicate that Tank 1064 was taken out of service, rebuilt, and is scheduled for doming by the end of 2018.

[3] The Port Reading terminal previously had one additional EFRT. However, under the proposed SIP revision Buckeye retrofitted that Port Reading EFRT to an internal floating roof tank (Tank 1177) due to changes in facility operational needs (and an internal floating roof tank does not require a dome). Eight EFRTs now remain at the facility that are covered by the proposed SIP revision.

In addition, the Port Reading Terminal has at least two additional EFRTs (Tanks 7943 and 7944) that are not part of the proposed SIP revision. In approximately 2012, the company fitted these two Port Reading EFRTs with domes.

[4] As discussed in the prior footnote, the proposed SIP revision also includes conversion of Tank 1177 to an internal floating roof tank that is no longer subject to doming requirements.

reference. In accordance with the requirements of 1 CFR 51.5, we are proposing to incorporate by reference the provisions described above in Section III (Proposed Action).

The EPA has made, and will continue to make, these documents generally available electronically through *http://www.regulations.gov* and in hard copy at the appropriate EPA office (see the **ADDRESSES** section of this preamble for more information).

V. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the CAA and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 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 CAA. Accordingly, this action merely proposes to approve state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this proposed action:

- Is not a ''significant regulatory action'' subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993) 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, this rule does not have tribal implications as specified by Executive Order 13175, because the SIP is not approved to apply in Indian country located in the state, and the EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law. Thus, Executive Order 13175 does not apply to this action.

List of Subjects 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Nitrogen Dioxide, Intergovernmental Relations, Ozone, Reporting and recordkeeping requirements, Volatile Organic Compounds.

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

Dated: October 18, 2018.

Peter D. Lopez,

Regional Administrator, Region 2.

[FR Doc. 2018–23575 Filed 10–26–18; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 60

[EPA–HQ–OAR–2017–0483; FRL–9984–38–OAR]

RIN 2060–AT54

Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources Reconsideration

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of public hearing.

SUMMARY: On October 15, 2018, the Environmental Protection Agency (EPA) published in the **Federal Register** a proposed rule titled ''Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources Reconsideration.'' The comment period on the proposed action will end on December 17, 2018. The EPA is announcing that it will hold a public hearing on the proposed action. The hearing will provide interested parties the opportunity to present data, views, or arguments concerning the proposed action.

DATES: The EPA will hold a public hearing on November 14, 2018, in Denver, Colorado. Please refer to the **SUPPLEMENTARY INFORMATION** section for additional information on the public hearing.

ADDRESSES: The hearing will be held at the EPA Region 8 offices, 1595 Wynkoop Street, Denver, Colorado 80202. The hearing will convene at 8:00 a.m. local time and will conclude at 8:00 p.m. local time. Lunch and dinner breaks will be scheduled as time will allow depending on the number of registered speakers.

Because this hearing is being held at a U.S. government facility, individuals planning to attend the hearing should be prepared to show valid picture identification to the security staff in order to gain access to the meeting room. Please note that the REAL ID Act, passed by Congress in 2005, established new requirements for entering federal facilities. For purposes of the REAL ID Act, the EPA will accept government-issued IDs, including driver's licenses from the District of Columbia and all states and territories except from American Samoa. If your identification is issued by American Samoa, you must present an additional form of identification to enter the federal building where the public hearing will be held. Acceptable alternative forms of identification include: federal employee badges, passports, enhanced driver's licenses, and military identification cards. For additional information for the status of your state regarding REAL ID, go to: *https://www.dhs.gov/real-id-frequently-asked-questions.* Any objects brought into the building need to fit through the security screening system, such as a purse, laptop bag, or small backpack. Demonstrations will not be allowed on federal property for security reasons.

FOR FURTHER INFORMATION CONTACT: The EPA will begin pre-registering speakers for the hearing upon publication of this document in the **Federal Register**. To register to speak at the hearing, please use the online registration form available at *https://www.epa.gov/controlling-air-pollution-oil-and-natural-gas-industry/forms/public-hearing-proposed-improvements* or contact Virginia Hunt at (919) 541–0832 to register to speak at the hearing. The last day to pre-register to speak at the hearing will be November 6, 2018. On November 13, 2018, the EPA will post at *https://www.epa.gov/controlling-air-pollution-oil-and-natural-gas-industry/forms/public-hearing-proposed-improvements* a general agenda for the hearing that will list pre-registered

speakers in approximate order. The EPA will make every effort to follow the schedule as closely as possible on the day of the hearing; however, please plan for the hearing to run either ahead of schedule or behind schedule. Additionally, requests to speak will be taken the day of the hearing at the hearing registration desk. The EPA will make every effort to accommodate all speakers who arrive and register, although preferences on speaking times may not be able to be fulfilled.

SUPPLEMENTARY INFORMATION: Each commenter will have 5 minutes to provide oral testimony. The EPA encourages commenters to provide the EPA with a copy of their oral testimony electronically (via email) or in hard copy form.

The EPA may ask clarifying questions during the oral presentations, but will not respond to the presentations at that time. Written statements and supporting information submitted during the comment period will be considered with the same weight as oral comments and supporting information presented at the public hearing. Commenters should notify Virginia Hunt if there are special needs related to providing comments at the hearings. Verbatim transcripts of the hearings and written statements will be included in the docket for the rulemaking.

Please note that any updates made to any aspect of the hearing will be posted online at *https://www.epa.gov/controlling-air-pollution-oil-and-natural-gas-industry/forms/public-hearing-proposed-improvements.* While the EPA expects the hearing to go forward as set forth above, please monitor our website or contact Virginia Hunt at (919) 541–0832 or *hunt.virginia@epa.gov* to determine if there are any updates. The EPA does not intend to publish a document in the **Federal Register** announcing updates.

The EPA will not provide audiovisual equipment for presentations. Any media presentations should be submitted to the public docket at *https://www.regulations.gov/,* identified by Docket ID No. EPA–HQ–OAR–2017–0483. The EPA must receive comments on the proposed action (83 FR 52056) no later than December 17, 2018.

If you require the service of a translator or special accommodations such as audio description, please pre-register for the hearing and describe your needs by November 6, 2018. We may not be able to arrange accommodations without advanced notice.

Dated: October 22, 2018.

Panagiotis Tsirigotis,

Director, Office of Air Quality Planning and Standards.

[FR Doc. 2018–23570 Filed 10–26–18; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 271

[EPA–R04–RCRA–2018–0528; FRL- 9985–93–Region 4]

Mississippi: Proposed Authorization of State Hazardous Waste Management Program Revisions

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: Mississippi has applied to the Environmental Protection Agency (EPA) for final authorization of changes to its hazardous waste program under the Resource Conservation and Recovery Act (RCRA), as amended. EPA has reviewed Mississippi's application and is proposing to determine that these changes satisfy all requirements needed to qualify for final authorization. Therefore, we are proposing to authorize the State's changes. EPA seeks public comment prior to taking final action.

DATES: Comments must be received on or before November 28, 2018.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R04–RCRA–2018–0528, at *http://www.regulations.gov.* Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from *www.regulations.gov.* 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. 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: Leah Davis, Materials and Waste Management Branch, RCR Division, U.S. Environmental Protection Agency, Atlanta Federal Center, 61 Forsyth Street SW, Atlanta, Georgia 30303–8960; telephone number: (404) 562–8562; fax number: (404) 562–9964; email address: *davis.leah@epa.gov.*

SUPPLEMENTARY INFORMATION:

A. Why are revisions to state programs necessary?

States that have received final authorization from EPA under RCRA section 3006(b), 42 U.S.C. 6926(b), must maintain a hazardous waste program that is equivalent to, consistent with, and no less stringent than the federal program. As the federal program changes, states must change their programs and ask EPA to authorize the changes. Changes to state programs may be necessary when federal or state statutory or regulatory authority is modified or when certain other changes occur. Most commonly, states must change their programs because of changes to EPA's regulations in 40 Code of Federal Regulations (CFR) parts 124, 260 through 268, 270, 273, and 279.

New federal requirements and prohibitions imposed by federal regulations that EPA promulgates pursuant to the Hazardous and Solid Waste Amendments of 1984 (HSWA) take effect in authorized states at the same time that they take effect in unauthorized states. Thus, EPA will implement those requirements and prohibitions in the states, including the issuance of new permits implementing those requirements, until the states are granted authorization to do so.

B. What decisions is EPA proposing to make in this rule?

Mississippi submitted program revision applications, dated September 10, 2014 and June 1, 2018, seeking authorization of changes to its hazardous waste program that correspond to certain federal rules promulgated between July 1, 2004 and June 30, 2014 (including RCRA Clusters [1] XV through XXIII). EPA concludes that Mississippi's applications to revise its authorized program meet all of the statutory and regulatory requirements established by RCRA, as set forth in RCRA section 3006(b), 42 U.S.C. 6926(b), and 40 CFR part 271. Therefore, EPA proposes to grant Mississippi final authorization to operate its hazardous waste program

[1] A ''cluster'' is a grouping of hazardous waste rules that EPA promulgates from July 1st of one year to June 30th of the following year.

with the changes described in its authorization applications, and as outlined below in Section F of this document.

Mississippi has responsibility for permitting treatment, storage, and disposal facilities within its borders (except in Indian country) and for carrying out the aspects of the RCRA program described in its revised program applications, subject to the limitations of HSWA, as discussed above.

C. What is the effect of this proposed authorization decision?

If Mississippi is authorized for the changes described in Mississippi's authorization applications, these changes will become part of the authorized State hazardous waste program, and therefore will be federally enforceable. Mississippi will continue to have primary enforcement authority and responsibility for its State hazardous waste program. EPA would retain its authorities under RCRA sections 3007, 3008, 3013, and 7003, including its authority to:

- Conduct inspections, and require monitoring, tests, analyses or reports;
- Enforce RCRA requirements, including authorized State program requirements, and suspend or revoke permits; and
- Take enforcement actions regardless of whether the State has taken its own actions.

This action will not impose additional requirements on the regulated community because the regulations for which EPA is proposing to authorize Mississippi are already effective, and are not changed by today's proposed action.

D. What happens if EPA receives comments that oppose this action?

EPA will evaluate any comments received on this proposed action and will make a final decision on approval or disapproval of Mississippi's proposed authorization. Our decision will be published in the **Federal Register**. You may not have another opportunity to comment. If you want to comment on this authorization, you must do so at this time.

E. What has Mississippi previously been authorized for?

Mississippi initially received final authorization on June 13, 1984, effective June 27, 1984 (49 FR 24377), to implement the RCRA hazardous waste management program. EPA granted authorization for changes to Mississippi's program on August 17, 1988, effective October 17, 1988 (53 FR 31000); August 10, 1990, effective October 9, 1990 (55 FR 32624); March 29, 1991, effective May 28, 1991 (56 FR 13079); June 26, 1991, effective August 27, 1991 (56 FR 29589); May 11, 1992, effective July 10, 1992 (57 FR 20056); April 8, 1993, effective June 7, 1993 (58 FR 18162); October 20, 1993, effective December 20, 1993 (58 FR 54044); March 18, 1994, effective May 17, 1994 (59 FR 12857); June 1, 1995, effective July 31, 1995 (60 FR 28539); August 30, 1995, effective October 30, 1995 (60 FR 5718); February 23, 2005, effective April 25, 2005 (70 FR 8731); and August 4, 2008, effective October 3, 2008 (73 FR 45170).

F. What changes are we proposing with today's action?

Mississippi submitted program revision applications, dated September 10, 2014 and June 1, 2018, seeking authorization of changes to its hazardous waste management program in accordance with 40 CFR 271.21. The September 10, 2014 application included changes associated with Checklists [2] 206.1, 207.1, 208–215, 217–218, 220, 222–223, and 225–228. All of these Checklists were resubmitted with Mississippi's June 1, 2018 application in response to prior EPA comments. The June 1, 2018 application also included changes associated with Checklists 229–232, as well as the non-checklist technical correction published at 72 FR 35666 (June 29, 2007). EPA proposes to determine, subject to receipt of written comments that oppose this action, that Mississippi's hazardous waste program revisions are equivalent to, consistent with, and no less stringent than the federal program, and therefore satisfy all of the requirements necessary to qualify for final authorization. Therefore, EPA is proposing to authorize Mississippi for the following program changes:

Description of Federal requirement	**Federal Register** date and page	Analogous State authority [3]
Checklist 206.1, Nonwastewaters from Dyes and Pigments (Correction)	70 FR 35032, 6/16/05	R. 1.2.
Checklist 207.1, Uniform Hazardous Waste Manifest Rule (Correction)	70 FR 35034, 6/16/05	R. 1.3, 1.7, and 1.11.
Checklist 208, Methods Innovation Rule and SW–846 Final Update IIIB	70 FR 34538, 6/14/05, 70 FR 44150, 8/1/05.	R. 1.1, 1.2, 1.7, 1.11, 1.13, 1.15, 1.16, and 1.22.
Checklist 209, Universal Waste Rule: Specific Provisions for Mercury Containing Equipment.	70 FR 45508, 8/5/05	R. 1.1, 1.2, 1.7, 1.11, 1.15, 1.16, and 1.21.
Checklist 210, Standardized Permit for RCRA Hazardous Waste Management Facilities.	70 FR 53420, 9/8/05	R. 1.1, 1.2, 1.14, 1.16, and 1.23.
Checklist 211, Revision of Wastewater Treatment Exemptions for Hazardous Waste Mixtures (''Headworks exemptions'').	70 FR 57769, 10/4/05	R. 1.2.
Checklist 212, NESHAP: Final Standards for Hazardous Waste Combustors (Phase I Final Replacement Standards and Phase II).	70 FR 59402, 10/12/05	R. 1.1, 1.7, 1.11, 1.13, and 1.16.
Checklist 213,[4] Burden Reduction Initiative	71 FR 16862, 4/4/06	R. 1.1, 1.2, 1.7, 1.11, 1.13, 1.15, and 1.16.
Checklist 214, Corrections to Errors in the Code of Federal Regulations	71 FR 40254, 7/14/06	R. 1.1, 1.2, 1.3, 1.7, 1.11, 1.13, 1.14, 1.15, 1.16, 1.21, and 1.22.
Checklist 215, Cathode Ray Tubes (CRT) Rule	71 FR 42928, 7/28/06	R. 1.1 and 1.2.
Checklist 217, NESHAP: Final Standards for Hazardous Waste Combustors (Phase I Final Replacement Standards and Phase II) Amendments.	73 FR 18970, 4/8/08	R. 1.7 and 1.13.
Checklist 218, F019 Exemption for Wastewater Treatment Sludges from Auto Manufacturing Zinc Phosphating Processes.	73 FR 31756, 6/4/08	R. 1.2.
Checklist 220, Academic Laboratories Generator Standards	73 FR 72912, 12/1/08	R. 1.2 and 1.3.

[2] A ''checklist'' is developed by EPA for each federal rule amending the RCRA regulations. The checklists document the changes made by each federal rule and are presented and numbered in chronological order by date of promulgation.

Description of Federal requirement	**Federal Register** date and page	Analogous State authority [3]
Checklist 222, OECD Requirements; Export Shipment of Spent Lead-Acid Batteries	75 FR 1236, 1/8/10	R. 1.3, 1.5, 1.7, 1.11, and 1.13.
Checklist 223, Hazardous Waste Technical Corrections and Clarifications	75 FR 12989 3/18/10, 75 FR 31716 6/4/10.	R. 1.1, 1.2, 1.3, 1.5, 1.7, 1.11, 1.13, 1.15, and 1.16.
Checklist 225, Removal of Saccharin and its Salts from the Lists of Hazardous Constituents.	75 FR 78918, 12/17/10	R. 1.2 and 1.15.
Checklist 226, Academic Laboratories Generator Standards Technical Corrections	75 FR 79304, 12/20/10	R. 1.3.
Checklist 227, Revision of the Land Disposal Treatment Standards for Carbamate Wastes.	76 FR 34147, 6/13/11	R. 1.15.
Checklist 228, Hazardous Waste Technical Corrections and Clarifications	77 FR 22229, 4/13/12	R. 1.2 and 1.13.
Checklist 229, Conditional Exclusions for Solvent Contaminated Wipes	78 FR 46448, 7/31/13	R. 1.1 and 1.2.
Checklist 230, Conditional Exclusions for Carbon Dioxide (CO_2) Streams in Geologic Sequestration Activities.	79 FR 350, 1/3/14	R. 1.1 and 1.2.
Checklist 231, Hazardous Waste Electronic Manifest Rule	79 FR 7518, 2/7/14	R. 1.1, 1.3, 1.5, 1.7, and 1.11.
Checklist 232, Revisions to the Export Provisions of the Cathode Ray Tube (CRT) Rule.	79 FR 36220, 6/26/14	R. 1.1 and 1.2.
Non-Checklist Item Technical Correction	72 FR 35666, 6/29/07	R. 1.21.

[3] The Mississippi regulatory provisions are from the Mississippi Hazardous Waste Regulations, Title 11, Part 3, Chapter 1, effective November 17, 2017.

[4] The National Environmental Performance Track Program referenced in the Burden Reduction Initiative Rule has been discontinued.

G. Where are the revised State rules different from the federal rules?

When revised state rules differ from the federal rules in the RCRA state authorization process, EPA determines whether the state rules are equivalent to, more stringent than, or broader in scope than the federal program. Pursuant to Section 3009 of RCRA, 42 U.S.C. 6929, state programs may contain requirements that are more stringent than the federal regulations. Such more stringent requirements can be federally authorized and, once authorized, become federally enforceable. Although the statute does not prevent states from adopting regulations that are broader in scope than the federal program, such regulations cannot be authorized and are not federally enforceable. In its review of the Mississippi regulations submitted as part of the program revision applications that are the subject of this proposed rule, EPA did not find any State regulations to be more stringent or broader in scope than the federal program.

EPA cannot delegate certain federal requirements associated with the manifest registry system in the Uniform Hazardous Waste Manifest Rule (Checklist 207) or the operation of the electronic manifest system in the Hazardous Waste Electronic Manifest Rule (Checklist 231). Mississippi has adopted these requirements and appropriately preserved EPA's authority to implement them (see 11 Miss. Admin. Code Pt. 3, Ch. 1, Rules 1.1, 1.3, 1.5, 1.7, and 1.11).

EPA also cannot delegate the federal requirements associated with international shipments (*i.e.,* import and export provisions) associated with the Cathode Ray Tubes Rule (Checklists 215 and 232) and the OECD Requirements for Export Shipments of Spent Lead-Acid Batteries (Checklist 222). Mississippi has adopted these requirements and appropriately preserved EPA's authority to implement them (see 11 Miss. Admin. Code Pt. 3, Ch. 1, Rules 1.1, 1.2, and 1.3).

H. Who handles permits after the final authorization takes effect?

Mississippi will issue permits for all the provisions for which it is authorized and will administer the permits it issues. EPA will continue to administer any RCRA hazardous waste permits or portions of permits which EPA issued prior to the effective date of authorization until they expire or are terminated. EPA will not issue any new permits or new portions of permits for the provisions listed in the Table above after the effective date of the final authorization. EPA will continue to implement and issue permits for HSWA requirements for which Mississippi is not yet authorized.

I. How does today's proposed action affect Indian country (18 U.S.C. 1151) in Mississippi?

Mississippi is not authorized to carry out its hazardous waste program in Indian country within the State, which includes the Mississippi Band of Choctaw Indians. Therefore, this proposed action has no effect on Indian Country. EPA will continue to implement and administer the RCRA program on these lands.

J. What is codification and will EPA codify Mississippi's hazardous waste program as proposed in this rule?

Codification is the process of placing the state's statutes and regulations that comprise the state's authorized hazardous waste program into the Code of Federal Regulations. EPA does this by referencing the authorized state rules in 40 CFR part 272. EPA is not proposing to codify the authorization of Mississippi's changes at this time. However, EPA reserves the amendment of 40 CFR part 272, subpart Z, for the authorization of Mississippi's program changes at a later date.

K. Statutory and Executive Order Reviews

The Office of Management and Budget (OMB) has exempted this action from the requirements of Executive Order 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011). This action proposes to authorize State requirements for the purpose of RCRA section 3006 and imposes no additional requirements beyond those imposed by State law. Therefore, this action is not subject to review by OMB. This action is not an Executive Order 13771 (82 FR 9339, February 3, 2017) regulatory action because actions such as today's proposed authorization of Mississippi's revised hazardous waste program under RCRA are exempted under Executive Order 12866. Accordingly, I certify that this action will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). Because this action proposes to authorize pre-

existing requirements under State law and does not impose any additional enforceable duty beyond that required by State law, it does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538). For the same reason, this action also does not significantly or uniquely affect the communities of tribal governments, as specified by Executive Order 13175 (65 FR 67249, November 9, 2000). This action will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999), because it merely proposes to authorize State requirements as part of the State RCRA hazardous waste program without altering the relationship or the distribution of power and responsibilities established by RCRA. This action also is not subject to Executive Order 13045 (62 FR 19885, April 23, 1997), because it is not economically significant and it does not make decisions based on environmental health or safety risks. This action is not subject to Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001), because it is not a significant regulatory action under Executive Order 12866.

Under RCRA section 3006(b), EPA grants a state's application for authorization as long as the state meets the criteria required by RCRA. It would thus be inconsistent with applicable law for EPA, when it reviews a state authorization application, to require the use of any particular voluntary consensus standard in place of another standard that otherwise satisfies the requirements of RCRA. Thus, the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply. As required by section 3 of Executive Order 12988 (61 FR 4729, February 7, 1996), in proposing this rule, EPA has taken the necessary steps to eliminate drafting errors and ambiguity, minimize potential litigation, and provide a clear legal standard for affected conduct. EPA has complied with Executive Order 12630 (53 FR 8859, March 15, 1988) by examining the takings implications of this action in accordance with the ''Attorney General's Supplemental Guidelines for the Evaluation of Risk and Avoidance of Unanticipated Takings'' issued under the executive order. This action does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). ''Burden'' is defined at 5 CFR 1320.3(b). Executive Order 12898 (59 FR 7629, February 16, 1994) establishes federal executive policy on environmental justice. Its main provision directs federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States. Because this action proposes authorization of pre-existing State rules which are at least equivalent to, and no less stringent than existing federal requirements, and imposes no additional requirements beyond those imposed by State law, and there are no anticipated significant adverse human health or environmental effects, this proposed rule is not subject to Executive Order 12898.

List of Subjects in 40 CFR Part 271

Environmental protection, Administrative practice and procedure, Confidential business information, Hazardous waste, Hazardous waste transportation, Indian lands, Intergovernmental relations, Penalties, Reporting and recordkeeping requirements.

Authority: This action is issued under the authority of sections 2002(a), 3006, and 7004(b) of the Solid Waste Disposal Act as amended, 42 U.S.C. 6912(a), 6926, and 6974(b).

Dated: September 27, 2018.

Onis ''Trey'' Glenn, III,

Regional Administrator, Region 4.

[FR Doc. 2018–23580 Filed 10–26–18; 8:45 am]

BILLING CODE 6560–50–P

Notices

Federal Register

Vol. 83, No. 209

Monday, October 29, 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

Submission for OMB Review; Comment Request

October 24, 2018.

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

Comments regarding this information collection received by November 28, 2018 will be considered. Written comments should be addressed to: Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), New Executive Office Building, 725 17th Street NW, Washington, DC 20503. Commentors are encouraged to submit their comments to OMB via email to: *OIRA_Submission@omb.eop.gov* or fax (202) 395–5806 and to Departmental Clearance Office, USDA, OCIO, Mail Stop 7602, Washington, DC 20250–7602. Copies of the submission(s) may be obtained by calling (202) 720–8681.

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

Forest Service

Title: Generic Clearance Social Science and Economics Data Collections on Natural Disasters and Disturbances.

OMB Control Number: 0596–NEW.

Summary of Collection: Wildfires, droughts, floods, diseases, invasive species, effects of climate change, and other natural disasters and disturbances periodically affect ecosystems, causing immediate and long-term changes. The frequency, type, duration, and intensity of disturbances shape our forests, grasslands, and other natural ecosystems and impact people's lives. Social science and economics research methods, including surveys, interviews, and focus groups, administered under this generic information collection approval will be designed to collect information from individuals/households, States, Local and Tribal Agencies and groups who are preparing for, responding to, and/or recovering from natural disasters and disturbances, including but not limited to fires, droughts, floods, hurricanes, climate change, high intensity weather systems, and invasive species infestations.

The data collection efforts initiated under this generic information approval will be broadly similar in that they will all be focused on all individuals, communities, and/or stakeholders preparing for, responding to, recovering from, and/or building resilience to natural disasters or disturbances. The justification for each individual study, in particular the rationale for populations being queried, the questions being asked, and the research methods used, will be thoroughly described in each individual information collection submission that falls under this generic clearance.

This generic information collection contains a comprehensive but not exhaustive range of questions that the individual research teams may deploy to successfully answer research questions, and the methods, sampling approaches, and data collection questions will be carefully determined based on individual, group, and site factors, and will be detailed in the individual information collections. Specific studies may propose additional questions as needed to provide a rigorous, reliable, and valid investigation of the identified knowledge gap.

Need and Use of the Information: The purpose of this collection is to collect information to enable the USDA Forest Service to understand how individuals, communities, and organizations prepare for, respond and adapt to, recover from, and build resilience to natural disturbances and disasters. Given the wide range of people affected by natural disasters and disturbances, as well as the significant impacts these disturbances have on agriculture, forestry, and rural communities providing key food and fiber sources, and the business and employment implications related to such topics, the collection of this information is of great importance to achieving our Forest Service Strategic Goal to deliver benefits to the public as well as the USDA Goal to focus on customer service.

Description of Respondents: Individuals or households; Business or other for-profit; Not-for-profit institutions; State, Local or Tribal Government.

Number of Respondents: 78,150.

Frequency of Responses: On occasion.

Total Burden Hours: 9,754.

Forest Service

Title: Generic Information Collection for Social Science and Economics Data Collections on Goods, Services, and Jobs Provided by Forests and Natural Areas.

OMB Control Number: 0596–NEW.

Summary of Collection: Across the country, forests, grasslands and other natural areas provide jobs through a range of ways, including logging, sawmills, and extraction of non-timber forest products; guiding services, hotels, restaurants, and equipment sales that support recreation; and natural area restoration and management activities, among many others. Innovative forest products such as wood-based nanotechnologies and laminated timbers are critical to the modern economies of rural and urban communities. Forests and natural areas provide important ecosystem services such as clean water and air, carbon sequestration, natural flood control, cultural services, and recreation opportunities, and influence other critical economic factors like home and land values. Furthermore,

there is a significant body of research that demonstrates contact with nature can have positive impacts on human health and well-being. In addition to the products and services derived from forests, grasslands, and other natural areas, people may also value and appreciate the natural environment itself when they experience it directly. These experiences can have meaningful impacts on quality of life, sense of self, and sense of community, and play an important role in how people respond to management proposals and actions.

The information collected under this generic approval links to the delivery of high quality customer service. Because the goods, services, and experiences of forests, grasslands, and natural areas benefit every American in some way, directly or indirectly, it is imperative that the views and perspectives of as wide a range of the population as possible are included in decision making. Research under this generic information collection will assist forest and natural resources managers and other public policy makers in understanding tradeoffs and synergies, building consensus, and assuring that diverse market and non-market information is incorporated in decision-making.

The data collection efforts initiated under this generic information approval will be broadly similar in that they will all be focused on all individuals, communities, and/or stakeholders who seek or are benefited by a wide variety of services from forests and other natural areas. The justification for each individual study, in particular the rationale for populations being queried, the questions being asked, and the research methods used will be thoroughly described in each individual information collection submission that falls under this generic clearance.

This generic information collection contains a comprehensive but not exhaustive range of questions that the individual research teams may deploy to successfully answer research questions, and the methods, sampling approaches, and data collection questions will be carefully determined based on individual, group, and site factors, and will be detailed in the individual information collections. Specific studies may propose additional questions as needed to provide a rigorous, reliable, and valid investigation of the identified knowledge gap.

Need and Use of the Information: The purpose of this collection is to collect information that will help the Forest Service sustainably manage and provide guidance to others about managing the wide range of goods, services, values, and jobs derived from forests, grasslands, and other natural areas. Understanding these provisioning services is critical to managing the Nation's forests and grasslands, and other natural areas to meet the needs of American citizens and to achieving the mission of the USDA Forest Service: ''to sustain the health, diversity, and productivity of the Nation's forests and grasslands to meet the needs of present and future generation.''

Central to effective policy development and management is better understanding the risks, trade-offs, synergies, and values implied by alternate decisions. Although market prices reflect social preferences and acceptable trade-offs to some degree, they clearly do not encompass all values associated with forests and other natural areas. Better and/or new means are needed to translate society's preferences into meaningful goals, objectives, and guidelines for managers to consider and incorporate into management, planning, and programming. Utilizing such data, which often cannot be quantifiable through market indicators alone, will position the Agency for greater efficiency and output measures. This effort requires a sound scientific basis and the engagement of Forest Service social science and economics researchers and varied experts.

Description of Respondents: Individuals or households; Business or other for-profit; Not-for-profit institutions; State, Local or Tribal Government.

Number of Respondents: 78,150.

Frequency of Responses: On occasion.

Total Burden Hours: 9,754.

Forest Service

Title: Generic Information Collection for Social Science and Economics Data Collections on Natural Resources Planning and Collaborative Conservation.

OMB Control Number: 0596–NEW.

Summary of Collection: The USDA Forest Service's motto is ''caring for the land and serving people'' and the mission is ''to sustain the health, diversity, and productivity of the Nation's forests and grasslands to meet the needs of present and future generation.'' This includes directly managing National Forests and providing science-based guidelines for the management of forests and other natural resources in cities and towns, as well as those under management by land trusts, neighborhood groups, states, and other entities. In order to fulfill this mission, the Agency needs an accurate understanding of the range of views and preferences held by stakeholders regarding management and conservation of forests and other natural resources. This requires a sound scientific basis and the engagement of Forest Service social science and economics researchers and experts.

The data collection efforts initiated under this generic information approval will be broadly similar in that they will all be focused on individuals and groups who are stakeholders in the conservation, management, planning, and restoration of forests and other natural resources. The justification for each individual study, in particular the rationale for populations being queried, the questions being asked, and the research methods used will be thoroughly described in each individual information collection submission that falls under this generic clearance.

This generic information collection contains a comprehensive but not exhaustive range of questions that the individual research teams may deploy to successfully answer research questions, and the methods, sampling approaches, and data collection questions will be carefully determined based on individual, group, and site factors, and will be detailed in the individual information collections. Specific studies may propose additional questions as needed to provide a rigorous, reliable, and valid investigation of the identified knowledge gap.

Need and Use of the Information: The purpose of this collection is to collect information from a wide range of stakeholders to guide the agency in conserving and managing forests and associated natural resources. The Forest Service and other public and private land managers need to collect information from a wide range of stakeholders in order to make informed decisions about natural resource conservation, restoration and management, land management amendments and planning revisions. Such stakeholders would include individuals/households, States, local and Tribal Agencies and groups who may participate and/or contribute to the National Forest Land Management Planning process. To ensure that the Forest Service can meet its statutory and regulatory responsibilities and is able to inform management of forests and other natural areas, the Forest Service seeks to collect information from people who use, live near, manage, make policies for, or otherwise have a stake in the management of forests and other natural resources.

The USDA Forest Service Research & Development Social Science Program,

and others as appropriate, will conduct the necessary quality controls to ensure that each information collection and its data collection instrument conforms to the guidelines of this generic approval, and will submit each information collection request to OMB for expedited review. Each collection will clearly fit within the overall plan and scope of this generic approval and will be well defined in terms of its research methods and sample or respondent pool. Standardization of methods and content across the country, as appropriate, will help provide reliable and consistent information to land managers, policy makers, and other decision makers over time.

Description of Respondents: Individuals or households; Business or other for-profit; Not-for-profit institutions; State, Local or Tribal Government.

Number of Respondents: 104,200.

Frequency of Responses: On occasion.

Total Burden Hours: 13,226.

Ruth Brown,

Departmental Information Collection Clearance Officer.

[FR Doc. 2018–23525 Filed 10–26–18; 8:45 am]

BILLING CODE 3411–15–P

DEPARTMENT OF AGRICULTURE

Submission for OMB Review; Comment Request

October 24, 2018.

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

Comments regarding this information collection received by November 28, 2018 will be considered. Written comments should be addressed to: Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), New Executive Office Building, 725 17th Street NW, Washington, DC 20502. Commenters are encouraged to submit their comments to OMB via email to: *OIRA_Submission@OMB.EOP.GOV* or fax (202) 395–5806 and to Departmental Clearance Office, USDA, OCIO, Mail Stop 7602, Washington, DC 20250–7602. Copies of the submission(s) may be obtained by calling (202) 720–8958.

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

Title: National Poultry Improvement Plan (NPIP).

OMB Control Number: 0579–0007.

Summary of Collection: Under the Animal Health Protection Act (7 U.S.C. 8301 *et seq.*), the Animal and Plant Health Inspection Service (APHIS) is authorized to among other things, administer the National Poultry Improvement Plan (NPIP or the Plan), the primary purpose of which is to protect the health of the U.S. poultry population. NPIP is a voluntary Federal-State-industry cooperative program for the improvement of poultry flocks and products through disease control techniques. The NPIP regulations are contained in 9 CFR parts 56, 145, 146 and 147.

Need and Use of the Information: APHIS will collect information using several forms to continually improve the health of the U.S. poultry population and the quality of U.S. poultry products. If the information were collected less frequently or not collected, APHIS could not affectively monitor the health of the nation's poultry population.

Description of Respondents: Business or other for-profit; State, Local or Tribal Government.

Number of Respondents: 6,851.

Frequency of Responses: Recordkeeping; Reporting: On occasion.

Total Burden Hours: 117,254.

Animal and Plant Health Inspection Service.

Title: Animal Welfare.

OMB Control Number: 0579–0036.

Summary of Collection: Under the Animal Welfare Act (AWA, 7 U.S.C. 2131 *et seq.*), the Secretary of Agriculture is authorized to promulgate standards and other requirements governing the humane handling, care, treatment, and transportation of certain animals by dealers, exhibitors, operators of auction sales, research facilities, carriers and intermediate handlers. The Secretary has delegated responsibility for administering the AWA to the U.S. Department of Agriculture's Animal and Plant Health Inspection Service (APHIS), Animal Care.

Definitions, regulations, and standards established under the AWA are contained in 9 CFR parts 1, 2, and 3 (referred to below as the regulations). Part 1 contains definitions for terms used in parts 2 and 3. Part 2 provides administrative requirements and sets forth institutional responsibilities for regulated parties, including licensing requirements for dealers, exhibitors, and operators of auction sales. Dealers, exhibitors, and operators of auction sales are required to comply in all respects with the regulations and standards (9 CFR 2.100(a)) and to allow APHIS officials access to their place of business, facilities, animals, and records to inspect for compliance (9 CFR 2.126). Part 3 provides standards for the humane handling, care, treatment, and transportation of covered animals. Part 3 consists of subparts A through E, which contain specific standards for dogs and cats, guinea pigs and hamsters, rabbits, nonhuman primates, and marine mammals, respectively, and subpart F, which sets forth general standards for warmblooded animals not otherwise specified in part 3.

Need and Use of the Information: Administering the AWA requires the use of several information collection activities such as license applications and renewals, which now include a request to identify whether the business mailing address is a personal residence or not a personal residence; registration applications and updates; annual reports; acknowledgement of regulations and standards; inspections; requests; notifications; agreements; plans; written program of veterinary care and health records; itineraries; applications and permits; records of acquisition, disposition, or transport of animals; official identification; variances; protocols; health certificates; complaints; marking requirements; and recordkeeping. The information is used to provide APHIS with the data necessary to review and evaluate program compliance by regulated facilities, and provide a workable system to administer the requirements of the AWA and intent of Congress without resorting to more detailed and stringent regulations and standards that could be more burdensome to regulated facilities.

Description of Respondents: Individuals or Households; Businesses or Other For-Profit Entities; Not-For-Profit Institutions; State, Local, and Tribal Governments; Foreign Federal Governments.

Number of Respondents: 13,183.

Frequency of Responses: Recordkeeping; Reporting: On occasion; Third Party Disclosure.

Total Burden Hours: 366,021.

Ruth Brown,

Departmental Information Collection Clearance Officer.

[FR Doc. 2018–23565 Filed 10–26–18; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF AGRICULTURE

Submission for OMB Review; Comment Request

October 24, 2018.

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

Comments regarding this information collection received by November 28, 2018 will be considered. Written comments should be addressed to: Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), New Executive Office Building, 725 17th Street NW, Washington, DC 20502. Commenters are encouraged to submit their comments to OMB via email to: *OIRA_Submission@OMB.EOP.GOV* or fax (202) 395–5806 and to Departmental Clearance Office, USDA, OCIO, Mail Stop 7602, Washington, DC 20250–7602. Copies of the submission(s) may be obtained by calling (202) 720–8958.

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National Institute of Food and Agriculture

Title: NIFA Grant Application.

OMB Control Number: 0524–0039.

Summary of Collection: The United States Department of Agriculture (USDA), National Institute of Food and Agriculture (NIFA) sponsors ongoing agricultural research, education, and extension programs under which competitive, formula, and special awards of a high-priority nature are made. These programs are authorized pursuant to the authorities contained in the National Agricultural Research, Extension, and Teaching Policy Act of 1977, as amended (7 U.S.C. 3101), the Smith-Lever Act, and other legislative authorities. Before awards can be issued, certain information is required from applicants as part of an overall application. In addition to a project summary, proposal narrative, vitae of key personnel, and other pertinent technical aspects of the proposed project, supporting documentation of an administrative and budgetary nature also must be provided. This information is obtained via applications through the use of federal-wide standard grant application forms and NIFA specific application forms. Because competitive applications are submitted, many of which necessitate review by peer panelists, it is particularly important that applicants provide the information in a standardized fashion to ensure equitable treatment for all.

Need and Use of the Information: The fundamental purpose of the information requested is to provide information that is not obtained in the federal-wide application forms but is necessary for the NIFA proposal and award process. In addition to federal-wide standard grant application forms, NIFA will use the following program and agency specific components as part of its application package: Letter of Intent Form, Supplemental Information Form; Application Type Form; Form NIFA–2008, Assurance Statement(s); and Form NIFA–2010, Fellowships/Scholarships Entry/Annual Update/Exit Form.

Description of Respondents: Individuals or household; Federal Government; State, Local or Tribal Government.

Number of Respondents: 15,153.

Frequency of Responses: Recordkeeping; Reporting: Weekly; Monthly; Annually.

Total Burden Hours: 18,354.

National Institute of Food and Agriculture

Title: NIFA Proposal Review Process.

OMB Control Number: 0524–0041.

Summary of Collection: The United States Department of Agriculture (USDA), National Institute of Food and Agriculture (NIFA), administers competitive, peer-reviewed research, education and extension programs. The reviews are undertaken to ensure that projects supported by NIFA are of a high-quality and are consistent with the goals and requirements of the funding program. These programs are authorized pursuant to the authorities contained in the National Agricultural Research, Extension, and Teaching Policy Act of 1977, as amended (7 U.S.C. 3101), the Smith-Lever Act, and other legislative authorities.

Need and Use of the Information: The collected information from the evaluations is used to support NIFA grant programs. NIFA uses the results of each proposal to determine whether a proposal should be declined or recommended for award. In order to obtain this information, an electronic questionnaire is used to collect information about potential panel and ad-hoc reviewers. If this information is not collected, it would be difficult for a review panel and NIFA staff to determine which projects warrant funding, or identify appropriate qualified reviewers. In addition, Federal grants staff and auditors could not assess the quality or integrity of the review, and the writer of the application would not benefit from any feedback on why the application was funded or not.

Description of Respondents: Individuals or households; Federal Government; State, Local or Tribal Government.

Number of Respondents: 50,000.

Frequency of Responses: Reporting: Weekly; Annually.

Total Burden Hours: 102,400.

Ruth Brown,

Departmental Information Collection Clearance Officer.

[FR Doc. 2018–23552 Filed 10–26–18; 8:45 am]

BILLING CODE 3410–09–P

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

[Docket No. APHIS–2018–0076]

Notice of Request for Revision to and Extension of Approval of an Information Collection: Importation of Citrus From Peru; Expansion of Citrus-Growing Area

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Revision to and extension of approval of an information collection; comment request.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice announces the Animal and Plant Health Inspection Service's intention to request a revision to and extension of approval of an information collection associated with the regulations for the importation of citrus from Peru into the continental United States.

DATES: We will consider all comments that we receive on or before December 28, 2018.

ADDRESSES: You may submit comments by either of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov/#!docket Detail;D=APHIS-2018*-0076.
- *Postal Mail/Commercial Delivery:* Send your comment to Docket No. APHIS–2018–0076, Regulatory Analysis and Development, PPD, APHIS, Station 3A–03.8, 4700 River Road Unit 118, Riverdale, MD 20737–1238.

Supporting documents and any comments we receive on this docket may be viewed at *http://www.regulations.gov/#!docketDetail; D=APHIS-2018-0076* or 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.

FOR FURTHER INFORMATION CONTACT: For information on the importation of citrus from Peru and expansion of citrus-growing area, contact Ms. Claudia Ferguson, Senior Regulatory Policy Specialist, PPQ, APHIS, 4700 River Road Unit 39, Riverdale, MD 20737; (301) 851–2242. For more detailed information on the information collection, contact Ms. Kimberly Hardy, APHIS' Information Collection Coordinator, at (301) 851–2483.

SUPPLEMENTARY INFORMATION:

Title: Importation of Citrus From Peru; Expansion of Citrus-Growing Area.

OMB Control Number: 0579–0433.

Type of Request: Revision to and extension of approval of an information collection.

Abstract: The United States Department of Agriculture, Animal and Plant Health Inspection Service (APHIS) is responsible for preventing plant pests and noxious weeds from entering the United States, preventing the spread of plant diseases not widely distributed in the United States, and eradicating those imported pests and noxious weeds when eradication is feasible. Under the Plant Protection Act (7 U.S.C. 7701 *et seq.*), the Secretary of Agriculture is authorized to carry out operations or measures to detect, eradicate, suppress, control, prevent, or retard the spread of plant pests new to the United States or not known to be widely distributed throughout the United States.

The regulations in ''Subpart—Fruits and Vegetables'' (7 CFR 319.56–1 through 319.56–12, referred to below as the regulations), prohibit or restrict the importation of fruits and vegetables into the United States from certain parts of the world, to prevent the introduction and dissemination of plant pests and plant diseases.

APHIS currently allows the importation of citrus fruit to the continental United States from Peru utilizing a systems approach that mitigates the plant pest risk associated with citrus fruit produced in Peru. This systems approach allows the importation of citrus fruit from Peru while continuing to provide protection against the introduction of plant pests into the continental United States. Allowing the importation of citrus into the United States from Peru requires information collection activities, such as phytosanitary certificates, grower registrations and agreements, recordkeeping, fruit fly management programs with trapping and control of fruit fly inspections, import permit applications, port of first arrival sampling inspections, emergency action notifications, and notices of arrival.

We are asking the Office of Management and Budget (OMB) to approve our use of these information collection activities, as described, for an additional 3 years.

The purpose of this notice is to solicit comments from the public (as well as affected agencies) concerning our information collection. These comments will help us:

(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 our 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, through use, as appropriate, of automated, electronic, mechanical, and other collection technologies; *e.g.,* permitting electronic submission of responses.

Estimate of burden: The public burden for this collection of information is estimated to average 1.6 hours per response.

Respondents: National plant protection organization of Peru, producers, and exporters.

Estimated annual number of respondents: 66.

Estimated annual number of responses per respondent: 13.

Estimated annual number of responses: 853.

Estimated total annual burden on respondents: 1,360 hours. (Due to averaging, the total annual burden hours may not equal the product of the annual number of responses multiplied by the reporting burden per response.)

All responses to this notice will be summarized and included in the request for OMB approval. All comments will also become a matter of public record.

Done in Washington, DC, this 24th day of October 2018.

Kevin Shea,

Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 2018–23540 Filed 10–26–18; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF AGRICULTURE

Rural Utilities Service

Information Collection Activity; Comment Request

AGENCY: Rural Utilities Service, USDA.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, the United States Department of Agriculture's (USDA) Rural Utilities Service (RUS) invites comments on this information collection for which the Agency intends to request approval from the Office of Management and Budget (OMB).

DATES: Comments on this notice must be received by December 28, 2018.

FOR FURTHER INFORMATION CONTACT: Michele Brooks, Team Lead, Rural Development Innovation Center—Regulations Management, Rural Development, USDA, 1400 Independence Ave. SW, STOP 1522, Room 5168 South Building, Washington, DC 20250–1522. Telephone: (202) 690–1078. Email: *Michele.Brooks@usda.gov*.

SUPPLEMENTARY INFORMATION: The Office of Management and Budget's (OMB) regulation (5 CFR part 1320) implementing provisions of the Paperwork Reduction Act of 1995 (Pub. L. 104–13) requires that interested members of the public and affected agencies have an opportunity to comment on information collection and recordkeeping activities (see 5 CFR 1320.8(d)). This notice identifies an information collection that RUS is submitting to OMB as a revision to an existing collection. Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Agency, including whether the information will have practical utility; (b) 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) ways to enhance the quality, utility and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Comments may be sent to: MaryPat Daskal, Management Analyst, Rural Development Innovation Center-Regulations Management, Rural Development, U.S. Department of Agriculture, STOP 1522, Room 5168, 1400 Independence Avenue SW, Washington, DC 20250–1522. *MaryPat.Daskal@USDA.gov*.

Title: 7 CFR part 1786, Prepayment of Rural Utilities Service Guaranteed and Insured Loans to Electric and Telephone Borrowers.

OMB Control Number: 0572–0088.

Type of Request: Extension of a currently approved collection.

Abstract: The Rural Utilities Service relies on the information provided by the borrowers in their financial statements to make lending decisions as to borrowers' credit worthiness and to assure that loan funds are approved, advanced and disbursed for proper RE Act purposes. This information collection contains submissions for 7 CFR part 1786, subpart E, ''Discounted Prepayments on RUS Notes in the Event of a Merger of Certain RUS Electric Borrowers'', subpart F, ''Discounted Prepayments on RUS Electric Loans'', and subpart G, ''Refinancing and Prepayment of RUS Guaranteed FFB Loans pursuant to Section 306(c) of the RE Act''. Subparts E and F allow agency borrowers to prepay RUS loans and subpart G allows refinancing. These financial statements are audited by a certified public accountant to provide independent assurance that the data being reported are properly measured and fairly presented.

Estimate of Burden: Public reporting burden for this collection of information is estimated to average 2.00 hours per response.

Respondents: Business or other forprofit, Not-for-profit institutions.

Estimated Number of Respondents: 38.

Estimated Number of Responses per Respondent: 1.00.

Estimated Total Annual Burden on Respondents: 76 hours.

Copies of this information collection can be obtained from MaryPat Daskal, Rural Development Innovation Center-Regulations Management, at (202) 720–7853. Email: *MaryPat.Daskal@usda.gov*.

All responses to this notice will be summarized and included in the request for OMB approval. All comments will also become a matter of public record.

Dated: October 18, 2018.

Christopher A. McLean,

Acting Administrator, Rural Utilities Service.

[FR Doc. 2018–23499 Filed 10–26–18; 8:45 am]

BILLING CODE P

COMMISSION ON CIVIL RIGHTS

Notice of Public Meeting of the Illinois Advisory Committee to the U.S. Commission on Civil Rights

AGENCY: U.S. Commission on Civil Rights.

ACTION: Announcement of meeting.

SUMMARY: Notice is hereby given, pursuant to the provisions of the rules and regulations of the U.S. Commission on Civil Rights (Commission) and the Federal Advisory Committee Act that the Illinois Advisory Committee (Committee) will hold a meeting on Wednesday, November 14, 2018, at 12 p.m. CDT for the purpose of discussing the implementation of the Committee's project on fair housing.

DATES: The meeting will be held on Wednesday, November 14, 2018, at 12 p.m. CDT.

Public Call Information: Dial: 877–260–1479, Conference ID: 3699292.

FOR FURTHER INFORMATION CONTACT: Alejandro Ventura, DFO, at *aventura@usccr.gov* or 213–894–3437.

SUPPLEMENTARY INFORMATION: Members of the public may listen to the discussion. This meeting is available to the public through the call in information listed above. Any interested member of the public may call this number and listen to the meeting. An open comment period will be provided to allow members of the public to make a statement to the Committee as time allows. The conference call operator will ask callers to identify themselves, the organization they are affiliated with (if any), and an email address prior to placing callers into the conference room. Callers can expect to incur regular charges for calls they initiate over wireless lines, according to their wireless plan. 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. Persons with hearing impairments may also follow the proceedings by first calling the Federal Relay Service at 1–800–877–8339 and providing the Service with the conference call number and conference ID number.

Members of the public are also entitled to submit written comments; the comments must be received in the regional office within 30 days following the meeting. Written comments may be mailed to the Midwestern Regional Office, U.S. Commission on Civil Rights, 230 South Dearborn St., Suite 2120, Chicago, IL 60604. They may also be faxed to the Commission at (312) 353–8324, or emailed to Carolyn Allen at *callen@usccr.gov*. Persons who desire additional information may contact the Midwestern Regional Office at (312) 353–8311.

Records generated from this meeting may be inspected and reproduced at the Midwestern Regional Office, as they become available, both before and after the meeting. Records of the meeting will be available via *www.facadatabase.gov* under the Commission on Civil Rights, Illinois Advisory Committee link. Persons interested in the work of this Committee are directed to the Commission's website, *http://www.usccr.gov,* or may contact the Midwestern Regional Office at the above email or street address.

Agenda

I. Welcome and Roll Call
II. Approval of Minutes
III. Discussion on Implementing the Project on Fair Housing

—Options for Gathering Testimony, including Web Briefings
—Efforts to Ensure Statewide Focus or Approach
IV. Public Comment
V. Next Steps
VI. Adjournment

Dated: October 24, 2018.

David Mussatt,

Supervisory Chief, Regional Programs Unit.

[FR Doc. 2018–23543 Filed 10–26–18; 8:45 am]

BILLING CODE P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[B–64–2018]

Foreign-Trade Zone (FTZ) 119—Minneapolis-St. Paul, Minnesota; Notification of Proposed Production Activity AGCO Corporation Subzone 119M (Agricultural Equipment and Related Subassemblies and Components) Jackson and Round Lake, Minnesota

AGCO Corporation (AGCO), operator of Subzone 119M, submitted a notification of proposed production activity to the FTZ Board for its facilities in Jackson and Round Lake, Minnesota. The notification conforming to the requirements of the regulations of the FTZ Board (15 CFR 400.22) was received on October 11, 2018.

The AGCO facilities are located within Subzone 119M. The facilities are used for the production of agricultural equipment and related subassemblies and components. Pursuant to 15 CFR 400.14(b), FTZ activity would be limited to the specific foreign-status materials/components and specific finished products described in the submitted notification (as described below) and subsequently authorized by the FTZ Board.

Production under FTZ procedures could exempt AGCO from customs duty payments on the foreign-status materials/components used in export production (estimated 20 percent of production). On its domestic sales, for the foreign-status materials/components noted below, AGCO would be able to choose the duty rates during customs entry procedures that apply to: Gasoline engines; gas (natural and LP) engines; diesel engines; liquid pumps; tractor attachments for spraying liquids; tractor attachments for spreading solids; electrical equipment for controlling agricultural implements; grinding, screening, and sifting equipment; accumulators; steering control units; light switch panels; electronic control units and joy sticks; wiring harnesses; tractors for agricultural use; spraying vehicles for agricultural use; heating system field repair kits; status indicators for engine functions; instrument panels; engine control units; brake field service kits; and, related subassemblies (duty rates range from duty-free to 7.8%). AGCO would be able to avoid duty on foreign-status components which become scrap/waste. Customs duties also could possibly be deferred or reduced on foreign-status production equipment.

The materials/components sourced from abroad include: Oil and grease; joint sealant; glue; polyethylene hoses; polypropylene hoses; plastic hoses; non-textile reinforced rubber hoses; textile-reinforced rubber hoses; rubber hose connectors; plastic tape; paper safety, warning, and identification labels; plastic reflectors; polyurethane film; polyethylene bags; plastic insulators for use in vehicle assembly; plastic tool boxes; plastic plugs and caps; plastic trim pieces; plastic o-rings; plastic seals; plastic washers; plastic clamps; plastic bushings; rubber o-rings; rubber seals; rubber washers; non-reinforced rubber hoses; non-textile reinforced rubber hoses; textile-reinforced rubber hoses; rubber hydraulic hoses; metal-reinforced rubber conveyor belts; textile-reinforced conveyor rubber belts; non-textile reinforced rubber transmission belts; textile reinforced rubber transmission belts; rubber mats; rubber gaskets; pneumatic tires of rubber; rubber plugs, pads, grommets, bushings, and sleeves; wooden crates; cork/rubber composite gaskets; paper gaskets; printed manuals and operating guides; gaskets of textile materials; textile sound absorbers; asbestos gaskets; asbestos brake linings; non-asbestos brake linings; carbon fiber gaskets; mineral gaskets; molded and machined glass; rear-view mirrors; mirror assemblies; glass fiber sound and heat insulators; steel and stainless steel crossmembers; iron pipe fittings and adapters; iron and steel threaded elbows; iron and steel flanges; steel wire and cable; steel chain; steel screws; steel bolts; steel nuts; steel hose plugs and stems; steel washers; steel pins, spacers, spanners and clips; steel springs; keyrings; steel clamps, flanges, pins, hose fittings, and spacers; copper and brass pipe fittings; aluminum dust caps; aluminum gaskets; nut spanners; hammers; locks, lock parts, and lock assemblies for vehicles; key assemblies; metal hinges for vehicles; metal hinge support plates for vehicles; metal brackets; plastic supports; metal weldments; metal stairs and stair rails; metal mounting hardware; metal identification plates; gasoline engines; gas (natural and LP) engines; diesel engines; engine plugs; engine tubes; hydraulic cylinders; pneumatic cylinders; metal hydraulic cylinder fittings; metal pneumatic cylinder fittings; dosing modules; liquid pumps; metal hydraulic pump fittings; metal pneumatic pump fittings; air compressors; turbochargers; fans; metal turbocharger fittings; plastic turbocharger fittings; fan shrouds; metal fan fittings; plastic fan fittings; air conditioning system compressors; air conditioning system condensers; metal air conditioning system fittings; plastic air conditioning system fittings; vehicle heating systems; oil and fuel filters; hydraulic fluid filters; air filters; catalytic converters; compressor filters; metal filtration system fittings; plastic filtration system fittings; fertilizer application equipment; windshield washer systems; metal windshield washer fittings; plastic windshield washer fittings; metal handrails, stairs, steps, and uprights; wheels without tires; tractor implement electronic controls; grinding, screening, and sifting equipment; accumulators; electrical indicators for agricultural tractors and other off-road vehicles; transmission valves; valve assemblies; steering control units; backflow prevention valves and stoppers; safety valves; relief valves; valve bleeder; bearings; tapered roller bearings; spherical roller bearings; needle bearings; roller bearings; bearing cups; bearing races; power transmission shafts; housed bearings; bearing housings; transmission gears; torque converters; pulleys; clutches; universal joints; gear drives; metal gaskets; mechanical seals; oil and dust seals; electric motors; magnets and electromagnets; lead-acid batteries; spark plugs; distributors; starter motors; alternators; pressure switches; metal electrical system fittings; plastic electrical system fittings; vehicle lighting; horns and buzzers; wiper blades, arms, and assemblies; wiper arms; microphones; speakers; audio amplifiers; video cameras; GPS receivers; radio cassette players; LCD and other flat panel monitors; antennas; light switch panels; resistors; circuit boards; circuit breakers; vehicle fuses; vehicle fuse assemblies; relays; switches; coaxial electrical connectors; electrical terminals; linear electrical connectors; electronic control unit and joy sticks; light bulbs; diodes; electrical sensors; pressure sensors; proximity sensors; transducers; coaxial cables; wiring harnesses; electrical cables; electrical conduit; vehicle frames;

operator cabs; tractor body parts; steel frame members; safety belts of fabric; plastic vehicle body panels; metal vehicle body panels; metal vehicle body panel fittings; plastic vehicle body panel fittings; fabric-reinforced cab isolators; headliners incorporating fabric; brake system tubing; metal brake system fittings; transmissions; metal transmission fittings; front and rear axles; metal axle fittings; balancing weights for wheels; impeller wheels; wheel hubs; shock absorbers; metal shock absorber fittings; engine cooling systems; engine radiators; metal engine cooling system fittings; plastic engine cooling system fittings; exhaust systems; mufflers; exhaust pipes; metal exhaust system fittings; clutch pedals; metal clutch pedal fittings; plastic clutch pedal fittings; steering columns; metal steering system fittings; plastic steering system fittings; transmission subassemblies; brake shoes; axle covers; metal brackets; plastic brackets; frame and body stays; metal flanges; plastic flanges; metal supports; plastic supports; metal knobs; plastic knobs; metal levers; plastic levers; wiper blades; control wire and cable; universal joints; metal guards; plastic guards; cover plates; drive shafts; clutch rod shafts; u-joints; shaft assemblies; collars; differential cases; transmission cases; ball joints; axle cases; drive shaft caps; shaft couplings; steering shafts; shaft yokes; thrust collars; synchronizer rings; dust covers; tie rods; battery retainers; fuel tanks; control pedals; hand rails; radiator grilles; bonnet dampers; steering and suspension linkages; sound suppressors incorporating fabric; wind screens of fabric; sun visors of fabric; unmounted glass lenses for vehicle signals and controls; glass lenses for vehicle signals and controls; wind speed/direction measuring equipment; barometric pressure measuring equipment; temperature sensors; fluid level sensors; status indicators for equipment functions; engine analyzers; instrument panels; speed sensors; engine performance sensors; engine control units; weatherproof molded rubber seats; seats with fabric surfaces; indicator light covers; and, cigarette lighters (duty rates range from duty-free to 10.7%).

The request indicates that textile-reinforced rubber hoses, textile-reinforced rubber conveyor belts, textile-reinforced rubber transmission belts, gaskets of textile materials, textile sound absorbers, safety belts of fabric, fabric-reinforced cab isolators, headliners incorporating fabric, windscreens of fabric, sound suppressors incorporating fabric, sun visors of fabric, and seats with fabric surfaces will be admitted to the zone in privileged foreign status (19 CFR 146.41), thereby precluding inverted tariff benefits on such items. The request indicates that pneumatic tires of rubber, iron pipe fittings and adapters, steel washers, tapered roller bearings, bearing cups, bearing races, and bearing housings are subject to antidumping/countervailing duty (AD/CVD) investigations/orders if imported from certain countries. The FTZ Board's regulations (15 CFR 400.14(e)) require that merchandise subject to AD/CVD orders, or items which would be otherwise subject to suspension of liquidation under AD/CVD procedures if they entered U.S. customs territory, be admitted to the zone in privileged foreign status (19 CFR 146.41). The request also indicates that steel and stainless steel crossmembers are subject to special duties under Section 232 of the Trade Expansion Act of 1962 (Section 232), and that certain materials/components are subject to special duties under Section 301 of the Trade Act of 1974 (Section 301), depending on the country of origin. The applicable Section 232 and Section 301 decisions require subject merchandise to be admitted to FTZs in privileged foreign status (19 CFR 146.41).

Public comment is invited from interested parties. Submissions shall be addressed to the Board's Executive Secretary at the address below. The closing period for their receipt is December 10, 2018.

A copy of the notification will be available for public inspection at the Office of the Executive Secretary, Foreign-Trade Zones Board, Room 21013, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230–0002, and in the ''Reading Room'' section of the Board's website, which is accessible via *www.trade.gov/ftz.*

For further information, contact Diane Finver at *Diane.Finver@trade.gov* or (202) 482–1367.

Dated: October 23, 2018.

Andrew McGilvray,

Executive Secretary.

[FR Doc. 2018–23555 Filed 10–26–18; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[Application No. 01–1A001]

Export Trade Certificate of Review

ACTION: Notice of issuance of an Export Trade Certificate of Review to Ginseng & Herb Cooperative (''GHC''), Application No. 01–1A001.

SUMMARY: The Secretary of Commerce, through the Office of Trade and Economic Analysis (''OTEA''), issued an amended Export Trade Certificate of Review to GHC on October 16, 2018.

FOR FURTHER INFORMATION CONTACT: Joseph Flynn, Director, OTEA, International Trade Administration, by telephone at (202) 482–5131 (this is not a toll-free number) or email at *etca@trade.gov.*

SUPPLEMENTARY INFORMATION: Title III of the Export Trading Company Act of 1982 (15 U.S.C. Sections 4001–21) (''the Act'') authorizes the Secretary of Commerce to issue Export Trade Certificates of Review. An Export Trade Certificate of Review protects the holder and the members identified in the Certificate from State and Federal government antitrust actions and from private treble damage antitrust actions for the export conduct specified in the Certificate and carried out in compliance with its terms and conditions. The regulations implementing Title III are found at 15 CFR part 325 (2018). OTEA is issuing this notice pursuant to 15 CFR 325.6(b), which requires the Secretary of Commerce to publish a summary of the certification in the **Federal Register**. Under Section 305(a) of the Act and 15 CFR 325.11(a), any person aggrieved by the Secretary's determination may, within 30 days of the date of this notice, bring an action in any appropriate district court of the United States to set aside the determination on the ground that the determination is erroneous.

Description of Certified Conduct

GHC's Export Trade Certificate of Review has been amended to:

1. Remove Ginseng Board of Wisconsin (''GBW'') as the Export Trade Certificate of Review holder and issue the Export Trade Certificate of Review to GHC,
2. Remove all references to GBW and to the GBW Seal,
3. Remove all references to Members,
4. Remove all references to Mechthild Handke,
5. Remove all references to Ginseng Research Institute of America, Inc. (''GRIA''),

6. Remove reference to the supplier lottery,

7. Change the Products covered from ''cultivated ginseng and cultivated ginseng products; cultivated golden seal and cultivated golden seal products; cultivated echinacea and cultivated echinacea products'' to ''cultivated ginseng and cultivated ginseng products, *i.e.,* wholesale ginseng roots, ginseng capsules 500 mg, ginseng slices, ginseng tea, ginseng powder and fiber, and ginseng retail root'', and

8. Strike the following: ''Meetings at which GBW and the Members establish export prices shall not be open to the public.''

The effective date of the amended certificate is July 18, 2018, the date on which GHC's application to amend was deemed submitted.

Dated: October 24, 2018.

Joseph Flynn,

Director, Office of Trade and Economic Analysis, International Trade Administration, U.S. Department of Commerce.

[FR Doc. 2018–23578 Filed 10–26–18; 8:45 am]

BILLING CODE 3510–DR–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XG586

Mid-Atlantic Fishery Management Council (MAFMC); Public Meeting

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

ACTION: Notice; public meeting.

SUMMARY: The Mid-Atlantic Fishery Management Council's Summer Flounder, Scup, and Black Sea Bass Monitoring Committee will hold a public meeting.

DATES: The meeting will be held on Tuesday, November 13, 2018, from 10 a.m. to 3 p.m. For agenda details, see **SUPPLEMENTARY INFORMATION.**

ADDRESSES: The meeting will be held via webinar, which can be accessed at: *http://mafmc.adobeconnect.com/sfsbsb_mc_nov2018/.* Meeting audio can also be accessed via telephone by dialing 1–800–832–0736 and entering room number 5068871.

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

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

SUPPLEMENTARY INFORMATION: The Summer Flounder, Scup, and Black Sea Bass Monitoring Committee will meet to consider 2019 recreational management measures for summer flounder, scup, and black sea bass. In light of the ongoing benchmark stock assessment for summer flounder, with peer review scheduled for late November 2018, the Monitoring Committee will consider how to approach development of 2019 summer flounder recreational measures after the assessment results are available. In addition, the Monitoring Committee will receive an update on a recreational Management Strategy Evaluation (MSE) for summer flounder. For scup and black sea bass, the Monitoring Committee will recommend federal waters measures for consideration by the MAFMC and Atlantic States Marine Fisheries Commission's Summer Flounder, Scup, and Black Sea Bass Board in December 2018.

The Monitoring Committee will also review analysis of proposed changes in the commercial scup incidental possession limits and may develop plans for reviewing the commercial scup incidental possession limits in future years.

Meeting materials will be posted to *http://www.mafmc.org/council-events/2018/sfsbsb-mc-meeting.*

Special Accommodations

The meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to M. Jan Saunders at the Mid-Atlantic Council Office (302) 526–5251 at least 5 days prior to the meeting date.

Dated: October 24, 2018.

Tracey L. Thompson,

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

[FR Doc. 2018–23557 Filed 10–26–18; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Proposed Information Collection; Comment Request; Economic Value of the Reduction in the Risk of Whale Strikes in the Channel Islands National Marine Sanctuary

AGENCY: National Oceanic and Atmospheric Administration (NOAA).

ACTION: Notice.

SUMMARY: The Department of Commerce, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995.

DATES: Written comments must be submitted on or before December 28, 2018.

ADDRESSES: Direct all written comments to Jennifer Jessup, Departmental Paperwork Clearance Officer, Department of Commerce, Room 6616, 14th and Constitution Avenue NW, Washington, DC 20230 (or via the internet at *pracomments@doc.gov*).

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument and instructions should be directed to Dr. Vernon R. (Bob) Leeworthy, (301) 713–7261 or *Bob.Leeworthy@noaa.gov.*

SUPPLEMENTARY INFORMATION:

I. Abstract

This request is for extension of a currently approved information collection.

NOAA is sponsoring a class project at the Bren School of Management & Science at the University of California, Santa Barbara to estimate the market and non-market economic values associated with the reduction in risk of whale strikes by different scenarios of changes in traffic lanes and/or vessel speeds for major commercial vessels operating in the region of southern California where the Channel Islands National Marine Sanctuary is located.

The required information is to conduct surveys of the for hire operations that take people out for non-consumptive recreation to watch whales or other wildlife to obtain total use by type of activity (*e.g.* whale watching, and other wildlife observation) and the spatial use by type of activity. Information will also be obtained on costs-and-earnings of the operations and demographic information on owner/captains and crews. Surveys will also be conducted of the passengers aboard the for hire operation boats to obtain their market and non-market economic use values for the reduction in the risk of whale strikes. Additional information will be obtained on importance-satisfaction ratings of key natural resource attributes, facilities and services along with demographic profiles of passengers.

Note: We have completed the for-hire operations survey and one season of the Passenger Survey. We need to complete the second season of the Passenger Survey.

II. Method of Collection

For the for hire operations, a team of students will go to the operations offices and collect the information. For the passengers, surveys will be conducted at the docks after the completion of their whale watching trip. The on-site survey will obtain information on demographic profiles, annual number of whale watching trips in the Channel Islands region, and their non-market economic use value for reductions in the risk of whale strikes. Self-addressed, postage paid mail back questionnaires will be used for importance-satisfaction ratings and whale watching trip expenditures.

III. Data

OMB Control Number: 0648–0729.

Form Number: None.

Type of Review: Extension of a currently approved information collection.

Affected Public: Business operations *and* Individuals or households.

Estimated Number of Respondents: 25 for hire operations and 500 individuals on-site, 250 for importance-satisfaction mail back and 200 for the expenditure mailback.

Estimated Time per Response: 2 hours per for hire operation, 20 minutes per on-site interview of passengers, 20 minutes per importance-satisfaction mail back and 20 minutes for the expenditure mail back.

Estimated Total Annual Burden Hours: 367 total: 50 hours for ''for hire'' operations, 167 hours for the on-site survey of passengers, 83 hours for the importance-satisfaction mail back and 67 hours for the expenditure mail back.

Estimated Total Annual Cost to Public: $0 in recordkeeping/reporting costs.

IV. Request for Comments

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden (including hours and cost) of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection; they also will become a matter of public record.

Dated: October 24, 2018.

Sarah Brabson,

NOAA PRA Clearance Officer.

[FR Doc. 2018–23546 Filed 10–26–18; 8:45 am]

BILLING CODE 3510–NK–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Proposed Information Collection; Comment Request; Economic Value of Non-Consumptive Recreation Use From Those Accessing the Monterey Bay National Marine Sanctuary via For Hire Operation Boats

AGENCY: National Oceanic and Atmospheric Administration (NOAA).

ACTION: Notice.

SUMMARY: The Department of Commerce, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995.

DATES: Written comments must be submitted on or before December 28, 2018.

ADDRESSES: Direct all written comments to Jennifer Jessup, Departmental Paperwork Clearance Officer, Department of Commerce, Room 6616, 14th and Constitution Avenue NW, Washington, DC 20230 (or via the internet at *JJessup@doc.gov).*

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument and instructions should be directed to Dr. Vernon R. (Bob) Leeworthy, 240–533–0647 or *Bob.Leeworthy@noaa.gov.*

SUPPLEMENTARY INFORMATION:

I. Abstract

This request is for extension of a currently approved information collection. The collection was approved three years ago but had not begun.

NOAA is mentoring student interns from the Monterey Institute for International Studies to estimate the market and non-market economic values associated with non-consumptive recreation uses (*e.g.* whale watching, other wildlife observation, SCUBA diving, snorkeling, beach activities, surfing, wind-surfing, kite boarding, paddle boarding, etc.) in the Monterey Bay National Marine Sanctuary (MBNMS) for those accessing the MBNMS via ''for hire'' operation boats.

The required information is to conduct surveys of the for hire operations that take people out for non-consumptive recreation to obtain total use by type of activity and the spatial use by type of activity. Information will also be obtained on costs-and-earnings of the operations, knowledge, attitudes & perceptions of sanctuary management strategies and regulations, and demographic information on owner/captains and crews. Surveys will also be conducted of the passengers aboard the for hire operation boats to obtain their market and non-market economic use values for non-consumptive recreation use and how those value change with changes in natural resource attribute conditions and user characteristics. Additional information will be obtained on importance-satisfaction ratings of key natural resource attributes, facilities and services, knowledge, attitudes and perceptions of management strategies and regulations, and demographic profiles of passengers. This survey was not started during the 2015–2018 OMB approval period.

II. Method of Collection

For the for hire operations, a team of students will go to the operations offices and collect the information. For the passengers, surveys will be conducted at the docks after the completion of their trips. The on-site survey will obtain information on demographic profiles, annual number of trips in the MBNMS for non-consumptive recreation, and their non-market economic use value. Self-addressed, postage paid mail back questionnaires will be used for importance-satisfaction ratings, knowledge, attitudes and perceptions, and trip expenditures.

III. Data

OMB Control Number: 0648–0726.

Form Number: None.

Type of Review: Regular submission (extension).

Affected Public: Business operations *and* Individuals or households.

Estimated Number of Respondents: 50 for hire operations and 1,000 individuals on-site, 500 for importance-satisfaction/knowledge, attitudes and perceptions mail back and 400 for the expenditure mailback.

Estimated Time per Response: 2 hours per for hire operation, 20 minutes per on-site interview of passengers, 20 minutes per importance-satisfaction/knowledge, attitudes & perceptions mail back, and 20 minutes for the expenditure mail back.

Estimated Total Annual Burden Hours: 733 total: 100 hours for ''for hire'' operations, 333 hours for the on-site survey of passengers, 167 hours for the importance-satisfaction/knowledge, attitudes & perceptions mail back and 133 hours for the expenditure mail back.

Estimated Total Annual Cost to Public: $0 in recordkeeping/reporting costs.

IV. Request for Comments

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden (including hours and cost) of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection; they also will become a matter of public record.

Dated: October 24, 2018.

Sarah Brabson,

NOAA PRA Clearance Officer.

[FR Doc. 2018–23545 Filed 10–26–18; 8:45 am]

BILLING CODE 3510–NK–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Submission for OMB Review; Comment Request

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

Agency: National Oceanic and Atmospheric Administration (NOAA).

Title: U.S. Fishermen Fishing in Russian Waters.

OMB Control Number: 0648–0228.

Form Number(s): None.

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

Number of Respondents: 1.

Average Hours per Response: 30 minutes.

Burden Hours: 1 hour.

Needs and Uses: This request is for extension of a currently approved information collection.

Regulations at 50 CFR part 300, subpart J, govern U.S. fishing in the Economic Zone of the Russian Federation. Russian authorities may permit U.S. fishermen to fish for allocations of surplus stocks in the Russian Economic Zone. Permit application information is sent to the National Marine Fisheries Service (NMFS) for transmission to Russia. If Russian authorities issue a permit, the vessel owner or operator must submit a permit abstract report to NMFS, and also report 24 hours before leaving the U.S. Exclusive Economic Zone (EEZ) for the Russian Economic Zone and 24 hours before re-entering the U.S. EEZ after being in the Russian Economic Zone.

The permit application information is used by Russian authorities to determine whether to issue a permit. NMFS uses the other information to help ensure compliance with Russian and U.S. fishery management regulations.

Affected Public: Business or other for-profit organizations.

Frequency: On occasion.

Respondent's Obligation: Mandatory.

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

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

Dated: October 24, 2018.

Sarah Brabson,

NOAA PRA Clearance Officer.

[FR Doc. 2018–23544 Filed 10–26–18; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

Patent and Trademark Office

[Docket No.: PTO–C–2018–0058]

National Medal of Technology and Innovation Nomination Evaluation Committee Meeting

AGENCY: United States Patent and Trademark Office.

ACTION: Notice of closed meeting.

SUMMARY: The National Medal of Technology and Innovation (NMTI) Nomination Evaluation Committee will meet in closed session on November 9, 2018. The primary purpose of the meeting is to discuss the relative merits of persons, teams, and companies nominated for the NMTI.

DATES: The meeting will convene November 9, 2018, at approximately 9 a.m., and adjourn at approximately 5 p.m.

ADDRESSES: The meeting will be held at Northwestern University in Evanston, Illinois.

FOR FURTHER INFORMATION CONTACT: John Palafoutas, Program Manager, National Medal of Technology and Innovation Program, United States Patent and Trademark Office, P.O. Box, Alexandria, VA 22313; telephone (571) 272–9821; or by electronic mail: *nmti@uspto.gov.*

SUPPLEMENTARY INFORMATION: Pursuant to the Federal Advisory Committee Act (FACA), 5 U.S.C. App. 2, notice is hereby given that the NMTI Nomination Evaluation Committee, chartered to the United States Department of Commerce, will meet at the United States Patent and Trademark Office campus in Alexandria, Virginia.

The Secretary of Commerce is responsible for recommending to the President prospective NMTI recipients. The NMTI Nomination Evaluation Committee evaluates the nominations received pursuant to public solicitation and makes its recommendations for the Medal to the Secretary. Committee members are distinguished experts in the fields of science, technology, business, and patent law drawn from both the public and private sectors and are appointed by the Secretary for three-year terms.

The NMTI Nomination Evaluation Committee was established in accordance with the FACA. The Committee meeting will be closed to the public in accordance with the FACA and 5 U.S.C. 552b(c)(6) and (9)(B), because the discussion of the relative merit of the Medal nominations is likely to disclose information of a personal nature that would constitute a clearly

unwarranted invasion of personal privacy of the nominees; and premature disclosure of the Committee's recommendations would be likely to significantly frustrate implementation of the Medal Program.

The Acting Chief Financial Officer/Assistant Secretary for Administration, and Deputy Assistant Secretary for Administration, United States Department of Commerce, formally determined on October 17, 2018, pursuant to section 10(d) of the FACA, that the meeting may be closed because Committee members are concerned with matters that are within the purview of 5 U.S.C. 552b(c)(6) and (9)(B). Due to closure of this meeting, copies of any minutes of the meeting will not be available. A copy of the determination is available for public inspection at the United States Patent and Trademark Office.

Dated: October 24, 2018.

Andrei Iancu,

Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office.

[FR Doc. 2018–23609 Filed 10–26–18; 8:45 am]

BILLING CODE 3510–16–P

DEPARTMENT OF COMMERCE

Patent and Trademark Office

Submission for OMB Review; Comment Request; USPTO Websites Customer Satisfaction Surveys

The United States Patent and Trademark Office (USTPO) will submit to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act.

Agency: United States Patent and Trademark Office, Commerce.

Title: USPTO Websites Customer Satisfaction Surveys.

OMB Control Number: 0651-New.

Form Number(s):

- None.

Type of Request: Regular.

Number of Respondents: 100,000 responses per year.

Average Hours per Response: 8 minutes per response.

Burden Hours: 13,333.33 hours annually.

Cost Burden: $0.

Needs and Uses: The United States Patent and Trademark Office (USPTO) wishes to conduct customer satisfaction surveys on its websites. This collection will allow for continued use of a data-driven and a statistically valid approach to understanding customer satisfaction with Agency websites. The objective is to help the USPTO become more citizen-centric and achieve higher levels of public trust and confidence. The USPTO will use the ForeSee surveys in order to collaborate effectively with the public and meet Administration mandates. These surveys will assist the Agency in its efforts to be open and collaborative.

Affected Public: Businesses or other for-profits; not-for-profit institutions.

Frequency: On occasion.

Respondent's Obligation: Voluntary.

OMB Desk Officer: Nicholas A. Fraser, email: *Nicholas_A._Fraser@omb.eop.gov.*

Once submitted, the request will be publicly available in electronic format through *reginfo.gov.* Follow the instructions to view Department of Commerce collections currently under review by OMB.

Further information can be obtained by:

- *Email: InformationCollection@uspto.gov.* Include ''0651-New'' in the subject line of the message.
- *Mail:* Marcie Lovett, Records and Information Governance Division Director, Office of the Chief Technology Officer, United States Patent and Trademark Office, P.O. Box 1450, Alexandria, VA 22313–1450.

Written comments and recommendations for the proposed information collection should be sent on or before November 28, 2018 to Nicholas A. Fraser, OMB Desk Officer, via email to *Nicholas_A._Fraser@omb.eop.gov,* or by fax to 202–395–5167, marked to the attention of Nicholas A. Fraser.

Marcie Lovett,

Records and Information Governance Division Director, OCTO, United States Patent and Trademark Office.

[FR Doc. 2018–23553 Filed 10–26–18; 8:45 am]

BILLING CODE 3510–16–P

DEPARTMENT OF COMMERCE

Patent and Trademark Office

[Docket No. PTO–P–2018–0062]

Request for Comments on Motion To Amend Practice and Procedures in Trial Proceedings Under the America Invents Act Before the Patent Trial and Appeal Board

AGENCY: United States Patent and Trademark Office, U.S. Department of Commerce.

ACTION: Request for comments.

SUMMARY: This Request for Comments seeks public input on certain practices and procedures that the Patent Trial and Appeal Board (''PTAB'' or ''Board'') of the United States Patent and Trademark Office (''Office'' or ''USPTO'') proposes regarding motions to amend filed in *inter partes* reviews (''IPR''), post-grant reviews (''PGR''), and covered business method patent reviews (''CBM'') pursuant to the provisions of the Leahy-Smith America Invents Act (''AIA'') providing for trial proceedings before the Office. Specifically, the Office seeks input on a proposed amendment process that would involve a preliminary non-binding decision by the Board that provides information to the parties regarding the merits of a motion to amend, and an opportunity for a patent owner to revise its motion to amend thereafter. In addition, the Office seeks input on a proposed pilot program implementing the new amendment process. The Office also seeks input regarding whether the Office should continue to allocate the burden of persuasion regarding patentability of substitute claims as set forth in a recent informative Board decision, as well as any suggestions the public may have as to motion to amend practice before the Board generally.

DATES: *Comment Deadline Date:* Written comments must be received on or before December 14, 2018, to ensure consideration.

ADDRESSES: Comments should be sent by electronic mail message over the internet addressed to: *TrialRFC2018Amendments@uspto.gov.* Comments may also be submitted by postal mail addressed to: Mail Stop Patent Board, Director of the United States Patent and Trademark Office, P.O. Box 1450, Alexandria, VA 22313–1450, marked to the attention of ''Acting Deputy Chief Administrative Patent Judge Jacqueline Wright Bonilla or Vice Chief Administrative Patent Judge Michael Tierney, PTAB Request for Comments 2018.''

Although comments may be submitted by postal mail, the Office prefers to receive comments by electronic mail message to more easily share all comments with the public. The Office prefers the comments to be submitted in plain text, but also accepts comments submitted in portable document format or DOC format. Comments not submitted electronically should be submitted on paper in a format that facilitates convenient digital scanning into portable document format.

The comments will be available for public inspection at the Patent Trial and Appeal Board, located in Madison East, Ninth Floor, 600 Dulany Street,

Alexandria, Virginia. Comments also will be available for viewing via the Office's internet website, *https://go.usa.gov/xXXFW*. Because comments will be made available for public inspection, information that the submitter does not desire to be made public, such as address or phone number, should not be included in the comments.

FOR FURTHER INFORMATION CONTACT: Jacqueline Wright Bonilla, Acting Deputy Chief Administrative Patent Judge, or Michael Tierney, Vice Chief Administrative Patent Judge, by telephone at (571) 272–9797.

SUPPLEMENTARY INFORMATION:

Summary

In this Request for Comments, the Office seeks feedback and information regarding a new amendment process involving a preliminary non-binding decision by the Board that provides information to the parties regarding the merits of a motion to amend, and an opportunity for a patent owner to revise its motion to amend thereafter. The Office also seeks feedback and information regarding a proposed pilot program implementing the new amendment process before the Board. The goal of the proposed amendment process and pilot program is to provide an improved amendment practice in AIA trials in a manner that is fair and balanced for all parties and stakeholders. In essence, this is proposed to be done by: Providing the parties with the Board's initial assessment of the proposed amendment early in the process; providing meaningful opportunity to revise, and oppose, proposed amendments; and ensuring that the amendment process concludes within the 12-month statutory timeline.

The Office has received feedback from the public regarding the Board's current motion to amend practice, including some concerns regarding the grant rate of claim amendments in AIA trial proceedings. As detailed further below, the Office has conducted a study of the outcomes of motions to amend decided by the Board and compiled data on reasons why motions to amend have been granted or denied. The Office now seeks to explore what effect certain proposed changes to the Board's procedures described below may have on amendment practice in AIA trial proceedings, and to obtain the public's perspectives on the potential impacts of such changes.

In particular, the Office wishes to explore whether, and under what circumstances, a preliminary decision by the Board that evaluates a motion to amend might prove helpful in an AIA trial amendment process. In the Office's current proposal, the Board will provide a patent owner an opportunity to file a motion to amend during the course of an AIA trial, and an opportunity to revise that motion. By statute, the Board may permit additional motions to amend ''as permitted by regulations prescribed by the Director.'' 35 U.S.C. 316(d)(2). Under currently prescribed regulations, the Board may authorize an additional motion to amend when, for example, ''there is a good cause showing.'' 37 CFR 42.121(c) & 42.221(c).

In the current proposal, after the patent owner files an initial motion to amend and the petitioner has an opportunity to respond, a Board panel will provide a preliminary decision addressing the initial motion to amend. The preliminary decision may provide information relevant to whether the motion to amend meets statutory and regulatory requirements, as well as whether the proposed substitute claims meet the patentability requirements under the Patent Act in light of prior art of record. To the extent it is necessary, the issuance of the Board's preliminary decision addressing the initial motion to amend will be deemed ''good cause'' for further amendment under 37 CFR 42.121(c) & 42.221(c).

Similar to a decision to institute, a preliminary decision on a motion to amend will not be binding on the Board's final written decision. Both parties will have an opportunity to respond to the preliminary decision, and the patent owner will have an opportunity to revise its motion to amend after receiving the preliminary decision. Thereafter, if the Board determines the petitioner has shown that corresponding original challenged claims are unpatentable or that the original claims are otherwise cancelled, the Board will consider the entirety of the record, including parties' arguments and cited evidence relevant to the motion to amend, before reaching a final written decision on the substitute claims proposed in the latest version of the motion to amend filed by the patent owner.

In this Request for Comments, the Office also seeks input regarding whether the Office should continue to allocate the burden of persuasion regarding patentability of substitute claims as set forth in *Western Digital Corp.* v. *SPEX Techs., Inc.,* Case IPR2018–00082 (Paper 13) (PTAB April 25, 2018), as well as any suggestions the public may have as to motion to amend practice before the Board generally.

Background

To elicit specific input on the Board's motion to amend practice, in June 2014, the Office published a Request for Comments in the **Federal Register** that requested comments on the Board's practice regarding motions to amend. *See* Request for Comments on Trial Proceedings Under the America Invents Act Before the Patent Trial and Appeal Board, 79 FR 36474 (June 27, 2014).

Comments from the public (including bar associations, corporations, law firms, and individuals) regarding motions to amend ranged from seeking no change to the Board's current practice, to proposals for the grant of all motions to amend that meet 35 U.S.C. 316(d) statutory requirements without a review of patentability. Most comments focused on which party should bear the burden of proving the patentability or unpatentability of substitute claims proposed in a motion to amend, or on the scope of the prior art that must be discussed by a patent owner in making a motion to amend. The feedback generally did not relate to the timing of motions to amend or other aspects of Board procedure in considering such motions. The comments are available on the USPTO website: *https://go.usa.gov/xXXF8*.

In August 2015, the Office solicited further input from the public on ''[w]hat modifications, if any, should be made to the Board's practice regarding motions to amend.'' *See* Proposed Amendments to the Rules of Practice for Trials Before the Patent Trial and Appeal Board (''Proposed Amendments to the Rules''), 80 FR 50720, 50724–25 (Aug. 20, 2015). Once again, in relation to motions to amend, most comments focused on which party should bear the burden of proof on the patentability of substitute claims proposed in a motion to amend. The comments are available on the USPTO website: *https://go.usa.gov/x5SbK*. In addition, a few comments suggested using examiners to review the patentability of proposed substitute claims. On balance, the Office decided at that time not to implement changes to the Board's motion to amend procedures through rulemaking, but reaffirmed its commitment to continue to evaluate the best way to improve the Board's practice. *See* Proposed Amendments to the Rules, 80 FR at 50724–25; Amendments to the Rules of Practice for Trials Before the Patent Trial and Appeal Board, 81 FR 18750, 18755 (Apr. 1, 2016).

In an effort to better understand the Board's motion to amend practice, the Board undertook in early 2016 a study to determine: (1) The number of motions

to amend that had been filed in AIA trials, both as a cumulative total and by fiscal year; (2) subsequent developments in each motion to amend (*i.e.,* whether the motion was decided, rendered moot, withdrawn, or otherwise dismissed); (3) the number of motions to amend requesting to substitute claims that were granted, granted-in-part and denied-in-part, and denied; and (4) the reasons the Board provided for denying entry of substitute claims. *See* Motion to Amend Study (April 30, 2016), *https://go.usa.gov/xXXyT*; Data for 192 Completed Trials with a Motion to Amend, *https://go.usa.gov/xXXyZ* (last visited Oct. 11, 2018). The Board continues to collect data on motions to amend, and has published on its website an update to the study through March 31, 2018. *See https://go.usa.gov/xUJgB* (last visited Oct. 11, 2018).

Data obtained from the study show that patent owners filed motions to amend in about 10% (305) of the 3203 completed AIA trials and in about 8% (56) of the 725 pending AIA trials—a total of 361 motions to amend through March 31, 2018. Although motions to amend are filed in less than 10% of AIA trials (completed and pending), current data show an increase in the number of motions to amend filed in fiscal year 2018, when compared to other fiscal years. The number of motions to amend filed through the first half of fiscal year 2018 (54) exceeded the number of motions to amend filed for the entire fiscal year 2017 (50), and is approximately equal to the number of motions to amend filed for the entire fiscal year 2016 (56).

The data further show that the Board ruled on a motion to amend requesting to substitute claims in 62% (189) of the 305 completed AIA trials with amendment motions as of March 31, 2018. In the remaining 38% (116) of the 305 completed AIA trials, the motion to amend: (a) Requested solely to cancel claims (20 or 7%); (b) was rendered moot because the panel of judges found the original claims not unpatentable or because the panel of judges already decided a motion to amend proposing the same substitute claims (35 or 11%); or (c) was not decided because the motion was withdrawn or the case terminated prior to a final written decision (61 or 20%), respectively. Of the 189 motions to amend requesting to substitute claims that the Board decided, the Board granted the motion to amend in 4% (7) of the trials, granted-in-part and denied-in-part the motion to amend in 6% (11) of the trials, and denied the motion to amend in 90% (171) of the trials. The specific reasons the Board provided for denying or denying-in-part the motions to amend are set forth in the table below.

REASONS FOR DENYING OR DENYING-IN-PART THE MOTIONS TO AMEND

Reason(s) for denying	Number of motions	Percent of total ***
Anticipated/obvious over art of record (102/103)	74	41
Multiple statutory reasons *	43	24
Non-statutory subject matter (101)	12	7
Lack of written description (112)	14	8
Lack of enablement (112)	3	2
Indefiniteness (112)	1	1
Claims enlarge scope of patent (316)	10	5
Unreasonable number of substitute claims (316) **	3	2
Procedural reasons	22	12
Total Motions to Amend Denied or Denied-in-Part	182	

* All motions to amend but one that the Board denied for multiple statutory reasons included 35 U.S.C. 102, 103, and/or 112 as a reason for denial.

** *See also* 37 CFR 42.121(a)(3) (stating that the ''presumption is that only one substitute claim would be needed to replace each challenged claim, and it may be rebutted by a demonstration of need'').

*** The ''Percent of Total'' adds up to slightly more than 100% (*i.e.,* 102%) due to rounding of percent numbers for each individual row in ''Reason(s) for Denying.''

As noted above, in 182 AIA trials, the Board has denied or denied-in-part a motion to amend. In 81% (147) of those trials, the Board's final written decision identified at least one statutory ground of patentability that the proposed substitute claims did not satisfy. *See* Data for 305 Completed Trials with a Motion to Amend, *https://go.usa.gov/xUJgk* (last visited Oct. 11, 2018). Using conventional patent prosecution as a comparison, the Board's decisions in those cases are akin to an examiner rejecting a proposed amended claim because it is anticipated, obvious, not adequately described in the written description, indefinite, or directed to non-statutory subject matter. In 7% (13) of the 182 AIA trials, the Board based a denial on a failure by the patent owner to satisfy the statutory requirements of a motion to amend under 35 U.S.C. 316(d)(1)(B) and (3) (requiring ''a reasonable number of substitute claims'' and stating that an amendment ''may not enlarge the scope of the claims of the patent or introduce new matter''). In the remaining 12% (22) of those trials, the Board based a denial solely on procedural reasons, such as a failure to provide a claim construction for limitations added in substitute claims.

On October 4, 2017, the *en banc* United States Court of Appeals for the Federal Circuit issued its decision in *Aqua Products, Inc.* v. *Matal,* 872 F.3d 1290 (Fed. Cir. 2017) (*en banc*) (''*Aqua Products*''), addressing the burden of persuasion regarding patentability of substitute claims presented in a motion to amend. The lead opinion of the decision concludes with the following:

> The only legal conclusions that support and define the judgment of the court are: (1) The PTO has not adopted a rule placing the burden of persuasion with respect to the patentability of amended claims on the patent owner that is entitled to deference; and (2) in the absence of anything that might be entitled deference, the PTO may not place that burden on the patentee.

Id. at 1327.

In view of the Federal Circuit's holding in *Aqua Products,* on November 21, 2017, the Office issued formal guidance through a memorandum from the Chief Administrative Patent Judge (''Guidance Memo''). *See Guidance on Motion to Amend in View of Aqua Products, https://go.usa.gov/xQGAA* (last visited Oct. 11, 2018). The Guidance Memo explains that, in light of the *Aqua Products* decision, the Board will no longer place the burden of persuasion on a patent owner with respect to patentability of the proposed substitute claims presented in a motion to amend. The Guidance Memo also notes that a motion to amend must continue to satisfy the requirements of 37 CFR 42.121 or 42.221, as applicable, that all parties still have a duty of candor under 37 CFR 42.11, and that the page-limits, type, and timing of briefs remain unchanged. *Id.*

On December 22, 2017, the Federal Circuit issued a decision in *Bosch Automotive Service Solutions, LLC* v. *Matal,* 878 F.3d 1027 (Fed. Cir. 2017), as amended in part on reh'g (Mar. 15, 2018) (''*Bosch*''). In that decision, the Federal Circuit explained, ''the petitioner bears the burden of proving that the proposed amended claims are unpatentable by a preponderance of the evidence.'' *Id.* at 1040. Because the petitioner in *Bosch* had settled with the patent owner, the Federal Circuit remanded the case to the Board to evaluate the patentability of the amended claims, indicating that the Board must justify any finding of unpatentability by reference to the evidence of record in the IPR. *Id.* (''[W]here the challenger ceases to participate in the IPR and the Board proceeds to final judgment, *it is the Board* that must justify any finding of unpatentability by reference to the evidence of record in the IPR.'') (*quoting Aqua Products,* 872 F.2d at 1311 (opinion of O'Malley, J.)).

In view of decisions by the Federal Circuit regarding motion to amend practice and procedure in AIA trials, as explained above, the Board recently de-

designated as precedential *MasterImage 3D, Inc.* v. *RealD Inc.,* Case IPR2015–00040 (PTAB July 15, 2015) (Paper 42) and de-designated as informative *Idle Free Sys., Inc.* v. *Bergstrom, Inc.,* IPR 2012–00027 (PTAB June 11, 2013). Concurrently, the Board designated *Western Digital Corp.* v. *SPEX Techs., Inc.,* Case IPR2018–00082 (Paper 13) (PTAB April 25, 2018) (''*Western Digital* order'') as informative to provide current guidance on several aspects of the motion to amend practice. With respect to the burden of persuasion, the *Western Digital* order explains that under the current state of the law ''the burden of persuasion will ordinarily lie with the petitioner to show that any proposed substitute claims are unpatentable'' and that the ''Board itself may justify any finding of unpatentability by reference to evidence of record in the proceeding.'' *Id.* at 4.

In light of more than five years' worth of data obtained through the above-mentioned Board study, recent Federal Circuit decisions, the Guidance Memo, and the *Western Digital* order (informative), and in an effort to continue to enhance the effectiveness and fairness of AIA trial proceedings, the Office seeks further specific feedback regarding changes to the Board's motion to amend practice and a motion to amend pilot program.

Request for Public Comments

The Office seeks written public comments on an amendment procedure in AIA trials that involves the Board issuing a preliminary non-binding decision that provides information relevant to the merits of a motion to amend, and provides a patent owner with an opportunity to revise its motion to amend thereafter. A proposed timeline showing the parties' filings and the preliminary decision envisioned under the current proposal is set forth in Appendix A1 of this request. An overlay of that timeline onto a timeline of an AIA trial considering only the patentability of originally challenged claims is set forth in Appendix A2. The Office plans to implement such a process as a pilot program, as set forth below in greater detail. The Office also seeks comments as to whether, in view of recent Federal Circuit case law, it should engage in rulemaking to allocate the burden of persuasion when determining patentability of substitute claims as set forth in the *Western Digital* order. The Office welcomes any comments from the public on the topics covered in this notice. The Office also poses specific questions below, and invites public feedback on those questions.

Proposal: Preliminary Decision by the Board on a Motion To Amend and an Opportunity To Revise That Motion

The Office seeks written public comments as to whether, and under what circumstances, a preliminary non-binding decision by the Board evaluating a motion to amend would be helpful in AIA trials. The preliminary decision would initially assess whether a motion to amend meets statutory and regulatory requirements, and/or the patentability of proposed substitute claims, for example, in light of prior art of record in the proceeding.

In the current proposal, after institution of an AIA trial, a patent owner would have an opportunity to file a motion to amend, and then revise that motion after receiving the petitioner's opposition and the preliminary decision from the Board. Specifically, after a patent owner files a motion to amend that proposes substitute claims, and a petitioner files an opposition (if it so chooses), the Board would present an initial evaluation of the parties' submissions in a preliminary decision. The current proposed timing for a motion to amend, the preliminary decision, a revision to the motion, and related briefing is set forth in Appendix A1.

After receiving the preliminary decision, a patent owner may file a revision to its motion to amend. The revision may include, for example, changes to the initially proposed substitute claims to address issues identified in the preliminary decision. The petitioner would have an opportunity to file an opposition responding to the revised motion to amend and the preliminary decision. Before the oral hearing, the patent owner also may file a reply to an opposition to the revised motion to amend, and the petitioner may file a corresponding sur-reply. During the oral hearing itself, both parties may address points raised and evidence discussed in the preliminary decision and as briefed by the parties.

Although a preliminary decision would not be binding on the Board's subsequent decisions or provide dispositive conclusions regarding motion to amend requirements or the patentability of substitute claims, it may provide information helpful to the parties, such as to a patent owner as it determines whether and/or how to revise its motion to amend, or to petitioner as it determines how to respond to a revised motion to amend, or to both parties as they determine how to respond to information discussed in the preliminary decision itself.

Preliminary Decision on a Motion to Amend: The Board would provide a preliminary decision after the petitioner has an opportunity to file an opposition to a patent owner's motion to amend. The preliminary decision would provide information relating to whether the motion to amend meets the statutory requirements of 35 U.S.C. 316(d) or 326(d) and the regulatory requirements of 35 CFR 42.121 or 42.221, and information relating to the patentability of the proposed substitute claims. To meet statutory and regulatory requirements, a motion to amend must, among other things: propose a reasonable number of substitute claims; propose substitute claims that do not enlarge claim scope or introduce new matter; respond to a ground of unpatentability involved in the trial; and set forth written description support for each substitute claim. *See* 35 U.S.C. 316(d) & 326(d); 37 CFR 42.121 & 42.221; *see also Western Digital* order, Case IPR2018–00082 (Paper 13) (PTAB April 25, 2018).

Similar to an institution decision, a preliminary decision on a motion to amend during an AIA trial would not be binding on the Board, for example, when it renders a final written decision. In the current proposal, the preliminary decision would indicate whether there is a reasonable likelihood that: (1) The patent owner would prevail in establishing that the motion to amend meets statutory and regulatory requirements, and/or (2) the petitioner would prevail in establishing the unpatentability of any proposed substitute claims.

Depending on the patent owner's response to the initial evaluation in the preliminary decision, the case will proceed according to Alternative 1 or Alternative 2 discussed below.

Alternative 1: Patent Owner Reply or Revised Motion to Amend and Subsequent Briefing (patent owner has the first opportunity to respond to the preliminary decision, as shown in Appendix A1): If the preliminary decision indicates that the motion to amend fails to meet any statutory or regulatory requirements, or that the petitioner demonstrates a reasonable likelihood that it would prevail in establishing the unpatentability of any proposed substitute claims in view of the current record, the patent owner and petitioner may file papers as discussed below.

Within a certain time frame after receiving the preliminary decision, for example, within 1 month, a patent owner may file: (1) A reply to the petitioner's opposition to the motion to amend and the preliminary decision; or

(2) a revised motion to amend that revises the proposed new substitute claims and provides new arguments and/or evidence as to why the revised substitute claims meet statutory and regulatory requirements for a motion to amend, as well as arguments and evidence (as patent owner chooses to include) relevant to the patentability of the revised substitute claims. A revised motion to amend must provide amendments, arguments, and/or evidence in a manner that is responsive to issues raised in the preliminary decision. A revised motion to amend may not include amendments, arguments, and/or evidence that are unrelated to issues raised in the preliminary decision or the petitioner's opposition to the motion to amend. Generally, the Board will render a final written decision only as to the latest-filed version of the patent owner's motion to amend and substitute claims proposed therein.

As shown in Appendix A1, if the patent owner files a reply to the petitioner's opposition to the motion to amend and the preliminary decision, the petitioner may file a corresponding sur-reply. As also shown in Appendix A1, if the patent owner chooses instead to revise its motion to amend (file a ''revised MTA''), the petitioner may file an opposition to that motion, the patent owner may file a reply to that opposition, and the petitioner may file a sur-reply. Thus, if patent owner files a reply, rather than a revised motion to amend, there will be only two papers filed by the parties after the preliminary decision (*i.e.,* the patent owner reply and the petitioner sur-reply), rather than all four shown in Appendices A1 and A2. An opposition or reply may be accompanied by new evidence that responds to new evidence or issues raised in the preliminary decision, or in the corresponding revised motion to amend or opposition. A petitioner sur-reply may not be accompanied by new evidence other than deposition transcripts of the cross-examination of any reply witness. The sur-reply may only respond to arguments made in reply briefs, comment on reply declaration testimony, and/or point to cross-examination testimony.

Alternative 2: Petitioner Reply and Patent Owner Sur-Reply (petitioner has the first opportunity to respond to the preliminary decision): If the preliminary decision indicates that the motion to amend meets the statutory and regulatory requirements, and that the petitioner does not demonstrate a reasonable likelihood that it would prevail in establishing the unpatentability of any proposed substitute claims in view of the current record, the petitioner may file a reply to the preliminary decision (*e.g.,* within one month after the Board provides its preliminary decision), and the patent owner may file a sur-reply in response (*e.g.,* within one month after the reply is filed). In addition, if patent owner chooses not to file any paper, *i.e.,* a reply or a revised motion to amend, within a designated time frame for such a paper (*e.g.,* within one month) after the Board provides a preliminary decision, the petitioner may file a reply to the preliminary decision (*e.g.,* within two weeks thereafter), and the patent owner may file a sur-reply in response (*e.g.,* within two weeks after the reply is filed).

Specifically, if the preliminary decision indicates that the Board is reasonably likely to deny the motion to amend in relation to at least one substitute claim, Alternative 1 applies, as discussed above. If the preliminary decision indicates that the Board is reasonably likely to grant the motion to amend in relation to all substitute claims proposed by the patent owner, however, Alternative 2 applies, and petitioner may file the first paper (a reply) in response to the preliminary decision. Similarly, if patent owner chooses not to file a paper after the Board provides a preliminary decision, Alternative 2 applies, albeit potentially on an accelerated schedule.

If Alternative 2 applies, the petitioner reply may be accompanied by new evidence that responds to new issues raised in the preliminary decision, but the petitioner may not raise a new argument of unpatentability that it did not raise in its opposition to the motion to amend. The patent owner sur-reply may not be accompanied by new evidence other than deposition transcripts of the cross-examination of any reply witness. The sur-reply may only respond to arguments made in reply briefs, comment on reply declaration testimony, and/or point to cross-examination testimony.

Cross-Examination Through Depositions: In the current proposal, all cross-examinations, *i.e.,* depositions, of witnesses in relation to direct testimony (provided in declarations) pertaining to a motion to amend would occur after the Board issues the preliminary decision on a motion to amend.

Petitioner Ceases to Participate in an AIA Trial and the Board Proceeds to a Final Written Decision on a Motion to Amend: If the petitioner ceases to participate altogether in an AIA trial in which the patent owner files a motion to amend, and the Board nevertheless proceeds with the trial thereafter, the Board may, in its discretion, solicit patent examiner assistance in the absence of a petitioner opposition to a motion to amend. That assistance, *e.g.,* by an examiner in the Central Reexamination Unit, could include the preparation of an advisory report that initially assesses whether a motion to amend meets certain statutory and regulatory requirements (*i.e.,* whether the amendment enlarges the scope of the claims of the patent or introduces new matter), as well as the patentability of proposed substitute claims, for example, in light of prior art that was provided by the patent owner and/or obtained in prior art searches by the examiner.

An examiner advisory report would not include a final determination on any ultimate legal conclusion. When preparing an advisory report, the examiner would consider relevant papers of record, as well as evidence cited therein, with certain exceptions. The examiner would take into account affidavits or declarations by witnesses cited by parties, but generally would not consider cross-examination testimony of such witnesses, engage in witness credibility determinations, or address admissibility of evidence. The examiner would conduct prior art searches as appropriate, and take into account search results that are relevant to the substitute claims when preparing an advisory report. The examiner will not, however, search on or address the original claims.

An examiner advisory report would not be binding, but may assist the patent owner and the Board during an AIA trial proceeding. Similar to *inter partes* reexamination, an examiner would not conduct interviews or otherwise interact directly with the parties. Rather, as needed, the patent owner may contact the Board with questions or request a conference call with the panel. Depositions or other requests for discovery or testimony regarding an examiner's decision-making process would be denied pursuant to the Manual of Patent Examining Procedure 1701.

If the Board seeks examiner assistance prior to issuing a preliminary decision, the patent owner may respond to the examiner advisory report and the preliminary decision in a reply or a revised motion to amend filed after the preliminary decision. If the Board seeks examiner assistance after issuing a preliminary decision and after the patent owner files a revised motion to amend, the patent owner may respond to the preliminary decision and the examiner advisory report in a reply. A patent owner reply or revised motion to

amend may be accompanied by new evidence that responds to new prior art or issues raised in an examiner advisory report or discussed in the preliminary decision.

Proposed Pilot Program

The Office is also seeking input on the use of a pilot program to implement the proposed amendment process discussed above. As part of the pilot program, the Board will issue a preliminary decision after receiving a patent owner's motion to amend and any opposition by a petitioner, and a patent owner would have an opportunity to file a revised motion to amend, as described above. The currently proposed briefing schedule for the pilot program is set forth in Appendix A1.

Conduct of Proposed Pilot Program: The Office anticipates that it will implement the pilot program shortly after the comment deadline for this Request for Comments ends on December 14, 2018. The Office plans to issue a notice to the public providing any necessary additional details of the pilot program shortly before implementation. Once the pilot program begins, the Office likely will conduct it for at least one year, and the program may be extended beyond that time. The Office would provide notice of any extension prior to expiration of the pilot.

The Office may implement the pilot program so that the new procedure is used in every AIA trial proceeding involving a motion to amend where the Board issues a decision to institute a trial after the implementation date of the pilot program. In AIA trial proceedings where the Board has instituted a trial before the implementation date of the program, the motion to amend process would proceed under currently existing procedures. Once implemented as a pilot program, the new amendment procedure would be the only option available for amending claims in AIA proceedings. That is to say, the current amendment process would no longer be available as an option. The program is a ''pilot'' in the sense that the Office may modify the amendment procedures in response to feedback and experience with the program, during the course of the pilot. The Office requests feedback and comment in this regard, and also as to whether it should consider not proceeding with the program in AIA trials where both parties agree to opt-out of the program.

The Office would then consider the results of this pilot program in determining how to refine this approach going forward.

Potential Rulemaking To Allocate the Burden of Persuasion as Set Forth in the Western Digital Order

The Office also requests comments from the public regarding whether it should engage in rulemaking to allocate the burden of persuasion as suggested by the *Aqua Products en banc* court, and if so, whether the Office should allocate that burden as set forth in the *Western Digital* order. Specifically, the *Western Digital* order provides that ''the burden of persuasion will ordinarily lie with the petitioner to show that any proposed substitute claims are unpatentable'' and that the ''Board itself also may justify any finding of unpatentability by reference to evidence of record in the proceeding.'' *Western Digital* order 4. ''Thus, the Board determines whether substitute claims are unpatentable by a preponderance of the evidence based on the entirety of the record, including any opposition made by the petitioner.'' *Id.*

The Office seeks public comment on the circumstances in which the Board itself may justify findings of unpatentability, for example: When the petitioner has ceased to participate in the proceeding; when the petitioner remains in the proceeding but chooses not to oppose the motion to amend or a subset of proposed substitute claims in the motion to amend; or when the petitioner opposes the motion to amend but fails to take into account all aspects of the record before the Board. The Office does not envision, however, that allowing the Board to justify any findings of unpatentability would limit a petitioner's ability to submit its own arguments or evidence regarding unpatentability, or prevent the Board from adopting a petitioner's arguments in deciding the motion to amend. Moreover, the Board is not required to make any determinations of unpatentability in situations where the petitioner, for any reason, has not established that proposed substitute claims are unpatentable by a preponderance of the evidence. In other words, the Board is permitted, but not required, to find claims unpatentable for reasons other than those advanced by the petitioner as long as the patent owner has notice and an opportunity to be heard.

In addition, the Office seeks public comment on how, if at all, adoption of the proposed motion to amend process would affect the allocation of the burden of persuasion as set forth in the *Western Digital* order.

Questions Regarding the Proposed Amendment Process and Pilot Program

The Office welcomes any comments from the public on the proposed amendment process and pilot program, and would be particularly interested in the public's input on the questions and requested information noted below.

1. Should the Office modify its current practice to implement the proposal summarized above and presented in part in Appendix A1? Why or why not?

2. Please provide comments on any aspect of the proposed amendment process, including, but not limited to, the content of the papers provided by the parties and the Office and the timing of those papers during an AIA trial.

3. How does the timeline in Appendix A1 impact the parties' abilities to present their respective cases? If changes to the timeline are warranted, what specific changes are needed and why?

4. If the Office implements this proposal, should the Board prepare a preliminary decision in every proceeding where a patent owner files a motion to amend that proposes substitute claims?

5. What information should a preliminary decision include to provide the most assistance to the parties in presenting their case? For example, is there certain information that may be particularly useful as the parties consider arguments and evidence to present in their papers, how issues may be narrowed for presentation to the Board, and/or whether to discuss a settlement?

6. If the Office implements this proposal, should there be any limits on the substance of the claims that may be proposed in the revised motion to amend? For example, should patent owners be permitted only to add limitations to, or otherwise narrow the scope of, the claims proposed in the originally-filed motion to amend?

7. What is the most effective way for parties and the Office to use declaration testimony during the procedure discussed above? For example, how and when should parties rely on declaration testimony? When should cross-examination of declaration witnesses take place, if at all, in the process? At what stage of briefing should a party be able to rely on cross-examination (deposition transcripts) testimony of a witness?

8. If a petitioner ceases to participate in an AIA trial and the Board solicits patent examiner assistance regarding a motion to amend, how should the Board weigh an examiner advisory report

relative to arguments and evidence provided by a patent owner? What type of assistance or information should a patent examiner provide? Should prior art searches by examiners be limited to those relevant to new limitations added to proposed substitute claims and reasons to combine related to such limitations?

9. Should the Board solicit patent examiner assistance in other circumstances, and if so, what circumstances? For example, should the Board solicit patent examiner assistance when the petitioner remains in the AIA trial but chooses not to oppose the motion to amend?

10. Should a motion to amend filed under the proposed new process be contingent or non-contingent? For purposes of this question, ''contingent'' means that the Board will provide a final decision on the patentability of a proposed substitute claim only if it determines that a corresponding original claim is unpatentable (as in the current proposal); and ''non-contingent'' means that the Board will provide a final decision on the patentability of substitute claims in place of determining the patentability of corresponding original claims.

11. If the Office implements the proposal in which the Board issues a preliminary decision on a motion to amend, as discussed above, should any additional changes be made to the current default trial schedule to accommodate the new practice?

12. What impact would implementing the proposals above have on small or micro entities who participate as parties in AIA trial proceedings?

13. Should the Office consider additional options for changing the timing and/or the Board's procedures for handling motions to amend that are not covered by the proposals above? If so, please provide additional options or proposals for the Office to consider, and discuss the advantages or disadvantages of implementation.

14. Should the Office consider not proceeding with the pilot program in AIA trials where both parties agree to opt-out of the program?

Questions Regarding Potential Rulemaking To Allocate Burden of Persuasion as Set Forth in the Western Digital Order

15. Should the Office engage in rulemaking to allocate the burden of persuasion regarding the patentability of proposed substitute claims in a motion to amend as set forth in the *Western Digital* order? What are the advantages or disadvantages of doing so?

16. If the Office continues to allocate the burden as set forth in the *Western Digital* order, under what circumstances should the Board itself be able to justify findings of unpatentability? Only if the petitioner withdraws from the proceeding? Or are there situations where the Board itself should be able to justify findings of unpatentability when the petitioner remains in the proceeding? What are the advantages or disadvantages?

17. If the Office adopts the current proposal including a preliminary decision by the Board on a motion to amend, do the answers to questions 15 and 16 change?

Dated: October 19, 2018.

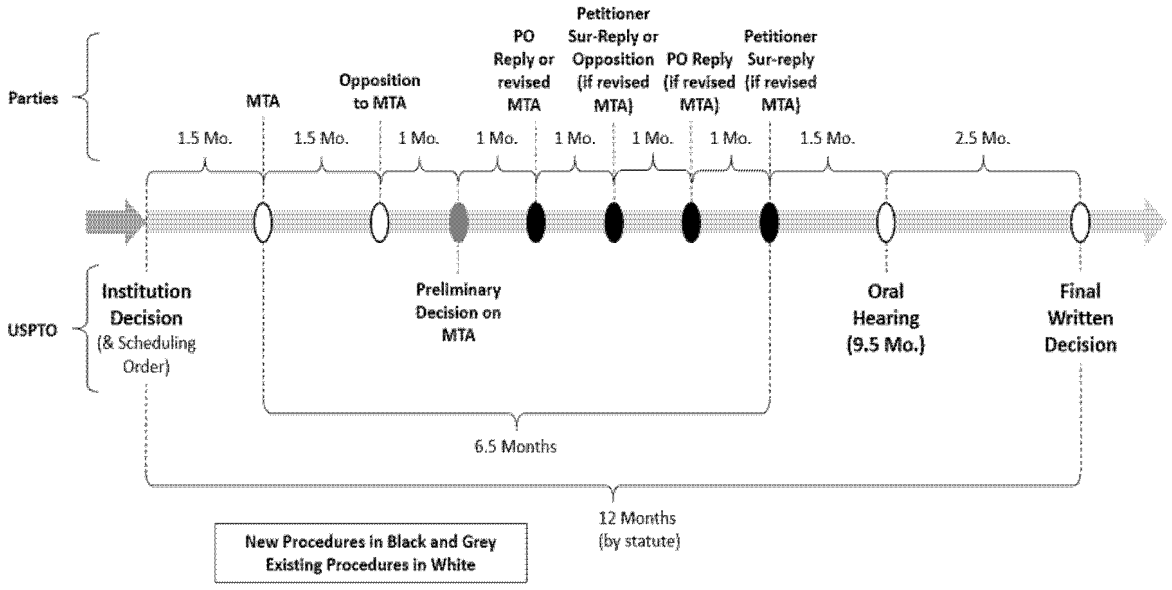
Andrei Iancu,

Under Secretary of Commerce for Intellectual Property, Director of the United States Patent and Trademark Office.

BILLING CODE 3510–16–P

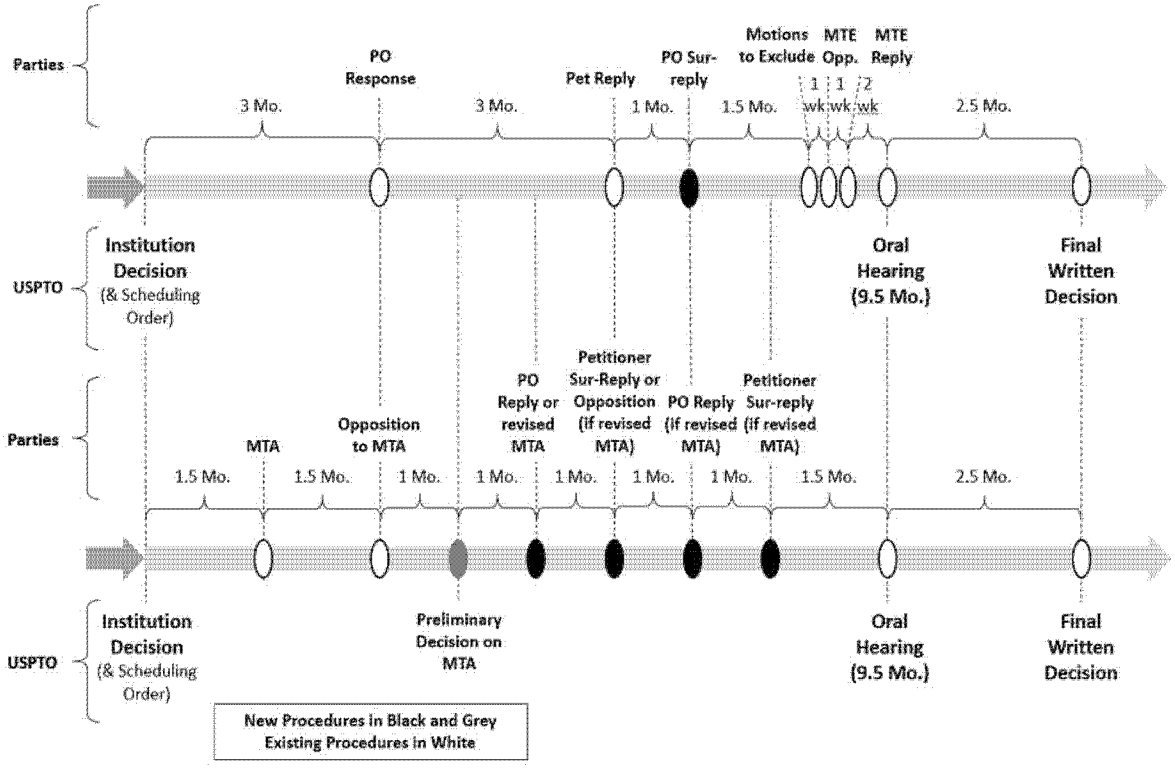
Appendix A1

Proposed Timeline for New Motion to Amend Process



Appendix A2

Overlay of Proposed New Motion to Amend Process Timeline and AIA Trial Timeline



[FR Doc. 2018–23187 Filed 10–26–18; 8:45 am]
BILLING CODE 3510–16–C

COMMODITY FUTURES TRADING COMMISSION

Agency Information Collection Activities Under OMB Review

AGENCY: Commodity Futures Trading Commission.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995 (PRA), this notice announces that the Information Collection Request (ICR) abstracted below has been forwarded to the Office of Management and Budget (OMB) for review and comment. The ICR describes the nature of the information collection and its expected costs and burden.

DATES: Comments must be submitted on or before November 28, 2018.

ADDRESSES: Comments regarding the burden estimate or any other aspect of the information collection, including suggestions for reducing the burden, may be submitted directly to the Office of Information and Regulatory Affairs (OIRA) in OMB within 30 days of this notice's publication by either of the following methods. Please identify the comments by ''OMB Control No. 3038–0085.''

- *By email addressed to: OIRAsubmissions@omb.eop.gov* or
- *By mail addressed to:* The Office of Information and Regulatory Affairs, Office of Management and Budget, Attention Desk Officer for the Commodity Futures Trading Commission, 725 17th Street NW, Washington, DC 20503.

A copy of all comments submitted to OIRA should be sent to the Commodity Futures Trading Commission (Commission) by either of the following methods. The copies should refer to ''OMB Control No. 3038–0085.''

- *By mail addressed to:* Christopher Kirkpatrick, Secretary of the Commission, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street NW, Washington, DC 20581;
- By Hand Delivery/Courier to the same address; or
- Through the Commission's website at *http://comments.cftc.gov.* Please follow the instructions for submitting comments through the website.

A copy of the supporting statement for the collection of information discussed herein may be obtained by visiting *http://RegInfo.gov.*

All comments must be submitted in English, or if not, accompanied by an English translation. Comments will be posted as received to *http://www.cftc.gov.* You should submit only information that you wish to make available publicly. If you wish the Commission to consider information that you believe is exempt from disclosure under the Freedom of Information Act, a petition for confidential treatment of the exempt information may be submitted according to the procedures established in § 145.9 of the Commission's regulations.[1] The Commission reserves the right, but shall have no obligation, to review, pre-screen, filter, redact, refuse or remove any or all of your submission from *http://www.cftc.gov* that it may deem to be inappropriate for publication, such as obscene language. All submissions that have been redacted or removed that contain comments on the merits of the ICR will be retained in the public comment file and will be considered as

[1] 17 CFR 145.9.

required under the Administrative Procedure Act and other applicable laws, and may be accessible under the Freedom of Information Act.

FOR FURTHER INFORMATION CONTACT: Melissa D'Arcy, Special Counsel, Division of Clearing and Risk, Commodity Futures Trading Commission, (202) 418–5086; email: *mdarcy@cftc.gov,* and refer to OMB Control No. 3038–0085.

SUPPLEMENTARY INFORMATION:

Title: Rule 50.50 End-User Notification of Non-Cleared Swap (OMB Control No. 3038–0085). This is a request for an extension and revision of a currently approved information collection.

Abstract: The Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) amended Section 2(h)(1) of the Commodity Exchange Act (CEA) to provide that it shall be unlawful for any person to engage in a swap unless that person submits such swap for clearing to a derivatives clearing organization if the swap is required to be cleared. However, Section 2(h)(7) of the CEA, as added by the Dodd-Frank Act, also provides that a swap otherwise subject to the clearing requirement is eligible for an elective exception from clearing if one party to the swap is not a financial entity, is using swaps to hedge or mitigate commercial risk, and notifies the Commission, in a manner set forth by the Commission, how it generally meets its financial obligations associated with entering into non-cleared swaps (End-User Exception).

The Commission adopted Commission regulation 39.6 to specify requirements for electing the End-User Exception, including the reporting of certain information to a registered swap data repository (SDR) or the Commission. Following the publication of Commission regulation 39.6, the Commission recodified it as Commission regulation 50.50 (17 CFR 50.50). The information reported and collected under Commission regulation 50.50 is necessary as part of the overall package of swap-related information that must generally be submitted by reporting counterparties to SDRs under the Dodd-Frank Act. The Commission uses this information to assess and monitor the market participants electing the End-User Exception to the swap clearing requirement in order to prevent evasion of the clearing requirement.

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. On August 13, 2018, the Commission published in the **Federal Register** notice of the proposed extension of this information collection and provided 60 days for public comment on the proposed extension, 83 FR 39991 (60-Day Notice). The Commission received one comment on the 60-Day Notice.

In a comment letter submitted in response to the 60-Day Notice, the American Bankers Association (ABA) urged the Commission to amend Commission regulation 50.50 with respect to the frequency of the reporting requirement.[2] Currently, end-users electing the exception are required to report information to the Commission annually, if not more frequently. The ABA requested that the Commission issue a notice of proposed rulemaking to consider revising the reporting requirement in Commission regulation 50.50(b)(2) to permit end-users to report this information less frequently than annually, in certain cases. The ABA's request for an amendment to the rule text in Commission regulation 50.50 is outside the scope of the request for an extension of the subject collection. The ABA did not submit any comments to the Commission related to the burdens associated with this information collection, such as the estimated number of respondents or the estimated average burden hours per respondent. Accordingly, the Commission continues to believe that the burden estimates published in the 60-Day Notice are appropriate.

Burden Statement: The respondent burden for this collection is estimated to be as follows:

Estimated Number of Respondents: 1,815.

Estimated Average Burden Hours per Respondent: 0.58.

Estimated Total Annual Burden Hours: 1,053.[3]

Frequency of Collection: On occasion; annually.

There are no capital costs or operating and maintenance costs associated with this collection.

Authority: 44 U.S.C. 3501 *et seq.*

Dated: October 24, 2018.

Robert Sidman,

Deputy Secretary of the Commission.

[FR Doc. 2018–23539 Filed 10–26–18; 8:45 am]

BILLING CODE 6351–01–P

[2] ABA's comment letter submitted in response to the 60-Day Notice, Oct. 12, 2018, available at: *https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=61830&SearchText=.*

[3] 1815 × .58 hr = 1,052.7, and when rounded up to the next whole number equals 1,053 (the estimated total annual burden hours).

COMMODITY FUTURES TRADING COMMISSION

Agency Information Collection Activities Under OMB Review

AGENCY: Commodity Futures Trading Commission.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995 (PRA), this notice announces that the Information Collection Request (ICR) abstracted below has been forwarded to the Office of Management and Budget (OMB) for review and comment. The ICR describes the nature of the information collection and its expected costs and burden.

DATES: Comments must be submitted on or before November 28, 2018.

ADDRESSES: Comments regarding the burden estimate or any other aspect of the information collection, including suggestions for reducing the burden, may be submitted directly to the Office of Information and Regulatory Affairs (OIRA) in OMB within 30 days of this notice's publication by either of the following methods. Please identify the comments by ''OMB Control No. 3038–0101.''

- *By email addressed to: OIRAsubmissions@omb.eop.gov* or
- *By mail addressed to:* the Office of Information and Regulatory Affairs, Office of Management and Budget, Attention Desk Officer for the Commodity Futures Trading Commission, 725 17th Street NW, Washington, DC 20503.

A copy of all comments submitted to OIRA should be sent to the Commodity Futures Trading Commission (the ''Commission'') by either of the following methods. The copies should refer to ''OMB Control No. 3038–0101.''

- *By mail addressed to:* Christopher Kirkpatrick, Secretary of the Commission, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street NW, Washington, DC 20581;
- By Hand Delivery/Courier to the same address; or
- Through the Commission's website at *http://comments.cftc.gov.* Please follow the instructions for submitting comments through the website.

A copy of the supporting statement for the collection of information discussed herein may be obtained by visiting *http://RegInfo.gov.*

All comments must be submitted in English, or if not, accompanied by an English translation. Comments will be posted as received to *http://www.cftc.gov.* You should submit only

information that you wish to make available publicly. If you wish the Commission to consider information that you believe is exempt from disclosure under the Freedom of Information Act, a petition for confidential treatment of the exempt information may be submitted according to the procedures established in § 145.9 of the Commission's regulations.[1] The Commission reserves the right, but shall have no obligation, to review, pre-screen, filter, redact, refuse or remove any or all of your submission from *http://www.cftc.gov* that it may deem to be inappropriate for publication, such as obscene language. All submissions that have been redacted or removed that contain comments on the merits of the ICR will be retained in the public comment file and will be considered as required under the Administrative Procedure Act and other applicable laws, and may be accessible under the Freedom of Information Act.

FOR FURTHER INFORMATION CONTACT: Duane C. Andresen, Associate Director, Division of Market Oversight, Commodity Futures Trading Commission, (202) 418–5492; email: *dandresen@cftc.gov,* and refer to OMB Control No. 3038–0101.

SUPPLEMENTARY INFORMATION:

Title: Registration of Foreign Boards of Trade (OMB Control No. 3038–0101). This is a request for extension of a currently approved information collection.

Abstract: Section 738 of the Dodd-Frank Act amended section 4(b) of the Commodity Exchange Act to provide that the Commission may adopt rules and regulations requiring foreign boards of trade (FBOT) that wish to provide their members or other participants located in the United States with direct access to the FBOT's electronic trading and order matching system to register with the Commission. Pursuant to this authorization, the CFTC adopted a final rule requiring FBOTs that wish to permit trading by direct access to provide certain information to the Commission in applications for registration and, once registered, to provide certain information to meet quarterly and annual reporting requirements. Currently, Part 48 of the Commission's regulations sets forth reporting and/or recordkeeping requirements to ensure registered FBOTs providing for trading by direct access meet statutory and regulatory requirements on an initial and ongoing basis.

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. On August 13, 2018, the Commission published in the **Federal Register** notice of the proposed extension of this information collection and provided 60 days for public comment on the proposed extension, 83 FR 39989 (''60-Day Notice''). The Commission did not receive any comments on the 60-Day Notice.

Burden Statement: The Commission is revising its estimate of the burden for this collection for registered FBOTs, by reducing the number of FBOTs to which the burden applies. The respondent burden for this collection is estimated to be as follows:

Estimated Number of Respondents: 23.

Estimated Average Burden Hours per Respondent: 375.2.

Estimated Total Annual Burden Hours: 8,630.

Frequency of Collection: When a reportable event occurs and quarterly and annually for required reports.

There are no capital costs or operating and maintenance costs associated with this collection.

Authority: 44 U.S.C. 3501 *et seq.*

Dated: October 24, 2018.

Robert Sidman,

Deputy Secretary of the Commission.

[FR Doc. 2018–23538 Filed 10–26–18; 8:45 am]

BILLING CODE 6351–01–P

[1] 17 CFR 145.9.

COURT SERVICES AND OFFENDER SUPERVISION AGENCY FOR THE DISTRICT OF COLUMBIA

SES Performance Review Board

AGENCY: Court Services and Offender Supervision Agency for the District of Columbia.

ACTION: Notice.

SUMMARY: Notice is hereby given of the appointment of new members to the Court Services and Offender Supervision Services for the District of Columbia (CSOSA) and the Pretrial Services Agency for the District of Columbia (PSA), Senior Executive Service (SES) Performance Review Board. PSA is an independent agency within CSOSA. The Performance Review Board assures consistency, stability, and objectivity in the appraisal process.

DATES: *Applicable:* December 1, 2018 to February 2019.

FOR FURTHER INFORMATION CONTACT: William Layne, Assistant Director, Human Capital Planning and Executive Resources, Court Services and Offender Supervision Agency for the District of Columbia, 800 North Capitol Street NW, Suite 701, Washington, DC 20005, (202) 220–5637.

SUPPLEMENTARY INFORMATION: Section 4314(c)(1) of Title 5 of the United States Code requires each agency to establish, in accordance with regulations prescribed by the Office of Personnel Management, one or more SES Performance Review Boards (PRB). (Section 4314(c)(4) requires that notice of appointment of PRB members be published in the **Federal Register**). The PRB is responsible for making recommendations to the appointing and awarding authority on the performance appraisal ratings and performance awards for SES employees. Members of the PRB will serve a term that shall begin on December 1, 2018. The following executives have been designated as member of the Performance Review Board for CSOSA and PSA:

Cedric Hendricks, Associate Director for the Office of Legislative, Intergovernmental and Public Affairs for CSOSA

Reggie James, Reginald James, Associate Director for the Office of Administration for CSOSA

Linda Mays, Associate Director for the Office of Human Resources for CSOSA

William Kirkendale, Associate Director for the Office of Information Technology for CSOSA

Sheila Stokes, General Counsel for CSOSA

David Huffer, Associate Director for the Office of Research and Evaluation for CSOSA

Paul Girardo, Associate Director for the Office of Financial Management for CSOSA

Leslie Cooper, Director for PSA

Catherine Terry-Crusor, Associate Director for the Office of Operations for PSA

Lisa Rawlings, Chief of Staff for CSOSA

Jerrolyn Patricia Smoot, Deputy Director for PSA

Dated: October 23, 2018.

Rochelle Durant,

Federal Register Liaison.

[FR Doc. 2018–23541 Filed 10–26–18; 8:45 am]

BILLING CODE P

DEPARTMENT OF DEFENSE

Department of the Army

Western Hemisphere Institute for Security Cooperation Board of Visitors Meeting Notice

AGENCY: Department of the Army, DoD.

ACTION: Notice of open meeting.

SUMMARY: The Department of the Army is publishing this notice to announce the following Federal advisory committee meeting of the Western Hemisphere Institute for Security Cooperation (WHINSEC) Board of Visitors. This meeting is open to the public.

DATES: The WHINSEC Board of Visitors will meet from 9:00 a.m. to 4:00 p.m. on Thursday, November 29, 2018.

ADDRESSES: Western Hemisphere Institute for Security Cooperation, Bradley Hall, 7301 Baltzell Avenue, Building 396, Fort Benning, GA 31905.

FOR FURTHER INFORMATION CONTACT: Mr. Richard Procell, Acting Executive Secretary for the Committee, in writing at USACGSC, 100 Stimson Avenue, Fort Leavenworth, KS 66027–2301, by email at *richard.d.procell2.civ@mail.mil,* or by telephone at (913) 684–2963.

SUPPLEMENTARY INFORMATION: The committee meeting is being held under the provisions of the Federal Advisory Committee Act of 1972 (5 U.S.C., Appendix, as amended), the Government in the Sunshine Act of 1976 (5 U.S.C. 552b, as amended), 41 CFR 102–3.140(c), and 41 CFR 102–3.150.

Purpose of the Meeting: The Western Hemisphere Institute for Security Cooperation (WHINSEC) Board of Visitors (BoV) is a non-discretionary Federal Advisory Committee chartered to provide the Secretary of Defense, through the Secretary of the Army, independent advice and recommendations on matters pertaining to the curriculum, instruction, physical equipment, fiscal affairs, and academic methods of the institute; other matters relating to the institute that the board decides to consider; and other items that the Secretary of Defense determines appropriate. The board reviews curriculum to determine whether it adheres to current U.S. doctrine, complies with applicable U.S. laws and regulations, and is consistent with U.S. policy goals toward Latin America and the Caribbean. The board also determines whether the instruction under the curriculum of the institute appropriately emphasizes human rights, the rule of law, due process, civilian control of the military, and the role of the military in a democratic society. The Secretary of Defense may act on the committee's advice and recommendations.

Agenda: Status briefing from the institute's commandant; update briefings from the Office of the Under Secretary of Defense (Policy); Department of State; U.S. Northern Command; U.S. Southern Command; a public comments period; and presentation of other information appropriate to the board's interests.

Public Accessibility to the Meeting: Pursuant to 5 U.S.C. 552b, as amended, and 41 CFR 102–3.140 through 102–3.165, and subject to the availability of space, this meeting is open to the public. A 15-minute period between 9:30 to 9:45 will be available for verbal public comments. Seating is on a first to arrive basis. Attendees are requested to submit their name, affiliation, and daytime phone number seven business days prior to the meeting to Mr. Procell, via electronic mail, the preferred mode of submission, at the address listed in the **FOR FURTHER INFORMATION CONTACT** section. Because the meeting of the committee will be held in a Federal Government facility on a military base, security screening is required. A photo ID is required to enter base. Please note that security and gate guards have the right to inspect vehicles and persons seeking to enter and exit the installation. Bradley Hall is fully handicap accessible. Wheelchair access is available in front at the main entrance of the building. For additional information about public access procedures, contact Mr. Procell at the email address or telephone number listed in the **FOR FURTHER INFORMATION CONTACT** section.

Written Comments and Statements: Pursuant to 41 CFR 102–3.105(j) and 102–3.140 and section 10(a)(3) of the Federal Advisory Committee Act, the public or interested organizations may submit written comments or statements to the committee, in response to the stated agenda of the open meeting or in regard to the committee's mission in general. Written comments or statements should be submitted to Mr. Procell, via electronic mail, the preferred mode of submission, at the address listed in the **FOR FURTHER INFORMATION CONTACT** section. Each page of the comment or statement must include the author's name, title or affiliation, address, and daytime phone number. Written comments or statements being submitted in response to the agenda set forth in this notice must be received at least two business days prior to the meeting to be considered by the committee. The Designated Federal Officer will review all timely submitted written comments or statements with the committee chairperson, and ensure the comments are provided to all members of the committee before the meeting. Written comments or statements received after this date will be filed and presented to the committee during its next meeting.

Brenda S. Bowen,

Army Federal Register Liaison Officer.

[FR Doc. 2018–23542 Filed 10–26–18; 8:45 am]

BILLING CODE 5001–03–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID: DOD–2018–OS–0086]

Proposed Collection; Comment Request

AGENCY: Office of the Under Secretary of Defense for Acquisition and Sustainment, DoD.

ACTION: Information collection notice.

SUMMARY: In compliance with the *Paperwork Reduction Act of 1995,* the Defense Logistics Agency announces a proposed public information collection and seeks public comment on the provisions thereof. Comments are invited on: Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; the accuracy of the agency's estimate of the burden of the proposed information collection; ways to enhance the quality, utility, and clarity of the information to be collected; and ways to minimize the burden of the information collection on respondents, including through the use of automated collection techniques or other forms of information technology.

DATES: Consideration will be given to all comments received by December 28, 2018.

ADDRESSES: You may submit comments, identified by docket number and title, by any of the following methods:

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

Mail: Department of Defense, Office of the Chief Management Officer, Directorate for Oversight and Compliance, 4800 Mark Center Drive, Mailbox #24, Suite 08D09, Alexandria, VA 22350–1700.

Instructions: All submissions received must include the agency name, docket number and title for this **Federal**

Register document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: To request more information on this proposed information collection or to obtain a copy of the proposal and associated collection instruments, please write to Defense Logistics Agency Headquarters, ATTN: Mr. Steven Nace, J349, 8725 John J. Kingman Rd., Ft. Belvoir, VA 22060–6221; or call (571) 767–6582.

SUPPLEMENTARY INFORMATION:

Title; Associated Form; and OMB Number: End-Use Certificate; DLA Form 1822; OMB Control Number 0704–0382.

Needs and Uses: All individuals wishing to acquire DOD/Government property identified as U.S. Munitions List Items (MLI) or Commerce Control List Item (CCLI) must complete this form each time they enter into a transaction. It is used to clear recipients to ensure their eligibility to conduct business with the government. That they are not debarred bidders; Specially Designated Nationals (SDN) or Blocked Persons; have not violated U.S. export laws; will not divert the property to denied/sanctioned countries, unauthorized destinations or sell to debarred/Bidder Experience List firms or individuals. The EUC informs the recipients that when this property is to be exported, they must comply with the International Traffic in Arms Regulation (ITAR), 22 CFR 120 *et seq.;* Export Administration Regulations (EAR), 15 CFR 730 *et seq.;* Office of Foreign Asset Controls (OFAC), 31 CFR 500 *et seq.;* and the United States Customs Service rules and regulations.

Affected Public: Individuals or households; business or other for-profit; not-for-profit institutions.

Annual Burden Hours: 14,000.

Number of Respondents: 42,000.

Responses per Respondent: 1.

Annual Responses: 42,000.

Average Burden per Response: 20 minutes.

Frequency: On occasion.

Respondents are individuals/businesses/contractors who receive defense property identified as U.S. Munitions List Items and Commerce Control List Items through: Purchase, exchange/trade sale, authorized transfer or donation. They are checked to determine if they are responsible, not debarred bidders, Specially Designated Nationals or Blocked Persons, or have not violated U.S. export laws. The form is available on the DOD DEMIL/Trade Security Controls web page, DLA Disposition Services usable property sales web page, General Services Administration (GSA) auction web page, and Defense Contract Management Agency offices, FormFlow and ProForm.

Dated: October 24, 2018.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2018–23579 Filed 10–26–18; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Transmittal No. 18–35]

Arms Sales Notification

AGENCY: Defense Security Cooperation Agency, Department of Defense.

ACTION: Arms sales notice.

SUMMARY: The Department of Defense is publishing the unclassified text of a section 36(b)(1) arms sales notification.

FOR FURTHER INFORMATION CONTACT: DSCA at *dsca.ncr.lmo.mbx.info@mail.mil* or (703) 697–9709.

SUPPLEMENTARY INFORMATION: This 36(b)(1) arms sales notification is published to fulfill the requirements of section 155 of Public Law 104–164 dated July 21, 1996. The following is a copy of a letter to the Speaker of the House of Representatives, Transmittal 18–35 with attached Policy Justification and Sensitivity of Technology.

Dated: October 24, 2018.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

DEFENSE SECURITY COOPERATION AGENCY
201 12TH STREET SOUTH, STE 203
ARLINGTON, VA 22202-5408

SEP 1 3 2018

The Honorable Paul D. Ryan
Speaker of the House
U.S. House of Representatives
H-209, The Capitol
Washington, DC 20515

Dear Mr. Speaker:

Pursuant to the reporting requirements of Section 36(b)(1) of the Arms Export Control Act, as amended, we are forwarding herewith Transmittal No. 18-35, concerning the Army's proposed Letter(s) of Offer and Acceptance to the Republic of Korea for defense articles and services estimated to cost $501 million. After this letter is delivered to your office, we plan to issue a news release to notify the public of this proposed sale.

Sincerely,

Charles W. Hooper
Lieutenant General, USA
Director

Enclosures:
1. Transmittal
2. Policy Justification
3. Sensitivity of Technology

Transmittal No. 18–35

Notice of Proposed Issuance of Letter of Offer Pursuant to Section 36(b)(1) of the Arms Export Control Act, as amended

(i) *Prospective Purchaser:* Republic of Korea

(ii) *Total Estimated Value:*

Major Defense Equipment * ..	$365 million
Other	$136 million
TOTAL	$501 million

(iii) *Description and Quantity or Quantities of Articles or Services under Consideration for Purchase:*

Major Defense Equipment (MDE): Sixty-four (64) Patriot Advanced Capability–3 (PAC–3) Missile Segment Enhancement (MSE) Missiles

Non-MDE: Also included are two (2) PAC–MSE Test Missiles, range and test programs, publications and technical documentations, training equipment, spare parts, personnel training, U.S. Government and contractor technical, engineering, and logistics support services, and other related elements of logistics and program support.

(iv) *Military Department:* Army (KS–B–ZGT)

(v) *Prior Related Cases, if any:* None

(vi) *Sales Commission, Fee, etc., Paid, Offered, or Agreed to be Paid:* None

(vii) *Sensitivity of Technology Contained in the Defense Article or*

Defense Services Proposed to be Sold: See Annex Attached

(viii) *Date Report Delivered to Congress:* September 13, 2018

* As defined in Section 47(6) of the Arms Export Control Act.

POLICY JUSTIFICATION

Korea—Patriot Advanced Capabilitv–3 (PAC–3) Missile Segment Enhancement (MSE) Missiles

The Republic of Korea (ROK) has requested to buy sixty four (64) Patriot Advanced Capability-3 (PAC–3) Missile Segment Enhancement (MSE) Missiles. Also included are two (2) PAC–MSE Test Missiles, range and test programs, publications and technical documentations, training equipment, spare parts, personnel training, U.S. Government and contractor technical, engineering, and logistics support services, and other related elements of logistics and program support. The total estimated program cost is $501 million.

The ROK is one of the closest allies in the INDOPACOM Theater. The proposed sale will support U.S. foreign policy and national security objectives by meeting Korea's legitimate security and defense needs.

The ROK will use the Patriot missile system to improve its missile defense capability, defend its territorial integrity and deter threats to regional stability. The proposed sale will increase the defensive capabilities of the ROK Military to guard against hostile aggression and shield the allies who train and operate within South Korea's borders. The ROK should have no difficulty absorbing this system into its armed forces.

The proposed sale of this equipment and support does not alter the basic military balance in the region.

The prime contractor will be Lockheed-Martin, Dallas, Texas. There are no known offset agreements expected to be proposed in connection with this potential sale.

Implementation of this proposed sale will not require the assignment of any additional U.S. Government or contractor representatives to the Republic of Korea.

There will be no adverse impact on U.S. defense readiness as a result of this proposed sale.

Transmittal No. 18–35

Notice of Proposed Issuance of Letter of Offer Pursuant to Section 36(b)(1) of the Arms Export Control Act

Annex

Item No. vii

(vii) *Sensitivity of Technology:*

1. The Patriot Air Defense System contains classified CONFIDENTIAL hardware components, SECRET tactical software and critical/sensitive technology. The Patriot Advanced Capability-3 (PAC–3) Missile Segment Enhancement (MSE) hardware is classified CONFIDENTIAL and the associated launcher hardware is UNCLASSIFIED. With the incorporation of the PAC–3 MSE missiles, the Patriot system will continue to hold a significant technology lead over other surface-to-air missile systems in the world.

2. The PAC–3 MSE sensitive/critical technology is primarily in the area of design and production know-how and primarily inherent in the design, development and/or manufacturing data related to certain components.

3. Information on system performance capabilities, effectiveness, survivability, missile seeker capabilities, select software/software documentation and test data are classified up to and including SECRET.

4. If a technologically advanced adversary were to obtain knowledge of the specific hardware and software elements, the information could be used to develop countermeasures that might reduce weapon system effectiveness or be used in the development of a system with similar or advanced capabilities.

5. A determination has been made that the recipient government can provide substantially the same degree of protection for the technology being released as the U.S. Government. This sale supports the U.S. foreign policy and national security objectives as outlined in the Policy Justification.

6. All defense articles and services listed in this transmittal have been authorized for release and export to the ROK.

[FR Doc. 2018–23601 Filed 10–26–18; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID: DOD–2018–OS–0052]

Submission for OMB Review; Comment Request

AGENCY: Office of the Under Secretary of Defense for Personnel and Readiness, DoD.

ACTION: 30-Day information collection notice.

SUMMARY: The Department of Defense has submitted to OMB for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act.

DATES: Consideration will be given to all comments received by November 28, 2018.

ADDRESSES: Comments and recommendations on the proposed information collection should be emailed to Ms. Jasmeet Seehra, DoD Desk Officer, at *oira_submission@omb.eop.gov.* Please identify the proposed information collection by DoD Desk Officer, Docket ID number, and title of the information collection.

FOR FURTHER INFORMATION CONTACT: Fred Licari, 571–372–0493, or *whs.mc-alex.esd.mbx.dd-dod-information-collections@mail.mil.*

SUPPLEMENTARY INFORMATION:

Title; Associated Form; and OMB Number: Mandatory Disclosures as Part of Limitations on Terms of Consumer Credit Extended to Service Members and Dependents; OMB Control Number 0704–0444.

Type of Request: Reinstatement without Change.

Number of Respondents: 37,500.

Responses per Respondent: Varies by type of respondent.

Annual Responses: 238,000,000.

Average Burden per Response: 30 seconds.

Annual Burden Hours: 2,000,000.

Needs and Uses: With respect to any extension of consumer credit to a covered borrower, a creditor is required to provide to the borrower a statement of Military Annual Percentage Rate (MAPR). The required information would be included in standard account agreements. Additionally, a creditor may, at its discretion, identify the status of a consumer-applicant, as permitted under 32 CFR 232.5(b) of the final rule and, in the event that the information indicates that consumer-applicant is not a covered borrower, take advantage of a safe harbor from liability under 10 U.S.C. 987 by retaining a record of the information so obtained. This includes Military Annual Percentage Rate (MAPR) applicable to the extension of consumer credit, and the total dollar amount of all charges included in the MAPR.

Affected Public: Business or other for-profit.

Frequency: As required.

Respondent's Obligation: Mandatory.

OMB Desk Officer: Ms. Jasmeet Seehra.

You may also submit comments and recommendations, identified by Docket ID number and title, by the following method:

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

Instructions: All submissions received must include the agency name, Docket ID number, and title for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

DOD Clearance Officer: Mr. Frederick Licari.

Requests for copies of the information collection proposal should be sent to Mr. Licari at *whs.mc-alex.esd.mbx.dd-dod-information-collections@mail.mil.*

Dated: October 24, 2018.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2018–23588 Filed 10–26–18; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Department of the Navy

[Docket ID: USN–2018–HQ–0019]

Proposed Collection; Comment Request

AGENCY: The Office of the Secretary of the Navy, DoD.

ACTION: Information collection notice.

SUMMARY: In compliance with the *Paperwork Reduction Act of 1995,* the U.S. Navy Judge Advocate General's Corps announces a proposed public information collection and seeks public comment on the provisions thereof. Comments are invited on: Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; the accuracy of the agency's estimate of the burden of the proposed information collection; ways to enhance the quality, utility, and clarity of the information to be collected; and ways to minimize the burden of the information collection on respondents, including through the use of automated collection techniques or other forms of information technology.

DATES: Consideration will be given to all comments received by December 28, 2018.

ADDRESSES: You may submit comments, identified by docket number and title, by any of the following methods:

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

Mail: Department of Defense, Office of the Chief Management Officer, Directorate for Oversight and Compliance, 4800 Mark Center Drive, Mailbox #24 Suite 08D09, Alexandria, VA 22350–1700.

Instructions: All submissions received must include the agency name, docket number and title for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: To request more information on this proposed information collection or to obtain a copy of the proposal and associated collection instruments, please write to Office of the Judge Advocate General, ATTN: Special Assistant for Strategic Planning (SASP). 1322 Patterson Ave SE, Suite 3000, Washington Navy Yard, DC 20374–5066, or call SASP at 202–685–5185

SUPPLEMENTARY INFORMATION:

Title; Associated Form; and OMB Number: JAG Corps Student Program or Direct Accession Application and Internship/Externship Program Application; OPNAV 1070/3 Internship/Externship Program Application; OMB Control Number 0703–0059.

Needs and Uses: This information requirement is needed to determine the eligibility, competitive standing, and the scholastic and leadership potential of students and lawyers interested in the U.S. Navy Judge Advocate General's Corps (JAGC) Student Program or Direct Accession Application and Internship/Externship Program Application.

JAGC Student Program Direct Accession Application

Affected Public: Individuals or Households.
Annual Burden Hours: 1,600.
Number of Respondents: 800.
Responses per Respondent: 1.
Annual Responses: 800.
Average Burden per Response: 2 hours.
Frequency: Semi-Annually.

OPNAV 1070/3

Affected Public: Individuals or Households.
Annual Burden Hours: 100.
Number of Respondents: 100.
Responses per Respondent: 1.
Annual Responses: 100.
Average Burden per Response: 1 hour.
Frequency: Semi-Annually.

Structured Interviews

Affected Public: Individuals or Households.
Annual Burden Hours: 500.
Number of Respondents: 500.
Responses per Respondent: 1.
Annual Responses: 500.
Average Burden per Response: 1 hour.
Frequency: Semi-Annually.

Totals

Annual Burden Hours: 1,820 hours.
Total Number of Respondents: 1,400.
Total Responses per Respondent: 1.
Total Annual Responses: 1,400.
Average burden per Response: 1.3 hours.

The Student Program application is currently available two times a year; the Direct Accession application is available one time per year; the Internship application is available throughout the year for programs offered in the Summer, Fall and Spring. This online application is used to select applicants for either a voluntary internship position with a JAG Corps office or for a professional recommendation to commission in the JAG Corps. The application consists of an online form detailing academic and extracurricular achievement, professional experience if applicable, and supporting documentation.

Morgan E. Park,

Alternate OSD Federal Register, Liaison Officer, Department of Defense.

[FR Doc. 2018–23572 Filed 10–26–18; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF EDUCATION

National Assessment Governing Board

AGENCY: National Assessment Governing Board, U.S. Department of Education.

ACTION: Announcement of open and closed meetings.

SUMMARY: This notice sets forth the agenda for the November 15–17, 2018 Quarterly Board Meeting of the National Assessment Governing Board (hereafter referred to as Governing Board). This notice provides information to members of the public who may be interested in attending the meeting or providing written comments related to the work of the Governing Board. Notice of this meeting is required under the Federal Advisory Committee Act (FACA).

DATES: The Quarterly Board Meeting will be held on the following dates:

- November 15, 2018 from 2:00 p.m. to 6:00 p.m.
- November 16, 2018 from 8:30 a.m. to 5:30 p.m.

- November 17, 2018 from 7:30 a.m. to 12:00 p.m.

ADDRESSES: Washington Court Hotel, 525 New Jersey Avenue NW, Washington, DC 20001.

FOR FURTHER INFORMATION CONTACT: Munira Mwalimu, Executive Officer/Designated Federal Official for the Governing Board, 800 North Capitol Street NW, Suite 825, Washington, DC 20002, telephone: (202) 357–6938, fax: (202) 357–6945, email: *Munira.Mwalimu@ed.gov.*

SUPPLEMENTARY INFORMATION:

Statutory Authority and Function: The Governing Board is established under the National Assessment of Educational Progress Authorization Act, Title III of Public Law 107–279.

The Governing Board is established to formulate policy for the National Assessment of Educational Progress (NAEP). The Governing Board's responsibilities include the following: selecting subject areas to be assessed, developing assessment frameworks and specifications, developing appropriate student achievement levels for each grade and subject tested, developing standards and procedures for interstate and national comparisons, improving the form and use of NAEP, developing guidelines for reporting and disseminating results, and releasing initial NAEP results to the public.

November 15–17, 2018 Committee Meetings

The Governing Board's standing committees will meet to conduct regularly scheduled work based on agenda items planned for this Quarterly Board Meeting and follow-up items as reported in the Governing Board's committee meeting minutes available at *https://www.nagb.gov/governing-board/quarterly-board-meetings.html.*

Detailed Meeting Agenda: November 15–17, 2018

November 15: Committee Meetings

Ad Hoc Committee on Measures of Postsecondary Preparedness: Open Session: 2:00 p.m. to 4:00 p.m.

Executive Committee: Open Session: 4:30 p.m. to 4:35 p.m.; Closed Session 4:35 p.m. to 6:00 p.m.

November 16: Full Governing Board and Committee Meetings

Full Governing Board: Open Session: 8:30 a.m. to 10:15 a.m.; 2:45 p.m. to 4:45 p.m.; Closed Sessions: 12:45 p.m.–2:30 p.m.; 4:45 p.m. to 5:15 p.m.

Committee Meetings: 10:30 a.m. to 12:30 p.m.

Assessment Development Committee (ADC): Closed Session: 10:30 a.m.–11:05 a.m. Open Session: 11:05 a.m. to 12:30 p.m.

Reporting and Dissemination (R&D): Open Session 10:30 a.m. to 11:30 a.m.

Committee on Standards, Design and Methodology (COSDAM): Open Session: 10:30 a.m. to 11:30 a.m.;

Joint Committee Meetings: COSDAM and R&D: Open Session: 11:30 a.m. to 12:30 p.m.

November 17: Full Governing Board and Committee Meetings

Nominations Committee: Closed Session: 7:30 a.m. to 8:20 a.m.

Full Governing Board: Closed Session: 8:30 a.m. to 9:00 a.m.; Open Session: 9:00 a.m. to 11:00 a.m.; Closed Session: 11:00 a.m. to 12:00 p.m.

On Thursday, November 15, 2018, the Ad Hoc Committee on Measures of Postsecondary Preparedness will meet in open session from 2:00 p.m. to 4:00 p.m. The Executive Committee will convene in open session from 4:30 p.m. to 4:35 p.m. to review the committee agenda.

Thereafter, the Executive Committee will convene in closed session from 4:35 p.m. to 6:00 p.m. During the closed session, the Executive Committee will receive and discuss independent cost estimates and implications for implementing the Long-Term Trend assessment in 2021 and costs estimates to conduct assessments based on a draft revised NAEP Assessment Schedule extending to 2030. This meeting must be conducted in closed session because public disclosure of this information would likely have an adverse financial effect on the NAEP program by providing independent government cost estimates and proprietary contract costs of current NAEP contractors to the public. Discussion of this information would be likely to significantly impede implementation of a proposed agency action if conducted in open session. Such matters are protected by exemption 9(B) of section 552b of Title 5 U.S.C.

On Friday, November 16, 2018, the Governing Board will meet in open session from 8:30 a.m. to 10:15 a.m. From 8:30 a.m. to 9:30 a.m. the Governing Board will review and approve the November 15–17, 2018 quarterly meeting agenda and meeting minutes from the August 2018 Quarterly Board Meeting. The Governing Board Chair and new members of the Governing Board will provide remarks. Thereafter, the Secretary of Education, Betsy DeVos, will administer the oath of office to four new Governing Board members and a reappointed member, following which she will address the Governing Board. From 9:30 a.m. to 10:00 a.m. the Governing Board's Deputy Executive Director Lisa Stooksberry will provide an update on the Governing Board's work, followed by updates from the Institute of Education Sciences and NCES.

From 10:00 a.m. to 10:15 a.m., the standing committee chairs will provide a preview of the agenda items for the committee meetings. At 10:15 a.m., the Governing Board will recess for a 15 minute break. Thereafter, committee meetings will take place from 10:30 a.m. to 12:30 p.m.

The Committee on Standards, Design and Methodology and the Reporting and Dissemination Committee will meet in open sessions from 10:30 a.m. to 11:30 a.m. Thereafter, these committees will meet jointly in open session from 11:30 a.m. to 12:30 p.m.

The Assessment Development Committee will meet in closed session from 10:30 a.m. to 11:05 a.m. and thereafter in open session from 11:05 a.m. to 12:30 p.m. During the closed session, the Assessment Development Committee will review secure items on the Vocabulary Assessment in NAEP Reading. This meeting must be conducted in closed session because public disclosure of this information would likely have an adverse financial effect on the NAEP program by releasing test items that have not been disclosed to the public. Discussion of this information would be likely to significantly impede implementation of a proposed agency action if conducted in open session. Such matters are protected by exemption 9(B) of section 552b of Title 5 U.S.C.

Following the committee meetings, on Friday, November 16, 2018, the Governing Board will convene in closed session from 12:45 p.m. to 2:30 p.m. to discuss the NAEP Assessment Schedule and budget. This meeting must be conducted in closed session because discussions will involve reviewing independent government cost estimates for assessing various NAEP subjects on the assessment schedule. Public disclosure of the cost estimates would significantly impede implementation of the NAEP assessment program if conducted in open session. Such matters are protected by exemption 9(B) of § 552b(c) of Title 5 of the United States Code.

The Governing Board will take a 15 minute break and reconvene in open session from 2:45 p.m. to 4:45 p.m. The Governing Board will receive a briefing

from a panel on the history and context of the NAEP achievement levels. The Governing Board will then discuss the draft Governing Board Policy on Developing Student Achievement Levels for NAEP.

From 4:45 p.m. to 5:15 p.m. the Governing Board will meet in closed session to receive a confidential briefing on ethics from the Office of General Counsel. This meeting is closed because the discussions pertain solely to internal personnel rules and practices of an agency and information of a personal nature wherein disclosure would constitute a clearly unwarranted invasion of personal privacy. As such, the discussions are protected by exemptions 2 and 6 of § 552b(c) of Title 5 of the United States Code.

The November 16, 2018 session of the Governing Board meeting will adjourn at 5:15 p.m.

On Saturday, November 17, 2018, the Governing Board will convene in three closed sessions. During the first closed session, the Nominations Committee will meet from 7:30 a.m. to 8:20 a.m. to discuss and receive updates on nominations received for Governing Board vacancies for terms that begin on October 1, 2019. The Nominations Committee's discussions pertain solely to internal personnel rules and practices of an agency and information of a personal nature where disclosure would constitute a clearly unwarranted invasion of personal privacy. As such, the discussions are protected by exemptions 2 and 6 of § 552b(c) of Title 5 of the United States Code.

The second closed session on November 17, 2018 scheduled from 8:30 a.m. to 9:00 a.m. is to receive a briefing from Terry Mazany, Chair of the Search Committee for the Executive Director, on the status of the search process with a proposed timeline for the search. These discussions pertain solely to internal personnel rules and practices of an agency and information of a personal nature where disclosure would constitute a clearly unwarranted invasion of personal privacy. As such, the discussions are protected by exemptions 2 and 6 of § 552b(c) of Title 5 of the United States Code.

Following these closed sessions, the Governing Board will meet in open session from 9:00 a.m. to 11:00 a.m. From 9:00 a.m. to 10:15 a.m., the Governing Board will receive a final report from the Chair of the Ad Hoc Committee Terry Mazany on recommendations made by the Ad Hoc Committee on Measures of Postsecondary Preparedness.

Following a 15 minute break, the Governing Board will receive reports from its standing committees from 10:30 a.m. to 11:00 a.m. Action items for Governing Board consideration include the Governing Board Policy on Developing Student Achievement Levels for NAEP and a proposed Release Plan for the 2018 NAEP Technology and Engineering Literacy Assessment.

From 11:00 a.m. to 12:00 p.m. the Governing Board will meet in its third closed session of the day to receive a briefing on the 2017 NAEP Writing Assessment. This meeting must be conducted in closed session because the assessment test items and data are secure and have not been released to the public. Public disclosure of the secure test items and data would significantly impede implementation of the NAEP assessment program if conducted in open session. Such matters are protected by exemption 9(B) of § 552b(c) of Title 5 of the United States Code.

The November 17, 2018 session of the Governing Board meeting will adjourn at 12:00 p.m.

Access to Records of the Meeting: Pursuant to FACA requirements, the public may also inspect the meeting materials at *www.nagb.gov* beginning on Thursday, November 15, 2018, by 10:00 a.m. EST. The official verbatim transcripts of the public meeting sessions will be available for public inspection no later than 30 calendar days following the meeting.

Reasonable Accommodations: The meeting site is accessible to individuals with disabilities. If you will need an auxiliary aid or service to participate in the meeting (*e.g.,* interpreting service, assistive listening device, or materials in an alternate format), notify the contact person listed in this notice no later than 21 days prior to the meeting.

Written comments may be submitted electronically or in hard copy to the attention of the Executive Officer/Designated Federal Official (see contact information noted above). Information on the Governing Board and its work can be found at *www.nagb.gov.*

Electronic Access to This Document: The official version of this document is the document published in the **Federal Register**. Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available via the Federal Digital System at: *www.gpo.gov/fdsys.* At this site you can view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Adobe Portable Document Format (PDF). To use PDF, you must have Adobe Acrobat Reader, which is available free at the Adobe website. You may also access documents of the Department published in the **Federal Register** by using the article search feature at: *www.federalregister.gov.* Specifically, through the advanced search feature at this site, you can limit your search to documents published by the Department.

Authority: Pub. L. 107–279, Title III—National Assessment of Educational Progress § 301.

Dated: October 22, 2018.

Lisa Stooksberry,

Deputy Executive Director, National Assessment Governing Board (NAGB), U. S. Department of Education.

[FR Doc. 2018–23495 Filed 10–26–18; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

[Docket No.: ED–2018–ICCD–0113]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Comment Request; Middle Grades Longitudinal Study of 2017–18 (MGLS:2017) Main Study First Follow-Up (MS2) Tracking and Recruitment Revision and Operational Field Test Second Follow-Up (OFT3)

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 November 28, 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–0113. 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, 550 12th Street SW, PCP, Room 9089, Washington, DC 20202–0023.

FOR FURTHER INFORMATION CONTACT: For specific questions related to collection

activities, please contact Kashka Kubzdela, 202–245–7377 or email *NCES.Information.Collections@ed.gov.*

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: Middle Grades Longitudinal Study of 2017–18 (MGLS:2017) Main Study First Follow-Up (MS2) Tracking and Recruitment Revision and Operational Field Test Second Follow-Up (OFT3).

OMB Control Number: 1850–0911.

Type of Review: A revision of an existing information collection.

Respondents/Affected Public: Individuals or Households.

Total Estimated Number of Annual Responses: 20,113.

Total Estimated Number of Annual Burden Hours: 10,891.

Abstract: The Middle Grades Longitudinal Study of 2017–18 (MGLS:2017) is the first study conducted by the National Center for Education Statistics (NCES) to follow a nationally representative sample of students as they enter and move through the middle grades (grades 6–8). The data collected through repeated measures of key constructs will provide a rich descriptive picture of the academic experiences and development of students during these critical years and will allow researchers to examine associations between contextual factors and student outcomes. The study focuses on student achievement in mathematics and literacy along with measures of student socioemotional wellbeing and other outcomes. The study includes students with disabilities for whom descriptive information on their outcomes, educational experiences, and special education services are being collected. In preparation for the Main Study (MS), the data collection instruments and procedures were field tested. An Item Validation Field Test (IVFT) was conducted from January through May 2016 to determine the psychometric properties of assessment and survey items and the predictive potential of items so that valid, reliable, and useful assessment and survey instruments could be developed for the Main Study. The MGLS:2017 Operational Field Test (OFT) Base Year (OFT1) data collection was conducted from January through May 2017 to test the near-final instruments and recruitment and data collection procedures and materials in preparation for the MGLS:2017 Main Study Base Year (MS1). The MS1 data collection took place from January to August 2018, and the OFT First Follow-up (OFT2) data collections from February to May 2018. OFT2 was conducted primarily to obtain information on recruiting, particularly for students in three focal IDEA-defined disability groups: Specific learning disability, autism, and emotional disturbance; obtain a tracking sample that can be used to study mobility patterns in subsequent years; and test protocols, items, and administrative procedures. Originally, NCES planned for MGLS:2017 to conduct annual main study follow-up data collections first beginning in January 2019 and next beginning in January 2020, when most of the students in the sample will be in grades 7 and 8, respectively. In September 2018, OMB approved NCES's request (OMB# 1850–0911 v.20) to revise the study design due to lower than expected response rates experienced in the sixth grade data collection and to: (1) Drop the originally planned seventh grade round of data collection and conduct the Main Study First Follow-up (MS2) data collection in January–July 2020 (when most sample students will be in the eighth grade), (2) notify participating districts and schools of this change in data collection schedule, (3) discontinue the procedures designed to oversample students in specific IDEA-defined disability groups, and (4) conduct MS2 and OFT Second Follow-up (OFT3) tracking activities. This request is to further modify the study design for MS2 to augment the sample with additional schools to achieve about 776 participating schools in MS2.

Dated: October 24, 2018.

Tomakie Washington,

Acting Director, Information Collection Clearance Division, Office of the Chief Privacy Officer, Office of Management.

[FR Doc. 2018–23551 Filed 10–26–18; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

[Docket No. ED–2018–ICCD–0112]

Agency Information Collection Activities; Comment Request; Educational Quality Through Innovative Partnerships (EQUIP) Experimental Sites Initiative

AGENCY: Federal Student Aid (FSA), 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 December 28, 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–0112. 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, 550 12th Street SW, PCP, Room 9086, Washington, DC 20202–0023.

FOR FURTHER INFORMATION CONTACT: For specific questions related to collection activities, please contact Beth Grebeldinger, 202–377–4018.

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: Educational Quality through Innovative Partnerships (EQUIP) Experimental Sites Initiative.

OMB Control Number: 1845–0140.

Type of Review: An extension of an existing information collection.

Respondents/Affected Public: State, Local, and Tribal Governments; Private Sector.

Total Estimated Number of Annual Responses: 60.

Total Estimated Number of Annual Burden Hours: 4,800.

Abstract: The Department of Education (the Department) is requesting an extension without change to this information collection package to provide for a series of questions that are components of the selection process for a new Federal Student Aid experimental site project. The Educational Quality through Innovative Partnerships (EQUIP) project was undertaken in order to advance the Department's understanding of how to best increase access to high quality innovative programs in higher education. An invitation to participate and an explanation of this proposed experimental site would be published separately in the **Federal Register**. This experimental site project is designed to explore ways to increase access for low-income students to high-quality innovate programs in higher education through the engagement of institutions of higher education (IHEs) with non-IHE providers and quality assurance entities that can develop new quality assurance processes for student and taxpayer protection. The data and information collected can provide valuable guidance for the Department in determining future policy in these areas.

Dated: October 23, 2018.

Kate Mullan,

Acting Director, Information Collection Clearance Division, Office of the Chief Privacy Officer, Office of Management.

[FR Doc. 2018–23494 Filed 10–26–18; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

[FE Docket No. 18–145–LNG]

Energía Costa Azul S. de R.L. de C.V; Application for Long-Term, Multi-Contract Authorization To Export Natural Gas to Mexico and To Export Liquefied Natural Gas to Non-Free Trade Agreement Nations

AGENCY: Office of Fossil Energy, DOE.

ACTION: Notice of application.

SUMMARY: The Office of Fossil Energy (FE) of the Department of Energy (DOE) gives notice of receipt of an application (Application), filed on September 27, 2018, by Energía Costa Azul S. de R.L. de C.V (Energía Costa Azul), a subsidiary of Infrastructura Energetica Nova, S.A.B. de C.V. (IEnova) and IEnova's subsidiaries. A majority of the ownership interests in IEnova (66.43%) is held by indirect, wholly-owned subsidiaries of Sempra Energy, a publicly traded California corporation. The Application requests long-term, multi-contract authorization to export domestically produced natural gas to Mexico in a volume up to 545 billion cubic feet (Bcf) per year (Bcf/yr) (1.5 Bcf per day), and to re-export a portion of this natural gas as liquefied natural gas (LNG) in a volume equivalent to 475 Bcf/yr of natural gas (1.3 Bcf per day). Energía Costa Azul seeks to export this LNG from the proposed Energía Costa Azul Large-Scale Project, which consists of certain liquefaction and export terminal facilities located on the site of Energía Costa Azul's existing LNG import terminal north of Ensenada, Baja California, Mexico. The volumes for which Energía Costa Azul seeks authorization in this Application would be additive to the volumes for which Energía Costa Azul seeks authorization in its application in FE Docket No. 18–144–LNG. Energía Costa Azul requests authorization to export this; LNG to: (i) Countries with which the United States has entered into a free trade agreement (FTA) requiring national treatment for trade in natural gas (FTA countries) and (ii) any other countries with which trade is not prohibited by U.S. law or policy (non-FTA countries). Energía Costa Azul seeks to export the requested volume of natural gas and the requested volume of LNG on its own behalf and as agent for other entities who hold title to the natural gas at the time of export. Energía Costa Azul requests the authorization for a 20-year term to commence on the earlier of the date of first export or seven years from the issuance of the requested authorization. Energía Costa Azul further requests authorization to continue exporting for a total of three years following the end of the 20-year authorization term requested herein, solely to export any volumes that it is unable to export during the 20-year authorization term (Make-Up Volumes). Energía Costa Azul filed the Application under section 3 of the Natural Gas Act (NGA). Additional details and related procedural history can be found in Energía Costa Azul's Application, posted on the DOE/FE website at: *https://www.energy.gov/fe/downloads/energ-costa-azul-s-de-rl-de-cv-dkt-no-18-145-lng.* Protests, motions to intervene, notices of intervention, and written comments are invited.

DATES: Protests, motions to intervene or notices of intervention, as applicable, requests for additional procedures, and written comments are to be filed using procedures detailed in the Public Comment Procedures section no later than 4:30 p.m., Eastern time, December 28, 2018.

ADDRESSES:

Electronic Filing by email: fergas@hq.doe.gov.

Regular Mail: U.S. Department of Energy (FE–34), Office of Regulation, Analysis, and Engagement, Office of Fossil Energy, P.O. Box 44375, Washington, DC 20026–4375.

Hand Delivery or Private Delivery Services (e.g., FedEx, UPS, etc.): U.S. Department of Energy (FE–34), Office of Regulation, Analysis, and Engagement, Office of Fossil Energy, Forrestal Building, Room 3E–042, 1000 Independence Avenue SW, Washington, DC 20585.

FOR FURTHER INFORMATION CONTACT: Benjamin Nussdorf or Larine Moore, U.S. Department of Energy (FE–34), Office of Regulation, Analysis, and Engagement, Office of Fossil Energy, Forrestal Building, Room 3E–042, 1000 Independence Avenue SW, Washington, DC 20585, (202) 586–7970; (202) 586–9478. Cassandra Bernstein or Ronald (R.J.) Colwell, U.S. Department of Energy (GC–76), Office of the Assistant General Counsel for Electricity and Fossil Energy, Forrestal Building, 1000 Independence Avenue SW, Washington,

DC 20585, (202) 586–9793; (202) 586–8499.

SUPPLEMENTARY INFORMATION:

DOE/FE Evaluation

In the Application, Energía Costa Azul requests authorization to export LNG from the proposed Energía Costa Azul liquefaction and export terminal facilities to both FTA countries and non-FTA countries. This Notice applies only to the portion of the Application requesting authority to export LNG to non-FTA countries pursuant to section 3(a) of the NGA, 15 U.S.C. 717b(a). DOE/FE will review Energía Costa Azul's request for a FTA export authorization separately pursuant to section 3(c) of the NGA, 15 U.S.C. 717b(c).

In reviewing Energía Costa Azul's request for a non-FTA authorization, DOE will consider any issues required by law or policy. DOE will consider domestic need for the natural gas, as well as any other issues determined to be appropriate, including whether the arrangement is consistent with DOE's policy of promoting competition in the marketplace by allowing commercial parties to freely negotiate their own trade arrangements. As part of this analysis, DOE will consider one or more of the following studies examining the cumulative impacts of exporting domestically produced LNG:

- *Effect of Increased Levels of Liquefied Natural Gas on U.S. Energy Markets,* conducted by the U.S. Energy Information Administration upon DOE's request (2014 EIA LNG Export Study); [1]
- *The Macroeconomic Impact of Increasing U.S. LNG Exports,* conducted jointly by the Center for Energy Studies at Rice University's Baker Institute for Public Policy and Oxford Economics, on behalf of DOE (2015 LNG Export Study); [2] and
- *Macroeconomic Outcomes of Market Determined Levels of U.S. LNG Exports,* conducted by NERA Economic Consulting on behalf of DOE (2018 LNG Export Study).[3]

Additionally, DOE will consider the following environmental documents:

- *Addendum to Environmental Review Documents Concerning Exports of Natural Gas From the United States,* 79 FR 48132 (Aug. 15, 2014); [4] and
- *Life Cycle Greenhouse Gas Perspective on Exporting Liquefied Natural Gas from the United States,* 79 FR 32260 (June 4, 2014).[5]

Parties that may oppose this Application should address these issues and documents in their comments and/or protests, as well as other issues deemed relevant to the Application.

The National Environmental Policy Act (NEPA), 42 U.S.C. 4321 *et seq.,* requires DOE to give appropriate consideration to the environmental effects of its proposed decisions. No final decision will be issued in this proceeding until DOE has met its environmental responsibilities.

Public Comment Procedures

In response to this Notice, any person may file a protest, comments, or a motion to intervene or notice of intervention, as applicable. Interested parties will be provided 60 days from the date of publication of this Notice in which to submit comments, protests, motions to intervene, or notices of intervention.

Any person wishing to become a party to the proceeding must file a motion to intervene or notice of intervention. The filing of comments or a protest with respect to the Application will not serve to make the commenter or protestant a party to the proceeding, although protests and comments received from persons who are not parties will be considered in determining the appropriate action to be taken on the Application. All protests, comments, motions to intervene, or notices of intervention must meet the requirements specified by the regulations in 10 CFR part 590.

Filings may be submitted using one of the following methods: (1) Emailing the filing to *fergas@hq.doe.gov,* with FE Docket No. 18–145–LNG in the title line; (2) mailing an original and three paper copies of the filing to the Office of Regulation, Analysis, and Engagement at the address listed in **ADDRESSES**; or (3) hand delivering an original and three paper copies of the filing to the Office of Regulation, Analysis, and Engagement at the address listed in **ADDRESSES**. All filings must include a reference to FE Docket No. 18–145–LNG. PLEASE NOTE: If submitting a filing via email, please include all related documents and attachments (*e.g.,* exhibits) in the original email correspondence. Please do not include any active hyperlinks or password protection in any of the documents or attachments related to the filing. All electronic filings submitted to DOE must follow these guidelines to ensure that all documents are filed in a timely manner. Any hardcopy filing submitted greater in length than 50 pages must also include, at the time of the filing, a digital copy on disk of the entire submission.

A decisional record on the Application will be developed through responses to this Notice by parties, including the parties' written comments and replies thereto. Additional procedures will be used as necessary to achieve a complete understanding of the facts and issues. If an additional procedure is scheduled, notice will be provided to all parties. If no party requests additional procedures, a final Opinion and Order may be issued based on the official record, including the Application and responses filed by parties pursuant to this notice, in accordance with 10 CFR 590.316.

The Application is available for inspection and copying in the Office of Regulation, Analysis, and Engagement docket room, Room 3E–042, 1000 Independence Avenue SW, Washington, DC 20585. The docket room is open between the hours of 8:00 a.m. and 4:30 p.m., Monday through Friday, except Federal holidays. The Application and any filed protests, motions to intervene or notice of interventions, and comments will also be available electronically by going to the following DOE/FE Web address: *http://www.fe.doe.gov/programs/gasregulation/index.html.*

Signed in Washington, DC, on October 23, 2018.

Amy Sweeney,

Director, Division of Natural Gas Regulation.

[FR Doc. 2018–23471 Filed 10–26–18; 8:45 am]

BILLING CODE 6450–01–P

[1] The 2014 EIA LNG Export Study, published on Oct. 29, 2014, is available at: *https://www.eia.gov/analysis/requests/fe/.*

[2] The 2015 LNG Export Study, dated Oct. 29, 2015, is available at: *http://energy.gov/sites/prod/files/2015/12/f27/20151113_macro_impact_of_lng_exports_0.pdf.*

[3] The 2018 LNG Export Study, dated June 7, 2018, is available at: *https://www.energy.gov/sites/prod/files/2018/06/f52/Macroeconomic%20LNG%20Export%20Study%202018.pdf.* DOE is currently evaluating public comments received on this Study (83 FR 27314).

[4] The Addendum and related documents are available at: *https://www.energy.gov/sites/prod/files/2014/08/f18/Addendum.pdf.*

[5] The Life Cycle Greenhouse Gas Report is available at: *http://energy.gov/fe/life-cycle-greenhouse-gas-perspective-exporting-liquefied-natural-gas-united-states.*

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER19–158–000]

Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization; Ambit Northeast, LLC

This is a supplemental notice in the above-referenced proceeding of Ambit Northeast, LLC's application for market-

based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is November 13, 2018.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 5 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426.

The filings in the above-referenced proceeding are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for electronic review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the 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.

Dated: October 23, 2018.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2018–23533 Filed 10–26–18; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings

Take notice that the Commission has received the following Natural Gas Pipeline Rate and Refund Report filings:

Filings Instituting Proceedings

Docket Numbers: RP19–108–000.

Applicants: Texas Eastern Transmission, LP.

Description: § 4(d) Rate Filing: Negotiated Rate—Conoco 911441 to be effective 11/1/2018.

Filed Date: 10/22/18.

Accession Number: 20181022–5053.

Comments Due: 5 p.m. ET 11/5/18.

Docket Numbers: RP19–109–000.

Applicants: Eastern Shore Natural Gas Company.

Description: Compliance filing Negotiated Rate and Non-Conforming-Calpine to be effective 11/1/2018.

Filed Date: 10/22/18.

Accession Number: 20181022–5196.

Comments Due: 5 p.m. ET 11/5/18.

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: October 23, 2018.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2018–23534 Filed 10–26–18; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 5089–026]

Notice of Intent To File License Application, Filing of Pre-Application Document, Approving Use of the Traditional Licensing Process: Fall River Rural Electric Cooperative, Inc.

a. *Type of Filing:* Notice of Intent to File License Application and Request to Use the Traditional Licensing Process.

b. *Project No.:* 5089–026.

c. *Date Filed:* August 31, 2018.

d. *Submitted By:* Fall River Rural Electric Cooperative, Inc.

e. *Name of Project:* Felt Hydroelectric Project.

f. *Location:* On the Teton River, in Teton County, Idaho. The project occupies 50.2 acres of United States lands administered by the U.S. Bureau of Land Management.

g. *Filed Pursuant to:* 18 CFR 5.3 of the Commission's regulations.

h. *Potential Applicant Contact:* Dave Peterson, Fall River Rural Electric Cooperative, Inc., 1150N 3400E, Ashton, ID 83420; (208) 652–7431; email—*dave.peterson@fallriverelectric.com.*

i. *FERC Contact:* John Matkowski at (202) 502–8576; or email at *john.matkowski@ferc.gov.*

j. Fall River Rural Electric Cooperative, Inc. (Fall River) filed its request to use the Traditional Licensing Process on August 31, 2018. Fall River provided public notice of its request on September 6, 2018. In a letter dated October 23, 2018, the Director of the Division of Hydropower Licensing approved Fall River's request to use the Traditional Licensing Process.

k. With this notice, we are initiating informal consultation with the U.S. Fish and Wildlife Service under section 7 of the Endangered Species Act and the joint agency regulations thereunder at 50 CFR, Part 402. We are also initiating consultation with the Idaho State Historic Preservation Officer, as required by section 106, National Historic Preservation Act, and the implementing regulations of the Advisory Council on Historic Preservation at 36 CFR 800.2.

l. Fall River filed a Pre-Application Document (PAD; including a proposed process plan and schedule) with the Commission, pursuant to 18 CFR 5.6 of the Commission's regulations.

m. A copy of the PAD is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's website (*http://www.ferc.gov*), using the ''eLibrary''

link. Enter the docket number, excluding the last three digits in the docket number field to access the document. For assistance, contact FERC Online Support at *FERCOnlineSupport@ferc.gov,* (866) 208–3676 (toll free), or (202) 502–8659 (TTY). A copy is also available for inspection and reproduction at the address in paragraph h.

n. The licensee states its unequivocal intent to submit an application for a new license for Project No. 5089. Pursuant to 18 CFR 16.8, 16.9, and 16.10 each application for a new license and any competing license applications must be filed with the Commission at least 24 months prior to the expiration of the existing license. All applications for license for this project must be filed by August 31, 2021.

o. Register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via email of new filing and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

Dated: October 23, 2018.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2018–23530 Filed 10–26–18; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP19–5–000]

Notice of Request Under Blanket Authorization: Perryville Gas Storage LLC

Take notice that on October 5, 2018, Perryville Gas Storage LLC (Perryville), Three Riverway, Suite 1250, Houston, Texas 77056, filed a prior notice application pursuant to section 213(b) of the Federal Energy Regulatory Commission's (Commission) regulations under the Natural Gas Act (NGA), and Perryville's blanket certificate issued in Docket No. CP09–418–000. Perryville requests authorization to reclassify certain quantities of working gas as base gas at Perryville's natural gas storage facility in Franklin and Richland Parishes, Louisiana, all as more fully set forth in the application, which is open to the public for 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, contact FERC at *FERCOnlineSupport@ferc.gov* or call toll-free, (866) 208–3676 or TTY, (202) 502–8659.

Any questions regarding this application should be directed to Debbie Caperton, Director, Reservoir Engineering and Geology, Perryville Gas Storage Company, LLC, Three Riverway, Suite 1250, Houston, Texas 77056, or phone (713) 350–2529, or by email *Debbie.caperton@cardinalgs.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 final environmental impact statement (FEIS) or EA for this proposal. The filing of the EA in the Commission's public record for this proceeding or the issuance of a Notice of Schedule for Environmental Review will serve to notify federal and state agencies of the timing for the completion of all necessary reviews, and the subsequent need to complete all federal authorizations within 90 days of the date of issuance of the Commission staff's FEIS or EA.

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 commenter 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 5 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426.

Dated: October 23, 2018.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2018–23529 Filed 10–26–18; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

October 23, 2018.

Take notice that the Commission received the following exempt wholesale generator filings:

Docket Numbers: EG19–13–000.

Applicants: Gateway Energy Storage, LLC.

Description: Notice of Self-Certification of Exempt Wholesale Generator Status.

Filed Date: 10/23/18.

Accession Number: 20181023–5241.

Comments Due: 5 p.m. ET 11/13/18.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER18–2340–001.

Applicants: Midcontinent Independent System Operator, Inc.

Description: Tariff Amendment: 2018–10–23_SA 3153 Crescent Wind-METC GIA (J538) Substitute Original to be effective 8/15/2018.

Filed Date: 10/23/18.

Accession Number: 20181023–5064.

Comments Due: 5 p.m. ET 11/13/18.

Docket Numbers: ER19–156–000.

Applicants: Duke Energy Progress, LLC.

Description: § 205(d) Rate Filing: DEP As-Available Capacity Agreement Concurrence Filing to be effective 12/22/2018.

Filed Date: 10/22/18.

Accession Number: 20181022–5145.
Comments Due: 5 p.m. ET 11/13/18.

Docket Numbers: ER19–157–000.
Applicants: Midcontinent Independent System Operator, Inc.
Description: § 205(d) Rate Filing: 2018–10–22_SA 3181 Glaciers Edge-MidAmerican GIA (J506) to be effective 10/8/2018.
Filed Date: 10/22/18.
Accession Number: 20181022–5147.
Comments Due: 5 p.m. ET 11/13/18.

Docket Numbers: ER19–158–000.
Applicants: Ambit Northeast, LLC.
Description: Baseline eTariff Filing: Ambit Northeast LLC MBR Application to be effective 10/22/2018.
Filed Date: 10/22/18.
Accession Number: 20181022–5198.
Comments Due: 5 p.m. ET 11/13/18.

Docket Numbers: ER19–159–000.
Applicants: Southwestern Electric Power Company.
Description: § 205(d) Rate Filing: ETEC and NTEC PSA to be effective 5/31/2018.
Filed Date: 10/23/18.
Accession Number: 20181023–5087.
Comments Due: 5 p.m. ET 11/13/18.

Docket Numbers: ER19–160–000.
Applicants: PJM Interconnection, L.L.C.
Description: § 205(d) Rate Filing: Clean-up to OATT, Schedule 1A to add language previously accepted by FERC to be effective 1/1/2018.
Filed Date: 10/23/18.
Accession Number: 20181023–5203.
Comments Due: 5 p.m. ET 11/13/18.

Docket Numbers: ER19–161–000.
Applicants: ISO New England Inc., New England Power Pool Participants Committee.
Description: § 205(d) Rate Filing: Revisions to Permit Ex-Post Refund of Cluster Participation Deposits to be effective 12/23/2018.
Filed Date: 10/23/18.
Accession Number: 20181023–5216.
Comments Due: 5 p.m. ET 11/13/18.

Docket Numbers: ER19–162–000.
Applicants: Midcontinent Independent System Operator, Inc., ALLETE, Inc.
Description: § 205(d) Rate Filing: 2018–10–23_SA 3191 MP–GRE T–L IA (Tower Frazer) to be effective 10/24/2018.
Filed Date: 10/23/18.
Accession Number: 20181023–5235.
Comments Due: 5 p.m. ET 11/13/18.

Docket Numbers: ER19–163–000.
Applicants: AEP Texas Inc.
Description: § 205(d) Rate Filing: AEPTX-Cranell Wind Farm Interconnection Agreement to be effective 10/12/2018.
Filed Date: 10/23/18.
Accession Number: 20181023–5254.
Comments Due: 5 p.m. ET 11/13/18.

Docket Numbers: ER19–164–000.
Applicants: Southwest Power Pool, Inc.
Description: § 205(d) Rate Filing: Midwest Energy Depreciation Rates to be effective 1/1/2019.
Filed Date: 10/23/18.
Accession Number: 20181023–5259.
Comments Due: 5 p.m. ET 11/13/18.

Docket Numbers: ER19–165–000.
Applicants: Southwestern Electric Power Company.
Description: § 205(d) Rate Filing: ETEC and NTEC PSA to be effective 5/31/2018.
Filed Date: 10/23/18.
Accession Number: 20181023–5269.
Comments Due: 5 p.m. ET 11/13/18.

Docket Numbers: ER19–166–000.
Applicants: Southwest Power Pool, Inc.
Description: § 205(d) Rate Filing: Tariff Revisions to Accelerate the Process for Frequently Constrained Areas to be effective 12/22/2018.
Filed Date: 10/23/18.
Accession Number: 20181023–5271.
Comments Due: 5 p.m. ET 11/13/18.

Docket Numbers: ER19–167–000.
Applicants: AEP Texas Inc.
Description: § 205(d) Rate Filing: AEPTX-Chapman Ranch Wind I System Upgrade Agreement Cancellation to be effective 10/10/2018.
Filed Date: 10/23/18.
Accession Number: 20181023–5272.
Comments Due: 5 p.m. ET 11/13/18.

Take notice that the Commission received the following electric securities filings:

Docket Numbers: ES19–1–000.
Applicants: Kansas City Power & Light Company, KCP&L Greater Missouri Operations Company, Kansas Gas and Electric Company, Westar Energy, Inc.
Description: Errata to October 3, 2018 Joint Application for Authorization Under FPA Section 204 to Issue Short-Term Debt Securities of Kansas City Power & Light Company, et al.
Filed Date: 10/9/18.
Accession Number: 20181009–5295.
Comments Due: 5 p.m. ET 10/24/18.

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: October 23, 2018.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2018–23531 Filed 10–26–18; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPPT–2017–0648; FRL–9985–66–OEI]

Information Collection Request Submitted to OMB for Review and Approval; Comment Request; Chemical Data Reporting Under the Toxic Substances Control Act (TSCA Section 8(a)) (Renewal)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The Environmental Protection Agency (EPA) has submitted the following information collection request (ICR) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act (PRA): Chemical Data Reporting under the Toxic Substances Control Act (TSCA section 8(a)), identified by EPA ICR No. 1884.10 and OMB Control No. 2070–0162. This is a request to renew the approval of an existing ICR that is currently scheduled to expire on October 31, 2018. The ICR, which is available in the docket along with other related materials, provides a detailed explanation of the collection activities and the burden estimate that is only briefly summarized in this document. Comments received in response to the previously provided 60-day public review opportunity are also in the docket and have been addressed in the ICR. With this submission, EPA is providing an additional 30 days for public review and comment.

DATES: Comments must be submitted on or before November 28, 2018.

ADDRESSES: Submit your comments, identified by docket identification (ID) number EPA–HQ–OPPT–2017–0648 and OMB Control No. 2070–0162, to both EPA and OMB as follows:

• To EPA online using *http://www.regulations.gov* (our preferred method) or by mail to: EPA Docket Center, Environmental Protection Agency, Mail Code 28221T, 1200 Pennsylvania Ave. NW, Washington, DC 20460.

• To OMB via email to *oira_submission@omb.eop.gov.* Address comments to OMB Desk Officer for EPA.

EPA's policy is that all comments received will be included in the 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. Do not submit electronically any information you consider to be CBI or other information whose disclosure is restricted by statute.

FOR FURTHER INFORMATION CONTACT: Meredith Comnes, Chemical Control Division (7405M), Office of Pollution Prevention and Toxics, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001; telephone number: (202) 564–3193; email address: *comnes.meredith@epa.gov.*

SUPPLEMENTARY INFORMATION:

Docket: Supporting documents, including the ICR that explains in detail the information collection activities and the related burden and cost estimates that are summarized in this document, are available in the docket for this ICR. The docket can be viewed online at *http://www.regulations.gov* or in person at the EPA Docket Center, West William Jefferson Clinton Bldg., Rm. 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.*

ICR status: This ICR is currently scheduled to expire on October 31, 2018. EPA previously announced and provided a 60-day public review and comment opportunity on the proposed renewal of this ICR in the **Federal Register** of July 31, 2018 (83 FR 36928) (FRL–9980–28). EPA received three comments during the comment period that have been addressed in the ICR and copies of which are available in the docket.

Under OMB regulations, the Agency may continue to conduct or sponsor the collection of information while this submission is pending at OMB. Under PRA, 44 U.S.C. 3501 *et seq.,* an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information, unless it displays a currently valid OMB control number. The OMB control numbers are displayed either by publication in the **Federal Register** or by other appropriate means, such as on the related collection instrument or form, if applicable. The display of OMB control numbers for certain EPA regulations is consolidated in 40 CFR part 9.

Abstract: This ICR covers the information collection activities associated with the statutory mandate in the Toxic Substances Control Act (TSCA), as amended by the Frank R. Lautenberg Chemical Safety for the 21st Century Act of 2016, that requires EPA to compile and keep current a complete list of chemical substances manufactured (including imported) or processed in the United States. Through the Chemical Data Reporting (CDR) regulation in 40 CFR part 711, EPA collects basic exposure-related manufacturing, processing, and use information for a subset of these chemical substances every four years, which is used by the Agency and others in a wide range of activities. The data collected is used by EPA and others to better understand and interpret the state of U.S. chemical manufacturing, processing, and use, and further enhances EPA's ability to identify, evaluate, and manage potential chemical risks.

Respondents may claim information on the report confidential. EPA will disclose information that is covered by a claim of confidentiality only to the extent permitted by, and in accordance with, the procedures described in TSCA section 14 and 40 CFR part 2.

Form numbers: EPA Form No. 7740–8.

Respondents/affected entities: Entities potentially affected by this ICR are companies that manufacture (including import) chemical substances and mixtures in the United States.

Respondent's obligation to respond: Mandatory (see TSCA section 8(b) and EPA regulations at 40 CFR part 711).

Frequency of response: Reporting is required every four years.

Total estimated number of respondents: 5,662.

Total estimated burden: 716,024 hours (per year). Burden is defined at 5 CFR 1320.3(b).

Total estimated cost: $56,959,323 (per year), includes $0 annualized capital or operation and maintenance costs.

Changes in the estimates: There is a decrease of 73,179 hours in the total estimated burden compared with that approved by OMB. This decrease reflects a combination of program changes and adjustments. Program changes involve updated CBI substantiation requirements as a result of the 2016 amendments to TSCA (−4,877 hours); and adjustments involve methodology corrections (−184,158 hours) and an increase in the estimated number of respondents (+106,102 hours). The ICR provides a detailed analysis of the change in burden estimate.

Courtney Kerwin,

Director, Regulatory Support Division.

[FR Doc. 2018–23560 Filed 10–26–18; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–9985–89–OA]

Meetings of the Small Communities Advisory Subcommittee (SCAS) and the Local Government Advisory Committee (LGAC)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The Small Communities Advisory Subcommittee (SCAS) will meet via teleconference on Tuesday, November 14, 2018 at 4 p.m.–4:30 p.m. (ET). The Subcommittee will discuss recommendations regarding the Clean Water Act 2015 Waters of the United States Rule and per- and polyfluoroalkyl substances (PFAS) and the impacts to small communities. This is an open meeting and all interested persons are invited to participate. The Subcommittee will hear comments from the public between 4:15 p.m.–4:20 p.m. Individuals or organizations wishing to address the Subcommittee will be allowed a maximum of five minutes to present their point of view. Also, written comments should be submitted electronically to *Mercurio.Cristina@epa.gov.* Please contact the Designated Federal Officer (DFO) at (202) 564–6481 to schedule a time on the agenda. Time will be allotted on a first-come first-serve basis, and the total period for comments may be extended if the number of requests for presentations requires it.

ADDRESSES: EPA's Small Community Advisory Subcommittee meetings will be held via teleconference. Meeting summaries will be available after the meeting online at *https://www.epa.gov/ocir/small-community-advisory-subcommittee-scas* and can be obtained by written request to the DFO.

FOR FURTHER INFORMATION CONTACT: Small Community Advisory Subcommittee (SCAS) contact Cristina Mercurio at (202) 564–6481 or email at *Mercurio.Cristina@epa.gov.*

INFORMATION SERVICES FOR THOSE WITH DISABILITIES: For information on access or services for individuals with disabilities, please contact Cristina Mercurio at (202) 564–6481 or *Mercurio.Cristina@epa.gov.* To request accommodation of a disability, please request it 10 days prior to the meeting, to give EPA as much time as possible to process your request.

The Local Government Advisory Committee (LGAC) will meet via teleconference on Tuesday, November 14, 2018, 4:30 p.m.–5:30 p.m. (ET). The Committee will discuss recommendations of the subcommittee and LGAC workgroups on per- and polyfluoroalkyl substances (PFAS) and the Clean Water Act 2015 Waters of the United States Rule. This is an open meeting and all interested persons are invited to participate. The Committee will hear comments from the public between 5 p.m.–5:10 p.m. (ET). Individuals or organizations wishing to address the Committee will be allowed a maximum of five minutes to present their point of view. Also, written comments should be submitted electronically to *Eargle.Frances@epa.gov.* Please contact the Designated Federal Officer (DFO) at the number listed below to schedule a time on the agenda. Time will be allotted on a first-come first-serve basis, and the total period for comments may be extended if the number of requests for presentations requires it.

ADDRESSES: EPA's Local Government Advisory Committee meetings will be held via teleconference. Meeting summaries will be available after the meeting online at *www.epa.gov/ocir/scas_lgac/lgac_index.htm* and can be obtained by written request to the DFO.

FOR FURTHER INFORMATION CONTACT: Local Government Advisory Committee (LGAC) contact Frances Eargle at (202) 564–3115 or email at *Eargle.Frances@epa.gov.*

INFORMATION SERVICES FOR THOSE WITH DISABILITIES: For information on access or services for individuals with disabilities, please contact Frances Eargle at (202) 564–3115 or *Eargle.Frances@epa.gov.* To request accommodation of a disability, please request it 10 days prior to the meeting, to give EPA as much time as possible to process your request.

Dated: October 18, 2018.

M. Arnita Hannon Christmon,

Intergovernmental Liaison, Office of Congressional and Intergovernmental Relations.

[FR Doc. 2018–23573 Filed 10–26–18; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OLEM–2018–0392, FRL–9985–03–OEI]

Agency Information Collection Activities; Submission to OMB for Review and Approval; Comment Request; Requirements and Exemptions for Specific RCRA Wastes (Renewal)

AGENCY: Environmental Protection Agency.

ACTION: Notice.

SUMMARY: The Environmental Protection Agency (EPA) has submitted an information collection request (ICR), Requirements and Exemptions for Specific RCRA Wastes (EPA ICR Number 1597.13, OMB Control Number 2050–0145), to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act. This is a proposed extension of the ICR, which is currently approved through October 31, 2018. Public comments were previously requested via the **Federal Register** on July 3, 2018 during a 60-day comment period. This notice allows for an additional 30 days for public comments. A fuller description of the ICR is given below, including its estimated burden and cost to the public. An agency may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

DATES: Additional comments may be submitted on or before November 28, 2018.

ADDRESSES: Submit your comments, referencing Docket ID No. EPA–HQ–OLEM–2018–0392, FRL 9985–03–OEI, to (1) EPA, either online using *www.regulations.gov* (our preferred method), or by email to *rcra-docket@epa.gov,* or by mail to: RCRA Docket (2822T), U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue NW, Washington, DC 20460; and (2) OMB via email to *oira_submission@omb.eop.gov.* Address comments to OMB Desk Officer for EPA.

EPA's policy is that all comments received will be included in the public docket without change including any personal information provided, unless the comment includes profanity, threats, information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute.

FOR FURTHER INFORMATION CONTACT: Peggy Vyas, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460; telephone number: 703–308–5477; fax number: 703–308–8433; email address: *vyas.peggy@epa.gov.*

SUPPLEMENTARY INFORMATION: Supporting documents, which explain in detail the information that the EPA will be collecting, are available in the public docket for this ICR. The docket can be viewed online at *www.regulations.gov* or in person at the EPA Docket Center, WJC West, Room 3334, 1301 Constitution Ave. NW, Washington, DC. The telephone number for the Docket Center is 202–566–1744. For additional information about EPA's public docket, visit *http://www.epa.gov/dockets.*

Abstract: Universal Wastes, which include certain batteries, pesticides, mercury-containing lamps and thermostats, are generated in a variety of non-industrial settings present in non-hazardous waste management systems. Regulations at 40 CFR part 273, which govern the collection and management of Universal Wastes, are designed to ensure facilities collect these wastes and manage them in an appropriate hazardous waste management system. EPA collects notifications of Universal Waste management to obtain general information on handlers and to facilitate enforcement of the Part 273 regulations. EPA promulgated labeling and marking requirements and accumulation time limits to ensure that Universal Waste is being accumulated responsibly. EPA collects information on illegal Universal Waste shipments to enforce compliance with applicable regulations. Finally, EPA requires tracking of Universal Waste shipments to help ensure that Universal Waste is being properly treated, recycled, or disposed.

Regulations at 40 CFR part 266 provide increased flexibility to facilities managing wastes commonly known as ''Mixed Waste.'' Mixed Wastes are low-level mixed waste (LLMW) and naturally occurring and/or accelerator-produced radioactive material (NARM) containing hazardous waste, which are also regulated by the Atomic Energy Act. When specified eligibility criteria and conditions are met, LLMW and NARM are exempt from the definition of hazardous waste in Part 261. Although these wastes are exempt from RCRA manifest, transportation, and disposal requirements, facilities must still comply with the manifest, transportation, and disposal requirements under the Nuclear Regulatory Commission (NRC) regulations. Section 266.345(a) requires that generators or treaters notify EPA or the Authorized State that they are

claiming the Transportation and Disposal Conditional Exemption prior to the initial shipment of a waste to a LLRW disposal facility. This exemption notice provides a tool for RCRA program regulatory agencies to become aware of the generator's exemption claims. The information contained in the notification package provides the RCRA program regulatory agencies with a general understanding of the claimant. This information also allows the agencies to document the generator's exemption status and to plan inspections and review exemption-related records.

Regulations at 40 CFR part 279, which codify used oil management standards, establish, among other things, streamlined procedures for notification, testing, labeling, and recordkeeping. They also establish a flexible self-implementing approach for tracking off-site shipments that allow used oil handlers to use standard business practices (*e.g.,* invoices, bill of lading). In addition, part 279 sets standards for the prevention and cleanup of releases to the environment during storage and transit. These requirements minimize potential mismanagement of used oils, while not discouraging recycling. Used oil transporters must comply with all applicable packaging, labeling, and placarding requirements of 49 CFR parts 173, 178, and 179 and must report discharges of used oil according to existing 49 CFR part 171 and 33 CFR part 153 requirements.

Form numbers: None.

Respondents/affected entities: Private Sector and State, Local, or Tribal Governments.

Respondent's obligation to respond: Mandatory (40 CFR part 273), required to obtain or retain a benefit (40 CFR parts 266 and 279).

Estimated number of respondents: 141,038.

Frequency of response: On occasion.

Total estimated burden: 791,715 hours per year. Burden is defined at 5 CFR 1320.03(b).

Total estimated cost: $68,980,149 (per year), includes $14,161,065 annualized capital or operation & maintenance costs.

Changes in the estimates: There is an increase in the total estimated respondent burden compared with the ICR currently approved by OMB. This increase is an increase in the number of respondents.

Courtney Kerwin,

Director, Regulatory Support Division.

[FR Doc. 2018–23556 Filed 10–26–18; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OLEM–2018–0390, FRL–9985–04–OEI]

Agency Information Collection Activities; Submission to OMB for Review and Approval; Comment Request; Hazardous Waste Generator Standards (Renewal)

AGENCY: Environmental Protection Agency.

ACTION: Notice.

SUMMARY: The Environmental Protection Agency (EPA) has submitted an information collection request (ICR), Hazardous Waste Generator Standards (EPA ICR No. 0820.14, OMB Control No. 2050–0035), to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act. This is a proposed extension of the ICR, which is currently approved through October 31, 2018. Public comments were previously requested via the **Federal Register** on July 3, 2018 during a 60-day comment period. This notice allows for an additional 30 days for public comments. A fuller description of the ICR is given below, including its estimated burden and cost to the public. An agency may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

DATES: Additional comments may be submitted on or before November 28, 2018.

ADDRESSES: Submit your comments, referencing Docket ID No. EPA–HQ–OLEM–2018–0390, to (1) EPA, either online using *www.regulations.gov* (our preferred method), or by email to *rcra-docket@epa.gov,* or by mail to: RCRA Docket (2822T), U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue NW, Washington, DC 20460; and (2) OMB via email to *oira_submission@omb.eop.gov.* Address comments to OMB Desk Officer for EPA.

EPA's policy is that all comments received will be included in the public docket without change including any personal information provided, unless the comment includes profanity, threats, information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute.

FOR FURTHER INFORMATION CONTACT: Brian Knieser, Office of Resource Conservation and Recovery (mail code 5304P), Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460; telephone number: 703–347–8769; fax number: 703–308–0514; email address: *knieser.brian@epa.gov.*

SUPPLEMENTARY INFORMATION: Supporting documents, which explain in detail the information that the EPA will be collecting, are available in the public docket for this ICR. The docket can be viewed online at *www.regulations.gov* or in person at the EPA Docket Center, WJC West, Room 3334, 1301 Constitution Ave. NW, Washington, DC. The telephone number for the Docket Center is 202–566–1744. For additional information about EPA's public docket, visit *http://www.epa.gov/dockets.*

Abstract: In the Resource Conservation and Recovery Act of 1976 (RCRA), as amended, Congress authorized the Environmental Protection Agency (EPA) to develop and administer a national hazardous waste program. The core of the program is the regulation of hazardous waste from generation to eventual disposal, *i.e.,* from ''cradle to grave.'' Sections 3001(d) and 3002 of RCRA authorize EPA to develop and promulgate regulations for generators of hazardous waste. Among other things, EPA is authorized to establish generator standards for recordkeeping, labeling, storage of wastes, use of a hazardous waste manifest system, and biennial reporting to EPA. RCRA section 3017 sets forth requirements for exporters exporting hazardous waste from the United States (*e.g.,* notification and annual reporting requirements).

This ICR incorporates recordkeeping and reporting requirements defined in ICRs supporting two recently promulgated rules: The Hazardous Waste Generator Improvements rule of 2016 (OMB Control No. 2050–0213), and the Hazardous Waste Export-Import Revisions rule of 2016 (OMB Number 2050–0214). The Generator rule implemented a reorganization of the hazardous waste regulations. The Export-Import rule made all U.S. imports and exports of hazardous waste subject to standards equivalent to those previously promulgated in 40 CFR part 262, subpart H. In addition, EPA mandated the phased-in electronic submission of required import and export documents.

In 1980, EPA promulgated the principal elements of the generator requirements in 40 CFR part 262. These regulations have been amended on several occasions. This ICR discusses six categories of information collection requirements in part 262: Pre-transport requirements; hazardous waste storage requirements for containers, tanks,

containment buildings and drip pads; air emission standards for large quantity generators; recordkeeping and reporting requirements; flexibilities for VSQGs and SQGs; and export/import requirements.

Form Numbers: None.

Respondents/affected entities: Private business or other for-profit.

Respondent's obligation to respond: Mandatory (40 CFR part 262 and 265).

Estimated number of respondents: 644,345.

Frequency of response: On occasion.

Total estimated burden: 526,989 hours per year. Burden is defined at 5 CFR 1320.03(b).

Total estimated cost: $31,367,417 per year, which includes $63,345 in annualized capital or operation & maintenance costs.

Changes in the Estimates: There is an increase of 273,470 hours in the total estimated respondent burden compared with the ICR currently approved by OMB. This increase is due primarily to changes in the universe size due to the 2016 Hazardous Waste Generators Improvements Rule.

Courtney Kerwin,

Director, Regulatory Support Division.

[FR Doc. 2018–23558 Filed 10–26–18; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OLEM–2018–0693, FRL–9985–81–OLEM]

Agency Information Collection Activities; Proposed Collection; Comment Request; Identification of Non-Hazardous Secondary Materials That are Solid Waste (Renewal)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The Environmental Protection Agency (EPA) is planning to submit the information collection request (ICR), Identification of Non-Hazardous Secondary Materials that are Solid Waste (Renewal) (EPA ICR No. 2382.05, OMB Control No. 2050–0205) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act (PRA). Before doing so, the 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 April 30, 2019. This ICR will be combined with the Categorical Non-Waste Determination for Selected Non Hazardous Secondary Materials (NHSM): Construction and Demolition Wood, Recycling Process Residuals, and Creosote-Treated Railroad Ties (Additions to List of Section 241.4 Categorical Non-Waste Fuels) (EPA ICR Number 2493.03, OMB Number 2050–0215), which is currently approved through March 31, 2019. 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 December 28, 2018.

ADDRESSES: Submit your comments, referencing by Docket ID No. EPA–HQ–OLEM–2018–0693, online using *www.regulations.gov* (our preferred method), by email to *rcra-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: Jesse Miller, Office of Resource Conservation and Recovery, Materials Recovery and Waste Management Division, MC 5302P, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460; telephone number: (703) 308–1180; fax number: (703) 308- 0522; email address: *miller.jesse@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, the 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. The 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, the 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: EPA published the Non-Hazardous Secondary Materials (NHSM) Rule on March 21, 2011. This rule finalized standards and procedures to be used to identify whether non-hazardous secondary materials are solid wastes when used as fuels or ingredients in combustion units. ''Secondary material'' is defined as any material that is not the primary product of a manufacturing or commercial process, and can include post-consumer material, off-specification commercial chemical products or manufacturing chemical intermediates, post-industrial material, and scrap (codified in § 241.2). ''Non-hazardous secondary material'' is a secondary material that, when discarded, would not be identified as a hazardous waste under 40 CFR part 261 (codified in § 241.2). This RCRA solid waste definition determines whether a combustion unit is required to meet the emissions standards for solid waste incineration units issued under section 129 of the Clean Air Act (CAA) or the emissions standards for commercial, industrial, and institutional boilers issued under section 112 of the CAA. In this rule, EPA also finalized a definition of traditional fuels.

Amendments to this rule were published on February 7, 2013 (78 FR 9112), which added new materials to the list of categorical non-waste fuels. These amendments also provided clarification on certain issues on which EPA received new information, as well as specific targeted revisions.

Further amendments to this rule were published on February 8, 2016 (81 FR 6688) and on February 7, 2018 (83 FR 5317), which added more materials to the list of categorical non-waste fuels. The ICRs associated with the February 2013, February 2016 and February 2018

rules are being consolidated into this ICR.

Form Numbers: None.

Respondents/affected entities: Entities potentially affected by this action are Business or other for-profit.

Respondent's obligation to respond: Required to obtain benefit (Sections 1004 and 2002 of RCRA).

Estimated number of respondents: 2,076.

Frequency of response: One time.

Total estimated burden: 3,236. Burden is defined at 5 CFR 1320.03(b).

Total estimated cost: $108,068 (per year), which includes $106,716 in annualized labor and $1,343 in annualized capital or operation & maintenance costs.

Changes in Estimates: The burden hours are likely to stay substantially the same.

Dated: October 18, 2018.

Barnes Johnson,

Director, Office of Resource Conservation and Recovery.

[FR Doc. 2018–23584 Filed 10–26–18; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OLEM–2018–0691; FRL–9985–80–OLEM]

Agency Information Collection Activities; Proposed Collection; Comment Request; Standardized Permit for RCRA Hazardous Waste Management Facilities (Renewal)

AGENCY: Environmental Protection Agency.

ACTION: Notice.

SUMMARY: The Environmental Protection Agency (EPA) is planning to submit the information collection request (ICR), Standardized Permit for RCRA Hazardous Waste Management Facilities (EPA ICR No. 1935.05, OMB Control No. 2050–0182) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act (PRA) (44 U.S.C. 3501 *et seq.*). Before doing so, the 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 March 31, 2019. 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 December 28, 2018.

ADDRESSES: Submit your comments, referencing by Docket ID No. EPA–HQ–OLEM–2018–0691, online using *www.regulations.gov* (our preferred method), by email to *rcra-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: Jeff Gaines, Office of Resource Conservation and Recovery, (5303P), Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460; telephone number: 703–308–8655; fax number: 703–308–8617; email address: *gaines.jeff@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, the 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. The 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, the 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: Under the authority of sections 3004, 3005, 3008 and 3010 of the Resource Conservation and Recovery Act (RCRA), as amended, EPA revised the RCRA hazardous waste permitting program to allow a ''standardized permit.'' The standardized permit is available to facilities that generate hazardous waste and routinely manage the waste on-site in non-thermal units such as tanks, containers, and containment buildings. In addition, the standardized permit is available to facilities that receive hazardous waste generated off-site by a generator under the same ownership as the receiving facility, and then store or non-thermally treat the hazardous waste in containers, tanks, or containment buildings. The RCRA standardized permit consists of two components: A uniform portion that is included in all cases, and a supplemental portion that the Director of a regulatory agency includes at his or her discretion. The uniform portion consists of terms and conditions, relevant to the unit(s) at the permitted facility, and is established on a national basis. The Director, at his or her discretion, may also issue a supplemental portion on a case-by-case basis. The supplemental portion imposes site-specific permit terms and conditions that the Director determines necessary to institute corrective action under section 264.101 (or state equivalent), or otherwise necessary to protect human health and the environment. Owners and operators have to comply with the terms and conditions in the supplemental portion, in addition to those in the uniform portion.

Form numbers: None.

Respondents/affected entities: Entities potentially affected by this action are business or other for-profit.

Respondent's obligation to respond: Voluntary (40 CFR 270.275).

Estimated number of respondents: 86.

Frequency of response: On occasion.

Total estimated burden: 13,948 hours. Burden is defined at 5 CFR 1320.03(b).

Total estimated cost: $1,242,205 (per year), includes $662,478 in annualized labor and $579,727 in annualized capital or operation & maintenance costs.

Changes in estimates: The burden hours are likely to stay substantially the same.

Dated: October 18, 2018.

Barnes Johnson,

Director, Office of Resource Conservation and Recovery.

[FR Doc. 2018–23581 Filed 10–26–18; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–9985–82–OLEM]

Thirty-Fourth Update of the Federal Agency Hazardous Waste Compliance Docket

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: Since 1988, the Environmental Protection Agency (EPA) has maintained a Federal Agency Hazardous Waste Compliance Docket (''Docket'') under Section 120(c) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). Section 120(c) requires EPA to establish a Docket that contains certain information reported to EPA by Federal facilities that manage hazardous waste or from which a reportable quantity of hazardous substances has been released. As explained further below, the Docket is used to identify Federal facilities that should be evaluated to determine if they pose a threat to public health or welfare and the environment and to provide a mechanism to make this information available to the public.

This notice identifies the Federal facilities not previously listed on the Docket and also identifies Federal facilities reported to EPA since the last update on May 8, 2018. In addition to the list of additions to the Docket, this notice includes a section with revisions of the previous Docket list and a section of Federal facilities that are to be deleted from the Docket. Thus, the revisions in this update include 9 additions, 6 deletions, and 3 corrections to the Docket since the previous update. At the time of publication of this notice, the new total number of Federal facilities listed on the Docket is 2,355.

DATES: This list is current as of October 11, 2018.

FOR FURTHER INFORMATION CONTACT: Electronic versions of the Docket and more information on its implementation can be obtained at *http://www.epa.gov/fedfac/previous-federal-agency-hazardous-waste-compliance-docket-updates* by clicking on the link for *Cleanups at Federal Facilities* or by contacting Benjamin Simes (*Simes.Benjamin@epa.gov*), Federal Agency Hazardous Waste Compliance Docket Coordinator, Federal Facilities Restoration and Reuse Office (Mail Code 5106R), U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue NW, Washington, DC 20460. Additional information on the Docket and a complete list of Docket sites can be obtained at: *https://www.epa.gov/fedfac/fedfacts.*

SUPPLEMENTARY INFORMATION:

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1.0 Introduction

Section 120(c) of CERCLA, 42 United States Code (U.S.C.) 9620(c), as amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA), requires EPA to establish the Federal Agency Hazardous Waste Compliance Docket. The Docket contains information on Federal facilities that manage hazardous waste and such information is submitted by Federal agencies to EPA under Sections 3005, 3010, and 3016 of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. 6925, 6930, and 6937. Additionally, the Docket contains information on Federal facilities with a reportable quantity of hazardous substances that has been released and such information is submitted by Federal agencies to EPA under Section 103 of CERCLA, 42 U.S.C. 9603. Specifically, RCRA Section 3005 establishes a permitting system for certain hazardous waste treatment, storage, and disposal (TSD) facilities; RCRA Section 3010 requires waste generators, transporters and TSD facilities to notify EPA of their hazardous waste activities; and RCRA Section 3016 requires Federal agencies to submit biennially to EPA an inventory of their Federal hazardous waste facilities. CERCLA Section 103(a) requires the owner or operator of a vessel or onshore or offshore facility to notify the National Response Center (NRC) of any spill or other release of a hazardous substance that equals or exceeds a reportable quantity (RQ), as defined by CERCLA Section 101. Additionally, CERCLA Section 103(c) requires facilities that have ''stored, treated, or disposed of'' hazardous wastes and where there is ''known, suspected, or likely releases'' of hazardous substances to report their activities to EPA.

CERCLA Section 120(d) requires EPA to take steps to assure that a Preliminary Assessment (PA) be completed for those sites identified in the Docket and that the evaluation and listing of sites with a PA be completed within a reasonable time frame. The PA is designed to provide information for EPA to consider when evaluating the site for potential response action or inclusion on the National Priorities List (NPL).

The Docket serves three major purposes: (1) To identify all Federal facilities that must be evaluated to determine whether they pose a threat to human health and the environment sufficient to warrant inclusion on the National Priorities List (NPL); (2) to compile and maintain the information submitted to EPA on such facilities under the provisions listed in Section 120(c) of CERCLA; and (3) to provide a mechanism to make the information available to the public.

The initial list of Federal facilities to be included on the Docket was published in the **Federal Register** on February 12, 1988 (53 FR 4280). Since then, updates to the Docket have been published on November 16, 1988 (53 FR 46364); December 15, 1989 (54 FR 51472); August 22, 1990 (55 FR 34492); September 27, 1991 (56 FR 49328); December 12, 1991 (56 FR 64898); July 17, 1992 (57 FR 31758); February 5, 1993 (58 FR 7298); November 10, 1993 (58 FR 59790); April 11, 1995 (60 FR 18474); June 27, 1997 (62 FR 34779); November 23, 1998 (63 FR 64806); June 12, 2000 (65 FR 36994); December 29, 2000 (65 FR 83222); October 2, 2001 (66 FR 50185); July 1, 2002 (67 FR 44200); January 2, 2003 (68 FR 107); July 11, 2003 (68 FR 41353); December 15, 2003 (68 FR 69685); July 19, 2004 (69 FR 42989); December 20, 2004 (69 FR 75951); October 25, 2005 (70 FR 61616); August 17, 2007 (72 FR 46218); November 25, 2008 (73 FR 71644); October 13, 2010 (75 FR 62810); November 6, 2012 (77 FR 66609); March 18, 2013 (78 FR 16668); January 6, 2014 (79 FR 654), December 31, 2014 (79 FR 78850); August 17, 2015 (80 FR 49223), March 3, 2016 (81 FR 11212), October 24, 2016 (81 FR 73096), June 6, 2017 (82 FR 26092), December 8, 2017 (82 FR 57976), and May 8, 2018 (83 FR 20813). This notice constitutes the thirty-fourth update of the Docket.

This notice provides some background information on the Docket. Additional information on the Docket requirements and implementation are found in the Docket Reference Manual, Federal Agency Hazardous Waste

Compliance Docket found at *http://www.epa.gov/fedfac/docket-reference-manual-federal-agency-hazardous-waste-compliance-docket-interim-final* or obtained by calling the Regional Docket Coordinators listed below. This notice also provides changes to the list of sites included on the Docket in three areas: (1) Additions, (2) Deletions, and (3) Corrections. Specifically, additions are newly identified Federal facilities that have been reported to EPA since the last update and now are included on the Docket; the deletions section lists Federal facilities that EPA is deleting from the Docket.[1] The information submitted to EPA on each Federal facility is maintained in the Docket repository located in the EPA Regional office of the Region in which the Federal facility is located; for a description of the information required under those provisions, *see* 53 FR 4280 (February 12, 1988). Each repository contains the documents submitted to EPA under the reporting provisions and correspondence relevant to the reporting provisions for each Federal facility.

In prior updates, information was also provided regarding No Further Remedial Action Planned (NFRAP) status changes. However, information on NFRAP and NPL status is no longer being provided separately in the Docket update as it is now available at: *http://www.epa.gov/fedfac/fedfacts* or by contacting the EPA HQ Docket Coordinator at the address provided in the **FOR FURTHER INFORMATION CONTACT** section of this notice.

2.0 Regional Docket Coordinators

Contact the following Docket Coordinators for information on Regional Docket repositories:

Martha Bosworth (HBS), US EPA Region 1, 5 Post Office Square, Suite 100, Mail Code: OSRR07–2, Boston, MA 02109–3912, (617) 918–1407.

Cathy Moyik (ERRD), US EPA Region 2, 290 Broadway, New York, NY 10007–1866, (212) 637– 4339.

Joseph Vitello (3HS12), US EPA Region 3, 1650 Arch Street, Philadelphia, PA 19107, (215) 814–3354.

Leigh Lattimore (4SF–SRSEB), US EPA Region 4, 61 Forsyth St, SW, Atlanta, GA 30303, 404–562–8768.

David Brauner (SR–6J), US EPA Region 5, 77 W Jackson Blvd., Chicago, IL 60604, (312) 886–1526.

Philip Ofosu (6SF–RA), US EPA Region 6, 1445 Ross Avenue, Dallas, TX 75202–2733, (214) 665–3178.

Todd H. Davis (SUPRERSP), US EPA Region 7, 11201 Renner Blvd., Lenexa, KS 66219, (913) 551–7749.

Ryan Dunham (EPR–F), US EPA Region 8, 1595 Wynkoop Street, Denver, CO 80202, (303) 312–6627.

Leslie Ramirez (SFD–6–1), US EPA Region 9, 75 Hawthorne Street, San Francisco, CA 94105, (415) 972–3978.

Ken Marcy (ECL, ABU), US EPA Region 10, 1200 Sixth Avenue, Suite 900, ECL–112, Seattle, WA 98101, (206) 890–0591.

3.0 Revisions of the Previous Docket

This section includes a discussion of the additions, deletions, and corrections, to the list of Docket facilities since the previous Docket update.

3.1 Additions

In this notice, 9 Federal facilities are being added to the Docket. These Federal facilities are being added primarily because of new information obtained by EPA (for example, recent reporting of a facility pursuant to RCRA Sections 3005, 3010, or 3016 or CERCLA Section 103). CERCLA Section 120, as amended by the Defense Authorization Act of 1997, specifies that EPA take steps to assure that a Preliminary Assessment (PA) be completed within a reasonable time frame for those Federal facilities that are included on the Docket. Among other things, the PA is designed to provide information for EPA to consider when evaluating the site for potential response action or listing on the NPL.

3.2 Deletions

In this notice, 6 Federal facilities are being deleted from the Docket. There are no statutory or regulatory provisions that address deletion of a facility from the Docket. However, if a facility is incorrectly included on the Docket, it may be deleted from the Docket. The criteria EPA uses in deleting sites from the Docket include: a facility for which there was an incorrect report submitted for hazardous waste activity under RCRA (*e.g.,* 40 CFR 262.44); a facility that was not Federally-owned or operated at the time of the listing; A facility included more than once (*i.e.,* redundant listings); or when multiple facilities are combined under one listing. (*See* Docket Codes (*Categories for Deletion of Facilities*) for a more refined list of the criteria EPA uses for deleting sites from the Docket.) Facilities being deleted no longer will be subject to the requirements of CERCLA Section 120(d).

3.3 Corrections

Changes necessary to correct the previous Docket are identified by both EPA and Federal agencies. The corrections section may include changes in addresses or spelling, and corrections of the recorded name and ownership of a Federal facility. In addition, changes in the names of Federal facilities may be made to establish consistency in the Docket or between the Superfund Enterprise Management System (SEMS) and the Docket. For the Federal facility for which a correction is entered, the original entry is as it appeared in previous Docket updates. The corrected update is shown directly below, for easy comparison. This notice includes three corrections.

4.0 Process for Compiling the Updated Docket

In compiling the newly reported Federal facilities for the update being published in this notice, EPA extracted the names, addresses, and identification numbers of facilities from four EPA databases—the WebEOC, the Biennial Inventory of Federal Agency Hazardous Waste Activities, the Resource Conservation and Recovery Act Information System (RCRAInfo), and SEMS—that contain information about Federal facilities submitted under the four provisions listed in CERCLA Section 120(c).

EPA assures the quality of the information on the Docket by conducting extensive evaluation of the current Docket list and contacts the other Federal Agency (OFA) with the information obtained from the databases identified above to determine which Federal facilities were, in fact, newly reported and qualified for inclusion on the update. EPA is also striving to correct errors for Federal facilities that were previously reported. For example, state-owned or privately-owned facilities that are not operated by the Federal government may have been included. Such problems are sometimes caused by procedures historically used to report and track Federal facilities data. Representatives of Federal agencies are asked to contact the EPA HQ Docket Coordinator at the address provided in the **FOR FURTHER INFORMATION CONTACT** section of this notice if revisions of this update information are necessary.

5.0 Facilities Not Included

Certain categories of facilities may not be included on the Docket, such as: (1) Federal facilities formerly owned by a Federal agency that at the time of consideration was not Federally-owned or operated; (2) Federal facilities that are small quantity generators (SQGs) that have not, more than once per calendar year, generated more than 1,000 kg of hazardous waste in any single month; (3) Federal facilities that are very small quantity generators (VSQGs) that have

[1] See Section 3.2 for the criteria for being deleted from the Docket.

never generated more than 100 kg of hazardous waste in any month; (4) Federal facilities that are solely hazardous waste transportation facilities, as reported under RCRA Section 3010; and (5) Federal facilities that have mixed mine or mill site ownership.

An EPA policy issued in June 2003 provided guidance for a site-by-site evaluation as to whether ''mixed ownership'' mine or mill sites, typically created as a result of activities conducted pursuant to the General Mining Law of 1872 and never reported under Section 103(a), should be included on the Docket. For purposes of that policy, mixed ownership mine or mill sites are those located partially on private land and partially on public land. This policy is found at *http://www.epa.gov/fedfac/policy-listing-mixed-ownership-mine-or-mill-sites-created-result-general-mining-law-1872.* The policy of not including these facilities may change; facilities now omitted may be added at some point if EPA determines that they should be included.

6.0 Facility NPL Status Reporting, Including NFRAP Status

EPA tracks the NPL status of Federal facilities listed on the Docket. An updated list of the NPL status of all Docket facilities, as well as their NFRAP status, is available at *http://www.epa.gov/fedfac/fedfacts* or by contacting the EPA HQ Docket Coordinator at the address provided in the **FOR FURTHER INFORMATION CONTACT** section of this notice. In prior updates, information regarding NFRAP status changes was provided separately.

7.0 Information Contained on Docket Listing

The information is provided in three tables. The first table is a list of additional Federal facilities that are being added to the Docket. The second table is a list of Federal facilities that are being deleted from the Docket. The third table is for corrections.

The Federal facilities listed in each table are organized by the date reported. Under each heading is listed the name and address of the facility, the Federal agency responsible for the facility, the statutory provision(s) under which the facility was reported to EPA, and a code.[2]

The statutory provisions under which a Federal facility is reported are listed in a column titled ''Reporting Mechanism.'' Applicable mechanisms are listed for each Federal facility: for example, Sections 3005, 3010, 3016, 103(c), or Other. ''Other'' has been added as a reporting mechanism to indicate those Federal facilities that otherwise have been identified to have releases or threat of releases of hazardous substances. The National Contingency Plan 40 CFR 300.405 addresses discovery or notification, outlines what constitutes discovery of a hazardous substance release, and states that a release may be discovered in several ways, including: (1) A report submitted in accordance with Section 103(a) of CERCLA, *i.e.,* reportable quantities codified at 40 CFR part 302; (2) a report submitted to EPA in accordance with Section 103(c) of CERCLA; (3) investigation by government authorities conducted in accordance with Section 104(e) of CERCLA or other statutory authority; (4) notification of a release by a Federal or state permit holder when required by its permit; (5) inventory or survey efforts or random or incidental observation reported by government agencies or the public; (6) submission of a citizen petition to EPA or the appropriate Federal facility requesting a preliminary assessment, in accordance with Section 105(d) of CERCLA; (7) a report submitted in accordance with Section 311(b)(5) of the Clean Water Act; and (8) other sources. As a policy matter, EPA generally believes it is appropriate for Federal facilities identified through the CERCLA discovery and notification process to be included on the Docket.

The complete list of Federal facilities that now make up the Docket and the NPL and NFRAP status are available to interested parties and can be obtained at *http://www.epa.gov/fedfac/fedfacts* or by contacting the EPA HQ Docket Coordinator at the address provided in the **FOR FURTHER INFORMATION CONTACT** section of this notice. As of the date of this notice, the total number of Federal facilities that appear on the Docket is 2,355.

[2] Each Federal facility listed in the update has been assigned a code that indicates a specific reason for the addition or deletion. The code precedes this list.

Dated: October 17, 2018.

Gregory Gervais,

Acting Director, Federal Facilities Restoration and Reuse Office, Office of Land and Emergency Management.

Categories for Deletion of Facilities

(1) Small-Quantity Generator and Very Small Quantity Generator. Show citation box

(2) Never Federally Owned and/or Operated.

(3) Formerly Federally Owned and/or Operated but not at time of listing.

(4) No Hazardous Waste Generated.

(5) (This code is no longer used.)

(6) Redundant Listing/Site on Facility.

(7) Combining Sites Into One Facility/Entries Combined.

(8) Does Not Fit Facility Definition.

Categories for Addition of Facilities

(15) Small-Quantity Generator with either a RCRA 3016 or CERCLA 103 Reporting Mechanism.

(16) One Entry Being Split Into Two (or more)/Federal Agency Responsibility Being Split. (16A) NPL site that is part of a Facility already listed on the Docket.

(17) New Information Obtained Showing That Facility Should Be Included.

(18) Facility Was a Site on a Facility That Was Disbanded; Now a Separate Facility.

(19) Sites Were Combined Into One Facility.

(19A) New Currently Federally Owned and/or Operated Facility Site.

Categories for Corrections of Information About Facilities

(20) Reporting Provisions Change.

(20A) Typo Correction/Name Change/Address Change.

(21) Changing Responsible Federal Agency. (If applicable, new responsible Federal agency submits proof of previously performed PA, which is subject to approval by EPA.)

(22) Changing Responsible Federal Agency and Facility Name. (If applicable, new responsible Federal Agency submits proof of previously performed PA, which is subject to approval by EPA.)

(24) Reporting Mechanism Determined To Be Not Applicable After Review of Regional Files.

FEDERAL AGENCY HAZARDOUS WASTE COMPLIANCE DOCKET UPDATE #34—ADDITIONS

Facility name	Address	City	State	Zip code	Agency	Reporting mechanism	Code	Date
FCI–EL RENO	4205 W HWY 66	EL RENO	OK	73036	JUSTICE	RCRA 3010	17	Update #34.
FAA–VICTORIA REGIONAL AIRPORT.	609 FOSTER FIELD DRIVE.	VICTORIA	TX	77904	TRANSPORTATION.	CERCLA 103	17	Update #34.
BETHEL MERCURY SPILL.	951 WEST BETHEL ROAD.	COPPELL	TX	75099	USPS	CERCLA 103	17	Update #34.
BR—FOLSOM DAM	7794 FOLSOM DAM ROAD.	FOLSOM	CA	95630	INTERIOR	CERCLA 103	17	Update #34.
USDA NEZ PERCE NF: TIGER PROSPECT.	Lat: 45.57542 N, Long: −115.66456 W	CONCORD	ID		AGRICULTURE.	CERCLA 103	17	Update #34.
USDA NEZ PERCE NF: SPOKANE MINE.	Lat: 45.56877 N, Long: −115.66400 W	CONCORD	ID		AGRICULTURE.	CERCLA 103	17	Update #34.
USDA NEZ PERCE NF: DEL RIO MINE.	Lat: 45.556217 N, Long: −115.681650 W.	CONCORD	ID		AGRICULTURE.	CERCLA 103	17	Update #34.
USDA TONGASS NF: EMPIRE MINE.	Lat: 58.183783 N, Long: −134.788148 W.	15 MILES WEST–SOUTHWEST OF JUNEAU.	AK	99801	AGRICULTURE.	CERCLA 103	17	Update #34.
NORTH PENN US ARMY RESERVE TRAINING CENTER.	1625 BERKS ROAD	NORRISTOWN	PA	19403	ARMY	CERCLA 103	17	Update #34.

FEDERAL AGENCY HAZARDOUS WASTE COMPLIANCE DOCKET UPDATE #34—DELETIONS

Facility name	Address	City	State	Zip code	Agency	Reporting mechanism	Code	Date
SEQUOYAH NUCLEAR PLANT.	SEQUOYAH ACCESS ROAD.	SODDY DAISY	TN	37379	TVA	RCRA 3010	6	Update #33.
FORMER AIR FORCE PLANT 39.	7400 S CICERO AVE	CHICAGO	IL	60629	CORPS OF ENGINEERS, CIVIL.	RCRA 3010	3	6/11/95.
WAYNE–HOOSIER NF: WEBB SITE.	T4N, R16W, SEC 18	IRONTON	OH		AGRICULTURE.	CERCLA 103	2	12/15/1989.
USDA FS CARIBOU–TARGHEE NF: SOUTH MAYBE CANYON MINE.	T8S R44E SEC 4	SODA SPRINGS	ID	83201	AGRICULTURE.	OTHER	6	10/13/2010.
SAN FRANCISCO VA MEDICAL CENTER.	CLEMENT STREET	SAN FRANCISCO.	CA	94121	VETERANS AFFAIRS.	RCRA 3010	6	Update #33.
USCG—ARGO INCIDENT NUMBER 1510–22–2322.	41 38.359 N, 82.599 W.	KELLEYS ISLAND.	OH	43438	HOMELAND SECURITY.	RCRA 3010	2	6/6/2017.

FEDERAL AGENCY HAZARDOUS WASTE COMPLIANCE DOCKET UPDATE #34—CORRECTIONS

Facility name	Address	City	State	Zip code	Agency	Reporting mechanism	Code	Date
AMERICAN FORK CANYON/UINTA NATIONAL.	AMERICAN FORK CANYON.	PLEASANT GROVE.	UT	84602	INTERIOR	CERCLA 103	21	5-Feb-89.
AMERICAN FORK CANYON/UINTA NATIONAL.	AMERICAN FORK CANYON.	PLEASANT GROVE.	UT	84602	AGRICULTURE.	CERCLA 103		5-Feb-89.
US POSTAL SERVICE BACON STATION.	STRATFORD DR	BLOOMINGDALE	IL	60117	USPS	RCRA 3010	20a	12/31/2014.
US POSTAL SERVICE BACON STATION.	2727 E. 55TH STREET.	INDIANAPOLIS	IN	46220	USPS	RCRA 3010		12/31/2014.
BLM–SALAMBO MINE	T2S, R15E, SEC 32, NE1/4, MDM.	TOLUMNE COUNTY.	CA	95311	INTERIOR	RCRA 3016	20a	7/17/1992.
BLM–SOLAMBO MINE	T2S, R15E, SEC 32, NE1/4, MDM.	TOLUMNE COUNTY.	CA	95311	INTERIOR	RCRA 3016		7/17/1992.

[FR Doc. 2018–23585 Filed 10–26–18; 8:45 am]
BILLING CODE 6560–50–P

FEDERAL DEPOSIT INSURANCE CORPORATION

Agency Information Collection Activities: Submission for OMB Review; Comment Request (OMB No. 3064–0185)

AGENCY: Federal Deposit Insurance Corporation (FDIC).

ACTION: Notice and request for comment.

SUMMARY: The FDIC, pursuant to the mandatory reporting requirements of the Paperwork Reduction Act of 1995 (PRA) (OMB No. 3064–0185), invites the general public and other Federal agencies to take this opportunity to comment on the renewal of the existing information collection. On July 30, 2018, the FDIC requested comment for 60 days on a proposal to renew the information collection described below. One comment was received. The FDIC hereby gives notice of its plan to submit to OMB a request to approve the renewal of this collection, and again invites comment on this renewal.

DATES: Comments must be submitted on or before November 28, 2018.

ADDRESSES: Interested parties are invited to submit written comments to the FDIC by any of the following methods:

- *Agency Website: https://www.FDIC.gov/regulations/laws/federal.*
- *Email: comments@fdic.gov.* Include the name and number of the collection in the subject line of the message.
- *Mail:* Jennifer Jones (202–898–6768), Counsel, MB–3105, Federal Deposit Insurance Corporation, 550 17th Street NW, Washington, DC 20429.
- *Hand Delivery:* Comments may be hand-delivered to the guard station at the rear of the 17th Street Building (located on F Street), on business days between 7:00 a.m. and 5:00 p.m.

All comments should refer to the relevant Office of Management and Budget (OMB) control number. A copy of the comments may also be submitted to the OMB desk officer for the FDIC: Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Jennifer Jones, Counsel, 202–898–6768, *jennjones@fdic.gov,* MB–3105, Federal Deposit Insurance Corporation, 550 17th Street NW, Washington, DC 20429.

SUPPLEMENTARY INFORMATION: On July 30, 2018, the FDIC requested comment for 60 days on a proposal to renew the information collection described below. One comment was received which suggested policy changes to the underlying rule, Section 360.10 of the FDIC's regulations (12 CFR 360.10 or the Rule), which is currently under review. However, the comment did not address the accuracy of the PRA estimates. Therefore, the FDIC hereby gives notice of its plan to submit to OMB a request to approve the renewal of this collection, and again invites comment on this renewal.

Proposal to renew the following currently approved collection of information:

1. *Title:* Resolution Plans Required for Insured Depository Institutions With $50 Billion or More in Total Assets.

OMB Number: 3064–0185.

Form Number: None.

Affected Public: Large and Highly Complex Depository Institutions.

Burden Estimate:

SUMMARY OF ANNUAL BURDEN

	Type of burden	Obligation to respond	Estimated number of respondents	Estimated frequency of responses	Estimated time per response	Frequency of response	Total annual estimated burden (hours)
Contingent Resolution Plan (CIDI Subsidiaries of Regional Bank Holding Companies and CIDI Subsidiaries of U.S. GSIFIs).	Reporting	Mandatory	4	1	7,200	On Occasion	28,800
Contingent Resolution Plan—Annual Update (CIDI Subsidiaries of Regional Bank Holding Companies)*.	Reporting	Mandatory	28	1	6,613	Annual	185,164
Contingent Resolution Plan—Annual Update (CIDI Subsidiaries of U.S. GSIFIs)*.	Reporting	Mandatory	9	1	39,843	Annual	358,587
Notice of Material Change (CIDI Subsidiaries of Regional Bank Holding Companies and CIDI Subsidiaries of U.S. GSIFIs).	Reporting	Mandatory	1	2	120	On Occasion	240
Total Hourly Burden							572,791

*Because submissions have been required no more frequently than biennially, the burden associated with the Annual Update has been multiplied by ⅔ to represent two Annual Update filings over the three-year period contemplated by this notice and renewal.

General Description of Collection:

The Rule requires certain insured depository institutions (IDIs) to submit a Resolution Plan that should enable the FDIC, as receiver, to resolve the institution under Sections 11 and 13 of the Federal Deposit Insurance Act (FDI Act), 12 U.S.C. 1821 and 1823, in a manner that ensures that depositors receive access to their insured deposits within one business day of the institution's failure (two business days if the failure occurs on a day other than Friday), maximizes the net present value return from the sale or disposition of its assets, and minimizes the amount of any loss to be realized by the institution's creditors. An IDI with $50 billion or more in total assets (*i.e.,* a covered IDI or CIDI) is required to submit periodically to the FDIC a contingent plan for the resolution of such institution in the event of its failure.

The Rule established the requirements for submission and content of a Resolution Plan, as well as procedures for review by the FDIC. After the initial submission, the Rule requires plan submissions on an annual basis (Annual Update) unless the FDIC determines to change the submission date. A CIDI must notify the FDIC of any event, occurrence, change in conditions or circumstances or other change which results in, or reasonably could be foreseen to have, a material effect on the CIDI's resolution plan.

The Rule is intended to address the continuing exposure of the banking industry to the risks of insolvency of large and complex IDIs that can be mitigated with proper resolution planning. The Interim Final Rule, which preceded the Rule, became effective January 1, 2012, and remained in effect until it was superseded by the Rule on April 1, 2012.

The annual burden for this information collection is estimated to be 572,791 hours. This represents an increase of 281,305 hours from the current burden estimate of 291,486 hours. This increase is not due to any new requirements imposed by the FDIC. Rather, it is due to FDIC's reassessment of the burden hours associated with responding to the existing requirements of the Rule and to guidance, feedback, and additional requests for information by the FDIC as part of the iterative resolution planning process. The revised estimates are informed by feedback received from the CIDIs over the past year. Because submissions have been required no more frequently than biennially, the burden associated with the Annual Update has been multiplied by ⅔ to represent two Annual Update filings over the three-year period contemplated by this notice and renewal.

Request for Comment

Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the FDIC's functions, including whether the information has practical utility; (b) the accuracy of the estimates of the burden of the 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; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. All comments will become a matter of public record.

Dated at Washington, DC, on October 23, 2018.

Federal Deposit Insurance Corporation.

Robert E. Feldman,

Executive Secretary.

[FR Doc. 2018–23500 Filed 10–26–18; 8:45 am]

BILLING CODE 6714–01–P

FEDERAL ELECTION COMMISSION

Sunshine Act Meeting

FEDERAL REGISTER CITATION NOTICE OF PREVIOUS ANNOUNCEMENT: 83 FR 52832.

PREVIOUSLY ANNOUNCED TIME AND DATE OF THE MEETING: Tuesday, October 23, 2018 at 10:00 a.m.

CHANGES IN THE MEETING: The meeting was continued on Thursday, October 25, 2018.

* * * * *

CONTACT PERSON FOR MORE INFORMATION: Judith Ingram, Press Officer, Telephone: (202) 694–1220.

Laura E. Sinram,

Deputy Secretary of the Commission.

[FR Doc. 2018–23717 Filed 10–25–18; 4:15 pm]

BILLING CODE 6715–01–P

GENERAL SERVICES ADMINISTRATION

[Notice MV–2018–01; Docket No. 2018–0002, Sequence No. 29]

Federal Acquisition Regulation; FY 2019 FAR Reissue Posted to the Acquisition.gov Website

AGENCY: General Services Administration (GSA).

ACTION: Notice.

SUMMARY: This notice advises users that the FY 2019 Federal Acquisition Regulation (FAR) Reissue will be available for download at *https://www.acquisition.gov/browsefar.*

DATES: Applicable date: November 13, 2018.

FOR FURTHER INFORMATION CONTACT: The Regulatory Secretariat Division, at 202–501–4755; or via email at *GSARegSec@gsa.gov.* Please cite 2019 FAR Reissue Posted to the Acquisition.gov website.

SUPPLEMENTARY INFORMATION: Periodically, the FAR is reissued because of administrative necessity. Although the reissue does not alter the language of the FAR, it does contain several administrative updates to improve the user experience and increase accessibility. The following updates are to features that do not appear in the Code of Federal Regulations:

- Future Federal Acquisition Circulars (FAC) will be renumbered so that the next issued FAC will be FAC 2019–01. This reissue will replace the prior numbering system which used FACs 2005–01 through FAC 2005–101. Because of the renumbering, the Foreword section of the FAR will be updated to reflect the current FAC number.
- The FAR Looseleaf package will no longer be offered. Instead, a List of Sections Affected (LSA) will be included on the *https://acquisition.gov* website, and updated for each FAC.
- The matrix will continue to be available in the PDF version of the FAR. However, acquisition.gov will be releasing the new Smart Matrix. The new FAR Smart Matrix includes a filterable clause matrix, file saving options, improved search capabilities, as well as hyperlinked clauses, provisions and prescriptions to the current version of the FAR.
- The FAR will be available in HTML, XML, Word, and PDF formats. Users intending to print the FAR can refer to the Adobe PDF file.
- FAR Proposed Rule Publications that are open for comments are available at *https://acquisition.gov/requesting_comments.*
- The Federal Alert Notices (FAN) are available at *https://acquisition.gov/fan_list.*

Although these changes do not alter the Code of Federal Regulations, they will provide smoother access to the FAR for new and experienced users alike. Please contact the Regulatory Secretariat Division with any questions or concerns.

Dated: October 24, 2018.

William F. Clark,

Director, Office of Government-wide Acquisition Policy, Office of Acquisition Policy, Office of Government-wide Policy.

[FR Doc. 2018–23568 Filed 10–26–18; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[Document Identifiers: CMS–10492, CMS–10664, and CMS–R–74]

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: Centers for Medicare & Medicaid Services, HHS.

ACTION: Notice.

SUMMARY: The Centers for Medicare & Medicaid Services (CMS) is announcing an opportunity for the public to comment on CMS' intention to collect information from the public. Under the Paperwork Reduction Act of 1995 (the PRA), federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information (including each proposed extension or reinstatement of an existing collection of information) and to allow 60 days for public comment on the proposed action. Interested persons are invited to send comments regarding our burden estimates or any other aspect of this collection of information, including the necessity and utility of the proposed information collection for the proper performance of the agency's functions, the accuracy of the estimated burden, ways to enhance the quality, utility, and

clarity of the information to be collected, and the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

DATES: Comments must be received by *December 28, 2018.*

ADDRESSES: When commenting, please reference the document identifier or OMB control number. To be assured consideration, comments and recommendations must be submitted in any one of the following ways:

1. *Electronically.* You may send your comments electronically to *http://www.regulations.gov.* Follow the instructions for ''Comment or Submission'' or ''More Search Options'' to find the information collection document(s) that are accepting comments.

2. *By regular mail.* You may mail written comments to the following address: CMS, Office of Strategic Operations and Regulatory Affairs, Division of Regulations Development, Attention: Document Identifier/OMB Control Number ____, Room C4–26–05, 7500 Security Boulevard, Baltimore, Maryland 21244–1850.

To obtain copies of a supporting statement and any related forms for the proposed collection(s) summarized in this notice, you may make your request using one of following:

1. Access CMS' website address at *https://www.cms.gov/Regulations-and-Guidance/Legislation/PaperworkReductionActof1995/PRA-Listing.html.*

2. Email your request, including your address, phone number, OMB number, and CMS document identifier, to *Paperwork@cms.hhs.gov.*

3. Call the Reports Clearance Office at (410) 786–1326.

FOR FURTHER INFORMATION CONTACT: William Parham at (410) 786–4669.

SUPPLEMENTARY INFORMATION:

Contents

This notice sets out a summary of the use and burden associated with the following information collections. More detailed information can be found in each collection's supporting statement and associated materials (see **ADDRESSES**).

CMS–10492 Data Submission for the Federally-facilitated Exchange User Fee Adjustment

CMS–10664 Medicare Durable Medical Equipment, Prosthetics, Orthotics, and Supplies (DMEPOS) Templates

CMS–R–74 Income and Eligibility Verification System Reporting and Supporting Regulations

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. The term ''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 requires federal agencies to publish a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension or reinstatement of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, CMS is publishing this notice.

Information Collection

1. *Type of Information Collection Request:* Extension without change of a currently approved collection; *Title of Information Collection:* Data Submission for the Federally-facilitated Exchange User Fee Adjustment; *Use:* Section 2713 of the Public Health Service Act requires coverage without cost sharing of certain preventive health services, including certain contraceptive services, in non-exempt, non-grandfathered group health plans and health insurance coverage. The final regulations establish rules under which the third party administrator of the plan would provide or arrange for a third party to provide separate contraceptive coverage to plan participants and beneficiaries without cost sharing, premium, fee, or other charge to plan participants or beneficiaries or to the eligible organization or its plan. Eligible organizations are required to self-certify that they are eligible for this accommodation and provide a copy of such self-certification to their third party administrators. The final rules also set forth processes and standards to fund the payments for the contraceptive services that are provided for participants and beneficiaries in self-insured plans of eligible organizations under the accommodation described previously, through an adjustment in the FFE user fee payable by an issuer participating in an FFE.

CMS will use the data collections from participating issuers and third party administrators to verify the total dollar amount for such payments for contraceptive services provided under this accommodation for the purpose of determining a participating issuer's user fee adjustment. The attestation that the payments for contraceptive services were made in compliance with 26 CFR 54.9815–2713A(b)(2) or 29 CFR 2590.715–2713A(b)(2) will help ensure that the user fee adjustment is being utilized to provide contraceptive services for the self-insured plans in accordance with the previously noted accommodation. *Form Number:* CMS–10492 (OMB control number: 0938–1285); *Frequency:* Annually; *Affected Public:* Private sector (Business or other for-profits and Not-for-profit institutions); *Number of Respondents:* 861; *Total Annual Responses:* 861; *Total Annual Hours:* 12,930. (For policy questions regarding this collection contact Ernest Ayukawa (301) 492–5213.)

2. *Type of Information Collection Request:* New collection (Request for a new OMB Control Number); *Title of Information Collection:* Medicare Durable Medical Equipment, Prosthetics, Orthotics, and Supplies (DMEPOS) Templates; *Use:* The templates will help users capture the appropriate information needed to document medical necessity and appropriateness to help qualify DMEPOS for reimbursement under Medicare coverage and payment regulations. The physicians/NPPs complete the DMEPOS F2F encounter documentation or progress note, the DMEPOS order, and the results of required laboratory testing. This will help physicians/NPPs in complying with Medicare policy requirements, thereby reducing improper payments secondary to insufficient documentation. In addition, CMS will use this information to help substantiate that the request for payment (*e.g.* claim) is for devices and services that are medically necessary and appropriate as required by regulation. This will substantially reduce inappropriate payment due to incomplete documentation.

The primary users of these clinical templates will be physicians/NPPs and their support staff. The users of the information will also include other providers and suppliers that must have documentation to substantiate the need for the devices or services as part of the requirements for payment by Medicare FFS. Complete documentation will help with reducing claim denials and improper payments. By using these templates and CDEs, providers and suppliers of DMEPOS devices and services will receive proper documentation/information from the referring provider that is required for payment. *Form Number:* CMS–10664 (OMB control number: 0938–NEW); *Frequency:* Annually; *Affected Public:* Private Sector, Business or other for-profit and not-for-profit institutions; *Number of Respondents:* 522; *Number*

of Responses: 2,138; *Total Annual Hours:* 170,589. (For policy questions regarding this collection contact Kevin Young at 410–786–6133 or Ashley Stedding at 410–786–4250).

3. *Type of Information Collection Request:* Extension of a currently approved collection; *Title of Information Collection:* Income and Eligibility Verification System Reporting and Supporting Regulations; *Use:* Section 1137 of the Social Security Act requires that States verify the income and eligibility information contained on the applicant's application and in the applicant's case file through data matches with the agencies and entities identified in this section. The State Medicaid/CHIP agency will report the existence of a system to collect all information needed to determine and redetermine eligibility for Medicaid and CHIP. The State Medicaid/CHIP agency will attest to using the PARIS system in determining beneficiary eligibility in Medicaid or CHIP benefit programs. *Form Number:* CMS–R–74 (OMB control number: 0938–0467); *Frequency:* Occasionally; *Affected Public:* State, Local, or Tribal Governments; *Number of Respondents:* 55; *Total Annual Responses:* 3,241; *Total Annual Hours:* 1,071. (For policy questions regarding this collection contact Stephanie Bell at 410–786–0617.)

Dated: October 23, 2018.

William N. Parham, III,

Director, Paperwork Reduction Staff, Office of Strategic Operations and Regulatory Affairs.

[FR Doc. 2018–23576 Filed 10–26–18; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[Document Identifier: CMS–10494]

Agency Information Collection Activities: Submission for OMB Review; Comment Request

AGENCY: Centers for Medicare & Medicaid Services, HHS.

ACTION: Notice.

SUMMARY: The Centers for Medicare & Medicaid Services (CMS) is announcing an opportunity for the public to comment on CMS' intention to collect information from the public. 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 or reinstatement of an existing collection of information, and to allow a second opportunity for public comment on the notice. Interested persons are invited to send comments regarding the burden estimate or any other aspect of this collection of information, including the necessity and utility of the proposed information collection for the proper performance of the agency's functions, the accuracy of the estimated burden, ways to enhance the quality, utility, and clarity of the information to be collected, and the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

DATES: Comments on the collection(s) of information must be received by the OMB desk officer by November 28, 2018.

ADDRESSES: When commenting on the proposed information collections, please reference the document identifier or OMB control number. To be assured consideration, comments and recommendations must be received by the OMB desk officer via one of the following transmissions: OMB, Office of Information and Regulatory Affairs, Attention: CMS Desk Officer, Fax Number: (202) 395–5806 *or* Email: *OIRA__submission@omb.eop.gov.*

To obtain copies of a supporting statement and any related forms for the proposed collection(s) summarized in this notice, you may make your request using one of following:

1. Access CMS' website address at *http://www.cms.hhs.gov/PaperworkReductionActof1995.*

2. Email your request, including your address, phone number, OMB number, and CMS document identifier, to *Paperwork@cms.hhs.gov.*

3. Call the Reports Clearance Office at (410) 786–1326.

FOR FURTHER INFORMATION CONTACT: William Parham at (410) 786–4669.

SUPPLEMENTARY INFORMATION: Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501–3520), federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. The term ''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 publish a 30-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension or reinstatement of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, CMS is publishing this notice that summarizes the following proposed collection(s) of information for public comment:

1. *Type of Information Collection Request:* Revision of a previously approved collection; *Title of Information Collection:* Exchange Functions: Standards for Navigators and Non-Navigator Assistance Personnel—CAC; *Use:* Section 1321(a)(1) of the Affordable Care Act directs and authorizes the Secretary to issue regulations setting standards for meeting the requirements under title I of the Affordable Care Act, with respect to, among other things, the establishment and operation of Exchanges. Pursuant to this authority, regulations establishing the certified application counselor program have been finalized at 45 CFR 155.225. In accordance with 155.225(d)(1) and (7), certified application counselors in all Exchanges are required to be initially certified and recertified on at least an annual basis and successfully complete Exchange-required training. *Form Number:* CMS–10494 (OMB control number: 0938–1205); *Frequency:* On Occasion; *Affected Public:* State, Local, or Tribal Governments, Private Sector (not-for-profit institutions); individuals or households; *Number of Respondents:* 30,000; *Total Annual Responses:* 30,000; *Total Annual Hours:* 7,500. (For policy questions regarding this collection contact Deborah Bryant at 301–492–5213.)

Dated: October 24, 2018.

William N. Parham, III,

Director, Paperwork Reduction Staff, Office of Strategic Operations and Regulatory Affairs.

[FR Doc. 2018–23590 Filed 10–26–18; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Proposed Information Collection Activity; Comment Request

Proposed Projects: Office of Child Care CCDF Onsite Monitoring.

Title: Child Care and Development Fund (CCDF) State Monitoring Compliance Demonstration Packet.

OMB No.: New.

Description: This is a new proposed data collection from the Office of Child Care (OCC) for the Onsite Monitoring System.

Section 658I of the Child Care and Development Block Grant Act and Subpart J of 45 CFR, part 98 of the Child Care and Development Fund requires the monitoring of programs funded under the CCDF for compliance with:

(1) The Act;

(2) CCDF Regulations; and

(3) The State/Territory CCDF approved Plan.

The proposed data collection will be used by the Office of Child Care (OCC) to monitor State CCDF Lead Agencies to determine and validate compliance with CCDF regulations and the approved State Plan. The data collection is designed to provide States with the flexibility to propose an approach that is feasible and sufficient to demonstrate compliance based on State circumstances and processes. State Lead Agencies will participate in onsite monitoring based on a 3-year cohort; submitting data once every three years. OCC will begin monitoring for compliance in FY 2019.

The data collection for the first 3-years will focus on 11 topical areas: (1) Disaster Preparedness, Response and Recovery; (2) Consumer Education: Dissemination of Information to Parents, Providers, and General Public (Monitoring Reports and Annual Aggregate Data); (3) Twelve-Month Eligibility; (4) Child: Staff Ratios and Group Sizes; (5) Health and Safety Requirements for Providers (11 Health and Safety Topics); (6) Pre-Service/Orientation and Ongoing Training Requirements for Providers; (7) Inspections for CCDF Licensed Providers; (8) Inspections for License-Exempt CCDF Providers; (9) Ratios for Licensing Inspectors; (10) Child Abuse and Neglect Reporting; and (11) Program Integrity.

In developing the Onsite Monitoring System, OCC convened a workgroup of states to provide feedback and input on the design of the Onsite Monitoring System. As part of the workgroup discussions, states emphasized the need for individualized monitoring because of the complexity of each state's CCDF structure and variance in implementation strategies. As a response, OCC developed the Compliance Demonstration Packet that offers states the opportunity to propose their approach to demonstrating compliance based on how their CCDF program is administered. OCC also consulted other federal programs and monitoring experts on the Onsite Monitoring System's development and incorporated their feedback regarding the efficiency and efficacy of the proposed process.

During the development of the Onsite Monitoring System, OCC conducted pilots in a number of States. Feedback received from pilot States and the pilot results were used to enhance the monitoring process and data collection method. Burden estimates below are based on an analysis of data collected through all of the pilot visits while accounting for variance in state documentation.

Respondents: State grantees and the District of Columbia.

ANNUAL BURDEN ESTIMATES

Instrument	Number of respondents	Number of responses per respondent	Average burden hours per response	Total burden hours
Compliance Demonstration Chart	17	1	16	272
Document Submission Chart	17	1	80	1,360

Estimated Total Annual Burden Hours: 1,632 hours.

In compliance with the requirements of the Paperwork Reduction Act of 1995 (Pub. L. 104–13, 44 U.S.C. chap 35), the Administration for Children and Families is soliciting public comment on the specific aspects of the information collection described above. Copies of the proposed collection of information can be obtained and comments may be forwarded by writing to the Administration for Children and Families, Office of Planning, Research and Evaluation, 330 C Street SW, Washington, DC 20201. Attn: ACF Reports Clearance Officer. Email address: *infocollection@acf.hhs.gov.* All requests should be identified by the title of the information collection.

The Department specifically requests comments on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted within 60 days of this publication.

Robert Sargis,

Reports Clearance Officer.

[FR Doc. 2018–23536 Filed 10–26–18; 8:45 am]

BILLING CODE 4184–43–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2018–N–3647]

Endo Pharmaceuticals, Inc., et al.; Withdrawal of Approval of 10 New Drug Applications

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA or Agency) is withdrawing approval of 10 new drug applications (NDAs) from multiple applicants. The applicants 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 November 28, 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 applicants 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.

Application No.	Drug	Applicant
NDA 009165	Delatestryl (testosterone enanthate) Injection, 200 milligrams (mg)/milliliter (mL).	Endo Pharmaceuticals, Inc., 1400 Atwater Dr., Malvern, PA 19355.
NDA 010417	Xylocaine (lidocaine hydrochloride (HCl)) 4% Topical Solution/Sterile Injection.	Fresenius Kabi, USA, LLC, Three Corporate Dr., Lake Zurich, IL 60047.
NDA 016297	Xylocaine (1.5% lidocaine HCl with dextrose 7.5%) Spinal Injection, 2 mL ampules.	Do.
NDA 016724	Norinyl 1+80 (mestranol and norethindrone) 21-Day Tablets, 0.08 mg/1 mg.	GD Searle LLC, a subsidiary of Pfizer Inc., 235 East 42nd St., New York, NY 10017.
NDA 016725	Norinyl 1+80 (mestranol and norethindrone) 28-Day Tablets, 0.08 mg/1 mg.	Do.
NDA 019217	Sodium Chloride 0.9% Injection USP in Plastic Container, 9 mg/mL.	ICU Medical, Inc., 600 N. Field Dr., Lake Forest, IL 60045.
NDA 019222	Dextrose 5% Injection USP in Plastic Container, 50 mg/mL	Do.
NDA 203098	Testosterone Gel, 2.5 mg/1.25 grams (g), 25 mg/2.5 g, 50 mg/5 g.	Perrigo Co., U.S. Agent for Perrigo Israel Pharmaceuticals Ltd., 3490 Quebec Ave. North, Minneapolis, MN 55427.
NDA 204031	Xartemis XR (oxycodone HCl and acetaminophen) Extended-Release Tablets, 7.5 mg/325 mg.	Mallinckrodt Inc., 675 McDonnell Blvd., Hazelwood, MO 63042.
NDA 205777	Targiniq ER (naloxone HCl and oxycodone HCl) Extended-Release Tablets, 5 mg/10 mg, 10 mg/20 mg, and 20 mg/40 mg.	Purdue Pharma, LP, One Stamford Forum, Stamford, CT 06901–3431.

Therefore, approval of the applications listed in the table, and all amendments and supplements thereto, is hereby withdrawn as of November 28, 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 November 28, 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: October 23, 2018.

Leslie Kux,

Associate Commissioner for Policy.

[FR Doc. 2018–23528 Filed 10–26–18; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2018–N–0821]

Agency Information Collection Activities; Submission for Office of Management and Budget Review; Comment Request; Investigation of Consumer Perceptions of Expressed Modified Risk Claims

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA, Agency, or we) is announcing that a proposed collection of information has been submitted to the Office of Management and Budget (OMB) for review and clearance under the Paperwork Reduction Act of 1995.

DATES: Fax written comments on the collection of information by November 28, 2018.

ADDRESSES: To ensure that comments on the information collection are received, OMB recommends that written comments be faxed to the Office of Information and Regulatory Affairs, OMB, Attn: FDA Desk Officer, Fax: 202–395–7285, or emailed to *oira_submission@omb.eop.gov.* All comments should be identified with the OMB control number 0910–NEW and title ''Investigation of Consumer Perceptions of Expressed Modified Risk Claims.'' Also include the FDA docket number found in brackets in the heading of this document.

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: In compliance with 44 U.S.C. 3507, FDA has submitted the following proposed collection of information to OMB for review and clearance.

Investigation of Consumer Perceptions of Expressed Modified Risk Claims

OMB Control Number 0910—NEW

I. Background

FDA's Center for Tobacco Products proposes to conduct a study to develop generalizable scientific knowledge to help inform its implementation of section 911 of the Federal Food, Drug, and Cosmetic Act (FD&C Act) (21 U.S.C. 387k), wherein FDA will be evaluating information submitted to the Agency about how consumers understand and perceive modified risk tobacco products (MRTPs). Section 911 of the FD&C Act authorizes FDA to grant orders to persons to allow the marketing of MRTPs. The term ''modified risk tobacco product'' means any tobacco product that is sold or distributed for use to reduce harm or the risk of tobacco-related disease associated with commercially marketed tobacco products. FDA can issue a risk modification order under section 911(g)(1) of the FD&C Act authorizing the marketing of an MRTP only if the Agency determines that the product, as it is used by consumers, will significantly reduce harm and the risk of tobacco-related disease to individual tobacco users and benefit the health of the population as a whole, taking into account both users of tobacco products and persons who do not currently use tobacco products (section 911(g)(1) of the FD&C Act). Alternatively, with respect to tobacco products that may not be commercially marketed under section 911(g)(1) of the FD&C Act, FDA may issue an exposure modification order under section 911(g)(2) of the FD&C Act authorizing the marketing of an MRTP if the Agency determines that the standard in section 911(g)(2) of the FD&C Act is met, including, among other requirements, that: Any aspect of the label, labeling, or advertising that would cause the product to be an MRTP

is limited to an explicit or implicit representation that the tobacco product or its smoke does not contain or is free of a substance or contains a reduced level of a substance, or presents a reduced exposure to a substance in tobacco smoke; the order would be appropriate to promote the public health; the issuance of the order is expected to benefit the population as a whole, taking into account both users and nonusers of tobacco products; and the existing evidence demonstrates that a measurable and substantial reduction in morbidity and mortality among individual tobacco users is reasonably likely to be shown in subsequent studies (section 911(g)(2) of the FD&C Act). In addition, section 911 of the FD&C Act requires that any advertising or labeling concerning modified risk products enable the public to comprehend the information concerning modified risk and to understand the relative significance of such information in the context of total health and in relation to all the diseases and health-related conditions associated with the use of tobacco products (section 911(h)(1) of the FD&C Act). The proposed research will inform the Agency's efforts to implement the provisions of the FD&C Act related to MRTPs.

FDA proposes conducting a study to assist in determining appropriate methods for gathering information about how consumers perceive and understand modified risk information. The study would develop and validate measures of consumer perceptions of health risk from using tobacco products. Moreover, the study would test how participants' responses on these measures are affected by viewing modified risk labeling or advertising, participants' characteristics such as prior beliefs about the harmfulness of tobacco products, current use of tobacco products, and sociodemographic characteristics. Finally, the study would examine factors that may influence the effectiveness of debriefing at the end of a consumer perception study to ensure that people read and recall key information about the study. This research is significant because it will validate methods that can be used in studies of the impact of labels, labeling, and advertising on consumer perceptions and understanding of the risks of product use.

Measures of consumer health risk perception will be developed and validated by conducting a study on two product types: Moist snuff smokeless tobacco products and electronic cigarette (e-cigarette) products. For each product type, we will assess individual-level factors that may moderate the impact of modified risk information on consumer responses. Potential moderating factors under study include: Beliefs (prior to viewing the modified risk information) about the harmfulness of tobacco products, and the strength with which those beliefs are held; current tobacco use behaviors; and sociodemographic characteristics including age and educational attainment. For each product type, participants will be randomized to view one of two conditions: Tobacco product labeling and advertising that either does or does not contain modified risk claims about a product. The labeling will consist of a product package. The advertising will consist of a print advertisement. The study will assess participants' perceptions of various health risks from using the product, as well as their perceptions of health risk from using the product compared to smoking cigarettes, using nicotine replacement therapies, and quitting all tobacco and nicotine products. The study will also assess participants' intentions to use the product and their level of doubt about whether tobacco products are harmful to users' health. Measures of intentions and doubt will be used to help assess the validity of the measures of health risk perception.

In the **Federal Register** of May 21, 2018 (83 FR 23464), FDA published a 60-day notice requesting public comment on the proposed collection of information. FDA received four comments that were PRA related. Within those submissions, FDA received multiple comments which the Agency has addressed.

(Comment) Three of the comments were supportive of the usefulness and importance of the proposed data collection. These comments stated that validated measures of consumers' health risk perceptions could be useful for FDA, researchers in the field, and industry—in particular, sponsors of modified risk tobacco product applications (MRTPAs). One of these comments expressed hope that the proposed study would be part of a more general effort by FDA to establish methods and standards for evaluating other aspects of MRTPAs.

(Response) FDA agrees with these comments to the extent they relate to this study.

(Comment) One of the comments was unsupportive of the proposed data collection, stating that it should not be undertaken for two reasons. The comment stated that the data are unneeded because U.S. consumers already understand the negative health effects of tobacco use and will not use a tobacco product if they are concerned about their health.

(Response) The proposed data collection focuses on consumer perceptions of modified risk tobacco products, which are products that are sold or distributed for use to reduce harm or the risk of tobacco-related diseases associated with commercially marketed tobacco products.

(Comment) A comment stated that the proposed data collection should not be undertaken because it would waste taxpayers' money.

(Response) FDA believes this study will provide information important to its implementation of The Family Smoking Prevention and Tobacco Control Act. FDA also notes that the study is not funded by taxpayers' money, but rather by industry user fees paid by regulated tobacco companies.

(Comment) One comment suggested that the proposed data collection should be guided by a theoretical approach.

(Response) The main objective of the data collection—developing and validating measures of consumer perceptions of tobacco health risks—is intentionally atheoretical. We intend for this aspect of the research to be data-driven rather than theory-driven. To accomplish this, we have created a large pool of risk perception items by aggregating items from all of the multi-item measures we could find in the published tobacco literature, putting them into the main categories of tobacco health effects that have been identified in prior health reviews, changing the wording of the items to put them in a common format, eliminating redundant or poorly worded items by consulting expert colleagues in medicine, epidemiology, and social science, and adding items to fill remaining gaps in terms of the main categories of tobacco health effects. When analyzing data from this proposed data collection, we plan to use factor analysis to identify the main dimensions underlying how U.S. consumers perceive tobacco product risks. Thus, overall, the goal of the proposed measurement development research is to comprehensively assess risk perceptions without overlaying our own preconceptions about how people may perceive these risks.

(Comment) One comment stated that the findings from our proposed analyses of moderation effects—in particular, the moderating effects of prior beliefs and the certainty with which those beliefs are held—should be considered exploratory, given that these effects are not well established in prior literature. Relatedly, another comment pointed out that the findings from these moderation

analyses may only apply to moist snuff smokeless tobacco and e-cigarette products, given that these are the product types under study in this proposed data collection.

(Response) FDA agrees that the findings of these analyses will be novel in the tobacco literature, and we plan to encourage others to replicate and extend our findings. However, we also note that the measures used in this part of the study were adapted from measures developed and used previously in the attitude certainty literature, and the hypotheses about the potential moderating effects of belief certainty were developed based on prior studies of attitude certainty (Refs. 1 and 2). Thus, there is related literature that will help us interpret our findings on this topic.

(Comment) A comment encouraged FDA to consider how to account for participants' prior beliefs when the tobacco product under study has not been previously marketed in the United States and is therefore unknown to U.S. consumers.

(Response) Our hypothesis would be that consumers may tend to be less certain about their beliefs about such unknown products, and therefore their beliefs about such products may be more susceptible to influence by modified risk information—but this is a hypothesis that has not been empirically tested. We agree that our findings from the proposed analyses of the moderating effects of prior beliefs will benefit from replication and extension by others.

(Comment) One comment suggested that we should consider making four changes to the proposed data collection methodology. First, this comment suggested modifying the study design to change it from a between-subjects design (*i.e.,* in which participants are randomized to conditions and complete a posttest) to a mixed factorial design (*i.e.,* in which participants complete a pretest, are randomized to conditions, and then complete a posttest). The comment stated that this modified design, described as a pretest-posttest-control-group design, would allow us to control for pretest scores, which would ''explicitly minimize the potential threat to internal validity, namely, selection bias.''

(Response) There are advantages and disadvantages to this alternative design type. Whereas the pretest-posttest-control-group design may help determine whether there is anything unusual about the sample that would reduce its representativeness of the target population (*i.e.,* caused by biased selection), using this design would require participants to respond to the key measures twice within a short period of time. This would significantly lengthen the study, which is currently estimated to take approximately 20 minutes, and may influence how participants respond on the posttest (*e.g.,* because of boredom or frustration with repetitive items, testing effects, or demand characteristics). Instead, we propose to use the original, between-subjects design and to conduct analyses to examine the sociodemographic and other characteristics of the sample to understand its representativeness of the U.S. population and to test the success of the randomization procedure.

(Comment) A comment suggested that we should consider using a newly developed measure of participants' intentions to use tobacco products rather than the currently proposed intention items. The comment noted that the currently proposed items are based on prior research but stated that the new measure was developed and validated following procedures in FDA's (2009) guidance on patient-reported outcome measures.

(Response) We appreciate this comment and support the continued development and validation of intention measures. However, at this time, we cannot use this newly developed measure because the research supporting its use has not yet been published in a peer-reviewed journal.

(Comment) A comment suggested that this proposed data collection should assess many more of participants' pre-existing beliefs and attitudes. As examples, the comment suggested assessing participants' skepticism and perceived truthfulness of modified risk claims, stating that this would allow us to more fully capture the key constructs that explain why some people are more likely than others to recall and comprehend the claims.

(Response) As with the recommendations above, we appreciate this suggestion but propose not to assess these additional constructs in this data collection because of concerns about participant burden. The proposed data collection is not intended to comprehensively assess influences on consumer responses to modified risk claims. Rather, it is intended to achieve several specific goals such as developing measures and testing novel potential moderators of the effects of modified risk information. The constructs proposed in this comment have been studied in prior research, as have additional constructs such as brand loyalty (November 19, 2014 (79 FR 68888)). Assessing such constructs may be informative but is not required to achieve the goals of the current proposed data collection.

(Comment) To assist with this project's measurement validation aims, this comment recommended that the study should collect two types of evidence discussed in an FDA guidance on patient-reported outcome measures (FDA, 2009): Evidence of the measures' content validity, such as open-ended input from appropriate populations, and evidence of reliability, other aspects of validity, and sensitivity to detect change.

(Response) The proposed data collection is consistent with both these recommendations. As described above, to achieve content validity, we developed our initial pool of items to be as comprehensive as possible, consulting multi-item measures used previously in the tobacco literature, literature on the objective health effects of tobacco use, and expert colleagues. Additionally, we cognitively tested our pool of items in individual, qualitative interviews with tobacco users and non-users to evaluate their understanding of the items and beliefs about product risks. These interviews included open-ended questions, as recommended. Moreover, the proposed data collection is designed to test the performance of our measures on the criteria discussed in the comment, including internal consistency reliability, other aspects of validity (*e.g.,* known groups, convergent, and discriminant validity), and sensitivity to detect changes (*i.e.,* based on responsiveness to viewing advertisements with vs. without modified risk information). Other performance measures such as test-retest reliability must await further study.

(Comment) Lastly, one comment requested that we clarify how the proposed data collection will assist in measuring consumers' understanding of modified risk information, in addition to their perceptions of health risk.

(Response) In our conceptualization, risk perceptions are a component of consumer understanding, which also includes other components. The goal of the present study is to develop and validate measures of understanding insofar as this construct includes people's perceptions of absolute and relative health risks of using tobacco products.

FDA estimates the burden of this collection of information as follows:

TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN [1]

Activity	Number of respondents	Number of responses per respondent	Total annual responses	Average burden per response	Total hours
Invitation: Young Adults (Ages 18–25)	29,000	1	29,000	0.02 (1 minute)	580
Invitation: Adults (Ages 26+)	29,000	1	29,000	0.02 (1 minute)	580
Consent and Screener: Young Adults (Ages 18–25).	11,000	1	11,000	0.10 (6 minutes)	1,100
Consent and Screener: Adults (Ages 26+)	16,500	1	16,500	0.10 (6 minutes)	1,650
Study: Young Adults (Ages 18–25)	3,300	1	3,300	0.33 (20 minutes)	1,089
Study: Adults (Ages 26+)	3,300	1	3,300	0.33 (20 minutes)	1,089
Total					6,088

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

FDA's burden estimate is based on prior experience with research that is similar to this proposed study. Approximately 58,000 people will receive a study invitation, estimated to take 1 minute to read (approximately 0.02 hour), for a total of 1,160 hours for invitations. Approximately 27,500 people will complete the informed consent and screener to determine eligibility for participation in the study, estimated to take 6 minutes (0.10 hour), for a total of 2,750 hours for informed consent and screening activities. Approximately 6,600 people will complete the full study, estimated to take 20 minutes (approximately 0.33 hour), for a total of 2,178 hours for study completion activities. The estimated total hour burden of the collection of information is 6,088 hours.

II. References

The following references marked with an asterisk (*) are on display at the Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852) and are available for viewing by interested persons between 9 a.m. and 4 p.m., Monday through Friday; they also are available electronically at *https://www.regulations.gov.* References without asterisks are not on public display at *https://www.regulations.gov* because they have copyright restriction. Some may be available at the website address, if listed. References without asterisks are available for viewing only at the Dockets Management Staff. FDA has verified the website addresses, as of the date this document publishes in the **Federal Register**, but websites are subject to change over time.

1. Tormala, Z.L. and D.D. Rucker, ''Attitude Certainty: A Review of Past Findings and Emerging Perspectives.'' *Social and Personality Psychology Compass,* 1:469–492, 2007. doi:10.1111/j.1751–9004.2007.00025.x.
2. Tormala, Z.L. and D.D. Rucker, ''Attitude Certainty: Antecedents, Consequences, and New Directions.'' *Consumer Psychology Review,* 1:72–89, 2018. doi:10.1002/arcp.1004.*

Dated: October 23, 2018.

Leslie Kux,

Associate Commissioner for Policy.

[FR Doc. 2018–23523 Filed 10–26–18; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2018–N–1726]

Circulatory System 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 public advisory committee meeting of the Circulatory System Devices Panel of the Medical Devices Advisory Committee. The general function of the committee is to provide advice and recommendations to the Agency on FDA's regulatory issues. The meeting will be open to the public.

DATES: The meeting will be held on December 4 and 5, 2018, from 8 a.m. to 6 p.m.

ADDRESSES: Hilton Washington DC North/Gaithersburg, Salons A, B, C, and D, 620 Perry Pkwy., Gaithersburg, MD 20877. The hotel telephone number is 301–977–8900; additional information available online at: *https://www3.hilton.com/en/hotels/maryland/hilton-washington-dc-north-gaithersburg-GAIGHHF/index.html.* 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: Patricio Garcia, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. G610, Silver Spring, MD 20993–0002, *patricio.garcia@fda.hhs.gov,* 301–796–6875, 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.

SUPPLEMENTARY INFORMATION:

Agenda: On December 4, 2018, the committee will discuss, make recommendations, and vote on information regarding the premarket application (PMA) for the OPTIMIZER SMART Implantable Pulse Generator device, sponsored by Impulse Dynamics (USA), Inc. This first-of-a-kind device is indicated to provide cardiac contractility modulation for class III heart failure patients who are not responding to optimal medical therapy.

On December 5, 2018, the committee will discuss and make recommendations regarding issues relating to the emergence of medical devices, which aim to treat hypertension. Currently, clinical studies to evaluate the safety and effectiveness of these devices are progressing. FDA requests panel input regarding the potential indications and labeling for devices intended to treat hypertension and optimal study designs needed to

evaluate the potential benefits and risks while considering issues such as medication compliance, patient perspective, and appropriate study controls.

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: FDA will work with affected industry, professional organizations, and societies with an interest in medical devices designed to treat hypertension, as well as members of those groups who wish to make a presentation separate from the general open public hearing; time slots are available on December 5, 2018. Representatives from industry, professional organizations and societies interested in making formal presentations to the committee should notify the contact person on or before November 13, 2018.

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 November 21, 2018. Oral presentations from the public will be scheduled on December 4 and 5, between approximately 1 p.m. and 2 p.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 November 13, 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 November 14, 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 Artair Mallett at *artair.mallett@fda.hhs.gov* or 301–796–9638 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: October 24, 2018.

Leslie Kux,

Associate Commissioner for Policy.

[FR Doc. 2018–23577 Filed 10–26–18; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2017–E–4181]

Determination of Regulatory Review Period for Purposes of Patent Extension; RAINDROP NEAR VISION INLAY

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 RAINDROP NEAR VISION INLAY 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 medical device.

DATES: Anyone with knowledge that any of the dates as published (see the **SUPPLEMENTARY INFORMATION** section) are incorrect may submit either electronic or written comments and ask for a redetermination by December 28, 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 April 29, 2019. 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 December 28, 2018. The *https://www.regulations.gov* electronic filing system will accept comments until 11:59 p.m. Eastern Time at the end of December 28, 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–2017–E–4181 for ''Determination of

Regulatory Review Period for Purposes of Patent Extension; RAINDROP NEAR VISION INLAY.'' 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:

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 medical devices, the testing phase begins with a clinical investigation of the device and runs until the approval phase begins. The approval phase starts with the initial submission of an application to market the device and continues until permission to market the device is granted. Although only a portion of a regulatory review period may count toward the actual amount of extension that the Director of USPTO may award (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 medical device will include all the testing phase and approval phase as specified in 35 U.S.C. 156(g)(3)(B).

FDA has approved for marketing the medical device RAINDROP NEAR VISION INLAY. RAINDROP NEAR VISION INLAY is indicated for intrastromal implantation to improve near vision in the non-dominant eye of phakic, presbyopic patients, 41 to 65 years of age, who have manifest refractive spherical equivalent of +1.00 diopters (D) to -0.50 D with less than or equal to 0.75 D of refractive cylinder, who do not require correction for clear distance vision, but who do require near correction of +1.50 D to +2.50 D of reading add. Subsequent to this approval, the USPTO received a patent term restoration application for RAINDROP NEAR VISION INLAY (U.S. Patent No. 8,057,541) from ReVision Optics, Inc., and the USPTO requested FDA's assistance in determining this patent's eligibility for patent term restoration. In a letter dated September 20, 2017, FDA advised the USPTO that this medical device had undergone a regulatory review period and that the approval of RAINDROP NEAR VISION INLAY 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 RAINDROP NEAR VISION INLAY is 2,354 days. Of this time, 2,074 days occurred during the testing phase of the regulatory review period, while 280 days occurred during the approval phase. These periods of time were derived from the following dates:

1. *The date an exemption under section 520(g) of the Federal Food, Drug, and Cosmetic Act (FD&C Act) (21 U.S.C. 360j(g)) involving this device became effective:* January 20, 2010. FDA has verified the applicant's claim that the date the investigational device exemption required under section 520(g) of the FD&C Act for human tests to begin became effective was January 20, 2010.

2. *The date an application was initially submitted with respect to the device under section 515 of the FD&C Act (21 U.S.C. 360e):* September 24, 2015. The applicant claims March 25, 2014, as the date the premarket approval application (PMA) for RAINDROP NEAR VISION INLAY (PMA P150034) was initially submitted. However, FDA records indicate that PMA P150034 was completely submitted on September 24, 2015.

3. *The date the application was approved:* June 29, 2016. FDA has verified the applicant's claim that PMA P150034 was approved on June 29, 2016.

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 828 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: October 23, 2018.

Leslie Kux,

Associate Commissioner for Policy.

[FR Doc. 2018–23527 Filed 10–26–18; 8:45 am]

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DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2014–N–1051]

Modified Risk Tobacco Product Applications for Snus Products Submitted by Swedish Match North America Inc.; Reopening of the Comment Period

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice; reopening of the comment period.

SUMMARY: The Food and Drug Administration (FDA or the Agency) is reopening the period for public comment on modified risk tobacco product applications (MRTPAs) for specific General Snus products submitted by Swedish Match North America Inc. and announcing the availability for public comment of a recently received amendment to the MRTPAs. The original notice of availability for the applications appeared in the **Federal Register** of August 27, 2014. In that notice, FDA requested comments on the originally filed MRTPAs that are posted on *https://www.regulations.gov* and FDA's website. In the **Federal Register** of July 31, 2015, FDA issued a notice to reopen and extended the comment period for comments on amendments to the MRTPAs. That comment period closed on August 31, 2015. FDA is now reopening the comment period to seek comment specifically on a recent amendment to the MRTPAs.

DATES: Electronic or written comments on the application may be submitted beginning October 29, 2018. FDA will establish a closing date for the comment period as described in section I.

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–2014–N–1051 for ''Modified Risk Tobacco Product Applications for Snus Products Submitted by Swedish Match North America Inc.'' Received comments 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 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: Paul Hart, Center for Tobacco Products, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 71, Rm. G335, Silver Spring, MD 20993–0002, 1–877–287–1373, email: *AskCTP@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

In the **Federal Register** of August 27, 2014 (79 FR 51183), FDA published a notice of availability for MRTPAs submitted by Swedish Match North America Inc. and gave the public 180 days to comment on the applications. FDA subsequently published a notice in the **Federal Register** of July 31, 2015 (80 FR 45661), to reopen and extend the comment period to allow for comment on amendments to the applications. The comment period closed on August 31, 2015. On December 14, 2016, FDA

issued a letter to Swedish Match North America Inc. that denied the MRTPAs, in part, and outlined deficiencies in the remaining portions of the MRTPAs that the applicant could address by submitting an amendment to the applications. FDA recently received an amendment to Swedish Match North America Inc.'s MRTPAs and is making the amendment available (except for matters in the amendment that are trade secrets or otherwise confidential commercial information) for public comment. FDA is reopening the period for public comment so that the public has the opportunity to review and comment on the amendment.

FDA is required by section 911(e) of the Federal Food, Drug, and Cosmetic Act (FD&C Act) (21 U.S.C. 387k(e)) to make an MRTPA available to the public (except for matters in the application that are trade secrets or otherwise confidential commercial information) and to request comments by interested persons on the information contained in the application and on the label, labeling, and advertising accompanying the application. The determination of whether an order is appropriate under section 911 of the FD&C Act is based on the scientific information submitted by the applicant as well as the scientific evidence and other information that is made available to the Agency, including through public comments.

FDA has posted the application amendment for public comment, which has been redacted in accordance with applicable laws. FDA intends to establish a closing date for the comment period that is at least 30 days after the final documents from the application are made available for public comment and will announce the closing date at least 30 days in advance. FDA will notify the public about the availability of additional application documents, if any, and the closing date for the comment period via the Agency's web page for the MRTPA (see section II) and by other means of public communication, such as by email to individuals who have signed up to receive email alerts. FDA does not intend to issue additional notices in the **Federal Register** regarding amendments or the comment period for these MRTPAs. To receive email alerts, visit FDA's email subscription service management website (*http://go.fda.gov/subscriptionmanagement*), provide an email address, scroll down to the ''Tobacco'' heading, select ''Modified Risk Tobacco Product Application Updates'', and click ''Submit''. To encourage public participation consistent with section 911(e) of the FD&C Act, FDA is making the redacted MRTPAs that are the subject of this notice available electronically (see section II).

II. Electronic Access

Persons with access to the internet may obtain the documents at either *https://www.fda.gov/TobaccoProducts/Labeling/MarketingandAdvertising/ucm533454.htm* or *https://www.regulations.gov.*

Dated: October 23, 2018.

Leslie Kux,

Associate Commissioner for Policy.

[FR Doc. 2018–23524 Filed 10–26–18; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Agency Information Collection Activities: Submission to OMB for Review and Approval; Public Comment Request; Ryan White HIV/AIDS Program Client-Level Data Reporting System, OMB No. 0906–xxxx–NEW

AGENCY: Health Resources and Services Administration (HRSA), Department of Health and Human Services.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995, HRSA has submitted an Information Collection Request (ICR) to the Office of Management and Budget (OMB) for review and approval. Comments submitted during the first public review of this ICR will be provided to OMB. OMB will accept further comments from the public during the review and approval period.

DATES: Comments on this ICR should be received no later than November 28, 2018.

ADDRESSES: Submit your comments, including the ICR Title, to the desk officer for HRSA, either by email to *OIRA_submission@omb.eop.gov* or by fax to (202) 395–5806.

FOR FURTHER INFORMATION CONTACT: To request a copy of the clearance requests submitted to OMB for review, email Lisa Wright-Solomon, the HRSA Information Collection Clearance Officer at *paperwork@hrsa.gov* or call (301) 443–1984.

SUPPLEMENTARY INFORMATION:

Information Collection Request Title: Client-Level Data Reporting System.

OMB No. 0906–xxxx–NEW.

Abstract: The Ryan White HIV/AIDS Program's (RWHAP) client-level data reporting system, entitled the RWHAP Services Report or the Ryan White Services Report (RSR), is designed to collect information from grant recipients, as well as their subrecipients, funded under Parts A, B, C, and D of the RWHAP statute. The RWHAP, authorized under Title XXVI of the Public Health Service Act, as amended by the Ryan White HIV/AIDS Treatment Extension Act of 2009, is administered by HRSA HIV/AIDS Bureau (HAB). The HRSA RWHAP funds and coordinates with cities, states, and local clinics/community-based organizations to deliver efficient and effective HIV care, treatment, and support to low-income people living with HIV (PLWH).

Need and Proposed Use of the Information: The RWHAP statute requires HRSA to monitor the administration of grant funds, allocation of funding, service utilization, and client demographic and HIV health outcome data (*e.g.,* viral suppression). The RSR collects data on the characteristics of RWHAP-funded recipients, subrecipients, and the patients or clients served. The RSR system consists of two online data forms: the Recipient Report and the Service Provider Report; and the Client Report, which is a data file containing the client-level data elements. Data are submitted annually. The RWHAP statute specifies the importance of recipient accountability and linking performance to budget. The RSR is used to ensure recipient compliance with the statute, including evaluating the effectiveness of programs, monitoring recipient and subrecipient performance, and informing annual reports to Congress. Information collected through the RSR is critical for HRSA, state/local grant recipients, and individual service providers to understand existing HIV-related service delivery systems and the clients served. Information in the RSR is used to assess trends in service utilization and HIV health outcomes for clients served. Data from the RSR is analyzed to identify disparities and gaps within the service delivery systems. The 60-day notice published on November 27, 2017 (Vol. 82, No. 226).

This new ICR is being developed to replace the existing ICR (OMB control number 0915–0323), for which HRSA has collected RSR data since 2009. As more recipients fully fund services using other RWHAP-related funding streams, such as pharmacy rebate dollars, HRSA HAB receives less information on RWHAP eligible clients, which reduces HRSA HAB's ability to measure the investment and impact of all RWHAP-related expenditures at state

and local levels. Revisions in this new package will account for the funding decisions made by recipients and will now include reporting of eligible clients who receive HRSA RWHAP allowable services using RWHAP-related funding (*e.g.,* program income and pharmacy rebates) starting with the 2019 RSR, submitted in March 2020. The proposed change may require recipients to collect additional data, either on clients or outcome measures. To decrease burden in collecting these additional data, HRSA HAB proposes a phased approach to allow time for recipients to expand their systems to collect the data. HRSA HAB expects that some recipients already receive this information from subrecipients for monitoring purposes. However, with respect to those subrecipients who are not collecting these data, such subrecipients would be required to collect additional client level information.

In an effort to increase HRSA HAB's ability to understand coverage areas for RWHAP provider sites and the population that provider sites serve, this new ICR will ask recipients to provide zip codes for RWHAP clients receiving outpatient ambulatory health services, in addition to asking them to list the number of unduplicated clients residing in each zip code.

Additional modifications will be made to several variables within the client report to reduce burden, improve data quality, and align data collection efforts with Policy Clarification Notice Ryan White HIV/AIDS Program Services: Eligible Individuals and Allowable Uses of Funds (PCN 16–02). These modifications will include the removal of 14 variables in the Client, Service Provider, and Recipient Reports. HRSA will continue to collect and report the client-level data elements supplied by the existing ICR through 2019. In 2019, HRSA will discontinue use of the existing ICR and will collect and report on the data elements defined in the new ICR. While there will be no overlap in the data collected and reported between the existing and new ICR, HRSA is submitting this new ICR in tandem with the existing ICR to allow recipients the ability to make modifications to their RSR systems between the two reporting periods. This will allow recipients to continue collecting and reporting on both the old and new variables without interruption.

Likely Respondents: RWHAP Part A, Part B, Part C, and Part D recipients and their subrecipients.

Burden Statement: Burden in this context means the time expended by persons to generate, maintain, retain, disclose or provide the information requested. This includes the time needed to (1) review instructions; (2) develop, acquire, install, and utilize technology and systems for the purpose of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; (3) train personnel and respond to a collection of information; (4) search data sources; (5) complete and review the collection of information; and (6) transmit or otherwise disclose the information. The total annual burden hours estimated for this ICR are summarized in the table below.

TOTAL ESTIMATED ANNUALIZED BURDEN—HOURS

Type of respondents	Form name	Number of respondents	Number of responses per respondent	Total responses	Average burden per response (in hours)	Total burden hours
RWHAP Parts A, B, C, and D Grant recipients.	Recipient Report ..	475	1	475	11	5,225
	Service Provider Report.	2,079	1	2,079	13	27,027
	Client Report	1,607	1	1,607	113	181,591
Total	.....	4,161	.....	4,161	.....	213,843

Amy P. McNulty,

Acting Director, Division of the Executive Secretariat.

[FR Doc. 2018–23547 Filed 10–26–18; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

[Document Identifier: OS–0990–0302]

Agency Information Collection Request. 60-Day Public Comment Request

AGENCY: Office of the Secretary, HHS.

ACTION: Notice.

SUMMARY: In compliance with the requirement of the Paperwork Reduction Act of 1995, the Office of the Secretary (OS), Department of Health and Human Services, is publishing the following summary of a proposed collection for public comment.

DATES: Comments on the ICR must be received on or before December 28, 2018.

ADDRESSES: Submit your comments to *Sherrette.Funn@hhs.gov* or by calling (202) 795–7714.

FOR FURTHER INFORMATION CONTACT: When submitting comments or requesting information, please include the document identifier 0990–0302–60D and project title for reference, to *Sherrette.funn@hhs.gov,* or call the Reports Clearance Officer at 202–795–7714.

SUPPLEMENTARY INFORMATION: Interested persons are invited to send comments regarding this burden estimate or any other aspect of this collection of information, including any of the following subjects: (1) The necessity and utility of the proposed information collection for the proper performance of the agency's functions; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

Title of the Collection: Medical Reserve Corps Unit Profile and Reports.

Type of Collection: Revision.

OMB No. 0990–0302.

Abstract: Medical Reserve Corps Units are currently located in 889 communities across the United States and represent a resource of 188,229 volunteers. In order to continue to support MRC units detailed information about the MRC units, including unit demographics, contact information (regular and emergency), volunteer numbers and information about unit activities is needed by the MRC

Program. MRC Unit Leaders are asked to update this information on the MRC website at least quarterly and to participate in a technical assistance assessment using the Capability Assessment at least annually. This collection informs resources and tools developed as part of national programing, identify trends and target technical assistance to support MRC units' preparedness to respond to disasters in their communities. The MRC unit data collection has been refined to eliminate duplication and streamline data collection tools.

ANNUALIZED BURDEN HOUR TABLE

Forms (if necessary)	Respondents (if necessary)	Number of respondents	Number of responses per respondents	Average burden per response	Total burden hours
Unit Profile	MRC Unit Leader	889	4	30/60	1,778
Capability Assessment	MRC Unit Leader	889	1	30/60	444.5
Factors for Success	MRC Unit Leader	889	4	30/60	1,778
Unit Activity Reporting	MRC Unit Leader	889	4	15/60	889
Total			13		4,889.5

Terry Clark,

Office of the Secretary, Paperwork Reduction Act Reports Clearance Officer.

[FR Doc. 2018–23522 Filed 10–26–18; 8:45 am]

BILLING CODE 4150–47–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Neurological Disorders and Stroke; Notice of Closed 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, National Institute of Neurological Disorders and Stroke.

The meeting will be closed to the public as indicated below in accordance with the provisions set forth in sections 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 of Neurological Disorders and Stroke, 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, National Institute of Neurological Disorders and Stroke.

Date: November 18–20, 2018.

Time: 6:00 p.m. to 12:00 p.m.

Agenda: To review and evaluate personal qualifications and performance, and competence of individual investigators.

Place: Residence Inn Bethesda, 7335 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: Nina F. Schor, M.D., Ph.D., Deputy Director and Acting Scientific Director, National Institute of Neurological Disorders and Stroke, NIH, Building 31, Room 8A52, Bethesda, MD 20892, (301) 496–9746, *nina.schor@nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.853, Clinical Research Related to Neurological Disorders; 93.854, Biological Basis Research in the Neurosciences, National Institutes of Health, HHS).

Dated: October 23, 2018.

Sylvia L. Neal,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2018–23511 Filed 10–26–18; 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 R13's Conference Grants.

Date: December 7, 2018.

Time: 2:00 p.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Natcher Building, Room 3An12N, 45 Center Drive, Bethesda, MD 20892.

Contact Person: John J. Laffan, Ph.D., Scientific Review Officer, Office of Scientific Review, National Institute of General Medical Sciences, National Institutes of Health, Natcher Building, Room 3AN18J, Bethesda, MD 20892, 301–594–2773, *laffanjo@mail.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: October 23, 2018.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2018–23513 Filed 10–26–18; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed 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; Small Business: Cardiovascular Respiratory Sciences.

Date: November 15, 2018.

Time: 8:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Residence Inn Capital View, 2850 South Potomac Avenue, Arlington, VA 22202.

Contact Person: Eugene Carstea, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4130, MSC 7818, Bethesda, MD 20892, (301) 408–9756, *carsteae@csr.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research; 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: October 23, 2018.

Sylvia L. Neal,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2018–23514 Filed 10–26–18; 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; Building Infrastructure Leading to Diversity (BUILD) Initiative Phase II.

Date: December 3–4, 2018.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Embassy Suites at the Chevy Chase Pavilion, 4300 Military Road NW, Washington, DC 20015.

Contact Person: Lisa A. Dunbar, Ph.D., Scientific Review Officer, Office of Scientific Review, National Institute of General Medical Sciences, National Institutes of Health, 45 Center Drive, Room 3AN12, Bethesda, MD 20892, 301–594–2849, *dunbarl@mail.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: October 23, 2018.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2018–23512 Filed 10–26–18; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Office of the Director, National Institutes of Health; Notice of Meeting

Pursuant to section 10(a) of the Federal Advisory Committee Act, as amended, notice is hereby given of a meeting of the Advisory Committee to the Deputy Director for Intramural Research, National Institutes of Health.

The meeting will be open to the public, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting.

Name of Committee: Advisory Committee to the Deputy Director for Intramural Research, National Institutes of Health.

Date: October 31, 2018.

Time: 12:00 p.m. to 1:00 p.m.

Agenda: To discuss the final report of the AC DDIR Site Visit Review of the Intramural Research Program Trans NIH Recruitment and Innovation Programs.

Place: National Institutes of Health, Building 1, Participant passcode: 68050, Teleconference Line 888–233–9215, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Michael M. Gottesman, Deputy Director, National Institutes of Health, Building One, Room 160, Bethesda, MD 20892, 301–496–1921.

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.

Any interested person may file written comments with the committee by forwarding the statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

(Catalogue of Federal Domestic Assistance Program Nos. 93.14, Intramural Research Training Award; 93.22, Clinical Research Loan Repayment Program for Individuals from Disadvantaged Backgrounds; 93.232, Loan Repayment Program for Research Generally; 93.39, Academic Research Enhancement Award; 93.936, NIH Acquired Immunodeficiency Syndrome Research Loan Repayment Program; 93.187, Undergraduate Scholarship Program for Individuals from Disadvantaged Backgrounds, National Institutes of Health, HHS)

Dated: October 23, 2018.

Sylvia L. Neal,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2018–23510 Filed 10–26–18; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

[Docket No. USCG–2018–0136]

Collection of Information Under Review by Office of Management and Budget; OMB Control Number: 1625–NEW

AGENCY: Coast Guard, DHS.

ACTION: Thirty-day notice requesting comments.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995 the U.S. Coast Guard is forwarding an Information Collection Request (ICR), abstracted below, to the Office of Management and Budget (OMB), Office of Information and Regulatory Affairs (OIRA), requesting approval for the following collection of information: 1625–NEW, Coast Guard Art Program Membership Application Form. Our ICR describes the information we seek to collect from the public. Review and comments by OIRA ensure we only impose paperwork burdens commensurate with our performance of duties.

DATES: Comments must reach the Coast Guard and OIRA on or before November 28, 2018.

ADDRESSES: You may submit comments identified by Coast Guard docket number [USCG–2018–0136] to the Coast Guard using the Federal eRulemaking Portal at *https://www.regulations.gov.* Alternatively, you may submit comments to OIRA using one of the following means:

(1) *Email: dhsdeskofficer@omb.eop.gov.*

(2) *Mail:* OIRA, 725 17th Street NW, Washington, DC 20503, attention Desk Officer for the Coast Guard.

A copy of the ICR is available through the docket on the internet at *https://*

www.regulations.gov. Additionally, copies are available from: Commandant (CG–612), Attn: Paperwork Reduction Act Manager, U.S. Coast Guard, 2703 Martin Luther King Jr. Ave. SE, Stop 7710, Washington, DC 20593–7710.

FOR FURTHER INFORMATION CONTACT: Mr. Anthony Smith, Office of Information Management, telephone 202–475–3532, or fax 202–372–8405, for questions on these documents.

SUPPLEMENTARY INFORMATION:

Public Participation and Request for Comments

This Notice relies on the authority of the Paperwork Reduction Act of 1995; 44 U.S.C. Chapter 35, as amended. An ICR is an application to OIRA seeking the approval, extension, or renewal of a Coast Guard collection of information (Collection). The ICR contains information describing the Collection's purpose, the Collection's likely burden on the affected public, an explanation of the necessity of the Collection, and other important information describing the Collection. There is one ICR for each Collection.

The Coast Guard invites comments on whether this ICR should be granted based on the Collection being necessary for the proper performance of Departmental functions. In particular, the Coast Guard would appreciate comments addressing: (1) The practical utility of the Collection; (2) the accuracy of the estimated burden of the Collection; (3) ways to enhance the quality, utility, and clarity of information subject to the Collection; and (4) ways to minimize the burden of the Collection on respondents, including the use of automated collection techniques or other forms of information technology. These comments will help OIRA determine whether to approve the ICR referred to in this Notice.

We encourage you to respond to this request by submitting comments and related materials. Comments to Coast Guard or OIRA must contain the OMB Control Number of the ICR. They must also contain the docket number of this request [USCG–2018–0136], and must be received by November 28, 2018.

Submitting Comments

We encourage you to submit comments through the Federal eRulemaking Portal at *https://www.regulations.gov.* If your material cannot be submitted using *https://www.regulations.gov,* contact the person in the **FOR FURTHER INFORMATION CONTACT** section of this document for alternate instructions. Documents mentioned in this notice, and all public comments, are in our online docket at *https://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.

We accept anonymous comments. All comments received will be posted without change to *https://www.regulations.gov* and will include any personal information you have provided. For more about privacy and the docket, you may review a Privacy Act notice regarding the Federal Docket Management System in the March 24, 2005, issue of the **Federal Register** (70 FR 15086).

OIRA posts its decisions on ICRs online at *https://www.reginfo.gov/public/do/PRAMain* after the comment period for each ICR. An OMB Notice of Action on each ICR will become available via a hyperlink in the OMB Control Number: 1625–NEW.

Previous Request for Comments

This request provides a 30-day comment period required by OIRA. The Coast Guard published the 60-day notice (83 FR 29564, June 25, 2018) required by 44 U.S.C. 3506(c)(2). That Notice elicited no comments. Accordingly, no changes have been made to the Collections.

Information Collection Request

Title: Coast Guard Art Program Membership Application Form.

OMB Control Number: 1625–NEW.

Summary: The collection contains the application form for membership and samples of work for those wishing to become Coast Guard Art Program (COGAP) member artists.

Need: The application and samples of work are needed to determine if the applicant has the necessary artistic skills and ability to become a contributing member of the Coast Guard Art Program.

Forms: CG–5700, Coast Guard Art Program (COGAP) Membership Application Form. Online application format the art program website (*https://www.uscg.mil/community/ArtProgram.asp*) which can be downloaded and samples of work in low resolution jpeg format which can be electronically submitted to *Maryann.bader@uscg.mil* or sent by regular mail to Mary Ann Bader, Coast Guard Headquarters, CG–09232, 2703 Martin Luther King Jr. Ave. SE, Stop, Washington, DC 20593–7103.

Respondents: Approximately ten applicants apply annually to become COGAP artists.

Frequency: Applicants apply only once per year.

Hour Burden Estimate: The estimated annual burden is 10 hours a year.

Authority: The Paperwork Reduction Act of 1995; 44 U.S.C. Chapter 35, as amended.

Dated: October 23, 2018.

James D. Roppel,

U.S. Coast Guard, Acting Chief, Office of Information Management.

[FR Doc. 2018–23502 Filed 10–26–18; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Transportation Security Administration

[Docket No. TSA–2011–0008]

Aviation Security Advisory Committee (ASAC) Meeting

AGENCY: Transportation Security Administration, DHS.

ACTION: Committee management; notice of Federal Advisory Committee meeting.

SUMMARY: The Transportation Security Administration (TSA) will hold a meeting of the Aviation Security Advisory Committee (ASAC) to discuss issues listed in the Meeting Agenda section below. This meeting will be open to the public as stated in the Summary section below.

DATES: The Committee will meet on Thursday, December 6, 2018, from 9 a.m. to 12 p.m. This meeting may end early if all business is completed.

ADDRESSES: The meeting will be held at TSA Headquarters, 601 12th Street South, Arlington, VA 20598–6028.

FOR FURTHER INFORMATION CONTACT: Tamika McCree Elhilali, Aviation Security Advisory Committee Designated Federal Official, Transportation Security Administration (TSA–28), 601 South 12th Street, Arlington, VA 20598–6028, *ASAC@tsa.dhs.gov,* 571–227–2632.

SUPPLEMENTARY INFORMATION:

Summary

Notice of this meeting is given in accordance with the Aviation Security Stakeholder Participation Act, codified at 49 U.S.C. 44946. Pursuant to 49 U.S.C. 44946(f), ASAC is exempt from the Federal Advisory Committee Act (5 U.S.C. App.). The committee provides advice and recommendations for improving aviation security measures to the Administrator of TSA.

The meeting will be open to the public and will focus on items listed in the ''Meeting Agenda'' section below. Members of the public, and all non-

ASAC members and non-TSA staff must register in advance with their full name and date of birth to attend. Due to space constraints, the meeting is limited to 75 people, including ASAC members and staff, on a first to register basis. Attendees are required to present government-issued photo identification to verify identity.

In addition, members of the public must make advance arrangements, as stated below, to present oral or written statements specifically addressing issues pertaining to the items listed in the Meeting Agenda section below. The public comment period will begin at approximately 11 a.m., depending on the meeting progress. Speakers are requested to limit their comments to three minutes. Contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section no later than November 23, 2018, to register to attend the meeting and/or to present oral or written statements addressing issues pertaining to the items listed in the Meeting Agenda section below. Anyone in need of assistance or a reasonable accommodation for the meeting should contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section.

Meeting Agenda

The Committee will meet to discuss items listed in the agenda below:

- Legislative Update
- Subcommittee and Work Group briefings on calendar year (CY) 2018 activities, key issues, and areas of focus for CY 2019:
  - Air Cargo
  - Airport
  - General Aviation
  - Insider Threat
  - International Aviation
  - Security Technology
  - Secondary Barriers Working Group
- Public Comments
- Discussion of the CY 2019 Committee Agenda
- Closing Comments and Adjournment

Dated: October 19, 2018.

Eddie D. Mayenschein,

Assistant Administrator, Office of Security Policy and Industry Engagement.

[FR Doc. 2018–23595 Filed 10–26–18; 8:45 am]

BILLING CODE 9110–05–P

DEPARTMENT OF HOMELAND SECURITY

Transportation Security Administration

Intent To Request Extension From OMB of One Current Public Collection of Information: Pipeline Operator Security Information

AGENCY: Transportation Security Administration, DHS.

ACTION: 60-Day notice.

SUMMARY: The Transportation Security Administration (TSA) invites public comment on one currently approved Information Collection Request (ICR), Office of Management and Budget (OMB) control number 1652–0055, abstracted below that we will submit to OMB for an extension in compliance with the Paperwork Reduction Act (PRA). The ICR describes the nature of the information collection and its expected burden. Specifically, the collection involves the submission of data concerning pipeline security incidents.

DATES: Send your comments by December 28, 2018.

ADDRESSES: Comments may be emailed to *TSAPRA@tsa.dhs.gov* or delivered to the TSA PRA Officer, Information Technology (IT), TSA–11, Transportation Security Administration, 601 South 12th Street, Arlington, VA 20598–6011.

FOR FURTHER INFORMATION CONTACT: Christina A. Walsh at the above address, or by telephone (571) 227–2062.

SUPPLEMENTARY INFORMATION:

Comments Invited

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid OMB control number. The ICR documentation will be available at *http://www.reginfo.gov* upon its submission to OMB. Therefore, in preparation for OMB review and approval of the following information collection, TSA is soliciting comments to—

(1) Evaluate whether the proposed information requirement is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including using appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Consistent with the requirements of Executive Order (E.O.) 13771, Reducing Regulation and Controlling Regulatory Costs, and E.O. 13777, Enforcing the Regulatory Reform Agenda, TSA is also requesting comments on the extent to which this request for information could be modified to reduce the burden on respondents.

Information Collection Requirement

OMB Control Number 1652–0055; Pipeline Operator Security Information. In addition to TSA's broad responsibility and authority for ''security in all modes of transportation . . . including security responsibilities . . . over modes of transportation[,]'' *see* 49 U.S.C. 114, TSA is required to issue recommendations for pipeline security measures and conduct inspections to assess implementation of the recommendations. *See* sec. 1557 of the Implementing Recommendations of the 9/11 Commission Act of 2007, Public Law 110–53 (August 3, 2007). Consistent with these requirements, TSA produced Pipeline Security Guidelines in December 2010, with an update published in March 2018.

As the lead Federal agency for pipeline security and consistent with its statutory authorities, TSA needs to be notified of all (1) incidents that may indicate a deliberate attempt to disrupt pipeline operations and (2) activities that could be precursors to such an attempt. The Pipeline Security Guidelines encourage pipeline operators to notify the Transportation Security Operations Center (TSOC) via phone or email as soon as possible if any of the following incidents occurs or if there is other reason to believe that a terrorist incident may be planned or may have occurred:

- Explosions or fires of a suspicious nature affecting pipeline systems, facilities, or assets.
- Actual or suspected attacks on pipeline systems, facilities, or assets.
- Bomb threats or weapons of mass destruction (WMD) threats to pipeline systems, facilities, or assets.
- Theft of pipeline company vehicles, uniforms, or employee credentials.
- Suspicious persons or vehicles around pipeline systems, facilities, assets, or right-of-way.
- Suspicious photography or possible surveillance of pipeline systems, facilities, or assets.
- Suspicious phone calls from people asking about the vulnerabilities or

security practices of a pipeline system, facility, or asset operation.

- Suspicious individuals applying for security-sensitive positions in the pipeline company.
- Theft or loss of Sensitive Security Information (SSI) (detailed pipeline maps, security plans, etc.).
- Actual or suspected cyber-attacks that could impact pipeline Supervisory Control and Data Acquisition (SCADA) or enterprise associated IT systems.

When voluntarily contacting the TSOC, the Guidelines request pipeline operators to provide as much of the following information as possible:

- Name and contact information (email address, telephone number).
- The time and location of the incident, as specifically as possible.
- A description of the incident or activity involved.
- Who has been notified and what actions have been taken.
- The names and/or descriptions of persons involved or suspicious parties and license plates as appropriate.

TSA expects voluntary reporting of pipeline security incidents will occur on an irregular basis. TSA estimates that approximately 32 incidents will be reported annually, requiring a maximum of 30 minutes to collect, review, and submit event information. The potential burden to the public is estimated to be 16 hours.

Dated: October 23, 2018.

Christina A. Walsh,

TSA Paperwork Reduction Act Officer, Information Technology.

[FR Doc. 2018–23593 Filed 10–26–18; 8:45 am]

BILLING CODE 9110–05–P

DEPARTMENT OF HOMELAND SECURITY

Transportation Security Administration

[Docket No. TSA–2002–11602]

Extension of Agency Information Collection Activity Under OMB Review: Security Programs for Foreign Air Carriers

AGENCY: Transportation Security Administration, DHS.

ACTION: 30-Day notice.

SUMMARY: This notice announces that the Transportation Security Administration (TSA) has forwarded the Information Collection Request (ICR), Office of Management and Budget (OMB) control number 1652–0005, abstracted below to OMB for review and approval of an extension of the currently approved collection under the Paperwork Reduction Act (PRA). The ICR describes the nature of the information collection and its expected burden. This information collection is mandatory for foreign air carriers and must be submitted prior to entry into the United States.

DATES: Send your comments by November 28, 2018. A comment to OMB is most effective if OMB receives it within 30 days of publication.

ADDRESSES: Interested persons are invited to submit written comments on the proposed information collection to the Office of Information and Regulatory Affairs, OMB. Comments should be addressed to Desk Officer, Department of Homeland Security/TSA, and sent via electronic mail to *dhsdeskofficer@omb.eop.gov.*

FOR FURTHER INFORMATION CONTACT: Christina A. Walsh, TSA PRA Officer, Information Technology (IT), TSA–11, Transportation Security Administration, 601 South 12th Street, Arlington, VA 20598–6011; telephone (571) 227–2062; email *TSAPRA@dhs.gov.*

SUPPLEMENTARY INFORMATION: TSA published a **Federal Register** notice, with a 60-day comment period soliciting comments, of the following collection of information on June 19, 2018, 83 FR 28444.

Comments Invited

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid OMB control number. The ICR documentation is available at *http://www.reginfo.gov* upon its submission to OMB. Therefore, in preparation for OMB review and approval of the following information collection, TSA is soliciting comments to—

(1) Evaluate whether the proposed information requirement is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including using appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Consistent with the requirements of Executive Order (E.O.) 13771, Reducing Regulation and Controlling Regulatory Costs, and E.O. 13777, Enforcing the Regulatory Reform Agenda, TSA is also requesting comments on the extent to which this request for information could be modified to reduce the burden on respondents.

Information Collection Requirement

Title: Security Programs for Foreign Air Carriers.

Type of Request: Extension of a currently approved collection.

OMB Control Number: 1652–0005.

Forms(s): N/A.

Affected Public: Foreign air carriers.

Abstract: TSA uses the information collected to determine compliance with 49 CFR part 1546 and to ensure passenger safety by monitoring foreign air carrier security procedures. Foreign air carriers must carry out security measures to provide for the safety of persons and property traveling on flights provided by the foreign air carrier against acts of criminal violence and air piracy, and the introduction of explosives, incendiaries, or weapons aboard an aircraft. The foreign air carrier's security program must provide a level of protection similar to the level of protection provided by U.S. aircraft operators serving the same airports, and the foreign air carrier must employ procedures equivalent to those required of U.S. aircraft operators serving the same airport, if TSA determines such procedures are necessary to provide a similar level of protection. This information collection is mandatory for foreign air carriers and must be submitted prior to entry into the United States. The TSA information collection includes providing information to TSA as set forth in the carrier's security program, which includes any amendments; maintaining records of compliance with 49 CFR part 1546 and the foreign air carrier's security program, including security training records; suspicious incident reporting; and submitting identifying information on foreign air carriers' flight crews and passengers.

Number of Respondents: 180.

Estimated Annual Burden Hours: An estimated 1,278,352 hours annually.

Dated: October 23, 2018.

Christina A. Walsh,

TSA Paperwork Reduction Act Officer, Information Technology.

[FR Doc. 2018–23594 Filed 10–26–18; 8:45 am]

BILLING CODE 9110–05–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[Docket No. FWS–R6–ES–2018–0075; FF06E23000–189–FXES11140600000]

Endangered and Threatened Wildlife and Plants; Wayne County, Utah, Incidental Take Permit Application; Range-Wide General Conservation Plan for Utah Prairie Dog

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of availability; request for public comments.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), announce the availability of several documents related to an incidental take permit (ITP) application under the Endangered Species Act. If approved, the permit would authorize Wayne County, Utah, to incidentally take Utah Prairie Dogs through under an existing Range-wide General Conservation Plan for Utah Prairie Dogs (GCP). We provide this notice to seek comments from the public and Federal, Tribal, State, and local governments.

DATES: We will accept comments received or postmarked on or before November 28, 2018. Comments submitted electronically using *regulations.gov* (see **ADDRESSES**) must be received by 11:59 p.m. eastern time on the closing date.

ADDRESSES:

Obtaining Documents:

• *Internet:* You may obtain copies of the application and related documents, as well as any comments and other materials that we receive, in Docket No. FWS–R6–ES–2018–0075 at *http://www.regulations.gov.*

• *U.S. Mail:* Copies of the application and related documents are available from the U.S. Fish and Wildlife Service, Utah Ecological Services Field Office, 2369 W Orton Circle, #50, West Valley City, UT 84119. Please note that your request is in reference to the ''Wayne County, UT, ITP.''

• *In-person:* Copies of the application and related documents will also be available for public inspection by appointment (call 801–975–3330) during normal business hours at the Utah Ecological Services Field Office (address above).

Submitting Comments: You may submit comments by one of the following methods. Please specify that your comments are regarding the ''Wayne County, UT, ITP.''

• *Online: http://www.regulations.gov.* Follow the instructions for submitting comments on Docket No. FWS–R6–ES–2018–0075.

• *U.S. mail or hand-delivery:* Public Comments Processing, Attn: Docket No. FWS–R6–ES–2018–0075; U.S. Fish and Wildlife Service; MS: BPHC; 5275 Leesburg Pike, Falls Church, VA 22041–3803.

We request that you send comments by only the methods described above. We will post all comments on *http://www.regulations.gov.* This generally means that we will post any personal information you provide (see Public Comments under **SUPPLEMENTARY INFORMATION**).

FOR FURTHER INFORMATION CONTACT: Laura Romin, 801–975–3330, ext. 142 (phone), or *laura_romin@fws.gov* (email). If you use a telecommunications device for the deaf, hard-of-hearing, or speech disabled, please call the Federal Relay Service at 800–877–8339.

SUPPLEMENTARY INFORMATION: We, the U.S. Fish and Wildlife Service (Service), announce the availability of an incidental take permit application from Wayne County, Utah. The permit would allow Wayne County to be a master permit holder under the Service's Utah prairie dog General Conservation Plan (GCP) (see Background). The Endangered Species Act, as amended (ESA; 16 U.S.C. 1531 *et seq.*) and our implementing regulations in part 17 of title 50 of the Code of Federal Regulations (CFR), provide for the issuance of such permits and require that we invite public comment before issuing permits for activities involving endangered or threatened species.

Background

Section 9 of the ESA and its implementing regulations prohibit take of fish and wildlife species listed as endangered or threatened (16 U.S.C. 1538). Under section 3 of the ESA, the term ''take'' means to ''harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct'' (16 U.S.C. 1532(19)).

Under section 10(a) of the ESA, the Service may issue permits to authorize incidental take of listed fish and wildlife species. ''Incidental take'' is defined by the ESA as take that is incidental to, and not the purpose of, carrying out an otherwise lawful activity. Section 10(a)(1)(B) of the ESA contains provisions for issuing incidental take permits to non-Federal entities for the incidental take of endangered and threatened species, provided in part that a conservation plan is developed and implemented. Regulations governing permits for listed fish and wildlife species are at 50 CFR 17.22.

In April 2018, the Service completed a GCP to provide a streamlined mechanism for authorizing incidental take of Utah prairie dogs that may result from residential and commercial development activities across the range of the species in central and southwest Utah. The GCP fulfilled requirements of the ESA for issuing permits to authorize take of Utah prairie dogs incidental to development activities. The GCP includes measures to minimize and mitigate the impacts of the take; these measures include prairie dog translocations, habitat and plague management at translocation sites, and the protection of occupied Utah prairie dog habitats, all of which are consistent with our recovery objectives for this species.

The GCP operates under either of two permitting structures: (1) Master permits and (2) individual permits. Wayne County's permit application is for a master permit. Under the master permit structure, project proponents would contact Wayne County (*i.e.,* master permit holder) for a certificate of inclusion. Wayne County would provide take authorization for Utah prairie dogs through the certificates of inclusion to project proponents who agree to adhere to the conditions of the GCP and the county's master permit.

We previously issued master permits under the GCP to Iron, Beaver, and Garfield Counties. We propose, at this time, to issue a 10-year master permit for incidental take of the Utah prairie dog in Wayne County, if Wayne County's application demonstrates commitments to implement the requirements of the GCP, thereby meeting all ESA section 10(a)(1)(B) permit issuance criteria.

Public Comments

We request information, views, and opinions from the public specifically on our proposed Federal action, the issuance of a master incidental take permit to Wayne County. Written comments received become part of the public record associated with this action. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you may request in your comment that we withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so. All submissions from organizations or

businesses and from individuals identifying themselves as representatives or officials of organizations or businesses will be made available for public disclosure in their entirety.

Authority

We provide this notice under section 10(c) of the ESA (16 U.S.C. 1531 *et seq.*) and its implementing regulations for incidental take permits (50 CFR 17.22).

Dated: August 9, 2018.

Laura Romin,

Utah Deputy Field Supervisor, Mountain-Prairie Region, U.S. Fish and Wildlife Service, Salt Lake City, Utah.

[FR Doc. 2018–23566 Filed 10–26–18; 8:45 am]

BILLING CODE 4333–15–P

DEPARTMENT OF THE INTERIOR

Office of the Secretary

[18XD4523WS/DWSN00000.000000/DS61500000/DP.61501]

Invasive Species Advisory Committee; Public Meeting

AGENCY: Policy and International Affairs, Interior.

ACTION: Notice of public meeting of the Invasive Species Advisory Committee.

SUMMARY: Pursuant to the provisions of the Federal Advisory Committee Act, notice is hereby given of a meeting of the Invasive Species Advisory Committee.

DATES: Teleconference Meeting of the Invasive Species Advisory Committee (ISAC) will be held on Tuesday, November 13, 2018; 1:00–3:00 p.m. (EDT).

ADDRESSES: U.S. Department of the Interior, Stuart Udall Building (MIB), 1849 C Street NW, Kiowa Room (basement), Washington, DC 20240. All visiting members of the public must be cleared through building security prior to being escorted to the meeting location. At least 48 hours prior to the meeting, please call the number listed in this notice for pre-clearance.

FOR FURTHER INFORMATION CONTACT: Kelsey Brantley, Coordinator for National Invasive Species Council (NISC) and ISAC Operations, (202) 208–4122; Fax: (202) 208–4118, email: *kelsey_brantley@ios.doi.gov.*

SUPPLEMENTARY INFORMATION: The purpose of the ISAC is to provide advice to the NISC, as authorized by Executive Orders 13112 and 13751, on a broad array of issues related to preventing the introduction of invasive species and providing for their control and minimizing the economic, ecological, and human health impacts that invasive species cause. The NISC is co-chaired by the Secretary of the Interior, the Secretary of Agriculture, and the Secretary of Commerce. The duty of the NISC is to provide national leadership regarding invasive species issues.

The purpose of the meeting on Tuesday, November 13, 2018 *via teleconference,* in lieu of physical travel, is to convene the full ISAC to plan for the final project and in-person meeting for ISAC Class 9.

Members of the public are welcome to participate by accessing the teleconference. Other than during the public comment period, public participation is in an observer capacity. The toll-free conference phone number and access code can be obtained by calling 202–208–4122, or visiting the NISC Secretariat's website, *www.invasivespecies.gov.* Accommodation is also being made for the public to join the teleconference at the U.S. Department of the Interior Stuart Udall Building in Washington, DC.

Note: The maximum capacity of the teleconference is 100 participants. For record keeping purposes, participants will be required to provide their name and contact information to the operator before being connected.

Public Availability of Comments

Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Authority: 5 U.S.C. Appendix 2.

Stanley W. Burgiel,

Assistant Director, National Invasive Species Council Secretariat.

[FR Doc. 2018–23587 Filed 10–26–18; 8:45 am]

BILLING CODE 4334–63–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLAZ910000.L12100000.XP0000 19X 6100.241A]

State of Arizona Resource Advisory Council Meeting

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, the Bureau of Land Management (BLM), Arizona Resource Advisory Council (RAC) will meet in Phoenix, Arizona, as indicated below.

DATES: The Arizona RAC will hold a public meeting on Tuesday, December 11, and Wednesday, December 12, 2018. The meeting will include an informational, working-group day on December 11, from 8:30 a.m. to 4:30 p.m., and an official business day on December 12, from 8:30 a.m. to 4 p.m. The Recreation RAC subcommittee will hold a 20-minute public-comment period related to the Forest Service (USFS) fee proposals starting at 1:45 p.m. on December 12. The general RAC will hold a 30-minute comment period for BLM-related topics starting at 2:30 p.m. on December 12.

ADDRESSES: The meeting will be held in the 8th floor conference room at the BLM Arizona State Office, One North Central Avenue, Suite 800, Phoenix, Arizona, 85004.

FOR FURTHER INFORMATION CONTACT: Dolores Garcia, Public Affairs Specialist, at the Bureau of Land Management, Arizona State Office, One North Central Avenue, Suite 800, Phoenix, Arizona, 85004–4427, telephone: 602–417–9500 or email: *dagarcia@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 Council advises the Secretary of the Interior, through the BLM, on a variety of planning and management issues associated with public land management in Arizona. All meetings are open to the public in their entirety.

Planned agenda items at the meeting include a BLM overview and member orientation, overview of Department of the Interior priorities and Secretary's Orders, and Division and District updates.

Under the Federal Lands Recreation Enhancement Act, the RAC has been designated as the Recreation RAC and has the authority to review all BLM and the USFS recreation fee proposals in Arizona. The Recreation RAC will review three USFS Forest Service fee

proposals at the December meeting—Sollers Cabin rental fees and the Forest Fee Program for the Coronado National Forest, and Spring Valley cabin rental fees for the Kaibab National Forest.

A complete agenda will be posted 2 weeks prior to the meeting on the BLM Arizona RAC website at: *https://www.blm.gov/get-involved/resource-advisory-council/near-you/arizona.*

Individuals who need special assistance, such as sign language interpretation or other reasonable accommodations, should contact Dolores Garcia, Public Affairs Specialist (see **ADDRESSES** section), no later than 2 weeks before the start of the meeting.

Before including your address, phone number, email address, or other personally identifiable (PII) information in your comments, please be aware that your entire comment—including your PII—may be made publicly available at any time. While you can ask us in your comment to withhold your PII from public review, we cannot guarantee we will be able to do so.

(Authority: 43 CFR 1784.4–2)

Raymond Suazo,

Arizona State Director.

[FR Doc. 2018–23549 Filed 10–26–18; 8:45 am]

BILLING CODE 4310–32–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLCON00000–L18200000.XX0000–18X]

Notice of Public Meeting, Northwest Resource Advisory Council, Colorado

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 (BLM) Northwest Resource Advisory Council (RAC) will meet as indicated below.

DATES: The meeting will be held on December 6, 2018, from 8 a.m. to 3 p.m.

ADDRESSES: The meeting will be held at the BLM Colorado River Valley Field Office, 2300 River Frontage Road, Silt, Colorado 81652.

FOR FURTHER INFORMATION CONTACT: David Boyd, Public Affairs Specialist, Northwest District Office, 2300 River Frontage Road, Silt, CO 81652 by phone at (970) 876–9008 or by email at *dboyd@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 Northwest Colorado RAC advises the Secretary of the Interior, through the BLM, on a variety of public land issues in the Northwest District including the Colorado River Valley, Kremmling, Little Snake and White River Field Offices. Agenda items for this meeting include wild horse management, public land tenure overview, locatable mineral management, consideration of a letter supporting fire mitigation, and District and Field Manager updates. This meeting is open to the public, and public comment periods will be held at 10 a.m. and 2 p.m. Depending on the number of persons wishing to comment and time available, the time for individual oral comments may be limited. The public may present written comments to the NW RAC. Before including your address, phone number, email address, or other personally identifiable information (PII) in your comment, you should be aware that your entire comment—including your PII—may be made publicly available at any time. While you can ask us in your comment to withhold your PII from public review, we cannot guarantee that we will be able to do so.

Summary minutes for the RAC meetings will be maintained in the Northwest District Office and will be available for public inspection and reproduction during regular business hours within 30 days following the meeting. Previous minutes and agendas are available at: *https://www.blm.gov/get-involved/resource-advisory-council/near-you/colorado/northwest-rac* for reference.

Gregory Shoop,

Acting BLM Colorado State Director.

[FR Doc. 2018–23550 Filed 10–26–18; 8:45 am]

BILLING CODE 4310–JB–P

INTERNATIONAL TRADE COMMISSION

[USITC SE–18–051]

Government in the Sunshine Act Meeting Notice

AGENCY HOLDING THE MEETING: United States International Trade Commission.

TIME AND DATE: November 2, 2018 at 11:00 a.m.

PLACE: Room 101, 500 E Street SW, Washington, DC 20436, Telephone: (202) 205–2000.

STATUS: Open to the public.

MATTER TO BE CONSIDERED:

1. Agendas for future meetings: None.
2. Minutes.
3. Ratification List.
4. Vote on Inv. Nos. 701–TA–610 and 731–TA–1425–1427 (Preliminary) (Refillable Stainless Steel Kegs from China, Germany, and Mexico). The Commission is currently scheduled to complete and file its determinations on November 5, 2018; views of the Commission are currently scheduled to be completed and filed on November 13, 2018.
5. Vote on Inv. Nos. 701–TA–611 and 731–TA–1428 (Preliminary) (Aluminum Wire and Cable from China). The Commission is currently scheduled to complete and file its determinations on November 5, 2018; views of the Commission are currently scheduled to be completed and filed on November 13, 2018.
6. Vote on Inv. Nos. 731–TA–672 and 673 (Fourth Review) (Silicomanganese from China and Ukraine). The Commission is currently scheduled to complete and filed its determinations and views of the Commission by November 16, 2018.
7. Outstanding action jackets: None.

In accordance with Commission policy, subject matter listed above, not disposed of at the scheduled meeting, may be carried over to the agenda of the following meeting.

By order of the Commission.

Issued: October 24, 2018.

William Bishop,

Supervisory Hearings and Information Officer.

[FR Doc. 2018–23629 Filed 10–25–18; 11:15 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[USITC SE–18–050]

Government in the Sunshine Act Meeting Notice

AGENCY HOLDING THE MEETING: United States International Trade Commission.

TIME AND DATE: November 1, 2018 at 10:00 a.m.

PLACE: Room 101, 500 E Street SW, Washington, DC 20436, Telephone: (202) 205–2000.

STATUS: Open to the public.

MATTER TO BE CONSIDERED:

1. Agendas for future meetings: None.
2. Minutes.
3. Ratification List.
4. Vote on Inv. No. 731–TA–1424 (Preliminary)(Mattresses from China). The Commission is currently scheduled to complete and file its determination on November 2, 2018; views of the Commission are currently scheduled to be completed and filed on November 9, 2018.
5. Outstanding action jackets: None.

In accordance with Commission policy, subject matter listed above, not disposed of at the scheduled meeting, may be carried over to the agenda of the following meeting.

By order of the Commission.

Issued: October 24, 2018.

William Bishop,

Supervisory Hearings and Information Officer.

[FR Doc. 2018–23628 Filed 10–25–18; 11:15 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigation Nos. 701–TA–601 and 731–TA–1411 (Final)]

Laminated Woven Sacks From Vietnam; Scheduling of the Final Phase of Countervailing Duty and Anti-Dumping 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–601 and 731–TA–1411 (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 laminated woven sacks from Vietnam, provided for in subheading 6305.33.00 (statistical reporting numbers 6305.33.0040 and 6305.33.0080) of the Harmonized Tariff Schedule of the United States, preliminarily determined by the Department of Commerce (''Commerce'') to be subsidized and sold at less-than-fair-value.[1]

DATES: October 17, 2018.

FOR FURTHER INFORMATION CONTACT: Moses Song (202–205–3176), 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 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 Vietnam of laminated woven sacks, 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 filed on March 7, 2018, by the Laminated Woven Sacks Fair Trade Coalition.[2]

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 February 12, 2019, 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, February 28, 2019, 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 February 21, 2019. 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 February 22, 2019, 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

[1] For purposes of these investigations, Commerce has defined the subject merchandise as laminated woven sacks. For Commerce's complete scope, see 83 FR 51436, October 11, 2018.

[2] The Laminated Woven Sacks Fair Trade Coalition consists of Polytex Fibers Corporation, Houston, Texas; and ProAmpac, LLC, Cincinnati, Ohio.

provisions of section 207.23 of the Commission's rules; the deadline for filing is February 20, 2019. 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 March 7, 2019. 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 March 7, 2019. On March 21, 2019, 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 March 25, 2019, 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.

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: October 23, 2018.

Jessica Mullan,

Attorney Advisor.

[FR Doc. 2018–23518 Filed 10–26–18; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF LABOR

Office of Workers' Compensation Programs

Advisory Board on Toxic Substances and Worker Health; Meeting

AGENCY: Office of Workers' Compensation Programs, Department of Labor.

ACTION: Announcement of meeting of the Advisory Board on Toxic Substances and Worker Health (Advisory Board) for the Energy Employees Occupational Illness Compensation Program Act (EEOICPA).

SUMMARY: The Advisory Board will meet November 14–15, 2018, in Washington, DC.

Comments, requests to speak, submissions of materials for the record, and requests for special accommodations: You must submit (postmark, send, transmit) comments, requests to address the Advisory Board, speaker presentations, and requests for special accommodations for the meetings by November 6, 2018.

ADDRESSES: The Advisory Board will meet in Room N–4215 A/B/C, U.S. Department of Labor, 200 Constitution Avenue NW, Washington, DC 20210.

Submission of comments, requests to speak and submissions of materials for the record: You may submit comments, materials, and requests to speak at the Advisory Board meeting, identified by the Advisory Board name and the meeting date of November 14–15, 2018, by any of the following methods:

- *Electronically:* Send to: *EnergyAdvisoryBoard@dol.gov* (specify in the email subject line, for example ''Request to Speak: Advisory Board on Toxic Substances and Worker Health'').
- *Mail, express delivery, hand delivery, messenger, or courier service:* Submit one copy to the following address: U.S. Department of Labor, Office of Workers' Compensation Programs, Advisory Board on Toxic Substances and Worker Health, Room S–3522, 200 Constitution Ave. NW, Washington, DC 20210.

Requests for special accommodations: Please submit requests for special accommodations to attend the Advisory Board meeting by email, telephone, or hard copy to Ms. Carrie Rhoads, OWCP, Room S–3524, U.S. Department of Labor, 200 Constitution Ave. NW, Washington, DC 20210; telephone (202) 343–5580; email *EnergyAdvisoryBoard@dol.gov*.

Instructions: Your submissions must include the Agency name (OWCP), the committee name (the Advisory Board), and the meeting date (November 14–15, 2018). Due to security-related procedures, receipt of submissions by regular mail may experience significant delays. For additional information about submissions, see the **SUPPLEMENTARY INFORMATION** section of this notice.

OWCP will make available publically, without change, any comments, requests to speak, and speaker presentations, including any personal information that you provide. Therefore, OWCP cautions interested parties against submitting personal information such as Social Security numbers and birthdates.

FOR FURTHER INFORMATION CONTACT: For press inquiries: Ms. Amy Louviere, Office of Public Affairs, U.S. Department of Labor, Room S–1028, 200 Constitution Ave. NW, Washington, DC 20210; telephone (202) 693–4672; email *Louviere.Amy@DOL.GOV*.

SUPPLEMENTARY INFORMATION:

The Advisory Board will meet: Wednesday, November 14, 2018 and Thursday, November 15, 2018, from 8:30 a.m. to 6:00 p.m. Eastern time in Washington, DC. Some Advisory Board members may attend the meeting by teleconference. The teleconference number and other details for participating remotely will be posted on the Advisory Board's website, *http://www.dol.gov/owcp/energy/regs/compliance/AdvisoryBoard.htm,* 72 hours prior to the commencement of the first meeting date. Advisory Board meetings are open to the public.

Public comment session: Wednesday, November 14, 2018, from 4:30 p.m. to 6:00 p.m. Eastern time. Please note that the public comment session ends at the time indicated or following the last call for comments, whichever is earlier. Members of the public who wish to provide public comments should plan to attend the public comment session (in person or remotely) at the start time listed.

The Advisory Board is mandated by Section 3687 of EEOICPA. The Secretary of Labor established the Board under this authority and Executive Order 13699 (June 26, 2015). The purpose of the Advisory Board is to advise the Secretary with respect to: (1) The Site Exposure Matrices (SEM) of the Department of Labor; (2) medical guidance for claims examiners for claims with the EEOICPA program, with respect to the weighing of the medical

evidence of claimants; (3) evidentiary requirements for claims under Part B of EEOICPA related to lung disease; and (4) the work of industrial hygienists and staff physicians and consulting physicians of the Department of Labor and reports of such hygienists and physicians to ensure quality, objectivity, and consistency. The Advisory Board sunsets on December 19, 2024.

The Advisory Board operates in accordance with the Federal Advisory Committee Act (FACA) (5 U.S.C. App. 2) and its implementing regulations (41 CFR part 102–3).

Agenda: The tentative agenda for the Advisory Board meeting includes:

- Welcome remarks from DOL officials;
- New member orientation including FACA and ethics rules;
- Overview of the EEOICPA program;
- Discussion on the Site Exposure Matrices (SEM) of the Department of Labor;
- Discussion on medical guidance for claims examiners with respect to the weighing of medical evidence of claimants;
- Discussion on evidentiary requirements for claims under EEOICPA Part B related to lung disease;
- Discussion on the work of industrial hygienists and staff physicians and consulting physicians of the Department of Labor and reports of such hygienists and physicians to ensure quality, objectivity, and consistency;
- Administrative matters;
- Review of DOL responses to past Advisory Board recommendations;
- Consideration of any new issues; and
- Public comments.

OWCP transcribes and prepares detailed minutes of Advisory Board meetings. OWCP posts the transcripts and minutes on the Advisory Board web page, *http://www.dol.gov/owcp/energy/regs/compliance/AdvisoryBoard.htm,* along with written comments, speaker presentations, and other materials submitted to the Advisory Board or presented at Advisory Board meetings.

Public Participation, Submissions and Access to Public Record

Advisory Board meetings: All Advisory Board meetings are open to the public. Information on how to participate in the meeting remotely will be posted on the Advisory Board's website.

Individuals requesting special accommodations to attend the Advisory Board meeting should contact Ms. Rhoads.

Submission of comments: You may submit comments using one of the methods listed in the **ADDRESSES** section. Your submission must include the Agency name (OWCP) and date for this Advisory Board meeting (November 14–15, 2018). OWCP will post your comments on the Advisory Board website and provide your submissions to Advisory Board members.

Because of security-related procedures, receipt of submissions by regular mail may experience significant delays.

Requests to speak and speaker presentations: If you want to address the Advisory Board at the meeting you must submit a request to speak, as well as any written or electronic presentation, by November 6, 2018, using one of the methods listed in the **ADDRESSES** section. Your request may include:

- The amount of time requested to speak;
- The interest you represent (*e.g.,* business, organization, affiliation), if any; and
- A brief outline of the presentation.

PowerPoint presentations and other electronic materials must be compatible with PowerPoint 2010 and other Microsoft Office 2010 formats. The Advisory Board Chair may grant requests to address the Board as time and circumstances permit.

Electronic copies of this **Federal Register** notice are available at *http://www.regulations.gov.* This notice, as well as news releases and other relevant information, are also available on the Advisory Board's web page at *http://www.dol.gov/owcp/energy/regs/compliance/AdvisoryBoard.htm.*

For further information regarding this meeting, you may contact Douglas Fitzgerald, Designated Federal Officer, at *fitzgerald.douglas@dol.gov,* or Carrie Rhoads, Alternate Designated Federal Officer, at *rhoads.carrie@dol.gov,* U.S. Department of Labor, 200 Constitution Avenue NW, Suite S–3524, Washington, DC 20210, telephone (202) 343–5580.

This is not a toll-free number.

Signed at Washington, DC, October 22, 2018.

Julia K. Hearthway,

Director, Office of Workers' Compensation Programs.

[FR Doc. 2018–23516 Filed 10–26–18; 8:45 am]

BILLING CODE 4510–24–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice: 18–083]

NASA Advisory Council; Aeronautics Committee Meeting; Amended WebEx Information

AGENCY: National Aeronautics and Space Administration.

ACTION: Notice of amended WebEx information for Aeronautics Committee meeting of NASA Advisory Council. REF: **Federal Register**/Vol. 83, No. 203/Friday, October 19, 2018/Notices. Page 53113.

SUMMARY: In accordance with the Federal Advisory Committee Act, as amended, the National Aeronautics and Space Administration (NASA) announces amended WebEx information for the upcoming meeting of the Aeronautics Committee of the NASA Advisory Council (NAC). As noted in previous **Federal Register** notice, same subject (see REF), this meeting will be held for soliciting, from the aeronautics community and other persons, research and technical information relevant to program planning.

DATES: Thursday, November 15, 2018, 10:30 a.m.–5:30 p.m., Eastern Time.

ADDRESSES: NASA Langley Research Center, 2 Langley Boulevard, Building 2101, Room 305, Hampton, VA 23681.

FOR FURTHER INFORMATION CONTACT: Ms. Irma Rodriguez, Designated Federal Officer, Aeronautics Research Mission Directorate, NASA Headquarters, Washington, DC 20546, (202) 358–0984, or *irma.c.rodriguez@nasa.gov.*

SUPPLEMENTARY INFORMATION: The meeting will be open to the public up to the capacity of the room. This meeting is also available telephonically and by WebEx. You must use a touch-tone telephone to participate in this meeting. Any interested person may dial the USA toll-free conference number 1–888–769–8716, participant passcode: 681359, followed by the # sign to participate in this meeting by telephone. *The amended WebEx link is https://nasaenterprise.webex.com/, the meeting number is 901 412 850, and the password is 8vMRARb@.* The agenda for the meeting includes the following topics:

—Subsonic Technology Development Strategy
—Vertical Lift Noise
—Autonomy Update

For NASA Langley Research Center visitor access, please go through the Main Gate and show a valid government-issued identification (*i.e.,*

driver's license, passport, etc.) to the security guard. Inform the security guard that you are attending a meeting in Building 2101. Foreign nationals attending this meeting will be required to provide a copy of their passport and visa in addition to providing the following information no less than 15 days prior to the meeting: Full name; gender; date/place of birth; citizenship; passport information (number, country, telephone); visa information (number, type, expiration date); employer/affiliation information (name of institution, address, country, telephone); title/position of attendee. To expedite admittance, U.S. citizens and Permanent Residents (green card holders) are requested to provide full name and citizenship status no less than 5 working days in advance. Information should be sent to Ms. Irma Rodriguez by fax at (202) 358–4060. If any questions, please call Ms. Irma Rodriguez at (202) 358–0984. Attendees will also be required to sign a register prior to entering the meeting room. It is imperative that the meeting be held on these dates to accommodate the scheduling priorities of the key participants.

Patricia Rausch,

Advisory Committee Management Officer, National Aeronautics and Space Administration.

[FR Doc. 2018–23491 Filed 10–26–18; 8:45 am]

BILLING CODE P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice: 18–084]

National Space Council Users' Advisory Group; Meeting

AGENCY: National Aeronautics and Space Administration.

ACTION: Notice of meeting.

SUMMARY: In accordance with the Federal Advisory Committee Act, as amended, the National Aeronautics and Space Administration (NASA) announces a meeting of the National Space Council Users' Advisory Group (UAG). This will be the second meeting of the UAG.

DATES: Thursday, November 15, 2018, from 9:00 a.m.–4:00 p.m., Eastern Time.

ADDRESSES: NASA Headquarters, Executive Conference Center, Room 8Q40B, 300 E Street SW, Washington, DC 20546. Please note that if the prior room is filled to maximum capacity, an overflow room will be provided in the James E. Webb Memorial Auditorium, located on the 1st floor, near the west end lobby.

FOR FURTHER INFORMATION CONTACT: Mr. Brandon Eden, UAG Designated Federal Officer/Executive Secretary, NASA Headquarters, Washington, DC 20546, (202) 358–2470 or *brandon.t.eden@nasa.gov.*

SUPPLEMENTARY INFORMATION: This meeting will be open to the public up to the capacity of the meeting room. This meeting is also available telephonically and by WebEx. You must use a touch-tone phone to participate in this meeting. Any interested person may dial the toll free number 1–888–942–9869 or the toll number 1–517–308–9460 and then the numeric passcode 9695733, followed by the # sign. *NOTE:* If dialing in, please ''mute'' your phone. To join via WebEx, the link is *https://nasaenterprise.webex.com/.* The meeting number on November 15 is 904 172 523 and the meeting password is BgR6jDz@ (case sensitive). The agenda for the meeting will include the following:

—Opening Remarks by UAG Chairman
—Reports from UAG Subcommittees:
  - Exploration and Discovery Subcommittee
  - National Security Space Subcommittee
  - Economic Development/Industrial Base Subcommittee
  - Technology and Innovation Subcommittee
  - Outreach and Education Subcommittee
  - Space Policy and International Engagement Subcommittee
—Update on NASA Exploration Campaign and DoD Space Planning
—Other UAG Business and Public Input

Attendees will be requested to sign a register and to comply with NASA Headquarters security requirements, including the presentation of a valid picture ID to NASA Security before access to NASA Headquarters. Foreign nationals attending this meeting will be required to provide a copy of their passport and visa in addition to providing the following information no less than 10 days prior to the meeting: Full name; gender; date/place of birth; citizenship; passport information (number, country, telephone); visa information (number, type, expiration date); employer/affiliation information (name of institution, address, country, telephone); title/position of attendee. To expedite admittance, attendees that are U.S. citizens and Permanent Residents (green card holders) are requested to provide full name and citizenship status no less than 3 working days prior to the meeting. Information should be sent to Mr. Brandon Eden via email at *brandon.t.eden@nasa.gov.* It is imperative that the meeting be held on these dates to the scheduling priorities of the key participants. For further information, visit the UAG website at: *https://www.nasa.gov/content/national-space-council-users-advisory-group.*

Patricia Rausch,

Advisory Committee Management Officer, National Aeronautics and Space Administration.

[FR Doc. 2018–23492 Filed 10–26–18; 8:45 am]

BILLING CODE 7510–13–P

NATIONAL SCIENCE FOUNDATION

Membership of National Science Foundation's Senior Executive Service Performance Review Board

AGENCY: National Science Foundation.

ACTION: Notice.

SUMMARY: The National Science Foundation is announcing the members of the Senior Executive Service Performance Review Board.

ADDRESSES: Comments should be addressed to Branch Chief, Executive Services, Division of Human Resource Management, National Science Foundation, Room W15219, 2415 Eisenhower Avenue, Alexandria, VA 22314.

FOR FURTHER INFORMATION CONTACT: Ms. Jennifer Munz at the above address or (703) 292–2478.

SUPPLEMENTARY INFORMATION: The membership of the National Science Foundation's Senior Executive Service Performance Review Board is as follows:

F. Fleming Crim, Chief Operating Officer, Chairperson
Dianne Campbell Krieger, Chief Human Capital Officer & Division Director, Division of Human Resource Management
Dorothy Aronson, Chief Information Officer
Anne Kinney, Assistant Director, Directorate for Mathematical & Physical Sciences
Suzanne C. Iacono, Office Head, Office of Integrative Activities
Michael Wetklow, Deputy Chief Financial Officer and Division Director, Budget Division
Joanne Tornow, Acting Assistant Director, Directorate for Biological Sciences
Sylvia M. James, Acting Deputy Assistant Director, Directorate for Education and Human Resources
Erwin Gianchandani, Assistant Director, Directorate for Computer and Information Science and Engineering

This announcement of the membership of the National Science Foundation's Senior Executive Service Performance Review Board is made in compliance with 5 U.S.C. 4314(c)(4).

Dated: October 24, 2018.

Suzanne H. Plimpton,

Reports Clearance Officer, National Science Foundation.

[FR Doc. 2018–23589 Filed 10–26–18; 8:45 am]

BILLING CODE 7555–01–P

NATIONAL SCIENCE FOUNDATION

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: National Science Foundation.

ACTION: Notice and request for comments.

SUMMARY: Under the Paperwork Reduction Act of 1995, and as part of its continuing effort to reduce paperwork and respondent burden, the National Center for Science and Engineering Statistics (NCSES) within the National Science Foundation (NSF) is inviting the general public or other Federal agencies to comment on this proposed continuing information collection. The NCSES will publish periodic summaries of the proposed projects.

DATES: Written comments on this notice must be received by December 28, 2018 to be assured consideration. Comments received after that date will be considered to the extent practicable. Send comments to the address listed in **FOR FURTHER INFORMATION CONTACT**.

FOR FURTHER INFORMATION CONTACT: Suzanne H. Plimpton, Reports Clearance Officer, National Science Foundation, 2415 Eisenhower Avenue, Suite W18253, Alexandria, Virginia 22314; telephone (703) 292–7556; or send email to *splimpto@nsf.gov.* Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339, which is accessible 24 hours a day, 7 days a week, 365 days a year (including Federal holidays).

SUPPLEMENTARY INFORMATION:

Comments: Comments are invited on (a) whether the proposed collection of information is necessary for the proper performance of the functions of the NCSES, including whether the information will have practical utility; (b) the accuracy of the NCSES's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected, including through the use of automated collection techniques or other forms of information technology; and (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated collection techniques or other forms of information technology.

Title of Collection: Survey of Earned Doctorates.

OMB Approval Number: 3145–0019.

Expiration Date of Approval: May 31, 2020.

Type of Request: Intent to seek approval to renew an information collection for three years.

Abstract: Established within NSF by the America COMPETES Reauthorization Act of 2010 § 505, codified in the NSF Act of 1950, as amended, NCSES serves as a central Federal clearinghouse for the collection, interpretation, analysis, and dissemination of objective data on science, engineering, technology, and research and development for use by practitioners, researchers, policymakers, and the public.

The Survey of Earned Doctorates (SED) is part of NCSES' survey system that collects data on individuals in an effort to provide information on science and engineering education and careers in the United States. The SED has been conducted annually since 1958 and is jointly sponsored by the National Science Foundation, National Institutes of Health, U.S. Department of Education, and National Endowment for the Humanities in order to avoid duplication. It is an accurate, timely source of information on one of our Nation's most important resources—highly educated individuals.

Data are obtained primarily via Web survey from each person earning a research doctorate at the time they receive the degree. Data are collected on their field of specialty, educational background, sources of support in graduate school, debt level, postgraduation plans, and demographic characteristics. The Federal government, universities, researchers, and others use the information extensively. NCSES publishes statistics from the survey in several reports, primarily in the annual publication series Doctorate Recipients from U.S. Universities. These reports are available on the NCSES website. The survey will be collected in conformance with the Privacy Act of 1974. Responses from individuals are voluntary. NCSES will ensure that all individually identifiable information collected will be kept strictly confidential and will be used only for research or statistical purposes.

Use of the Information: Results from the SED are used to assess characteristics of the doctorate population and trends in doctoral education and degrees by researchers, policy makers, universities, and government agencies. Data from the survey are published annually on the NCSES website in a publication series reporting on all fields of study, titled *Doctorate Recipients from U.S. Universities.* Information from the SED is also included in other series available online: *Science and Engineering Indicators;* and *Women, Minorities, and Persons with Disabilities in Science and Engineering.* In addition, access to tabular data from selected variables is available through Integrated Data Tool, an online table-generating tool on the NCSES website.

Expected Respondents: The SED is a census of all individuals receiving a research doctorate from an accredited U.S. academic institution in the academic year beginning 1 July and ending 30 June of the subsequent year. As such, the population for the 2020 SED consists of all individuals receiving a research doctorate in the 12-month period beginning 1 July 2019 and ending 30 June 2020. Likewise, the population for the 2021 SED consists of all individuals receiving a research doctorate in the 12-month period beginning 1 July 2020 and ending 30 June 2021. A research doctorate is a doctoral degree that (1) requires completion of an original intellectual contribution in the form of a dissertation or an equivalent culminating project (*e.g.,* musical composition) and (2) is not primarily intended as a degree for the practice of a profession. The most common research doctorate degree is the Ph.D. Recipients of professional doctoral degrees, such as MD, DDS, JD, DPharm, and PsyD, are not included in the SED. The 2020 and 2021 SED are expected to include about 606 separately reporting doctoral programs from among approximately 446 eligible research doctorate-granting institutions.

Estimate of Burden: A total response rate of 91.4% of the 54,664 persons who earned a research doctorate from a U.S. institution was obtained in academic year 2017. This level of response rate has been consistent for several years. Based on the historical trend, in 2020 approximately 58,000 individuals are expected to receive research doctorates from U.S. institutions. Using the past response rate, the number of SED respondents in 2020 is estimated to be 52,780 (58,000 doctorate recipients × 0.91 response rate). Similarly, the number of individuals expected to earn

research doctorates in 2021 is estimated to be about 59,000; hence, the number of respondents in 2021 is estimated to be 53,690 (59,000 × 0.91).

Based on the average Web survey completion time for the 2018 SED (19 minutes) and the extension of a few questions to an additional subset of respondents, NCSES estimates that, on average, 21 minutes per respondent will be required to complete the 2020 or 2021 SED questionnaire. The annual respondent burden for completing the SED is therefore estimated at 18,473 hours in 2020 (52,780 respondents × 21 minutes) and 18,792 hours in 2021 (based on 53,690 respondents). In addition to the actual questionnaire, the SED requires the collection of administrative data from participating academic institutions. The Institutional Coordinator at the institution helps distribute the Web survey link (and paper surveys when necessary), track survey completions, and submit information to the SED survey contractor. Based on focus groups conducted with Institutional Coordinators, it is estimated that the SED demands no more than 1% of the Institutional Coordinator's time over the course of a year, which computes to 20 hours per year per Institutional Coordinator (40 hours per week × 50 weeks per year × .01). With about 606 programs expected to participate in the SED in 2020 and 2021, the estimated annual burden to Institutional Coordinators of administering the SED is 12,120 hours. Therefore, the total annual information burden for the SED is estimated to be 30,593 (18,473 + 12,120) hours in 2020 and 30,912 (18,792 + 12,120) hours in 2021.

Dated: October 24, 2018.

Suzanne H. Plimpton,

Reports Clearance Officer, National Science Foundation.

[FR Doc. 2018–23561 Filed 10–26–18; 8:45 am]

BILLING CODE 7555–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 40–9059; NRC–2018–0158]

Water Remediation Technology, LLC

AGENCY: Nuclear Regulatory Commission.

ACTION: Environmental assessment and finding of no significant impact; issuance.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is considering renewal of Water Remediation Technology, LLC (WRT) Source Materials License No. SUC–1591, as well as WRT's request to expand the scope of its licensed activities. License SUC–1591 was originally issued by the NRC on January 25, 2007, and is a performance-based, multisite license that authorizes WRT to use its ion exchange technology to remove uranium from community drinking water systems (CWSs). WRT submitted its request for license renewal and to expand the scope of licensed activities on December 21, 2016, and on January 16, 2018, WRT revised its application to request a 20-year renewal term.

DATES: The final environmental assessment (EA) referenced in this document is available on October 29, 2018.

ADDRESSES: Please refer to Docket ID NRC–2018–0158 when contacting the NRC about the availability of information regarding this document. You may obtain publicly-available information related to this document using any of the following methods:

- *Federal Rulemaking Website:* Go to *http://www.regulations.gov* and search for Docket ID NRC–2018–0158. Address questions about docket IDs in *Regulations.gov* to Jennifer Borges; telephone: 301–287–9127; email: *Jennifer.Borges@nrc.gov.* For technical questions, contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly-available documents online in the ADAMS Public Documents collection at *http://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''Begin Web-based ADAMS Search.'' For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to *pdr.resource@nrc.gov.* The ADAMS accession number for the document referenced (if it is available in ADAMS) is provided the first time that it is mentioned in this document.
- *NRC's PDR:* You may examine and purchase copies of public documents at the NRC's PDR, Room O1–F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.

FOR FURTHER INFORMATION CONTACT: James Park, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–6954, email: *James.Park@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Introduction

The NRC is considering the renewal of WRT's Source Materials License No. SUC–1591 for a 20-year term and amending the license to expand the scope of authorized licensed activities. Therefore, as required by part 51 of Title 10 of the *Code of Federal Regulations* (10 CFR), the NRC performed an EA. Based on the results of this EA, the NRC has determined not to prepare an environmental impact statement (EIS) for the license renewal and for the expansion of the scope of the authorized licensed activities, and is issuing a finding of no significant impact.

License SUC–1591 was originally issued by the NRC on January 25, 2007 (ADAMS Accession No. ML062960463), to R.M.D. Operations, LLC (RMD), the predecessor of WRT. License SUC–1591 is a performance-based, multisite license that authorizes WRT to use its ion exchange technology to remove uranium from CWSs. WRT operates in several NRC ''Agreement States,'' where WRT's activities are subject to applicable State law and regulation due to the NRC's relinquishment of certain categories of its regulatory authority to the Agreement State.[1] Currently, WRT does not operate in any non-Agreement States, where its activities would be subject to NRC jurisdiction.

II. Summary of Environmental Assessment

The NRC staff's EA is available online in the ADAMS Public Documents collection at *http://www.nrc.gov/reading-rm/adams.html* (*ADAMS* Accession No. ML18255A117). This section is a summary of the EA.

Description of the Proposed Action

The proposed action is the NRC staff's approval or disapproval of WRT's application to renew its license for an additional 20-year term and to expand the scope of licensed activities. The proposed action is in accordance with the licensee's application dated December 21, 2016 (ADAMS Accession No. ML16358A447), and with its January 16, 2018, request to extend the license renewal term from 10 to 20 years (ADAMS Accession No. ML18016B080). Renewal of its NRC license would allow WRT to continue using its ion exchange

[1] Under Section 274 of the Atomic Energy Act, as amended (42 U.S.C. 2021), the NRC is authorized to relinquish certain prescribed categories of its regulatory authority to a State, provided that the State's governor enter into a duly authorized agreement with the NRC in accordance with Section 274. Presently, there are 38 Agreement States (Wyoming became the 38th Agreement State on September 30, 2018). Of these Agreement States, WRT operates in California, Colorado, Georgia, Nebraska, New Jersey, South Carolina, and Virginia.

uranium recovery system (URS) to safely remove and contain uranium from CWS drinking water sources to levels at or below the uranium maximum concentration limit (MCL) set by the U.S. Environmental Protection Agency (EPA), and to transfer the uranium to an appropriately licensed facility for either reuse (*i.e.,* mixed uranium oxide [''yellowcake''] production) or disposal. Expansion of the scope of WRT's authorized licensed activities would allow WRT to remove uranium from non-drinking water sources (*e.g.,* mine sites, pit lakes, and groundwater remediation sites). If approved by the NRC, these activities would be authorized under a renewed License SUC–1591.

Need for the Proposed Action

The current version of License SUC–1591 authorizes the licensee to install its URS at a CWS, to possess and store the extracted uranium in the URS, and to transfer and properly disposition the extracted uranium.

In addition to renewing its license for an additional 20-year term, WRT seeks to expand the scope of its licensed activities to include the use of its URS at customer facilities other than CWSs for the purpose of removing uranium from non-drinking water sources (*e.g.,* mines, pit lakes, and groundwater remediation sites).

Environmental Impacts of the Proposed Action

The NRC staff assessed the environmental impacts of the license renewal and expanded scope of activities and determined there would not be significant impacts to the quality of the human environment. The NRC staff concluded that impacts for most resource areas, namely, land use; geology and soils; transportation; water resources; ecological resources; air quality; noise; visual and scenic resources; socioeconomics; public and occupational health; and waste management were small. With respect to environmental justice, the NRC staff does not expect that the proposed action (to include an expanded scope of licensed activities) would cause noticeable impact on any population. Therefore, the NRC staff has determined that there are no disproportionately high and adverse human health and environmental effects on minority or low-income populations.

For historic and cultural resources, the NRC expects that there would be no adverse effects on historic properties from the continued use of WRT's URS at CWSs and if the request to expand the scope of authorized license activities is approved, the NRC similarly expects that there would be no adverse effects on historic properties and cultural resources resulting from the installation and operation of WRT's URS at non-drinking water sites. As described in the environmental assessment, the renewed SUC–1591 license will include license conditions that sets parameters on the types of locations where WRT can install its URS without prior NRC approval. These license conditions are expected to prevent any adverse effects to historic properties and cultural resources. If WRT seeks to install a URS at a site not meeting these license conditions, WRT would then need to submit a license amendment to the NRC for that specific site and the NRC would then conduct a site-specific environmental review prior to making its decision on whether to approve or disapprove that license amendment request.

The NRC has also determined that the proposed action is not likely to adversely affect threatened and endangered species. Similar to historic and cultural resources, the license conditions setting parameters on the types of locations where WRT can install its URS are expected to prevent any impacts to threatened or endangered species and their critical habitat.

Environmental Impacts of the Alternatives to the Proposed Action

The NRC staff evaluated the no-action alternative, that is denial of WRT's license renewal request and by default, denial of its expanded scope request—in effect, WRT's multisite license SUC–1591 would expire. The NRC staff also evaluated a partial alternative involving approval of WRT's license renewal request, but not its expanded scope request, such that WRT would only be authorized to continue to use its URS at CWS sites in non-Agreement States under its multisite license.

The no-action alternative (*i.e.,* denial of the license renewal request) would have no impact on current WRT operations, as those operations occur exclusively in Agreement States, where WRT is subject to applicable State law and regulation and operates in accordance with its Agreement State licenses. As such, WRT could continue to operate in its current locations as well as in other potential, future Agreement State locations if the NRC denies the license renewal request. Thus, a denial of the license renewal request would only forestall WRT from operating in a non-Agreement State under its multisite license.

If the NRC exercises the no-action alternative, WRT could choose to apply to the NRC for a specific license for each potential CWS client. If, however, WRT chose not to apply for such a specific license, then the affected CWS would not be able to utilize WRT's URS to meet the EPA-mandated uranium MCL for drinking water. The CWS would then have to rely upon other alternative treatment methodologies and technologies to meet the applicable MCL. These other treatment methodologies and technologies were described in the 2006 EA (ADAMS Accession No. ML062490415) that supported the issuance of the 2007 license to RMD; the environmental impacts of these alternative treatment methodologies and technologies would most likely be similar to the use of the WRT URS.

In assessing environmental impacts for CWSs under the partial alternative (denial of the expanded scope request), the NRC staff noted that it had evaluated the potential environmental impacts of authorizing WRT to operate at CWS sites in its 2006 EA. The NRC staff's evaluation of WRT's performance since 2007 has confirmed the findings and conclusions of the 2006 EA. Therefore, the NRC staff has determined that the partial alternative will present the same environmental impacts that the proposed action would likely have with respect to CWS facilities

With respect to non-drinking water sites, under both the no-action alternative and the partial alternative, WRT could choose to apply for a specific license for each potential non-drinking water site. If WRT chose not to submit a specific license application for a given non-drinking water site, then that site would not be impacted by WRT operations. The owners and operators of such a non-drinking water site would then have to consider other alternative treatment methodologies or technologies to reduce uranium levels or would have to forego reducing the uranium levels altogether (non-drinking water sites are not subject to EPA's Safe Drinking Water Act regulations).

Agencies and Persons Consulted

By letters dated July 5, 2018 (ADAMS Accession No. ML18131A200), the NRC staff requested comment on a draft of this environmental assessment from a total of seven NRC Agreement States where the NRC staff understood that WRT was currently operating: California, Colorado, Georgia, Nebraska, New Jersey, South Carolina, and Virginia. Responses were received from six of the seven of the Agreement States (Nebraska did not respond), with the EA

revised to address the comments received.

III. Finding of No Significant Impact

Based on its review of the proposed action, as documented in the EA, the NRC staff concludes that the renewal of License SUC–1591 with an expanded scope of authorized activities will not have a significant effect on the quality of the human environment. Therefore, the NRC staff has determined not to prepare an EIS for the proposed action and that, pursuant to 10 CFR 51.32, a finding of no significant impact is appropriate.

Dated at Rockville, Maryland, on October 23, 2018.

For the Nuclear Regulatory Commission.

Brian W. Smith,

Acting Director, Division of Fuel Cycle Safety, Safeguards and Environmental Review, Office of Nuclear Material Safety and Safeguards.

[FR Doc. 2018–23509 Filed 10–26–18; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2018–0230]

Training and Experience Requirements for Different Categories of Radiopharmaceuticals

AGENCY: Nuclear Regulatory Commission.

ACTION: Training and experience requirements; request for comment.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is requesting comments on its training and experience (T&E) requirements. Specifically, the NRC would like input on whether it should establish tailored T&E requirements for different categories of radiopharmaceuticals for which a written directive is required in accordance with its regulations. The input will be used to determine whether significant regulatory changes to the NRC's T&E requirements for authorized users (AUs) are warranted.

DATES: Submit comments by January 29, 2019. Comments received after this date will be considered if it is practical to do so, but the NRC is only able to ensure consideration for comments received on or before this date.

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

- *Federal Rulemaking Website:* Go to *http://www.regulations.gov* and search for Docket ID NRC–2018–0230. Address questions about Docket IDs in *Regulations.gov* to Jennifer Borges; telephone: 301–287–9127; email: *Jennifer.Borges@nrc.gov*. For technical questions, contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.
- *Mail comments to:* May Ma, Office of Administration, Mail Stop: TWFN–7–A60M, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

For additional direction on obtaining information and submitting comments, see ''Obtaining Information and Submitting Comments'' in the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: Sarah Lopas, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–6360, email: *Sarah.Lopas@nrc.gov*.

SUPPLEMENTARY INFORMATION:

I. Obtaining Information and Submitting Comments

A. Obtaining Information

Please refer to Docket ID NRC–2018–0230 when contacting the NRC about the availability of information for this action. You may obtain publicly-available information related to this action by any of the following methods:

- *Federal Rulemaking Website:* Go to *http://www.regulations.gov* and search for Docket ID NRC–2018–0230.
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly-available documents online in the ADAMS Public Documents collection at *http://www.nrc.gov/reading-rm/adams.html*. To begin the search, select ''Begin Web-based ADAMS Search.'' For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to *pdr.resource@nrc.gov*. The ADAMS accession number for each document referenced is provided the first time that it is mentioned in the **SUPPLEMENTARY INFORMATION** section.
- *NRC's PDR:* You may examine and purchase copies of public documents at the NRC's PDR, Room O1–F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.

B. Submitting Comments

Please include Docket ID NRC–2018–0230 in your comment submission. The NRC cautions you not to include identifying or contact information in comment submissions that you do not want to be publicly disclosed in your comment submission. All comment submissions are posted at *http://www.regulations.gov* and entered into ADAMS. Comment submissions are not routinely edited to remove identifying or contact information.

If you are requesting or aggregating comments from other persons for submission to the NRC, then you should inform those persons not to include identifying or contact information that they do not want to be publicly disclosed in their comment submission. Your request should state that the NRC does not routinely edit comment submissions to remove such information before making the comment submissions available to the public or entering the comment into ADAMS.

II. Background

On August 17, 2017, the Commission issued a staff requirements memorandum (SRM), SRM–M170817 (ADAMS Accession No. ML17229B284), approving the final rule revising parts 30, 32, and 35 of title 10 of the *Code of Federal Regulations* (10 CFR), ''Medical Use of Byproduct Material—Medical Event Definitions, Training and Experience, and Clarifying Amendments,'' and directing the staff to evaluate (1) whether it makes sense to establish tailored T&E requirements for different categories of radiopharmaceuticals, (2) how those categories should be determined (such as by risks posed by groups of radionuclides or by delivery method), (3) what the appropriate T&E requirements would be for each category, and (4) whether those requirements should be based on hours of T&E or focused more on competency. In response to the SRM, the NRC staff documented its initial results, status, and next steps related to this evaluation in SECY–18–0084, ''Staff Evaluation of Training and Experience Requirements for Administering Different Categories of Radiopharmaceuticals in Response to SRM–M170817'' (ADAMS Accession No. ML18135A276). In SECY–18–0084, the staff concluded that additional outreach with the medical community is needed to determine whether and how to tailor the T&E requirements to establish a limited AU status, the specific T&E requirements that should apply, how the T&E requirements should be met (*e.g.,* hours of training, demonstration of competency), and whether a competency-based approach makes sense for the T&E requirements for all the medical uses authorized under 10 CFR 35.300, ''Use of unsealed byproduct material for which a written directive is required.''

The NRC is interested in obtaining input from as many stakeholders as possible, including members of the Advisory Committee on the Medical

Uses of Isotopes, professional organizations, physicians, patients, patient advocacy groups, licensees, Agreement States, and other interested individuals. The focus of this request is to gather information that will permit the NRC staff to determine whether changes to the T&E requirements are warranted for different categories of radiopharmaceuticals for physicians seeking AU status for the medical use of specific categories of radiopharmaceuticals requiring a written directive under 10 CFR 35.300.

During the comment period between October 29, 2018 and January 29, 2019, the NRC will hold four public meetings that will discuss the information being requested and to accept comments on the docket. All four public meetings will be available for remote participation by moderated bridge line and webinar, and two of the four meetings will be open for in-person attendance at NRC's headquarters in Rockville, Maryland.

The public meetings are scheduled for November 14, 2018 (webinar-only); December 11, 2018 (webinar and in-person attendance); January 10, 2019 (webinar and in-person attendance); and January 22, 2019 (webinar-only). The public meetings will be noticed on the NRC's public meeting website at least 10 calendar days before the meeting. Members of the public should monitor the NRC's public meeting website at *https://www.nrc.gov/pmns/mtg.* The NRC will also post the meeting notices on the Federal Rulemaking website at *https://www.regulations.gov/* under Docket ID NRC–2018–0230.

The NRC may post additional materials related to this document, including public comments, on the Federal Rulemaking website. The Federal Rulemaking website allows you to receive alerts when changes or additions occur in a docket folder. To subscribe: (1) Navigate to the docket folder NRC–2018–0230; (2) click the ''Sign up for Email Alerts'' link; and (3) enter your email address and select how frequently you would like to receive emails (daily, weekly, or monthly).

III. Specific Requests for Comments

A. Tailored Training & Experience Requirements

The NRC is requesting comments on whether it should establish tailored T&E requirements for different categories of radiopharmaceuticals for physicians seeking AU status for the medical use of specific categories of radiopharmaceuticals requiring a written directive under 10 CFR 35.300 (*i.e.,* a limited AU status). This would be for physicians seeking AU status via the alternate non-board certified pathway, and for physicians certified by a medical specialty board that is not currently recognized by the NRC under 10 CFR 35.390, 35.392, 35.394, or 35.396 (Unsealed Byproduct Material—Written Directive Required).

1. Are the current pathways for obtaining AU status reasonable and accessible? Provide a rationale for your answer.

2. Are the current pathways for obtaining AU status adequate for protecting public health and safety? Provide a rationale for your answer.

3. Should the NRC develop a new tailored T&E pathway for these physicians? If so, what would be the appropriate way to categorize radiopharmaceuticals for tailored T&E requirements? If not, explain why the regulations should remain unchanged. [Some options to categorize radiopharmaceuticals include radiopharmaceuticals with similar delivery methods (oral, parenteral); same type of radiation characteristics or emission (alpha, beta, gamma, low-energy photon); similar preparation method (patient-ready doses); or a combination thereof (*e.g.,* radiopharmaceuticals containing alpha- and beta-emitting radioisotopes that are administered intravenously and are prepared as patient-ready doses).]

4. Should the fundamental T&E required of physicians seeking limited AU status need to have the same fundamental T&E required of physicians seeking full AU status for all oral and parenteral administrations under 10 CFR 35.300?

5. How should the requirements for this fundamental T&E be structured for a specific category of radiopharmaceuticals?

a. Describe what the requirements should include:

i. Classroom and laboratory training—What topics need to be covered in this training requirement? How many hours of classroom and laboratory training should be required? Provide the basis for the number of hours. If not hours, explain how this training should be quantified. [*Note:* The topics currently required in the regulations to be included in the classroom and laboratory training and work experience are listed in 10 CFR 35.390, 35.392, 35.394, and 35.396.]

ii. Work experience—What should the work experience requirement involve? How many hours of work experience should be required and what is the minimum number of patient or human research subject administrations that an individual must perform? Provide the basis for the number of hours and administrations. What should be the qualifications of the supervising individual?

iii. Competency—How should competency be evaluated? Should a written and/or practical examination by an independent examining committee be administered? Provide a rationale for your answer.

b. Should a preceptor attestation be required for the fundamental T&E? Provide a rationale for your answer.

c. Should the radiopharmaceutical manufacturer be able to provide the preceptor attestation? Provide a rational for your answer.

d. Who should establish and administer the curriculum and examination? Provide specific group(s). [Some options are: NRC, medical specialty boards, medical professional societies, educational professional groups, and NRC in collaboration with any or more of the aforementioned groups.]

e. Should AU competency be periodically assessed? If so, how should it be assessed, how often, and by whom?

B. NRC's Recognition of Medical Specialty Boards

The NRC is requesting comments on its recognition of medical specialty boards. The NRC's procedures for recognizing medical specialty boards are located on the Medical Uses Licensee Toolkit website (*https://www.nrc.gov/materials/miau/med-use-toolkit/certif-process-boards.html*). The NRC staff periodically reviews information to determine a board's continued eligibility for recognition.

1. What boards other than those already recognized by the NRC (American Board of Nuclear Medicine [ABNM], American Board of Radiology [ABR], American Osteopathic Board of Radiology [AOBR], Certification Board of Nuclear Endocrinology [CBNE]) could be considered for recognition for medical uses under 10 CFR 35.300?

2. Are the current NRC medical specialty board recognition criteria sufficient? If not, what additional criteria should the NRC use?

C. Patient Access

The NRC is requesting comments on whether there is a shortage in the number of AUs for 10 CFR 35.300.

1. Is there a shortage in the number of AUs for medical uses under 10 CFR 35.300? If so, is the shortage associated with the use of a specific radiopharmaceutical? Explain how.

2. Are there certain geographic areas with an inadequate number of AUs? Identify these areas.

3. Do current NRC regulations on AU T&E requirements unnecessarily limit patient access to procedures involving radiopharmaceuticals? Explain how.

4. Do current NRC regulations on AU T&E requirements unnecessarily limit research and development in nuclear medicine? Explain how.

D. Other Suggested Changes to the T&E Regulations

In 2002, the NRC revised its regulatory framework for medical use. The goal was to focus the NRC's regulations on those medical procedures that pose the highest risk to workers, the general public, patients, and human research subjects and to structure the regulations to be more risk-informed and more performance-based. The 2002 rule reduced the unnecessary regulatory burden by either reducing or eliminating the prescriptiveness of some regulations. Instead, the rule provided for a performance-based approach that relied on the training and experience of the AUs, authorized nuclear pharmacists, and radiation safety officers. The NRC is requesting comments on whether there are any other changes to the T&E regulations in 10 CFR part 35 that should be considered. Please discuss your suggested changes.

1. Should the NRC regulate the T&E of physicians for medical uses?

2. Are there requirements in the NRC's T&E regulatory framework for physicians that are non-safety related?

3. How can the NRC transform its regulatory approach for T&E while still ensuring that adequate protection is maintained for workers, the general public, patients, and human research subjects?

Dated at Rockville, Maryland, this 23rd day of October 2018.

For the Nuclear Regulatory Commission.

Daniel S. Collins,

Director, Division of Materials Safety, Security, State, and Tribal Programs, Office of Nuclear Material Safety and Safeguards.

[FR Doc. 2018–23521 Filed 10–26–18; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2018–0062]

Information Collection: Physical Protection of Category 1 and Category 2 Quantities of Radioactive Material

AGENCY: Nuclear Regulatory Commission.

ACTION: Renewal of existing information collection; request for comment.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) invites public comment on the renewal of Office of Management and Budget (OMB) approval for an existing collection of information. The information collection is entitled, ''Physical Protection of Category 1 and Category 2 Quantities of Radioactive Material.''

DATES: Submit comments by December 28, 2018. Comments received after this date will be considered if it is practical to do so, but the Commission is able to ensure consideration only for comments received on or before this date.

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

- *Federal Rulemaking Website:* Go to *http://www.regulations.gov* and search for Docket ID NRC–2018–0062. Address questions about Docket IDs in *Regulations.gov* to Jennifer Borges; telephone: 301–287–9127; email: *Jennifer.Borges@nrc.gov.* For technical questions, contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.
- *Mail comments to:* David Cullison, Office of the Chief Information Officer, Mail Stop: T–2 F43, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

For additional direction on obtaining information and submitting comments, see ''Obtaining Information and Submitting Comments'' in the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: David Cullison, Office of the Chief Information Officer, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–2084; email: *INFOCOLLECTS.Resource@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Obtaining Information and Submitting Comments

A. Obtaining Information

Please refer to Docket ID NRC–2018–0062 when contacting the NRC about the availability of information for this action. You may obtain publicly-available information related to this action by any of the following methods:

- *Federal Rulemaking Website:* Go to *http://www.regulations.gov* and search for Docket ID NRC–2018–0062.
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly-available documents online in the ADAMS Public Documents collection at *http://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''*Begin Web-based ADAMS Search.*'' For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to *pdr.resource@nrc.gov.* The supporting statement associated with the part 37 information collections, the burden table, and the NRC Form 755 are available in ADAMS under Accession Nos. ML18172A301, ML18172A300, and ML18295A594.
- *NRC's PDR:* You may examine and purchase copies of public documents at the NRC's PDR, Room O1–F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.
- *NRC's Clearance Officer:* A copy of the collection of information and related instructions may be obtained without charge by contacting the NRC's Clearance Officer, David Cullison, Office of the Chief Information Officer, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–2084; email: *INFOCOLLECTS.Resource@nrc.gov.*

B. Submitting Comments

The NRC cautions you not to include identifying or contact information in comment submissions that you do not want to be publicly disclosed in your comment submission. All comment submissions are posted at *http://www.regulations.gov* and entered into ADAMS. Comment submissions are not routinely edited to remove identifying or contact information.

If you are requesting or aggregating comments from other persons for submission to the OMB, then you should inform those persons not to include identifying or contact information that they do not want to be publicly disclosed in their comment submission. Your request should state that the NRC does not routinely edit comment submissions to remove such information before making the comment submissions available to the public or entering the comment submissions into ADAMS.

II. Background

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the NRC is requesting public comment on its intention to request the OMB's approval for the information collection summarized in this section.

1. *The title of the information collection:* 10 CFR part 37, Physical Protection of Category 1 and Category 2 Quantities of Radioactive Material.''

2. *OMB approval number:* 3150–0214.

3. *Type of submission:* Revision.

4. *The form number, if applicable:* NRC Form 755, ''Notification to the NRC

of Shipments of Category 1 Quantities of Radioactive Material''.

5. *How often the collection is required or requested:* One time for initial compliance notifications and fingerprints for the reviewing officials; and as needed for implementation notifications, event notifications, notifications of shipments of radioactive material, and fingerprinting of new employees.

6. *Who will be required or asked to respond:* Licensees that are authorized to possess and use category 1 or category 2 quantities of radioactive material.

7. *The estimated number of annual responses:* 101,479 (4,704 reporting responses + 95,375 third party disclosure responses + 1,400 recordkeepers).

8. *The estimated number of annual respondents:* 5,600.

9. *The estimated number of hours needed annually to comply with the information collection requirement or request:* 74,043 hours (1,557 reporting + 23,989 recordkeeping + 48,497 third party disclosure).

10. *Abstract:* Part 37 of title 10 of the Code of Federal Regulations (10 CFR), contains security requirements for the use of category 1 and category 2 quantities of radioactive material. Licensees are required to: (1) Develop procedures for implementation of the security provisions; (2) develop a security plan that describes how security is being implemented; (3) conduct training on the procedures and security plan; (4) conduct background investigations for those individuals permitted access to category 1 or category 2 quantities of radioactive material; (5) coordinate with LLEAs so the LLEAs would be better prepared to respond in an emergency; (6) conduct preplanning and coordination activities before shipping radioactive material; and (7) implement security measures for the protection of the radioactive material. Licensees are required to promptly report any attempted or actual theft or diversion of the radioactive material. Licensees are required to keep copies of the security plan, procedures, background investigation records, training records, and documentation that certain activities have occurred. NRC Form 755, ''Notification to the NRC of Shipments of Category 1 Quantities of Radioactive Material'' is used by licensees to provide advance notification of shipments of category 1 quantities of radioactive material. The NRC uses the information required by 10 CFR part 37 to fulfill its responsibilities to respond to, investigate, and correct situations that adversely affect public health and safety or the common defense and security.

III. Specific Requests for Comments

The NRC is seeking comments that address the following questions:

1. Is the proposed collection of information necessary for the NRC to properly perform its functions? Does the information have practical utility?

2. Is the estimate of the burden of the information collection accurate?

3. Is there a way to enhance the quality, utility, and clarity of the information to be collected?

4. How can the burden of the information collection on respondents be minimized, including the use of automated collection techniques or other forms of information technology?

Dated at Rockville, Maryland, this 23rd day of October, 2018. For the Nuclear Regulatory Commission.

David Cullison,

NRC Clearance Officer, Office of the Chief Information Officer.

[FR Doc. 2018–23493 Filed 10–26–18; 8:45 am]

BILLING CODE 7590–01–P

PENSION BENEFIT GUARANTY CORPORATION

Submission of Information Collection for OMB Review; Comment Request; Partitions of Eligible Multiemployer Plans

AGENCY: Pension Benefit Guaranty Corporation.

ACTION: Notice of request for extension of OMB approval.

SUMMARY: The Pension Benefit Guaranty Corporation (PBGC) is requesting that the Office of Management and Budget (OMB) extend approval, under the Paperwork Reduction Act, of a collection of information contained in its regulation on Partitions of Eligible Multiemployer Plans. This notice informs the public of PBGC's request and solicits public comment on the collection.

DATES: Comments must be submitted by November 28, 2018.

ADDRESSES: Comments should be sent to the Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: Desk Officer for Pension Benefit Guaranty Corporation, via electronic mail at *OIRA_submission@omb.eop.gov* or by fax to (202) 395–6974.

A copy of the request will be posted on PBGC's website at: *https://www.pbgc.gov/prac/laws-and-regulations/information-collections-under-omb-review.* It may also be obtained without charge by writing to the Disclosure Division of the Office of the General Counsel, 1200 K Street NW, Washington, DC 20005–4026; faxing a request to 202–326–4042; or, calling 202–326–4040 during normal business hours (TTY users may call the Federal Relay Service toll-free at 1–800–877–8339 and ask to be connected to 202–326–4040). The Disclosure Division will email, fax, or mail the information to you, as you request.

FOR FURTHER INFORMATION CONTACT: Melissa Rifkin (*rifkin.melissa@pbgc.gov*), Attorney, Regulatory Affairs Division, Office of the General Counsel, Pension Benefit Guaranty Corporation, 1200 K Street NW, Washington, DC 20005–4026; 202–326–4400, extension 6563. TTY users may call the Federal Relay Service toll-free at 800–877–8339 and ask to be connected to 202–326–4400, extension 6563.

SUPPLEMENTARY INFORMATION: Sections 4233(a) and (b) of the Employee Retirement Income Security Act of 1974 (ERISA) allow a plan sponsor of a multiemployer plan to apply to PBGC for a partition of the plan and state the criteria that PBGC uses to determine a plan's eligibility for a partition.

PBGC's regulation on Partitions of Eligible Multiemployer Plans (29 CFR part 4233) sets forth the procedures for applying for a partition, the information required to be included in a partition application, and notices to interested parties of the application.

PBGC needs the information to determine whether a plan is eligible for partition and whether a proposed partition would comply with the statutory conditions required before PGBC may order a partition.

The existing collection of information was approved under OMB control number 1212–0068 (expires December 31, 2018). On August 17, 2018, PBGC published in the **Federal Register** (at 83 FR 41113) a notice informing the public of its intent to request an extension of this collection of information. PBGC did not receive any comments about this collection of information. PBGC is requesting that OMB extend approval of the collection for three years. 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.

PBGC estimates that there will be six applications for partition each year for which plan sponsors submit applications under this regulation. The total estimated annual burden of the

collection of information is 78 hours and $239,400.

Issued in Washington, DC.

Hilary Duke,

Assistant General Counsel for Regulatory Affairs, Pension Benefit Guaranty Corporation.

[FR Doc. 2018–23498 Filed 10–26–18; 8:45 am]

BILLING CODE 7709–02–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–84471; File No. SR–NYSEArca–2018–63]

Self-Regulatory Organizations; NYSE Arca, Inc.; Order Approving a Proposed Rule Change To Amend NYSE Arca Rule 1.1(ll) To Modify the Formula for Establishing the Official Closing Price for a Derivative Securities Product When There Is No Closing Auction or if the Closing Auction Is Less Than One Round Lot, by Excluding the NBBO Midpoint if the Midpoint Multiplied by 10% Is Less Than the NBBO Spread or if the NBBO Is Crossed

October 23, 2018.

I. Introduction

On August 29, 2018, NYSE Arca, Inc. (''Exchange'' or ''NYSE Arca'') filed with the Securities and Exchange Commission (''Commission'') pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'' [1] and Rule 19b–4 thereunder,[2] a proposed rule change to amend NYSE Arca Rule 1.1(ll) to exclude from the time-weighted average price (''TWAP'') calculation, for purpose of determining the Official Closing Price [3] for an Exchange-listed security that is a Derivative Securities Product [4] if the Exchange does not conduct a Closing Auction [5] or if a Closing Auction trade is less than a round lot, a midpoint that is based on a National Best Bid and Offer (''NBBO'') that may not be reflective of the security's true and current value. The proposed rule change was published for comment in the **Federal Register** on September 17, 2018.[6] The Commission received no comment letters on the proposed rule change. This order approves the proposed rule change.

II. Description of the Proposed Rule Change

On March 20, 2018, the Commission approved the Exchange's proposal (''OCP Filing'') to amend NYSE Arca Rule 1.1(ll) to provide for how the Official Closing Price is determined for an Exchange-listed security that is a Derivative Securities Product if the Exchange does not conduct a Closing Auction or if a Closing Auction trade is less than a round lot.[7] As described in the Notice, the Exchange had sought a method for deriving the Official Closing Price that would be more indicative of the actual value of the securities, in particular for listed securities that are thinly traded or generally illiquid.[8] Prior to approval of the OCP Filing, the Official Closing Price for such securities would have been based on a last-sale trade that may have been hours, days, or even months old and therefore not necessarily indicative of their true and current value. With approval of the OCP Filing, the Exchange adopted a revised calculation to derive the value for securities that have a potentially stale last-price, depending on when the last consolidated last-sale eligible trade occurred. Specifically, for such securities, the Official Closing Price would be derived by adding a percentage of the TWAP of the NBBO midpoint measured over the last five minutes before the end of Core Trading Hours and a percentage of the last consolidated last-sale eligible trade before the end of Core Trading Hours on that trading day.[9]

The Exchange now proposes to further amend NYSE Arca Rule 1.1(ll)(1)(B) to exclude from the TWAP calculation a midpoint that is based on an NBBO that the Exchange believes is too wide and therefore not reflective of the security's true and current value.[10] Specifically, the Exchange proposes to exclude an NBBO midpoint from the calculation of the Official Closing Price if that midpoint, when multiplied by ten percent (10%), is less than the spread of that NBBO.[11] The Exchange also would exclude a crossed NBBO from the calculation.[12]

The Exchange notes that its proposed change to the Official Closing Price calculation in this scenario is similar to how it considers an ''Auction NBBO,'' which is used as a basis for determining the Auction Reference Price for the Core Open Auction.[13] To qualify as an Auction NBBO for the Core Open Auction, there must be both a bid and an offer that is not zero, the NBBO cannot be crossed, and the midpoint of the NBBO when multiplied by a designated percentage cannot be greater than or equal to the spread of the NBBO.[14]

The Exchange also proposes a non-substantive clarifying change to NYSE Arca Rule 1.1(ll) to specify that the process under NYSE Arca Rule 1.1(ll)(1)(D) would be utilized if the Official Closing Price cannot be determined under NYSE Arca Rule1.1(ll)(1)(A), (B), or (C).[15]

The Exchange anticipates the implementation date for the proposed rule change will be in the first quarter of 2019, and the Exchange will announce such implementation date by Trader Update.[16]

III. Discussion and Commission's Findings

After careful review, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.[17] In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act,[18] which requires, among other things, that the rules of a national securities exchange be

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* NYSE Arca Rule 1.1(ll) for a definition of Official Closing Price.

[4] With respect to equities traded on the Exchange, the term ''Derivative Securities Product'' means a security that meets the definition of ''derivative securities product'' in Rule 19b–4(e) under the Act. *See* NYSE Arca Rule 1.1(k). For purposes of Rule 19b–4(e), a ''derivative securities product'' means any type of option, warrant, hybrid securities product or any other security, other than a single equity option or a security futures product, whose value is based, in whole or in part, upon the performance of, or interest, in, an underlying instrument. 17 CFR 240.19b–4(e).

[5] *See* NYSE Arca Rule 7.35–E(d) regarding the operation of Closing Auctions on the Exchange.

[6] *See* Securities Exchange Act Release No. 84079 (September 11, 2018), 83 FR 46981 (''Notice'').

[7] *See* Securities Exchange Act Release No. 82907 (March 20, 2018), 83 FR 12980 (March 26, 2018) (order approving SR–NYSEArca–2018–08).

[8] *See* Notice, *supra,* note 6, at 46981.

[9] *See* NYSE Arca Rule 1.1(ll)(1)(B)(i)–(vi).

[10] *See* Notice, *supra,* note 6, at 46981.

[11] *See* proposed NYSE Arca Rule 1.1(ll)(1)(B).

[12] *See id.* For an example of this proposed new process, see Notice, *supra,* note 6, at 46981–82.

[13] The term ''Auction NBBO'' means an NBBO that is used for purposes of pricing an auction. *See* NYSE Arca Rule 7.35–E(a)(5). The Exchange also uses the Auction NBBO for determining the Indicative Match Price in specified situations for the Closing Auction. *See* NYSE Arca Rule 7.35–E(a)(8)(C).

[14] *See* NYSE Arca Rule 7.35–E(a)(5). The Exchange notes that, unlike its current proposal to codify a designated percentage of ten percent (10%) to be used in the TWAP calculation for the Official Closing Price, the designated percentage used for determining the Auction NBBO for the Core Open Auction is determined by the Exchange upon prior notice to ETP Holders. *See* Notice, *supra,* note 6, at 46982.

[15] *See* proposed NYSE Arca Rule 1.1(ll)(1)(D).

[16] *See* Notice, *supra,* note 6, at 46982.

[17] In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[18] 15 U.S.C. 78f(b)(5).

designed to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest, and not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers. The Commission also finds that the proposed rule change is consistent with Section 6(b)(8) of the Act,[19] which requires that the rules of an exchange not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

The proposal would set forth an additional procedure governing how the Exchange would determine the Official Closing Price in Exchange-listed securities that are Derivative Securities Products when the Exchange does not conduct a Closing Auction or if a Closing Auction trade is less than a round lot. The Commission notes that the primary listing market's closing price for a security is relied upon by market participants for a variety of reasons, including, but not limited to, calculation of index values, calculation of the net asset value of mutual funds and exchange-traded products, the price of derivatives that are based on the security, and certain types of trading benchmarks such as volume weighted average price strategies. As the Exchange notes, its current calculation for the Official Closing Price in such a scenario is designed to utilize more recent and reliable market information to provide a closing price that more accurately reflects the true and current value of a security that may be thinly traded or generally illiquid and when the Official Closing Price for such security may otherwise be based on a potentially stale last-sale trade.[20] The Exchange now proposes to exclude from the TWAP calculation used under this process a midpoint that is based on an NBBO that the Exchange believes is too wide and therefore not reflective of the security's true and current value.[21] The Commission believes that this exclusion, utilizing a specified percentage of the midpoint value, is a reasonable approach to avoid utilizing market information in the TWAP calculation that may provide less accurate information about the true value of a security. The Commission therefore believes that the Exchange's proposal is reasonably designed to achieve the Act's objectives to protect investors and the public interest. Accordingly, the Commission finds that the proposed rule change is consistent with the requirements of the Act.

IV. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[22] that the proposed rule change (SR–NYSEArca-2018–63) be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[23]

Eduardo A. Aleman,

Assistant Secretary.

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[19] 15 U.S.C. 78f(b)(8).

[20] *See* Notice, *supra* note 6, at 46981.

[21] *See id.*

[22] 15 U.S.C. 78s(b)(2).

[23] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–84473; File No. SR–OCC–2018–012]

Self-Regulatory Organizations; The Options Clearing Corporation; Order Approving Proposed Rule Change Related to The Options Clearing Corporation's Board of Directors and Board Committee Charters

October 23, 2018.

I. Introduction

On August 24, 2018, The Options Clearing Corporation (''OCC'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change SR–OCC–2018–012 (''Proposed Rule Change'') pursuant to Section 19(b) of the Securities Exchange Act of 1934 (''Exchange Act'') [1] and Rule 19b–4 [2] thereunder to make changes to OCC's (1) Audit Committee Charter, (2) Compensation and Performance Committee Charter, (3) Governance and Nominating Committee Charter, (4) Risk Committee Charter, (5) Technology Committee Charter and (6) Board of Directors Charter. The Proposed Rule Change was published for comment in the **Federal Register** on September 10, 2018,[3] and the Commission has received no comments in response.

II. Background [4]

The Proposed Rule Change would make certain changes to OCC's (1) Audit Committee (''AC'') Charter (''AC Charter''), (2) Compensation and Performance Committee (''CPC'') Charter (''CPC Charter''), (3) Governance and Nominating Committee (''GNC'') Charter (''GNC Charter''), (4) Risk Committee (''RC'') Charter (''RC Charter''), (5) Technology Committee (''TC'') Charter (''TC Charter''), and (6) Board of Directors (''Board'') Charter (''Board Charter'').[5] These changes are described and broadly categorized below.[6]

As a general matter, the Proposed Rule Change would amend the charters to provide that in carrying out their responsibilities the Board and the committees would prioritize the safety and efficiency of OCC, generally support the stability of the broader financial system and consider the legitimate interests of Clearing Members, customers of Clearing Members and other relevant stakeholders, including OCC's shareholders and other participant exchanges, taking into account prudent risk management standards (including systemic risk mitigation) and industry best practices.

A. Clarity and Transparency

Several of the changes within the Proposed Rule Change seek to better describe OCC's current processes. Such changes range from clarification (*e.g.,* changing ''annually'' to ''each calendar year'') to removal of redundancies (*e.g.,* where a requirement is found elsewhere in OCC's rules) to stating the existing functions and responsibilities of OCC's Board and Board committees. These changes are described in more detail below.

The Proposed Rule Change would make a number of changes to OCC's Board committee charters to clarify that, where certain actions were required to be performed ''annually'' under the charters, those actions would now be required to occur ''each calendar year.'' OCC believes that it is appropriate to clarify which actions are required on an every twelve months-basis, particularly in cases where a regulatory requirement

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Securities Exchange Act Release No. 84021 (Sep. 4, 2018), 83 FR 45706 (Sep. 10, 2018) (SR–OCC–2018–012) (''Notice'').

[4] All terms with initial capitalization that are not otherwise defined herein have the same meaning as set forth in the OCC By-Laws and Rules. OCC's By-Laws and Rules can be found on OCC's public website: *http://optionsclearing.com/about/publications/bylaws.jsp.*

[5] *See* Notice at 45707–08. As discussed below, the changes to the Board Charter would involve incorporating provisions from OCC's Corporate Governance Principles (''CGP'') and changing the title of the resultant document to the Board Charter and Corporate Governance Principles.

[6] Many of the components of the Proposed Rule Change may serve more than one purpose and could, therefore, be discussed in more than one category herein. The categorization of changes is not designed to denote otherwise.

to do so exists.[7] Such changes include amending the committee charters to provide that the following activities must occur on a calendar year basis: (i) Appointment of directors to particular committees; (ii) committee meetings with certain members of management in executive sessions conducted regularly (no less than once per calendar year); (iii) reporting from each committee to the Board summarizing that committee's activities for the prior year; (iv) confirmation by each committee to the Board that all responsibilities outlined in the committee's charter have been carried out; and (v) provision of each committee's assessment of its and its individual members' performance to the GNC for review.

The Proposed Rule Change would also make a number of clarifying changes to each charter. For example, with respect to the AC Charter, the Proposed Rule Change would replace the current reference to ''financial and senior management'' to OCC's ''Corporate Finance Department'' in describing the AC's responsibility to facilitate open communication between external auditors and certain groups within OCC. Additionally, the AC Charter would be amended to provide that the AC is authorized to approve the ''issuance of the annual financial'' statements after its review of such statements.

The Proposed Rule Change would also amend certain descriptions of the AC's responsibilities. For example, the Proposed Rule Change would revise text describing the role of the AC, along with external auditors, as responsible for ''planning and carrying out audit work, as appropriate'' rather than ''planning and carrying out a proper audit.'' The AC Charter's description of the AC's power to delegate to the Chief Audit Executive (''CAE'') ''within the external audit limits'' would be changed for accuracy to read ''within the co-sourced audit hour limits.''

With respect to the CPC Charter, the Proposed Rule Change would remove a number of specified responsibilities and replace them with a general statement that the committee is required to perform activities consistent with the CPC Charter as it deems necessary or appropriate or as are delegated to the committee by the Board. The specified responsibilities that would be removed include, for example, a provision that states that the committee reviews special financial matters as requested by the Board, and provisions addressing the committee's review and approval of policies and programs regarding salary compensation and incentive compensation and its review of material changes to executive management benefits.

With respect to the GNC Charter, the Proposed Rule Change would make revisions such that the GNC is no longer responsible for recommending to the Board candidates for nomination for election or re-election by the stockholders and any Board vacancies that are to be filled by the Board.[8]

With respect to the RC Charter, the Proposed Rule Change would add a clarifying statement to state that the RC is required to perform its responsibilities in accordance with the provisions of the RC Charter and applicable regulatory requirements. Regarding meetings of the RC, the RC Charter would specify that joint meetings with other Board committees count toward the requirement to meet at least six times a year. The Proposed Rule Change would also clarify that in-person attendance at meetings is preferred.

With respect to the TC Charter, the Proposed Rule Change would revise the TC Charter to remove specific references to the committee's oversight of OCC's physical security and instead describe the committee's responsibility for overseeing the adequacy of OCC's management of information security risks, which generally includes: Oversight of the confidentiality, integrity, and availability of OCC data; the security of the information systems used to process, transmit, and store OCC information; and the physical, personnel, procedural, administrative, and environment security disciplines. The Proposed Rule Change would replace language stating that the TC will periodically review and appraise OCC's crisis management plans with language stating that the TC will oversee and receive a quarterly report on OCC's Business Continuity and Disaster Recovery Programs because crisis management plans are incorporated within the Business Continuity and Disaster Recovery Programs.

The Proposed Rule Change would delete certain general statements regarding the TC's duty to make recommendations to the Board with respect to IT-related projects and investments and critically review the progress of such projects and/or technology architecture decisions. These general statements would be replaced with more specific descriptions of the TC's duties. For example, the TC will receive a report on management's progress in executing on major information technology (''IT'') initiatives, technology architecture decisions and IT priorities. The TC will also review and recommend to the Board for approval material changes to (i) the operational execution and delivery of core clearing and settlement services, and (ii) written policies concerning information security risk.

The Proposed Rule Change would make similar changes to the TC Charter with respect to other TC responsibilities. For example, the Proposed Rule Change would revise the language describing the TC's responsibility to monitor and assess OCC's management of IT-related compliance risks as a responsibility to monitor and oversee the overall adequacy of OCC's IT and operational control environment, including the implementation of key controls in response to regulatory requirements.

With respect to the Board Charter, the Proposed Rule Change will incorporate the existing CGP into the Board Charter and rename the charter as the ''Board of Directors Charter and Corporate Governance Principles'' to reflect the change. OCC believes this change is appropriate to eliminate significant overlap between the contents of the two existing documents and thereby make the consolidated provisions in the Board Charter easier for Clearing Members and other OCC stakeholders to access, use, and understand.[9] For example, the existing CGP and Board Charter each address aspects of the Board such as its size and composition. The Proposed Rule Change would make changes to the contents of the CGP to conform the existing provisions to the structure and organization of the Board Charter and related requirements in the By-Laws and Rules.[10] However, the majority of the provisions in the CGP would be incorporated in their existing form, and these provisions address, for example, the size of the Board and its

[7] *See* Notice at 45708.

[8] The requirement that the GNC nominate candidates is provided explicitly in the By-Laws. *See* OCC By-Law Article III, Sections 5 and 6A. The GNC Charter would specify that the GNC's role in this context applies specifically to Public Directors and Member Directors to promote consistency with the By-Laws.

[9] *See* Notice at 45713.

[10] For example, the CGP provides in one instance that all materials for Board meetings are made available online by the office of the secretary. This particular provision in the CGP would not be incorporated into the Board Charter, but the Board Charter would be amended to provide that OCC operates a portal for the general dissemination of meeting and other written materials to directors, a process that is consistent with how OCC distributes such materials today. In addition, the Proposed Rule Change would state in the Board Charter that Public Directors do not have term limits, consistent with the requirements in Article III, Section 6 of the OCC By-Laws.

composition, membership criteria, appointment of the GNC, the selection of Member, Public, Exchange, and Management Directors, conduct matters, ethics and conflicts of interest, compensation, access to senior management, and Board and Board committee evaluations.

As a further result of incorporation of the CGP into the Board Charter, the Proposed Rule Change would remove certain existing provisions in the Board Charter that specifically reference, or are duplicative of, more comprehensive descriptions from the CGP. Specifically, sections of the Board Charter would be replaced with more detailed explanations drawn from the CGP with respect to: (i) Board composition; (ii) qualification standards for directors; (iii) election of directors, resignation, and disqualification; (iv) tenure, term, and age limitations; and (v) calling of Board meetings, selection of agenda items, and attendance.

Currently, the Board Charter sets forth a number of functions and responsibilities of the Board. The Proposed Rule Change would reorganize this list of functions and responsibilities in a new section regarding the mission of the Board and would make non-substantive changes to some of the descriptions of the Board's responsibilities. For example, the Board Charter currently provides that the Board is responsible for advising, approving, and overseeing OCC's business strategies, including expansions of clearing and settlement services to new business lines, as well as monitoring OCC's performance in delivering clearance and settlement services. The Proposed Rule Change would amend the Board Charter to provide that the Board is responsible for overseeing OCC's business strategies, including expansions of clearance and settlement services to new business lines and product types, to ensure they reflect the legitimate interests of relevant stakeholders and are consistent with the public interest. As a further example, the Proposed Rule Change would revise the Board's responsibility to oversee ''OCC's information technology strategy, infrastructure, resources and risks'' to provide that the Board's responsibility is to oversee ''OCC's technology infrastructure, resources, and capabilities to ensure resiliency with regard to OCC's provision of its clearing, settlement, and risk management services.'' The Proposed Rule Change would also remove oversight of human resources programs from the Board Charter because that responsibility has been delegated to the CPC under the current CPC Charter. OCC stated that the changes described above are designed to improve the readability of the Board Charter as well as to specify additional, specific considerations of the Board with respect to particular responsibilities.[11]

In addition to the changes described above, the Proposed Rule Change would specify that the Board's authority extends to performing such functions as it believes are appropriate or necessary, or as otherwise prescribed by rules or regulation, including OCC's By-Laws and Rules, ''or other policies.'' OCC stated that this change is intended to clarify that the scope of the Board's authority extends to all of OCC's policies.[12]

The Board Charter would also provide that the Board is responsible for the business and affairs of OCC, and that the Board will continue to be responsible for performing such other functions as the Board believes appropriate or necessary or as otherwise prescribed by rules or regulations, including OCC's By-Laws and Rules. Pursuant to this broad responsibility, OCC believes that the functions and responsibilities of the Board will remain consistent notwithstanding certain proposed deletions or rephrasing regarding the existing list of responsibilities.[13] For example, the Board Charter would no longer specify that the Board will review committee charters and reports of committee activities; however, it would nevertheless provide that the Board is responsible for establishing a written charter for each committee and that each committee will be responsible for providing an annual report to the Board regarding its activities.

The Proposed Rule Change would make certain other changes to the Board Charter. The Proposed Rule Change would delete the provision noting that the Member Vice Chairman of the Board has the responsibilities set forth in the By-Laws. The Proposed Rule Change would also delete the current footnote one (1) from the Board Charter, which provides an example of an instance in which certain provisions of the By-Laws provide that the Board should not take action. The amended Board Charter will continue to provide that the Board's responsibilities and duties are subject to any exceptions provided in OCC's Amended and Restated Certificate of Incorporation or the By-Laws and Rules. OCC believes that the footnote providing an example of such an instance is unnecessary, and that its deletion would improve readability of the Board Charter.[14]

Additionally, the Proposed Rule Change includes revisions (including by removing or relocating existing content and changing word choices) intended to reduce redundancy and better organize the content of the charters to more clearly state what a committee is authorized or obligated to do. OCC stated that such changes will not substantively alter the responsibilities or activities of the relevant committee.[15] For example, all of the charters would be amended to state that the Board or the relevant committee will review the charter ''at least once every twelve months'' instead of ''annually'' to provide further clarity around the intended frequency. Further, the statement in the TC Charter that the TC ''shall also have the authority to perform any other duties'' consistent with the TC Charter would be revised to provide that the TC ''is authorized to perform any other duties'' consistent with the TC Charter. In addition, the statement in the AC Charter that the committee shall ''approve material changes in accounting principles and practices'' would state that the AC ''is authorized to approve material changes in accounting principles and practices.'' Consistent with this change, where a charter currently states that the Board or a committee ''shall approve'' a particular matter, the charter would state instead that the Board or a committee is ''authorized to approve'' the particular matter. OCC believes such changes properly clarify the oversight role of the Board and the committees, and that approval of a particular matter is not mandatory.[16]

The Proposed Rule Change would make amendments acknowledging, where relevant based on the particular charter, that its Executive Chairman (''EC'') also serves as its Chief Executive Officer (''CEO''), and that therefore certain responsibilities and considerations that currently apply to the EC would also apply to the CEO. All charters would also be revised to state that a role of the Board or the committee, as applicable, is to advise management.

B. Public and Stakeholder Interests

The Proposed Rule Change would specify that the GNC shall review the composition of the Board for consistency with public interest and regulatory requirements at least every three years rather than periodically. The

[11] *See* Notice at 45714.

[12] *See* Notice at 45714, n. 78.

[13] *See* Notice at 45714, n. 79.

[14] *See* Notice at 45715.

[15] *See* Notice at 45707.

[16] *See* Notice at 45707, n. 16.

GNC Charter would further be amended to require yearly GNC review of the committee charters for consistency with the public interest and other regulatory requirements.[17] Lastly, the Proposed Rule Change would require the GNC annually to review and advise the Board with regard to director independence.

C. Board and Management Expertise

The Proposed Rule Change would make several changes related to the experience and skills of the Board and management. With respect to the CPC Charter, the Proposed Rule Change would clarify the role that the CPC plays in oversight of succession planning regarding OCC's Management Committee. A new provision would also provide that the CPC must review the results of Management Committee succession planning activities at least once every twelve months.

With respect to the GNC Charter, the Proposed Rule Change would make two revisions that specifically address the experience and skills of the Board and management. First, the Proposed Rule Change would amend the GNC Charter to establish new responsibilities for the GNC to advise the Board on matters pertaining to director leadership development and succession planning. Second, the Proposed Rule Change would revise the language regarding the GNC's responsibilities with respect to ensuring that directors are appropriately qualified. For example, rather than providing that the GNC will work toward developing a Board with a broad spectrum of experience and expertise, the GNC Charter would provide that the GNC shall identify, for purposes of making recommendations to the Board, the criteria, skills, experience, expertise, attributes, and professional backgrounds (collectively, the ''Standards'') desirable in directors to ensure the Board is able to discharge its duties and responsibilities. Relatedly, the GNC Charter would no longer include language providing that the GNC is responsible for recommending to the Board for approval and overseeing the implementation and effectiveness of OCC's policies and procedures for identifying and reviewing Board nominee candidates, including the criteria for Board nominees.

With respect to the Board Charter, the Proposed Rule Change would provide that the Board is responsible for overseeing OCC's activities through regular assessments of Board and individual director performance. Because the Board has delegated responsibility to the GNC for the annual evaluation of the Board and its committees, OCC believes that it is no longer necessary to specify that the Board would have an annual self-evaluation obligation, as provided in the current charter.[18] The Proposed Rule Change would further amend the Board Charter to provide that the regular assessments will no longer include a focus on individual director performance, but will instead focus primarily on the performance of the Board and each committee as a whole. OCC stated that focusing the annual self-evaluation on individual director performance is less effective than focusing on the performance of each committee as a whole because not every director has the opportunity to work with each other director.[19]

D. Clear and Direct Lines of Responsibility

The Proposed Rule Change would amend the charters to provide clearer information regarding the functions and responsibilities of the Board and committees and reporting requirements. The Proposed Rule Change would amend all of the charters to specify that the Board and each committee may delegate authority to one or more designated officers of OCC or may refer a risk under its oversight to another committee or the Board as advisable or appropriate. The proposed revisions would provide, however, that the delegating body will retain the obligation to oversee any such delegation or referral and assure itself that delegation and reliance on the work of any delegate is reasonable.

The Proposed Rule Change would further clarify that, where the Board or a committee has authority to approve reports or other proposals in its business judgment, such as materials provided by management, it is not obligated to approve such reports or other proposals, and related modifications would articulate a clear means of recourse for the committee or the Board if it does not approve. OCC stated that the purpose of these changes would be to promote governance arrangements that clearly prioritize the safety and efficiency of OCC and specify clear and direct lines of responsibility in its governance arrangements.[20] The Proposed Rule Change would amend certain committee charters to address committee member vacancies to provide that in the event of a vacancy, the applicable committee would continue to undertake its responsibilities, so long as the remaining committee members are capable of satisfying the quorum requirement.[21]

The AC Charter would describe new responsibilities for the AC that include reviewing the impact of litigation and other legal matters that may have a material impact on OCC's financial statements and overseeing the structure, independence and objectivity, staffing, resources, and budget of OCC's compliance and audit departments. The Proposed Rule Change would amend the AC Charter and the RC Charter to transfer responsibility for reviewing the investigation and enforcement outcomes of disciplinary actions taken by OCC against Clearing Members from the AC to the RC. OCC believes that the RC is appropriately situated to review disciplinary actions against Clearing Members given the committee's broader role in overseeing OCC's management of third party risks, which includes OCC counterparties such as Clearing Members.[22]

The Proposed Rule Change would revise the description of the AC's responsibility with respect to OCC's compliance department by providing more generally that the AC will review ongoing compliance monitoring activities by reviewing reports and other communications prepared by the Chief Compliance Officer (''CCO'') and inquire of management regarding steps taken to deal with items raised. As a result of this change, the AC Charter would no longer specify that the AC is responsible for approving the annual Compliance Testing Plan, monitoring progress against the annual Compliance Testing Plan, and approving any recommendations by the CCO relating to that plan. OCC stated that the purpose of this change is to shift OCC's compliance department to a monitoring role and away from its historic role of creating a specific plan to follow, as well as to facilitate the transition of validation responsibilities to OCC's internal audit department, over which the compliance department would have monitoring responsibilities.[23] The AC would also be authorized to approve management's recommendations regarding approval or replacement of the CCO.

Under the Proposed Rule Change, the AC charter would no longer expressly require annual Board approval regarding audit services. However, the AC would

[17] The GNC currently performs such a review of the Board Charter annually.

[18] *See* Notice at 45715.

[19] *See id.*

[20] *See* Notice at 45708, n. 23.

[21] No such change would be added to the GNC Charter because the matter is already addressed therein.

[22] *See* Notice at 45712.

[23] *See* Notice at 45709.

be required to confirm annually to the Board that all of the AC's responsibilities have been carried out and provide an annual report to the Board summarizing the AC's activities during the previous year.

The Proposed Rule Change would amend the AC Charter to provide that, in addition to the CAE and CCO, the Chief Financial Officer (''CFO'') also will be authorized to communicate directly with the Chair of the AC with respect to any of the responsibilities of the AC between meetings of the AC given the CFO's role as part of OCC's executive team and his/her responsibility for OCC finances.

The Proposed Rule Change would revise the CPC Charter to provide that the CPC will oversee and monitor the activities of OCC's Administrative Committee, including the approval of the Administrative Committee's charter and changes thereto and of the members of the Administrative Committee. OCC believes that these allocations of responsibility are appropriate given the CPC's current oversight of the Administrative Committee, whereby the CPC is responsible for, among other things, appointing members of the Administrative Committee and overseeing and monitoring the activities of the Administrative Committee with respect to retirement and retirement savings plans.[24]

The Proposed Rule Change would amend the CPC Charter to state that the CPC assists the Board in overseeing risks related to OCC's general business, regulatory capital, investments, corporate planning, compensation, and human capital in addition to assisting the Board in executive management succession planning and performance assessments; however, OCC management will continue to identify, manage, monitor, and report the associated risks to the Board. The Proposed Rule Change would clarify that the corporate plan and budget are annual arrangements, and that the CPC oversees their alignment with OCC's business strategy.

The Proposed Rule Change would also address the CPC's oversight of OCC's capital plan. The CPC Charter would clarify that oversight of OCC's capital plan includes the written policies adopted thereunder, which include OCC's fee, dividend, and refund policies. Revisions to the CPC Charter would also clarify that the CPC must review the capital plan at least once every twelve months, and that the committee makes recommendations to the Board concerning capital requirements, refund payments, and dividend payments. In addition, the Proposed Rule Change would add a provision to the CPC Charter requiring management to provide a quarterly performance report to the committee against the capital plan.

Regarding the CPC's review of Public Director compensation and the recommendations that it provides to the Board related thereto, a requirement would be added to the CPC Charter for the committee to engage in these activities not less than once every two years. OCC believes that a two-year period is appropriate for such a review because the overall trends in industry compensation generally do not change dramatically from year-to-year.[25] The CPC would no longer be required to perform a full review of each component of Public Director compensation packages and recommend adjustments to the Board on a yearly basis. The Proposed Rule Change would also clarify that the CPC is not authorized to adopt or amend compensation, retirement, or welfare benefit plans that require Board approval. The Proposed Rule Change would also add a new requirement that the CPC must review OCC's insurance program at least once every twelve months.

The Proposed Rule Change would amend the GNC Charter to establish new responsibilities for the GNC to approve all material changes to written policies concerning related-party transactions and recommend such changes to the Board for approval. The GNC Charter would also be amended to provide that the GNC shall review and, if appropriate, approve or ratify, any related-party transactions involving OCC in accordance with the written policy governing such transactions. Because the GNC is already responsible for the review of conflicts of interests of directors and the manner in which such conflicts will be monitored and resolved, OCC believes that it is appropriate for the GNC to assume the additional responsibility of reviewing related-party transactions.[26] Additionally, the Proposed Rule Change would remove the ability for a designee of the chair of the GNC to call an additional meeting beyond the four times per year that the GNC must meet. OCC believes this change would help ensure that the committee's time and resources would be utilized appropriately.[27]

The RC Charter currently provides that the RC assists the Board in overseeing OCC's policies and processes for identifying and addressing strategic, operational, and financial (*e.g.,* credit, market, liquidity, and systemic) risks. The Proposed Rule Change would amend the RC Charter to state more specifically that the RC will have responsibility for assisting the Board in its oversight of OCC's financial, collateral, risk model, and third party risk management processes.[28] Corresponding changes would also be made to clarify that the RC has an oversight role regarding these responsibilities, and that it remains OCC management's responsibility to identify, manage, monitor, and report risks in these areas. The RC would continue to be responsible for functions delegated to it under the By-Laws and Rules and as may be delegated to it by the Board.

The current provisions of the RC Charter dealing with the oversight of credit, collateral, liquidity, and third party risks would be replaced with more specific provisions. At least once every twelve months, the RC would be required to review the adequacy of OCC's management of credit, collateral, liquidity, and third party risks. In connection with these responsibilities, the RC would receive monthly reports from OCC management regarding the effectiveness of OCC's management of credit exposures and liquidity risks.[29] The RC would also be required to review the adequacy of OCC's secured committed liquidity facilities at least once every twelve months and recommend the size and composition of such facilities to the Board for approval. The RC would also be responsible for approval of all material changes to written policies regarding risk management in these areas and recommending such changes to the Board.

The Proposed Rule Change would make explicit the RC's responsibilities in connection with the review and approval of any new products that materially impact OCC's established risk profile or introduce novel or unique financial, risk model, and third party risks. The RC would refer any such new

[24] *See* Notice at 45710.

[25] *See id.*

[26] *See* Notice at 45710–11.

[27] *See* Notice at 45711, n. 47.

[28] As described below, the RC would no longer be responsible for oversight of strategic or operational risks because those matters would be overseen by the Board as they relate to enterprise risk management.

[29] For example, the report regarding the effectiveness of the management of credit exposures would include the results of: (i) A comprehensive analysis of OCC's existing stress testing scenarios, models and underlying parameters and assumptions, and (ii) a sensitivity analysis of OCC's margin models and a review of the associated parameters and assumptions for back testing.

products that it approves to the Board for its potential approval.

The Proposed Rule Change would amend the RC Charter to codify the RC's responsibility to oversee OCC's Recovery and Orderly Wind-down Plan (''RWD Plan''). This responsibility would include reviewing the adequacy of the RWD Plan at least once every twelve months. If the committee approves the RWD Plan, it would next recommend the RWD Plan to the Board for potential Board approval. The RC would also have responsibility for reviewing and approving any material changes to the RWD Plan. In the event the RC approves any such changes, it would, in turn, recommend the changes to the Board for its potential approval.

The Proposed Rule Change would amend the RC Charter to detail the RC's responsibility regarding the structure and staffing of OCC's corporate risk management functions in addition to OCC's financial risk management group. The RC must review structure and staffing in these areas at least once every twelve months. A provision would also be added requiring that the RC review and approve the Chief Risk Officer's goals and objectives, and any material changes thereto, at least once every twelve months.

Further, the Proposed Rule Change would add a statement to the RC Charter to clarify that the RC is responsible for reviewing third-party assessment reports as to financial, collateral, risk model, and third-party risk management processes and for reviewing OCC management's remediation efforts pertaining to any such reports.

The Proposed Rule Change would amend the TC Charter to clarify that the TC's role is one of oversight, and that it remains the responsibility of OCC management to identify, manage, monitor, and report on IT and other operational risks arising from OCC's business activities. The Proposed Rule Change would also amend the TC Charter such that the TC would have responsibility for OCC's operational initiatives, including approving major IT and operational initiatives, recommending major capital expenditures to the Board, and approving the IT and operational budget for each calendar year.[30]

The Proposed Rule Change would amend the Board Charter to set forth certain key considerations and responsibilities. These include providing that the Board will exercise its authority to provide for governance arrangements that, among other things, support applicable public interest requirements and the objectives of owners and participants, establish that the Board and senior management have appropriate experience and skills to discharge their duties and responsibilities, specify clear and direct lines of responsibility, and consider the interests of Clearing Members' customers.[31] The Proposed Rule Change would also revise the Board Charter to note that the Board has explicitly delegated management of specific risks to the Board committees, and that to the extent a specific risk is not retained by the Board or otherwise assigned to a Board committee, such risk shall be overseen by the RC.[32] Similarly, the Proposed Rule Change would amend the Board Charter to state that the Board is responsible for approving the compensation of the EC and certain other officers because the Board has delegated responsibility to the CPC to evaluate and fix such compensation.

Finally, the Proposed Rule Change would amend the Board Charter to provide that a number of different activities related to the conduct and functioning of the Board would involve participation by or input from certain other officers of OCC that serve functions relevant to the topic at issue. For example, the Board Charter would state that the EC and CEO, in consultation with the Chief Operating Officer (''COO'') and Chief Administrative Officer (''CAO''), other directors or officers of OCC, and the Corporate Secretary shall establish the agenda for Board meetings.[33] OCC stated that these changes are designed to make clear the roles and authority of certain officers and to ensure that input from additional officers is included where appropriate.[34]

The Proposed Rule Change would also amend the charters to provide for clear reporting requirements. The Proposed Rule Change would amend the AC Charter to provide that certain mandatory reports be sent to the AC for review, including quarterly reports from the CAE regarding the internal audit plan and from the General Counsel regarding existing, pending, or threatened litigation.[35] OCC believes that such quarterly reports would help provide the AC with the necessary information to appropriately discharge its duties and responsibilities.[36] OCC also believes that these quarterly reports to the AC would help specify clear and direct lines of responsibility in OCC's governance arrangements by ensuring that these officers keep the AC apprised of OCC's ongoing performance or handling of these matters, which in turn would allow the AC to more effectively carry out its oversight functions and the responsibilities associated therewith.[37]

A new provision of the CPC Charter would require management to provide a quarterly report to the committee that contains information on OCC's performance against the corporate plan and the budget. OCC believes that quarterly reporting by management to the CPC would help specify clear and direct lines of responsibility in OCC's governance arrangements by ensuring that management keeps the CPC apprised of OCC's ongoing performance on these matters, which, in turn, would allow the CPC to more effectively carry out its oversight functions and the responsibilities associated therewith.[38]

The Proposed Rule Change would also require OCC management to provide the RC with quarterly reports regarding the effectiveness of OCC's management of collateral and third-party risks. OCC believes that this quarterly reporting would help specify clear and direct lines of responsibility in OCC's governance arrangements by

[30] Relatedly, the Proposed Rule Change would amend the TC Charter so that it would no longer require that the TC work with, or report to, the AC and RC to monitor the quality and effectiveness of IT systems and processes that relate to or affect OCC's internal control systems and risk management systems.

[31] The Board Charter would also provide as a guiding principle that the Board is, among other things, mindful of the public interest as it fulfills its duties by complying with the obligations imposed on it under relevant law, and that it discloses major decisions to relevant stakeholders and the public.

[32] The amended Board Charter would further specify that the Board may form and delegate authority to committees and may delegate authority to one or more of its members and to one or more designated officers of OCC, but would note that the Board retains the obligation to oversee any such delegation or referral and assure itself that delegation and reliance on the work of any delegate is reasonable.

[33] Similarly, the Proposed Rule Change would amend the Board Charter to provide that the CEO, COO and CAO would have the authority to invite employees to Board meetings, that such officers encourage members of senior management to respond to questions posed by directors relating to their areas of expertise, and that directors shall coordinate access to members of senior management and outside advisors through such officers. The criteria for Board member eligibility would also be expanded to ensure that candidates' experience and expertise are not only adequate to offer advice and guidance to the Executive Chairman, but also to the CEO, COO, and CAO.

[34] *See* Notice at 45715.

[35] The Proposed Rule change would also include certain other descriptive changes to the AC Charter, such as providing that the AC will review OCC's Reporting Concerns and Whistleblower Policy (and specifying that such review will occur each calendar year), rather than providing a more detailed description of what the reporting concerns and whistleblower procedures under the relevant policy entail.

[36] *See* Notice at 45709.

[37] *See* Notice at 45709, n. 33.

[38] *See* Notice at 45710, n. 42.

ensuring that management keeps the RC apprised of OCC's ongoing performance on these matters, which, in turn, would allow the RC to more effectively carry out its oversight functions and the responsibilities associated therewith.[39] A new provision in the RC Charter would provide that, from time to time, the RC may receive reports and guidance relating to financial risk issues from, among others, OCC's Financial Risk Advisory Council, and that the RC would consider and discuss such reports and consider how such financial risk issues may impact the options and futures industries. The RC would take such guidance into account in the exercise of its fiduciary judgment and the performance of its functions and responsibilities.

The Proposed Rule Change would amend the TC Charter to introduce mandatory periodic reporting from management on major IT initiatives. The TC would oversee and receive quarterly reports from management that provide information on: (i) Executing on major IT initiatives, technology architecture decisions (as applicable) and IT priorities as well as overall IT performance; (ii) the effectiveness of the management of information security risks; (iii) OCC's Business Continuity and Disaster Recovery Programs, including the progress on executing the annual test plan and achieving recovery time objectives; and (iv) major operational initiatives and metrics on the effectiveness of OCC's operations with reference to key indicators. OCC believes that such reports would provide the TC with the necessary information to discharge its oversight duties and responsibilities appropriately and would facilitate dialogue between the TC and OCC's senior IT management team. OCC believes that this reporting would also help specify clear and direct lines of responsibility in OCC's governance arrangements by ensuring that management keeps the TC apprised of OCC's ongoing performance on these matters, which, in turn, would allow the TC to more effectively carry out its oversight functions and the associated responsibilities.[40]

E. Risk Management

The Proposed Rule Change would amend the committee charters to provide that each committee would perform, and is authorized to perform, such other responsibilities and functions as may, from time to time, be assigned to it under the By-Laws and Rules, other policies, or delegated to it by the Board.[41] The Proposed Rule Change would amend the committee charters to provide that each committee shall perform any other duties consistent with their respective charters as the committee deems necessary or appropriate, or as the Board shall further delegate to the particular committee.[42] OCC believes that these changes would provide for flexibility for each committee to supervise and account for matters naturally within the scope of their responsibility or that may be assigned to them by the Board.[43]

The Proposed Rule Change would modify the description of the Board's functions and responsibilities as part of the description of the mission of the Board to include: (i) Overseeing OCC's governance structures and processes, including through regular assessments of Board and individual director performance, to ensure that the Board is positioned to fulfill its responsibilities effectively and efficiently, consistent with applicable requirements; (ii) ensuring that risk management, compliance, and internal audit personnel have sufficient authority, resources, independence from management, access to the Board, and a direct reporting line to, and oversight by, certain committees; (iii) ensuring that the Audit Committee of the Board is independent; (iv) transitioning the overall oversight of ERM to the Board; and (v) assigning responsibility for risk decisions and policies to address decision-making during a crisis. The Board Charter would also be amended to codify the Board's existing responsibility for overseeing and approving OCC's RWD Plan.

As noted above, the Proposed Rule Change would transfer responsibility for the oversight of the enterprise risk management (''ERM'') program from the RC to the Board.[44] This change would allow the Board to retain responsibility for the comprehensive oversight of OCC's overall risk management framework, while retaining the ability to delegate oversight of specific risks to designated committees, which would then report to and be subject to oversight by the Board. OCC believes that shifting enterprise risk oversight responsibility from the RC to the Board would promote further engagement by and attention from the Board regarding OCC's risk universe and how such risks impact OCC's strategic direction and priorities, as well as provide for more meaningful dialogue and discussion at Board meetings.[45] OCC believes, moreover, that the change would alleviate the potential for overburdening the RC and establish clearer lines of oversight responsibilities for particular risks across the Board's committees.[46] Additionally, the collective expertise of the Board would be available to provide appropriate guidance relative to each key risk within OCC's risk universe.[47]

Consistent with changes to the RC Charter that provide that the RC would no longer have responsibilities related to the ERM program, the Proposed Rule Change would remove the RC's responsibility for strategic and operational risks. OCC believes that these changes are appropriate because issues regarding ERM are central to OCC's comprehensive management of risk and would therefore benefit from the experience and attention of the full Board.[48]

In connection with the RC no longer having responsibilities regarding the ERM program, several related provisions would be removed from the RC Charter. For example, the RC would no longer have responsibility to oversee the structure, staffing, and resources of the ERM program or approve its goals and objectives on an annual basis. Additionally, the RC would no longer be responsible for reviewing OCC's risk appetite statements and risk tolerances because the Board would assume responsibility for approval of these matters.

The Proposed Rule Change would require that the TC review, at least every twelve months, the adequacy of OCC's management of information security risks, approve all material changes to written polices related to the managing information security risks, and recommend such changes to the Board.

[39] *See* Notice at 45712, n. 55.

[40] *See* Notice at 45713, n. 63.

[41] OCC noted that a comparable provision to this exists in the RC Charter. *See* Notice at 45708.

[42] OCC noted that comparable language currently appears in the AC Charter, GNC Charter, and TC Charter. *See* Notice at 45708, n. 25.

[43] *See* Notice at 45708.

[44] For example, the Proposed Rule Change would modify the description of the Board's functions and responsibilities as part of the description of the mission of the Board to include transitioning the overall oversight of ERM to the Board. The RC Charter currently provides that the committee is responsible for overseeing OCC's overall ERM framework, including ''reviewing material policies and processes relating to (i) membership criteria and financial safeguards, (ii) member and other counterparty risk exposure assessments, (iii) liquidity requirements and maintenance of financial resources, (iv) risk modeling and assessments, (v) default management planning, and (vi) risks related to new initiatives.'' The revised descriptions in the RC Charter regarding its oversight of these areas would continue to involve responsibilities related to credit, market, liquidity and systemic risk, but would no longer include responsibility for overseeing those aspects related to the ERM program.

[45] *See* Notice at 45714.

[46] *See id.*

[47] *See* Notice at 45715.

[48] *See* Notice at 45711.

Additionally, the Proposed Rule Change would address the identification and escalation of risks. The AC Charter, the RC Charter, and the TC Charter would each be amended to require the respective committees to identify risk issues relating to their areas of oversight that should be escalated to the Board for its review and consideration.

F. Internal Audit

The AC Charter would be amended to clarify that the AC shall oversee the independence and objectivity of the internal audit department. Further, the Proposed Rule Change would amend the AC Charter to provide that the AC must review the effectiveness of the internal audit function, including conformance with the Institute of Internal Auditor's Code of Ethics and the International Standards for Professional Practice of Internal Auditing. The AC Charter would also be amended to authorize the AC to approve deviations to the audit plan that may arise over the course of an audit. OCC believes that these changes would be a natural extension of the AC's role and responsibilities.[49] Additionally, the Proposed Rule Change would amend the AC charter to authorize the AC to approve management's recommendation to appoint or replace the CAE.

The Proposed Rule Change would also amend the AC charter to authorize the AC to approve OCC's audited financial statements after review, to oversee the timing and process for implementing a rotation of the engagement partner of the external auditor, and to discuss certain significant issues with the external auditor. OCC believes that framing the AC's responsibilities in this manner would provide appropriate flexibility for the committee to carry out its oversight and advisory responsibilities using its business judgment.[50]

III. Discussion and Commission Findings

Section 19(b)(2)(C) of the Exchange Act directs the Commission to approve a proposed rule change of a self-regulatory organization if it finds that such proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to such organization.[51] After carefully considering the Proposed Rule Change, the Commission finds the proposal is consistent with the requirements of the Exchange Act and the rules and regulations thereunder applicable to OCC. More specifically, the Commission finds that the proposal is consistent with Section 17A(b)(3)(F) of the Exchange Act[52] and Rules 17Ad–22(e)(2) and (3) thereunder.[53]

A. Consistency With Section 17A(b)(3)(F) of the Exchange Act

Section 17A(b)(3)(F) of the Act requires, among other things, that the rules of a clearing agency be designed to promote the prompt and accurate clearance and settlement of securities transaction and, in general, to protect investors and the public interest.[54]

As described above, the Proposed Rule Change would make numerous changes to OCC's rules. The changes address a number of areas, including providing clarification and transparency to the committees' processes and responsibilities, reducing redundancy and improving readability of the charters, addressing the consistency of the charters with the public interest, providing further detail and specificity regarding the Board and management expertise, specifying clear and direct lines of responsibility, including the responsibilities of the Board and the committees and the responsibilities of management to provide particular information to the Board and the committees, and ensuring that the Board is responsible for OCC's overall risk management.

The Commission believes that, as a general matter, the Proposed Rule Change should help ensure that OCC has governance arrangements that support its ability to promptly and accurately offer clearance and settlement services to its Clearing Members and the markets OCC serves, and effectively manage the range of risks that arise in the course of providing such services. Moreover, the Commission believes that the Proposed Rule Change should provide greater accessibility, transparency and clarity to market participants to better understand OCC's governance arrangements. For both of these reasons, the Commission believes that the Proposed Rule Change is consistent with the prompt and accurate clearance and settlement of securities transaction, and, accordingly, with Section 17A(b)(3)(F) of the Exchange Act.[55]

The Proposed Rule Change is also designed, in part, to reallocate responsibilities across OCC's governing bodies. For example, the Proposed Rule Change would shift responsibility for investigations and enforcement outcomes from the AC to the RC, which OCC has stated is appropriate because the RC is better situated to review such matters given its oversight the OCC's Clearing Membership framework.[56] Similarly, the Proposed Rule Change would shift responsibility for ERM from the RC to the Board, which OCC has stated would promote engagement by and attention from the Board regarding OCC's risk universe and how risks impact OCC's strategic direction and priorities.[57] The Commission believes that these aspects of the Proposed Rule Change should better align these particular responsibilities with the relevant expertise within OCC's Board and promote Board engagement in a manner that should provide for a more effective framework for comprehensive risk management, which, in turn, should help protect the public interest. The Commission believes, therefore, that the Proposed Rule Change is consistent, in general, with the protection of investors and the public interest, and, accordingly, with Section 17A(b)(3)(F) of the Exchange Act.[58]

B. Consistency With Rule 17Ad–22(e)(2) Under the Exchange Act

Rule 17Ad–22(e)(2) under the Exchange Act requires, among other things, that a covered clearing agency establish, implement, maintain, and enforce written policies and procedures reasonably designed to provide for governance arrangements that meet certain criteria.[59]

As described above in section II., the Proposed Rule Change would amend the charters to provide that, in carrying out their responsibilities, the Board and the committees would prioritize the safety and efficiency of OCC, generally support the stability of the broader financial system and consider legitimate interests of Clearing Members, customers of Clearing Members and other relevant stakeholders, including OCC's shareholders and other participant exchanges, taking into account prudent risk management standards (including systemic risk mitigation) and industry best practices. Such amended charter language would be, at least in part, aligned with the provisions of Exchange Act Rule 17Ad–22(e)(2), such as prioritizing the safety and efficiency of a covered clearing agency and considering the interests of participants' customers, securities issuers and holders, and other relevant stakeholders

[49] *See* Notice at 45709.

[50] *See id.*

[51] 15 U.S.C. 78s(b)(2)(C).

[52] 15 U.S.C. 78q–1(b)(3)(F).

[53] 17 CFR 240.17Ad–22(e)(2) and (3).

[54] 15 U.S.C. 78q–1(b)(3)(F).

[55] *Id.*

[56] *See* Notice at 45709.

[57] *See* Notice at 45712.

[58] 15 U.S.C. 78q–1(b)(3)(F).

[59] 17 CFR 240.17Ad–22(e)(2).

of the covered clearing agency.[60] The Commission believes that these amendments should provide for governance arrangements that allow the Board and the committees to consider whether their actions are consistent with such considerations. Accordingly, the Commission believes that the proposed change providing for the inclusion of such a statement is consistent with Exchange Act Rule 17Ad–22(e)(2).[61]

Rule 17Ad–22(e)(2)(i) under the Exchange Act requires that such governance arrangements are clear and transparent.[62] As described above in section II.A., the Proposed Rule Change includes changes that should better clarify and assign certain responsibilities for the governance and oversight of OCC among the Board and its respective committees. Certain aspects of the Proposed Rule Change would amend OCC's rules to provide clear and transparent descriptions of existing operating procedures and lines of responsibility throughout OCC. For example, the RC Charter would clarify that joint meetings of the RC with other Board committees count toward the requirement to meet at least six times a year. The Board Charter would remove the language stating that the Board oversees ''OCC's information technology strategy, infrastructure, resources and risks'' and replace it with language stating that the Board oversees ''OCC's technology infrastructure, resources, and capabilities to ensure resiliency with regard to OCC's provision of its clearing, settlement, and risk management services.'' Additionally, such statements include the replacement of general statements in the TC Charter with specific duties such as the review material changes to the operational execution and delivery of core clearing and settlement services. The Commission believes that these aspects of the Proposed Rule Change should improve the clarity and transparency of OCC's governance arrangements by clearly identifying the current responsibilities of the Board, its committees, and management.

The Proposed Rule Change also includes changes ranging from clarification (*e.g.,* changing ''annually'' to ''each calendar year'') to removal of redundancies (*e.g.,* where a requirement is found elsewhere in OCC's rules). Delineating between those tasks that must be completed once each calendar year and those that must be completed annually provides more specificity and clarity around the requirements of OCC's rules. Similarly, the removal of redundant language, such as the removal of statements in the GNC Charter are regarding candidate nominations, which is in OCC's by-Laws, reduces the likelihood of later interpretive conflicts arising. In addition, the consolidation of documents, such as the Board Charter and CGP, along with the removal of redundancies between such documents would improve the accessibility and clarity of OCC's rules. The Commission believes that such consolidation and removal of redundancies would make OCC's rules more readable for the public and reduce the potential for internal inconsistencies in OCC's rules. Accordingly, based on the foregoing, the Commission believes that the proposed changes pertaining to the clarity and transparency of OCC's rules are consistent with Exchange Act Rule 17Ad–22(e)(2)(i).[63]

Rule 17Ad–22(e)(2)(iii) under the Exchange Act requires that the governance arrangements required under Rule 17Ad–22(e)(2) support the public interest requirements of Section 17A of the Exchange Act applicable to clearing agencies, and the objectives of owners and participants.[64] Further, Rule 17Ad–22(e)(2)(vi) under the Exchange Act requires that the governance arrangements required under Rule 17Ad–22(e)(2) consider the interests of participants' customers, securities issuers and holders, and other relevant stakeholders of the covered clearing agency.[65] As described above in section II.B., the Proposed Rule Change includes changes relevant to the consideration of the interests of OCC's various stakeholders. The GNC would review the composition of the Board at least once every three years and the Board and committee charters at least annually for consistency with public interest and regulatory requirements. Further, the GNC would annually review and advise the Board with regard to whether directors are independent as defined by the Board. The Commission believes that these requirements should help ensure the protection of the public interest.

The Proposed Rule Change would also amend the charters to clarify, among other things, that the Board and committees will generally support the stability of the broader financial system and consider legitimate interests of Clearing Members, customers of Clearing Members and other relevant stakeholders, including OCC's shareholders and other participant exchanges. The Commission believes that these amendments should provide for governance arrangements that allow the Board and the committees to consider whether their actions support the stability of the broader financial system and to consider the legitimate interests of Clearing Members, customers, and other relevant stakeholders. Accordingly, based on the foregoing, the Commission believes that the proposed changes pertaining to the composition of the Board, charter language, and director independence are consistent with Exchange Act Rules 17Ad–22(e)(2)(iii) and (vi).[66]

Rule 17Ad–22(e)(2)(iv) under the Exchange Act requires that the governance arrangements required under Rule 17Ad–22(e)(2) establish that the board of directors and senior management have appropriate experience and skills to discharge their duties and responsibilities.[67] As described above in section II.C., the Proposed Rule Change includes revisions relevant to ensuring that the directors and senior management have appropriate skills and experience. The Proposed Rule Change would also address the CPC's role in management succession planning and the GNC's role in director succession planning. Succession planning is important to ensuring that future members of OCC's senior management have appropriate experience and skills. Relatedly, the Proposed Rule Change would revise the language describing the GNC's role in identifying the Standards for directors on OCC's Board. The Commission believes that these aspects of the Proposed Rule Change should provide governance arrangements reasonably designed to ensure that the board of directors and senior management have appropriate experience and skills. The Proposed Rule Change would also directly address the Board and GNC's responsibilities regarding Board and director assessments. The Commission believes that assessing the performance of the Board and directors may provide the information necessary for OCC to identify gaps in the experience and skills represented on its Board. Accordingly, based on the foregoing, the Commission believes that the proposed changes pertaining to succession planning, Standards for directors, and Board assessments are consistent with Exchange Act Rule 17Ad–22(e)(2)(iv).[68]

[60] *See* 17 CFR 240.17Ad–22(e)(2)(ii) and (vi).

[61] *See* 17 CFR 240.17Ad–22(e)(2).

[62] 17 CFR 240.17Ad–22(e)(2)(i).

[63] *Id.*

[64] 17 CFR 240.17Ad–22(e)(2)(iii).

[65] 17 CFR 240.17Ad–22(e)(2)(vi).

[66] 17 CFR 240.17Ad–22(e)(2)(iii) and (vi).

[67] 17 CFR 240.17Ad–22(e)(2)(iv).

[68] *Id.*

Rule 17Ad–22(e)(2)(v) under the Exchange Act requires that the governance arrangements required under Rule 17Ad–22(e)(2) specify clear and direct lines of responsibility.[69] As described above in section II.D., the Proposed Rule Change would amend the charters in numerous places to clarify the various responsibilities of the Board, the committees, and OCC management. For example, the Proposed Rule Change addresses the delegation of authority from the Board and committees and describes the oversight responsibilities of the delegating body. The Proposed Rule Change addresses revisions to the specific responsibilities of the Board and committees, such as the oversight of ERM by the Board and the review of investigation and enforcement outcomes of disciplinary actions by the RC. Such changes document which bodies would be granted various authorities while clarifying where the ultimate responsibilities would reside. More generally, the Proposed Rule Change would provide greater specificity and clarity regarding the responsibilities of particular Board committees and would address how the committees interact with the Board and also with management. The Commission believes that these assignments and specifications of responsibilities among the Board and its committees should provide for clear and direct lines of responsibility for particular areas and functions performed by OCC.

The Proposed Rule Change also describes channels of communication from management to the Board, such as authorization for the CFO to communicate directly with the chair of the AC, as well as routine reporting requirements designed to keep OCC's governing bodies apprised of OCC's ongoing performance in areas relevant to each body. Additionally, as noted above, the Proposed Rule Change would provide for quarterly reporting to the RC from management regarding the effectiveness of OCC's management of collateral and third party risks. The Commission believes that such changes should clarify reporting lines and access to OCC's Board and committees. Accordingly, based on the foregoing, the Commission believes that the proposed changes pertaining to the assignment of responsibilities and reporting are consistent with Exchange Act Rule 17Ad–22(e)(2)(v).[70]

[69] 17 CFR 240.17Ad–22(e)(2)(v).

[70] *Id.*

C. Consistency With Rule 17Ad–22(e)(3) Under the Exchange Act

Rule 17Ad–22(e)(3) under the Exchange Act requires, among other things, that a covered clearing agency establish, implement, maintain, and enforce written policies and procedures reasonably designed to maintain a sound risk management framework for comprehensively managing legal, credit, liquidity, operational, general business, investment, custody, and other risks that arise in or are borne by the covered clearing agency, which meet certain criteria.[71] As described above in section II.E., a number of the amendments that would be made by the Proposed Rule Change address Board and committee responsibilities for risk-related activities. For example, the transfer of oversight of ERM from the RC to the Board may elevate and strengthen the focus on risk management at OCC. Additionally, the Proposed Rule Change would provide clarity regarding the identification and escalation of risk from committees to the Board. The Commission believes that having in place clear and transparent arrangements that facilitate risk identification and escalation is an important component of a sound risk management framework. Additionally, the Proposed Rule Change is designed, in part, to provide flexibility in stating that the committees would perform other duties as necessary or appropriate. The Commission recognizes that, while a covered clearing agency's risk management framework must be detailed to be comprehensive, it can also reflect a reasonable degree of flexibility in order to allow the covered clearing agency to respond to particular risks or issues arising in its operations in an effective manner.[72] Therefore, the Commission believes that including in the Proposed Rule Change flexibility for the committees to address such risks or issues, where exercised appropriately, may be a useful complement to a detailed risk management framework that otherwise is designed to comprehensively manage foreseeable risks that arise in or are borne by the covered clearing agency.[73] Accordingly, based on the foregoing, the Commission believes that the proposed changes pertaining to the assignment of responsibility for risk oversight are generally are consistent with Exchange Act Rule 17Ad–22(e)(3).[74]

Further, Rule 17Ad&22(e)(3)(iv) under the Exchange Act requires, in part, that the risk management framework required under Rule 17Ad–22(e)(3) provides internal audit personnel with oversight by an independent audit committee of the board of directors.[75] As described above in section II.F., the Proposed Rule Change includes revisions designed to strengthen the AC's oversight of OCC's internal audit department. The Proposed Rule Change addresses the independence of OCC's internal audit personnel by charging the AC with oversight of the independence and objectivity as well as the effectiveness of OCC's internal audit department. Such changes also provide for oversight of audit personnel by the AC. Similarly, the Proposed Rule Change strengthens the AC's oversight by providing authority to approve or replace the CAE and to oversee the timing and process for implementing a rotation of the engagement partner of the external auditor, and is authorized to discuss certain significant issues with the external auditor. The Commission believes that these aspects of the Proposed Rule Change should provide an appropriate framework for the AC's oversight of the internal audit function. Accordingly, based on the foregoing, the Commission believes that the proposed changes pertaining to the oversight of internal audit personnel are consistent with Exchange Act Rules 17Ad–22(e)(3)(iii) and (iv).[76]

IV. Conclusion

On the basis of the foregoing, the Commission finds that the Proposed Rule Change is consistent with the requirements of the Exchange Act, and in particular, the requirements of Section 17A of the Exchange Act[77] and the rules and regulations thereunder.

It is therefore ordered, pursuant to Section 19(b)(2) of the Exchange Act,[78] that the Proposed Rule Change (SR–OCC–2018–012) be, and hereby is, approved.

[71] 17 CFR 240.17Ad–22(e)(3).

[72] Securities Exchange Act Release No. 78961 (September 28, 2016), 81 FR 70786, 70801 (Oct. 13, 2016.

[73] In making this statement, the Commission is not expressing a view as to the comprehensiveness of OCC's overall risk management framework, which was not the subject of the Proposed Rule Change.

[74] 17 CFR 240.17Ad–22(e)(3).

[75] 17 CFR 240.17Ad–22(e)(3)(iv).

[76] 17 CFR 240.17Ad–22(e)(3)(iii) and (iv).

[77] In approving this Proposed Rule Change, the Commission has considered the proposed rules' impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[78] 15 U.S.C. 78s(b)(2).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[79]

Eduardo A. Aleman,

Assistant Secretary.

[FR Doc. 2018–23506 Filed 10–26–18; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–84470; File No. SR–CBOE–2018–066]

Self-Regulatory Organizations; Cboe Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Permit the Exchange To List Options on the Cboe Volatility Index (''VIX options'') on a Group Basis and Make Conforming Changes Throughout the Rules, Change the Minimum Increment for VIX Options Listed Under the Nonstandard Expirations Pilot Program (if the Exchange Lists VIX on a Group Basis), and Make Nonsubstantive Changes

October 23, 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 October 12, 2018, Cboe Exchange, Inc. (''Exchange'' or ''Cboe Options'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Exchange filed the proposal as a ''non-controversial'' proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act[3] and Rule 19b–4(f)(6) thereunder.[4] 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

Cboe Exchange, Inc. (the ''Exchange'' or ''Cboe Options'') proposes to amend its rules to permit the Exchange to list options on the Cboe Volatility Index (''VIX options'') on a group basis and make conforming changes throughout the Rules, change the minimum increment for VIX options listed under the Nonstandard Expirations Pilot Program (if the Exchange lists VIX on a group basis), and make nonsubstantive changes.

(additions are *italicized;* deletions are [bracketed])

* * * * *

Rules of Cboe Exchange, Inc.

* * * * *

Rule 6.42. Minimum Increments for Bids and Offers

[The Board of Directors may establish minimum increments for options traded on the Exchange. When the Board of Directors determines to change the minimum increments, the Exchange will designate such change as a stated policy, practice, or interpretation with respect to the administration of Rule 6.42 within the meaning of subparagraph (3)(A) of subsection 19(b) of the Exchange Act and will file a rule change for effectiveness upon filing with the Commission. Until such time as the Board of Directors makes a change to the minimum increments, t]*(a) Simple Orders.* The [following] minimum increments [shall apply to]*for bids and offers on simple orders for* options traded on the Exchange *are as follows:*

Class	Increment	Series Trading Price
Class Not Participating in Penny Pilot Program (including all series of VIX options if the Exchange does not list VIX on a group basis pursuant to Rule 8.14) and series of VIX Options not listed under the Nonstandard Expirations Pilot Program (if the Exchange lists VIX on a group basis pursuant to Rule 8.14)	*$0.05* *0.10*	*Lower than $3.00.* *$3.00 and higher.*
Class Participating in Penny Pilot Program	*0.01* *0.05*	*Lower than $3.00.* *$3.00 and higher.*
QQQs, IWM, and SPY, and Mini-SPX Index Options (XSP) (as long as SPDR options (SPY) participate in the Penny Pilot Program)	*0.01*	*All prices*
Series of VIX Options listed under the Nonstandard Expirations Pilot Program (if the Exchange lists VIX on a group basis pursuant to Rule 8.14).	*0.01*	*All prices.*
Options on the Dow Jones Industrial Average (DJX), as long as Diamonds options (DIA) participate in the Penny Pilot Program	*0.01* *0.05*	*Lower than $3.00.* *$3.00 and higher.*
Mini-Options	.....	*Same as permitted for standard options on the same security.*

[(1) Subject to paragraphs (2) and (3) below, bids and offers shall be expressed in decimal increments no smaller than $0.10, unless a different increment is approved by the Exchange for an option contract of a particular series.

(2) Subject to paragraph (3) below, bids and offers for all option series quoted below $3 a contract shall be expressed in decimal increments no smaller than $0.05

(3) The decimal increments for bids and offers for all series of the option classes participating in the Penny Pilot Program are: $0.01 for all option series quoted below $3 (including LEAPS), and $0.05 for all option series $3 and above (including LEAPS). For QQQQs, IWM, and SPY, the minimum increment is $0.01 for all option series. The Exchange may replace any option class participating in the Penny Pilot Program that has been delisted with the next most actively-traded, multiply-listed option class, based on national average daily volume in the preceding six calendar months, that is not yet included in the Pilot Program. Any replacement class would be added on the second trading day following July 1, 2018. The Penny Pilot shall expire on December 31, 2018.]

([4]*b*) *Complex Orders.* Except as provided in Rule 6.53C, *the minimum increment for* bids and offers on complex orders, as defined in Interpretation and Policy .01 below, [may be expressed in any net price increment (that may not be less than] *is* $0.01[)] *or greater,* [that]*which* may be determined by the Exchange on a class-by-class basis and announced to [the] Trading Permit Holders via Regulatory Circular[, regardless of the minimum increments otherwise appropriate to the individual legs of the order].

[79] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(iii).

[4] 17 CFR 240.19b–4(f)(6).

Notwithstanding the foregoing sentence, *the minimum increment for* bids and offers on complex orders in options on the S&P 500 Index (SPX) or on the S&P 100 Index (OEX and XEO), except for box/roll spreads, [shall be expressed in decimal increments no smaller than]*is* $0.05 *or greater*, or in any increment, [as]*which may be* determined by the Exchange on a class-by-class basis and announced to [the] Trading Permit Holders via Regulatory Circular. In addition:

([a]i) [T]the legs of a complex order may be executed in $0.01 increments; and ([b]ii) complex orders are subject to special priority requirements as described in Rules 6.45, 6.53C, 24.19 and 24.20.

. . . Interpretations and Policies:

.01 For purposes of this rule, ''complex order'' means a spread, straddle, combination or ratio order as defined in Rule 6.53, a stock-option order as defined in Rule 1.1(ii), a security future-option order as defined in Rule 1.1(zz), or any other complex order as defined in Rule 6.53C.

.02 For purposes of this rule, ''box/roll spread'' or ''box spread'' means an aggregation of positions in a long call option and short put option with the same exercise price (''buy side'') coupled with a long put option and short call option with the same exercise price (''sell side'') all of which have the same aggregate current underlying value, and are structured as either: ([A]a) a ''long box spread'' in which the sell side exercise price exceeds the buy side exercise price or ([B]b) a ''short box spread'' in which the buy side exercise price exceeds the sell side exercise price.

.03 When the Exchange determines to change the minimum increment for a class, the Exchange will designate such change as a stated policy, practice, or interpretation with respect to the administration of Rule 6.42 within the meaning of subparagraph (3)(A) of subsection 19(b) of the Act and will file a rule change for effectiveness upon filing with the Commission.

.04 The Exchange may replace any option class participating in the Penny Pilot Program that has been delisted with the next most actively traded, multiply listed option class, based on national average daily volume in the preceding six calendar months, that is not yet included in the Pilot Program. Any replacement class would be added on the second trading day following July 1, 2018. The Penny Pilot will expire on December 31, 2018.

[.03 For so long as SPDR options (SPY) and options on Diamonds (DIA) participate in the Penny Pilot Program, the minimum increments for Mini-SPX Index Options (XSP) shall be the same as SPY for all options series (including LEAPS) and for options on the Dow Jones Industrial Average (DJX) are $0.01 for all option series quoted below $3 (including LEAPS), and $0.05 for all option series $3 and above (including LEAPS).

.04 The minimum price variation for bids and offers for mini-options shall be determined in accordance with Interpretation and Policy .22(d) to Rule 5.5.]

* * * * *

Rule 6.53C. Complex Orders on the Hybrid System

(a)–(d) No change.

. . . Interpretations and Policies:

.01 No change.

.02 If the Exchange determines to list SPX *or VIX* on a group basis pursuant to Rule 8.14, a marketable complex order consisting of legs in different groups of series in the class does not automatically execute against individual orders residing in the EBook pursuant to Rule 6.53C(c)(ii)(1) or (d)(v)(1) and automatically executes against complex orders (or COA responses) in accordance with Rules 6.53C(c)(ii)(2) or (d)(v)(2) through (4). A marketable complex order consisting of legs in the same group of series in SPX *or VIX* executes against individual orders in the EBook in accordance with Rule 6.53C(c)(ii) and (d)(v). Complex orders consisting of legs in different groups of series that are marketable against each other may only execute at a net price that has priority over the individual orders and quotes resting in the EBook.

.03–.12 No change.

* * * * *

Rule 8.3. Appointment of Market-Makers

(a)–(b) No change.

(c) Market-Maker Appointments. Absent an exemption by the Exchange, an appointment of a Market-Maker confers the right to quote electronically and in open outcry in the Market-Maker's appointed classes during Regular Trading Hours as described below. Subject to paragraph (e) below, a Market-Maker may change its appointed classes upon advance notification to the Exchange in a form and manner prescribed by the Exchange.

(i) Hybrid Classes. Subject to paragraphs (c)(iv) and (e) below, a Market-Maker can create a Virtual Trading Crowd (''VTC'') appointment, which confers the right to quote electronically during Regular Trading Hours in an appropriate number of Hybrid classes (as defined in Rule 1.1(aaa)) selected from ''tiers'' that have been structured according to trading volume statistics, except for the AA tier. All classes within a specific tier will be assigned an ''appointment cost'' depending upon its tier location. The following table sets forth the tiers and related appointment costs.

Tier	Hybrid option classes	Appointment cost
AA	Options on the Cboe Volatility Index (VIX)	.499 **
	Options on the Standard & Poor's 500 Index (SPX)	1.0 **
*	* * * * * *	*

** If the Exchange determines to list SPX *or VIX* on a group basis pursuant to Rule 8.14, the SPX *or VIX* appointment cost, *as applicable,* confers the right to trade in all SPX *or VIX* groups, *respectively.*

(ii)–(v) No change.

(d)–(e) No change.

* * * * *

Rule 8.13. Preferred Market-Maker Program

(a)–(d) No change.

. . . Interpretations and Policies:

.01–.03 No change.

.04 If the Exchange determines to list SPX *or VIX* on a group basis pursuant to Rule 8.14, obligations of an SPX *or VIX* Market-Maker, *as applicable,* designated as a Preferred Market-Maker, as set forth in Rule 8.13, apply on a class basis, unless the Exchange determines to apply obligations on a group basis.

Rule 8.14. Hybrid Trading System Platforms & Market-Maker Participants

(a)–(b) No change.

. . . Interpretations and Policies:

.01 For each Hybrid 3.0 class, the Exchange may determine to authorize a group of series of the class for trading on the Hybrid Trading System and, if that authorization is granted, shall determine the eligible categories of Market-Maker participants for that group of series. The Exchange will also have the authority to determine whether to change the trading platform on which the group of series trades. If the Exchange lists SPX *or VIX* on the Hybrid Trading System, the Exchange may determine to list the class on a group basis, with both groups trading on the Hybrid Trading System. The Exchange will also have the authority to change the eligible categories of Market-Makers participants for each group. In addition, the following shall apply:

(a)–(c) No change.

Rule 8.15. Lead Market-Makers

(a)–(d) No change.

. . . Interpretations and Policies:

.01–.04 No change.

.05 If the Exchange determines to list SPX *or VIX* on a group basis pursuant to Rule 8.14, obligations of an SPX *or VIX* Market-Maker*, as applicable,* designated as a Lead Market-Maker, as set forth in Rule 8.15, apply on a class basis, unless the Exchange determines to apply obligations on a group basis.

* * * * *

Rule 8.85. DPM Obligations

(a)–(e) No change.

. . . Interpretations and Policies:

.01–.02 No change.

.03 If the Exchange determines to list SPX *or VIX* on a group basis pursuant to Rule 8.14, obligations of a Designated Primary Market-Maker with an SPX *or VIX* appointment, *as applicable,* as set forth in Rule 8.85, apply on a class basis, except if the Exchange determines to apply obligations on a group basis.

* * * * *

(b) Not applicable. [sic]

(c) Not applicable. [sic]

The text of the proposed rule change is also available on the Exchange's website (*http://www.cboe.com/AboutCBOE/CBOELegalRegulatoryHome.aspx*), at the Exchange's Office of the Secretary, 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 its Rules to permit the Exchange to list options on the Cboe Volatility Index (''VIX options'') on [sic] group basis and make conforming changes throughout the Rules, change the minimum increment for VIX options listed under the Nonstandard Expirations Pilot Program (if the Exchange lists VIX on a group basis), and make nonsubstantive changes. Rule 8.14, Interpretation and Policy .01 currently permits the Exchange to authorize a group of series of a Hybrid 3.0 [5] class for trading on the Hybrid Trading System. Rule 8.14, Interpretation and Policy .01 also permits the Exchange to list options on the S&P 500 (''SPX options'') on a group basis, with both groups trading on the Hybrid Trading System, if the Exchange lists SPX on the Hybrid Trading System.[6] If the Exchange authorizes this, it determines the eligible categories of Market-Maker participants for the group (Designated Primary Market-Makers (''DPMs''), Lead Market-Makers (''LMMs''), or Market-Makers). The Exchange may also appoint no DPM or LMM to a class if the conditions in Rule 8.14(b) are satisfied with respect to the class. A DPM's or LMM's obligations will apply to a class, unless the Exchange determines to apply a DPM's or LMM's obligations on a group basis. Market-Maker appointments apply on a class basis. The Exchange establishes Hybrid Trading System trading parameters (*e.g.,* applicable matching algorithm under Rule 6.45, opening rotation parameters under Rule 6.2B, automatic execution parameters under Rule 6.13, simple auction liaison parameters under Rule 6.13A, hybrid agency liaison parameters under Rule 6.14A, complex order parameters under Rule 6.53C, and automated improvement mechanism parameters under Rule 6.74A) on a group basis to the extent the Rules otherwise provide for such parameters to be established on a class basis.

The proposed rule change amends Rule 8.14, Interpretation and Policy .01 to permit the Exchange to list a class [sic] VIX options on a group basis if the Exchange lists VIX options on the Hybrid Trading System (which it currently does).[7] The remaining provisions of Interpretation and Policy .01 would apply. Thus, if the Exchange lists VIX options in two groups, it may determine on which trading platform each group trades (both could trade on the Hybrid Trading System, both could trade on the Hybrid 3.0 Platform, and one could trade on each platform) and the eligible categories of Market-Maker participants for each group. If the Exchange determines to appoint a DPM or LMM, the obligations of the DPM or LMM would apply to the entire VIX class, unless the Exchange determines to apply the DPM or LMM obligations, as applicable, on a group basis.[8] Market-Maker appointments would continue to apply to the entire VIX class, as further discussed below.[9]

As it does today, when determining whether to list a class on a group basis, the Exchange intends to generally select series with common expirations or classifications (*e.g.,* end-of-week series or end-of-month series, short-term option series, long-term option series, or series that expire on a particular expiration date) and trade them under individual listing symbols. For example, the Exchange currently lists SPX

[5] ''Hybrid Trading System'' refers to (i) the Exchange's trading platform that allows Market-Makers to submit electronic quotes in their appointed classes and (ii) any connectivity to the foregoing trading platform that is administered by or on behalf of the Exchange, such as a communications hub. ''Hybrid 3.0 Platform'' is an electronic trading platform on the Hybrid Trading System that allows one or more quoters to submit electronic quotes which represent the aggregate Market-Maker quoting interest in a series for the trading crowd. Classes authorized by the Exchange for trading on the Hybrid Trading System are referred to as Hybrid classes. Classes authorized by the Exchange for trading on the Hybrid 3.0 Platform are referred to as Hybrid 3.0 classes. *See* Rule 1.1(aaa). Currently, no classes trade on the Hybrid 3.0 Platform.

[6] Currently, the Exchange lists SPX options on the Hybrid Trading System, and lists the class in two groups—one group consists of SPX options with A.M.-settled standard third-Friday expirations and the other group consists of SPX options with P.M.-settled standard third-Friday expirations and nonstandard end-of-week or end-of-month expirations. The Exchange lists both groups of SPX options on the Hybrid Trading System.

[7] If VIX was a Hybrid 3.0 class, the Exchange would be able to list it on a group basis today pursuant to Rule 8.14, Interpretation and Policy .01.

[8] The proposed rule change makes conforming changes to Rules 8.15 and 8.85. The proposed rule change also makes a similar change to Rule 8.13 with respect to Preferred Market-Makers.

[9] The Exchange does not currently (and does not intend to) appoint Preferred Market-Makers (''PMMs'') or DPMs to VIX options pursuant to Rules 8.13 or 8.95, respectively. The Exchange currently appoints an on-floor LMM to VIX options (which includes VIXW options), and may determine to apply a DPM or LMM to each group of VIX options if the Exchange determines to list VIX on a group basis.

options with A.M.-settled standard third-Friday expirations under symbol ''SPX'' and lists options on the S&P 500 Index with P.M-settled standard third-Friday expirations and nonstandard expirations with all other expirations under symbol ''SPXW.'' The Exchange would provide sufficient notice to Trading Permit Holders if it determines to list VIX on a group basis.

If the Exchange determines to list VIX on a group basis, the Exchange would establish trading parameters (*e.g.* applicable matching algorithm under Rule 6.45, opening rotation parameters under Rule 6.2, automatic execution parameters under Rule 6.13, simple auction liaison parameters under Rule 6.13A, hybrid agency liaison parameters under Rule 6.14A, complex order parameters under Rule 6.53C, and automated improvement mechanism parameters under Rule 6.74A) on a group basis, as it does today for SPX and SPXW. Pursuant to the proposed rule change, the Exchange could apply a different allocation algorithm to each group of VIX options.

The Exchange believes for VIX, groups of series may exhibit different trading characteristics, including appeal to different categories of market participants. For example, the Exchange believes VIXW options may be more appealing to retail customers given their short expiration, and would be in more demand with a smaller trading increment (see discussion below). The Exchange generally establishes market models for classes based on these characteristics that most fit the product, which the Exchange believes benefits investors. This is true for VIX options with standard third-Friday expirations and VIX options with nonstandard expirations, which is why the Exchange believes it is appropriate to permit the Exchange to list VIX options in groups.

The Exchange proposes to amend Rule 6.53C, Interpretation and Policy .02 to state if the Exchange determines to list VIX options on a group basis pursuant to Rule 8.14, if a marketable complex order consists of legs in different groups of series in the class, it will not automatically execute against individual orders residing in the EBook pursuant to Rule 6.53C(c)(ii)(1) or (d)(v)(1). This is consistent with current functionality today applicable to SPX and SPXW pursuant to Rule 6.53C, Interpretation and Policy .10. The proposed rule change extends this functionality to VIX, if the Exchange lists it on a group basis.

As discussed above, if the Exchange lists VIX on a group basis, the Exchange may apply different trading parameters (including different allocation algorithms) to each group. Due to system limitations that in the Exchange's experience were prohibitively expensive to modify, complex orders consisting of different groups of series will not automatically execute against individual orders residing in the EBook, even if they trade on the same platform. Pursuant to Rule 6.53C, complex orders may only consist of legs from the same class. While VIX and VIXW series would be part of the same class even if the Exchange lists VIX on a group basis, and thus permissible for electronic handling under the Rules, the System would treat VIX and VIXW series as different classes (since they would potentially have different settings) and would be unable to process complex orders with components in different classes. The System has settings for each class. Currently, trading is not possible ''across'' classes given these different settings. Each class also has separate market data inputs, as the System must read different market data for each class in connection with potential executions in the class. If the System receives a complex order with one VIX leg and one VIXW leg, it would need to trade the VIX leg against the appropriate leg in the VIX ''class.'' After that leg execution, it would then need to trade the VIXW leg against the appropriate leg in the VIXW ''class.'' Given the time these executions would take across classes, it would not result in the near simultaneous execution of legs that is sought by the entry of complex orders. Additionally, after the first leg execution, because the complex order has not fully executed, the System would not be able to execute any other orders within the series of the first leg, which may prevent execution opportunities of those other orders.

For example, suppose the Exchange lists VIX on a group basis, as VIX and VIXW (similar to SPX and SPXW). The Exchange may determine pursuant to Rule 6.45(a) the allocation algorithm applicable to VIX/VIXW orders.[10] VIX/VIXW orders may execute against other VIX/VIXW orders in the COB upon entry or against orders and COA responses following a COA in accordance with the allocation and priority rules set forth in 6.53C(c)(ii)(2) and (d)(v)(2) through (4), respectively.[11] The proposed rule change states marketable VIX/VIXW orders will be eligible to automatically execute against other VIX/VIXW orders resting in the COB provided the execution is at a net price that has priority over the individual orders and quotes residing in the EBook (which is consistent with the manner in which the Exchange currently handles these complex orders are handled [sic], as provided in Rule 6.53C, Interpretation and Policy .10(b)). A VIX/VIXW order that is marketable against individual orders resting in the EBook but not marketable against any complex orders resting in the COB or COA responses will enter the COB or instead be routed to a PAR workstation during Regular Trading Hours and rejected back to the Trading Permit Holder during Extended Trading Hours if not eligible for COB entry due to the terms of the order (for example, if the order is for an origin code the Exchange does not permit to rest in the COB). This is how SPX/SPXW orders are handled today.[12]

The proposed rule change amends Rule 8.3(c)(i) to state if the Exchange determines to list VIX on a group basis pursuant to Rule 8.14, the appointment cost for VIX confers the right to trade in all groups of the class. This is consistent with how appointment costs currently work for VIX, and is consistent with how the appointment cost for SPX works (which the Exchange has determined to list on a group basis). A VIX Market-Maker's obligations pursuant to Rule 8.7 will continue to apply to VIX on a class basis (*i.e.,* series within all VIX groups), even if the

[10] Rule 6.45(a)(i) permits the Exchange to determine which base electronic allocation algorithm will apply to a class, and Rule 6.53C(ii)(2) permits the Exchange to determine which electronic allocation algorithm will apply to executions of complex orders on the COB. Pursuant to the proposed rule change, as discussed above, the Exchange may establish trading parameters on a group basis when the Rules otherwise provide for parameters to be established on a class basis.

[11] Rule 6.53C(c)(ii)(2) states the allocation of a complex order within the COB will be pursuant to the rules of trading priority otherwise applicable to incoming electronic orders in the individual component legs or another electronic matching algorithm from Rule 6.45, as determined by the Exchange on a class-by-class basis. Therefore, pursuant to that provision and the proposed rule change, the Exchange will determine for VIX/VIXW complex orders which electronic matching algorithm will apply to those orders when executing against other orders in the COB. Rules 6.53(d)(v)(2) through (4) specify the matching algorithm applicable to complex orders that execute following a COA, and those provisions will apply to VIX/VIXW complex orders pursuant to the proposed rule change.

[12] *See* Rule 6.12(a)(1), which states orders initially routed for electronic processing that are not eligible for automatic execution or book entry will route to PAR or back to the Trading Permit Holder, Rule 6.53C(d)(vi), which states a COA-eligible order that cannot be filled in whole or in a permissible ratio will route to the COB or back to PAR, as applicable, and Rule 6.1A(b), which states if in accordance with the Rules, an order would route to PAR, the order entry firm's booth, or otherwise for manual handling, the System will return the order to the Trading Permit Holder during Extended Trading Hours.

Exchange lists VIX on a group basis. This is consistent with how VIX Market-Makers' obligations apply to VIX today, as VIX Market-Makers' obligations apply to all VIX series. The Exchange proposes no change to the appointment cost, and thus Market-Makers with VIX appointments will not need to purchase any additional trading permits to quote VIX if the Exchange determines to list VIX on a group basis.

The Exchange also proposes to amend Rule 6.42 to permit series of VIX options listed under the Nonstandard Expiration pilot program (''VIXW'') to have a minimum increment of $0.01 for all strike prices if the Exchange determines to list VIX on a group basis. Currently, all VIX options have a minimum increment of $0.05 for series trading below $3 and $0.10 for series trading above $3.[13] The Exchange believes market demand (particularly by retail investors, who generally prefer lower trading increments) supports a lower trading increment for these series. Permitting a different minimum increment for VIXW and VIX is consistent with the Exchange's current authority (as discussed above) to determine all trading parameters and market model elements other than minimum increment on a group basis to address different trading characteristics and market demand between groups of series. Permitting VIXW series to trade at a different minimum increment than VIX series will permit the Exchange to similarly address the different trading characteristics and market demand for these two groups of series.

Additionally, penny pricing is available in weekly options on competitor products such as the iPath S&P 500 VIX Short-Term Futures exchange-traded note (''VXX''). As a result, the Exchange believes penny pricing for VIXW options is necessary for competitive reasons to allow the Exchange to price these weekly options at the same level of granularity as permitted for competitor weekly products.[14] The Exchange expects this more granular pricing to lead to narrowing of the bid-ask spread for these options and increase the possible number of price points available to investors for these series. The Exchange also notes that penny increments are appropriate for Nonstandard Expiration series, because they have shorter durations than standard options, and finer increments permit more precise pricing in line with the theoretical value of these shorter-term options. The proposed rule change also makes nonsubstantive changes to Rule 6.42, including moving certain provisions from the main body of the Rule to interpretations and policies .03 and .04, making language more plain English, conforming paragraph numbering and lettering to other rules, and displaying the increments in a more user-friendly table.

With regard to the impact of this proposed rule change on system capacity, the Exchange has analyzed its capacity and represents that it and the Options Price Reporting Authority have the necessary systems capacity to handle any potential additional traffic associated with this proposal. The Exchange does not believe any potential increased traffic will become unmanageable since this proposed rule change with respect to minimum trading increments is limited to a single class of options. The proposed rule change does not impact the number of expirations for VIX options the Exchange may list pursuant to Rule 24.9.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Securities Exchange Act of 1934 (the ''Act'') and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 6(b) of the Act.[15] Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)[16] requirements that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. Additionally, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)[17] requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

In particular, the Exchange believes the proposed rule change to permit the Exchange to list VIX options on a group basis will benefit investors and promote just and equitable principles of trade, as it provides the Exchange with flexibility to establish a more appropriate market model for a group of VIX options series that may exhibit different trading characteristics than other series in the class, even if both groups trade on the same platform. Currently, the Exchange may list VIX on a group basis if the groups of a class trade on different trading platforms (*e.g.,* if VIX was a Hybrid 3.0 class); the proposed rule change merely permits the Exchange to similarly list VIX on a group basis on the same trading platform.

Similarly, the proposed rule change to provide [sic] that VIX/VIXW complex orders will not execute against individual orders in the EBook, which is consistent with the treatment of SPX/SPXW orders. These orders will continue to be eligible for electronic processing, including electronic execution, in the same manner as complex orders consisting of VIX series only or VIXW series only, except they will not automatically execute against individual orders in the EBook for the legs due to system limitations described above and would instead rest in the COB (if eligible) or route to PAR or the Trading Permit Holder during Regular Trading Hours, or be rejected back to the Trading Permit Holder during Extended Trading Hours.

Additionally, the proposed rule change will similarly benefit investors. Retail customers generally prefer options with shorter expirations, and the proposed rule change will permit series of VIX with short expirations to be listed in a smaller increment consistent with that demand from retail investors. Permitting a different minimum increment for VIXW and VIX is consistent with the Exchange's current authority (as discussed above) to determine all trading parameters and market model elements other than minimum increment on a group basis to address different trading characteristics and market demand between groups of series. Permitting VIXW series to trade at a different minimum increment than VIX series will permit the Exchange to similarly address the different trading characteristics and market demand for these two groups of series.

Penny increments for VIXW series may lead to more granular pricing and narrowing of the bid-ask spread for these options and increase the possible

[13] As set forth in proposed Rule 6.42, if the Exchange does not list VIX on a group basis, these same increments would apply to the entire class.

[14] The Exchange notes that other options that trade on the Exchange are currently permitted to trade in penny increments because competitive products are able to trade in penny increments. *See* Rule 6.42, Interpretation and Policy .03 (the minimum for XSP options is $0.01 because that is the minimum increment for SPY options, and the minimum increment for DJX options is $0.01 for series below $3 and $0.05 for series $3 and above because that is the minimum increment for DIA options).

[15] 15 U.S.C. 78f(b).

[16] 15 U.S.C. 78f(b)(5).

[17] *Id.*

number of price points available for investors for these series. Additionally, as discussed above, penny pricing is available in weekly options on competitive products. The Exchange believes penny pricing for VIXW options is necessary for competitive reasons, which will and promote just and equitable principles of trade, to allow the Exchange to price these weekly options at the same level of granularity as permitted for competitor weekly products.[18] The Exchange also notes that penny increments are appropriate for Nonstandard Expiration series, because they have shorter durations than standard options, and finer increments permit more precise pricing in line with the theoretical value of these shorter-term options.

B. Self-Regulatory Organization's Statement on Burden on Competition

Cboe 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 proposed rule change has no impact on intramarket competition, as it will apply to all market participants that trade VIX if the Exchange determines to list VIX on a group basis. If VIX was a Hybrid 3.0 class, the Exchange could determine to list VIX on a group basis under current rules; the proposed rule change merely permits the Exchange to similarly list VIX on a group basis on the same trading platform. The proposed rule change has no impact on intermarket competition, as the proposed rule change relates to products exclusively listed on the Exchange. Additionally, the proposed rule change to permit VIXW options to be listed in penny increments may relieve any burden on, or otherwise promote, competition, as it will allow the Exchange to price these options at the same level of granularity as permitted for competitor weekly products. The Exchange notes that other options that trade on the Exchange are currently permitted to trade in penny increments because competitive products are able to trade in penny increments.[19]

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not:

A. Significantly affect the protection of investors or the public interest;

B. impose any significant burden on competition; and

C. 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[20] and Rule 19b–4(f)(6)[21] thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission will 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–CBOE–2018–066 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–CBOE–2018–066. 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–CBOE–2018–066, and should be submitted on or before November 19, 2018.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[22]

Eduardo A. Aleman,

Assistant Secretary.

[FR Doc. 2018–23508 Filed 10–26–18; 8:45 am]

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[18] The Exchange notes that other options that trade on the Exchange are currently permitted to trade in penny increments because competitive products are able to trade in penny increments. *See* Rule 6.42, Interpretation and Policy .03 (the minimum for XSP options is $0.01 because that is the minimum increment for SPY options, and the minimum increment for DJX options is $0.01 for series below $3 and $0.05 for series $3 and above because that is the minimum increment for DIA options).

[19] *See* Rule 6.42, Interpretation and Policy .03 (the minimum for XSP options is $0.01 because that is the minimum increment for SPY options, and the minimum increment for DJX options is $0.01 for series below $3 and $0.05 for series $3 and above because that is the minimum increment for DIA options).

[20] 15 U.S.C. 78s(b)(3)(A).

[21] 17 CFR 240.19b-4(f)(6).

[22] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–84472; File No. SR–BX–2018–025]

Self-Regulatory Organizations; Nasdaq BX, Inc.; Notice of Filing of Amendment No. 1 and Order Instituting Proceedings To Determine Whether To Approve or Disapprove a Proposed Rule Change, as Modified by Amendment No. 1, To Make Permanent the Retail Price Improvement Program Pilot, Which Is Set To Expire on December 31, 2018

October 23, 2018.

I. Introduction

On July 9, 2018, Nasdaq BX, Inc. (''Exchange'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'' or ''Exchange Act'') [1] and Rule 19b–4 thereunder,[2] a proposed rule change to make permanent the Exchange's Retail Price Improvement Program Pilot. The proposed rule change was published for comment in the **Federal Register** on July 26, 2018.[3] On August 31, 2018, the Commission designated a longer period within which to approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to disapprove the proposed rule change.[4] On October 11, 2018, the Exchange filed Amendment No. 1 to the proposed rule change, which replaced and superseded the proposed rule change as originally filed.[5] The Commission has received no comments on the proposed rule change. The Commission is publishing this notice to solicit comments on the proposed rule change, as modified by Amendment No. 1, from interested persons and this order to institute proceedings under Section 19(b)(2)(B) of the Act [6] to determine whether to approve or disapprove the proposed rule change, as modified by Amendment No. 1.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 83681 (July 20, 2018), 83 FR 35516 (''Notice'').

[4] *See* Securities Exchange Act Release No. 84013, 83 FR 45479 (September 7, 2018). The Commission designated October 24, 2018, as the date by which the Commission shall approve or disapprove, or institute proceedings to determine whether to disapprove, the proposed rule change.

[5] Amendment No. 1 is also publicly available on the Commission's website at: *https://www.sec.gov/comments/sr-bx-2018-025/srbx2018-025-4523638-176032.pdf.*

[6] 15 U.S.C. 78s(b)(2)(B).

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 make permanent the Exchange's pilot RPI Program,[7] currently scheduled to expire the earlier of approval of the filing to make this rule permanent or December 31, 2018.

Background

In November 2014, the Commission approved the RPI Program on a pilot basis.[8] The Program is designed to attract retail order flow to the Exchange, and allow such order flow to receive potential price improvement. The Program is currently limited to trades occurring at prices equal to or greater than $1.00 per share. Under the Program, a class of market participant called a Retail Member Organization (''RMO'') is eligible to submit certain retail order flow (''Retail Orders'') [9] to the Exchange. BX members (''Members'') are permitted to provide potential price improvement for Retail Orders in the form of non-displayed interest that is priced more aggressively than the Protected National Best Bid or Offer (''Protected NBBO'').[10]

[7] Securities Exchange Act Release No. 73702 (November 28, 2014), 79 FR 72049 (December 4, 2014) (SR–BX–2014–048) (''RPI Approval Order'').

[8] *See id.*

[9] A ''Retail Order'' is defined in BX Rule 4780(a)(2) by referencing BX Rule 4702, and BX Rule 4702(b)(6) says it is an order type with a non-display order attribute submitted to the Exchange by a RMO. A Retail Order must be an agency order, or riskless principal order that satisfies the criteria of FINRA Rule 5320.03. The Retail Order must reflect trading interest of a natural person with no change made to the terms of the underlying order of the natural person with respect to price (except in the case of a market order that is changed to a marketable limit order) or side of market and that does not originate from a trading algorithm or any other computerized methodology.

[10] The term Protected Quotation is defined in Chapter XII, Sec. 1(19) and has the same meaning as is set forth in Regulation NMS Rule 600(b)(58).

The Program was approved by the Commission on a pilot basis running one-year from the date of implementation.[11] The Commission approved the Program on November 28, 2014.[12] The Exchange implemented the Program on December 1, 2014 and the pilot has since been extended for a one-year period twice, as well as for a six-month period, with it now scheduled to expire the earlier of approval of the filing to make this rule permanent or December 31, 2018.[13]

Specifically, BX Rule 4780(h) will be amended to delete that the Program is a pilot and that it is scheduled to expire the earlier of approval of the filing to make this rule permanent or December 31, 2018. BX Rule 4780(h) will continue to say that the Program will be limited to securities whose Bid Price on the Exchange is greater than or equal to $1.00 per share.

The SEC approved the Program pilot, in part, because it concluded, ''the Program is reasonably designed to benefit retail investors by providing price improvement to retail order flow.'' [14] The Commission also found that ''while the Program would treat retail order flow differently from order flow submitted by other market participants, such segmentation would not be inconsistent with Section 6(b)(5) of the Act, which requires that the rules of an exchange are not designed to permit unfair discrimination.'' [15] As the SEC acknowledged, the retail order segmentation was designed to create greater retail order flow competition and thereby increase the amount of this flow to transparent and well-regulated exchanges. This would help to ensure that retail investors benefit from competitive price improvement that

The Protected NBBO is the best-priced protected bid and offer. Generally, the Protected NBBO and the national best bid and offer (''NBBO'') will be the same. However, a market center is not required to route to the NBBO if that market center is subject to an exception under Regulation NMS Rule 611(b)(1) or if such NBBO is otherwise not available for an automatic execution. In such case, the Protected NBBO would be the best-priced protected bid or offer to which a market center must route interest pursuant to Regulation NMS Rule 611.

[11] *See* RPI Approval Order, *supra* note 7 at 72053.

[12] *Id.* at 72049.

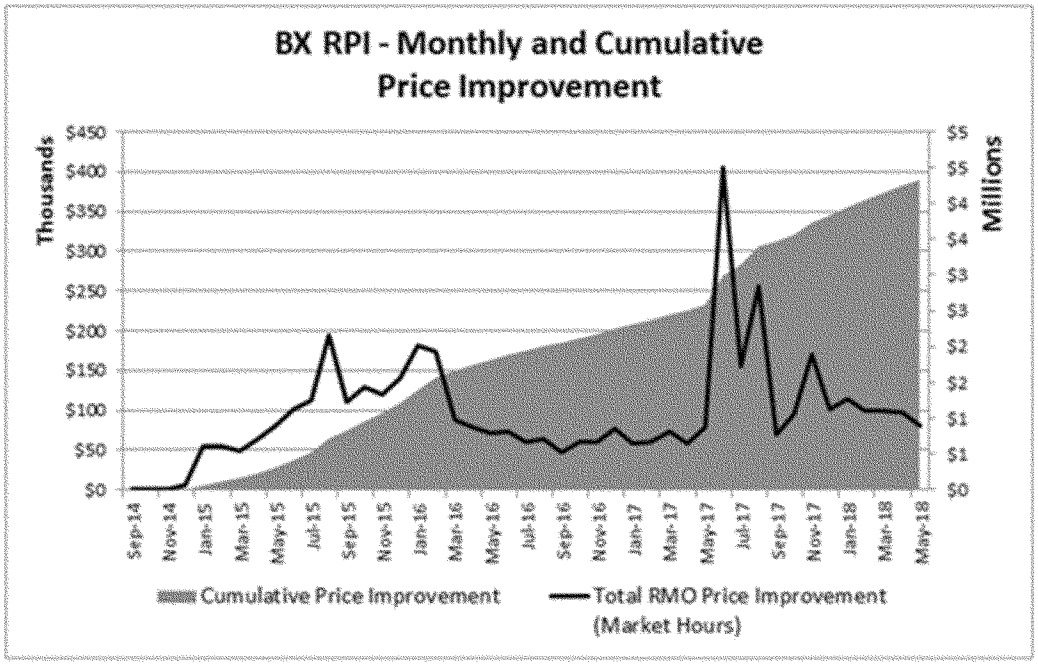
[13] *See* Securities Exchange Act Release No. 76490 (November 20, 2015), 80 FR 74165 (November 27, 2015) (SR–BX–2015–073); Securities Exchange Act Release No. 79446 (December 1, 2016), 81 FR 88290 (December 7, 2016) (SR–BX–2016–065); Securities Exchange Act Release No. 82192 (December 1, 2017), 82 FR 57809 (December 7, 2017) (SR–BX–2017–055); and Securities Exchange Act Release No. 83539 (June 28, 2018), 83 FR 31203 (July 3, 2018) (SR–BX–2018–026).

[14] *See* RPI Approval Order, *supra* note 7 at 72051.

[15] *Id.*

exchange-based liquidity providers provide.

As discussed below, the Exchange believes that the Program does not harm retail investors. In fact, so far it has provided price improvement of more than $4 million since inception to retail investors that they may not otherwise have received. As a result, the Exchange believes that it is therefore appropriate to make the pilot Program permanent.



Definitions

The Exchange adopted the following definitions under BX Rule 4780. First, the term ''Retail Member Organization'' (or ''RMO'') is defined as a Member (or a division thereof) that has been approved by the Exchange to submit Retail Orders.

Second, the term ''Retail Order'' is defined by BX Rule 4702(b)(6)(A) as an order type with a non-display order attribute submitted to the Exchange by a RMO. A Retail Order must be an agency Order, or riskless principal Order that satisfies the criteria of FINRA Rule 5320.03. The Retail Order must reflect trading interest of a natural person with no change made to the terms of the underlying order of the natural person with respect to price (except in the case of a market order that is changed to a marketable limit order) or side of market and that does not originate from a trading algorithm or any other computerized methodology.[16]

The criteria set forth in FINRA Rule 5320.03 adds additional precision to the definition of ''Retail Order'' by clarifying that an RMO may enter Retail Orders on a riskless principal basis, provided that (i) the entry of such riskless principal orders meet the requirements of FINRA Rule 5320.03, including that the RMO maintains supervisory systems to reconstruct, in a time-sequenced manner, all Retail Orders that are entered on a riskless principal basis; and (ii) the RMO submits a report, contemporaneously with the execution of the facilitated order, that identifies the trade as riskless principal.

The term ''Retail Price Improving Order'' or ''RPI Order'' or collectively ''RPI interest'' is defined as an Order Type with a Non- Display Order Attribute that is held on the Exchange Book in order to provide liquidity at a price at least $0.001 better than the NBBO through a special execution process described in Rule 4780. A RPI Order may be entered in price increments of $0.001. An RPI Order will be posted to the Exchange Book regardless of its price, but an RPI Order may execute only against a Retail Order, and only if its price is at least $0.001 better than the NBBO.[17] RPI orders can be priced either as an explicitly priced limit order or implicitly priced as relative to the NBBO with an offset of at least $0.001.

The price of an RPI Order with an offset is determined by a Member's entry of the following into the Exchange: (1) RPI buy or sell interest; (2) an offset from the Protected NBBO, if any; and (3) a ceiling or floor price. RPI Orders submitted with an offset are similar to other peg orders available to Members in that the order is tied or ''pegged'' to a certain price, and would have its price automatically set and adjusted upon changes in the Protected NBBO, both upon entry and any time thereafter. RPI sell or buy interest typically are entered to track the Protected NBBO, that is, RPI Orders typically are submitted with an offset. The offset is a predetermined amount by which the Member is willing to improve the Protected NBBO, subject to a ceiling or floor price. The ceiling or floor price is the amount above or below which the Member does not wish to trade. RPI Orders in their entirety (the buy or sell interest, the offset, and the ceiling or floor) will remain non-displayed. The Exchange also allows Members to enter RPI Orders that establish the exact limit price, which is similar to a non-displayed limit order currently accepted by the Exchange except the Exchange accepts sub-penny limit prices on RPI Orders in increments of $0.001. The

[16] *See supra* note 9.

[17] Exchange systems prevent Retail Orders from interacting with RPI Orders if the RPI Order is not priced at least $0.001 better than the Protected NBBO. The Exchange notes, however, that price improvement of $0.001 would be a minimum requirement and Members can enter RPI Orders that better the Protected NBBO by more than $0.001. Exchange systems accept RPI Orders without a minimum price improvement value; however, such interest execute at its floor or ceiling price only if such floor or ceiling price is better than the Protected NBBO by $0.001 or more.

Exchange monitors whether RPI buy or sell interest, adjusted by any offset and subject to the ceiling or floor price, is eligible to interact with incoming Retail Orders.

Members and RMOs may enter odd lots, round lots or mixed lots as RPI Orders and as Retail Orders respectively. As discussed below, RPI Orders are ranked and allocated according to price and time of entry into the System consistent with BX Rule 4757 and therefore without regard to whether the size entered is an odd lot, round lot or mixed lot amount. Similarly, Retail Orders interact with RPI Orders and other price-improving orders available on the Exchange (*e.g.,* non-displayed liquidity priced more aggressively than the NBBO) [18] according to the Priority and Allocation rules of the Program and without regard to whether they are odd lots, round lots or mixed lots. Finally, Retail Orders are designated as Type 1 or Type 2 without regard to the size of the order.

RPI Orders interact with Retail Orders as follows. Assume a Member enters RPI sell interest with an offset of $0.001 and a floor of $10.10 while the Protected NBO is $10.11. The RPI Order could interact with an incoming buy Retail Order at $10.109. If, however, the Protected NBO was $10.10, the RPI Order could not interact with the Retail Order because the price required to deliver the minimum $0.001 price improvement ($10.099) would violate the Member's floor of $10.10. If a Member otherwise enters an offset greater than the minimum required price improvement and the offset would produce a price that would violate the Member's floor, the offset would be applied only to the extent that it respects the Member's floor. By way of illustration, assume RPI buy interest is entered with an offset of $0.005 and a ceiling of $10.112 while the Protected NBBO is at $10.11. The RPI Order could interact with an incoming sell Retail Order at $10.112, because it would produce the required price improvement without violating the Member's ceiling, but it could not interact above the $10.112 ceiling. Finally, if a Member enters an RPI Order without an offset (*i.e.,* an explicitly priced limit order), the RPI Order will interact with Retail Orders at the level of the Member's limit price as long as the minimum required price improvement is produced. Accordingly, if RPI sell interest is entered with a limit price of $10.098 and no offset while the Protected NBBO is $10.11, the RPI Order could interact with the Retail Order at $10.098, producing $0.012 of price improvement. The System will not cancel RPI interest when it is not eligible to interact with incoming Retail Orders; such RPI interest will remain in the System and may become eligible again to interact with Retail Orders depending on the Protected NBBO. RPI Orders are not accepted during halts.

RMO Qualifications and Approval Process

Under BX Rule 4780(b), any Member may qualify as an RMO if it conducts a retail business or routes retail orders on behalf of another broker-dealer. For purposes of BX Rule 4780, conducting a retail business shall include carrying retail customer accounts on a fully disclosed basis. Any Member that wishes to obtain RMO status is required to submit: (i) An application form; (ii) supporting documentation sufficient to demonstrate the retail nature and characteristics of the applicant's order flow [19] and (iii) an attestation, in a form prescribed by the Exchange, that substantially all orders submitted by the Member as a Retail Order would meet the qualifications for such orders under proposed BX Rule 4780(b). The Exchange shall notify the applicant of its decision in writing.

An RMO is required to have written policies and procedures reasonably designed to assure that it will only designate orders as Retail Orders if all requirements of a Retail Order are met. Such written policies and procedures must require the Member to (i) exercise due diligence before entering a Retail Order to assure that entry as a Retail Order is in compliance with the requirements of this rule, and (ii) monitor whether orders entered as Retail Orders meet the applicable requirements. If the RMO represents Retail Orders from another broker-dealer customer, the RMO's supervisory procedures must be reasonably designed to assure that the orders it receives from such broker-dealer customer that it designates as Retail Orders meet the definition of a Retail Order. The RMO must (i) obtain an annual written representation, in a form acceptable to the Exchange, from each broker-dealer customer that sends it orders to be designated as Retail Orders that entry of such orders as Retail Orders will be in compliance with the requirements of this rule, and (ii) monitor whether its broker-dealer customers' Retail Order flow continues to meet the applicable requirements.[20]

If the Exchange disapproves the application, the Exchange provides a written notice to the Member. The disapproved applicant could appeal the disapproval by the Exchange as provided in proposed BX Rule 4780(d), and/or reapply for RMO status 90 days after the disapproval notice is issued by the Exchange. An RMO also could voluntarily withdraw from such status at any time by giving written notice to the Exchange.

Failure of RMO To Abide by Retail Order Requirements

BX Rule 4780(c) addresses an RMO's failure to abide by Retail Order requirements. If an RMO designates orders submitted to the Exchange as Retail Orders and the Exchange determines, in its sole discretion, that those orders fail to meet any of the requirements of Retail Orders, the Exchange may disqualify a Member from its status as an RMO. When disqualification determinations are made, the Exchange provides a written disqualification notice to the Member. A disqualified RMO may appeal the disqualification as provided in proposed BX Rule 4780(d) and/or reapply for RMO status 90 days after the disqualification notice is issued by the Exchange.

Appeal of Disapproval or Disqualification

BX Rule 4780(d) provides appeal rights to Members. If a Member disputes the Exchange's decision to disapprove it as an RMO under BX Rule 4780(b) or disqualify it under BX Rule 4780(c), such Member (''appellant'') may request, within five business days after notice of the decision is issued by the Exchange, that the Retail Price Improvement Program Panel (''RPI Panel'') review the decision to determine if it was correct.

[18] Other price improving liquidity may include, but is not limited to: Booked non-displayed orders with a limit price that is more aggressive than the then-current NBBO; midpoint-pegged orders (which are by definition non-displayed and priced more aggressively than the NBBO); non-displayed orders pegged to the NBBO with an aggressive offset, as defined in BX Rule 4780(a)(4) as Other Price Improving Contra-Side Interest. Orders that do not constitute other price improving liquidity include, but are not limited to: Orders with a time-in-force instruction of IOC; displayed orders; limit orders priced less aggressively than the NBBO.

[19] For example, a prospective RMO could be required to provide sample marketing literature, website screenshots, other publicly disclosed materials describing the retail nature of their order flow, and such other documentation and information as the Exchange may require to obtain reasonable assurance that the applicant's order flow would meet the requirements of the Retail Order definition.

[20] The Exchange or another self-regulatory organization on behalf of the Exchange will review an RMO's compliance with these requirements through an exam based review of the RMO's internal controls.

The RPI Panel consists of the Exchange's Chief Regulatory Officer (''CRO''), or a designee of the CRO, and two officers of the Exchange designated by the Chief Executive Officer of BX. The RPI Panel reviews the facts and render a decision within the time frame prescribed by the Exchange. The RPI Panel may overturn or modify an action taken by the Exchange and all determinations by the RPI Panel constitute final action by the Exchange on the matter at issue.

Retail Liquidity Identifier

Under BX Rule 4780(e), the Exchange disseminates an identifier when RPI interest priced at least $0.001 better than the Exchange's Protected Bid or Protected Offer for a particular security is available in the System (''Retail Liquidity Identifier''). The Retail Liquidity Identifier is disseminated through consolidated data streams (*i.e.,* pursuant to the Consolidated Tape Association Plan/Consolidated Quotation System, or CTA/CQS, for Tape A and Tape B securities, and the Nasdaq UTP Plan for Tape C securities) as well as through proprietary Exchange data feeds.[21] The Retail Liquidity Identifier reflects the symbol and the side (buy or sell) of the RPI interest, but does not include the price or size of the RPI interest. In particular, CQS and UTP quoting outputs include a field for codes related to the Retail Liquidity Identifier. The codes indicate RPI interest that is priced better than the Exchange's Protected Bid or Protected Offer by at least the minimum level of price improvement as required by the Program.

Retail Order Designations

Under BX Rule 4780(f), an RMO can designate how a Retail Order interacts with available contra-side interest as provided in Rule 4702.

A Type 1-designated Retail Order will attempt to execute against RPI Orders and any other orders on the Exchange Book with a price that is (i) equal to or better than the price of the Type-1 Retail Order and (ii) at least $0.001 better than the NBBO. A Type-1 Retail Order is not routable and will thereafter be cancelled.

A Type 2-designated Retail Order will first attempt to execute against RPI Orders and any other orders on the Exchange Book with a price that is (i) equal to or better than the price of the Type-2 Retail Order and (ii) at least $0.001 better than the NBBO and will then attempt to execute against any other order on the Exchange Book with a price that is equal to or better than the price of the Type-2 Retail Order, unless such executions would trade through a Protected Quotation. A Type-2 Retail Order may be designated as routable.

Priority and Order Allocation

Under BX Rule 4780(g), competing RPI Orders in the same security are ranked and allocated according to price then time of entry into the System. Executions occur in price/time priority in accordance with BX Rule 4757. Any remaining unexecuted RPI interest remain available to interact with other incoming Retail Orders if such interest is at an eligible price. Any remaining unexecuted portion of the Retail Order will cancel or execute in accordance with BX Rule 4780(f). The following example illustrates this method:

Protected NBBO for security ABC is $10.00—$10.05

Member 1 enters an RPI Order to buy ABC at $10.015 for 500

Member 2 then enters an RPI Order to buy ABC at $10.02 for 500

Member 3 then enters an RPI Order to buy ABC at $10.035 for 500

An incoming Retail Order to sell 1,000 shares of ABC for $10.00 executes first against Member 3's bid for 500 at $10.035, because it is the best priced bid, then against Member 2's bid for 500 at $10.02, because it is the next best priced bid. Member 1 is not filled because the entire size of the Retail Order to sell 1,000 is depleted. The Retail Order executes against RPI Orders in price/time priority.

However, assume the same facts above, except that Member 2's RPI Order to buy ABC at $10.02 is for 100. The incoming Retail Order to sell 1,000 executes first against Member 3's bid for 500 at $10.035, because it is the best priced bid, then against Member 2's bid for 100 at $10.02, because it is the next best priced bid. Member 1 then receives an execution for 400 of its bid for 500 at $10.015, at which point the entire size of the Retail Order to sell 1,000 is depleted.

As a final example, assume the same facts as above, except that Member 3's order was not an RPI Order to buy ABC at $10.035, but rather, a non-displayed order to buy ABC at $10.03. The result would be similar to the result immediately above, in that the incoming Retail Order to sell 1,000 executes first against Member 3's bid for 500 at $10.03, because it is the best priced bid, then against Member 2's bid for 100 at $10.02, because it is the next best priced bid. Member 1 then receives an execution for 400 of its bid for 500 at $10.015, at which point the entire size of the Retail Order to sell 1,000 is depleted.

All Regulation NMS securities traded on the Exchange are eligible for inclusion in the RPI Program. The Exchange limits the Program to trades occurring at prices equal to or greater than $1.00 per share. Toward that end, Exchange trade validation systems prevent the interaction of RPI buy or sell interest (adjusted by any offset) and Retail Orders at a price below $1.00 per share.[22] For example, if there is RPI buy interest tracking the Protected NBB at $0.99 with an offset of $0.001 and a ceiling of $1.02, Exchange trade validation systems would prevent the execution of the RPI Order at $0.991 with a sell Retail Order with a limit of $0.99. However, if the Retail Order was Type 2 as defined the Program,[23] it would be able to interact at $0.99 with liquidity outside the Program in the Exchange's order book. In addition to facilitating an orderly[24] and operationally intuitive program, the Exchange believes that limiting the Program to trades equal to or greater than $1.00 per share enabled it better to focus its efforts to monitor price competition and to assess any indications that data disseminated under the Program is potentially disadvantaging retail orders. As part of that review, the Exchange produced data throughout the pilot, which included statistics about participation, the frequency and level of price improvement provided by the Program, and any effects on the broader market structure.

[21] The Exchange notes that the Retail Liquidity Identifier for Tape A and Tape B securities are disseminated pursuant to the CTA/CQS Plan. The identifier is also available through the consolidated public market data stream for Tape C securities. The processor for the Nasdaq UTP quotation stream disseminates the Retail Liquidity Identifier and analogous identifiers from other market centers that operate programs similar to the RPI Program.

[22] As discussed above, the price of an RPI is determined by a Member's entry of buy or sell interest, an offset (if any) and a ceiling or floor price. RPI sell or buy interest typically tracks the Protected NBBO.

[23] Type 2 Retail Orders are treated as IOC orders that execute against displayed and non-displayed liquidity in the Exchange's order book where there is no available liquidity in the Program. Type 2 Retail Orders can either be designated as eligible for routing or as non-routable, as described above.

[24] Given the proposed limitation, the Program would have no impact on the minimum pricing increment for orders priced less than $1.00 and therefore no effect on the potential of markets executing those orders to lock or cross. In addition, the non-displayed nature of the liquidity in the Program simply has no potential to disrupt displayed, protected quotes. In any event, the Program would do nothing to change the obligation of exchanges to avoid and reconcile locked and crossed markets under NMS Rule 610(d).

Rationale for Making the Program Pilot Permanent

The Exchange established the RPI Program in an attempt to attract retail order flow to the Exchange by providing an opportunity price improvement to such order flow. The Exchange believes that the Program promotes transparent competition for retail order flow by allowing Exchange members to submit RPI Orders [25] to interact with Retail Orders. BX also believes that such competition promotes efficiency by facilitating the price discovery process and generating additional investor interest in trading securities, thereby promoting capital formation and retail investment opportunities. The Program will continue to be limited to trades occurring at prices equal to or greater than $1.00 per share.

The Exchange believes, in accordance with its filing establishing the pilot Program, which BX did ''produce data throughout the pilot, which will include statistics about participation, the frequency and level of price improvement provided by the Program, and any effects on the broader market structure.'' [26] The Exchange has fulfilled this obligation through the reports and assessments it has submitted to the Commission since the implementation of the pilot Program.

The SEC stated in the RPI Approval Order that the Program could promote competition for retail order flow among execution venues, and that this could benefit retail investors by creating additional well-regulated and transparent price improvement opportunities for marketable retail order flow, most of which is currently executed in the Over-the-Counter (''OTC'') markets without ever reaching a public exchange.[27] The Exchange believes that the Program does not harm retail investors and so far has provided price improvement of more than $4 million since inception to retail investors that they may not otherwise have received. The data demonstrates that the Program has continued to grow over time and the Exchange has not detected any negative impact to market quality. The Exchange also has not received any complaints or negative feedback concerning the Program.

As seen in the table below, RMO orders and shares executed have continued to rise since the introduction of the Program in December 2014. RMO executed share volume on BX accounted for 0.05% of total consolidated volume in eligible U.S. listed securities in Q4 2017. Despite its size relative to total consolidated trading, however, the Program has continued to provide some price improvement to RMO orders each month with total price improvement during market hours from the start of the Program through May 2018 totaling over $4.3 million.

Retail orders are routed by sophisticated brokers using systems that seek the highest fill rates and amounts of price improvement. These brokers have many choices of execution venues for retail orders. When they choose to route to the Program, they have determined that it is the best opportunity for fill rate and price improvement at that time.

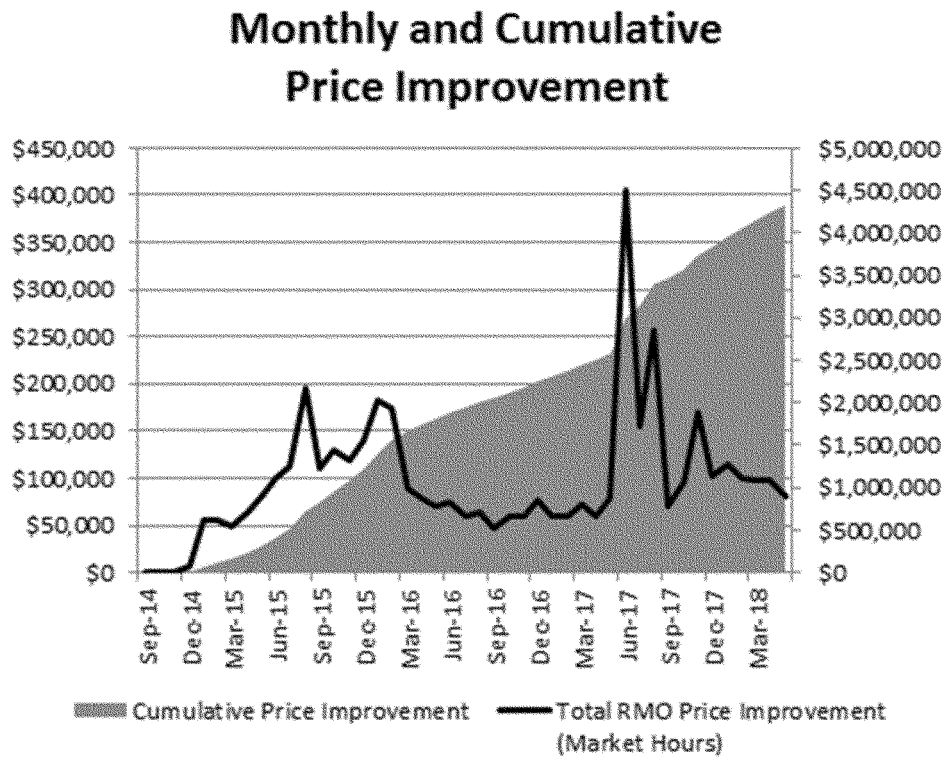
Month	Total RMO orders (market hours)	RMO shares executed (market hours)	Total RMO price improvement (market hours)
Sep-14	0	0	$0
Oct-14	0	0	0
Nov-14	0	0	0
Dec-14	4,003	521,587	6,572
Jan-15	66,903	9,723,791	55,480
Feb-15	71,204	12,948,664	54,769
Mar-15	62,216	10,818,042	49,232
Apr-15	75,558	12,121,577	63,247
May-15	98,859	16,723,281	81,268
Jun-15	116,570	20,341,305	100,520
Jul-15	133,917	22,310,364	111,657
Aug-15	192,546	30,011,636	194,706
Sep-15	141,496	23,199,937	110,415
Oct-15	148,414	25,745,772	128,838
Nov-15	123,267	20,788,967	120,037
Dec-15	145,022	24,414,783	140,444
Jan-16	162,025	30,010,815	181,781
Feb-16	135,409	27,794,644	173,988
Mar-16	93,729	17,688,230	88,900
Apr-16	82,819	15,269,513	78,241
May-16	70,192	13,336,738	71,145
Jun-16	76,092	15,356,152	74,035
Jul-16	65,121	13,532,803	59,305
Aug-16	78,611	16,412,113	64,231
Sep-16	84,240	17,368,907	46,792
Oct-16	146,207	30,827,361	60,624
Nov-16	103,046	19,744,407	60,391
Dec-16	168,638	31,003,843	76,025
Jan-17	140,203	23,474,999	58,887
Feb-17	139,447	26,643,083	59,372
Mar-17	161,154	30,595,963	73,250
Apr-17	126,665	26,587,486	59,141
May-17	143,927	31,368,371	78,979
Jun-17	332,266	71,569,426	405,933
Jul-17	210,309	39,061,892	155,669

[25] A Retail Price Improvement Order is defined in BX Rule 4780(a)(3) by referencing BX Rule 4702 and BX Rule 4702(b)(5) says that it is as an order type with a non-display order attribute that is held on the Exchange Book in order to provide liquidity at a price at least $0.001 better than the NBBO through a special execution process described in Rule 4780.

[26] *See* Securities Exchange Act Release No. 73410 (October 23, 2014), 79 FR 64447 at 64450 (SR–BX–2014–048).

[27] RPI Approval Order, 79 FR at 72053.

Month	Total RMO orders (market hours)	RMO shares executed (market hours)	Total RMO price improvement (market hours)
Aug-17	266,762	51,442,492	255,999
Sep-17	154,846	29,831,646	69,634
Oct-17	205,399	39,409,251	95,051
Nov-17	370,064	94,703,209	169,738
Dec-17	219,528	49,424,240	102,082
Jan-18	248,419	47,080,453	113,956
Feb-18	263,576	40,979,066	100,148
Mar-18	597,460	40,896,277	98,779
Apr-18	1,095,396	41,067,806	97,015
May-18	1,031,527	31,843,167	81,199
Total	8,353,052	1,193,994,059	4,327,477



The table below shows that between April 2017 and May 2018, roughly 50% of RMO orders were for 100 shares or less and around 70% of orders were for 300 shares or less. Larger orders of 7,500 shares or more accounted for approximately 2%, ranging from 0.62% to 3.09%. Although large order were a small percentage of total orders, they make up a significant portion of total shares ordered, ranging from 21.11% to 46.22%. Orders of 300 shares or less, which accounted for the vast majority of total RMO orders, accounted for only between 4.81% and 15.38% of total shares ordered.

DISTRIBUTION OF RMO ORDERS BY ORDER SIZE

Month	<=100 (%)	101–300 (%)	301–500 (%)	501–1,000 (%)	1,001–2,000 (%)	2,001–4,000 (%)	4,001–7,500 (%)	7,500–15,000 (%)	>15,000
Apr–17	49.50	18.53	8.67	9.47	5.69	3.84	2.24	1.38	0.69
May–17	46.55	23.79	8.25	8.42	5.26	3.71	2.12	1.29	0.62
Jun–17	59.60	13.26	6.62	7.91	4.75	3.48	2.36	1.52	0.51
Jul–17	57.30	14.61	7.32	8.50	5.17	3.28	2.00	1.19	0.65
Aug–17	56.38	15.19	7.54	8.49	5.23	3.41	1.91	1.22	0.63
Sep–17	53.16	16.29	7.69	8.79	5.71	4.05	2.22	1.38	0.70
Oct–17	54.28	16.00	7.46	8.65	5.64	3.84	2.15	1.33	0.66
Nov–17	47.76	15.30	8.19	10.23	7.38	5.10	2.95	2.04	1.06
Dec–17	48.66	15.30	8.27	10.34	6.99	4.82	2.79	1.87	0.98
Jan–18	53.60	14.93	7.73	9.20	5.98	4.04	2.28	1.53	0.71
Feb–18	58.44	14.58	7.14	8.02	4.93	3.29	1.91	1.14	0.55
Mar–18	55.29	17.97	8.63	8.38	5.12	2.64	1.07	0.61	0.28
Apr–18	54.52	19.12	9.04	8.31	5.02	2.50	0.87	0.42	0.19
May–18	50.44	20.21	9.89	9.10	5.77	2.88	0.96	0.50	0.26

DISTRIBUTION OF RMO SHARES ORDERED BY ORDER SIZE

Month	<=100 (%)	101–300 (%)	301–500 (%)	501–1,000 (%)	1,001–2,000 (%)	2,001–4,000 (%)	4,001–7,500 (%)	7,500–15,000 (%)	>15,000
Apr–17	3.04	4.63	4.42	8.78	10.06	12.89	13.89	16.06	26.23
May–17	3.28	6.49	4.49	8.34	9.98	13.38	14.28	16.05	23.71
Jun–17	2.47	3.78	3.95	8.89	10.15	13.74	17.06	20.07	19.88
Jul–17	2.82	4.20	4.36	9.31	10.78	12.94	14.44	16.47	24.67
Aug–17	2.80	4.28	4.42	9.21	10.84	13.21	13.55	16.63	25.08
Sep–17	2.88	4.16	3.98	8.36	10.50	14.04	14.17	16.78	25.14
Oct–17	2.89	4.31	4.09	8.73	11.02	14.04	14.49	17.11	23.32
Nov–17	1.80	3.01	3.26	7.48	10.45	13.51	14.27	18.89	27.33
Dec–17	2.00	3.17	3.48	8.02	10.45	13.46	14.18	18.35	26.91
Jan–18	2.50	3.78	4.01	8.82	11.05	13.94	14.30	18.35	23.26
Feb–18	3.25	4.52	4.52	9.34	11.08	13.87	14.53	16.86	22.02
Mar–18	5.73	6.96	6.80	12.44	14.90	14.65	11.00	12.34	15.17
Apr–18	7.27	8.11	7.84	13.68	16.23	15.46	10.29	9.51	11.61
May–18	6.31	7.54	7.50	13.09	16.40	15.66	10.00	9.80	13.70

DISTRIBUTION OF RMO SHARES EXECUTED BY ORDER SIZE

Month	<=100 (%)	101–300 (%)	301–500 (%)	501–1,000 (%)	1,001–2,000 (%)	2,001–4,000 (%)	4,001–7,500 (%)	7,500–15,000 (%)	>15,000
Apr–17	11.39	15.32	11.28	16.25	12.77	10.87	9.27	9.25	3.61
May–17	10.86	20.10	10.47	13.77	11.37	10.58	8.96	9.44	4.45
Jun–17	7.65	10.05	8.48	14.31	11.28	11.85	12.00	18.69	5.68
Jul–17	10.07	12.67	10.18	15.57	12.94	11.79	9.97	10.27	6.56
Aug–17	9.93	12.98	10.89	17.05	14.16	11.94	9.38	8.23	5.45
Sep–17	11.36	13.46	10.12	16.01	13.80	13.07	8.60	8.61	4.97
Oct–17	10.83	13.37	10.07	16.40	14.46	12.48	9.47	7.96	4.96
Nov–17	7.04	10.64	10.14	19.81	18.19	13.96	9.04	7.10	4.09
Dec–17	8.25	11.27	10.37	19.49	17.05	13.33	8.82	7.13	4.28
Jan–18	9.93	12.43	10.92	19.37	16.07	12.66	8.49	6.49	3.64
Feb–18	12.63	14.31	11.81	19.45	15.07	11.22	6.81	5.55	3.16
Mar–18	13.92	15.35	11.92	19.14	14.77	10.05	6.35	5.49	3.00
Apr–18	14.81	15.76	11.86	18.35	13.47	10.21	6.75	5.41	3.39
May–18	13.65	15.78	12.38	18.77	13.92	10.57	6.25	5.27	3.40

The table below shows the average and median sizes of RMO removing orders.

AVERAGE AND MEDIAN RMO SIZES

Year	RMO taking order size	
	Avg	Median
Apr–17	863	111
May–17	802	180
Jun–17	743	82
Jul–17	739	100
Aug–17	753	100
Sep–17	841	100
Oct–17	793	100
Nov–17	1,103	150
Dec–17	1,044	132
Jan–18	844	100
Feb–18	690	100
Mar–18	512	100
Apr–18	454	100
May–18	517	100

The data provided by the Exchange describes a valuable service that delivers some price improvement in a transparent and well-regulated environment. The Program represents just a fraction of retail orders, most of which are executed off-exchange by a wide range of order handling services that have considerably more market share and which operate pursuant to different rules and regulatory requirements. BX found no data or received any customer feedback that indicated any negative impact of the Program on overall market quality or for retail investors.

As discussed more fully below, the reports and assessments provided by the Exchange to the SEC have covered (i) the economic impact of the Program on the entire market; (ii) the economic impact of the Program on execution quality; (iii) whether only eligible participants are accessing Program liquidity; (iv) whether the Program is attracting retail participants; (v) the net benefits of the Program on participants; (vi) the overall success in achieving intended benefits; and (vii) whether the Program can be improved.

1. Economic Impact of the RPI Program on the Entire Market

The Exchange sees no way to detect a market-wide impact from a Program of this size. The entire size of the Program is smaller than the normal day-to-day fluctuations of market share between different venues. Any positive or negative impact of this Program is eclipsed by much larger forces affecting order flow, execution quality and quote competition. For example, during the time that the Program has been in effect, off-exchange trading has varied from 33%–40% of consolidated volume, with much larger variation in individual stocks. Meanwhile the Program averages less than 0.1% of consolidated volume. The combination of substantial variation in other market factors and very little variation in the Program eliminates the ability of statistical tests to indicate causation.

The Program is intended to attract off-exchange order flow back to transparent and well-regulated exchange trading systems. Given current market structure, BX believes that the Program does not harm retail investors and it so far has provided price improvement of more than $4 million since inception to retail investors that they may not otherwise have received. The Program may also improve overall market quality by attracting desirable order flow and liquidity-providers back to the vigorous order competition available on-exchange.

Using correlation tests and visualization the Exchange failed to detect a significant relationship between the amount of RMO volume traded on BX and measurements of overall market quality. The results of correlation tests against 30-second realized spreads show minimal to no correlation.

Additionally, through time series visualization BX detects no significant changes in BX market quality measures during the life of the pilot Program. Metrics including quoted spreads, volatility, realized spreads, and depth were examined using executions on BX and the NBBO weighted by volume executed on BX. Both quoted and realized spreads did not show any dramatic changes following the implementation of the Program or as it gained traction over time. Consolidated trade-to-trade volatility appears to have decreased slightly in the middle of the Program.

2. Economic Impact of the BX RPI Program on Execution Quality

To assess the execution quality of the Program, BX focused on symbol-day combinations when during market hours: (i) An RMO execution occurred on BX, (ii) a non-RMO execution occurred on BX, and (iii) a tape-eligible trade occurred on BX. Symbol day combinations are aggregated to overall daily statistics by either a simple average or by volume weighting by RMO executed volume during market hours.[28] This results in the number and identity of symbols captured in each daily average changing from day to day. Using this data, the Exchange examined whether the economic outcomes for RMO trades differs from non-RMO trades and/or all trades.

When comparing average price improvement for RMO and non-RMO executions for a subset of 100 stocks with the largest number of RMO shares executed, the price improvement seen in RMO and non-RMO trades is comparable over the life of the Program. When volume weighting the average price improvement by RMO volume to emphasize those stock/day combinations with the highest volume traded in RMO, average price improvement on BX for both RMO and non-RMO trades appear generally comparable over time, with RMO price improvement generally beating non-RMO. Note that this price improvement measure does not take rebates into account.

In the subset of active RMO symbols, RMO volume-weighted effective and realized spreads for RMO and all executions, which includes RMO executions, are generally comparable throughout the duration of the Program.

Similar to regular, liquidity-taking orders on BX, the Program offers inverted pricing where RMO orders receive a rebate (on top of the price improvement they receive) when executing against RPI liquidity, while there is a fee associated with RPI orders which post non-displayed, price-improving liquidity. RPI orders are charged $0.0025 per share. Retail Orders currently receive a rebate of $0.0021 per share when executing against RPI liquidity, a rebate of $0.0000 per share when executing against other hidden, price-improvising liquidity, and a rebate of $0.0017 per share when executing against other displayed liquidity on the BX book.

3. Are Only Eligible Participants Accessing Program Liquidity

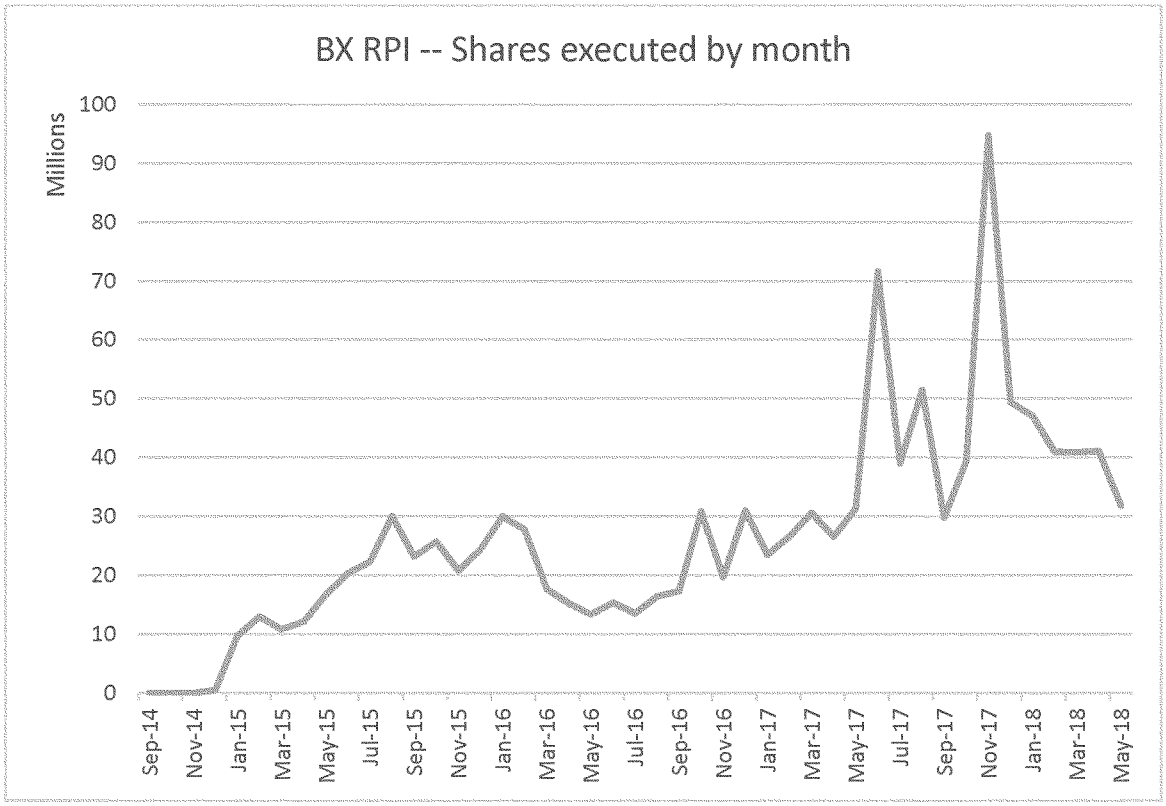
Only RMOs that have been approved by BX can enter RMO orders that access the Program liquidity, and the BX trading system does not allow non-RMO orders to access RPI providing orders. The BX trading system does not allow non-RMO orders to access RPI providing orders. BX Rule 4780(c) enables BX at its sole discretion to disqualify RMO members that submit orders that fail to meet any of the requirements of the rule.

4. Is the Program Attracting Retail Participation

The Program has attracted some retail orders to the Exchange and participation in the Program has continued to increase over time. The Exchange believes that the Program provided tangible price improvement and transparency to retail investors through a competitive pricing process.

Brokers route retail orders to a wide range of different trading systems. The Program offers a transparent and well-regulated option providing competition and price improvement. BX believes that it has achieved its goal of attracting retail order flow to BX and, as stated above, it has resulted in a significant price improvement to retail investors through a competitive pricing process. The Exchange also has not detected any negative impact to market quality or to retail investors as the Program has continued to grow over time.

[28] Both RMO and non-RMO execution quality values are weighted by RMO volume and a very small number of extreme outlier symbol-day stats have been removed from the analysis.



On average, an RMO execution continues to get more price improvement than the minimum $0.001 price improvement required of an RPI liquidity-providing order in the Program, and over time the price improvement seen on BX in non-RMO orders does not appear to be negatively impacted by the introduction of the Program.

5. Net Benefits of the Program on Participants

From the beginning of 2017 through January 2018, 97.9% of RMO shares ordered and 98.5% of RMO shares executed were RMO Type 1 orders, while the remainder were RMO Type 2 orders. Type 1 orders had an aggregated fill rate of 19.2%, while Type 2 orders had a fill rate of 4.1% in this timeframe.

Of the RMO Type 1 executions, 94.9% of shares were executed against RPI liquidity and 5.1% against other non-RPI price-improving hidden liquidity. Of the RMO Type 2 executions, 23.7% of shares were executed against RPI liquidity, 14% against other non-RPI price-improving hidden liquidity, and 62.3% against other liquidity on the BX book. None of the Type 2 orders entered included routing instructions to allow for executions away from BX.

The Exchange believes that the Program through retail order segmentation does create greater retail order flow competition and thereby increases the amount of this flow to BX. This helps to ensure that retail investors benefit from the price improvement that liquidity providers are willing to provide. The Program promotes competition for retail order flow by allowing Exchange members to submit RPI Orders to interact with Retail Orders. Such competition promotes efficiency by facilitating the price discovery process and generating additional investor interest in trading securities, thereby promoting capital formation.

The Program also promotes competition for retail order flow among execution venues, and this benefits retail investors by creating additional price improvement opportunities for marketable retail order flow, most of which is currently executed in the OTC markets without ever reaching a public exchange. The Exchange believes that it has achieved its goal of attracting retail order flow to BX, and has resulted in price improvement to retail investors through a competitive pricing process. The data also demonstrates that the Program has continued to grow over time and the Exchange has not detected any negative impact to market quality or to retail investors.

6. Overall Success in Achieving Intended Benefits

The Program has demonstrated the effectiveness of a transparent, on-exchange retail order price improvement functionality, and while small relative to total consolidated volume, has achieved its goals of attracting retail order flow and providing those orders with price improvement totaling tens of thousands of dollars each month.

The Program provides additional competition to the handling of retail orders. The added opportunity for price improvement provides pressure on other more established venues to increase the price improvement that they provide. By doing this, the Exchange believes that the Program may have a greater positive effect than the market share would directly indicate.

7. Can the Program Be Improved

The Program provides a transparent, well-regulated, and competitive venue for retail orders to receive price improvement. The size of the Program is somewhat limited by the rules that prevent BX from matching features offered by non-exchange trading venues. Nonetheless, the Exchange believes the Program is worthwhile and it will continue to look for ways to further innovate and improve the Program. The Exchange believes that making the pilot permanent is appropriate and through this filing seeks to make permanent the current operation of the Program.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,[29] in general, and with Section 6(b)(5) of the Act,[30] in particular, in that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general to protect investors and the public interest and not to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Exchange believes that making the pilot Program permanent is consistent with these principles because the Program is reasonably designed to attract retail order flow to the exchange environment, while helping to ensure that retail investors benefit from the better price that liquidity providers are willing to give their orders. During the pilot period, BX has provided data and analysis to the Commission, and this data and analysis, as well as the further analysis in this filing, shows that the Program has operated as intended and is consistent with the Act.

Additionally, the Exchange believes the proposed rule change is designed to facilitate transactions in securities and to remove impediments to, and perfect the mechanisms of, a free and open market and a national market system because the competition promoted by the Program facilitates the price discovery process and potentially generate additional investor interest in trading securities. Making the pilot Program permanent will allow the Exchange to continue to provide the Program's benefits to retail investors on a permanent basis and maintain the improvements to public price discovery and the broader market structure. The data provided by BX to the SEC staff demonstrates that the Program provided tangible price improvement and transparency to retail investors through a competitive pricing process.

As described below in BX's statement regarding the burden on competition, the Exchange also believes that it is subject to significant competitive forces. For all of these reasons, the Exchange believes that the proposal is consistent with the Act.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended. BX believes that making the Program permanent would continue to enhance competition for retail order flow among execution venues and contribute to the public price discovery process.

The Exchange believes that the data supplied to the Commission and experience gained over the life of the pilot have demonstrated that the Program creates price improvement opportunities for retail orders that are equal to what would be provided under OTC internalization arrangements, thereby benefiting retail investors and increasing competition between execution venues. BX also believes that making the Program permanent will promote competition between execution venues operating their own retail liquidity programs. Such competition will lead to innovation within the market, thereby increasing the quality of the national market system.

Additionally, the Exchange notes that it operates in a highly competitive market in which market participants can easily direct their orders to competing venues, including off-exchange venues. In such an environment, the Exchange must continually review, and consider adjusting the services it offers and the requirements, it imposes to remain competitive with other U.S. equity exchanges.

For the reasons described above, BX believes that the proposed rule change reflects this competitive environment.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Proceedings To Determine Whether To Approve or Disapprove SR–BX–2018–025, as Modified by Amendment No.1, and Grounds for Disapproval Under Consideration

The Commission is instituting proceedings pursuant to Section 19(b)(2)(B) of the Act[31] to determine whether the proposed rule change, as modified by Amendment No. 1, should be approved or disapproved. Institution of such proceedings is appropriate at this time in view of the legal and policy issues raised by the proposed rule change. Institution of proceedings does not indicate that the Commission has reached any conclusions with respect to any of the issues involved. Rather, as described below, the Commission seeks and encourages interested persons to provide comments on the proposed rule change, as modified by Amendment No. 1.

Pursuant to Section 19(b)(2)(B) of the Act,[32] the Commission is providing notice of the grounds for disapproval under consideration. The Commission is instituting proceedings to allow for additional analysis of the proposed rule change's consistency with Sections 6(b)(5)[33] and 6(b)(8)[34] of the Act. Section 6(b)(5) of the Act requires that the rules of a national securities exchange be designed, among other things, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest, and not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers. Section 6(b)(8) of the Act requires that the rules of a national securities exchange not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

In Amendment No. 1, the Exchange provides an analysis of what it considers to be the economic benefits for retail investors and the marketplace flowing from operation of the Program. With regard to the effect of the Program on the broader market, the Exchange states that it has not detected any negative impact to market quality, that it ''sees no way to detect a market-wide impact'' from the Program given the Program's size, and that ''substantial variation in other market factors and very little variation in the Program eliminates [sic] the ability of statistical tests to indicate causation.''[35]

Under the Commission's Rules of Practice, the ''burden to demonstrate that a proposed rule change is consistent with the [Act] and the rules and regulations issued thereunder . . . is on the [SRO] that proposed the rule change.''[36] 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,[37] and any failure of an SRO to provide this information may result in the Commission not having a sufficient basis to make an affirmative finding that

[29] 15 U.S.C. 78f.

[30] 15 U.S.C. 78f(b)(5).

[31] 15 U.S.C. 78s(b)(2)(B).

[32] *Id.*

[33] 15 U.S.C. 78f(b)(5).

[34] 15 U.S.C. 78f(b)(8).

[35] *See supra* Secton II.A.1.1, *Economic Impact of the RPI Program on the Entire Market.*

[36] Rule 700(b)(3), Commission Rules of Practice, 17 CFR 201.700(b)(3).

[37] *See id.*

a proposed rule change is consistent with the Act and the applicable rules and regulations.[38] Moreover, ''unquestioning reliance'' on an SRO's representations in a proposed rule change would not be sufficient to justify Commission approval of a proposed rule change.[39]

The Commission believes that it should seek public comment on Amendment No. 1. The Commission questions whether the information and analysis provided by the Exchange in Amendment No. 1 support the Exchange's conclusions that the Program ''has demonstrated the effectiveness of a transparent, on-exchange retail order price improvement functionality, and while small relative to total consolidated volume, has achieved its goals of attracting retail order flow and providing those orders with price improvement totaling tens of thousands of dollars each month.'' The Commission also questions whether the Exchange has provided sufficient information and analysis concerning the Program's impact on the broader market; for example whether the Program has not had a material adverse impact on market quality. As noted above, the Exchange states that it has not detected any negative impact to market quality, and suggests that the size of the Program prevents the Exchange from providing additional information to support the view that the Program has not had a material adverse impact on market quality. The Commission believes it is appropriate to institute proceedings to allow for public comment on Amendment No. 1, sufficient consideration and comment on the issues raised herein, any potential response to comments or supplemental information provided by the Exchange, and any additional independent analysis by the Commission. The Commission believes that these issues raise questions as to whether the Exchange has met its burden to demonstrate, based on the data and analysis provided, that permanent approval of the Program is consistent with the Act, and specifically, with its requirements that the Program be designed to perfect the mechanism of a free and open market and the national market system, protect investors and the public interest, and not be unfairly discriminatory; or not impose an unnecessary or inappropriate burden on competition.[40]

IV. Procedure: Request for Written Comments

The Commission requests that interested persons provide written submissions of their views, data, and arguments with respect to the issues identified above, as well as any other concerns they may have with the proposal. In particular, the Commission invites the written views of interested persons concerning whether the proposal is consistent with Sections 6(b)(5) and 6(b)(8), or any other provision of the Exchange Act, or the rules and regulations thereunder. Although there do not appear to be any issues relevant to approval or disapproval that would be facilitated by an oral presentation of views, data, and arguments, the Commission will consider, pursuant to Rule 19b–4, any request for an opportunity to make an oral presentation.[41]

Interested persons are invited to submit written data, views, and arguments regarding whether the proposal should be approved or disapproved by November 19, 2018. Any person who wishes to file a rebuttal to any other person's submission must file that rebuttal by December 3, 2018.

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–BX–2018–025 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 Numbers SR–BX–2018–025. 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 these filings 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–BX–2018–025 and should be submitted on or before November 19, 2018. Rebuttal comments should be submitted by December 3, 2018.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[42]

Eduardo A. Aleman,

Assistant Secretary.

[FR Doc. 2018–23505 Filed 10–26–18; 8:45 am]

BILLING CODE 8011–01–P

[38] *See id.*

[39] *See Susquehanna Int'l Group, LLP* v. *Securities and Exchange Commission,* 866 F.3d 442, 446–47 (D.C. Cir. 2017) (rejecting the Commission's reliance on an SRO's own determinations without sufficient evidence of the basis for such determinations).

[40] *See* 15 U.S.C. 78f(b)(4), (5), and (8).

[41] Section 19(b)(2) of the Exchange Act, as amended by the Securities Act Amendments of 1975, Pub. L. 94–29 (June 4, 1975), grants the Commission flexibility to determine what type of proceeding—either oral or notice and opportunity for written comments—is appropriate for consideration of a particular proposal by a self-regulatory organization. *See* Securities Act Amendments of 1975, Senate Comm. on Banking, Housing & Urban Affairs, S. Rep. No. 75, 94th Cong., 1st Sess. 30 (1975).

[42] 17 CFR 200.30–3(a)(57).

SECURITIES AND EXCHANGE COMMISSION

Sunshine Act Meetings

TIME AND DATE: Notice is hereby given, pursuant to the provisions of the Government in the Sunshine Act, Public Law 94–409, the Securities and Exchange Commission will hold an Open Meeting on Wednesday, October 31, 2018 at 10:00 a.m.

PLACE: The meeting will be held in Auditorium LL–002 at the Commission's headquarters, 100 F Street NE, Washington, DC 20549.

STATUS: This meeting will begin at 10:00 a.m. (ET) and will be open to the public. Seating will be on a first-come, first-served basis. Visitors will be subject to security checks. The meeting will be webcast on the Commission's website at *www.sec.gov.*

MATTERS TO BE CONSIDERED: The subject matter of the Open Meeting will be the Commission's consideration of:

- Whether to adopt amendments to modernize the property disclosure requirements for mining registrants and related guidance.

At times, changes in Commission priorities require alterations in the scheduling of meeting items.

CONTACT PERSON FOR MORE INFORMATION: For further information, please contact Brent J. Fields from the Office of the Secretary at (202) 551–5400.

Dated: October 24, 2018.

Brent J. Fields,

Secretary.

[FR Doc. 2018–23658 Filed 10–25–18; 11:15 am]

BILLING CODE 8011–01–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #15742 and #15743; FLORIDA Disaster Number FL–00140]

Presidential Declaration Amendment of a Major Disaster for the State of Florida

AGENCY: U.S. Small Business Administration.

ACTION: Amendment 4.

SUMMARY: This is an amendment of the Presidential declaration of a major disaster for the State of Florida (FEMA–4399–DR), dated 10/11/2018.

Incident: Hurricane Michael.

Incident Period: 10/07/2018 through 10/19/2018.

DATES: Issued on 10/22/2018.

Physical Loan Application Deadline Date: 12/10/2018.

Economic Injury (EIDL) Loan Application Deadline Date: 07/11/2019.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street SW, Suite 6050, Washington, DC 20416, (202) 205–6734.

SUPPLEMENTARY INFORMATION: The notice of the President's major disaster declaration for the State of Florida, dated 10/11/2018, is hereby amended to establish the incident period for this disaster as beginning 10/07/2018 and continuing through 10/19/2018.

All other information in the original declaration remains unchanged.

(Catalog of Federal Domestic Assistance Number 59008)

James Rivera,

Associate Administrator for Disaster Assistance.

[FR Doc. 2018–23501 Filed 10–26–18; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #15746 and #15747; NORTH CAROLINA Disaster Number NC–00100]

Presidential Declaration Amendment of a Major Disaster for Public Assistance Only for the State of North Carolina

AGENCY: U.S. Small Business Administration.

ACTION: Amendment 1.

SUMMARY: This is an amendment of the Presidential declaration of a major disaster for Public Assistance Only for the State of North Carolina (FEMA–4393–DR), dated 10/12/2018.

Incident: Hurricane Florence.

Incident Period: 09/07/2018 through 09/29/2018.

DATES: Issued on 10/12/2018.

Physical Loan Application Deadline Date: 12/11/2018.

Economic Injury (EIDL) Loan Application Deadline Date: 07/12/2019.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center,

14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street SW, Suite 6050, Washington, DC 20416, (202) 205–6734.

SUPPLEMENTARY INFORMATION: The notice of the President's major disaster declaration for Private Non-Profit organizations in the State of North Carolina, dated 10/12/2018, is hereby amended to include the following areas as adversely affected by the disaster.

Primary Counties: Bertie, Davidson, Orange, Pitt

All other information in the original declaration remains unchanged.

(Catalog of Federal Domestic Assistance Number 59008)

James Rivera,

Associate Administrator for Disaster Assistance.

[FR Doc. 2018–23497 Filed 10–26–18; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #15778 and #15779; KANSAS Disaster Number KS–00121]

Presidential Declaration of a Major Disaster for Public Assistance Only for the State of Kansas

AGENCY: U.S. Small Business Administration.

ACTION: Notice.

SUMMARY: This is a Notice of the Presidential declaration of a major disaster for Public Assistance Only for the State of Kansas (FEMA–4403–DR), dated 10/19/2018.

Incident: Severe Storms, Straight-line Winds, and Flooding.

Incident Period: 09/01/2018 through 09/08/2018.

DATES: Issued on 10/19/2018.

Physical Loan Application Deadline Date: 12/18/2018.

Economic Injury (EIDL) Loan Application Deadline Date: 07/19/2019.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street SW, Suite 6050, Washington, DC 20416, (202) 205–6734.

SUPPLEMENTARY INFORMATION: Notice is hereby given that as a result of the President's major disaster declaration on 10/19/2018, Private Non-Profit organizations that provide essential services of a governmental nature may file disaster loan applications at the address listed above or other locally announced locations. The following areas have been determined to be adversely affected by the disaster:

Primary Counties: Barber, Clay, Kingman, Kiowa, Marshall, Pratt, Rice, Riley.

The Interest Rates are:

	Percent
For Physical Damage:	
Non-Profit Organizations with Credit Available Elsewhere	2.500
Non-Profit Organizations without Credit Available Elsewhere	2.500
For Economic Injury:	
Non-Profit Organizations without Credit Available Elsewhere	2.500

The number assigned to this disaster for physical damage is 157786 and for economic injury is 157790.

(Catalog of Federal Domestic Assistance Number 59008)

James Rivera,

Associate Administrator for Disaster Assistance.

[FR Doc. 2018–23496 Filed 10–26–18; 8:45 am]

BILLING CODE 8025–01–P

DEPARTMENT OF STATE

[Public Notice: 10594]

30-Day Notice of Proposed Information Collection: JADE Act Questionnaire

ACTION: Notice of request for public comment and submission to OMB of proposed collection of information.

SUMMARY: The Department of State has submitted the information collection described below to the Office of Management and Budget (OMB) for approval. In accordance with the Paperwork Reduction Act of 1995 we are requesting comments on this collection from all interested individuals and organizations. The purpose of this Notice is to allow 30 days for public comment.

DATES: Submit comments directly to the Office of Management and Budget (OMB) up to November 28, 2018.

ADDRESSES: Direct comments to the Department of State Desk Officer in the Office of Information and Regulatory Affairs at the Office of Management and Budget (OMB). You may submit comments by the following methods:

- *Email: oira_submission@omb.eop.gov.* You must include the DS form number, information collection title, and the OMB control number in the subject line of your message.
- *Fax:* 202–395–5806. Attention: Desk Officer for Department of State.

SUPPLEMENTARY INFORMATION:

- *Title of Information Collection:* JADE Act Questionnaire.
- *OMB Control Number:* None.
- *Type of Request:* New Collection.
- *Originating Office:* CA/VO/L/R.
- *Form Number:* DS–5537.
- *Respondents:* Burmese Applicants for U.S. Visas.
- *Estimated Number of Respondents:* 20,500.
- *Estimated Number of Responses:* 20,500.
- *Average Time per Response:* 30 minutes.
- *Total Estimated Burden Time:* 10,250 hours.
- *Frequency:* Once per application.
- *Obligation to Respond:* Required to Obtain or Retain a Benefit.

We are soliciting public comments to permit the Department to:

- Evaluate whether the proposed information collection is necessary for the proper functions of the Department.
- Evaluate the accuracy of our estimate of the time and cost burden for this proposed collection, including the validity of the methodology and assumptions used.
- Enhance the quality, utility, and clarity of the information to be collected.
- Minimize the reporting burden on those who are to respond, including the use of automated collection techniques or other forms of information technology.

Please note that comments submitted in response to this Notice are public record. Before including any detailed personal information, you should be aware that your comments as submitted, including your personal information, will be available for public review.

Abstract of Proposed Collection

The Tom Lantos Block Burmese Jade Junta's Anti-Democratic Efforts (JADE) Act of 2008, Public Law 110–286, renders certain individuals involved in specified Burmese organizations or activities ineligible for U.S. visas, including: Leaders of the State Peace and Development Council (SPDC), the Burmese military, or the Union Solidarity Development Association (USDA); officials of the SPDC, the Burmese military, or the USDA involved in human rights violations and impeding democracy in Burma; and Burmese persons who provided substantial economic or political support to the SPDC, Burmese military, or USDA. Immediate family members of these individuals are also ineligible for United States visas. Department of State consular officers will use the information provided to evaluate and adjudicate the individual applicant's eligibility for a visa consistent with these requirements.

Methodology

Visa applicants from Burma will fill out and submit the supplemental form and provide it to consular officers. Consular officers will use the form to screen for potential visa ineligibility under the JADE Act.

Edward J. Ramotowski,

Deputy Assistant Secretary, Bureau of Consular Affairs, Department of State.

[FR Doc. 2018–23520 Filed 10–26–18; 8:45 am]

BILLING CODE 4710–06–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Agency Information Collection Activities: Corrected Requests for Comments; Clearance of a Renewed Approval of Information Collection: Certification of Repair Stations, Part 145 of Title 14, CFR

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, FAA invites public comments about our intention to request the Office of Management and Budget (OMB) approval to renew an information collection. The **Federal Register** Notice with a 60-day comment period soliciting comments on the following collection of information was published on August 28, 2018. The burden in this 30-day notice is less than the burden published in the 60-day notice. The 60-day notice burden included a one-time training obligation that is complete. Persons requesting to obtain an initial air agency certificate for a repair station or changes to an existing repair station (air agency) certificate are required to submit this request in a format acceptable to the FAA. Repair stations perform maintenance, preventive maintenance, alterations of aircraft and aircraft components and parts thereof. In order to remain consistent and provide ease of application, the FAA designed and made available to the public the FAA Form 8310–3 Application for Repair Station Certificate and/or Rating. The form provides space for the applicant to provide certification information such as, but not limited to, ratings sought, physical place of business, ownership, and request to contract maintenance functions. The applicants submit FAA Form 8310–3 to the FAA Flight Standards Office closest to the proposed place of business for initial certification. The information collected is necessary to obtain repair station certification or if currently certificated, a change in ratings, changes in ownership, changes in the physical location of the repair station, or any other purpose the applicant deems appropriate.

DATES: Written comments should be submitted by November 28, 2018.

ADDRESSES: Interested persons are invited to submit written comments on the proposed information collection to the Office of Information and Regulatory Affairs, Office of Management and Budget. Comments should be addressed

to the attention of the Desk Officer, Department of Transportation/FAA, and sent via electronic mail to *oira_submission@omb.eop.gov,* or faxed to (202) 395–6974, or mailed to the Office of Information and Regulatory Affairs, Office of Management and Budget, Docket Library, Room 10102, 725 17th Street NW, Washington, DC 20503.

Public Comments Invited: You are asked to comment on any aspect of this information collection, including (a) Whether the proposed collection of information is necessary for FAA's performance; (b) the accuracy of the estimated burden; (c) ways for FAA to enhance the quality, utility and clarity of the information collection; and (d) ways that the burden could be minimized without reducing the quality of the collected information. The agency will summarize and/or include your comments in the request for OMB's clearance of this information collection.

FOR FURTHER INFORMATION CONTACT: Barbara Hall at (940) 594–5913, or by email at: *Barbara.L.Hall@faa.gov.*

SUPPLEMENTARY INFORMATION:

OMB Control Number: 2120–0682.

Title: Certification of Repair Stations, Part 145 of Title 14, CFR.

Form Numbers: FAA Form 8310–3.

Type of Review: Clearance of a renewal of an information collection.

Background: The **Federal Register** Notice with a 60-day comment period soliciting comments on the following collection of information was published on August 28, 2018 (83 FR 43954). 14 CFR part 145 prescribes the requirements for the issuance of repair station certificates. The FAA Form 8310–3, Application for Repair Station Certificate and/or Rating is available to the applicant who wishes to obtain initial repair station certification or submit changes to an existing air agency certificate. The applicant submits this application to the appropriate FAA office by mail or email for review and acceptance. Information entered onto the application consists of, official name of repair station, location where business is conducted, official mailing address, any doing business as name, changes in ratings, or if initial certification, ratings sought, changes in location or housing and facilities, change in name or ownership, or any other purpose for which the applicant requests, including a request for approval to contract maintenance functions to outside entities. Once the FAA reviews the submitted application and finds by inspection that the applicant has the ability to comply with the 14 CFR part 145 requirements for certification, an air agency certificate and ratings is issued. The FAA retains a copy of the application in the FAA office that issued the certificate for an indefinite time or a time-period specified by mandated file retention laws after the certificate is revoked or surrendered.

Respondents: Approximately 4,820 maintenance and alteration organizations.

Responses: 193.

Frequency: Information is collected on occasion.

Estimated Average Burden per Response: 15 minutes.

Estimated Total Annual Burden: 48.25 hours.

Issued in Washington, DC on October 23, 2018.

Barbara Hall,

FAA Information Collection Clearance Officer, Performance, Policy, and Records Management Branch, ASP–110.

[FR Doc. 2018–23532 Filed 10–26–18; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

Sunshine Act Meetings; Unified Carrier Registration Plan Board of Directors

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of Unified Carrier Registration Plan Board of Directors meeting.

TIME AND DATE: The meeting will be held on November 8, 2018, from 12:00 noon to 3:00 p.m., Eastern Standard Time.

PLACE: This meeting will be open to the public via conference call. Any interested person may call 1–866–210–1669, passcode 5253902#, to listen and participate in this meeting.

STATUS: Open to the public.

MATTERS TO BE CONSIDERED: The Unified Carrier Registration Plan Board of Directors (the Board) will continue its work in developing and implementing the Unified Carrier Registration Plan and Agreement and to that end, may consider matters properly before the Board. An agenda for this meeting will be available no later than 5:00 p.m. Eastern Daylight Time, October 29, 2018, at: *https://ucrplan.org.*

FOR FURTHER INFORMATION CONTACT: Mr. Avelino Gutierrez, Chair, Unified Carrier Registration Board of Directors at (505) 827–4565.

Issued on: October 24, 2018.

Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2018–23704 Filed 10–25–18; 4:15 pm]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

[Docket Number FRA–2006–23686]

Petition for Approval of Product Safety Plan

Under part 211 of Title 49 Code of Federal Regulations (CFR), this provides the public notice that on October 16, 2018, BNSF Railway Company (BNSF) petitioned the Federal Railroad Administration (FRA) for approval of a Product Safety Plan (PSP) Version 2.5, dated August 31, 2018, pursuant to 49 CFR 236.907(a). FRA assigned the petition Docket Number FRA–2006–23686.

BNSF requests FRA approval of a PSP for the Dual Radar Roadway Vehicle Detector (VDR24). The VDR24, supplied by Island Radar, is used as a vehicle detection subsystem for four-quadrant gate crossing warning systems, with its intended application as an alternative to inductive loop vehicle detectors. BNSF asserts that this PSP addresses all requirements of 49 CFR 236.907(a). The petition states that Version 2.5 incorporates revisions required by the conditions of FRA's July 19, 2018 letter.

A copy of the petition, as well as any written communications concerning the petition, is available for review online at *www.regulations.gov* and in person at the U.S. Department of Transportation's (DOT) Docket Operations Facility, 1200 New Jersey Avenue SE, W12–140, Washington, DC 20590. The Docket Operations Facility is open from 9 a.m. to 5 p.m., Monday through Friday, except Federal Holidays.

Interested parties are invited to participate in these proceedings by submitting written views, data, or comments. FRA does not anticipate scheduling a public hearing in connection with these proceedings since the facts do not appear to warrant a hearing. If any interested parties desire an opportunity for oral comment and a public hearing, they should notify FRA, in writing, before the end of the comment period and specify the basis for their request.

All communications concerning these proceedings should identify the appropriate docket number and may be submitted by any of the following methods:

• *Website: http://www.regulations.gov.* Follow the online instructions for submitting comments.
• *Fax:* 202–493–2251.
• *Mail:* Docket Operations Facility, U.S. Department of Transportation, 1200 New Jersey Avenue SE, W12–140, Washington, DC 20590.
• *Hand Delivery:* 1200 New Jersey Avenue SE, Room W12–140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.

Communications received by December 13, 2018 will be considered by FRA before final action is taken. Comments received after that date will be considered if practicable.

Anyone can search the electronic form of any written communications and comments received into any of our dockets by the name of the individual submitting the comment (or signing the document, if submitted on behalf of an association, business, labor union, etc.). Under 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its processes. DOT posts these comments, without edit, including any personal information the commenter provides, to *www.regulations.gov,* as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *https://www.transportation.gov/privacy.* See also *https://www.regulations.gov/privacyNotice* for the privacy notice of *regulations.gov.*

Issued in Washington, DC.

Robert C. Lauby,

Associate Administrator for Railroad Safety Chief Safety Officer.

[FR Doc. 2018–23535 Filed 10–26–18; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Internal Revenue Service Advisory Council; Meeting

AGENCY: Internal Revenue Service, Department of Treasury.

ACTION: Notice of meeting.

SUMMARY: The Internal Revenue Service Advisory Council (IRSAC) will hold a public meeting on Thursday, November 15, 2018.

FOR FURTHER INFORMATION CONTACT: Ms. Anna Millikan, National Public Liaison, CL:NPL:P, Rm. 7559, 1111 Constitution Avenue NW, Washington, DC 20224. Phone: 202–317–6851 (not a toll-free number). Email address: *PublicLiaison@irs.gov.*

SUPPLEMENTARY INFORMATION: Notice is hereby given pursuant to section 10(a)(2) of the Federal Advisory Committee Act, 5 U.S.C. App. (1988), a public meeting of the IRSAC will be held on Thursday, November 15, 2018, from 9:10 a.m. to 12:30 p.m. at the Melrose Georgetown Hotel, 2430 Pennsylvania Ave NW, Potomac III, Washington, DC 20037. Issues to be discussed include, but are not limited to: *The Critical Need to Provide the IRS with Adequate and Reliable Funds; Improving the Free File Program by Increasing IRS Oversight and Restructuring the MOU; Statutory Authority of the IRS to Establish and Enforce Minimum Standards of Competence for all Tax Practitioners, Including Tax Return Preparers; Improving Real-Time IRS Communications During Exigent Circumstances and Streamlining Regular IRS Communications; Third-Party Authentication; Taxpayer Digital Correspondence (TDC) Pilot; eA3 rule (Authentication, Authorization, and Access); Application Program Interface (API) Integration Strategy; Tax Pro Account; Transfer Pricing Documentation; Use of New Country-by-Country (CbC) Reports for Transfer Pricing Risk Assessment; The Office of Professional Responsibility Should Publish Disciplinary Actions, with No Taxpayer or Preparer Information; Updating Circular 230, Due Diligence—Cyber Technology,* and *The Future of the IRSAC.* Last-minute agenda changes may preclude advanced notice. The meeting room accommodates approximately 50 people; this number includes IRSAC members and Internal Revenue Service officials. Due to limited seating, **PLEASE CALL TINA BRISCOE AT 202–317–6535 TO CONFIRM YOUR ATTENDANCE.** Attendees are encouraged to arrive at least 30 minutes before the meeting begins. Should you wish the IRSAC to consider a written statement, please write to Internal Revenue Service, Office of National Public Liaison, CL:NPL, Room 7559, 1111 Constitution Avenue NW, Washington, DC 20224 or email *PublicLiaison@irs.gov.*

Dated: October 18, 2018.

John Lipold,

Chief, Relationship Management & Tax Forums.

[FR Doc. 2018–23537 Filed 10–26–18; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Multiple Internal Revenue Service Information Collection Requests

AGENCY: Departmental Offices, U.S. Department of the Treasury.

ACTION: Notice.

SUMMARY: The Department of the Treasury will submit the following information collection requests to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995, on or after the date of publication of this notice. The public is invited to submit comments on these requests.

DATES: Comments should be received on or before November 28, 2018 to be assured of consideration.

ADDRESSES: Send comments regarding the burden estimate, or any other aspect of the information collection, including suggestions for reducing the burden, to (1) Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: Desk Officer for Treasury, New Executive Office Building, Room 10235, Washington, DC 20503, or email at *OIRA_Submission@OMB.EOP.gov* and (2) Treasury PRA Clearance Officer, 1750 Pennsylvania Ave. NW, Suite 8100, Washington, DC 20220, or email at *PRA@treasury.gov.*

FOR FURTHER INFORMATION CONTACT: Copies of the submissions may be obtained from Jennifer Quintana by emailing *PRA@treasury.gov,* calling (202) 622–0489, or viewing the entire information collection request at *www.reginfo.gov.*

SUPPLEMENTARY INFORMATION:

Internal Revenue Service (IRS)

1. Title: Employers' Identification Numbers.

OMB Control Number: 1545–0003.

Type of Review: Extension without change of a currently approved collection.

Description: Taxpayers required to have an identification number for use on any return, statement, or other document must prepare and file Form SS–4 or Form SS–4–PR (Puerto Rico only) to obtain a number. The information is used by the IRS and the Social Security Administration in tax administration and by the Bureau of the Census for business statistics.

Form: SS–4–PR, SS–4.

Affected Public: Businesses or other for-profits, Not-for-profit organizations, Government agencies.

Estimated Number of Respondents: 2,419,064.

Frequency of Response: On occasion.

Estimated Total Number of Annual Responses: 1,612,708.

Estimated Time per Response: 34 minutes.

Estimated Total Annual Burden Hours: 903,116.

2. Title: Information and Initial Excise Tax Return for Black Lung Benefit Trusts and Certain Related Persons and Form 6069, Return of Excise Tax on Excess Contributions to Black Lung Benefit Trust Under Section 4953 and Computation of Section 192 Deduction.

OMB Control Number: 1545–0049.

Type of Review: Extension without change of a currently approved collection.

Description: IRS uses Form 990–BL to monitor activities of black lung benefit trusts, and to collect excise taxes on these trusts and certain related persons if they engage in proscribed activities. The tax is figured on Schedule A of Form 990–BL. Form 6069 is used by coal mine operators to figure the maximum deduction to a black lung benefit trust. If excess contributions are made, IRS uses the form to figure and collect the tax on excess contributions.

Form: 990–BL, 6069.

Affected Public: Businesses or other for-profits.

Estimated Number of Respondents: 23.

Frequency of Response: Annually.

Estimated Total Number of Annual Responses: 23.

Estimated Time per Response: 34.25 hours for Form 990–BL, 10 hours for Form 6069.

Estimated Total Annual Burden Hours: 764.

3. Title: Form 1028—Application for Recognition of Exemption Under Section 521 of the Internal Revenue Code.

OMB Control Number: 1545–0058.

Type of Review: Extension without change of a currently approved collection.

Description: Farmers' cooperatives must file Form 1028 to apply for exemption from Federal income tax as being organizations described in IRC section 521. The information on Form 1028 provides the basis for determining whether the applicants are exempt.

Form: 1028.

Affected Public: Businesses or other for-profits.

Estimated Number of Respondents: 50.

Frequency of Response: On occasion.

Estimated Total Number of Annual Responses: 50.

Estimated Time per Response: 71.88 hours.

Estimated Total Annual Burden Hours: 3,594.

4. Title: Form 4029—Application for Exemption From Social Security and Medicare Taxes and Waiver of Benefits.

OMB Control Number: 1545–0064.

Type of Review: Extension without change of a currently approved collection.

Description: Form 4029 is used by members of recognized religious groups to apply for exemption from social security and Medicare taxes under IRC sections 1402(g) and 3127. The information is used to approve or deny exemption from social security and Medicare taxes.

Form: 4029.

Affected Public: Individuals and households.

Estimated Number of Respondents: 3,754.

Frequency of Response: Once.

Estimated Total Number of Annual Responses: 3,754.

Estimated Time per Response: 61 minutes.

Estimated Total Annual Burden Hours: 3,792.

5. Title: Heavy Highway Vehicle Use Tax Return.

OMB Control Number: 1545–0143.

Type of Review: Revision of a currently approved collection.

Description: Form 2290 is used to compute and report the tax imposed by section 4481 on the highway use of certain motor vehicles. The information is used to determine whether the taxpayer has paid the correct amount of tax.

Form: 2290, 2290–SP.

Affected Public: Businesses or other for-profits.

Estimated Number of Respondents: 629,000.

Frequency of Response: Annually.

Estimated Total Number of Annual Responses: 629,000.

Estimated Time per Response: 42.86 hours.

Estimated Total Annual Burden Hours: 27,120,040.

6. Title: International Boycott Report.

OMB Control Number: 1545–0216.

Type of Review: Revision of a currently approved collection.

Description: Form 5713 and related Schedules A, B, and C are used by any entity that has operations in a ''boycotting'' country. If that entity cooperates with or participates in an international boycott it loses a portion of the foreign tax credit, or deferral of FSC and IC–DISC benefits. The IRS uses Form 5713 to determine if any of the above benefits should be lost. The information is also used as the basis for a report to Congress.

Form: 5713 and Schedules A–C.

Affected Public: Businesses or other for-profits.

Estimated Number of Respondents: 5,632.

Frequency of Response: Annually.

Estimated Total Number of Annual Responses: 5,632.

Estimated Time per Response: 25.5 hours.

Estimated Total Annual Burden Hours: 143,498.

7. Title: Claims for credit or refund by tax return preparers or appraisers.

OMB Control Number: 1545–0240.

Type of Review: Extension without change of a currently approved collection.

Description: Internal Revenue Code section 6696(c) sets forth the procedure for claiming a refund by a tax return preparer who has overpaid any of the tax return preparer's penalties. TD 9436 contained final regulations implementing amendments to the tax return preparer penalties under sections 6694 and 6695 of the Internal Revenue Code (Code) and related provisions under sections 6060, 6107, 6109, 6696, and 7701(a)(36) reflecting amendments to the Code made by section 8246 of the Small Business and Work Opportunity Tax Act of 2007 and section 506 of the Tax Extenders and Alternative Minimum Tax Relief Act of 2008. 26 CFR 1.6696–1 outlines the procedures for claims for credit or refund by tax return preparers or appraisers. Notwithstanding section 301.6402–2(c), Form 6118, ''Claim for Refund of Income Tax Return Preparer and Promoter Penalties,'' is the form prescribed for making a claim as provided in this section with respect to penalties under sections 6694 and 6695.

Form: 6118.

Affected Public: Individuals and households.

Estimated Number of Respondents: 10,000.

Frequency of Response: On Occasion.

Estimated Total Number of Annual Responses: 10,000.

Estimated Time per Response: 68 minutes.

Estimated Total Annual Burden Hours: 11,400.

8. Title: Request for Copy of Tax Return.

OMB Control Number: 1545–0429.

Type of Review: Extension without change of a currently approved collection.

Description: 26 U.S.C. 7513 allows for taxpayers to request a copy of a tax

return. Form 4506 is used by a taxpayer to request a copy of a Federal tax form. The information provided will be used for research to locate the tax form and to ensure that the requester is the taxpayer or someone authorized by the taxpayer.

Form: 4506.

Affected Public: Individuals and households.

Estimated Number of Respondents: 325,000.

Frequency of Response: On occasion.

Estimated Total Number of Annual Responses: 325,000.

Estimated Time per Response: 48 minutes.

Estimated Total Annual Burden Hours: 260,000.

9. Title: Form 4810—Request for Prompt Assessment Under Internal Revenue Code Section 6501(d).

OMB Control Number: 1545–0430.

Type of Review: Extension without change of a currently approved collection.

Description: Form 4810 is used to request a prompt assessment under IRC Section 6501(d). IRS uses this form to locate the return to expedite processing of the taxpayer's request.

Form: 4810.

Affected Public: Businesses or other for-profits.

Estimated Number of Respondents: 4,000.

Frequency of Response: On occasion.

Estimated Total Number of Annual Responses: 4,000.

Estimated Time per Response: 6.2 hours.

Estimated Total Annual Burden Hours: 24,800.

10. Title: TD 7898—Employers Qualified Educational Assistance Programs.

OMB Control Number: 1545–0768.

Type of Review: Extension without change of a currently approved collection.

Description: Respondents include employers who maintain education assistance programs for their employees. The information verifies that programs are qualified and that employees may exclude educational assistance from their gross incomes. Section 127(a) of the Internal Revenue Code provides that the gross income of any employee does not include amounts paid or expenses incurred by an employer if furnished to the employee pursuant to a qualified educational assistance program. Section 127(b) sets forth the requirements which must be met in order for a program to be a qualified educational assistance program. Among these requirements, section 127(b)(1) requires that a program be a separate written plan of the employer. Treas. Reg. section 1.127 2(b) restates this requirement. No advance approval of the plan is required. Employees must be notified of the availability and terms of the program. Section 127(b)(6) and Treas. Reg. section 1.127 2(g). Pursuant to section 6001, substantiation may be required to verify that employees are entitled to exclude the value of such benefits from their gross incomes.

Form: None.

Affected Public: Businesses or other for-profits.

Estimated Number of Respondents: 5,200.

Frequency of Response: Annually.

Estimated Total Number of Annual Responses: 5,200.

Estimated Time per Response: 7 minutes.

Estimated Total Annual Burden Hours: 615.

11. Title: Inspection of Applications for Tax Exemption and Applications for Determination Letters for Pension and Other Plans.

OMB Control Number: 1545–0817.

Type of Review: Extension without change of a currently approved collection.

Description: Internal Revenue Code section 6104 requires applications for tax exempt status, annual reports of private foundations, and certain portions of returns to be open for public inspection. Some information may be withheld from disclosure. The Internal Revenue Service needs the required information to comply with requests for public inspection.

Form: None.

Affected Public: Businesses or other for-profits.

Estimated Number of Respondents: 42,370.

Frequency of Response: On Occasion.

Estimated Total Number of Annual Responses: 42,370.

Estimated Time per Response: 12 minutes.

Estimated Total Annual Burden Hours: 8,538.

12. Title: Effective Dates and Other Issues Arising Under the Employee Benefit Provisions of the Tax.

OMB Control Number: 1545–0916.

Type of Review: Extension without change of a currently approved collection.

Description: Section 505(c) of the Internal Revenue Code provides that an organization will not be recognized as exempt under section 501(c)(9) as a voluntary employees' beneficiary association, under section 501(c)(17) as a trust forming part of a plan for the payment of supplemental unemployment compensation benefits, or under section 501(c)(20) as a trust forming part of a qualified group legal services plan unless notification is given to the Internal Revenue Service. The temporary regulations provide that the notice is filed by submitting a properly completed and executed Form 1024, ''Application for Recognition of Exemption Under Section 501(a)'' together with specified additional information. The temporary regulations further provide that an organization or trust that has previously notified the Internal Revenue Service of its claim to exemption under sections 501(c)(9), (17) or (20) or its claim to exempt status under those sections pursuant to another provision of the Internal Revenue Code, is not required under section 505(c) to submit a revocation.

Section 1042(a) of the Internal Revenue Code provides that a taxpayer may elect not to recognize gain on the sale of certain ''qualified securities'' to an employee stock ownership plan (ESOP) or worker owned cooperative, where ''qualified replacement property'' is purchased within a specified period. Section 1042(b)(4) requires that a written statement (described in section 1042(b)(4)(B)) be filed along with such an election. The temporary regulations at section 1.1042 lT (Q&A 3) require that a taxpayer elect section 1042(a) treatment by attaching a statement to his income tax return. Section 1.1042–lT (Q&A 2(d) requires the taxpayer to file a written statement of the employer whose employees are covered by the ESOP, consenting to the application of section 4978(a).

Form: None.

Affected Public: Businesses or other for-profits.

Estimated Number of Respondents: 8,000.

Frequency of Response: On occasion.

Estimated Total Number of Annual Responses: 8,000.

Estimated Time per Response: 30 minutes.

Estimated Total Annual Burden Hours: 4,000.

13. Title: Form 2587—Application for Special Enrollment Examination.

OMB Control Number: 1545–0949.

Type of Review: Revision of a currently approved collection.

Description: This information relates to the determination of the eligibility of individuals seeking enrollment status to practice before the Internal Revenue Service.

Form: 2587.

Affected Public: Individuals and households.

Estimated Number of Respondents: 11,000.

Frequency of Response: Once.

Estimated Total Number of Annual Responses: 11,000.

Estimated Time per Response: 6 minutes.

Estimated Total Annual Burden Hours: 11,000.

Authority: 44 U.S.C. 3501 *et seq.*

Dated: October 23, 2018.

Spencer W. Clark,

Treasury PRA Clearance Officer.

[FR Doc. 2018–23515 Filed 10–26–18; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF VETERANS AFFAIRS

Solicitation of Nomination for Appointment to the Veterans' Advisory Committee on Rehabilitation

AGENCY: Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: The Department of Veterans Affairs (VA), Veterans Benefits Administration (VBA), is seeking nominations of qualified candidates to be considered for appointment as a member of the Veterans' Advisory Committee on Rehabilitation (hereinafter referred to as ''the Committee'').

DATES: Nominations for membership on the Committee must be received by November 23, 2018, no later than 4:00 p.m., eastern standard time. Packages received after this time will not be considered for the current membership cycle.

ADDRESSES: All nomination packages should be sent to the Veterans Benefits Administration (28), Department of Veterans Affairs, 1800 G. Street NW, Washington, DC 20006, or emailed (recommended) to *Sabrina.McNeil@va.gov.*

SUPPLEMENTARY INFORMATION: In carrying out the duties set forth, the Committee responsibilities include, but are not limited to submit to the Secretary an annual report on the rehabilitation programs and activities of the VA. VBA is requesting nominations for upcoming vacancies on the Committee. Members of the Committee are appointed by the Secretary from the general public, including but not limited to:

(1) Veterans with service-connected disabilities;

(2) Persons who have distinguished themselves in the public and private sectors in the fields of rehabilitation medicine, vocational guidance, vocational rehabilitation, and employment and training programs

(3) Ex officio members of the Committee shall include one representative from the Veterans Health Administration and one from the Veterans Benefits Administration; one representative each from the Rehabilitation Services Administration of the Department of Education, and the National Institute for Handicapped Research of the Department of Education; and one representative of the Assistant Secretary for Veterans' Employment and Training of the Department of Labor.

Authority: The Committee was established pursuant to 38 U.S.C. 3121, to advise the Secretary of VA with respect to the administration of Veterans' rehabilitation programs. Nominations of qualified candidates are being sought to fill upcoming vacancies on the Committee.

To the extent possible, the Secretary seeks members who have diverse professional and personal qualifications. We ask that nominations include information of this type so that VA can ensure a balanced Committee membership. Individuals appointed to the Committee by the Secretary shall be invited to serve a two- or three-year term. The Secretary may reappoint a member for an additional term of service. In accordance with Federal Travel Regulation, Committee members will receive travel expenses and a per diem allowance for any travel made in association with duties as members of the Committee and within federal travel guidelines. Self-nominations are acceptable. Any letters of nomination from organizations or other individuals should accompany the package when it is submitted. Non-Veterans are also eligible for nomination.

Requirements for Nomination Submission

Nominations should be typed (one nomination per nominator). Nomination package should include: (1) A letter of nomination that clearly states the name and affiliation of the nominee, the basis for the nomination (*i.e.,* specific attributes which qualify the nominee for service in this capacity), and a statement from the nominee indicating that he/she is a U.S. citizen and is willingness to serve as a member of the Committee; (2) the nominee's contact information, including name, mailing address, telephone numbers, and email address; (3) the nominee's curriculum vitae; (4) a summary of the nominee's experience and qualifications relative to the membership considerations described above; and (5) a statement confirming that he/she is not a federally-registered lobbyist.

The Department makes every effort to ensure that the membership of VA Federal advisory committees is fairly balanced in terms of points of view represented and the committee's function. Appointments to this Committee shall be made without discrimination based on a person's race, color, religion, sex, sexual orientation, gender identity, national origin, age, disability, or genetic information. Nominations must state that the nominee appears to have no conflict of interest that would preclude membership. An ethics review is conducted for each selected nominee.

Dated: October 23, 2018.

LaTonya L. Small,

Federal Advisory Committee Management Officer.

[FR Doc. 2018–23503 Filed 10–26–18; 8:45 am]

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FEDERAL REGISTER

Vol. 83 Monday,

No. 209 October 29, 2018

Part II

Department of the Treasury

Internal Revenue Service

Department of Labor

Employee Benefits Security Administration

Department of Health and Human Services

26 CFR Parts 1 and 54

29 CFR Parts 2510 and 2590

45 CFR Parts 144, 146, 147, et al.

Health Reimbursement Arrangements and Other Account-Based Group Health Plans; Proposed Rule

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Parts 1 and 54

[REG–136724–17]

RIN 1545–BO46

DEPARTMENT OF LABOR

Employee Benefits Security Administration

29 CFR Parts 2510 and 2590

RIN 1210–AB87

DEPARTMENT OF HEALTH AND HUMAN SERVICES

45 CFR Parts 144, 146, 147, and 155

[CMS–9918–P]

RIN 0938–AT90

Health Reimbursement Arrangements and Other Account-Based Group Health Plans

AGENCY: Internal Revenue Service, Department of the Treasury; Employee Benefits Security Administration, Department of Labor; Centers for Medicare & Medicaid Services, Department of Health and Human Services.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document sets forth proposed rules to expand opportunities for working men and women and their families to access affordable, quality healthcare through proposed changes to regulations under various provisions of the Public Health Service Act (PHS Act), the Employee Retirement Income Security Act (ERISA), and the Internal Revenue Code (Code) regarding health reimbursement arrangements (HRAs) and other account-based group health plans. (For simplicity, this preamble generally refers only to HRAs, but references to HRAs should also be considered to include other account-based group health plans, unless indicated otherwise.) Specifically, these proposed rules allow integrating HRAs with individual health insurance coverage, if certain conditions are met. The proposed rules also set forth conditions under which certain HRAs would be recognized as limited excepted benefits. Also, the Department of the Treasury (Treasury Department) and the Internal Revenue Service (IRS) propose rules regarding premium tax credit (PTC) eligibility for individuals offered coverage under an HRA integrated with individual health insurance coverage. In addition, the Department of Labor (DOL) proposes a clarification to provide plan sponsors with assurance that the individual health insurance coverage the premiums of which are reimbursed by an HRA or a qualified small employer health reimbursement arrangement (QSEHRA) does not become part of an ERISA plan, provided certain conditions are met. Finally, the Department of Health and Human Services (HHS) proposes rules that would provide a special enrollment period in the individual market for individuals who gain access to an HRA integrated with individual health insurance coverage or who are provided a QSEHRA. The goal of these proposed rules is to expand the flexibility and use of HRAs to provide more Americans with additional options to obtain quality, affordable healthcare. The proposed rules would affect employees and their family members; employers, employee organizations, and other plan sponsors; group health plans; health insurance issuers; and purchasers of individual health insurance coverage.

DATES: Comments are due on or before December 28, 2018.

ADDRESSES: Written comments may be submitted to the addresses specified below. Any comment that is submitted will be shared with the DOL and HHS. Please do not submit duplicates.

All comments will be made available to the public. Warning: Do not include any personally identifiable information (such as name, address, or other contact information) or confidential business information that you do not want publicly disclosed. All comments are posted on the internet exactly as received, and can be retrieved by most internet search engines. No deletions, modifications, or redactions will be made to the comments received, as they are public records. Comments may be submitted anonymously.

Comments, identified by REG–136724–17, may be submitted by one of the following methods:

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

Mail: CC:PA:LPD:PR (REG–136724–17), Room 5205, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044.

Hand or courier delivery: Monday through Friday between the hours of 8 a.m. and 4 p.m. to CC:PA:LPD:PR (REG–136724–17), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue NW, Washington, DC 20224.

Comments received will be posted without change to *www.regulations.gov* and available for public inspection.

Inspection of Public Comments: All comments received before the close of the comment period are available for viewing by the public, including any personally identifiable information that is included in a comment. All comments received before the close of the comment period will be posted on the following website as soon as possible after they have been received: *https://www.regulations.gov.* Follow the search instructions on that website to view public comments.

FOR FURTHER INFORMATION CONTACT: Christopher Dellana, Internal Revenue Service, Department of the Treasury, at (202) 317–5500; Elizabeth Schumacher or Matthew Litton, Employee Benefits Security Administration, Department of Labor, at (202) 693–8335; David Mlawsky or Cam Clemmons, Centers for Medicare & Medicaid Services, Department of Health and Human Services, at (410) 786–1565.

Customer Service Information: Individuals interested in obtaining information from the DOL concerning employment-based health coverage laws may call the EBSA Toll-Free Hotline at 1–866–444–EBSA (3272) or visit the DOL's website (*www.dol.gov/ebsa*). In addition, information from HHS on private health insurance coverage and coverage provided by nonfederal governmental group health plans can be found on the Centers for Medicare & Medicaid Services (CMS) website (*www.cms.gov/cciio*), and information on healthcare reform can be found at *www.HealthCare.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

A. Executive Order 13813

On October 12, 2017, President Trump issued Executive Order 13813,[1] ''Promoting Healthcare Choice and Competition Across the United States,'' stating, in part, that the ''Administration will prioritize three areas for improvement in the near term: Association health plans (AHPs), short-term, limited-duration insurance (STLDI), and health reimbursement arrangements (HRAs).'' With regard to HRAs, the Executive Order directs the Secretaries of the Treasury, Labor, and HHS to ''consider proposing regulations or revising guidance, to the extent permitted by law and supported by sound policy, to increase the usability of HRAs, to expand employers' ability to offer HRAs to their employees, and to allow HRAs to be used in conjunction with nongroup coverage.'' The Executive Order further provides that

[1] 82 FR 48385 (Oct. 17, 2017).

expanding ''the flexibility and use of HRAs would provide many Americans, including employees who work at small businesses, with more options for financing their healthcare.'' The proposed rules have been developed in response to this Executive Order.[2]

B. Health Reimbursement Arrangements and Other Account-Based Group Health Plans

1. In General

An account-based group health plan is an employer-provided group health plan that provides for reimbursement of expenses for medical care (as defined under section 213(d) of the Code) (medical care expenses), subject to a maximum fixed-dollar amount of reimbursements for a period (for example, a calendar year). An HRA is a type of account-based group health plan funded solely by employer contributions (with no salary reduction contributions or other contributions by employees) that reimburses an employee solely for medical care expenses incurred by the employee, or the employee's spouse, dependents, and children who, as of the end of the taxable year, have not attained age 27, up to a maximum dollar amount for a coverage period.[3] The reimbursements under these types of arrangements are excludable from the employee's income and wages for Federal income tax and employment tax purposes. Amounts that remain in the HRA at the end of the year often may be used to reimburse medical care expenses incurred in later years, depending on the terms of the HRA.

HRAs are not the only type of account-based group health plan. For example, an employer payment plan is also an account-based group health plan. An employer payment plan is an arrangement under which an employer reimburses an employee for some or all of the premium expenses incurred for individual health insurance coverage, or other non-employer sponsored hospital or medical insurance, such as a reimbursement arrangement described in Revenue Ruling 61–146, 1961–2 CB 25, or an arrangement under which the employer uses its funds directly to pay the premium for individual health insurance coverage or other non-employer sponsored hospital or medical insurance covering the employee.[4] Other examples of account-based group health plans include health flexible spending arrangements (health FSAs) and certain other employer-provided medical reimbursement plans that are not HRAs.[5]

2. Application of the Patient Protection and Affordable Care Act to HRAs and Other Account-Based Group Health Plans

The Patient Protection and Affordable Care Act, Public Law 111–148, was enacted on March 23, 2010; the Health Care and Education Reconciliation Act of 2010, Public Law 111–152, was enacted on March 30, 2010 (collectively, PPACA). PPACA reorganized, amended, and added to the provisions of part A of title XXVII of the PHS Act relating to health coverage requirements for group health plans and health insurance issuers in the group and individual markets. The term ''group health plan'' includes both insured and self-insured group health plans.

PPACA also added section 715 to ERISA and section 9815 to the Code to incorporate the provisions of part A of title XXVII of the PHS Act, PHS Act sections 2701 through 2728 (the market requirements), into ERISA and the Code, making them applicable to group health plans and health insurance issuers providing health insurance coverage in connection with group health plans. In accordance with section 9831(b) and (c) of the Code, section 732(b) and (c) of ERISA, and sections 2722(b), (c) and 2763 of the PHS Act, the market requirements do not apply to a group health plan or health insurance issuers in the group or individual markets in relation to their provision of excepted benefits described in section 9832(c) of the Code, section 733(c) of ERISA, and section 2791(c) of the PHS Act.[6] See the discussion later in this preamble for additional background on excepted benefits. In addition, in accordance with section 9831(a)(2) of the Code and section 732(a) of ERISA, the market requirements do not apply to a group health plan that has fewer than two participants who are current employees on the first day of the plan year.[7]

PHS Act section 2711, as added by PPACA, generally prohibits group health plans and health insurance issuers offering group or individual health insurance coverage[8] from establishing for any individual any lifetime or annual limits on the dollar value of essential health benefits (EHBs), as defined in section 1302(b) of PPACA. PHS Act section 2711, however, does not prevent a group health plan, or a health insurance issuer offering group or individual health insurance coverage, from placing an annual or lifetime dollar limit for any individual on specific covered benefits that are not EHBs, to the extent these limits are otherwise permitted under applicable law.[9]

[2] In response to Executive Order 13813, on June 21, 2018, DOL published the Definition of Employer under Section 3(5) of ERISA—Association Health Plans final rule and on August 3, 2018, DOL, HHS and the Treasury Department published the Short-Term, Limited-Duration Insurance final rule. *See* the Association Health Plan final rule at 83 FR 28912 and the Short-Term, Limited-Duration Insurance final rule at 83 FR 38212.

[3] *See* IRS Notice 2002–45, 2002–02 CB 93; Revenue Ruling 2002–41, 2002–2 CB 75; IRS Notice 2013–54, 2013–40 IRB 287.

[4] For more information about employer payment plans, *see* IRS Notice 2013–54, Q1 & Q3, and IRS Notice 2015–17, Q4 & Q5, 2015–14 IRB 845.

[5] A QSEHRA, as defined in section 9831(d) of the Code, is not a group health plan for purposes of the market requirements of the Code (except as provided in section 4980I(f)(4) of the Code), parts 6 and 7 of ERISA, and title XXII and XXVII of the PHS Act, and is not included in the definition of HRAs and other account-based group health plans for purposes of these proposed regulations or this preamble. A QSEHRA is, however, considered a group health plan under the PHS Act for purposes of part C of title XI of the Social Security Act (42 U.S.C. 1320d, *et seq.*). *See* section 2791(a)(1) of the PHS Act, as amended by section 18001(c) of the Cures Act. As previously noted, the preamble generally refers only to HRAs, but references to HRAs should also be considered to include other account-based group health plans as defined in these proposed rules, unless otherwise specified. This term does not include QSEHRAs, medical savings accounts (MSAs), or health savings accounts (HSAs). In addition, for purposes of these proposed rules, the term ''HRA or other account-based group health plan'' does not include an employer arrangement that reimburses the cost of individual health insurance coverage in a cafeteria plan under section 125 of the Code (cafeteria plan premium arrangements); however see later in this preamble for a clarification that plan sponsors may offer such an arrangement in addition to an HRA integrated with individual health insurance coverage in certain circumstances and see later in this preamble for a related comment solicitation.

[6] While the PPACA amendments to PHS Act section 2722(b) and (c) (formerly section 2721(c) and (d)) could be read as restricting the exemption for excepted benefits so that it applies only with respect to subpart 2 of part A of title XXVII of the PHS Act, HHS does not intend to use its resources to enforce the market requirements with respect to excepted benefits offered by non-federal governmental plans and encourages States to adopt a similar approach with respect to issuers of excepted benefits. *See* 75 FR 34537 at 34539–34540 (June 17, 2010).

[7] While the PPACA amendments to title XXVII of the PHS Act removed the parallel provision at section 2722(a) (formerly section 2721(a)), HHS follows a similar approach for retiree-only non-federal governmental plans and encourages States to adopt a similar approach with respect to health insurance issuers of retiree-only plans. *See* 75 FR 34537, 34539–34540 (June 17, 2010).

[8] PHS Act section 2711 applies to grandfathered health plans, except that the annual dollar limit prohibition does not apply to grandfathered individual health insurance coverage. Grandfathered health plans are health plans that were in existence as of March 23, 2010, and that are only subject to certain provisions of PPACA, as long as they maintain status as grandfathered health plans under the applicable regulations. *See* 26 CFR 54.9815–1251, 29 CFR 2590.715–1251, and 45 CFR 147.140.

[9] For information regarding EHBs, *see* HHS's February 25, 2013 final regulations addressing EHBs under section 1302 of PPACA (78 FR 12834);

Continued

HRAs are subject to PHS Act section 2711. An HRA generally will fail to comply with PHS Act section 2711 because the arrangement is a group health plan that imposes an annual dollar limit on EHBs that the HRA will reimburse for an individual.

As explained in prior guidance, however, the Treasury Department, DOL, and HHS (collectively, the Departments) have determined that the annual dollar limit prohibition is not applicable to certain account-based group health plans that are subject to other statutory provisions limiting the benefits available under those plans.[10] Specifically, the Departments have explained that the annual dollar limit prohibition does not apply to health FSAs that are offered through a cafeteria plan under section 125 of the Code (cafeteria plan) because section 9005 of PPACA specifically limits salary reduction contributions to health FSAs to $2,500 (indexed for inflation) per year.[11] Similarly, although medical savings accounts (MSAs) under section 220 of the Code and health savings accounts (HSAs) under section 223 of the Code generally are not treated as group health plans subject to the market requirements,[12] the Departments have concluded that the annual dollar limit prohibition would not apply to an MSA or HSA even if a particular arrangement did meet the criteria to be a group health plan because both types of arrangements are subject to specific statutory provisions that limit the contributions.[13] Therefore, the proposed rules do not apply to MSAs, HSAs, or, in certain circumstances, health FSAs.

PHS Act section 2713, as added by PPACA, requires non-grandfathered group health plans, and health insurance issuers offering non-grandfathered group or individual health insurance coverage, to provide coverage for certain preventive services without imposing any cost-sharing requirements for these services.[14] Non-grandfathered HRAs are subject to and fail to comply with PHS Act section 2713 because, while HRAs may be used to reimburse the costs of preventive services, HRAs do not reimburse such costs after the HRAs have reimbursed the maximum dollar amount for a coverage period, and therefore HRAs fail to provide the required coverage, and violate the prohibition on imposing cost-sharing for preventive services.[15]

3. Prior Regulations and Guidance on Integration of HRAs and Other Account-Based Group Health Plans

The Departments have previously issued regulations and subregulatory guidance regarding the application of PHS Act sections 2711 and 2713 to HRAs.[16] The regulations and guidance generally provide that, if an HRA is ''integrated'' with other group health plan coverage that complies with PHS Act sections 2711 and 2713, the HRA would be considered in compliance because the combined arrangement complies with PHS Act sections 2711 and 2713. The regulations and guidance also provide that HRAs may be integrated with Medicare and TRICARE coverage if certain conditions are met, but may not be integrated with individual health insurance coverage for purposes of complying with PHS Act sections 2711 and 2713.[17]

In the preamble to the 2010 interim final regulations under PHS Act section 2711, the Departments provided that HRAs may be integrated with ''other coverage as part of a group health plan'' that complies with PHS Act section 2711 in order for the HRAs to be considered to satisfy PHS Act section 2711.[18] The interim final regulations did not, however, set forth rules for implementing integration; the integration methods were set forth in later subregulatory guidance and subsequently included in the final regulations under PHS Act section 2711.

On September 13, 2013, the Treasury Department and the IRS issued Notice 2013–54, the DOL issued Technical Release 2013–03, and HHS issued contemporaneous guidance explaining that HHS concurred with the DOL and Treasury Department guidance.[19] This guidance stated that an HRA may not be integrated with individual health insurance coverage for purposes of PHS Act sections 2711 and 2713, but described methods for integrating an

see also HHS Notice of Benefit and Payment Parameters for 2016 (80 FR 10871, Feb. 27, 2015). In addition, HHS issued final rules providing States with additional flexibility to define EHBs, starting with plan years beginning on or after January 1, 2020. 45 CFR 156.111 (83 FR 16930, Apr. 17, 2018). The current regulations under PHS Act section 2711 include a definition of EHBs that applies for plans that are not required to provide EHBs. *See* 26 CFR 54.9815–2711(c), 29 CFR 2590.715–2711(c), and 45 CFR 147.126(c). As explained later in this preamble, the proposed rules set forth in this document include proposed amendments to the definition of EHBs under the PHS Act section 2711 regulations to reflect the updated final EHB rules.

[10] *See* 80 FR 72192, 72201 (November 18, 2015).

[11] Notwithstanding this exclusion for certain health FSAs from the application of the annual dollar limit prohibition, regulations under section 125 of the Code provide that health FSAs are not permitted to reimburse employees for premiums for health coverage. *See* proposed 26 CFR 1.125–5(k)(4) (72 FR 43938, 43959 (Aug. 6, 2007)).

[12] *See* 75 FR 37188, 37190 (June 28, 2010) and IRS Notice 2004–2, Q1 & Q3, 2004–2 IRB 269, which defines an HSA as a tax-exempt trust or custodial account and a high-deductible health plan as a health plan; *see also* DOL Field Assistance Bulletins 2004–01 and 2006–02, providing guidance regarding HSAs not constituting ''employee welfare benefit plans'' covered by title I of ERISA where employer involvement with the HSA is limited.

[13] *See* 75 FR 37188, 37190 (June 28, 2010).

[14] *See also* 26 CFR 54.9815–2713; 29 CFR 2590.715–2713; and 45 CFR 147.130.

[15] Because MSAs and HSAs are generally not treated as group health plans, these arrangements are not subject to PHS Act section 2713. Health FSAs are group health plans and, unless they are excepted benefits, will fail to satisfy the requirements of PHS Act section 2713 unless integrated with other coverage that satisfies these requirements. For more information about the application of PHS Act section 2713 to health FSAs, *see* IRS Notice 2013–54, Q&A 7; DOL Technical Release 2013–03, Q&A–7; and Insurance Standards Bulletin, Application of Affordable Care Act Provisions to Certain Healthcare Arrangements, September 16, 2013, available at *https://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/cms-hra-notice-9-16-2013.pdf.*

[16] Regulations and subregulatory guidance issued on this topic include: (1) 75 FR 37188 (June 28, 2010); (2) FAQs about Affordable Care Act Implementation (Part XI), available at *https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/faqs/aca-part-xi.pdf* or *http://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/aca_implementation_faqs11.html;* (3) IRS Notice 2013–54 and DOL Technical Release 2013–03, issued on September 13, 2013, and Insurance Standards Bulletin, Application of Affordable Care Act Provisions to Certain Healthcare Arrangements, September 16, 2013, available at: *https://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/cms-hra-notice-9-16-2013.pdf;* (4) IRS FAQ on Employer Healthcare Arrangements, available at *https://www.irs.gov/affordable-care-act/employer-health-care-arrangements;* (5) FAQs about Affordable Care Act Implementation (Part XXII), available at *https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/faqs/aca-part-xxii.pdf* or *https://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/Downloads/FAQs-Part-XXII-FINAL.pdf;* (6) IRS Notice 2015–17, issued on February 18, 2015, (as detailed in Notice 2015–17, DOL and HHS reviewed and agreed with the guidance in Part II); (7) 80 FR 72192 (November 18, 2015); (8) Notice 2015–87, issued on December 16, 2015; (9) IRS Notice 2016–17, DOL Technical Release No. 2016–01, and Insurance Standards Bulletin, Application of the Market Reforms and Other Provisions of the Affordable Care Act to Student Health Coverage, each issued on February 5, 2016, available at *https://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/student-health-bulletin.pdf;* (10) FAQs about Affordable Care Act Implementation Part 33, available at *https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/faqs/aca-part-33.pdf* or *https://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/Downloads/ACA-FAQ-Set-33-Final.pdf;* and (11) FAQs about Affordable Care Act Implementation Part 37, available at *https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/faqs/aca-part-37.pdf* or *https://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/Downloads/FAQs-Part-37.pdf.*

[17] 26 CFR 54.9815–2711(d)(4); 29 CFR 2590.715–2711(d)(4) and 45 CFR 147.126(d)(4).

[18] *See* 75 FR 37188, 37190–37191 (June 28, 2010).

[19] *See* Insurance Standards Bulletin, Application of Affordable Care Act Provisions to Certain Healthcare Arrangements, September 16, 2013, available at *https://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/cms-hra-notice-9-16-2013.pdf.*

HRA with another group health plan.[20] The provisions in this guidance were later incorporated into the final regulations under PHS Act section 2711, which are summarized later in this section of the preamble.

On November 6, 2014, the Departments issued FAQs about Affordable Care Act Implementation (Part XXII).[21] Q&A–1 reiterated and clarified prior subregulatory guidance by explaining that if an employer offers its employees cash to reimburse the purchase of individual health insurance coverage, the payment arrangement is a group health plan, without regard to whether the employer treats the money as a pre-tax or post-tax benefit to the employee, and may not be integrated with individual health insurance coverage, and therefore will fail to comply with PHS Act sections 2711 and 2713.[22]

On February 18, 2015, the Treasury Department and the IRS issued Notice 2015–17. Q&A–3 of Notice 2015–17 provides that an arrangement under which an employer reimburses (or pays directly) some or all of the medical care expenses for employees covered by TRICARE constitutes an HRA and may not be integrated with TRICARE to comply with PHS Act sections 2711 and 2713 because TRICARE is not a group health plan for integration purposes. However, Q&A–3 states that an HRA that pays for or reimburses medical care expenses for employees covered by TRICARE may be integrated with another group health plan offered by the employer for purposes of PHS Act sections 2711 and 2713 if (1) the employer offers a group health plan (other than the HRA) to the employee that does not consist solely of excepted benefits and that provides minimum value (MV); (2) the employee participating in the HRA is enrolled in TRICARE; (3) the HRA is available only to employees who are enrolled in TRICARE; and (4) the HRA is limited to reimbursement of cost sharing and excepted benefits, including TRICARE supplemental premiums. Notice 2015–17 also included a general reminder that to the extent such an arrangement is available to active employees it may be subject to restrictions under other laws that prohibit offering financial or other incentives for TRICARE-eligible employees to decline employer-provided group health plan coverage, similar to the Medicare secondary payer rules.

Q&A–3 of Notice 2015–17 also provides that an employer payment plan through which an employer reimburses (or pays directly) all or a portion of Medicare part B or D premiums for employees may not be integrated with Medicare coverage to comply with PHS Act sections 2711 and 2713 because Medicare coverage is not a group health plan. But it provides that this type of employer payment plan may be integrated with another group health plan offered by the employer for purposes of PHS Act sections 2711 and 2713 if: (1) The employer offers a group health plan (other than the employer payment plan) to the employee that does not consist solely of excepted benefits and that provides MV; (2) the employee participating in the employer payment plan is actually enrolled in Medicare parts A and B; (3) the employer payment plan is available only to employees who are enrolled in Medicare part A and part B or D; and (4) the employer payment plan is limited to reimbursement of Medicare part B or D premiums and excepted benefits, including Medigap premiums. Notice 2015–17 also includes a general reminder that to the extent such an arrangement is available to active employees it may be subject to restrictions under other laws, such as the Medicare secondary payer provisions. See later in this preamble for a discussion of the rules provided in the final regulations under PHS Act section 2711 allowing Medicare part B and D reimbursement arrangements to be integrated with Medicare in certain limited circumstances (that is, generally, for HRAs sponsored by employers with fewer than 20 employees).

On November 18, 2015, the Departments finalized the proposed and interim final rules under PHS Act section 2711, incorporating certain subregulatory guidance regarding HRA integration, and making various additional clarifications (the 2015 regulations).[23] Consistent with the initial subregulatory guidance, the final regulations under PHS Act section 2711 provide two methods for integration of HRAs with other group health plan coverage.[24] The first method applies to HRAs integrated with other group health plan coverage that provides MV (the MV Integration Method).[25] The second method applies to HRAs integrated with other group health plan coverage that does not provide MV (the Non-MV Integration Method).[26]

Both the MV Integration Method and the Non-MV Integration Method require that: (1) The HRA plan sponsor offer the employee a group health plan other than the HRA (non-HRA group coverage); (2) the employee receiving the HRA be enrolled in non-HRA group coverage, even if the non-HRA group coverage is not offered by the HRA plan sponsor, such as a group health plan maintained by an employer of the employee's spouse;[27] and (3) the HRA is made available only to employees who are enrolled in non-HRA group coverage, regardless of whether such coverage is provided by the HRA plan sponsor. For both methods, the non-HRA group coverage may not consist solely of excepted benefits and, for the MV

[20] In addition to describing the integration methods, IRS Notice 2013–54 and DOL Technical Release 2013–03, in Q&A–5, provided that, whether or not an HRA is integrated with other group health plan coverage, unused amounts that are credited to the HRA while the HRA is integrated with other group health plan coverage may be used to reimburse medical care expenses in accordance with the terms of the HRA after an employee ceases to be covered by the integrated group health plan coverage without causing the HRA to fail to comply with PHS Act sections 2711 and 2713. In IRS Notice 2015–87, Q&A–2, however, the Departments clarified that an HRA that includes terms permitting the purchase of individual health insurance coverage, even if reimbursement is only allowed after the employee ceases to be covered by other integrated group health plan coverage, fails to be integrated with other group health plan coverage and therefore fails to comply with PHS Act sections 2711 and 2713.

[21] *See* FAQs about Affordable Care Act Implementation (Part XXII), available at *https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/faqs/aca-part-xxii.pdf* or *https://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/Downloads/FAQs-Part-XXII-FINAL.pdf.*

[22] The Treasury Department and the IRS note that the information included in this preamble is not intended to be guidance regarding the proper Federal tax treatment or consequences of any particular arrangement, except to the extent the preamble addresses the application of sections 36B, 9801, 9802, 9815, 9831 and 9832 of the Code and PHS Act sections 2711 and 2713.

[23] *See* 80 FR 72192 (November 18, 2015). To the extent the final regulations did not incorporate or modify the prior subregulatory guidance, such guidance remains in effect.

[24] These two methods of integration were originally discussed in IRS Notice 2013–54, Q4, and DOL Technical Release 2013–03, available at *https://www.dol.gov/agencies/ebsa/employers-and-advisers/guidance/technical-releases/13-03.*

[25] *See* 26 CFR 54.9815–2711(d)(2)(ii); 29 CFR 2590.715–2711(d)(2)(ii); 45 CFR 147.126(d)(2)(ii).

[26] *See* 26 CFR 54.9815–2711(d)(2)(i); 29 CFR 2590.715–2711(d)(2)(i); 45 CFR 147.126(d)(2)(i).

[27] In IRS Notice 2015–87, Q&A–4, the Departments clarified that an HRA that may be used to reimburse the medical care expenses of an employee's spouse or dependents (a family HRA) may not be integrated with self-only coverage of the employee under the employer's non-HRA group health plan. On January 12, 2017, the Departments issued guidance to clarify that a family HRA is permitted to be integrated with a combination of coverage under qualifying non-HRA group health plan coverage for purposes of complying with PHS Act sections 2711 and 2713, provided that all of the individuals who are covered under the family HRA are also covered under qualifying non-HRA group coverage. *See* FAQs about Affordable Care Act Implementation Part 37, available at *https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/faqs/aca-part-37.pdf* or *https://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/Downloads/FAQs-Part-37.pdf.*

Integration Method, the non-HRA group coverage offered by the employer and in which the employee enrolls must provide MV.

In addition, both the MV Integration Method and the Non-MV Integration Method require that, under the terms of the HRA, an employee (or former employee) be permitted to permanently opt out of and waive future reimbursements at least annually from the HRA. Both integration methods also require that, upon termination of employment, either the funds remaining in the HRA are forfeited or the employee is permitted to permanently opt out of and waive future reimbursements under the HRA. For this purpose, forfeiture of the funds remaining in the HRA, or waiver of future reimbursements under the HRA, occurs even if the forfeited or waived amounts may be reinstated upon a fixed date, the participant's death, or the earlier of the two events.

The two methods differ with respect to the expenses that the HRA may reimburse. Under the MV Integration Method, the HRA may reimburse any medical care expenses, but under the Non-MV Integration Method, the HRA may reimburse only co-payments, co-insurance, deductibles, and premiums under the non-HRA group coverage, as well as medical care that does not constitute EHBs.[28]

The 2015 regulations also include a special integration method for certain arrangements offered by employers that are not required to offer, and do not offer, non-HRA group coverage to employees who are eligible for Medicare coverage (generally, employers with fewer than 20 employees), but that offer non-HRA group coverage that does not consist solely of excepted benefits to employees who are not eligible for Medicare.[29] For these employers, an HRA that may be used to reimburse premiums under Medicare part B or D may be integrated with Medicare (and deemed to comply with PHS Act sections 2711 and 2713) if the employees who are offered the HRA are enrolled in Medicare part B or D, the HRA is available only to employees who are enrolled in Medicare part B or D, and the HRA complies with the opt-out and forfeiture rules under the MV Integration Method and Non-MV Integration Method. These employers may use either of the non-Medicare-specific integration methods, as applicable, for HRAs offered to employees who are ineligible for Medicare.

The 2015 regulations also incorporate prior subregulatory guidance that HRAs cannot be integrated with individual health insurance coverage for purposes of complying with PHS Act sections 2711 and 2713.[30]

C. HIPAA Nondiscrimination Provisions

Prior to the enactment of PPACA, titles I and IV of the Health Insurance Portability and Accountability Act of 1996 (HIPAA), Public Law 104–191, added section 9802 of the Code, section 702 of ERISA, and section 2702 of the PHS Act (HIPAA nondiscrimination provisions). The Departments published joint final regulations implementing the HIPAA nondiscrimination provisions on December 13, 2006.[31] Section 1201 of PPACA reorganized and amended the HIPAA nondiscrimination provisions of the PHS Act. (Although section 9802 of the Code and section 702 of ERISA were not amended, the requirements of section 2705 of the PHS Act are also incorporated by reference into section 9815 of the Code and section 715 of ERISA.)[32] As amended by PPACA, the nondiscrimination provisions of section 2705 of the PHS Act largely reflect the 2006 regulations and extend the HIPAA nondiscrimination protections (but not the wellness program exception) to the individual market. These provisions generally prohibit group health plans and health insurance issuers in the group and individual markets from discriminating against individual participants and beneficiaries in eligibility, benefits, or premiums based on a health factor.[33]

Q&A–2 of FAQs about Affordable Care Act Implementation (Part XXII)[34] provided that, if an employer offers employees with high claims risk a choice between enrollment in a traditional group health plan or cash, the arrangement would not comply with the market requirements, citing section 2705 of the PHS Act (which is incorporated by reference into section 9815 of the Code and section 715 of ERISA), as well as the HIPAA nondiscrimination provisions of section 9802 of the Code and section 702 of ERISA. The Q&A explained that such arrangements will violate the nondiscrimination provisions regardless of whether: (1) The cash payment is treated by the employer as pre-tax or post-tax to the employee, (2) the employer is involved in the selection or purchase of any individual market product, or (3) the employee obtains any individual health insurance coverage. The Departments explained that, in the Departments' view, offering cash as an alternative to health coverage for individuals with adverse health factors is an eligibility rule that discourages participation in the traditional group

[28] Although, in general, an HRA integrated with non-HRA group coverage fails to comply with PHS Act section 2711 if the non-HRA group coverage with which the HRA is integrated does not cover a category of EHB and the HRA is available to cover that category of EHB and limits the coverage to the HRA's maximum benefit, the Departments have provided that if non-HRA group coverage satisfies the MV Integration Method, an HRA will not be treated as failing to comply with PHS Act section 2711, even if the non-HRA group coverage with which the HRA is integrated does not cover a category of EHB and the HRA is available to cover that category of EHB and limits the coverage to the HRA's maximum benefit. *See* IRS Notice 2013–54, Q&A 6.

[29] *See* 26 CFR 54.9815–2711(d)(5); 29 CFR 2590.715–2711(d)(5); 45 CFR 147.126(d)(5). The final regulations did not address the Medicare integration rules that apply to employers with 20 or more employees. For a discussion of those rules, see IRS Notice 2015–17 and the discussion elsewhere in this preamble.

[30] *See* 26 CFR 54.9815–2711(d)(4); 29 CFR 2590.715–2711(d)(4); 45 CFR 147.126(d)(4). *Also see* IRS Notice 2013–54, Q&A–1, and DOL Technical Release 2013–03, Q&A–1. This principle was also reiterated and clarified in the various other pieces of subregulatory guidance summarized elsewhere in this section of the preamble. *See also* IRS Notice 2015–87, Q&A–5, in which the Departments clarified that an HRA that by its terms may only be used to reimburse (or pay directly for) premiums for individual health insurance coverage consisting solely of excepted benefits will not fail to comply with PHS Act sections 2711 and 2713 because those provisions do not apply to a group health plan that is designed to provide only excepted benefits. For guidance on enforcement relief for certain premium reduction arrangements offered by institutions of higher education to students with respect to student health insurance coverage, which is a type of individual health insurance coverage, *see* FAQs about Affordable Care Act Implementation part 33, available at *https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/faqs/aca-part-33.pdf* or *https://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/Downloads/ACA-FAQ-Set-33-Final.pdf. See also* IRS Notice 2016–17, 2016–9 IRB 358; DOL Technical Release 2016–1, available at *http://www.dol.gov/ebsa/newsroom/tr16-01.html;* and Insurance Standards Bulletin, Application of the Market Reforms and Other Provisions of the Affordable Care Act to Student Health Coverage, February 5, 2016, available at *https://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/student-health-bulletin.pdf. See* elsewhere in this preamble for additional discussion of student health insurance coverage.

[31] 71 FR 75014.

[32] PPACA section 1201 moved the HIPAA nondiscrimination provisions from PHS Act section 2702 to PHS Act section 2705, with some modification.

[33] The HIPAA nondiscrimination provisions set forth eight health status related factors. The eight health factors are health status, medical condition (including both physical and mental illnesses), claims experience, receipt of health care, medical history, genetic information, evidence of insurability, and disability. These terms are largely overlapping and, in combination, include any factor related to an individual's health. 66 FR 1377, 1379 (January 8, 2001).

[34] *See* FAQs about Affordable Care Act Implementation (Part XXII), available at *https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/faqs/aca-part-xxii.pdf* or *https://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/Downloads/FAQs-Part-XXII-FINAL.pdf.*

health plan, in contravention of the HIPAA nondiscrimination provisions.

D. Excepted Benefits

Section 9831 of the Code, section 732 of ERISA, and sections 2722 and 2763 of the PHS Act provide that the requirements of chapter 100 of the Code, part 7 of ERISA, and title XXVII of the PHS Act, do not apply to excepted benefits. Excepted benefits are described in section 9832 of the Code, section 733 of ERISA, and section 2791 of the PHS Act.

There are four statutory categories of excepted benefits. One such category of excepted benefits is limited excepted benefits. Under the statutory provisions, limited excepted benefits may include limited scope vision or dental benefits, benefits for long-term care, nursing home care, home health care, or community-based care, or any combination thereof, and ''such other similar, limited benefits as are specified in regulations'' by the Departments.[35] To be excepted benefits under this category, the benefits must either: (1) Be insured and provided under a separate policy, certificate, or contract of insurance; or (2) otherwise not be an integral part of the plan.[36] The Departments previously exercised the authority to specify additional types of limited excepted benefits with respect to certain health FSAs, certain employee assistance programs, and certain limited wraparound coverage.[37]

Coverage that consists of excepted benefits is not minimum essential coverage (MEC).[38] Therefore, an individual offered or covered by an excepted benefit is not deemed ineligible for the PTC by virtue of the excepted benefit offer or coverage.[39] Further, the offer of an excepted benefit by an employer is not considered to be an offer of MEC under an eligible employer-sponsored plan for purposes of section 4980H of the Code, the employer shared responsibility provisions; thus, an employer will not avoid a payment under section 4980H of the Code by virtue of an offer of an excepted benefit.[40]

E. Premium Tax Credit

1. In General

Section 36B of the Code allows for the PTC to be available to applicable taxpayers to help with the cost of individual health insurance coverage obtained through an Exchange.[41] Under section 36B(a) and (b)(1) of the Code and 26 CFR 1.36B–3(d), a taxpayer's PTC is the sum of the premium assistance amounts for all coverage months during the taxable year for individuals in the taxpayer's family.

An individual is eligible for the PTC for a month if the individual meets various requirements for the month (a coverage month). Among other things, under section 36B(c)(2) of the Code, a month is not a coverage month for an individual if either: (1) The individual is eligible for coverage under an eligible employer-sponsored plan and the coverage is affordable and provides MV; or (2) the individual is enrolled in an eligible employer-sponsored plan, even if the coverage is not affordable or does not provide MV.[42] An eligible employer-sponsored plan includes coverage under a self-insured (as well as an insured) group health plan[43] and is MEC unless it consists solely of excepted benefits.[44]

An HRA is a self-insured group health plan and therefore is an eligible employer-sponsored plan. Accordingly, an individual currently is ineligible for the PTC for the individual's Exchange coverage for a month if the individual is covered by an HRA or is eligible for an HRA that is affordable and provides MV for the month. Although Treasury Department and IRS guidance provides that an HRA is an eligible employer-sponsored plan and therefore individuals covered by an HRA are ineligible for the PTC,[45] to date, the Treasury Department and the IRS have not provided guidance as to the circumstances in which an HRA is considered to be affordable or to provide MV.[46]

2. Affordability and Minimum Value

Section 36B(c)(2)(C) of the Code and 26 CFR 1.36B–2(c)(3)(v)(A)(*1*) and (*2*) provide that an eligible employer-sponsored plan is affordable for an employee, or for an individual who may enroll in the coverage because of a relationship to the employee, if the amount the employee must pay for self-only coverage whether by salary reduction or otherwise (the employee's required contribution) does not exceed a specified percentage of the employee's household income. The percentage is adjusted annually. However, 26 CFR 1.36B–2(c)(3)(v)(A)(*3*) provides an employee safe harbor under which an eligible employer-sponsored plan is not considered affordable for an entire plan year if, at the time an individual enrolls in a qualified health plan offered through an Exchange, the Exchange determines that the eligible employer-sponsored plan is not affordable.[47] Thus, the employee safe harbor locks in the Exchange's determination of affordability, which is based on estimated household income, even if the eligible employer-sponsored plan ultimately proves to be affordable based on actual household income for the tax year.

Under section 36B(c)(2)(C)(ii) of the Code, a plan provides MV if the plan's share of the total allowed costs of benefits provided under the plan is at least 60 percent of the costs. Section 1302(d)(2)(C) of PPACA provides that, in determining the percentage of the total allowed costs of benefits provided under a group health plan, the regulations promulgated by HHS under that paragraph apply. HHS regulations provide that an employer-sponsored plan provides MV only if the percentage of the total allowed costs of benefits provided under the plan is greater than or equal to 60 percent, and the benefits under the plan include substantial coverage of inpatient hospital services and physician services.[48]

F. Qualified Small Employer Health Reimbursement Arrangements

1. In General

The 21st Century Cures Act (Cures Act), Public Law 114–255, was enacted on December 13, 2016. Section 18001 of

[35] *See* section 9832(c)(2) of the Code, section 733(c)(2) of ERISA, and section 2791(c)(2) of the PHS Act.

[36] *See* section 9831(c)(1) of the Code, ERISA section 732(c)(1), and PHS Act section 2722(c)(1) and 2763(b). *See also* the discussion in 2014 final regulations concerning the application of these requirements to benefits such as limited-scope dental and vision benefits and employee assistance programs at 79 FR 59130, 59131–59134 (Oct. 1, 2014).

[37] *See* 26 CFR 54.9831–1(c)(3)(v), (vi) and (vii); 29 CFR 2590.732(c)(3)(v), (vi) and (vii); 45 CFR 146.145(b)(3)(v), (vi) and (vii).

[38] *See* section 5000A(f)(3) of the Code.

[39] *See* section 36B(c)(2)(B) of the Code.

[40] *See* section 4980H(a)(1), (b)(1) of the Code. *See also* 26 CFR 54.4980H–1(a)(14).

[41] Exchanges are entities established under section 1311 of PPACA through which qualified individuals and qualified employers can purchase health insurance coverage.

[42] *See* section 36B(c)(2)(C)(iii) of the Code and 26 CFR 1.36B–2(c)(3)(vii)(A) and 1.36B–3(c).

[43] *See* 26 CFR 1.5000A–2(c).

[44] *See* section 5000A(f)(3) of the Code and 26 CFR 1.5000A–2(g).

[45] *See* IRS Notice 2013–54, Q&A 10.

[46] The Treasury Department and the IRS have provided guidance regarding when amounts newly made available under an HRA count toward the affordability or MV of another group health plan offered by the same employer. *See* 26 CFR 1.36B–2(c)(3)(v)(A)(*5*) and 26 CFR 1.36B–6(c)(4). *See also* IRS Notice 2015–87, Q&A 7. This document does not make substantive revisions to those rules.

[47] This employee safe harbor does not apply if the individual does not respond to a redetermination notice or, with reckless disregard for the facts, provides incorrect information to the Exchange. *See* 26 CFR 1.36B–2(c)(3)(v)(A)(*3*).

[48] *See* 45 CFR 156.145. *See also* 80 FR 52678 (Sept. 1, 2015).

the Cures Act amends the Code, ERISA, and the PHS Act to permit an eligible employer to provide a QSEHRA to its eligible employees. The Cures Act provides that a QSEHRA is not a group health plan for purposes of the market requirements, and, as a result, QSEHRAs are not subject to PHS Act sections 2711 and 2713.[49] For purposes of the proposed rules, QSEHRAs are not included in the term ''HRA or other account-based group health plans.''

Pursuant to section 9831(d) of the Code, a QSEHRA is an arrangement that meets certain conditions, including the following:

- The arrangement provides, after the eligible employee provides proof of coverage,[50] for the payment or reimbursement of medical care expenses incurred by the employee or the employee's family members (in accordance with the terms of the arrangement);
- The amount of payments for and reimbursements of medical care expenses incurred by the employee or the employee's family members for any year does not exceed $4,950 ($10,000 [51] for an arrangement that also provides for payments or reimbursements of medical care expenses of the eligible employee's family members (family coverage)); and
- The arrangement generally is provided on the same terms to all eligible employees of the eligible employer.[52]

For the purpose of identifying who can provide a QSEHRA, the statute provides that an eligible employer is an employer that is not an applicable large employer (ALE), as defined in section 4980H(c)(2) of the Code and that does not offer a group health plan to any of its employees. The statute also requires that an employer providing a QSEHRA provide a written notice to each eligible employee (as defined in section 9831(d)(3)(A) of the Code) not later than 90 days before the beginning of the plan year (or, in the case of an employee who is not eligible to participate in the arrangement as of the beginning of the plan year, the date on which the employee is first eligible). Section 9831(d)(4) of the Code requires that the notice contain certain content, including information about the maximum dollar amount of payments and reimbursements that may be made under the terms of the QSEHRA for the year to the employee (the permitted benefit), and a statement that the employee should provide the information about the permitted benefit to the applicable Exchange if the employee applies for advance payments of the PTC.

On October 31, 2017, the Treasury Department and the IRS issued Notice 2017–67 [53] to provide guidance on the requirements for providing a QSEHRA to eligible employees, the tax consequences of the arrangement, and the requirements for providing written notice of the arrangement to eligible employees.

If an eligible employer complies with the guidance provided in section 9831(d) of the Code and Notice 2017–67, it may provide a QSEHRA to its eligible employees and the QSEHRA does not have to comply with PHS Act sections 2711 and 2713 because it is not subject to those requirements.

2. QSEHRAs and the PTC

The Cures Act also added provisions to section 36B of the Code relating to how a QSEHRA affects a taxpayer's eligibility for the PTC and how a QSEHRA affects a taxpayer's computation of the PTC. Under section 36B(c)(4)(A) of the Code, if an employee is provided a QSEHRA that constitutes affordable coverage for a month, the month is not a coverage month for the employee or the employee's spouse or dependents, meaning that the PTC is not allowed for that month. Section 36B(c)(4)(C) of the Code provides that a QSEHRA constitutes affordable coverage for a month if the excess of the monthly premium for the self-only second lowest cost silver plan in the employee's individual market over 1/12 of the employee's permitted benefit, as defined in section 9831(d)(3)(C) of the Code, does not exceed 1/12 of a percentage of the employee's household income. The percentage, which is adjusted annually, is 9.56 for 2018.[54]

Section 36B(c)(4)(B) of the Code provides that if an employee is provided a QSEHRA that does not constitute affordable coverage for a coverage month the PTC otherwise allowable for the month is reduced by 1/12 of the employee's annual permitted benefit under the QSEHRA.

G. Individual Market Special Enrollment Periods

Generally, individuals may enroll in or change to different individual health insurance coverage before the beginning of the calendar year only during the annual open enrollment period described in 45 CFR 155.410. An individual may qualify for a special enrollment period to enroll in or change to a different Exchange plan outside of the annual open enrollment period under a variety of circumstances prescribed by section 1311(c)(6)(C) and (D) of PPACA and as described in 45 CFR 155.420. These special enrollment periods are under the jurisdiction of HHS, and apply to persons seeking individual health insurance coverage through a State or Federal Exchange and, in some cases, to individuals seeking individual health insurance coverage outside an Exchange.[55]

[49] *See* Section 9831(d)(1) of the Code, section 733(a)(1) of ERISA, and section 2791(a)(1) of the PHS Act. However, QSEHRAs are group health plans under the PHS Act definition for purposes of part C of title XI of the Social Security Act (42 U.S.C. 1320d, *et seq.*). *See* section 2791(a)(1) of the PHS Act, as amended by section 18001(c) of the Cures Act. In addition, QSEHRAs were not excluded from ERISA's definition of employee welfare benefit plan under section 3(1) of ERISA and, therefore, remain subject to the requirements for employee welfare benefit plans under ERISA. *See* H. Rept. 114–634—Small Business Health Care Relief Act of 2016 (the relevant provisions of this bill were passed into law by the Cures Act). Moreover, because QSEHRAs are employee welfare benefit plans, individual health insurance coverage that is reimbursed by a QSEHRA would not become part of an ERISA plan if the conditions of the DOL proposed clarification described later in this preamble are met.

[50] Under section 106(g) of the Code, payments or reimbursements from a QSEHRA are not treated as paid or reimbursed under employer-provided coverage for medical expenses under an accident or health plan for purposes of sections 106 and 105 of the Code if, for the month in which the medical care is provided, the individual does not have minimum essential coverage within the meaning of section 5000A(f) of the Code. *See* IRS Notice 2017–67 for additional discussion of this minimum essential coverage requirement.

[51] Section 9831(d)(2)(D)(ii) of the Code provides that both statutory dollar limits are adjusted for inflation beginning after 2016. The adjusted limits for 2018 are $5,050 for self-only coverage and $10,250 for family coverage.

[52] Section 9831(d)(2)(C) of the Code provides that an arrangement shall not fail to be treated as provided on the same terms merely because the employee's permitted benefit varies in accordance with the variation in price of an insurance policy in the relevant individual health insurance market based on the employee's age or the number of family members whose expenses may be reimbursed under the arrangement. *See* section 9831(d)(2)(C) of the Code and IRS Notice 2017–67 for additional detail.

[53] *See* IRS Notice 2017–67, 2017–47 IRB 517. *See also* IRS Notice 2017–20, 2017–11 IRB 1010, which extended the period for an employer to furnish an initial written notice to its eligible employees regarding a QSEHRA.

[54] IRS Notice 2017–67 provides that for purposes of determining whether a QSEHRA constitutes affordable coverage under section 36B(c)(4) of the Code the permitted benefit for self-only coverage is used, regardless of whether the permitted benefit provided to a particular eligible employee is for self-only or family coverage. Further, if the amount of permitted benefit varies based on the age of the employee, the age-applicable self-only coverage amount is used.

[55] Group health plans must provide special enrollment periods under certain circumstances and the Departments have jurisdiction over those provisions. *See* section 9801(f) of the Code, section 701(f) of ERISA, and section 2704(f) of the PHS Act; *see also* 26 CFR 54.9801–6, 29 CFR 2590.701–6, 45 CFR 146.117, and 45 CFR 147.104(b)(3)–(5). The proposed rules do not affect the group health plan special enrollment periods, which continue to apply to group health plans, including HRAs.

Paragraph (d) of 45 CFR 155.420 describes the special enrollment periods available on the Exchanges to qualified individuals, enrollees, and their dependents. Paragraph (b) of 45 CFR 155.420 describes the coverage effective dates available in connection with each special enrollment period, and paragraph (a)(4) describes the plan changes a qualified individual, enrollee, or dependent may make upon qualifying for a special enrollment period.

With regard to individual health insurance coverage sold outside of the Exchange, 45 CFR 147.104(b)(2) provides that health insurance issuers must provide special enrollment periods for the triggering events described in 45 CFR 155.420(d), except for certain triggering events listed under 45 CFR 147.104(b)(2).

II. Overview of the Proposed Rules on HRA Integration and Excepted Benefits—the Departments of the Treasury, Labor, and Health and Human Services

In developing the proposed rules, the Departments carefully considered how to meet the objectives of Executive Order 13813 in a way that is permitted by law and supported by sound policy. The proposed rules are intended to increase the usability of HRAs to provide more Americans, including employees who work at small businesses, with additional healthcare options. Such changes will facilitate the development and operation of a more efficient healthcare system that provides high-quality care at affordable prices by increasing consumer choice for employees and promoting competition in healthcare markets by adding additional options for employers. In addition, the proposed rules include certain conditions designed to prevent negative consequences that would be inconsistent with certain provisions of HIPAA and PPACA.

The proposed rules would expand the use of HRAs in several ways. First, the proposed rules would remove the current prohibition against integrating an HRA with individual health insurance coverage [56] under the PHS Act section 2711 regulations.[57] The proposed rules would instead permit an HRA to be integrated with individual health insurance coverage and, therefore, to satisfy PHS Act sections 2711 and 2713, if the provisions of the proposed rules under 26 CFR 54.9802–4, 29 CFR 2590.702–2, and 45 CFR 146.123 are met (hereinafter, ''the proposed integration rules'').

Second, the proposed rules would expand the definition of limited excepted benefits, under section 9832(c)(2) of the Code, section 733(c)(2) of ERISA, and section 2791(c)(2)(C) of the PHS Act, to recognize certain HRAs limited in amount and that are limited with regard to the types of coverage for which premiums may be reimbursed, as limited excepted benefits if certain other conditions are met (an ''excepted benefit HRA'').

As discussed later in this preamble, the Treasury Department and the IRS are also proposing regulations under section 36B of the Code that would provide the PTC eligibility rules for individuals who are offered an HRA integrated [58] with individual health insurance coverage.[59] DOL is also proposing a clarification to provide HRA and QSEHRA plan sponsors with assurance that the individual health insurance coverage the premiums of which are reimbursed by the HRA or QSEHRA does not become part of an ERISA plan when certain conditions are met. Finally, HHS is proposing changes to regulations regarding special enrollment periods in the individual market that would provide special enrollment periods for individuals who gain access to HRAs integrated with individual health insurance coverage or who are provided QSEHRAs.

The Departments request comments on all aspects of the proposed rules. The following explanation of the proposed rules also solicits comments on specific topics of particular interest to the Departments.

A. Integration Rules

Pursuant to the President's Executive Order to consider proposing regulations to expand and facilitate access to HRAs, the proposed rules would remove the prohibition on integration of an HRA with individual health insurance coverage, if certain conditions are met, and propose requirements that an HRA must meet in order to be integrated with individual health insurance coverage. In order to ensure compliance with PHS Act sections 2711 and 2713, the proposed integration rules provide that to be integrated with individual health insurance coverage, the HRA must require participants [60] and any dependents [61] covered by the HRA to be enrolled in individual health insurance coverage (other than coverage that consists solely of excepted benefits) and to substantiate compliance with this requirement.

Further, in crafting the proposed integration rules, the Departments have considered the possibility that expanding access to HRAs could lead to employers offering coverage options to their employees in a manner that discriminates based on health status and that negatively impacts the individual market for health insurance coverage. In 1996, Congress enacted the HIPAA nondiscrimination provisions, which now generally prohibit group health plans and health insurance issuers in the group and individual markets from discriminating against individual

[56] For purposes of this preamble and the proposed regulations, ''individual health insurance coverage'' means health insurance coverage offered to individuals in the individual market, but does not include STLDI. *See* PHS Act section 2791(b)(5), 26 CFR 54.9801–2, 29 CFR 2590.701–2, and 45 CFR 144.103. Individual health insurance coverage can include dependent coverage and therefore can be self-only coverage or other-than-self-only coverage. ''Individual market'' means the market for health insurance coverage offered to individuals other than in connection with a group health plan. *See* PHS Act section 2791(e)(1), 26 CFR 54.9801–2, 29 CFR 2590.701–2, and 45 CFR 144.103. ''Group health insurance coverage'' means health insurance coverage offered in connection with a group health plan. *See* ERISA section 733(b)(4), PHS Act section 2791(b)(4), 26 CFR 54.9801–2, 29 CFR 2590.701–2, and 45 CFR 144.103.

[57] These proposed rules would make several non-substantive modifications to language throughout the regulations implementing PHS Act section 2711 to account for this change. *See* later in this preamble for a summary of these changes. The proposed regulations do not substantively change the current rules for integration of an HRA with non-HRA group coverage, Medicare or TRICARE. Unless the proposed regulations explicitly conflict with the subregulatory guidance that has been issued under PHS Act section 2711, that guidance remains in effect.

[58] References in the preamble to ''an offer of an HRA integrated with individual health insurance coverage'' or to similar phrases mean an offer of an HRA designed to be integrated with individual health insurance coverage under the proposed integration rules and that will be considered integrated with such individual health insurance coverage for an individual who enrolls in such coverage.

[59] The Treasury Department and the IRS are not proposing regulations under section 36B of the Code related to the excepted benefit HRA because the application of the PTC eligibility rules to excepted benefits is clear under current law. Also, the Treasury Department and the IRS are not proposing regulations under section 4980H of the Code, but see the discussion later in this preamble regarding how an offer of an HRA that is integrated with individual health insurance coverage is treated under section 4980H of the Code.

[60] For this purpose, the definition of participant under 26 CFR 54.9801–2, 29 CFR 2590.701–2, and 45 CFR 144.103 applies, which is defined as a participant within the meaning of section 3(7) of ERISA. Under section 3(7) of ERISA, ''the term 'participant' means any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit.''

[61] For this purpose, the definition of dependent under 26 CFR 54.9801–2, 29 CFR 2590.701–2, and 45 CFR 144.103 applies, which is defined as ''any individual who is or may become eligible for coverage under the terms of a group health plan because of a relationship to a participant.''

participants and beneficiaries in eligibility, benefits, or premiums based on a health factor. Later, in 2010, Congress enacted PPACA (which included PHS Act sections 2711 and 2713), in part, because individual health insurance coverage was not a viable option for many individuals since issuers in many States could deny coverage or charge higher premiums based on an individual's health risk. To address these issues, PPACA included numerous provisions that were intended to create a competitive individual market that would make affordable coverage available to individuals who do not have access to other health coverage, as described in more detail later in this section of the preamble. In developing these proposed regulations, the Departments have carefully considered how to exercise their rulemaking authority in a manner that is consistent with Congress's overall intent in enacting HIPAA and PPACA. As part of that process, the Departments have considered how to avoid permitting discrimination based on health status or similar employer practices with respect to offering HRAs to employees that might have destabilizing effects on the individual market or lead to higher premiums in that market.

The Departments are of the view that allowing HRAs to be integrated with individual health insurance coverage could result in opportunities for employers to encourage higher risk employees (that is, those with high expected medical claims or employees with family members with high expected medical claims) to obtain coverage in the individual market, external to the traditional group health plan sponsored by the employer, in order to reduce the cost of traditional group health plan coverage provided by the employer to lower risk employees.[62] This could happen in a number of ways. For example, if employees are permitted to choose between participating in an employer's traditional group health plan or participating in an HRA integrated with individual health insurance coverage, some higher risk employees may have an incentive to select the HRA and enroll in individual health insurance coverage. This is because most individual health insurance coverage must cover all EHBs and large group market and self-insured group health plans are not required to cover all categories of EHBs. An employer could also deliberately attempt to steer employees with certain medical conditions away from the employer's traditional group health plan. In either case, if HRAs integrated with individual health insurance coverage are used disproportionately by higher risk employees, such arrangements could worsen adverse selection and raise premiums in the individual market.

The Departments also considered the possibility that the market would develop the opposite way. Lower risk employees might choose HRAs integrated with individual health insurance coverage, while higher risk employees might remain with the relative certainty of their employer's traditional group health plan. Such an outcome could result for a host of reasons, including because higher risk employees tend to be more risk averse with respect to changing health benefits and because individual health insurance coverage might have much more restrictive provider networks than traditional group health plans and higher risk employees tend to be more sensitive to the make-up of the provider network than lower risk employees. Also, lower risk employees may prefer an HRA integrated with individual health insurance coverage, as compared to a more generous traditional group health plan, because it could allow them to spend less on premiums and have more funds available to cover cost sharing. Further, employers would have incentives to avoid legal concerns that could be raised by an attempt to steer higher risk employees toward an HRA integrated with individual health insurance coverage.

However, employers will face countervailing incentives to maintain (or improve) the average health risk that they insure. Therefore, the Departments have determined that the risk of market segmentation and health factor discrimination is sufficiently significant to justify including conditions in the proposed regulations intended to address those risks. Accordingly, the proposed regulations would add new regulations at 26 CFR 54.9802–4, 29 CFR 2590.702–2, and 45 CFR 146.123 to prevent a plan sponsor from intentionally or unintentionally, directly or indirectly, steering any participants or dependents with adverse health factors away from the plan sponsor's traditional group health plan and into the individual market. In particular, the proposed integration rules prohibit a plan sponsor from offering the same class of employees both a traditional group health plan and an HRA integrated with individual health insurance coverage. In addition, to the extent a plan sponsor offers an HRA that is integrated with individual health insurance coverage to a class of employees, the proposed integration rules require that the HRA be offered on the same terms to all employees within the class, subject to certain exceptions described later in this preamble.

In the Departments' view, these proposed integration requirements are necessary and appropriate to avoid the risk of market segmentation and to ensure there are protections against discrimination based on health status when HRAs are permitted to integrate with individual health insurance coverage for purposes of compliance with PHS Act sections 2711 and 2713. The Departments also are of the view these requirements are consistent with Congress's intent in enacting both HIPAA and PPACA as well as in granting the Departments the authority to promulgate such regulations as may be necessary or appropriate to carry out the provisions of the Code, ERISA, and the PHS Act that were added as a result of those Acts.[63] More specifically, these proposed integration requirements are intended to mitigate circumstances in which higher risk employees are incentivized (based on the design of the traditional group health plan versus the offer of the HRA) to obtain coverage in the individual market.

These proposed integration conditions avoid creating a high risk of market segmentation. As noted earlier in this preamble, PPACA includes several provisions designed to create a competitive individual market that makes affordable coverage available to individuals who do not have access to other health coverage. *See* PPACA section 1311 (establishing the Exchanges), section 1312(c) (instructing health insurance issuers to consider all enrollees in all health plans in a market—either individual or small group—as members of a single risk pool), section 1401 (establishing the PTC to help qualifying individuals and families pay for individual health insurance coverage), section 1402 (reducing cost-sharing for qualifying individuals enrolled in qualified health plans), and section 1501 (requiring non-exempt applicable individuals to maintain MEC or be subject to the individual shared responsibility payment).[64] These provisions are

[62] Amy Monahan and Daniel Schwarcz, ''Will Employers Undermine Health Care Reform by Dumping Sick Employees?'' *Virginia Law Review,* Vol. 97 (2011).

[63] *See* section 9833 of the Code, section 734 of ERISA, and section 2792 of the PHS Act.

[64] Section 5000A of the Code, added by PPACA, provides that all non-exempt applicable individuals must maintain MEC or pay an individual shared responsibility payment. On December 22, 2017, the President signed tax reform legislation (Pub. L. 115–97, 131 Stat. 2054) under which the individual

intended, in part, to draw more individuals of all risk profiles into the individual market and make premiums for individual market coverage more affordable. In addition, PPACA requires that non-grandfathered individual health insurance coverage cover generally the same categories of EHBs, in part, to prevent health insurance coverage with better benefits from becoming prohibitively expensive as lower-risk individuals gravitate to less expensive individual health insurance coverage with limited benefits while higher risk individuals select more expensive individual health insurance coverage with more generous benefits. PPACA also includes risk adjustment, reinsurance, and risk corridor programs to provide consumers with affordable health insurance coverage, to reduce incentives for issuers to avoid enrolling higher risk individuals, and to stabilize premiums in the individual and small group markets inside and outside of the Exchanges. Taken altogether, these PPACA provisions intend to create a robust and competitive individual market, in part by ensuring that risk pools included both higher risk and lower risk individuals.

If integration of HRAs led to market segmentation, it would result in significant destabilization in the individual market, undermining those provisions of PPACA that are intended to create a robust and competitive individual market. The text of PHS Act sections 2711 and 2713 is ambiguous with regard to whether and how separate plans can integrate to comply with its provisions, and the structural and practical policy concerns discussed earlier in this preamble could, if realized, prompt the Departments to adopt an interpretation of PHS Act sections 2711 and 2713 that prohibits integration of HRAs with individual health insurance coverage. By requiring employers who wish to take advantage of HRA integration with individual health insurance coverage to adhere to the protections described in more detail later in this preamble, in particular the prohibition on offering an HRA integrated with individual health insurance coverage and a traditional group health plan to the same employees, the Departments intend to prevent large-scale destabilization of the individual market, thus allowing the Departments to interpret PHS Act sections 2711 and 2713 to permit integration with individual health insurance coverage. Accordingly, the proposed regulations provide integration rules that are intended to avoid creating a high risk of market segmentation.

Lastly, because eligibility for coverage under an HRA may affect an individual's eligibility for the PTC and enrollment in an HRA affects an individual's eligibility for the PTC, the proposed integration rules allow employees of employers who offer an HRA to opt out of and waive future reimbursements under the HRA. The Departments also propose that HRAs be required to provide a notice to participants eligible for coverage under an HRA integrated with individual health insurance coverage with information regarding how the offer of the HRA or enrollment in the HRA affects their ability to claim the PTC.

The conditions in the proposed integration rules are discussed in detail below.

1. Requirement That All Individuals Covered by the HRA Are Enrolled in Individual Health Insurance Coverage

As discussed earlier in this preamble, an HRA is a group health plan that does not comply with PHS Act sections 2711 and 2713 on its own. However, the Departments previously have determined that an HRA can be considered to be in compliance with PHS Act sections 2711 and 2713 if it is integrated with non-HRA group coverage that is subject to and complies with these sections of the PHS Act. In the past, the Departments have made the determination that it is appropriate to treat an HRA as complying with PHS Act sections 2711 and 2713 when integrated with other group health plan coverage because, generally, an individual covered by the combined arrangement has coverage that complies with PHS Act sections 2711 and 2713. (Similarly, as discussed elsewhere in this preamble, other combined arrangements involving Medicare and TRICARE, are also considered to comply with PHS Act sections 2711 and 2713.)

The proposed integration rules similarly provide that an HRA may be integrated with individual health insurance coverage, and will be considered compliant with PHS Act sections 2711 and 2713, if the HRA requires the participant and any dependent(s) to be enrolled in individual health insurance coverage (other than coverage that consists solely of excepted benefits) for each month the individual(s) are covered by the HRA. If the individual covered by the HRA merely has the ability to obtain individual health insurance coverage, but does not actually have that coverage, the HRA would fail to comply with PHS Act sections 2711 and 2713. This proposed requirement would apply with respect to all individuals whose medical care expenses may be reimbursed under the HRA, not just the participant.

For purposes of integrating an HRA with individual health insurance coverage, the Departments are proposing to treat all individual health insurance coverage as subject to and compliant with PHS Act sections 2711 and 2713, except for coverage that consists solely of excepted benefits. While this would allow for integration with grandfathered individual health insurance coverage, which is not subject to and may not be compliant with PHS Act sections 2711 and 2713, only a small number of individuals are currently enrolled in grandfathered individual health insurance coverage and grandfathered coverage may not be sold in the individual market to new enrollees and may only be renewed by current enrollees so long as the coverage meets strict conditions. Additionally, the number of individuals with grandfathered individual health insurance coverage has declined each year since PPACA was enacted, and the already small number of individuals who have retained grandfathered coverage will continue to decline each year. Because it is the Departments' understanding that there are few individuals covered by grandfathered individual health insurance coverage, the Departments are of the view that there will be few instances where such individuals will be offered and accept an HRA that would be integrated with their grandfathered individual health insurance coverage. Moreover, new enrollees cannot enroll in grandfathered individual health insurance coverage, so employers offering traditional group health plans would not be able to shift workers into this coverage. Furthermore, even for non-grandfathered individual health insurance coverage, requiring participants or plan sponsors to substantiate compliance with PHS Act sections 2711 and 2713 for each individual health insurance policy separately is impracticable given that most participants and HRAs are unlikely to be able to reasonably determine the compliance of the individual health insurance policy. An independent assessment of compliance could require the participant or HRA to identify which benefits under each individual health insurance coverage enrolled in by a participant or dependent are considered EHBs for purposes of PHS Act section 2711, and whether all preventive services are covered without cost-sharing under

shared responsibility payment is reduced to $0 effective as of January 1, 2019.

each individual health insurance coverage enrolled in by a participant or dependent. The Departments are of the view that this would be an unwieldy and burdensome task.

The Departments' final rules for grandfathered plans provide that ''a plan or health insurance coverage must include a statement that the plan or coverage believes it is a grandfathered health plan . . . in any summary of benefits provided under the plan.'' [65] The Departments remain concerned, however, that the frequency of this disclosure to participants may be insufficient to substantiate compliance for purposes of these rules. For comparison's sake, ERISA plans must provide a new SPD only every 5 years, and the required disclosure for individual market coverage will differ from state to state. Additionally, other plan materials that provide a summary of benefits that may trigger the grandfathered plan disclosure requirement may not be subject to any specific timing requirements. Furthermore, the Departments have concerns as to whether participants will be able to locate or receive the disclosure materials in the time necessary to allow for a determination of whether the plan with which the HRA will be integrated is grandfathered (and therefore unlikely to comply with sections 2711 and 2713 of the PHS Act) or non-grandfathered (and therefore generally compliant). For example, for ERISA plans, a plan sponsor has 30 days to fulfill a disclosure request. Additionally, despite the fact that individual health insurance coverage may include a disclosure that the policy is grandfathered, there may be instances in which such disclosure is not accurate, or other instances where non-grandfathered individual health insurance coverage does not comply with PHS Act sections 2711 or 2713. For these reasons, the Departments have preliminarily determined that adopting this proxy approach of relying on the sale of the policy in the individual market to deem the policy compliant for purposes of the proposed integration rules strikes an appropriate balance. (See later in this preamble for a discussion of the substantiation requirements that would apply under the proposed integration rules).

The Departments solicit comments on methods by which an HRA could substantiate whether individual health insurance coverage is subject to and complies with PHS Act sections 2711 and 2713, including how an HRA might identify which benefits under the individual health insurance coverage are considered EHBs for purposes of PHS Act section 2711 and how an HRA might determine if all preventive services are covered without cost-sharing. The Departments solicit comments on whether an alternative approach, such as a requirement that an issuer make a representation about compliance and/or grandfather status upon request, would be practical, or whether any other methods might be appropriate as an alternative to the previously outlined proposed proxy approach.

Under the proposed integration rules, the requirement that each individual whose medical care expenses may be reimbursed under the HRA must be enrolled in individual health insurance coverage (other than coverage that consists solely of excepted benefits) would apply for each month that the individual is covered by the HRA. If an individual whose medical care expenses may be reimbursed under an HRA fails to have such individual health insurance coverage for any month, the HRA would fail to comply with PHS Act sections 2711 and 2713 for that month. Accordingly, the proposed rules provide that an HRA may not be integrated with individual health insurance coverage unless the HRA provides that medical care expenses for any individual covered by the HRA will not be reimbursed if the individual ceases to be covered by individual health insurance coverage and, if the individuals covered by the HRA cease to be covered by such individual health insurance coverage, the participant must forfeit the HRA, in accordance with applicable laws (including COBRA and other continuation of coverage requirements).[66]

2. Prohibition Against Offering Both an HRA Integrated With Individual Health Insurance Coverage and a Traditional Group Health Plan to the Same Class of Employees

a. In General

To address the previously described concerns about potential adverse selection and health factor discrimination, under the proposed integration rules, a plan sponsor may offer an HRA integrated with individual health insurance coverage to a class of employees only if the plan sponsor does not also offer a traditional group health plan to the same class of employees.[67] Therefore, a plan sponsor would not be permitted to allow any employee within a class of employees a choice between a traditional group health plan or an HRA integrated with individual health insurance coverage. For this purpose, the term ''traditional group health plan'' means any group health plan other than either an account-based group health plan or a group health plan that consists solely of excepted benefits. The Departments solicit comments on whether employers should be able to offer employees a choice between a traditional group health plan or an HRA integrated with individual health insurance coverage, and on the definition of ''traditional group health plan,'' including whether an alternate definition or term might be appropriate and whether a definition should be codified as part of these proposed regulations.

b. Classes of Employees

In addition, as described in more detail later in the preamble, the proposed integration rules require a plan sponsor that offers an HRA integrated with individual health insurance coverage to a class of employees to offer the HRA on the same terms to each participant within the class of employees, subject to certain exceptions. The proposed integration rules provide that a plan sponsor may only offer the HRA on different terms to different groups of employees, and may only offer either an HRA integrated with individual health insurance coverage or a traditional group health plan by groups of employees, if those groups are specific classes of employees identified by the proposed rules. The classes are: (1) Full-time employees (using either the definition that applies for purposes of section 105(h) or 4980H of the Code, as determined by the plan sponsor); (2) part-time employees (using either the definition that applies for purposes of section 105(h) or 4980H of the Code, as determined by the plan sponsor); (3) seasonal employees (using either the definition that applies for purposes of section 105(h) or 4980H of the Code, as determined by the plan sponsor); (4) employees who are included in a unit of employees covered by a collective bargaining agreement (CBA) in which the plan sponsor participates (as described in 26 CFR 1.105–11(c)(2)(iii)(D)); (5) employees who have not satisfied a waiting period for

[65] 26 CFR 54.9815–1251(a)(2); 29 CFR 2590.715–1251(a)(2); 45 CFR 147.140(a)(2).

[66] For an explanation of the application of COBRA to HRAs, see section VII of IRS Notice 2002–45.

[67] The Departments note that an employer may not provide a QSEHRA to any employee if it offers any employee a group health plan, including a traditional group health plan or an HRA. *See* section 9831(d)(3)(B)(ii) of the Code.

coverage (if the waiting period complies with the waiting period rules in PHS Act section 2708 and its implementing regulations);[68] (6) employees who have not attained age 25 prior to the beginning of the plan year (as described in 26 CFR 1.105–11(c)(2)(iii)(B)); (7) non-resident aliens with no U.S.-based income (as described in 26 CFR 1.105–11(c)(2)(iii)(E)) (generally, foreign employees who work abroad); and (8) employees whose primary site of employment is in the same rating area, as defined in 45 CFR 147.102(b). In addition, the proposed integration rules allow as additional classes, groups of employees described as a combination of two or more of the enumerated classes. For example, part-time employees included in a unit of employees covered by a CBA might be one class of employees, and full-time employees included in the same unit of employees covered by a CBA might be another class of employees. In that case, for example, the employer could offer an HRA to the part-time employees and not offer (or offer on different terms) an HRA to the full-time employees, but could not differentiate between the part-time employees covered under the CBA except based on any of them being in another class or, if within the same class, except as otherwise allowed under the same-terms requirement as explained later in this preamble. If an HRA is offered to former employees (such as retirees), former employees are considered to be in the same class they were in immediately before separation from service.

The Departments have concluded that it is appropriate to permit plan sponsors to offer different benefits to these classes of employees under the proposed integration rules. First, many employers historically have offered varying benefit packages to members of these different classes of employees clearly for purposes other than inducing higher risk employees to leave the plan sponsor's traditional group health plan. Second, the Departments have determined that it would be burdensome for employers to shift employees from one of these classes of employees to another merely for the purpose of offering different types of health benefits to employees based on a health factor, thereby reducing the risk that a plan sponsor will offer an HRA integrated with individual health insurance coverage only to its higher risk employees. Accordingly, the classes of employees identified in these proposed rules would balance employers' reasonable need to make distinctions among employees with respect to offering health benefits with the public interest in protecting the stability of the individual market risk pools.

Historically, employers have often provided different benefit packages to employees included in a unit of employees covered by a CBA, full-time employees, part-time employees, seasonal employees, employees who work abroad, employees of different ages, employees based on whether they have completed a waiting period, and employees in different locations. This is particularly true in the case of health benefits. For example, unions typically bargain with employers over health benefits provided to employees who are members of that union, and the health benefits that an employer provides pursuant to a CBA are often different than those that it provides to its employees who are not covered by the CBA. Similarly, health benefit packages offered to employees often vary by location, in part because certain healthcare providers or health insurance issuers operate only in some areas and not in others. A rule that prohibited employers from differentiating between these classes of employees for purposes of offering HRAs integrated with individual health insurance coverage would pose significant costs that might undermine the willingness of employers to offer HRAs in the first place.

The Departments are of the view that these classes of employees are not ones that could be easily manipulated in order to transfer the risks (and perceived higher costs) from the employer's traditional group health plan to the individual market. For example, labor laws generally prevent an employer from classifying an employee as subject to a CBA when the employee traditionally has not been subject to a CBA. Similarly, economic and labor forces generally make it difficult for employers to increase or reduce significantly the number of hours worked by employees in particular positions. In certain situations, ERISA may also prevent an employer from changing employee's hours in order to interfere with an employee's ability to participate in a health plan.[69] The Departments have not proposed permitting plan sponsors to treat salaried and hourly employees as different classes of employees for purposes of these rules, however, as many employers might easily be able to change an employee's status from salaried to hourly (and in certain circumstances, from hourly to salaried) with seemingly minimal economic or other consequences for either the employer or the employees.

To minimize burden and complexity, the Departments do not propose a minimum employer size or employee class size for purposes of applying the proposed integration rules. The Departments recognize that very small employers could manipulate these classes (for example, a very small employer could put someone who is a higher-risk employee in a separate class on his or her own), but note that other economic incentives related to attracting and retaining talent would discourage employers from doing so. The Departments invite comments on whether employer size or employee class size should be considered in determining permissible classes of employees.

In defining certain classes of employees to which different benefits may be offered in the proposed rules, the Departments propose to adopt definitions that are the same as those that apply under sections 105(h) and 4980H of the Code.

Specifically, for purposes of identifying classes of employees for purpose of the proposed integration regulations, an HRA plan sponsor may define ''full-time employee,'' ''part-time employee,'' and ''seasonal employee'' in accordance with either of those definitions under sections 105(h) and 4980H of the Code, but it must be consistent across these three classes of employees, to the extent it differentiates based on these classes, in using either sections 105(h) or 4980H of the Code to avoid overlapping classes of employees, and the HRA plan document must set forth the applicable definitions prior to the beginning of the plan year in which the definitions will apply. Thus, an HRA plan document may provide that, for the plan year, the term ''full-time employee'' means a full-time employee under section 4980H of the Code and the regulations thereunder and ''part-time employee'' means an employee who is not a full-time employee under section 4980H of the Code and the regulations thereunder, for the applicable plan year. But an HRA plan document may not provide that, for the plan year, the term ''full-time employee'' has the meaning set forth in section 4980H of the Code and the regulations thereunder, and the term ''part-time employee'' has the meaning set forth in 26 CFR 1.105–11(c)(2)(iii)(C), for the applicable plan year. Nothing would prevent an employer from changing the definitions

[68] 26 CFR 54.9815–2708; 29 CFR 2590.715–2708; 45 CFR 147.116.

[69] *See e.g., Marin* v. *Dave & Buster's, Inc.,* 159 F. Supp. 3d 460 (SDNY 2016).

for a subsequent plan year so long as each class is defined in accordance with the same provision for the applicable plan year and the HRA plan document is updated to reflect the applicable definitions prior to the beginning of the plan year in which the definitions would apply.

For the other classes of employees, the relevant definition under section 105(h) of the Code applies, except for the class of employees based on worksite rating area. The Departments propose to adopt the Code section 105(h) definitions, in part, because they reflect a relatively common understanding of the terms ''full-time,'' ''part-time'' and ''seasonal'' employees and because HRAs generally are subject to the nondiscrimination rules of section 105(h) of the Code. The Departments understand that plan sponsors may want to design their employee health plans, which may include offering a traditional group health plan and HRAs (or HRAs in different amounts or under different terms and conditions) to different classes of employees in a manner that complies with the requirements of Code section 105(h) to avoid the inclusion of amounts in income under that section.[70] The Departments have concluded that defining the classes of employees to which different offers of coverage may be made by using the Code section 105(h) definitions may be helpful in accomplishing that result.

As noted earlier, the Departments propose to allow employers to adopt the Code section 4980H definitions as an alternative set of definitions for identifying full-time, part-time, and seasonal employees. The Departments acknowledge that certain employers have already determined how those definitions apply to their workforce and using those same definitions for purposes of applying the proposed integration rules may reduce burden for those employers. Section 4980H of the Code applies to ALEs, which generally includes employers that employed at least 50 full-time employees (including full-time equivalent employees) in the prior calendar year.[71] An employer must classify its employees as either full-time or part-time employees, and in some cases as seasonal employees, in accordance with section 4980H of the Code and the regulations thereunder, in order to determine whether it is an ALE and, if so, to determine which employees it must offer coverage to in order to avoid liabilities under section 4980H of the Code and to complete the associated reporting requirements. Accordingly, ALEs that want to offer HRAs to a particular class of employees, or offer HRAs of differing amounts or under different terms and conditions based on particular classes of employees, may prefer to use the Code section 4980H definitions with which they are familiar and which they have historically communicated to employees through the reporting requirements. The Departments understand, however, that some ALEs may still wish to use the Code section 105(h) definitions, and some non-ALEs may wish to use the Code section 4980H definitions. Therefore, the proposed rules would offer each employer the flexibility to determine which set of definitions are appropriate for its workforce, provided the employer uses the same set of definitions for classifying its full-time, part-time, and seasonal employees to the extent it uses each of these classifications.

The proposed employee classes are intended to provide the flexibility needed to achieve increased HRA usability while establishing parameters sufficient to address the health status discrimination and adverse selection concerns described earlier in this preamble. The Departments considered whether employers should be allowed to offer or vary HRAs integrated with individual health insurance coverage for classes of employees based on a very general standard (like the one that generally applies under the HIPAA nondiscrimination rules, with a broad employment-based classification standard) or a more finite list of classes of employees that have been used in other rules for various employee benefits purposes (for example, under section 105(h) and/or 4980H of the Code). The Departments' view is that a broad and open-ended standard would not be sufficient to mitigate health factor discrimination that could increase adverse selection in the individual market. The classes the Departments propose to permit are ones which, based on the Departments' experience, employers use for other employee benefits and other purposes, with the result that an employer would be unlikely to shift employees between the classes simply for purposes of offering an HRA.

The Departments request comments on the proposed classes of employees, the definitions used, and whether additional classes of employees should be provided (for example, classifications based on form of compensation (hourly versus salaried), employee role or title, occupation, or whether the individual is a former employee). The Departments also seek comment on whether any additional classifications within the proposed classes of employees should be allowed, for example, allowing classifications based on more specific geographic locations, multiple gradations of part-time employees, or gradations based on employee tenure. In addition, the Departments request comments on whether the proposed classes of employees, including the class of employees based on employees having a primary worksite in a particular rating area and the rule allowing combinations of classes of employees, and any potential additional classes, are sufficient to mitigate adverse selection and health status discrimination concerns.

c. Salary Reduction Arrangements

The Departments have been made aware that some employers may wish to allow employees to pay the portion of the premium for individual health insurance coverage that is not covered by an HRA integrated with individual health insurance coverage, if any, by using a salary reduction arrangement under a cafeteria plan. Pursuant to section 125(f)(3) of the Code, an employer may not provide a qualified health plan (as defined in section 1301(a) of PPACA) offered through the Exchange as a benefit under its cafeteria plan.[72] Therefore, an employer may not permit employees to make salary reduction contributions to a cafeteria plan to purchase a qualified health plan (including individual health insurance coverage) offered through an Exchange.

However, section 125(f)(3) of the Code does not apply to individual health insurance coverage that is not purchased on an Exchange. Therefore, for an employee who purchases individual health insurance coverage outside the Exchange, the employer could permit the employee to pay the balance of the premium for the coverage through its cafeteria plan, subject to all

[70] HRAs generally are subject to the rules under section 105(h) of the Code and its related regulations as self-insured medical reimbursement plans. In general, section 105(h) of the Code provides that certain amounts paid to highly compensated individuals under self-insured medical reimbursement plans are includible in the income of the highly compensated individual. In the near term, the Treasury Department and the IRS intend to issue guidance that addresses the interaction of section 105(h) of the Code and HRAs integrated with individual health insurance coverage.

[71] Discussion of how section 4980H of the Code would affect an ALE that offers an HRA integrated with individual health insurance coverage is included later in this preamble.

[72] Note that section 125(f)(3)(B) of the Code provides an exception to this prohibition for certain small employers offering employees the opportunity to enroll in the group market through an Exchange.

applicable guidance.[73] To the extent the arrangement to pay the balance of the premium is a group health plan, such an arrangement would not be considered to be a traditional group health plan for purposes of the proposed integration rules. For a discussion of the application of the same-terms requirement to such an arrangement, see the next section of this preamble. For a general comment solicitation on cafeteria plan premiums arrangements, see later in this preamble.

3. Same-Terms Requirement

To address the Departments' concerns about health status discrimination leading to additional adverse selection in the individual market, the proposed integration rules generally require that a plan sponsor that offers an HRA integrated with individual health insurance coverage to a class of employees must offer the HRA on the same terms (that is, both in the same amount and otherwise on the same terms and conditions) to all employees within the class. For this purpose, a class of employees has the meaning described earlier in this preamble, but see later in this section of the preamble for a discussion of the application of this requirement to former employees. As part of this proposed requirement, the Departments make clear that offering a more generous HRA to individuals based on an adverse health factor violates the integration rules.

The Departments recognize, however, that premiums for individual health insurance coverage obtained by HRA participants and their dependents may vary and thus some variation in amounts made available under an HRA, even within a class of employees, may be appropriate. Therefore, under the proposed integration rules, the maximum dollar amount made available under the HRA for participants within a class of employees may increase as the age of the participant increases, so long as the same maximum dollar amount attributable to that increase in age is made available to all participants of the same age within the same class of employees. In addition, under the proposed integration rules, the maximum dollar amount made available under an HRA within a class of employees may increase as the number of the participant's dependents who are covered under the HRA increases, so long as the same maximum dollar amount attributable to that increase in family size is made available to all participants in that class of employees with the same number of dependents covered by the HRA. Under this exception, a plan sponsor may increase the HRA amount for a class of employees for both age and family size, which would mean, for example, that a plan sponsor could offer two employees in a class of employees of the same age different HRA amounts if the different HRA amounts are attributable to differences in family size. By permitting such variation, the Departments seek to balance the disparate costs of health insurance in the individual market with the need to prevent health status discrimination against HRA participants and their dependents.

Further, although the proposed integration regulations would generally apply to a former employee in the same way that they apply to a current employee (and former employees are considered to be in the same class that they were in immediately before separation from service), the Departments recognize that eligibility for post-employment health coverage, if any, varies widely and may be subject to age, service or other conditions. To avoid undue disruption of employers' practices relating to the provision of post-employment health coverage, the proposed integration rules provide that an HRA may be treated as provided on the same terms even if the plan sponsor offers the HRA to some former employees (for example, to all former employees with a minimum tenure of employment) but fails to offer the HRA to the other former employees within a class of employees. But if a plan sponsor does offer the HRA to one or more former employee(s) within a class of employees, the HRA must be offered to those former employee(s) on the same terms as all other employees within the class.[74] For example, if a plan sponsor offers an HRA to all of its current full-time employees and also to its former employees who were full-time employees immediately prior to separation from service who had at least five years of service, the plan sponsor must provide the HRA on the same terms to the eligible former employees and to the current full-time employees, subject to the generally applicable exceptions to the same terms requirement described elsewhere in this section of the preamble.

The proposed integration rules further provide that if a participant or dependent in an HRA integrated with individual health insurance coverage does not use all of the amounts made available in the HRA to reimburse medical care expenses for a plan year, and the HRA allows for these amounts to be made available to participants and their dependents in later plan years, these carryover amounts would be disregarded for purposes of determining whether the HRA is offered on the same terms, so long as the method for determining whether participants have access to unused amounts in future years, and the methodology and formula for determining the amounts of unused funds that they may access in future years, is the same for all participants in a class of employees. In addition, the proposed rules provide that the ability to pay the portion of the premium for individual health insurance coverage that is not covered by the HRA, if any, by using a salary reduction arrangement under a cafeteria plan [75] is considered to be a term of the HRA for purposes of the proposed integration rules; therefore an HRA shall fail to be treated as provided on the same terms unless such a salary reduction arrangement, if made available to any participant in a class of employees, is made available on the same terms to all participants (other than former employees) in a class of employees.

Further, the Treasury Department and the IRS are aware that an HRA under which the maximum dollar amount varies based on age may face issues regarding the application of section 105(h) of the Code and the regulations thereunder. Accordingly, the Treasury Department and the IRS intend to issue guidance in the near term that describes an anticipated safe harbor that would allow increases in the maximum dollar amount made available under an HRA integrated with individual health insurance coverage, if certain conditions are met, without a consequence under section 105(h) of the Code.[76]

[73] *See* Prop. Reg. 26 CFR 1.125–1(m); *see also* Rev. Rul. 61–146, 1961–2 CB 25.

[74] Note that the market requirements do not apply to a group health plan that has fewer than two participants who are current employees on the first day of the plan year. *See* section 9831(a)(2) of the Code and section 732(a) of ERISA. HHS follows a similar approach for non-federal governmental retiree-only plans and encourages States to adopt a similar approach with respect to issuers of retiree-only plans. *See* 75 FR 34539 (June 17, 2010). Therefore, a retiree-only HRA need not meet the requirements of any integration test.

[75] As previously noted, pursuant to section 125(f)(3) of the Code, a cafeteria plan may not permit employees to use salary reduction contributions made to a cafeteria plan to purchase individual health insurance coverage offered through an Exchange.

[76] HRAs generally are subject to the rules under Code section 105(h) and its related regulations as self-insured medical reimbursement plans. In general, Code section 105(h) provides that certain amounts paid to highly compensated individuals under self-insured medical reimbursement plans are includible in the income of the highly compensated individual. The regulations under

Continued

4. Opt-Out Provision

As described elsewhere in this preamble, if an individual is covered by an HRA integrated with individual health insurance coverage for a month, regardless of the amount of reimbursement available under the HRA, the individual is not eligible for the PTC for that month. Because in some circumstances an individual may be better off claiming the PTC than receiving reimbursements under an HRA, the Departments' existing rules regarding integration with non-HRA group coverage and with Medicare require plan sponsors that offer HRAs to allow participants to opt out of and waive future reimbursements from the HRA at least annually.[77] These proposed rules include the same requirement. Thus, current employees may be allowed the PTC, if they are otherwise eligible, if they opt out of and waive future reimbursements from the HRA and the HRA is either unaffordable or does not provide MV.[78]

Furthermore, as with the current integration rules, the proposed integration rules require that upon termination of employment, either the remaining amounts in the HRA must be forfeited or the participant must be allowed to permanently opt out of and waive future reimbursements from the HRA to ensure that the HRA participant may choose whether to claim the PTC, if otherwise eligible, or to continue to participate in the HRA after the participant's separation from service.

5. Substantiation and Verification of Individual Health Insurance Coverage

As discussed earlier in this preamble, the proposed integration rules would require that the individuals whose medical care expenses may be reimbursed under the HRA must be enrolled in individual health insurance coverage. To facilitate the administration of this requirement, under the proposed integration rules, an HRA must implement, and comply with, reasonable procedures to verify that individuals whose medical care expenses are reimbursable by the HRA are, or will be, enrolled in individual health insurance coverage (other than coverage that consists solely of excepted benefits) during the plan year. The reasonable procedures may include a requirement that a participant substantiate enrollment in individual health insurance coverage by providing either: (1) A document from a third party (for example, the issuer) showing that the participant and any dependent(s) covered by the HRA are, or will be, enrolled in individual health insurance coverage during the plan year (for example, an insurance card or an explanation of benefits pertaining to the relevant time period); or (2) an attestation by the participant stating that the participant and any dependent(s) are or will be enrolled in individual health insurance coverage, the date coverage began or will begin, and the name of the provider of the coverage.[79] For this purpose, an HRA may rely on the documentation or attestation provided by the participant unless the HRA has actual knowledge that any individual covered by the HRA is not, or will not be, enrolled in individual health insurance coverage (other than coverage that consists solely of excepted benefits) for the plan year.

In addition, following the initial substantiation of coverage, with each new request for reimbursement of an incurred medical care expense for the same plan year, the proposed integration rules provide that the HRA may not reimburse a participant for any medical care expenses unless, prior to each reimbursement, the participant provides substantiation (which may be in the form of a written attestation) that the participant and, if applicable, any dependent(s) whose medical care expenses are requested to be reimbursed continue to be enrolled in individual health insurance coverage (other than coverage that consists solely of excepted benefits) for the month during which the medical care expenses were incurred. The attestation may be part of the form used for requesting reimbursement. As with the substantiation of enrollment for the plan year, for this purpose, an HRA may rely on the documentation or attestation provided by the participant unless the HRA has actual knowledge that the participant and any individual seeking reimbursement for the month were not enrolled in individual health insurance coverage (other than coverage that consists solely of excepted benefits) for the month.

6. Notice Requirement

Because HRAs are different from traditional employer-provided health coverage in many respects, the Departments are concerned that individuals eligible for HRAs integrated with individual health insurance coverage may not recognize that the offer and/or acceptance of an HRA will have consequences for PTC eligibility, as described elsewhere in this preamble. Therefore, in order to ensure that participants who are eligible to participate in an HRA integrated with individual health insurance coverage understand the potential effect that the offer of and enrollment in the HRA might have on their ability to claim the PTC, these proposed rules include a requirement that an HRA provide written notice to eligible participants. The HRA would be required to provide a written notice to each participant at least 90 days before the beginning of each plan year. For participants who are not yet eligible to participate at the beginning of the plan year (or who are not eligible when the notice is provided at least 90 days prior to the beginning of the plan year), the HRA would be required to provide the notice no later than the date on which the participant is first eligible to participate in the HRA.

The proposed written notice would be required to include certain relevant information, including a description of the terms of the HRA, including the maximum dollar amount made available, as used in the affordability determination under the Code section 36B proposed rules;[80] a statement of the

Code section 105(h) provide that, for purposes of the nondiscriminatory benefits rule under Code section 105(h)(4), ''a plan may establish a maximum limit for the amount of reimbursement which may be paid a participant for any single benefit or a combination of benefits. However, any maximum limit attributable to employer contributions must be uniform for all participants and for all dependents of employees who are participants and may not be modified by reason of a participant's age or years of service.'' *See* 26 CFR 1.105–11(c)(3)(i). The guidance that the Treasury Department and the IRS intend to issue is also anticipated to address the application of the Code section 105(h) uniformity requirement to an HRA integrated with individual health insurance coverage more generally.

[77] *See* 26 CFR 54.9815–2711(d)(2)(i)(E), (d)(2)(ii)(D), (d)(5)(iv), 29 CFR 2590.715–2711(d)(2)(i)(E), (d)(2)(ii)(D), (d)(5)(iv), and 45 CFR 147.126(d)(2)(i)(E), (d)(2)(ii)(D) and (d)(5)(iv). Note that the rule for integration of an HRA with non-HRA group coverage allows certain HRA amounts that are forfeited to be reinstated in the future, but the proposed rules do not contain a similar provision for HRAs integrated with individual health insurance coverage due to concerns by the Departments about complexity and burden on employers. See 26 CFR 54.9815–2711(d)(3), 29 CFR 2590.715–2711(d)(3), and 45 CFR 147.126(d)(3).

[78] *See* elsewhere in this preamble for a discussion of rules being proposed by the Treasury Department and the IRS regarding the circumstances in which an offer of an HRA integrated with individual health insurance coverage is affordable and provides MV. Also note that a former employee is only rendered ineligible for the PTC if the former employee enrolls in employer-sponsored coverage; an offer of coverage (even if it is affordable and provides MV) does not preclude a former employee from claiming the PTC.

[79] For purposes of the Code provisions affected by the proposed regulations, the otherwise generally applicable substantiation and recordkeeping requirements under section 6001 of the Code apply, including the requirements specified in Rev. Proc. 98–25 (1998–1 CB 689) for records maintained within an Automated Data Processing system.

[80] The Departments note that in order to comply with the notice requirement, the HRA must determine the amounts that will be newly made

right of the participant to opt-out of and waive future reimbursement under the HRA; a description of the potential availability of the PTC if the participant opts out of and waives the HRA and the HRA is not affordable under the proposed PTC regulations; a description of the PTC eligibility consequences for a participant who accepts the HRA; a statement that the participant must inform any Exchange to which they apply for advance payments of the PTC of the availability of the HRA, the amount of the HRA, the number of months the HRA is available to participants during the plan year, whether the HRA is available to their dependents and whether they are a current or former employee; a statement that the participant should retain the written notice because it may be needed to determine whether the participant is allowed the PTC; a statement that the HRA may not reimburse any medical care expense unless the substantiation requirements are met; and a statement that it is the responsibility of the participant to inform the HRA if the participant or any dependent whose medical care expenses are reimbursable by the HRA is no longer enrolled in individual health insurance coverage.

This notice would provide some of the information the participant needs in order for the participant to ascertain the consequences of the HRA for PTC eligibility, and would inform them of their responsibilities for the HRA. If the requirements of the Department of Labor's proposed rules at 29 CFR 2510.3–1(l) are met, the notice would be required to also include a statement to advise participants that individual health insurance coverage integrated with the HRA is not subject to ERISA (see section IV of this preamble and the Department of Labor's proposed rules at 29 CFR 2510.3–1(l) for additional explanation regarding this requirement).

The written notice would be required to include the information required by the proposed integration rules, and would be permitted to include other information, as long as the additional information does not conflict with the required information.

The written notice would not need to include information specific to a participant. More specifically, although the notice must contain a description of the potential availability of the PTC for a participant who opts out of and waives an unaffordable HRA and must include the HRA amount that is relevant for determining affordability under the proposed rules at 26 CFR 1.36B–2(c)(5), the proposed rules would not require the HRA to include in the notice a determination of whether the HRA is considered affordable for the participant. The participant would need additional information (that is, their household income and the premium for the lowest cost silver plan in the Exchange for the rating area where they reside) to determine whether the HRA is affordable under the proposed PTC rules, as described in detail in section III of this preamble.

available for the plan year prior to the plan year. A similar requirement applies under the proposed premium tax credit regulations. *See* proposed 26 CFR 1.36B–2(c)(5)(v).

7. Student Health Insurance Coverage

Federal regulations under PPACA define student health insurance coverage as a type of individual health insurance coverage.[81] Although those regulations exempt student health insurance coverage from certain provisions of PPACA and HIPAA,[82] they do not exempt such coverage from sections 2711 and 2713 of the PHS Act. Therefore, given that student health insurance coverage is a type of individual health insurance coverage, and is required to comply with sections 2711 and 2713 of the PHS Act, the Departments clarify that under the proposed integration rules an HRA may be integrated with student health insurance coverage that satisfies the requirements in 45 CFR 147.145.[83]

The Departments also wish to confirm that prior guidance,[84] which provided enforcement relief to institutions of higher education for certain healthcare premium reduction arrangements offered in connection with student health coverage (insured or self-insured), remains in effect, pending further guidance.

8. Comment Solicitation Regarding Various Integration-Related Issues

In developing the proposed integration rules, the Departments considered whether to allow HRAs intended to satisfy the individual health insurance coverage integration test also to be integrated with group health plan coverage, such as a group health plan maintained by the employer of the participant's spouse, in addition to individual health insurance coverage, because like individual health insurance coverage, group health plan coverage is generally subject to and compliant with PHS Act sections 2711 and 2713. The Departments are not proposing such a rule because allowing such integration would add significant complexity to the individual health insurance coverage integration test.[85] The Departments request comments regarding whether the Departments should allow for such integration and if so, with respect to PHS Act section 2711 compliance, how such an integration test should be designed to take into account that, while most individual health insurance coverage is required to cover all EHBs, large group market and self-insured group health plans are not required to cover all EHBs. The Departments request comments on the demand for

[81] Under this definition, student health insurance coverage must be provided pursuant to a written agreement between an institution of higher education (as defined in the Higher Education Act of 1965) and a health insurance issuer, and provided to students enrolled in that institution and their dependents, and does not make health insurance coverage available other than in connection with enrollment as a student (or as a dependent of a student) in the institution, does not condition eligibility for the health insurance coverage on any health status-related factor (as defined in 45 CFR 146.121(a)) relating to a student (or a dependent of a student), and meets any additional requirements that may be imposed under State law. *See* 45 CFR 147.145(a).

[82] *See* 45 CFR 147.145(b).

[83] Self-insured student health plans are not a form of individual health insurance coverage. Therefore, these proposed integration regulations do not provide for HRA integration with self-insured student health plans.

[84] *See* FAQs About Affordable Care Act Implementation Part 33, available at *https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/faqs/aca-part-33.pdf* or *https://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/Downloads/ACA-FAQ-Set-33-Final.pdf. See also* IRS Notice 2016–17, 2016–9 IRB 358; DOL Technical Release 2016–1, available at *http://www.dol.gov/ebsa/newsroom/tr16-01.html*; and Insurance Standards Bulletin, Application of the Market Reforms and Other Provisions of the Affordable Care Act to Student Health Coverage, February 5, 2016, available at *https://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/student-health-bulletin.pdf.*

[85] PHS Act section 2711 applies with respect to the provision of EHBs. Because large group market and self-insured group health plan coverage are not required to provide EHBs, unlike individual health insurance coverage which is generally required to provide all EHBs, in the group health plan integration context, situations may arise where non-HRA group coverage with which the HRA is integrated does not cover every category of EHBs that the HRA covers. In that case, the HRA applies an annual dollar limit to a category of EHBs and the non-HRA group coverage with which it is integrated does not cure that limit by providing unlimited coverage of that category of EHBs. In the 2015 regulations under PHS Act section 2711, and in subregulatory guidance that preceded the Departments final rules, the Departments addressed this issue by providing two tests. Specifically, if the non-HRA group coverage with which an HRA is integrated provides MV, the HRA will not be considered to fail to comply with PHS Act section 2711, even though the HRA might provide reimbursement of an EHB that the plan with which the HRA is integrated does not. If an HRA is integrated with non-HRA group coverage that does not provide MV, the 2015 regulations limit the types of expenses that an HRA may reimburse to reimbursement of co-payments, co-insurance, deductibles, and premiums under the non-HRA group coverage, as well as medical care that does not constitute EHBs. For additional discussion of the final regulations under PHS Act section 2711 see the discussion earlier in this preamble.

such a rule, and any problems such a rule may raise.

The Departments also considered whether to propose a rule to permit HRAs to be integrated with other types of non-group coverage other than individual health insurance coverage, such as STLDI.[86] However, while all individual health insurance coverage that is currently written is non-grandfathered coverage, and therefore is subject to and, presumably, compliant with PHS Act sections 2711 and 2713 (and most individual market coverage that is renewed is also non-grandfathered), other types of non-group coverage, such as STLDI, may not be subject to PHS Act sections 2711 and 2713, in which case, integration would not be sufficient to ensure that the combined benefit package satisfies these requirements. The Departments request comments on whether integration with STLDI (which is not required to, but which may, satisfy PHS Act sections 2711 and 2713) should be permitted, including whether integration should be permitted with any other type of coverage that satisfies PHS Act sections 2711 and 2713, how such integration rules should be structured, as well as comments on what, if any, potential benefits and problems might arise from allowing these types of HRA integration. The Departments also seek comment on whether allowing such integration would raise any concerns about health status discrimination leading to additional adverse selection in the individual market.

The Departments also seek comment on whether the ability to integrate an HRA with individual health insurance coverage has the potential to increase participation in and strengthen the viability of States' individual market risk pools. Further, the Departments invite comment on whether the proposed integration safeguards are appropriate and narrowly tailored to mitigate adverse selection and the potential for discrimination based on health status, or whether less restrictive safeguards would suffice.

Further, as noted earlier in this preamble, the proposed integration rules do not address cafeteria plan premium arrangements, other than to provide that plan sponsors may offer such an arrangement in addition to an HRA integrated with individual health insurance coverage in certain circumstances. The Departments invite comments on whether employers may seek to provide cafeteria plan premium arrangements, including as a standalone arrangement, and, if so, what additional guidance is needed in order to facilitate the offering of such arrangements. In particular, the Departments solicit comments on whether the definition of the term ''account-based group health plan'' should include cafeteria plan premium arrangements in order to permit these arrangements to integrate with individual health insurance coverage subject to the requirements of the rule, including how that treatment would be coordinated with other requirements applicable to employee benefit plans.

9. Revisions to PHS Act Section 2711 Regulations Regarding Integration With Other Group Health Plan Coverage and Medicare

The 2015 regulations under PHS Act section 2711 provide methods for integrating HRAs with coverage under another group health plan, and, in certain circumstances, with Medicare parts B and D. These proposed rules do not substantively change the current group health plan or Medicare integration tests under the existing PHS Act section 2711 regulations. However, these proposed rules include minor proposed revisions to those regulations, including changing the term ''account-based plan'' to ''account-based group health plan'' and moving defined terms to a definitions section.

More substantively, these proposed rules would amend the regulations under PHS Act section 2711 to reflect that HRAs may be integrated with individual health insurance coverage subject to the requirements of 26 CFR 54.9802–4, 29 CFR 2590.702–2, and 45 CFR 146.123. Paragraph (d)(4) of 26 CFR 54.9815–2711, 29 CFR 2590.715–2711 and 45 CFR 147.126 is revised accordingly. In addition, for the sake of clarity, the proposed rules add to paragraph (d)(2) in each of the aforementioned PHS Act section 2711 regulations that an HRA integrated with non-HRA group coverage may not be used to purchase individual health insurance coverage (other than coverage that consists solely of excepted benefits), as the Departments previously clarified in Notice 2015–87, Q&A 2.

In addition, the proposed rules update the definition of EHBs set forth in paragraph (c) of the regulations under PHS Act section 2711, which applies for a group health plan or health insurance issuer not required to cover EHBs. The update in the proposed rules reflects the revision to the EHB-benchmark plan selection process that was promulgated in the HHS Notice of Benefit and Payment Parameters for 2019 Final Rule (2019 Payment Notice) and that applies for plan years beginning on or after January 1, 2020.[87] The 2019 Payment Notice revisions provide States with additional choices with respect to the selection of benefits and promote affordable coverage through offering States additional flexibility in their selection of an EHB-benchmark plan for plan years beginning on or after January 1, 2020. The State's existing EHB-benchmark plan will continue to apply for any year for which a State does not select a new EHB-benchmark plan from the available EHB-benchmark plan selection options finalized in the 2019 Payment Notice.[88]

B. Excepted Benefit HRAs

There may be scenarios in which an employer wishes to offer an HRA that may not be integrated with non-HRA group coverage, Medicare, TRICARE, or individual health insurance coverage. For example, some employers may wish to offer an HRA without regard to whether its employees have other coverage at all or without regard to whether its employees have coverage that is subject to and satisfies the market requirements. Therefore, these proposed rules would utilize the Departments' discretion under section 9832(c)(2)(C) of the Code, section 733(c)(2)(C) of ERISA, and section 2791(c)(2)(C) of the PHS Act, to recognize HRAs as limited excepted benefits, if certain conditions are met.[89]

As explained earlier in this preamble, the Departments have the authority and discretion to specify in regulations additional limited excepted benefits, that are similar to the limited benefits specified in the statute and that either are insured under a separate policy, certificate, or contract, or are otherwise not an integral part of a plan. The Departments are proposing an excepted benefit HRA that is both consistent with this statutory framework and consistent with the Departments' objective of expanding the availability and usability of HRAs.

The proposed rules provide the following four requirements for an HRA to qualify as an excepted benefit HRA: (1) The HRA must not be an integral part of the plan, (2) the HRA must

[86] *See* the definition of short-term, limited-duration insurance (STLDI) under 26 CFR 54.9801–2, 29 CFR 2590.701–2, 45 CFR 144.103.

[87] *See* 83 FR 16930 (April 17, 2018). The definition of EHB that applies under the PHS Act section 2711 regulations for plan years beginning before January 1, 2020 would not be substantively changed by the proposed rules.

[88] For more information on the revised EHB standard, refer to the preamble to the 2019 Payment Notice, beginning at page 17007.

[89] The proposed rules that recognize certain HRAs as limited excepted benefits do not apply to health FSAs. For a health FSA to qualify as an excepted benefit, the current regulations continue to apply.

provide benefits that are limited in amount, (3) the HRA cannot provide reimbursement for premiums for certain health insurance coverage, and (4) the HRA must be made available under the same terms to all similarly situated individuals.

1. Otherwise Not an Integral Part of the Plan

HRAs are self-insured group health plans and, therefore, are not insurance coverage that can be provided under a separate policy, certificate, or contract of insurance. Accordingly, HRAs must meet the statutory requirement to not be ''an integral part of the plan.'' To satisfy this condition, the proposed rules specify that for an HRA to be an excepted benefit, other group health plan coverage (other than an account-based group health plan or coverage consisting solely of excepted benefits) must be made available by the same plan sponsor for the plan year to the participants offered the HRA. Only individuals who are eligible for participation in the other group health plan would be eligible for participation in the excepted benefit HRA. However, while the plan sponsor would be required to make an offer of other group health plan coverage in order to meet this requirement, HRA participants (and their dependents) would not be required to enroll in the other group health plan in order to be eligible for the excepted benefit HRA.

This provision of the proposed excepted benefit HRA is similar to the requirement that applies under the limited excepted benefits regulations for health FSAs at 26 CFR 54.9831–1(c)(3)(v), 29 CFR 2590.732(c)(3)(v), and 45 CFR 146.145(b)(3)(v).

2. Limited in Amount

In creating the excepted benefit HRA, the Departments had to determine what type of HRA would be sufficiently limited to qualify as a limited excepted benefit. Under the statute, limited benefits may include limited scope vision or dental benefits, benefits for long-term care, nursing home care, home health care, or community-based care, or any combination thereof and may include ''such other similar, limited benefits as are specified in regulations'' by the Departments.

The Departments consistently have applied limiting principles in prior rulemakings under which discretion was exercised to establish additional types of limited excepted benefits. For example, health FSAs constitute excepted benefits only if the arrangement is structured so that the maximum benefit payable to any participant in the class for a year may not exceed two times the participant's salary reduction election under the arrangement for the year (or, if greater, may not exceed $500 plus the amount of the participant's salary reduction election).[90] Additionally, limited wraparound coverage is a limited excepted benefit only if it is limited in amount, such that the cost of coverage per employee (and any covered dependents) under the limited wraparound coverage does not exceed the greater of the maximum permitted annual salary reduction contribution toward a health FSA,[91] or 15 percent of the cost of coverage under the primary plan.[92]

In the proposed rules, the Departments propose that the amounts newly made available for a plan year in an excepted benefit HRA may not exceed $1,800, indexed for inflation for plan years beginning after December 31, 2020. For this purpose, inflation is defined in these proposed rules by reference to the Chained Consumer Price Index for All Urban Consumers, unadjusted (C–CPI–U), published by the Department of Labor. The adjusted limit for plan years beginning in a particular calendar year will be made available early in the fall of the prior calendar year.

In proposing this limit, the Departments considered several factors, including the limits on employer contributions to excepted benefit health FSAs (set at $500 in 1997 if there are no employee contributions to the FSA, although it might be much higher if there are employee contributions).[93] The Departments also considered indexing $500 for medical inflation using the medical care component of the Consumer Price Index for all Urban Consumers (CPI–U). The Departments considered the relationship between $500 and the average cost of insurance in 1997. The Departments also considered a limit of 15 percent-of-the-cost-of-coverage-under-the-primary-plan test, which is the limit used for both supplemental excepted benefits in the group market and limited wraparound coverage, as a benchmark to ensure that the benefits are limited in amount.[94] In considering how such a limit could be an appropriate limit for excepted benefit HRAs, the Departments considered 15 percent of the cost of group coverage for both employee-only and family coverage. However, the Departments also considered how to determine the primary plan in circumstances in which the participant does not enroll in a traditional group health plan, and concluded that such a determination would likely be difficult for employers. The Departments also considered using the cost of coverage for the second-lowest cost silver plan in various markets. These methodologies produced a wide range of possible excepted benefit HRA limits from $1,100 to $2,850. Consistent with the principle of promoting HRA use and availability, rather than proposing a complex test for the limit on amounts newly made available in the excepted benefit HRA, the Departments are proposing a maximum of $1,800 (indexed for inflation) on amounts newly made available for a plan year. This approximates the midpoint amount yielded by the various methodologies considered.

In proposing to index the amount by C–CPI–U, the Departments considered several factors, including the difficulties of administering an HRA with a changing amount, and the cost, including the cost to the Departments to publish the amount and provide notice every year, as balanced with the decreasing real value of a set HRA limit and the ability of an employer to maintain the HRA benefit at $1,800, should it choose to do so.

The Departments invite comment on the amount of the proposed maximum dollar limit and whether an alternate amount or formula for determining the maximum dollar limit for an excepted benefit HRA would be more appropriate and, if so, what that alternative would be and why. The Departments specifically request comments on whether the proposed HRA maximum amount of $1,800 should be higher if the HRA covers dependents (or alternatively, whether the $1,800 maximum amount should be lower if the HRA only covers the employee). The Departments also invite comments on the measure of inflation used, including whether the amount should be indexed to inflation (and if there are any administrability concerns associated with indexing), if C–CPI–U is the correct measure of inflation, or whether an

[90] 26 CFR 54.9831–1(c)(3)(v); 29 CFR 2590.732(c)(3)(v); 45 CFR 146.145(b)(3)(v).

[91] *See* section 125(i) of the Code.

[92] 26 CFR 54.9831–1(c)(3)(vii); 29 CFR 2590.732(c)(3)(vii); 45 CFR 146.145(b)(3)(vii).

[93] *See* 26 CFR 54.9831–1(c)(3)(v)(B); 29 CFR 2590.732(c)(3)(v)(B); 45 CFR 146.145(b)(3)(v)(B).

[94] *See* 26 CFR 54.9831–1(c)(3)(vii)(B)(2); 29 CFR 2590.732(c)(3)(vii)(B)(2); 45 CFR 146.145(b)(3)(vii)(B)(2). *See also* EBSA Field Assistance Bulletin No. 2007–04 (available at *https://www.dol.gov/agencies/ebsa/employers-and-advisers/guidance/field-assistance-bulletins/2007-04*); CMS Insurance Standards Bulletin 08–01 (available at *http://www.cms.gov/CCIIO/Resources/Files/Downloads/hipaa_08_01_508.pdf*); and IRS Notice 2008–23 (2008–07 IRB 433).

alternate measure, such as the overall *medical* care component for CPI–U, or the method specified under section 9831(d)(2)(D) of the Code for QSEHRAs, should be used. The Departments also invite comment on whether the publication of the adjusted limit for plan years beginning in a particular calendar year by early fall of the preceding calendar year will provide employers with sufficient time to adjust the excepted benefit HRA for the upcoming year.

If a participant or dependent in an excepted benefit HRA does not use all of the amounts made available in the excepted benefit HRA to reimburse medical care expenses for a plan year, and the excepted benefit HRA allows for these amounts to be made available to the participant and dependents in later plan years, the Departments propose that these carryover amounts would be disregarded for purposes of determining whether the benefits in the excepted benefit HRA are limited in amount.

Further, the proposed rules provide that if the plan sponsor provides more than one excepted benefit HRA to the participant for the same time period, the amounts made available under such plans are aggregated to determine whether the benefits are limited in amount.

3. Prohibition on Reimbursement of Premiums for Certain Types of Coverage

As the third requirement for an HRA to be recognized as a limited excepted benefit, the Departments propose that the HRA would not be permitted to reimburse premiums for individual health insurance coverage, coverage under a group health plan (other than COBRA or other group continuation coverage), or Medicare parts B or D. However, the proposed rules would allow an excepted benefit HRA to reimburse premiums for individual health insurance coverage that consists solely of excepted benefits or coverage under a group health plan that consists solely of excepted benefits, as well as for STLDI premiums, and for COBRA premiums.

The Departments have concluded that this limit is appropriate in light of the requirement that excepted benefits under this statutory provision provide only limited benefits. In addition, the Departments have concluded that this condition is appropriate because under our concurrent proposal to permit HRAs to be integrated with individual health insurance coverage and the current regulations that allow HRAs to be integrated with group health plan coverage and to reimburse premiums for Medicare parts B and D in certain circumstances, an employer that wishes to provide an HRA that reimburses premiums for individual health insurance coverage, coverage under a group health plan, or Medicare parts B or D may do so under the applicable integration rules. Such an approach ensures that excepted benefit HRAs provide limited benefits different from what a traditional group health plan would provide, similar to limited scope dental or vision plans and benefits for long-term care, nursing home care, home health care, and community-based care.

This proposed condition would not limit the ability of an excepted benefit HRA to reimburse premiums for COBRA or other group continuation coverage (premiums for which are generally paid with after-tax funds) or STLDI. Further, the excepted benefit HRA may reimburse premiums other than those listed as specifically excluded. The Departments request comments on this condition, including whether additional clarity is needed regarding whether premiums for certain types of coverage may be reimbursed under the proposed excepted benefit HRA.

4. Uniform Availability

To prevent a plan sponsor from intentionally or unintentionally, directly or indirectly, steering any participants or dependents with adverse health factors away from the sponsor's traditional group health plan, the fourth and final requirement for an HRA to be recognized as a limited excepted benefit relates to uniform availability. Specifically, an excepted benefit HRA would be required to be made available under the same terms to all similarly situated individuals (as defined in the HIPAA nondiscrimination regulations) regardless of any health factor. In the Departments' view, this condition is necessary to prevent discrimination based on health status and to preclude opportunities for an employer to offer a more generous excepted benefit HRA to individuals with an adverse health factor, such as an illness or a disability, as an incentive not to enroll in the plan sponsor's traditional group health plan. Therefore, the Departments are proposing a uniform-availability requirement and wish to make it clear that benefits must be provided uniformly, without regard to any health factor. Accordingly, for example, the HRA could not be offered only to employees who have cancer or fail a physical examination, just as the HRA could not be offered only to employees who are cancer-free or who pass a physical examination. Similarly, an employer could not make greater amounts available to an HRA for employees who have cancer or who fail a physical examination, just as an employer could not make greater amounts available to an HRA for employees who are cancer-free or who pass a physical examination. The Departments request comment on whether additional standards are necessary to prevent abuse and discrimination based on a health factor.

C. Interaction Between HRAs Integrated With Individual Health Insurance Coverage and Excepted Benefits HRAs

Under the proposed rules, an employer would be permitted to offer an HRA integrated with individual health insurance coverage to a class of employees so long as it does not also offer a traditional group health plan to the same class of employees, subject to additional conditions discussed elsewhere in this preamble. However, an employer could only offer an excepted benefit HRA if traditional group health plan coverage is also made available to the employees who are eligible to participate in the excepted benefit HRA. Thus, an employer would not be permitted to offer both an HRA integrated with individual health insurance coverage and an excepted benefit HRA to any employee.[95]

III. Overview of the Proposed Rules Regarding the Premium Tax Credit—Department of the Treasury and IRS

A. Premium Tax Credit Under Section 36B of the Code

Consistent with the objectives in Executive Order 13813 to expand the use of HRAs, the proposed rules would amend the regulations under section 36B of the Code to provide guidance for individuals who are offered or covered by an HRA integrated with individual health insurance coverage as described in the proposed integration rules and who otherwise may be eligible for the PTC.

An individual who is covered by an HRA integrated with individual health insurance coverage is ineligible for the PTC. However, see the discussion earlier in this preamble of the related requirement under the proposed integration rules that plan sponsors provide participants with the periodic opportunity to opt-out of and waive future reimbursements under an HRA.

[95] The Departments note that an employer may not provide a QSEHRA to any employee if it offers any employee a group health plan. Accordingly, an employer may not provide a QSEHRA to any employee if it offers any employee an HRA that may be integrated with individual health insurance coverage or an excepted benefit HRA. *See* section 9831(d)(3)(B)(ii) of the Code.

The proposed rules under section 36B of the Code describe the PTC eligibility of an individual who is offered, but opts out of, an HRA that is integrated with individual health insurance coverage. Consistent with section 36B of the Code and the existing regulations thereunder, the proposed rules provide that an employee who is offered, but opts out of, an HRA integrated with individual health insurance coverage, and an individual who is offered such an HRA because of a relationship to the employee (a related HRA individual), are eligible for MEC under an eligible employer-sponsored plan for any month the HRA is affordable and provides MV. Thus, these individuals are ineligible for the PTC for their Exchange coverage for months the HRA is affordable and provides MV.

Under the proposed rules, an HRA integrated with individual health insurance coverage is affordable for an employee (and a related HRA individual) for a month if the employee's required HRA contribution does not exceed 1/12 of the product of the employee's household income and the required contribution percentage (defined in 26 CFR 1.36B–2(c)(3)(v)(C)). For this purpose, an employee's required HRA contribution would be the excess of: (1) The monthly premium for the lowest cost silver plan for self-only coverage available to the employee through the Exchange for the rating area in which the employee resides; over (2) the monthly self-only HRA amount provided by the employee's employer, or, if the employer offers an HRA that provides for a single dollar amount regardless of whether an employee has self-only or other-than-self-only coverage, the monthly maximum amount available to the employee. Under the proposed rules, the monthly self-only HRA amount would be the self-only HRA amount newly made available to the employee from the employee's employer under the HRA for the plan year, divided by the number of months in the plan year the HRA is available to the employee. The monthly maximum amount available to the employee under the HRA, which is relevant if the HRA provides one amount regardless of the number of individuals covered, would be the maximum amount newly made available to the employee under the HRA, divided by the number of months in the plan year the HRA is available to the employee.

The affordability rule in the proposed rules uses the lowest cost silver plan for self-only coverage available to the employee through the Exchange for the rating area in which the employee resides, without regard to the type of plan in which the employee actually enrolls. The lowest cost silver plan was chosen because, in the individual market, the lowest cost silver plan is the lowest cost Exchange plan for which the plan's share of the total allowed costs of benefits provided under the plan is certain to be at least 60 percent of such costs, as required by section 36B(c)(2)(C)(ii) of the Code for a plan to provide MV. Specifically, section 36B(c)(2)(C)(ii) of the Code and 26 CFR 1.36B–6 provide that an eligible employer-sponsored plan provides MV only if the plan's share of the total allowed costs of benefits provided to an employee under the plan is at least 60 percent.[96] In selecting the lowest cost plan for which it is certain that the plan's share of the total allowed costs of benefits provided under the plan will be at least 60 percent of such costs, the proposed rules seek to most closely approximate the PTC eligibility rules that apply to offers of eligible-employer sponsored coverage that is not an HRA.[97] That is, the PTC eligibility rules under the proposed regulations for an HRA offer, as well as under section 36B of the Code for an offer of traditional employer coverage, are both based on the affordability of a plan available to the employee for which the plan's share of the total allowed costs of benefits provided under the plan must be at least 60 percent of such costs. (See the discussion later in this section of when an HRA integrated with individual health insurance coverage is considered to provide MV.) The Treasury Department and the IRS seek comment on whether the silver level plan used for this purpose should be the second lowest cost silver plan,[98] instead of the lowest cost silver plan, for self-only coverage offered in the Exchange for the rating area in which the employee resides or whether another plan should be used, and any operational or other issues that the use of the plan proposed or any alternative plan would entail. The proposed rules further provide that only amounts that are newly made available for the plan year of the HRA would be taken into account for determining affordability, provided that the amounts are determinable within a reasonable time before the beginning of the plan year of the HRA. Additionally, consistent with the rules for traditional employer coverage,[99] the proposed rules require affordability to be determined separately for each employment period that is less than a full calendar year or for the portions of the plan year of the HRA that fall within different taxable years of the employee. In addition, the proposed rules include examples of affordability calculations.

The proposed rules also address the circumstances in which an HRA is considered to provide MV. As noted earlier in this section of the preamble, section 36B of the Code generally provides that an offer of employer coverage prevents an employee from being allowed the PTC for his or her Exchange coverage only if the employer coverage is both affordable and provides MV. With respect to an offer of an HRA integrated with individual health insurance coverage, the individual health insurance coverage that is proposed to be used for purposes of the affordability test is the lowest cost silver level Exchange coverage for the rating area in which the employee resides, which, as previously noted, will always provide MV. A determination that the integrated arrangement is affordable under the proposed regulations is therefore sufficient to ensure that an employee who is offered an HRA integrated with individual health insurance coverage, and that is determined to be affordable, has the ability to purchase affordable coverage that provides MV. Consequently, the proposed rules provide that an HRA integrated with individual health insurance coverage that is affordable is treated as providing MV.

Determining PTC eligibility in the manner provided under the proposed rules is consistent with current rules for traditional employer coverage. That is, the proposed rules result in consistent treatment for purposes of section 36B of the Code for employees offered an HRA integrated with individual health insurance coverage and employees offered traditional employer coverage. In both instances, the employees may be allowed the PTC if they decline the offer and the coverage is either unaffordable or does not provide MV. Further, in both instances, the employee's required

[96] In the individual market, a bronze plan may have an actuarial value of 56 percent, which would not ensure the plan's share of the total allowed costs of benefits provided under the plan is at least 60 percent of such costs, as required by section 36B(c)(2)(C)(ii) of the Code for a plan to provide MV. *See* 45 CFR 156.140.

[97] With regard to an offer of eligible employer-sponsored coverage that is not an HRA, an individual is eligible for the PTC only if the employee's required contribution, which is the portion of the annual premium that would be paid for the lowest cost self-only MV coverage offered by the employer to the employee, exceeds a certain percentage of the employee's household income. *See* section 36B(c)(2)(C) of the Code.

[98] Note that the monthly premium for self-only coverage for the second lowest cost silver plan in the employee's individual health insurance market is used to determine the affordability of a QSEHRA. *See* section 36B(c)(4)(C) of the Code.

[99] *See* 26 CFR 1.36B–2(c)(3)(v)(B).

contribution is based on the amount the employee must pay for self-only coverage that provides MV because under the proposed rules affordability would be determined based on the lowest cost silver plan offered in the Exchange for the rating area in which the employee resides (which by definition will always provide MV). If the amount the employee must pay is more than the product of the required contribution percentage and the employee's household income, the employee may be allowed the PTC.

The proposed rules also clarify the ways in which the generally applicable employer-sponsored coverage PTC eligibility rules apply to HRAs integrated with individual health insurance coverage.[100] For example, as with traditional coverage under eligible employer-sponsored plans, the proposed rules provide that an HRA integrated with individual health insurance coverage is not affordable for a month for an employee or related HRA individual if, at the time of enrollment in a qualified health plan, an Exchange determines that the HRA is not affordable. This employee safe harbor locks in an Exchange's determination of unaffordability, which is based on estimated household income, even if the HRA ultimately proves to be affordable based on actual household income for the tax year. Consistent with the existing regulations under section 36B of the Code, the employee safe harbor does not apply (1) to a determination made as part of the redetermination process described in 45 CFR 155.335 unless the individual receiving an Exchange redetermination notification affirmatively responds and provides current information on affordability; or (2) for an individual who, with intentional or reckless disregard for the facts, provides incorrect information to an Exchange concerning the relevant HRA amount.

B. Employer Shared Responsibility Provisions Under Section 4980H of the Code

As part of implementing the objectives of Executive Order 13813, the Treasury Department and the IRS have considered how section 4980H of the Code would apply to an employer offering an HRA integrated with individual health insurance coverage, as set forth in the proposed integration rules and taking into account the proposed rules described previously in this preamble under section 36B of the Code.

Only ALEs are subject to section 4980H of the Code.[101] The Departments anticipate that many employers that would be interested in offering an HRA integrated with individual health insurance coverage, as set forth in the proposed integration rules, may be smaller employers and, therefore, may not need to consider section 4980H of the Code when designing their HRA program.

For an employer that is an ALE, the employer may owe a payment for a month under section 4980H(a) or section 4980H(b) of the Code or neither. In general, an employer will owe a payment under section 4980H(a) of the Code if it fails to offer an eligible employer-sponsored plan to at least 95 percent of its full-time employees and their dependents and at least one full-time employee is allowed the PTC for the month.[102] An HRA is an eligible employer-sponsored plan; therefore, if an ALE offers an eligible employer-sponsored plan (including an HRA) to at least 95 percent of its full-time employees and their dependents, the ALE would not be liable for a payment under section 4980H(a) of the Code for the month.

An employer that is an ALE and which offers an eligible employer-sponsored plan to at least 95 percent of its full-time employees and their dependents (and therefore is not liable for a payment under section 4980H(a) of the Code) may be liable for a payment under section 4980H(b) of the Code if at least one full-time employee is allowed the PTC, which may occur if the eligible employer-sponsored plan offered was not affordable or did not provide MV, or if the employee was not offered coverage. The extent to which a full-time employee who was offered an HRA will be eligible for the PTC depends on the rules proposed under section 36B of the Code. However, in the near term, the Treasury Department and the IRS intend to issue guidance that describes an anticipated safe harbor for purposes of determining whether an employer that has offered an HRA integrated with individual health insurance coverage would be treated as having made an offer of affordable coverage that provides MV for purposes of section 4980H of the Code, regardless of whether the employee who received that offer declines the HRA and claims the PTC.[103]

IV. Individual Health Insurance Coverage and ERISA Plan Status

This document includes a DOL-only proposed regulation that would clarify that the ERISA terms ''employee welfare benefit plan,'' ''welfare plan,'' and, as a direct result, ''group health plan'' would not include individual health insurance coverage the premiums of which are reimbursed by an HRA and certain other arrangements, provided that the employer, employee organization, or other plan sponsor is not involved in the selection of the individual health insurance coverage, among other criteria. Later, this section of the preamble also describes a related clarification made to regulations of all three Departments. DOL's objective in proposing this regulatory clarification is to provide employees; employers, employee organizations, and other plan sponsors; health insurance issuers; state insurance regulators; and other stakeholders with assurance that insurance policies sold as individual health insurance coverage, and subject to comprehensive Federal (and state) individual market rules for minimum and uniform coverage, standardized pricing, guaranteed availability, and guaranteed renewability, are not part of an HRA or certain other arrangements for purposes of ERISA.[104] Specifically, DOL is proposing an amendment to 29 CFR 2510.3–1 on the definition of ''employee welfare benefit plan'' in section 3(1) of ERISA.[105] This proposed

[100] The Treasury Department and the IRS have provided guidance regarding when amounts newly made available under an HRA count toward the affordability or MV of another group health plan offered by the same employer. *See* 26 CFR 1.36B–2(c)(3)(v)(A)(*5*) and 26 CFR 1.36B–6(c)(4). *See also* IRS Notice 2015–87, Q&A 7. This document does not make substantive revisions to those rules but does make clarifying updates to 26 CFR 1.36B–2(c)(3)(v)(A)(*5*), mainly to incorporate a reference to more recent guidance.

[101] The explanation of section 4980H of the Code provided here is a summary. For a complete explanation of the rules, including for definitions of terms used in this summary, see 26 CFR 54.4980H–1, *et seq.,* published in the **Federal Register** at 79 FR 8544 (Feb. 12, 2014).

[102] Note that if an ALE offered coverage to all but five of its full-time employees (and their dependents), and five is greater than 5 percent of the employer's full-time employees, the employer will not owe an employer shared responsibility payment under section 4980H(a) of the Code. *See* 26 CFR 54.4980H–4(a).

[103] In addition to setting forth a potential affordability safe harbor, the Treasury Department and the IRS intend to clarify in the upcoming guidance that the affordability safe harbors set forth under 26 CFR 54.4980H–5(e)(2) are available to employers offering an HRA integrated with individual health insurance coverage, subject to the relevant conditions set forth in those regulations.

[104] For examples of other circumstances under which DOL has determined an arrangement is not a plan within the meaning of ERISA, see 29 CFR 2510.3–1(j), 29 CFR 2510.3–2(f), and 29 CFR 2509.99–1. *See also* DOL Field Assistance Bulletins 2004–01 and 2006–02.

[105] In light of the fact that ''group health plan'' is defined derivatively in ERISA section 733(a)(1), in relevant part, as an ''employee welfare benefit plan to the extent that the plan provided medical care . . . directly or through insurance, reimbursement, or otherwise[,]'' DOL has concluded that a separate

amendment would also apply to certain existing arrangements that reimburse participants for the purchase of individual health insurance coverage that are not subject to the market requirements (including QSEHRAs and HRAs that have fewer than two participants who are current employees on the first day of the plan year). Further, this proposed amendment would apply to an arrangement under which an employer allows employees to pay the portion of the premium for individual health insurance coverage that is not covered by the HRA with which the coverage is integrated or that is not covered by a QSEHRA by using a salary reduction arrangement under a cafeteria plan (supplemental salary reduction arrangement).

Section 3(1) of ERISA specifically defines ERISA-covered welfare plans to include ''any plan, fund, or program'' ''established or maintained by an employer or employee organization'' for the provision of health benefits ''through the purchase of insurance or otherwise.'' At the same time, provisions in the PHS Act generally treat individual health insurance and group health insurance as mutually exclusive categories.[106] If individual health insurance coverage were considered to be a group health plan or part of a group health plan, the individual health insurance coverage would likely violate some of the market requirements (for example, the single risk pool requirement). Treatment of such individual health insurance coverage as subject to both individual market and group market requirements thus could result in conflicting requirements, uncertainty and confusion which could inhibit or, in some instances, even preclude, the ability to integrate HRAs with individual health insurance coverage as contemplated by other provisions in the proposed rules.

In light of the PHS Act's treatment of group and individual health insurance coverage policies as mutually exclusive categories and the other provisions in this rulemaking addressing the permissible integration of individual health insurance coverage with HRAs, DOL concluded that the ERISA status of such individual health insurance coverage should be clarified in the context of the proposed rules.[107]

Under the proposed regulatory clarification, the status under ERISA of an HRA, QSEHRA, or supplemental salary reduction arrangement would remain unaffected. However, under the proposal, individual health insurance coverage selected by the employee in the individual market and reimbursed by such a plan would not be treated as part of a group health plan, or as health insurance coverage offered in connection with a group health plan, or as a part of any employee welfare benefit plan for purposes of title I of ERISA, provided all the following conditions are satisfied:

- The purchase of any individual health insurance coverage is completely voluntary for employees.[108]
- The employer, employee organization, or other plan sponsor does not select or endorse any particular issuer or insurance coverage. Providing general contact information regarding availability of health insurance in a state (such as providing information regarding *www.healthcare.gov* or contact information for a state insurance commissioner's office) or providing general health insurance educational information (such as the uniform glossary of health coverage and medical terms available at: *https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/laws/affordable-care-act/for-employers-and-advisers/sbc-uniform-glossary-of-coverage-and-medical-terms-final.pdf*) is permitted.
- Reimbursement for nongroup health insurance premiums is limited solely to individual health insurance coverage.
- The employer, employee organization, or other plan sponsor receives no consideration in the form of cash or otherwise in connection with the employee's selection or renewal of any individual health insurance coverage.
- Each plan participant is notified annually that the individual health insurance coverage is not subject to ERISA. For an HRA integrated with individual health insurance coverage, the notice must meet the requirements set forth in the proposed integration rules at 29 CFR 2590.702–2(c)(6). For a QSEHRA or an HRA that is not subject to 29 CFR 2590.702–2(c)(6), model language is provided in the DOL proposed amendment, which can be used to satisfy the condition.[109] A supplemental salary reduction arrangement need not provide the required notice; the notice will be provided by the HRA or QSEHRA that the salary reduction arrangement supplements.

DOL invites comments on all aspects of the proposed regulatory clarification. Some of the conditions parallel or are similar to conditions in other existing DOL regulations and related guidance for other types of arrangements, and DOL specifically invites comments on whether all of these conditions are necessary or whether other conditions should be used in place of, or in addition to, those being proposed in this document. DOL has issued guidance describing certain types of employee communications that would not constitute ''endorsement'' as that condition applies under its regulations on payroll-deduction IRAs, see 29 CFR 2509.99–1, and specifically invites comments on whether similar regulatory or interpretive guidance would be helpful in the context of this proposed regulation. DOL also specifically invites comments on which forms of payment are appropriately treated as ''reimbursement'' to participants for purposes of this regulatory clarification, consistent with the terms and purposes of ERISA section 3(1). For example, should ''reimbursement'' be interpreted to include direct payments, individual or aggregate, by the employer, employee organization, or other plan sponsor to the insurance company? DOL also specifically invites comments on whether a better approach would involve providing relief from specified

regulation relating to the definition of group health plan is not needed.

[106] As described earlier, individual health insurance coverage means health insurance coverage offered to individuals in the individual market, but does not include STLDI. *See* PHS Act section 2791(b)(5), 26 CFR 54.9801–2, 29 CFR 2590.701–2, and 45 CFR 144.103. Individual market means the market for health insurance coverage offered to individuals other than in connection with a group health plan. *See* PHS Act section 2791(e)(1), 26 CFR 54.9801–2, 29 CFR 2590.701–2, and 45 CFR 144.103. Group health insurance coverage means health insurance coverage offered in connection with a group health plan. *See* ERISA section 733(b)(4), PHS Act section 2791(b)(4), 26 CFR 54.9801–2, 29 CFR 2590.701–2, and 45 CFR 144.103.

[107] It is the intention of DOL that integration of an HRA with individual health insurance coverage obtained in the individual market, as described in the proposed rules, generally will not result in the individual health insurance coverage being treated as an ''employee welfare benefit plan'' or a ''group health plan'' within the meaning of title I of ERISA. However, depending on the particular facts and circumstances surrounding the involvement of an employer, the issue may not be free from doubt. Consequently, DOL proposes the clarification herein.

[108] The fact that a plan sponsor requires such coverage to be purchased as a condition for participation in an HRA or supplemental salary reduction arrangement does not make the purchase involuntary. This issue should not arise in the context of a QSEHRA because in that case, although individuals must be enrolled in MEC, employers may not require employees to enroll in individual health insurance coverage.

[109] In DOL's view, the summary plan description (SPD) for the HRA, QSEHRA, or other ERISA plan would fail to satisfy the style, format, and content requirements in 29 CFR 2520.102–3 and 29 CFR 2520.102–3 unless it contained a discussion of the status of the HRA or QSEHRA and the individual health insurance coverage under ERISA sufficient to apprise the HRA or QSEHRA plan participants and beneficiaries of their rights and obligations under the plan and Title I of ERISA.

otherwise-applicable obligations under ERISA Title I, rather than carving the policy out as if it were outside of ERISA Title I.

Additionally, existing regulations of all three Departments define ''group health insurance coverage'' as health insurance coverage offered in connection with a group health plan.[110] The Departments propose to amend that definition by clarifying that individual health insurance coverage the premiums of which are reimbursed by an HRA or a supplemental salary reduction arrangement is not offered in connection with a group health plan, and is not group health insurance coverage, provided all the conditions in proposed 29 CFR 2510.3–1(l) (described earlier in this preamble) are satisfied.[111]

In light of the fact that HRAs are subject to many statutory rules and regulations not specifically addressed in this proposed rulemaking, including various reporting, disclosure, fiduciary, and enforcement provisions under title I of ERISA, DOL also specifically invites comment on whether it would be helpful for DOL to issue additional regulations or guidance addressing the application of ERISA reporting and disclosure requirements to HRAs integrated with such non-ERISA individual health insurance coverage (for example, SPD content and Form 5500 annual reporting requirements). Similarly, the limitation in the proposal on employers, employee organizations, and other plan sponsors receiving consideration from an issuer or person affiliated with an issuer in connection with any participant's purchase or renewal of individual health insurance coverage was not intended to change any ERISA requirements governing the circumstances under which plans, including HRAs, may reimburse employers, employee organizations and other plan sponsors for certain expenses associated with administration of the plan. DOL specifically invites comments on whether there are particular issues in that area related to HRAs, QSEHRAs, or supplemental salary reduction arrangements that would benefit from additional regulatory or interpretive guidance.

[110] 26 CFR 54.9801–2; 29 CFR 2590.701–2, 45 CFR 144.103.

[111] Note that the clarification with respect to the meaning of group health insurance coverage is not relevant for QSEHRAs because QSEHRAs are not group health plans.

V. Overview of the Proposed Rules Regarding Individual Market Special Enrollment Periods—Department of Health and Human Services

As set forth earlier in this preamble, the Departments are proposing regulations to expand the usability of HRAs and to provide flexibility to employers. The proposed rules allowing integration of an HRA with individual health insurance coverage require that the individuals whose medical care expenses may be reimbursed under the HRA must be enrolled in individual health insurance coverage (other than coverage that consists solely of excepted benefits). With the ability to integrate HRAs with individual health insurance coverage, many employees may need access to individual health insurance coverage, on or off Exchange, or may wish to change to another individual health insurance plan in order to take advantage of this employee benefit. Therefore, HHS is proposing a regulation to allow employees and their dependents to enroll in individual health insurance coverage or to change from one individual health insurance coverage plan to another outside of the individual market annual open enrollment period if they gain access to an HRA integrated with individual health insurance coverage.

In addition, because employees and dependents with a QSEHRA generally must be enrolled in MEC,[112] and a significant category of MEC is individual health insurance coverage, HHS has determined that it is also appropriate to apply the new special enrollment period to individuals who are provided QSEHRAs.[113]

More specifically, HHS proposes to add new paragraph 45 CFR 155.420(d)(14) to establish a special enrollment period for when a qualified individual, enrollee, or his or her dependent gains access to and enrolls in an HRA integrated with individual health insurance coverage or is provided a QSEHRA, so that the individual and his or her dependents may enroll in or change his or her enrollment in individual health insurance coverage.

45 CFR 155.420(d)(14) would provide access to coverage in the circumstance in which an employer after the start of the calendar year newly begins offering an HRA to its employees that is integrated with individual health insurance coverage or newly begins providing a QSEHRA to its employees. HHS anticipates that many employers that choose to offer an HRA integrated with individual health insurance coverage or to provide a QSEHRA will do so on a calendar year basis, which will allow employees to enroll in or change individual health insurance coverage during the annual open enrollment period. However, HHS is aware that employers may begin offering HRAs and providing QSEHRAs to their employees at any time during the calendar year and has determined that employers are best suited to determine which twelve-month period to use for their plan year. In addition, the new special enrollment period would apply to individuals who newly gain access to and enroll in an HRA integrated with individual health insurance coverage or who are provided a QSEHRA outside of open enrollment, for example, because the employee is hired after the start of the calendar year.

HHS notes that for some situations in which an employee would newly gain access to an HRA integrated with individual health insurance coverage or would newly be provided a QSEHRA, access to coverage already exists under current authority in 45 CFR 155.410 or 155.420(d). For example, if an employer begins offering an HRA integrated with individual health insurance coverage or begins providing a QSEHRA effective January 1, employees may already enroll in or change individual health insurance coverage during the annual open enrollment period described in 45 CFR 155.410 with such coverage becoming effective January 1 (to coincide with the availability of the HRA or QSEHRA). Similarly, if an employer previously offered another type of group health plan coverage and decides to stop offering that coverage after the start of the calendar year to some or all of its employees (or the plan year ends after the start of the calendar year) and instead begins offering those employees an HRA integrated with individual health insurance coverage or begins providing a QSEHRA to them, the employees might already qualify for a special enrollment period due to a loss of MEC in accordance with 45 CFR 155.420(d)(1). In addition, an employee without a prior offer of employer coverage who is enrolled in Exchange

[112] Generally, payments from a QSEHRA to reimburse an eligible employee's medical care expenses are not includible in the employee's gross income if the employee has coverage that provides MEC as defined in section 5000A(f) of the Code, which includes individual health insurance coverage.

[113] The Departments note that the new special enrollment period provided in the proposed rules applies only for individuals who gain access to HRAs integrated with individual health insurance coverage or for individuals who are provided QSEHRAs. Therefore, the new special enrollment period provided in the proposed rules would not apply for individuals who gain access to the proposed excepted benefit HRA.

coverage with advance payments of the PTC and cost-sharing reductions (CSRs) currently may qualify for the special enrollment periods in 45 CFR 155.420(d)(6)(i) or (ii) upon gaining access to an HRA integrated with individual health insurance coverage or being provided a QSEHRA after the start of the calendar year, if that results in the loss of eligibility for advance payments of the PTC or a reduction or loss of eligibility for CSRs. However, if this same employee was enrolled in Exchange coverage without advance payments of the PTC or CSRs, he or she would not qualify for this special enrollment period upon gaining access to an HRA integrated with individual health insurance coverage or being provided a QSEHRA after the start of the calendar year, and would instead need the proposed new special enrollment period in 45 CFR 155.420(d)(14) in order to change Exchange coverage.

Because access to and enrollment in health coverage varies by employers and among employees, as does employees' current ability to qualify for a special enrollment period should they gain access to an HRA integrated with individual health insurance coverage or be provided a QSEHRA, HHS has concluded that it is necessary to establish a new special enrollment period as proposed under 45 CFR 155.420(d)(14) so that all employees (and their dependents) who gain access outside of the individual market open enrollment period (for example, after the start of the calendar year) and enroll in HRAs integrated with individual health insurance coverage or are provided QSEHRAs, regardless of their prior coverage situations, may utilize this employee benefit by enrolling in or changing their enrollment in individual health insurance coverage at that time.

HHS proposes to establish a coverage effective date for the special enrollment period in 45 CFR 155.420(d)(14) of the first day of the first month following the individual's plan selection, which is proposed at 45 CFR 155.420(b)(2)(vi). HHS has concluded that a first-of-the-following-month coverage effective date is appropriate for this special enrollment period because it aligns with the coverage effective date option elected by the Federally-facilitated Exchanges (FFEs) for qualified individuals, enrollees, or dependents, including employees, who qualify for a special enrollment period for loss of MEC under 45 CFR 155.420(d)(1). This coverage effective date also aligns with the coverage effective date option elected by the FFEs for the special enrollment period at 45 CFR 155.420(d)(6)(iii), applicable when employees enrolled in employer-sponsored coverage are determined newly eligible for advance payments of the PTC based in part on a finding that they are ineligible for coverage in an eligible-employer sponsored plan in accordance with 26 CFR 1.36B–2(c)(3). HHS has concluded that these existing qualifying events, also known as triggering events, and the new proposed qualifying event are similar to one another and affect potentially overlapping populations and, therefore, should entitle qualifying individuals to the same coverage start dates.

Similarly, HHS proposes to offer the option for advance availability, in addition to subsequent availability, for the proposed special enrollment period in 45 CFR 155.420(d)(14), which would allow qualified individuals, enrollees, and dependents to qualify for this special enrollment period up to 60 days in advance of the qualifying event, as described in paragraph 45 CFR 155.420(c)(2) of the proposed rules. Under this advance availability in combination with 45 CFR 155.420(b)(2)(vi), if an individual's plan selection is made before the date of the qualifying event, then coverage would be effective the first day of the month following the date of the qualifying event, or, if the triggering event is on the first day of a month, on the date of the triggering event. In cases where the qualifying event is the first day of the month, for example, if an individual will gain access to an HRA that can be integrated with individual health insurance coverage on April 1, so long as a plan is selected prior to that date (before or on March 31), the effective date of this new coverage will be the date of the qualifying event (April 1). Advance availability allows individuals who are aware of an upcoming change in eligibility or coverage status to report this change to the Exchanges ahead of time, select a plan, and enroll with a coverage effective date that helps minimize a potential gap in coverage. Because participants whose employers begin offering HRAs integrated with individual health insurance coverage or begin providing QSEHRAs generally must be notified at least 90 days prior to the plan year, participants would have advance knowledge of either benefit. Therefore, HHS has concluded that it makes sense to allow the participant to report this upcoming change to the Exchanges in advance, if desired. Individuals may alternatively elect to report the qualifying event up to 60 days after the date of the qualifying event and qualify for the special enrollment period during the regular special enrollment period window, in accordance with 45 CFR 155.420(c)(1).

In addition, in order to allow participants and their dependents the flexibility to adequately respond to gaining access to an HRA integrated with individual health insurance coverage or to being provided a QSEHRA, HHS also proposes to amend 45 CFR 155.420(a)(4)(iii) to exclude Exchange enrollees who would qualify for the proposed special enrollment period in 45 CFR 155.420(d)(14) from plan enrollment restrictions upon qualifying for this special enrollment period.

Lastly, since these proposed rules would allow for HRAs to be integrated with individual health insurance coverage both on and off Exchange (and because individuals with QSEHRAs may enroll in individual health insurance coverage both on and off Exchange), HHS proposes to include this special enrollment period in the limited open enrollment periods available off Exchange, in accordance with current regulations at 45 CFR 147.104(b)(2). Therefore, an employee or an employee's dependent who gains access to an HRA integrated with individual health insurance coverage or who is provided a QSEHRA may elect to enroll in or change to different Exchange or off-Exchange individual health insurance coverage.

HHS seeks comments on these proposals. If an employer begins offering an HRA or providing a QSEHRA to its employees during the calendar year outside of the Exchange annual open enrollment period, subsequent plan years likely will also begin during the calendar year. Therefore, HHS also seeks comments about whether the proposed new special enrollment period at 45 CFR 155.420(d)(14) should be available to employees who have and are enrolled in an HRA or are provided a QSEHRA each year at the time their new health plan year starts. This would allow employees to enroll in or change to a new plan in response to updated information about their HRA or QSEHRA benefit for each of their group health plan years.

VI. Applicability Date

The proposed HRA integration and HRA excepted benefit provisions described in section II of this preamble, as well as the DOL clarification and the clarification by the Departments described in section IV of this preamble, are proposed to apply to group health plans and health insurance issuers for plan years beginning on or after January 1, 2020. The PTC provisions described in section III of this preamble are

proposed to be effective for taxable years beginning on and after January 1, 2020, and the HHS special enrollment period provisions described in section V of this preamble are proposed to be effective January 1, 2020. Taxpayers and others may not rely on these proposed rules. The Departments solicit comments on this proposed applicability date.

VII. Economic Impact and Paperwork Burden

A. Summary

The proposed rules would remove the current prohibition on integrating HRAs with individual health insurance coverage, if certain conditions are met. The proposed rules also set forth conditions under which certain HRAs would be recognized as limited excepted benefits. In addition, the Treasury Department and the IRS are proposing rules regarding PTC eligibility for individuals offered coverage under an HRA integrated with individual health insurance coverage. Further, DOL is proposing a clarification to provide HRA, QSEHRA and supplemental salary reduction arrangement plan sponsors with assurance that the individual health insurance coverage the premiums of which are reimbursed by an HRA, QSEHRA or supplemental salary reduction arrangement would not become part of an ERISA plan if certain conditions are met, and the Departments are proposing a related clarification to the definition of group health insurance coverage. Finally, HHS is proposing rules that would provide a special enrollment period in the individual market for individuals who gain access to an HRA integrated with individual health insurance coverage or who are provided a QSEHRA.

The Departments have examined the effects of the proposed rules as required by Executive Order 13563 (76 FR 3821, January 21, 2011, Improving Regulation and Regulatory Review); Executive Order 12866 (58 FR 51735, October 4, 1993, Regulatory Planning and Review); the Regulatory Flexibility Act (September 19, 1980, Pub. L. 96–354); section 1102(b) of the Social Security Act (42 U.S.C. 1102(b)); section 202 of the Unfunded Mandates Reform Act of 1995 (March 22, 1995, Pub. L. 104–4); Executive Order 13132 (64 FR 43255, August 10, 1999, Federalism); the Congressional Review Act (5 U.S.C. 804(2)); and Executive Order 13771 (82 FR 9339, February 3, 2017, Reducing Regulation and Controlling Regulatory Costs).

B. Executive Orders 12866 and 13563.

Executive Order 12866 directs agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 is supplemental to and reaffirms the principles, structures, and definitions governing regulatory review as established in Executive Order 12866.

Section 3(f) of Executive Order 12866 defines a ''significant regulatory action'' as an action that is likely to result in a rule: (1) Having an annual effect on the economy of $100 million or more in any 1 year, or adversely and materially affecting a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local or tribal governments or communities (also referred to as ''economically significant''); (2) creating a serious inconsistency or otherwise interfering with an action taken or planned by another agency; (3) materially altering the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raising novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

A regulatory impact analysis must be prepared for major rules with economically significant effects (for example, $100 million or more in any 1 year), and a ''significant'' regulatory action is subject to review by the Office of Management and Budget (OMB). The Departments anticipate that this regulatory action is likely to have economic impacts of $100 million or more in at least 1 year, and thus meets the definition of a ''significant rule'' under Executive Order 12866. Therefore, the Departments have provided an assessment of the potential costs, benefits, and transfers associated with the proposed rules. In accordance with the provisions of Executive Order 12866, the proposed rules were reviewed by OMB.

1. Need for Regulatory Action

This regulatory action is taken in light of Executive Order 13813 directing the Departments to consider proposing regulations or revising guidance to expand the flexibility and use of HRAs. Consistent with Executive Order 13813, the proposed rules are intended to increase the usability of HRAs to provide more Americans, including employees who work at small businesses, with more healthcare options. Such changes will facilitate the development and operation of a healthcare system that provides high-quality care at affordable prices for the American people by increasing consumer choice for employees and promoting competition in healthcare markets by providing additional options for employers.

The Departments are of the view that the benefits of the proposed rules would substantially outweigh the costs of the rules. The proposed rules would increase flexibility and choices of health coverage options for employers and employees. The increased use of HRAs could potentially reduce healthcare spending, particularly less efficient spending,[114] and ultimately result in increased taxable wages for workers currently in firms that offer traditional group health plans. The proposed rules are also expected to increase the number of low- and moderate-wage workers (and their family members) with health insurance coverage.

2. .Summary of Impacts of Proposed HRA Integrated With Individual Health Insurance Coverage.

The expected costs, benefits and transfers of the proposed rules are summarized in Table 1 and discussed in detail later in this section of the preamble.

TABLE 1—ACCOUNTING TABLE

Costs:
Qualitative:
• Loss of health insurance and potentially poorer financial or health outcomes for some individuals who experience premium increases.

[114] By less efficient healthcare spending, the Departments generally mean spending that is of low value from the consumer's perspective, relative to its cost.

TABLE 1—ACCOUNTING TABLE—Continued

• Increased administrative costs for employers, employees, and government agencies to learn about and/or use a new health benefits option.				
Benefits:				
Qualitative: • Gain of health insurance and potentially improved financial or health outcomes for some employees who are newly offered or newly accept benefits. • Increased choice and flexibility for employees and employers around compensation arrangements, potentially resulting in more efficient use of healthcare and more efficient labor markets (including higher taxable wages). • Decreased administrative costs for some employers who no longer offer traditional group health plans for some, or all, employees.				
Transfers	Estimate (billion)	Year dollar	Discount rate (percent)	Period covered
Annualized Monetized ($/year) (Net tax revenue loss)	$2.7 $2.8	2020 2020	7 3	2020–2028 2020–2028
Quantitative: [115] • Reduced tax revenue as a result of new HRAs offered by employers previously offering no health benefits, less reduced PTC from employees in such firms. • Increase in average individual market premiums of less than 1 percent and resulting increase in PTC.				
Qualitative: • Increased out-of-pocket costs for some employees who move from traditional group health plans to individual health insurance coverage and decreased costs for other employees who move from traditional group health plans to individual health insurance coverage (i.e., transfers from reduced within-firm cross-subsidization). • Reduced tax revenue as a result of new excepted benefit HRA.				

In all cases, the counterfactual baseline for analysis is current law. That is, the analysis assumes as the baseline statutes enacted and regulations that are final as of date of issuance of the proposed rules. This includes PPACA, the reduction of the individual shared responsibility payment to $0, as enacted in Public Law 115–97, the AHP final rule,[116] the STLDI final rule,[117] and all other administrative actions finalized as of the date of issuance of the proposed rules.

Costs

Loss of health insurance coverage. The Departments recognize that some individuals could experience a loss in health insurance coverage and that some of these people would experience worse financial or health outcomes as a result of the proposed rules.[118] Loss of coverage could occur if employers drop traditional group health plans and if some previously covered employees do not accept the HRA and fail to obtain their own coverage. Loss of coverage could also occur if the addition of new enrollees to the individual market causes premiums to rise, resulting in dropping of coverage by current individual market enrollees. In addition, some employees could have fewer choices of plans in the individual market than the number of group health plan choices previously provided by their employer, or might be unable to find new individual health insurance coverage that covers their preferred healthcare providers. As discussed below, the Departments estimate that choice and coverage would, on net, be increased by adoption of the proposed rules. The Departments request comments on this finding and the extent to which the proposed rules could reduce employee choice or cause some individuals to become uninsured.

Increased administrative costs. The proposed rules would also increase some administrative costs for employers, employees, and government entities.

All employers would have a new health benefits option about which to learn. Employers who offer HRAs integrated with individual health insurance coverage but did not offer employer-sponsored health benefits before would face increased costs of administering a health benefit. In addition, all employers that offer HRAs integrated with individual health insurance coverage would be required to establish reasonable procedures to substantiate that individuals covered by the HRA are enrolled in individual health insurance coverage; to provide a notice to all employees who are eligible for the HRA explaining the PTC eligibility consequences of the HRA offer and acceptance and other information; and to comply with various other generally applicable group health plan requirements, such as maintaining a plan document and complying with various reporting requirements. Employers offering HRAs integrated with individual health insurance coverage would need to establish

[115] The monetized estimates are of the net tax revenue loss, including reduced income and payroll tax revenue from employees who would receive HRAs and would not otherwise have a tax exclusion for a traditional group health plan, reduced PTC from individuals who would receive HRAs and would otherwise receive PTC, and increased PTC due to the increase in Exchange premiums. As noted in the text later in this section of the preamble, the quantitative estimates are subject to considerable uncertainty. For example, the rule could cause tax revenue to increase if the adoption of HRAs leads to reduced healthcare spending and higher taxable wages. Or the rule could result in larger premium increases in the individual market, or in premium decreases, if the rule results in more substantial changes in the health of the individual market risk pool. The Departments request comments on the likely costs, benefits and transfers that would result from the proposed rule.

[116] *See* 83 FR 28912.

[117] *See* 83 FR 38212.

[118] The Departments note however that increased insurance coverage does not necessarily result in better health. For example, Baicker et al. found that increased Medicaid coverage in Oregon ''generated no significant improvements in measured physical health outcomes in the first two years, but it did increase use of health care services, raise rates of diabetes detection and management, lower rates of depression, and reduce financial strain.'' *See* Baicker, K., S. Taubman, H. Allen, M. Bernstein, J. Gruber, J. Newhouse, E. Schneider, B. Wright, A. Zaslavsky, and A. Finkelstein. 2013. ''The Oregon Experiment: Effects of Medicaid on Clinical Outcomes.'' *New England Journal of Medicine* 368: 1713–22. *http://www.nejm.org/doi/full/10.1056/NEJMsa1212321;* and survey of the literature in Chapter 6 of *Economic Report of the President,* February 2018, *https://www.whitehouse.gov/wp-content/uploads/2018/02/ERP_2018_Final-FINAL.pdf.*

systems to reimburse premiums and employee out-of-pocket medical care expenses, or hire third-party administrators to do so. In addition, to the extent an employer is subject to section 4980H of the Code, the employer would need to learn about the proposed PTC regulations and any other related guidance under section 4980H of the Code that the Treasury Department and the IRS may issue. As noted later in this preamble, administrative costs associated with HRAs integrated with individual health insurance coverage could be lower than costs for traditional group health plans for some employers. The Departments request comment on the extent to which employer administrative costs would be increased or decreased by the proposed rules.

As to increased administrative burden and costs for employees, employees who previously enrolled in a traditional group health plan and who now receive an HRA integrated with individual health insurance coverage would need to shop for and choose their own insurance and learn new procedures for accessing their HRA benefits. In addition, employees who receive an HRA integrated with individual health insurance coverage would need to substantiate enrollment in individual health insurance coverage once per plan year and in connection with each request for reimbursement.

Further, Exchange enrollees might experience increased compliance burdens, to the extent that they must become familiar with the circumstances in which an offer of an HRA integrated with individual health insurance coverage precludes them from claiming the PTC. For employees who previously did not receive an offer of a traditional group health plan, this would require learning the PTC eligibility rules, and for employees who previously received an offer of a traditional group health plan, this would require learning new and different rules for PTC eligibility. Specifically, an employee who is offered a traditional group health plan is not eligible to claim the PTC for his or her Exchange coverage unless the premium of the lowest cost employer plan providing MV for self-only coverage less the employer contribution for self-only coverage exceeds 9.5 percent (indexed for inflation after 2014) of the employee's household income (assuming the employee meets various other PTC eligibility requirements). In contrast, under the proposed PTC regulations, an employee who is offered an HRA integrated with individual health insurance coverage would not be eligible to claim the PTC for his or her Exchange coverage unless the premium of the lowest cost silver plan for self-only coverage offered by the Exchange for the rating area in which the employee resides less the HRA amount exceeds 9.5 percent (indexed for inflation after 2014) of the employee's household income (assuming the employee meets various other PTC eligibility requirements). However, the Departments note that the proposed rules would require HRA plan sponsors to furnish a notice to participants providing some of the information necessary for an individual to determine if the offer of the HRA could render them ineligible for the PTC.

In addition, if an enrollee in Exchange coverage is eligible for the PTC, the amount of the PTC is based, in part, on the premium for the second lowest cost silver plan for the coverage unit offered in the Exchange for the rating area in which the employee resides. As noted earlier, the proposed PTC rule uses the premium for the lowest cost silver plan offered in the Exchange for the rating area in which the employee resides solely for purposes of PTC eligibility criterion related to an offer of an HRA integrated with individual health insurance coverage. Therefore, Exchange enrollees would need to understand which silver level plan premium applies to them for eligibility purposes and which silver level plan premium applies to their PTC calculation.

Similarly, the Federally-facilitated and State-based Exchanges would incur one-time costs to incorporate the proposed special enrollment period and the PTC regulations, if finalized, into their instructions for enrollees and Exchange employees and in automated calculations. HHS estimates that one-time costs to account for HRAs integrated with individual health insurance coverage for the FFE would be approximately $2.7 million to $3.6 million. In addition, the FFE call center and eligibility support contractors would incur additional annual cost of approximately $255 million annually by 2028 to serve the expanded Exchange population. Assuming that State-based Exchanges (SBEs) would incur costs similar to the FFE, total one-time costs incurred by the 12 SBEs would be $32.4 million to $43.2 million. Total additional ongoing costs incurred by the call centers and eligibility support contractors for the 12 SBEs would be approximately $85 million annually by 2028. The Departments request comments on the implementation and ongoing costs for SBEs. The IRS also would need to add information regarding employees offered HRAs integrated with individual health insurance coverage to instructions for IRS forms for taxpayers, employee training materials, and calculation programs.

The Departments are of the view that the total increase in administrative costs is likely to be modest, and would be significantly outweighed by the benefits of the rule outlined in the next section.

Benefits

Gain of health insurance coverage. Some individuals could experience a gain in health insurance coverage, greater financial security and potentially improved health outcomes, if employees are newly offered and accept HRAs integrated with individual health insurance coverage. As explained in greater detail in the Transfers section later in this preamble, the Departments estimate that on net, the number of insured persons would increase by about 800,000 by 2028, due to the proposed rules. Most of these newly insured individuals are expected to be low- and moderate-income workers in firms that currently do not offer a traditional group health plan.

Increased choice and flexibility for employees and employers. As a result of the proposed rules, employees would be able to purchase insurance with a tax subsidy by use of an HRA, without being locked into a specific plan or selection of plans chosen by their employer. As noted earlier in this preamble, some employees could have fewer choices of plans in the individual market than the number of group health plan choices previously provided by their employer, or might be unable to find a new individual health insurance coverage that covers their preferred healthcare providers. However, the expansion of enrollment in the individual market due to the proposed rules could also induce additional insurers to provide individual market coverage. The Departments are of the view that on net, the rule would significantly increase choice and flexibility for employees. Employers also would benefit from having another choice of a tax-preferred health benefit to offer their employees, potentially enabling them to attract and retain workers.

Current compensation arrangements can result in less efficient labor markets and inefficient healthcare spending. Employees within a firm (or employees within certain classes within a firm) are generally offered the same set of health benefits. As a result, some employees receive a greater share of compensation in the form of benefits than they would prefer, while others receive less. In addition, some employers offer plans

with a wide choice of providers, reflecting the diverse preferences and healthcare needs of their employees. This weakens the ability of employers and insurers to negotiate lower provider prices or otherwise manage employee care.

By expanding the ability of consumers to choose coverage that fits their preferences, the proposed rules would reduce these inefficiencies in labor markets and healthcare spending. Some employees who would be offered HRAs under the proposed rules would choose plans with lower premiums and higher deductibles and copayments (all of which could potentially be paid out of the HRA) and narrower provider networks than they would choose if offered a traditional group health plan. Employees facing higher cost-sharing could become more cost-conscious consumers of healthcare. Narrower provider networks could strengthen the ability of purchasers (through their insurers) to negotiate lower provider prices. Both effects could lead to reduced healthcare spending, which could in turn lead to reductions in amounts made available under HRAs integrated with individual health insurance coverage and corresponding increases in taxable wages. However, these benefits are uncertain and would take some time to occur.[119] Moreover, the provision of a new health benefit that can be used to pay cost-sharing as well as premiums and that is available to employees who were previously uninsured or enrolled in unsubsidized coverage would be expected to increase, rather than decrease, healthcare utilization by some consumers.

Small employers in particular might have little expertise or skill in choosing traditional group health plans or in administering coverage effectively for employees. However, some small employers can already obtain lower-cost coverage in the small group market or through AHPs than they could otherwise provide on their own. Small employers that are not ALEs can also forego offering health benefits and allow their employees to obtain individual health insurance coverage, often with PTC subsidization, without liability under section 4980H of the Code. Qualified small employers can also pursue establishment of QSEHRAs. Thus, small employers whose employees have particularly high healthcare costs or that have little skill or interest in administering health benefits might use these other options to control costs even in the absence of the proposed rules. If so, any increased efficiency gain from providing an additional incentive for small employers to drop traditional group health plans in favor of HRAs integrated with individual health insurance coverage could be modest.

Reduced administrative costs for some employers. Employers that offer an HRA integrated with individual health insurance coverage rather than a traditional group health plan could experience reduced administrative costs. For example, such employers would no longer need to choose health insurance plans or self-insured health benefits for their employees and manage those plans. However, some of these costs would be borne by HRA recipients, as part of their individual market premiums.

Transfers

The Treasury Department performed microsimulation modeling to evaluate the coverage changes and transfers that are likely to be induced by the proposed rules. The Treasury Department's model of health insurance coverage assumes that workers are paid the marginal product of their labor. Employers are assumed to be indifferent between paying wages and paying compensation in the form of benefits (as both expenses are deductible in computing employers' taxable incomes). The model therefore assumes that total compensation paid by a given firm is fixed, and the employer allocates this compensation between wages and benefits based on the aggregated preferences of their employees. As a result, employees bear the full cost of employer-sponsored health coverage (net of the value of any tax exclusion), in the form of reduced wages and the employee share of premiums.[120]

The Treasury Department's model assumes that employees' preferences regarding the type of health coverage (or no coverage) are determined by their expected healthcare expenses and the after-tax cost of employer-sponsored insurance, Exchange coverage with the PTC, or Exchange or other individual health insurance coverage integrated with an HRA, and the quality of different types of coverage (including actuarial value).[121] The tax preference for the HRA integrated with individual health insurance coverage is the same as that for a traditional group health plan, and this estimate assumes that employers would contribute the same amount towards an HRA integrated with individual health insurance coverage as they would contribute for a traditional group health plan.[122] Therefore, an employee would prefer an HRA integrated with individual health insurance coverage to a traditional group health plan if the price of individual health insurance coverage is lower than the price of traditional group health plan coverage, as long as the value of the higher quality of the traditional group health plan coverage (if any) does not outweigh the lower cost of individual health insurance coverage. The cost of individual health insurance coverage for an employee could be lower than the cost of the firm's traditional group health plan if the individual health insurance coverage is less generous, if the individual health insurance coverage

[119] The proposed HRA integrated with individual health insurance coverage provides an income and payroll tax exclusion that is available only to workers and, unlike the PTC, benefits workers at all income levels, including workers with incomes in excess of 400 percent of the federal poverty level. Thus, it is possible that the proposed rules could encourage individuals to join the labor force or to work more hours or seek higher-paying employment, generating further economic benefits. In addition, the proposed rules could increase labor force mobility (*i.e.,* encourage workers to move more freely to employers where their productivity is highest), because workers enrolled in individual health insurance coverage could find it easier to retain their coverage when they change jobs. However, these effects are highly uncertain, are likely to be relatively small, and might take some time to occur. Labor supply changes are not reflected in the revenue estimates provided in the transfers section below.

[120] Note that the wage reduction for an employee who is offered a health benefit may be greater or less than the expected cost of coverage for that particular employee. Because employees are generally paid the same regardless of age, health status, family size or acceptance of benefits, the model assumes that each employee bears the same share of the cost of the firm's coverage. The model allows for some limited variation of the wage reduction by wage class and educational status. All costs and benefits of coverage are taken into account and assumed to accrue to employees, including all income and employer and employee payroll tax exclusions and the avoidance of the employer shared responsibility payment under section 4980H of the Code by firms that offer coverage.

[121] Expected health care expenses by type of coverage, age, family size and other characteristics are estimated using the Medical Expenditure Panel Survey—Household Component (MEPS–HC). These predictions are then statistically matched to our tax data. The MEPS–HC is conducted by the United States Census Bureau for the Agency for Healthcare Research and Quality (AHRQ), Department of Health and Human Services.

[122] It is possible that employers that switch from offering traditional group health plans to offering HRAs integrated with individual health insurance coverage will contribute less to HRAs than they pay for group coverage, and increase taxable wages by a corresponding amount. However, it is not clear why an employer that (based on the incomes and preferences of its workforce) wants to substitute contributions to health benefits for wages would not do so today, in the absence of the availability of HRAs integrated with individual health insurance coverage, particularly since the proposed rules generally require that HRAs integrated with individual health insurance coverage be offered on the same terms to all employees in a class of employees, as described earlier in this preamble.

risk pool is healthier than the firm's risk pool, or if the cost of individual health insurance coverage to a particular employee is lower than the cost of the firm's coverage (because, for example, the employee is younger than the average-age worker in the firm).

When evaluating the choice between an HRA integrated with individual health insurance coverage and the PTC for Exchange coverage, the available coverage is assumed to be the same, but the tax preferences are different. Hence, an employee would prefer the HRA if the value of the income and payroll tax exclusion (including both the employee and employer portion of payroll tax) is greater than the value of the PTC. In modeling this decision, the Departments assume that the employee share of premiums is tax-preferred, either through a salary reduction plan or, for an individual with an HRA integrated with individual health insurance coverage, through reimbursement of premiums from the HRA, with any additional premiums paid through a salary reduction arrangement.[123]

In the Treasury Department's model, employees are aggregated into firms, based on tax data.[124] The expected health expenses of employees in the firm determine the cost of employer-sponsored insurance for the firm.[125] Employees effectively vote for their preferred coverage, and each employer's offered benefit is determined by the preferences of the majority of employees. Employees then decide whether to accept any offered coverage, and the resulting enrollment determines premiums for both employer coverage and individual health insurance coverage. The Treasury Department's model thus predicts enrollment and premiums in each type of coverage.

Transitions from traditional group health plans to HRAs integrated with individual health insurance coverage. Based on microsimulation modeling, the Departments expect that the proposed rules would cause some participants (and their dependents) to move from traditional group health plans to HRAs integrated with individual health insurance coverage. As previously noted, the estimates assume that for this group of firms and employees, employer contributions to HRAs integrated with individual health insurance coverage are the same as contributions to traditional group health plans would have been, and the estimates assume that tax-preferred salary reductions for individual health insurance coverage are the same as salary reductions for traditional group health plan coverage. Thus, by modeling construction there is no change in income or payroll tax revenues for this group of firms and employees (other than the changes in the PTC discussed later in this preamble). The Departments welcome comments on these assumptions.

While the tax preference is assumed to be unchanged for this group, after-tax out-of-pocket costs could increase for some employees (whose premiums or cost-sharing are higher in the individual market than in a traditional group health plan) and decrease for others.

Some employees who are offered a traditional group health plan nonetheless obtain individual health insurance coverage and the PTC, because the traditional group health plan is unaffordable to them or does not provide MV. Some of these employees would no longer be eligible for the PTC for their Exchange coverage when the employer switches from a traditional group health plan to an HRA integrated with individual health insurance coverage because the HRA integrated with individual health insurance coverage is determined to be affordable under the proposed PTC eligibility rules.[126] In addition, some employees who are offered HRAs integrated with individual health insurance coverage would not accept them, and would be newly able to obtain the PTC because the offer of the HRA would be considered to be unaffordable under the proposed PTC rules, even though the traditional group health plan they were previously offered is affordable under current rules.[127]

Transitions from no employer-sponsored health benefit to HRAs integrated with individual health insurance coverage. The Departments expect some employees to be offered HRAs integrated with individual health insurance coverage when they previously received no offer of an employer-sponsored health plan. As a result, taxable wages would fall and non-taxable wages would rise, reducing income tax and payroll tax revenues. In addition, some Exchange enrollees who previously claimed the PTC would be precluded from claiming the PTC as a result of the offer or acceptance of the HRA, reducing PTC transfers. As explained further below, the Departments assume that PTC spending is reduced only among Exchange enrollees with incomes greater than 200 percent of the federal poverty level.

Summary of transfers and coverage changes. The Departments estimate that once employers fully adjust to the proposed rules, roughly 800,000 firms would offer HRAs integrated with individual health insurance coverage. The Departments further estimate that it would take employers and employees about five years to fully adjust to the proposed rules, with about 10 percent of take-up occurring in 2020 and the full effect realized in 2024 and beyond.

This would result in an estimated 1.0 million individuals receiving an HRA integrated with individual health insurance coverage in 2020, growing to 10.7 million in 2028. Conversely, the number of individuals in traditional group health plan coverage would fall by an estimated 0.6 million (0.4 percent) in 2020 and 6.8 million (4.5 percent) in 2028. Similarly, the number of individuals in individual health insurance coverage without an HRA would fall by an estimated 0.3 million (2.2 percent) in 2020 and 3.2 million (23.2 percent) in 2028. The number of uninsured persons would fall by an estimated 0.1 million in 2020 and by an

[123] The assumption that coverage subsidized by the PTC is the same as coverage subsidized by an HRA may be incorrect to the extent that coverage on the Exchange differs from off-Exchange individual health insurance coverage. In addition, the assumption that the full premium for an employee with or without an HRA is tax preferred may be incorrect if the employer does not offer a salary reduction plan, if the employee does not elect the salary reduction, or if the employee chooses on-Exchange rather than off-Exchange coverage. Salary reductions may not be used to pay premiums for Exchange coverage. The Departments invite comments on whether these assumptions are important or likely to be incorrect.

[124] A crucial component of the model is the use of Form W–2, Wage and Tax Statement, filed by employers to report wages and other benefits of employees. Forms W–2 with the same employer identification number are grouped together to represent the employees of the firm.

[125] Some small firms are able to purchase community rated coverage in the small group market at lower cost than they could obtain by self-insuring or would pay if they had to purchase coverage in the underwritten large-group market. Firm coverage costs are over-estimated in Treasury's model for these firms. As a result, our model likely over-estimates the extent to which small firms would adopt HRAs integrated with individual health insurance coverage. On the other hand, our assumption that administrative burdens and costs for employees and employers are about the same for HRAs integrated with individual coverage as for traditional group health plans could result in an under-estimate of the extent to which small firms with higher than average administrative costs would adopt HRAs integrated with individual health insurance coverage.

[126] As noted below, however, the Departments' estimates assume that individuals with incomes below 200 percent of the federal poverty level are not newly firewalled from the PTC by HRA offers.

[127] The number of persons newly eligible for the PTC is expected to be very small. Under the assumption that employers contribute the same amount towards an HRA as they would for traditional group coverage, employees would become newly eligible for the PTC (if otherwise eligible) only if the lowest cost silver plan premium for self-only individual health insurance coverage is greater than the total cost of the lowest cost MV plan offered by the employer (including the employee and employer share of premiums).

estimated 0.8 million (1.3 percent) in 2028.[128] *See* Table 2 for details.

The modeling suggests that employees in firms that would switch from offering traditional group health plan coverage to offering an HRA integrated with individual health insurance coverage would have, on average, slightly higher expected healthcare expenses than employees in other firms and current individual market enrollees. As a result, premiums in the individual market would be expected to increase by less than 1 percent as a result of the proposed rules, throughout the 2020–2028 period examined. The Treasury Department model is nationally representative and does not necessarily reflect the expected experience for every market. The premium increase resulting from adverse selection could be larger in some markets, and premiums could fall in other markets. The Departments invite comments on the extent to which firms with healthy or less healthy risk pools would utilize HRAs integrated with individual health insurance coverage.

Income and payroll tax revenues would be expected to fall by about $500 million in fiscal year 2020 and $13.0 billion in 2028, as firms newly offer tax-preferred health benefits in the form of HRAs integrated with individual health insurance coverage. At the same time, total PTC would be expected to fall by about $100 million in 2020 and by about $6.9 billion in 2028. In total, the proposed rule is estimated to reduce tax revenue by about $400 million in fiscal year 2020, $6 billion in fiscal year 2028, and $29.8 billion over the nine-year period through fiscal year 2028.[129]

TABLE 2—ESTIMATED EFFECTS OF HRAS INTEGRATED WITH INDIVIDUAL HEALTH INSURANCE COVERAGE ON INSURANCE COVERAGE AND TAX REVENUES, 2020–2028

Calendar year	2020	2021	2022	2023	2024	2025	2026	2027	2028
Change in Coverage [Millions]: [a]									
Individual health insurance coverage with HRA	1.0	2.5	5.0	7.7	10.3	10.4	10.6	10.7	10.7
Traditional group health plan	−0.6	−1.6	−3.3	−4.9	−6.6	−6.7	−6.7	−6.8	−6.8
Individual health insurance coverage without HRA	−0.3	−0.7	−1.5	−2.2	−3.0	−3.0	−3.1	−3.2	−3.2
Uninsured	−0.1	−0.2	−0.3	−0.5	−0.7	−0.7	−0.7	−0.7	−0.8
Fiscal year	**2020**	**2021**	**2022**	**2023**	**2024**	**2025**	**2026**	**2027**	**2028**
Change in Revenue [Billions]:									
Premium Tax Credit Reduction	0.1	0.5	1.7	3.2	4.8	5.4	6.0	6.5	6.9
Other Income and Payroll Tax Reduction	0.5	1.5	3.3	5.7	8.3	9.6	11.1	12.2	13.0
Net Revenue Reduction	0.4	1.0	1.5	2.4	3.4	4.2	5.0	5.8	6.0

Notes:
a. Millions of covered lives, annualized.

The Departments acknowledge that the extent to which firms would offer HRAs integrated with individual health insurance coverage and the results on individual market risk pools and premiums, federal tax revenues, and private costs and benefits are highly uncertain. The Departments invite comment on the estimates and assumptions discussed previously in this preamble.

The Departments particularly emphasize that these estimates assume that every employee in a firm would be offered either an HRA integrated with individual health insurance coverage or a traditional group health plan (but not both and not a choice between the two), or no employer health benefit. The estimates further assume that a firm offering such an HRA would offer the same benefit to each employee in the firm, and would not vary the contribution by location, age, or other permitted factors other than self-only versus non-self-only benefits.[130] In other words, the estimates assume that the proposed rules would be effective in preventing firms from dividing their employees by health status or other factors in a way that would allow firms to capture greater tax subsidies or increase individual market premiums or the PTC.

HRA participation and transfers including individual market premium increases would likely be higher if these assumptions are incorrect. Because the number of individuals in traditional group health plans is large relative to the number of individuals in individual health insurance coverage, relatively

[128] These estimates are annualized counts (*e.g.,* two persons with six months of coverage each count as one covered person), and reflect only coverage for persons under age 65. For more information about Treasury's baseline estimates, see ''Treasury's Baseline Estimates of Health Coverage, Fiscal Year 2019 Budget Exercise'' June 2018, available at *https://www.treasury.gov/resource-center/tax-policy/tax-analysis/Documents/Treasury%27s-Baseline-Estimates-of-Health-Coverage-FY-2019.pdf.*

[129] These revenue estimates do not account for the possibility that the proposed rules would lead to increased taxable wages.

[130] The Departments imposed two constraints on the microsimulation that could be consistent with allowing the HRA offer to vary across employees within a firm. First, the Departments assume that persons with incomes below 200 percent of the federal poverty level who are enrolled in subsidized individual health insurance coverage in the baseline do not move to an HRA or to uninsured status as a result of the proposed rule. This is consistent with assuming that employers with low-wage workers currently receiving Medicaid or the PTC do not begin to offer HRAs large enough to render such employees ineligible for the PTC or from receiving public coverage. This constraint is also consistent with the assumption that employees who would experience a substantial subsidy loss would move to other jobs that would allow them to retain their current coverage. This assumption reduces the amount of PTC savings generated by the proposal, and also reduces the tax revenue cost of providing HRAs to such employees. Second, the Departments assume that employees with incomes above 400 percent of the federal poverty level who are enrolled in a traditional group health plan do not become uninsured as a result of the proposed rule, even if individual plan premiums are substantially higher than the cost of their traditional group health plan coverage. This is consistent with assuming that employers would provide larger HRAs to older employees or to employees in higher-cost markets than they would provide to other employees in their firms, in order to ensure affordable coverage. It is also consistent with assuming that employees would move to other firms, if they face large premium or cost-sharing increases when their employers switch from traditional group coverage to HRAs integrated with individual health insurance coverage.

small changes in employer offers of coverage can result in large changes in individual market premiums.[131] Consider the following illustrative, simplified example. The Departments estimate that about 80 percent of individuals in employer-sponsored coverage are relatively healthy and 20 percent are relatively unhealthy. Relatively healthy persons in the employer market have health costs equal to about a quarter of average single enrollee costs in the individual market and unhealthy persons in the employer market have health costs that are about three times the cost of the average person in the individual market.[132] Thus, if 5 million individuals moved from the employer market to the individual market, and these 5 million were representative of the average for the employer market with a ratio of healthy to unhealthy of 4 to 1, then individual market premiums would fall by about 3 percent. If, however, a disproportionate number of unhealthy employees enter the individual market, premiums in the individual market would rise. For example, if 3 million healthy and 2 million unhealthy enrollees entered the individual market, premiums would increase by an estimated 14 percent.

The Departments seek comment on the extent to which employers would offer different benefits to different classes of employees, including the classes based on rating area and all other classes, and on combinations of the classes, and the resulting effect on individual market premiums.

The Departments also emphasize that these estimates assume that employers would contribute the same amount to HRAs integrated with individual health insurance coverage as they would to traditional group health plans and that employees would elect the same amount of salary reduction to pay for individual health plans and cost-sharing as they would if they were enrolled in a traditional group health plan. But, as noted above, some employees who would be offered HRAs under the proposed rule would choose plans with lower premiums and higher deductibles and copayments and narrower provider networks than they would choose if offered a traditional group health plan. Higher cost-sharing and narrower provider networks could cause individuals to be more cost-conscious consumers of healthcare.

In addition, the estimates assume that the entire HRA balance is spent on healthcare premiums and cost-sharing each year. However, the Departments are of the view that many employers would allow employees to carry unspent HRA balances over from year to year, and that some employers would allow employees to continue to spend accumulated HRA funds even after separating from their employer. Moreover, HRA benefits are subject to COBRA protections, such that some employees would elect to use accumulated funds for up to 18 months after separation from service. The ability to carry over benefits from year to year could further encourage employees to curtail healthcare spending, particularly less efficient spending. This effect could be modest for several reasons. First, unlike HSA balances, which can be withdrawn for non-health purposes subject to tax but without penalty after age 65 and with a 20 percent penalty before age 65, HRAs may only be used for healthcare. In addition, unlike HSAs, HRAs are not the property of the employee and employers may limit the amount that can be carried over from year-to-year or accessed by the employee after separation. The Departments welcome comment on the extent to which HRA balances would likely be allowed to accumulate over time and accessed after employees separate from employment, and the extent to which employees would be incentivized to become more cost conscious consumers of healthcare.

These estimates further assume that all individual health insurance coverage integrated with an HRA would be treated as subject to and compliant with sections 2711 and 2713 of the PHS Act. The proposed rules prohibit an HRA from being integrated with STLDI and excepted benefits, which are not subject to the market requirements. Grandfathered coverage in the individual market is not subject to the annual dollar prohibition in section 2711 of the PHS Act or to the preventive services requirements in section 2713 of the PHS Act. However, the proposed rules would not require employees or employers to confirm that individual health insurance coverage integrated with an HRA is not grandfathered coverage. Requiring such confirmation would be administratively burdensome and the Departments expect that the number of employees who might use an HRA to buy such coverage would be extremely small, because individuals can only renew and cannot newly enroll in grandfathered individual health insurance coverage.

3. Impact of Excepted Benefit HRA

The proposed rules also provide for recognition of a new limited excepted benefit HRA under which amounts newly made available for each plan year are limited to $1,800 (indexed for inflation after 2020). Among other conditions, to offer the excepted benefit HRA, the employer must offer the employee a group health plan that is not limited to excepted benefits and that is not an HRA, but the employee would not need to enroll in this group health plan. The benefit would be funded by the employer, and in the Treasury Department's modeling, this means that it would be paid for by all employees in the firm through an overall reduction in wages. The benefit could be used to pay for any medical expense, other than premiums for individual health insurance coverage, group health plan coverage (other than COBRA, state, or other continuation coverage), or Medicare parts B or D. The excepted benefit HRA could be used to pay premiums for coverage that consists solely of excepted benefits and for other premiums, such as premiums for STLDI.

Due to the availability of other tax preferences for health benefits, including the tax exclusion for employer-sponsored benefits, salary reductions for group and off-Exchange individual health insurance coverage premiums when integrated with an HRA, health FSAs, and non-excepted benefit HRAs, the Departments are of the view that this new excepted benefit would be adopted by a small number of firms. However, it could provide flexibility for firms that want to provide a tax preference to employees that choose STLDI instead of the employer's traditional group health plan. The Departments welcome comments on the costs and benefits of the proposed excepted benefit HRA and the extent to which firms and employees would be likely to adopt such HRAs.

C. Regulatory Alternatives

In developing the proposed rules, the Departments considered various alternative approaches.

Retaining prohibition on integration of HRAs with individual health insurance coverage. The Departments considered retaining the existing prohibition on integration of HRAs with individual health insurance coverage.

[131] The Treasury Department projects that over 150 million persons under age 65 will be enrolled in employer-sponsored group health plans in 2020, compared to about 15 million in the individual market.

[132] Estimates are derived from RTI MarketScan claims data for 2014. These data indicate that 80 percent of persons in the employer market have no Hierarchical Condition Codes (HCCs) while 20 percent had one or more HCCs. Persons with no HCCs had costs equal to 24 percent of average single enrollee costs in the individual market and persons with one or more HCCs had costs equal to three times the average individual market enrollee cost.

However, the Departments determined that the adverse selection concerns that gave rise to the prohibition could be adequately addressed by including appropriate mitigating conditions in the proposed integration rules. Further, the Departments determined that eliminating the prohibition on integrating HRAs with individual health insurance coverage would increase the usability of HRAs which would provide more Americans, including employees who work at small businesses, with additional healthcare options. Such changes would facilitate the development and operation of a healthcare system that provides high-quality care at affordable prices for the American people by increasing consumer choice for employees and promoting competition in healthcare markets by adding additional options for employers.

Alternative approaches for safeguards intended to prevent health discrimination and adverse selection under the proposed integration rules. In developing the safeguards designed to prevent adverse selection, the Departments considered whether such safeguards are needed and alternatives for the design of such safeguards. As explained in more detail earlier in this preamble, although the Departments considered that it is possible that the consequences of HRA expansion for the individual market could be positive, the Departments determined that allowing HRAs to be integrated with individual health insurance coverage is more likely to result in opportunities for employers to discriminate by encouraging higher risk employees to obtain coverage in the individual market in order to reduce the cost of traditional group health plan coverage provided by the employer to lower risk employees. Such an arrangement could worsen adverse selection and raise premiums in the individual market if HRAs integrated with individual health insurance coverage are used disproportionately by higher risk employees. Thus, there is risk with permitting HRAs to be integrated with individual health insurance coverage without appropriate safeguards.

Accordingly, to significantly temper these concerns, the proposed integration rules prohibit a plan sponsor from offering the same class of employees both a traditional group health plan and an HRA integrated with individual health insurance coverage (or a choice between the two). In addition, to the extent a plan sponsor offers an HRA integrated with individual health insurance coverage to a class of employees, the proposed integration rules require that the HRA be offered on the same terms to all employees within the class, subject to certain exceptions.

In designing these safeguards, the Departments considered various alternatives, including prohibiting an employer that offers an HRA integrated with individual health insurance coverage from offering a traditional group health plan to any of its employees. The Departments instead decided to allow employers to offer either a traditional group health plan or an HRA integrated with individual health insurance coverage (but not a choice between the two) to different classes of employees, based on the determination that such a rule provides an appropriate safeguard against the adverse selection concerns while also providing employers sufficient flexibility, which is intended to allow employers of all sizes to take advantage of the expansion provided in the proposed integration rules.

As explained in more detail earlier in the preamble, the Departments also considered various options for defining the classes of employees that may be used in applying these safeguards. The Departments considered whether employers should be allowed to offer or vary HRAs integrated with individual health insurance coverage for classes of employees based on a very general standard (like the one that applies under the HIPAA nondiscrimination rules, with a broad employment-based classification standard) or a more finite list of classes of employees that have been used in other rules for various employee benefits purposes (for example, under section 105(h) and/or section 4980H of the Code). The Departments' view is that a broad and open-ended standard would not be sufficient to mitigate the risk of adverse selection that more defined categories would help address those concerns. Earlier in the preamble, the Departments solicit comments on all aspects of these classes of employees, including whether these are the appropriate classes of employees, whether alternate classes, such as the categories of similarly situated individuals under the HIPAA nondiscrimination provisions, are preferable, whether additional classes are required and whether allowing benefits to vary based on classes of employees could lead to adverse selection.

Earlier in this preamble, the Departments also seek comment on whether the ability to integrate an HRA with individual health insurance coverage has the potential to increase participation in and strengthen the viability of states' individual market risk pools. Further, the Departments also invite comment on whether the proposed integration safeguards are appropriate and narrowly tailored to prevent adverse selection and health status discrimination or whether less restrictive safeguards would suffice.

Allowing integration with coverage other than individual health insurance coverage under the proposed rules. The Departments considered whether to allow HRAs intended to satisfy the individual health insurance coverage integration test also to be integrated with non-HRA group coverage, such as a group health plan maintained by the employer of the participant's spouse, in addition to individual health insurance coverage, because, like individual health insurance coverage, group health plan coverage is generally subject to and compliant with sections 2711 and 2713 of the PHS Act. The Departments decided against proposing such a rule because allowing such integration would add significant complexity to the individual health insurance coverage integration test, as described earlier in this preamble. However, earlier in this preamble, the Departments request comments regarding whether the Departments should allow for such integration and, if so, with respect to compliance with section 2711 of the PHS Act, how such an integration test should be designed to take into account that, while most individual health insurance coverage is required to cover all EHBs, large group market and self-insured group health plans are not required to cover all EHBs. Earlier in this preamble the Departments also request comments on the demand for such a rule and any problems such a rule may raise.

In addition, the Departments considered whether to propose a rule to permit HRAs to be integrated with other types of non-group coverage other than individual health insurance coverage, such as STLDI. However, while all new individual health insurance coverage that is currently sold is non-grandfathered coverage (and most coverage that is renewed in also non-grandfathered) and is therefore generally subject to and compliant with sections 2711 and 2713 of the PHS Act, other types of coverage, such as STLDI, are not subject to and therefore may not be compliant with sections 2711 and 2713 of the PHS Act, in which case, integration would not be sufficient to ensure that the combined benefit package satisfies these requirements. Earlier in this preamble, the Departments request comments on whether integration with STLDI (which is not required to satisfy sections 2711

and 2713 of the PHS Act) should be permitted, whether integration should be permitted with any other type of coverage that satisfies sections 2711 and 2713 of the PHS Act, how such integration rules should be structured, as well as comments on what, if any, potential benefits and problems might arise from allowing these types of HRA integration. Earlier in this preamble the Departments also seek comments on whether allowing such integration would raise any concerns about health status discrimination leading to additional adverse selection in the individual market.

Alternatives for annual limits on amounts made available under the excepted benefit HRA and alternatives for indexing such amount. With regard to the excepted benefit HRA, in the proposed rules, the Departments propose that the amounts newly made available for a plan year may not exceed $1,800 (indexed for inflation after 2020). For this purpose, inflation is defined in the proposed rules by reference to C–CPI–U, published by the Department of Labor.

In proposing this limit, the Departments considered various alternative amounts, including the limits on employer contributions to excepted benefit health FSAs (set at $500 in 1997 if there are no employee contributions to the health FSA, although it might be much higher if there are employee contributions). The Departments considered the relationship between $500 and the average cost of insurance in 1997. The Departments also considered a limit of 15 percent-of-the-cost-of-coverage-under-the-primary-plan test, which is the limit used for both supplemental excepted benefits in the group market and limited wraparound coverage, as a benchmark to ensure that the benefits are limited in amount. In considering how such a limit could be an appropriate limit for excepted benefit HRAs, the Departments considered 15 percent of the cost of group coverage for both employee-only and family coverage. However, the Departments also considered how to determine the primary plan in circumstances in which the participant does not enroll in a traditional group health plan, and concluded that such a determination would likely be difficult for employers. The Departments also considered using the cost of coverage for the second lowest cost silver plan in various markets.

These methodologies produced a wide range of possible excepted benefit HRA limits from $1,100 to $2,850. Consistent with the principle of promoting HRA use and availability, rather than proposing a complex test for the limit on amounts newly made available in the excepted benefit HRA, the Departments are proposing a maximum of $1,800 (indexed for inflation after 2020) on amounts newly made available for a plan year that approximates the midpoint amount yielded by the various methodologies considered. Earlier in this preamble, the Departments request comments on this amount, and whether an alternate amount or formula for determining the maximum dollar limit for an excepted benefit HRA would be more appropriate and, if so, what that alternative would be and why. Further, earlier in this preamble, the Departments seek comment on whether the maximum dollar limit should be adjusted depending on whether a participant has dependent(s) and, if so, by what amount the maximum dollar limit should be adjusted to in that case.

With regard to indexing the dollar limit on amounts made newly available under the excepted benefit HRA, in proposing to index the amount by C–CPI–U, the Departments considered whether or not to index the amount, including the difficulties of administering an HRA with a changing amount, and the cost, including the cost to the Departments to publish the amount and provide notice every year, as balanced with the decreasing real value of a set HRA limit. The Departments determined that the benefit of indexing the amount outweighs the increased complexity for the Departments and for stakeholders. Earlier in this preamble, the Departments invite comments on the measure of inflation used, including whether the amount should be indexed to inflation (and if there are any administrability concerns associated with indexing), if C–CPI–U is the correct measure of inflation, or whether an alternate measure, such as the overall medical care component for CPI–U, or the method specified under section 9831(d)(2)(D) of the Code for QSEHRAs, should be used.

D. Paperwork Reduction Act—Department of Health and Human Services

Under the Paperwork Reduction Act of 1995 (PRA), we are required to provide 60-day notice in the **Federal Register** and solicit public comment before a collection of information requirement is submitted to OMB for review and approval. To fairly evaluate whether an information collection should be approved by OMB, section 3506(c)(2)(A) of the PRA requires that we solicit comment on the following issues:

- The need for the information collection and its usefulness in carrying out the proper functions of our agency.
- The accuracy of our estimate of the information collection burden.
- The quality, utility, and clarity of the information to be collected.
- Recommendations to minimize the information collection burden on the affected public, including automated collection techniques.

1. Wage Estimates

To derive wage estimates, the Departments generally used data from the Bureau of Labor Statistics to derive average labor costs (including a 100 percent increase for fringe benefits and overhead) for estimating the burden associated with the ICRs.[133] Table 2 below presents the mean hourly wage, the cost of fringe benefits and overhead, and the adjusted hourly wage.

As indicated, employee hourly wage estimates have been adjusted by a factor of 100 percent. This is necessarily a rough adjustment, both because fringe benefits and overhead costs vary significantly across employers, and because methods of estimating these costs vary widely across studies. Nonetheless, there is no practical alternative, and the Departments are of the view that doubling the hourly wage to estimate total cost is a reasonably accurate estimation method.

[133] *See* May 2017 Bureau of Labor Statistics, Occupational Employment Statistics, National Occupational Employment and Wage Estimates at *https://www.bls.gov/oes/current/oes_nat.htm.*

TABLE 1—ADJUSTED HOURLY WAGES USED IN BURDEN ESTIMATES

Occupation title	Occupational code	Mean hourly wage ($/hour)	Fringe benefits and overhead ($/hour)	Adjusted hourly wage ($/hour)
Compensation and Benefits Manager	11–3111	$62.50	$62.50	$125.00
Lawyer	23–1011	68.22	68.22	136.44

2. ICRs Regarding Substantiation of Individual Health Insurance Coverage

Under the proposed regulations, an HRA must implement reasonable procedures to verify that individuals whose medical care expenses are reimbursable by the HRA are, or will be, enrolled in individual health insurance coverage (other than coverage that consists solely of excepted benefits) for the plan year.

In addition, following the initial substantiation of coverage, with each new request for reimbursement of an incurred medical care expense for the same plan year, the proposed regulations provide that the HRA may not reimburse a participant for any medical care expenses unless, prior to each reimbursement, the participant provides substantiation that the participant and, if applicable, any dependent(s) whose medical care expenses are requested to be reimbursed were enrolled in individual health insurance coverage (other than coverage that consists solely of excepted benefits) for the month during which the medical care expenses were incurred. The attestation may be part of the form used for requesting reimbursement.

To satisfy this requirement, the HRA may require that the participant submit an attestation or a document provided by a third party (for example, an explanation of benefit or insurance card) as substantiation. The associated cost would be negligible and is, therefore, not estimated.

3. ICRs Regarding Notice Requirement

These proposed regulations include a requirement that an HRA provide written notice to eligible participants. The HRA would be required to provide a written notice to each participant at least 90 days before the beginning of each plan year. For participants who are not yet eligible to participate at the beginning of the plan year (or who are not eligible when the notice is provided at least 90 days prior to the beginning of the plan year), the HRA must provide the notice no later than the date on which the participant is first eligible to participate in the HRA.

The proposed written notice would be required to include certain relevant information, including a description of the terms of the HRA, including the amount made available that is used in the affordability determination under the Code section 36B proposed rules; a statement of the right of the participant to opt-out of and waive future reimbursement under the HRA; a description of the potential availability of the PTC for a participant who opts out of and waives an HRA if the HRA is not affordable under the proposed PTC regulations; a description of the PTC eligibility consequences for a participant who accepts the HRA; a statement that the participant must inform any Exchange to which they apply for advance payments of the PTC of the availability of the HRA, the amount of the HRA, the number of months the HRA is available to participants during the plan year, whether it is available to their dependents and whether they are a current or former employee; a statement that the participant should retain the written notice because it may be needed to determine whether the participant is allowed the PTC; a statement that the HRA may not reimburse any medical care expense unless the substantiation requirements are met; and a statement that it is the responsibility of the participant to inform the HRA if the participant or any dependent whose medical care expenses are reimbursable by the HRA is no longer enrolled in individual health insurance coverage. The written notice may include other information, as long as the additional information does not conflict with the required information. The written notice would not need to include information specific to a participant.

The Departments estimate that for each HRA plan sponsor, a compensation and benefits manager would need 2 hours (at $125 per hour) and a lawyer would need 1 hour (at $136.44 per hour) to prepare the notices. The total burden for an HRA plan sponsor would be 3 hours with an equivalent cost of approximately $386. This burden would be incurred the first time the plan sponsor provides an HRA that is integrated with individual health insurance coverage. In subsequent years, the burden to update the notice in expected to be minimal and therefore is not estimated.

HHS estimates that in 2020, an estimated 1,203 state and local government entities would offer HRAs that are integrated with individual health insurance coverage.[134] The total burden to prepare notices would be approximately 3,610 hours with an equivalent cost of approximately $464,984. In 2021 approximately 1,805 additional state and local government entities would offer HRAs that are integrated with individual health insurance coverage for the first time and would incur a burden of approximately 5,415 hours with an equivalent cost of approximately $697,476. In 2022, approximately 3,008 additional state and local government entities would offer HRAs that are integrated with individual health insurance coverage for the first time and would incur a burden of approximately 9,024 hours with an equivalent cost of approximately $1.16 million.

HRA plan sponsors would provide the notice to eligible participants every year. HHS estimates that HRA plan sponsors would provide printed notices to approximately 90,162 eligible participants [135] in 2020, 225,405 eligible participants in 2021 and 450,810 eligible participants in 2022. The Departments anticipate that the notices would be approximately 2 pages long and the cost of materials and printing

[134] U.S. Department of the Treasury, Office of Tax Analysis simulation model suggests that in 2020, approximately 80,000 employers will offer HRAs, with 1.0 million individuals receiving an HRA integrated with individual health insurance coverage. These numbers would increase to 200,000 employers and 2.5 million individuals in 2021 and to 400,000 employers and 5 million individuals in 2022. The Departments estimate that there is, on average, 1 dependent for every policyholder. The Departments also estimate that approximately 2 percent of employers are state and local government entities, accounting for approximately 14 percent of participants.

[135] U.S. Department of the Treasury, Office of Tax Analysis simulation model provides estimates of the number of participants and dependents receiving an HRA integrated with individual health insurance coverage. Number of eligible participants is estimated based on the assumption that 75 percent of eligible participants would enroll in their employers' plans. *See* Section 3 of the Kaiser ''2017 Employer Health Benefits Survey''. *https://www.kff.org/health-costs/report/2017-employer-health-benefits-survey/.*

would be $0.05 per page, with a total cost of $0.10 per notice. It is assumed that these notices would be provided along with other benefits information with no additional mailing cost. The Departments assume that approximately 54 percent of notices would be provided electronically and approximately 46 percent would be provided in print along with other benefits information. Therefore, in 2020, state and local government entities providing HRAs that are integrated with individual health insurance coverage would print approximately 41,475 notices at a cost of approximately $4,147. In 2021, approximately 103,686 notices would be printed at a cost of $10,369 and in 2022, approximately 207,373 notices would be printed at a cost of a $20,737.

TABLE 2—PROPOSED ANNUAL BURDEN AND COSTS

Year	Estimated number of employers newly offering HRAs	Estimated number of notices to all eligible participants	Total annual burden (hours)	Total estimated labor cost	Total estimated printing and materials cost
2020	1,203	90,162	3,610	$464,984	$4,147
2021	1,805	225,405	5,415	697,476	10,369
2022	3,008	450,810	9,024	1,162,461	20,737
3 year Average	2,005	255,459	6,016	774,974	11,751

TABLE 3—PROPOSED RECORDKEEPING AND REPORTING REQUIREMENTS

Regulation section	OMB Control No.	Respondents	Responses	Burden per response (hours)	Total annual burden (hours)	Hourly labor cost of reporting	Total labor cost of reporting	Printing and materials cost	Total cost
§ 146.123(c)(5), § 146.123(c)(6)	0938–0702	2,005	255,459	3	6,016	$128.81	$774,974	$11,751	$786,724

HHS intends to amend the information collection currently approved under OMB control number 0938–0702 ''Information Collection Requirements Referenced in HIPAA for the Group Market, Supporting Regulations 45 CFR 146, and forms/instructions'' (CMS-10430), to account for this additional burden.

4. Submission of PRA-Related Comments

We have submitted a copy of this proposed rule to OMB for its review of the rule's information collection and recordkeeping requirements. The requirements are not effective until they have been approved by OMB.

We invite public comments on these information collection requirements. If you wish to comment, please identify the rule (CMS–9918–P) and, where applicable, the ICR's CFR citation, CMS ID number, and OMB control number.

To obtain copies of a supporting statement and any related forms for the proposed collection(s) summarized in this notice, you may make your request using one of following:

1. Access CMS's website address at *https://www.cms.gov/Regulations-and-Guidance/Legislation/PaperworkReductionActof1995/PRA-Listing.html.*

2. Email your request, including your address, phone number, OMB number, and CMS document identifier, to *Paperwork@cms.hhs.gov.*

3. Call the Reports Clearance Office at (410) 786–1326.

See this rule's **DATES** and **ADDRESSES** sections for the comment due date and for additional instructions.

E. Paperwork Reduction Act—Department of Labor and Department of the Treasury

As part of its continuing effort to reduce paperwork and respondent burden, the Departments conduct a preclearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and continuing collections of information in accordance with the PRA. This helps to ensure that the public understands the Departments' collection instructions, respondents can provide the requested data in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the Departments can properly assess the impact of collection requirements on respondents.

Under the PRA, an agency may not conduct or sponsor, and an individual is not required to respond to, a collection of information unless it displays a valid OMB control number. In accordance with the requirements of the PRA, DOL is requesting an OMB control number for three new information collections (ICs) contained in the proposed rules. Two ICs are sponsored jointly by DOL and the Treasury Department: (1) Verification of Enrollment in Individual Health Insurance Coverage (29 CFR 2590.702–2(c)(5)); and (2) HRA Notice to Participants (29 CFR 2590.702–2(c)(6)). A third IC is sponsored solely by DOL (29 CFR 2510.3–1): (3) Notice to Participants that Individual Health Insurance Coverage Policy is Not Subject to Title I of ERISA.

With regard to the Treasury Department, the collection of information contained in these regulations is submitted to OMB for review in accordance with the PRA as follows. The collection of information in these regulations is in 26 CFR 54.9815–2711(d)(4) and 26 CFR 54.9802–4(c)(5) and (c)(6). The burden for the collection of information contained in these regulations is reflected in the burden for OMB Control Number 1545–0123 for the U.S. Business Income Tax Return, 1545–0074 for U.S. Individual Income Tax Return, and 1545–0047 Return of Organizations Exempt From Income Tax. The tax-exempt organization form instructions will be updated in the next revision. The estimated annual burden per respondent, estimated annual burden per recordkeeper, or estimated number of respondents is updated annually.

The Departments have submitted a copy of the proposed rule, Health Reimbursement Arrangements and Other Account-Based Group Health Plans, to OMB in accordance with 44 U.S.C. 3507(d) for review of its information collections. The Departments and OMB are particularly interested in comments that:

- 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;

• 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;

• Enhance the quality, utility, and clarity of the information to be collected; and

• Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

In addition to filing comments on the information collections with the agencies on the same basis as any other aspect of this rule, interested parties may file comments on the information collection requirements with the Office of Management and Budget (OMB). The method for submitting comments to the agencies is explained earlier in the Addresses section of the document. Comments to OMB should be sent to the Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10235, New Executive Office Building, Washington, DC 20503; Attention: Desk Officer for the Employee Benefits Security Administration. Notwithstanding the 60-day comment period to submit comments to the agencies, in order to ensure consideration, OMB requests that comments be submitted within 30 days of publication of this proposed rule. In addition, comments should identify the applicable OMB control number. PRA Addressee: Address requests for copies of the ICR to G. Christopher Cosby, Office of Policy and Research, U.S. Department of Labor, Employee Benefits Security Administration, 200 Constitution Avenue NW, Room N–5718, Washington, DC 20210. Telephone (202) 693–8410; Fax: (202) 219–5333. These are not toll-free numbers. ICRs submitted to OMB also are available at *http://www.RegInfo.gov.*

Below is a description of the information collections and their burden.

1. Verification of Enrollment in Individual Health Insurance Coverage

In order for an HRA to be integrated with individual health insurance, among other requirements, the HRA must implement, and comply with, reasonable procedures to verify that participants and dependents are, or will be, enrolled in individual health insurance coverage during the plan year. This requirement can be satisfied by providing a document from a third party, like an issuer, verifying coverage. As an alternative procedure, this requirement could also be satisfied if the HRA requires participants to provide an attestation of coverage, including the date coverage begins and the provider of the coverage.

In addition, following the initial substantiation of coverage, with each new request for reimbursement of an incurred medical care expense for the same plan year, the HRA may not reimburse participants for any medical care expenses unless, prior to each reimbursement, the participant provides substantiation (which may be in the form of a written attestation) that the participant and, if applicable, the dependent whose medical care expenses are requested to be reimbursed, continue to be enrolled in individual health insurance coverage for the month during which the medical care expenses were incurred. The attestation may be part of the form used for requesting reimbursement.

Documentation, including proof that expenditure of funds is for a medical care expense, is currently universal when seeking reimbursement from an HRA. For the new requirements contained in the proposed regulations regarding verification of enrollment in individual health insurance coverage, the HRA can require proof of coverage or attestations of coverage as part of the processes that already exist for when participants seek reimbursement from HRAs for premiums or other medical care expenses. The additional burden is de minimis, because the attestation can be a part of the information already required when seeking reimbursement. To the extent an HRA develops additional processes for the requirement that individuals verify enrollment in individual health insurance coverage for the plan year, the additional burden is also expected to be de minimis because it involves either attestation or providing documents that already exist.

2. HRA Notice to Participants

These proposed regulations require an HRA to provide written notice to eligible participants including, among other things, the following information: (1) A description of the terms of the HRA, including the amounts newly made available as used in the affordability determination under the Code section 36B proposed regulations; (2) a statement of the right of the participant to opt-out of and waive future reimbursement under the HRA; (3) a description of the potential availability of the PTC for a participant who opts out of and waives an HRA if the HRA is not affordable under the proposed PTC regulations; and (4) a description of the PTC eligibility consequences for a participant who accepts the HRA. The written notice may include other information, as long as the additional information does not conflict with the required information. The written notice does not need to include information specific to a participant.

The HRA must provide the written notice to each participant at least 90 days before the beginning of each plan year. For participants who are not yet eligible to participate at the beginning of the plan year (or who are not eligible when the notice is provided at least 90 days prior to the beginning of the plan year), the HRA must provide the notice no later than the date on which the participant is first eligible to participate in the HRA.

The Departments estimate that a compensation and benefits manager would require two hours (at $125 per hour) and a lawyer would require one hour (at $136.44 per hour) to prepare the notice for each HRA. Thus, the total hour burden for each HRA would be 3 hours with an equivalent cost of approximately $386. The Departments estimate that each notice would be two pages, with total materials and printing cost of $0.10 per notice ($0.05 per page). The Departments estimate that 78,797 private employers would [136] newly offer HRAs integrated with individual health insurance coverage in 2020 [137] as a result of the proposed rules in the first year. Therefore, the Departments estimate for the total hour burden for these HRAs to prepare the notices would be 236,390 hours with an equivalent cost of $30,450,216.

[136] U.S. Department of the Treasury, Office of Tax Analysis used a simulation model to obtain these estimates. For 2020 the model estimated that 80,000 employers would offer HRAs integrated with individual health insurance coverage and one million individuals would enroll in those HRAs. Based on DOL estimates about 98 percent of these will be in the private market, and the rest will be though public employers like state and local governments. There are on average one dependent for every policy holder. ''Health Insurance Coverage Bulletin'', Abstract of the Auxiliary Data for the March 2016 Annual Social and Economic Supplement of the Current Population Survey, July 25, 2017. *https://www.dol.gov/sites/default/files/ebsa/researchers/data/health-and-welfare/health-insurance-coverage-bulletin-2016.pdf*

[137] Comparable numbers for 2021 are 118,195 private employers would newly offer HRAs integrated with individual health insurance coverage and 1,441,262 eligible participants in all HRAs would receive notices, and for 2022 196,992 private employers would newly offer HRAs integrated with individual health insurance coverage and 2,882,523 eligible participants in all HRAs would receive notices.

All HRAs integrated with individual health insurance coverage are required to annually send the notice to all eligible participants (those eligible to enroll). The Departments estimate that there would be 576,505 eligible participants at private employers in 2020 that would need to receive the notice.[138] The Departments assume that approximately 54 percent of notices would be provided electronically and approximately 46 percent would be provided in print along with other benefits information. Therefore, a total of 265,192 notices will be printed at a cost of $26,519. Tables 1 and 2 provide estimates for years 2020, 2021 and 2022.

TABLE 1—BURDEN TO PREPARE HRA NOTICE FOR THE FIRST TIME-PRIVATE SECTOR EMPLOYERS

Year	Number of employers newly offering HRAs	Legal cost per hour	Number of hours for legal	Benefit manager cost per hour	Number of hours for benefit manager	Total hour burden	Total equivalent cost
(a)	(b)	(c)	(d) = 1 * (b)	(e)	(f) = 2 * (b)	(g) = (d) + (f)	(c) * (d) + (e) * (f)
2020	78,797	$136.44	78,797	$125.00	157,593	236,390	$30,450,216
2021	118,195	136.44	118,195	125.00	236,390	354,585	45,675,324
2022	196,992	136.44	196,992	125.00	393,984	590,976	76,125,539

TABLE 2—BURDEN TO PROVIDE NOTICE TO ALL ELIGIBLE PRIVATE SECTOR PARTICIPANTS

Year	Total number of notices	Number of notices sent by mail	Cost per notice	Total cost burden
(a)	(b)	(c)	(d)	(e) = (c) * (d)
2020	576,505	265,192	$0.10	$26,519
2021	1,441,262	662,980	0.10	66,298
2022	2,882,523	1,325,961	0.10	132,596

3. Notice to Participants That Individual Health Insurance Coverage Policy is not Subject to Title I of ERISA

In the proposed rules, DOL clarifies that individual health insurance coverage the premiums of which are reimbursed by an HRA, QSEHRA, or supplemental salary reduction arrangement is not considered an ''employee welfare benefit plan'' with the consumer protections provided under ERISA. HRA plan sponsors are required to notify participants of this fact. For an HRA, this notice requirement is met if annually the notice requirement in 29 CFR 2590.702–2(c)(6) is met, which is part of the HRA Notice to Participants. Therefore, this notice requirement imposes no additional burden. For QSEHRAs and for HRAs not subject to 29 CFR 2590.702–2(c)(6) but that reimburse premiums for individual health insurance coverage, this notice requirement is met if the plan sponsor annually includes language provided in the rule in the Summary Plan Description. DOL estimates that this burden will be de minimis, because the required text is provided by DOL and the required information can be included with other notices.

The information collections are summarized as follows:

Type of Review: New Collection.

Agency: DOL–EBSA, Treasury—IRS.

Title: Notice for Health Reimbursement Arrangements integrated with Individual Health Insurance Coverage.

OMB Numbers: 1210–new (DOL), 1545–0123, 1545–0074, and 1545–0047 (Treasury).

Affected Public: Private Sector.

Total Respondents: 131,328 three-year average.

Total Responses: 1,633,430 three-year average.

Frequency of Response: Annually.

Estimated Total Annual Burden Hours: 196,992 for each agency (combined total is 393,984 hours). Three year average.

Estimated Total Annual Burden Cost: $37,569 for each agency (combined total is $75,138). Three year average.

F. Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) (RFA) imposes certain requirements with respect to Federal rules that are subject to the notice and comment requirements of section 553(b) of the Administrative Procedure Act (5 U.S.C. 551 *et seq.*) and which are likely to have a significant economic impact on a substantial number of small entities. Unless an agency certifies that a proposed rule is not likely to have a significant economic impact on a substantial number of small entities, section 603 of RFA requires that the agency present an initial regulatory flexibility analysis at the time of the publication of the notice of proposed rulemaking describing the impact of the rule on small entities and seeking public comment on such impact. Small entities include small businesses, organizations, and governmental jurisdictions.

The RFA generally defines a ''small entity'' as (1) a proprietary firm meeting the size standards of the Small Business Administration (SBA) (13 CFR 121.201), (2) a nonprofit organization that is not dominant in its field, or (3) a small government jurisdiction with a population of less than 50,000. (States and individuals are not included in the definition of ''small entity.'') The Departments use as their measure of significant economic impact on a substantial number of small entities a change in revenues of more than 3 to 5 percent.

The Departments do not expect the proposed rules to produce costs or benefits in excess of 3 to 5 percent of revenues for small entities. Entities that choose to offer an HRA integrated with individual health insurance coverage instead of a traditional group health

[138] Number of eligible participants is estimated based on Treasury estimates of the number of individuals enrolled in HRAs integrated with individual coverage, the assumption that there are two enrollees per employee participant, and the assumption that 75 percent of eligible participants would enroll in their employers' plans. *See* Section 3 of the Kaiser ''2017 Employer Health Benefits Survey''. *https://www.kff.org/health-costs/report/2017-employer-health-benefits-survey/.*

plan are likely to experience a modest increase or decrease in administrative burden associated with health benefits. Entities that newly offer health benefits in the form of an HRA integrated with individual health insurance coverage would bear modest administrative costs. However, offering an HRA that is integrated with individual health insurance coverage is entirely voluntary on the part of employers, and no employer that would experience substantial costs would be expected to offer an HRA integrated with individual health insurance coverage. In addition, the proposed rules would provide large and small employers with an additional choice of a tax-preferred health benefit to offer their employees, potentially enabling them to attract and retain workers and maintain a healthier workforce.

In addition, section 1102(b) of the Social Security Act requires agencies to prepare a regulatory impact analysis if a rule may have a significant economic impact on the operations of a substantial number of small rural hospitals. This analysis must conform to the provisions of section 603 of the RFA. The proposed rules will not have a direct effect on small rural hospitals though there may be an indirect effect. By reducing the number of uninsured persons, the proposed rules could reduce administrative costs, such as billing costs and the costs of helping patients obtain public health benefits. The proposed rules could also reduce the cost of uncompensated care born by small rural hospitals and other healthcare providers (and shift such costs to insured persons). However, the Departments have determined that the proposed rules will not have a significant impact on the operations of a substantial number of small rural hospitals.

G. Impact of Regulations on Small Business—Department of the Treasury

Pursuant to section 7805(f) of the Code, the proposed rules have been submitted to the Chief Counsel for Advocacy of the SBA for comment on its impact on small business.

H. Unfunded Mandates Reform Act

Section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA) requires that agencies assess anticipated costs and benefits and take certain other actions before issuing a proposed rule that includes any Federal mandate that may result in expenditures in any 1 year by state, local, or Tribal governments, in the aggregate, or by the private sector, of $100 million in 1995 dollars, updated annually for inflation. In 2018, that threshold is approximately $150 million. The proposed rules do not include any Federal mandate that may result in expenditures by state, local, or tribal governments, or the private sector, that may impose an annual burden that exceeds that threshold.

I. Federalism

Executive Order 13132 outlines fundamental principles of federalism. It requires adherence to specific criteria by Federal agencies in formulating and implementing policies that have ''substantial direct effects'' on the states, the relationship between the national government and states, or on the distribution of power and responsibilities among the various levels of government. Federal agencies promulgating regulations that have these federalism implications must consult with state and local officials, and describe the extent of their consultation and the nature of the concerns of state and local officials in the preamble to the final regulations. In the Departments' view, the proposed rules do not have federalism implications.

J. Congressional Review Act

The proposed rules are subject to the Congressional Review Act provisions of the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801 *et seq.*), and, upon finalization, will be transmitted to the Congress and to the Comptroller General for review in accordance with such provisions.

K. Reducing Regulation and Controlling Regulatory Cost

Executive Order 13771, titled Reducing Regulation and Controlling Regulatory Costs, was issued on January 30, 2017 and requires that the costs associated with significant new regulations ''shall, to the extent permitted by law, be offset by the elimination of existing costs associated with at least two prior regulations.'' The proposed rules, if finalized as proposed, are expected to be an Executive Order 13771 deregulatory action.

Statutory Authority

The Department of the Treasury regulations are proposed to be adopted pursuant to the authority contained in sections 7805 and 9833 of the Code.

The Department of Labor regulations are proposed pursuant to the authority contained in 29 U.S.C. 1002, 1135, 1182, 1185d, 1191a, 1191b, and 1191c; Secretary of Labor's Order 1–2011, 77 FR 1088 (Jan. 9, 2012).

The Department of Health and Human Services regulations are proposed to be adopted pursuant to the authority contained in sections 2701 through 2763, 2791, 2792, and 2794 of the PHS Act (42 U.S.C. 300gg–300gg–63, 300gg–91, 300gg–92 and 300gg–94), as amended; sections 1311 and 1321 of PPACA (42 U.S.C. 13031 and 18041).

List of Subjects

26 CFR Part 1

Income Taxes, Reporting and recordkeeping requirements.

26 CFR Part 54

Excise taxes, Health care, Health insurance, Pensions, Reporting and recordkeeping requirements.

29 CFR Part 2510

Employee benefit plans, Pensions.

29 CFR Part 2590

Continuation coverage, Disclosure, Employee benefit plans, Group health plans, Health care, Health insurance, Medical child support, Reporting and recordkeeping requirements.

45 CFR Parts 144 and 146

Health care, Health insurance, Reporting and recordkeeping requirements.

45 CFR Part 147

Health care, Health insurance, Reporting and recordkeeping requirements, and State regulation of health insurance.

45 CFR Part 155

Exchange establishment standards and other related standards under the Affordable Care Act.

Kirsten Wielobob,

Deputy Commissioner for Services and Enforcement, Internal Revenue Service.

Signed at Washington DC, this 16th day of October, 2018.

Preston Rutledge,

Assistant Secretary, Employee Benefits Security Administration, Department of Labor.

Dated: October 17, 2018.

Seema Verma,

Administrator, Centers for Medicare & Medicaid Services.

Dated: October 18, 2018.

Alex M. Azar II,

Secretary, Department of Health and Human Services.

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Amendments to the Regulations

Accordingly, 26 CFR parts 1 and 54 are proposed to be amended as follows:

PART 1—INCOME TAXES

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

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

* * * * *

■ **Par. 2.** Section 1.36B–2 is amended by:

■ a. Redesignating paragraph (c)(3)(i) as paragraph (c)(3)(i)(A) and revising the subject heading of newly designated paragraph (c)(3)(i)(A).

■ b. Adding a new paragraph (c)(3)(i) subject heading and paragraph (c)(3)(i)(B).

■ c. Adding a sentence at the end of paragraphs (c)(3)(ii) and (c)(3)(v)(A)(*1*) and (*2*).

■ d. Revising paragraphs (c)(3)(v)(A)(*3*) and (*5*).

■ e. Adding a sentence at the end of paragraph (c)(3)(vi).

■ f. Adding paragraph (c)(5).

■ g. Revising paragraph (e)(1).

■ h. Adding paragraph (e)(3).

The revisions and additions read as follows:

§ 1.36B–2 Eligibility for premium tax credit.

* * * * *

(c) * * *

(3) * * *

(i) *In general*—(A) *Plans other than health reimbursement arrangements (HRAs) or other account-based group health plans described in paragraph (c)(3)(i)(B) of this section.* * * *

(B) *HRAs and other account-based group health plans integrated with individual health insurance coverage.* An employee who is offered an HRA or other account-based group health plan that would be integrated with individual health insurance coverage, within the meaning of §§ 54.9802–4 and 54.9815–2711(d)(4) of this chapter, if the individual enrolls in individual health insurance coverage, and an individual who is offered the HRA or other account-based group health plan because of a relationship to the employee (a related HRA individual), are eligible for minimum essential coverage under an eligible employer-sponsored plan for any month for which the HRA or other account-based group health plan is offered if the HRA or other account-based group health plan is affordable for the month under paragraph (c)(5) of this section or if the employee does not opt out of and waive future reimbursements from the HRA or other account-based group health plan. An HRA or other account-based group health plan described in this paragraph (c)(3)(i)(B) that is affordable for a month under paragraph (c)(5) of this section is treated as providing minimum value for the month. For purposes of paragraphs (c)(3) and (5) of this section, the definitions under § 54.9815–2711(d)(6) of this chapter apply.

(ii) * * * The plan year for an HRA or other account-based group health plan described in paragraph (c)(3)(i)(B) of this section is the plan's 12-month coverage period (or the remainder of the 12-month coverage period for a newly eligible individual or an individual who enrolls during a special enrollment period).

* * * * *

(v) * * *

(A) * * *

(*1*) * * * See paragraph (c)(5) of this section for rules for when an HRA or other account-based group health plan described in paragraph (c)(3)(i)(B) of this section is affordable for an employee for a month.

(*2*) * * * See paragraph (c)(5) of this section for rules for when an HRA or other account-based group health plan described in paragraph (c)(3)(i)(B) of this section is affordable for a related HRA individual for a month.

(*3*) *Employee safe harbor.* An eligible employer-sponsored plan is not affordable for an employee or a related individual for a plan year if, when the employee or a related individual enrolls in a qualified health plan for a period coinciding with the plan year (in whole or in part), an Exchange determines that the eligible employer-sponsored plan is not affordable for that plan year. This paragraph (c)(3)(v)(A)(*3*) does not apply to a determination made as part of the redetermination process described in 45 CFR 155.335 unless the individual receiving an Exchange redetermination notification affirmatively responds and provides current information on affordability. This paragraph (c)(3)(v)(A)(*3*) does not apply for an individual who, with intentional or reckless disregard for the facts, provides incorrect information to an Exchange concerning the portion of the annual premium for coverage for the employee or related individual under the plan. A reckless disregard of the facts occurs if the taxpayer makes little or no effort to determine whether the information provided to the Exchange is accurate under circumstances that demonstrate a substantial deviation from the standard of conduct a reasonable person would observe. A disregard of the facts is intentional if the taxpayer knows that the information provided to the Exchange is inaccurate. See paragraph (c)(5) of this section for an employee safe harbor that applies when an Exchange determines that an HRA or other account-based group health plan described in paragraph (c)(3)(i)(B) of this section is not affordable for an employee or a related HRA individual for the period of enrollment in a qualified health plan.

* * * * *

(*5*) *Employer contributions to HRAs integrated with eligible employer-sponsored plans.* Amounts newly made available for the current plan year under an HRA that an employee may use to pay premiums, or may use to pay cost-sharing or benefits not covered by the primary plan in addition to premiums, reduce the employee's required contribution if the HRA would be integrated, within the meaning of § 54.9815–2711(d)(2) of this chapter, with an eligible employer-sponsored plan for an employee enrolled in the plan. The eligible employer-sponsored plan and the HRA must be offered by the same employer. Employer contributions to an HRA described in this paragraph (c)(3)(v)(A)(*5*) reduce an employee's required contribution only to the extent the amount of the annual contribution is required under the terms of the plan or otherwise determinable within a reasonable time before the employee must decide whether to enroll in the eligible employer-sponsored plan.

* * * * *

(vi) * * * An HRA or other account-based group health plan described in paragraph (c)(3)(i)(B) of this section that is affordable for a month under

paragraph (c)(5) of this section is treated as providing minimum value for the month.

* * * * *

(5) *Affordable HRA or other account-based group health plan*—(i) *In general.* Except as otherwise provided in this paragraph (c)(5), an HRA or other account-based group health plan described in paragraph (c)(3)(i)(B) of this section is affordable for a month if the employee's required HRA contribution (as defined in paragraph (c)(5)(ii) of this section) for the month does not exceed 1/12 of the product of the employee's household income for the taxable year and the required contribution percentage (as defined in paragraph (c)(3)(v)(C) of this section).

(ii) *Required HRA contribution*—An employee's required HRA contribution is the excess of —

(A) The monthly premium for the lowest cost silver plan for self-only coverage of the employee offered in the Exchange for the rating area in which the employee resides, over

(B) The monthly self-only HRA or other account-based group health plan amount (or the monthly maximum amount available to the employee under the HRA or other account-based group health plan if the HRA or other account-based group health plan provides for reimbursements up to a single dollar amount regardless of whether an employee has self-only or other-than-self-only coverage).

(iii) *Monthly amount.* For purposes of paragraph (c)(5)(ii) of this section, the monthly self-only HRA or other account-based group health plan amount is the self-only HRA or other account-based group health plan amount newly made available under the HRA for the plan year, divided by the number of months in the plan year the HRA or other account-based group health plan is available to the employee. The monthly maximum amount newly made available to the employee under the HRA or other account-based group health plan is the maximum amount newly-made available for the plan year to the employee under the plan, divided by the number of months in the plan year the HRA or other account-based group health plan is available to the employee.

(iv) *Employee safe harbor.* An HRA or other account-based group health plan described in paragraph (c)(3)(i)(B) of this section is not affordable for a month for an employee or a related HRA individual if, when the employee or related HRA individual enrolls in a qualified health plan for a period coinciding with the period the HRA or other account-based group health plan is available to the employee or related HRA individual (in whole or in part), an Exchange determines that the HRA or other account-based group health plan is not affordable for the period of enrollment in the qualified health plan. This paragraph (c)(5)(iv) does not apply to a determination made as part of the redetermination process described in 45 CFR 155.335 unless the individual receiving an Exchange redetermination notification affirmatively responds and provides current information on affordability. This paragraph (c)(5)(iv) does not apply for an individual who, with intentional or reckless disregard for the facts, provides incorrect information to an Exchange concerning the relevant HRA or other account-based group health plan amount offered by the employee's employer. A reckless disregard of the facts occurs if the taxpayer makes little or no effort to determine whether the information provided to the Exchange is accurate under circumstances that demonstrate a substantial deviation from the standard of conduct a reasonable person would observe. A disregard of the facts is intentional if the taxpayer knows that the information provided to the Exchange is inaccurate.

(v) *Amounts used for affordability determination.* Only amounts that are newly made available for the plan year of the HRA or other account-based group health plan described in paragraph (c)(3)(i)(B) of this section and determinable within a reasonable time before the beginning of the plan year of the HRA or other account-based health plan are considered in determining whether an HRA or other account-based group health plan described in paragraph (c)(3)(i)(B) of this section is affordable. Amounts made available for a prior plan year that carry over to the current plan year are not taken into account for purposes of this paragraph (c)(5).

(vi) *Affordability for part-year period.* Affordability under this paragraph (c)(5) is determined separately for each employment period that is less than a full calendar year or for the portions of the plan year of an employer's HRA or other account-based group health plan that fall in different taxable years of an applicable taxpayer. An HRA or other account-based group health plan described in paragraph (c)(3)(i)(B) of this section is affordable for a part-year period if the employee's annualized required HRA contribution for the part-year period does not exceed the required contribution percentage of the applicable taxpayer's household income for the taxable year. The employee's annualized required HRA contribution is the employee's required HRA contribution for the part-year period times a fraction, the numerator of which is 12 and the denominator of which is the number of months in the part-year period during the applicable taxpayer's taxable year. Only full calendar months are included in the computation under this paragraph (c)(5)(vi).

(vii) *Related individual not allowed as a personal exemption deduction.* A related HRA individual is treated as ineligible for minimum essential coverage under an HRA or other account-based group health plan described in paragraph (c)(3)(i)(B) of this section for months that the employee opted out of and waived future reimbursements from the HRA or other account-based group health plan and the employee is not allowed a personal exemption deduction under section 151 for the related HRA individual.

(viii) *Post-employment coverage.* An individual who is offered an HRA or other account-based group health plan described in paragraph (c)(3)(i)(B) of this section, for months after an employee terminates employment with the employer offering the HRA or other account-based group health plan, is eligible for minimum essential coverage under the HRA or other account-based group health plan for months after termination of employment only if the employee does not forfeit or opt out of and waive future reimbursements from the HRA or other account-based group health plan for months after termination of employment.

(ix) *Examples.* The following examples illustrate the provisions of this paragraph (c)(5). The required contribution percentage is defined in paragraph (c)(3)(v)(C) of this section and is updated annually. Because the required contribution percentage for 2020 has not yet been determined, the examples assume a required contribution percentage for 2020 of 9.86%.

(A) Example 1. Determination of affordability. (*1*) In 2020 Taxpayer A is single, has no dependents, and has household income of $28,000. A is an employee of Employer X for all of 2020. X offers its employees an HRA described in paragraph (c)(3)(i)(B) of this section that reimburses $2,400 of medical care expenses for single employees with no children (the self-only HRA amount) and $4,000 for employees with a spouse or children for the medical expenses of the employees and their family members. A enrolls in a qualified health plan through the Exchange in the rating area in which A resides and remains enrolled for all of 2020. The monthly premium for the lowest cost silver plan for

self-only coverage of A that is offered in the Exchange for the rating area in which A resides is $500.

(*2*) A's required HRA contribution, as defined in paragraph (c)(5)(ii) of this section, is $300, the excess of $500 (the monthly premium for the lowest cost silver plan for self-only coverage of A) over $200 (1/12 of the self-only HRA amount provided by Employer X to its employees). In addition, 1/12 of the product of 9.86 percent and A's household income is $230 ($28,000 × .0986 = $2,761; $2,761/12 = $230). Because A's required HRA contribution of $300 exceeds $230 (1/12 of the product of 9.86 percent and A's household income), the HRA is unaffordable for A for each month of 2020 under paragraph (c)(5) of this section. If A opts out of and waives future reimbursements from the HRA, A is not eligible for minimum essential coverage under the HRA for each month of 2020 under paragraph (c)(3)(i)(B) of this section.

(B) Example 2. Determination of affordability for a related HRA individual. (*1*) In 2020 Taxpayer B is married and has one child who is a dependent of B for 2020. B has household income of $28,000. B is an employee of Employer X for all of 2020. X offers its employees an HRA described in paragraph (c)(3)(i)(B) of this section that reimburses $3,600 of medical care expenses for single employees with no children (the self-only HRA amount) and $5,000 for employees with a spouse or children for the medical expenses of the employees and their family members. B, B's spouse, and B's child enroll in a qualified health plan through the Exchange in the rating area in which B resides and they remain enrolled for all of 2020. No advance credit payments are made for their coverage. The monthly premium for the lowest cost silver plan for self-only coverage of B that is offered in the Exchange for the rating area in which B resides is $500.

(*2*) B's required HRA contribution, as defined in paragraph (c)(5)(ii) of this section, is $200, the excess of $500 (the monthly premium for the lowest cost silver plan for self-only coverage for B) over $300 (1/12 of the self-only HRA amount provided by Employer X to its employees). In addition, 1/12 of the product of 9.86 percent and B's household income for 2020 is $230 ($28,000 × .0986 = $2,761; $2,761/12 = $230). Because B's required HRA contribution of $200 does not exceed $230 (1/12 of the product of 9.86 percent and B's household income for 2020), the HRA is affordable for B under paragraph (c)(5) of this section, and B is eligible for minimum essential coverage under an eligible employer-sponsored plan for each month of 2020 under paragraph (c)(3)(i)(B) of this section. In addition, B's spouse and child are also eligible for minimum essential coverage under an eligible employer-sponsored plan for each month of 2020 under paragraph (c)(3)(i)(B) of this section.

(C) Example 3. Exchange determines that HRA is unaffordable. (*1*) The facts are the same as in Example 2, except that B, when enrolling in Exchange coverage for B's family, received a determination by the Exchange that the HRA was unaffordable, because B believed B's household income would be lower than it turned out to be. Consequently, advance credit payments were made for their 2020 coverage.

(*2*) Under paragraph (c)(5)(iv) of this section, the HRA is considered unaffordable for B, B's spouse, and B's child for each month of 2020 provided that B did not, with intentional or reckless disregard for the facts, provide incorrect information to the Exchange concerning the HRA or B's household income.

(D) Example 4. Affordability determined for part of a taxable year (part-year period). (*1*) Taxpayer C is an employee of Employer X. C's household income for 2020 is $28,000. X offers its employees an HRA described in paragraph (c)(3)(i)(B) of this section that reimburses medical care expenses of $3,600 for single employees without children (the self-only HRA amount) and $5,000 to employees with a spouse or children for the medical expenses of the employees and their family members. X's HRA plan year is September 1 to August 31 and C is first eligible to participate in the HRA for the period beginning September 1, 2020. C enrolls in a qualified health plan through the Exchange in the rating area in which C resides for all of 2020. The monthly premium for the lowest cost silver plan for self-only coverage of C that is offered in the Exchange for the rating area in which C resides for 2020 is $500.

(*2*) Under paragraph (c)(3)(vi) of this section, the affordability of the HRA is determined separately for the period September 1 through December 31, 2020, and for the period January 1 through August 31, 2021. C's required HRA contribution, as defined in paragraph (c)(5)(ii) of this section, for the period September 1 through December 31, 2020, is $200, the excess of $500 (the monthly premium for the lowest cost silver plan for self-only coverage for C) over $300 (1/12 of the self-only HRA amount provided by X to its employees). In addition, 1/12 of the product of 9.86 percent and C's household income is $230 ($28,000 × .0986 = $2,761; $2,677/12 = $230). Because C's required HRA contribution of $200 does not exceed $230, the HRA is affordable for C for each month in the period September 1 through December 31, 2020, under paragraph (c)(5) of this section. Affordability for the period January 1 through August 31, 2021, is determined using C's 2021 household income and required HRA contribution.

(E) Example 5. Carryover amounts ignored in determining affordability. (*1*) Taxpayer D is an employee of Employer X for all of 2020 and 2021. D is single. For each of 2020 and 2021, X offers its employees an HRA described in paragraph (c)(3)(i)(B) of this section that provides reimbursement for medical care expenses of $2,400 to single employees with no children (the self-only HRA amount) and $4,000 to employees with a spouse or children for the medical expenses of the employees and their family members. Under the terms of the HRA, amounts that an employee does not use in a calendar year may be carried over and used in the next calendar year. In 2020, D used only $1,500 of her $2,400 maximum reimbursement and the unused $900 is carried over and may be used by D in 2021.

(*2*) Under paragraph (c)(5)(v) of this section, only the $2,400 self-only HRA amount offered to D for 2021 is considered in determining whether D's HRA is affordable. The $900 carryover amount is not considered in determining the affordability of the HRA.

* * * * *

(e) * * * (1) Except as provided in paragraphs (e)(2) and (3) of this section, this section applies to taxable years ending after December 31, 2013.

* * * * *

(3) Paragraphs (c)(3)(i)(B) and (c)(5) of this section, and the last sentences at the end of paragraphs (c)(3)(ii), (c)(3)(v)(A)(*1*), (c)(3)(v)(A)(*2*), (c)(3)(v)(A)(*3*), and (c)(3)(vi) of this section apply to taxable years beginning on or after January 1, 2020.

PART 54—PENSION EXCISE TAXES

■ **Par. 3.** The authority citation for part 54 is amended by adding an entry for § 54.9802–4 in numerical order to read in part as follows:

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

* * * * *

Section 54.9802–4 also issued under 26 U.S.C. 9833.

* * * * *

■ **Par. 4.** Section 54.9801–2 is amended by revising the definition of ''Group health insurance coverage'' to read as follows:

§ 54.9801–2 Definitions.

* * * * *

Group health insurance coverage means health insurance coverage offered in connection with a group health plan. Individual health insurance coverage reimbursed by the arrangements described in 29 CFR 2510.3–1(l) is not offered in connection with a group health plan, and is not group health insurance coverage, provided all the conditions in 29 CFR 2510.3–1(l) are satisfied.

* * * * *

■ **Par. 5.** Section 54.9802–4 is added to read as follows:

§ 54.9802–4 Special rule allowing integration of health reimbursement arrangements (HRAs) and other account-based group health plans with individual health insurance coverage and prohibiting discrimination in HRAs and other account-based group health plans.

(a) *Scope.* This section applies to health reimbursement arrangements (HRAs) and other account-based group health plans, as defined in § 54.9815–2711(d)(6)(i) of this part. For ease of reference, the term ''HRA'' is used in this section to include other account-based group health plans.

(b) *Purpose.* This section provides the conditions that an HRA must satisfy in

order to be integrated with individual health insurance coverage for purposes of Public Health Service Act (PHS Act) sections 2711 and 2713 and § 54.9815–2711(d)(4) of this part. Some of the conditions set forth in this section specifically relate to compliance with PHS Act sections 2711 and 2713 and some relate to the effect of having or being offered an HRA on eligibility for the premium tax credit under section 36B. In addition, this section provides conditions that an HRA integrated with individual health insurance coverage must satisfy in order to comply with the nondiscrimination provisions in section 9802 and section 2705 of the PHS Act (which is incorporated in section 9815) and that are consistent with the provisions of the Patient Protection and Affordable Care Act, Public Law 111–148 (124 Stat. 119 (2010)), and the Health Care and Education Reconciliation Act of 2010, Public Law 111–152 (124 Stat. 1029 (2010)), each as amended, that are designed to create a competitive individual market. These conditions are intended to prevent an HRA plan sponsor from intentionally or unintentionally, directly or indirectly, steering any participants or dependents with adverse health factors away from its traditional group health plan, if any, and toward individual health insurance coverage.

(c) *General rule.* An HRA will be considered to be integrated with individual health insurance coverage for purposes of PHS Act sections 2711 and 2713 and § 54.9815–2711(d)(4) of this part and will not be considered to discriminate in violation of section 9802 and PHS Act section 2705 solely because it offers an HRA integrated with individual health insurance coverage, provided that the conditions of this paragraph (c) are satisfied.

(1) *Enrollment in individual health insurance coverage.* The HRA must require that the participant and any dependent(s) are enrolled in individual health insurance coverage that is subject to and complies with the requirements in PHS Act sections 2711 and 2713 for each month that the individual(s) are covered by the HRA. For this purpose, all individual health insurance coverage, except for individual health insurance coverage that consists solely of excepted benefits, is treated as being subject to and complying with PHS Act sections 2711 and 2713. References to individual health insurance coverage in this paragraph (c) do not include individual health insurance coverage that consists solely of excepted benefits. The HRA must also provide that, subject to applicable COBRA or other continuation of coverage requirements, if any individual covered by the HRA ceases to be covered by such individual health insurance coverage, the individual may not seek reimbursement under the HRA for claims that are incurred after the individual health insurance coverage ceases. In addition, subject to applicable COBRA or other continuation of coverage requirements, if the participant and all of the dependents covered by the participant's HRA cease to be covered by such individual health insurance coverage, the participant must forfeit the HRA.

(2) *No traditional group health plan may be offered to same participants.* To the extent a plan sponsor offers any class of employees (as defined in paragraph (d) of this section) an HRA integrated with individual health insurance coverage, the plan sponsor may not also offer a traditional group health plan to the same class of employees. For this purpose, a traditional group health plan is any group health plan other than either an account-based group health plan or a group health plan that consists solely of excepted benefits. Therefore, a plan sponsor may not offer a choice between an HRA integrated with individual health insurance coverage or a traditional group health plan to any participant.

(3) *Same terms requirement.* To the extent a plan sponsor offers an HRA integrated with individual health insurance coverage to a class of employees described in paragraph (d) of this section, the HRA must be offered on the same terms to all participants within the class, except as provided in paragraphs (c)(3)(i) and (ii) of this section and except that the HRA will not fail to be treated as provided on the same terms even if the plan sponsor offers the HRA to some, but not all, former employees within a class of employees. However, if a plan sponsor offers the HRA to one or more former employees within a class of employees, the HRA must be offered to the former employee(s) on the same terms as to all other employees within the class. Also, amounts that are not used to reimburse medical care expenses (as defined in § 54.9815–2711(d)(6)(ii) of this part) for any plan year that are made available to participants in later plan years are disregarded for purposes of determining whether an HRA is offered on the same terms, provided that the method for determining whether participants have access to unused amounts in future years, and the methodology and formula for determining the amounts of unused funds which they may access in future years, is the same for all participants in a class of employees. In addition, the ability to pay the portion of the premium for individual health insurance coverage that is not covered by the HRA, if any, by using a salary reduction arrangement under section 125 is considered to be a term of the HRA for purposes of this paragraph; therefore, an HRA shall fail to be treated as provided on the same terms unless such a salary reduction arrangement, if made available to any participant in a class of employees, is made available on the same terms to all participants (other than former employees) in the class of employees. Further, the HRA shall not fail to be treated as provided on the same terms because the maximum dollar amount made available to participants in a class of employees to reimburse medical care expenses for any plan year increases:

(i) As the age of the participant increases, so long as the same maximum dollar amount attributable to the increase in age is made available to all participants in that class of employees who are the same age; or

(ii) As the number of the participant's dependents who are covered under the HRA increases, so long as the same maximum dollar amount attributable to the increase in family size is made available to all participants in that class of employees with the same number of dependents covered by the HRA.

(4) *Opt out.* Under the terms of the HRA, a participant who is otherwise eligible for coverage must be permitted to opt out of and waive future reimbursements from the HRA at least annually, and, upon termination of employment, either the remaining amounts in the HRA are forfeited or the participant is permitted to permanently opt out of and waive future reimbursements from the HRA.

(5) *Reasonable procedures for verification and substantiation*—(i) *General rule for verification of individual health insurance coverage for the plan year.* The HRA must implement, and comply with, reasonable procedures to verify that participants and dependents are, or will be, enrolled in individual health insurance coverage for the plan year. The reasonable procedures may include a requirement that a participant substantiate enrollment by providing either:

(A) A document from a third party (for example, the issuer) showing that the participant and any dependents covered by the HRA are, or will be, enrolled in individual health insurance coverage (for example, an insurance card or an explanation of benefits document pertaining to the relevant time period); or

(B) An attestation by the participant stating that the participant and dependent(s) covered by the HRA are or will be enrolled in individual health insurance coverage, the date coverage began or will begin, and the name of the provider of the coverage.

(ii) *Coverage substantiation with each request for reimbursement of medical care expenses.* Following the initial verification of coverage, with each new request for reimbursement of an incurred medical care expense for the same plan year, the HRA may not reimburse participants for any medical care expenses unless, prior to each reimbursement, the participant provides substantiation (which may be in the form of a written attestation) that the participant and if applicable, the dependent whose medical care expenses are requested to be reimbursed continue to be enrolled in individual health insurance coverage for the month during which the medical care expenses were incurred. The attestation may be part of the form used for requesting reimbursement.

(iii) *Reliance on substantiation.* For purposes of this paragraph (c)(5), an HRA may rely on the participant's documentation or attestation unless the HRA has actual knowledge that any individual covered by the HRA is not, or will not be, enrolled in individual health insurance coverage for the plan year or the month, as applicable.

(6) *Notice requirement*—(i) *Timing.* The HRA must provide a written notice to each participant at least 90 days before the beginning of each plan year or, for a participant who is not eligible to participate at the beginning of the plan year (or who is not eligible to participate at the time the notice is provided at least 90 days before the beginning of the plan year), no later than the date on which the participant is first eligible to participate in the HRA.

(ii) *Content.* The notice must include all the information described in this paragraph (c)(6)(ii) (and may include any additional information as long as it does not conflict with the required information set forth in paragraph (c)(6)(ii)(A) through (H) of this section).

(A) A description of the terms of the HRA, including the maximum dollar amount available for each participant (including the self-only HRA amount available for the plan year (or the maximum dollar amount available for the plan year if the HRA provides for reimbursements up to a single dollar amount regardless of whether a participant has self-only or family coverage)), any rules regarding the proration of the maximum dollar amount applicable to any participant who is not eligible to participate in the HRA for the entire plan year, whether the participant's family members are eligible for the HRA, a statement that the HRA is not a qualified small employer health reimbursement arrangement, a statement that the HRA requires the participant and any dependents to be enrolled in individual health insurance coverage, a statement that the participant is required to substantiate the existence of such enrollment, a statement that the coverage enrolled in cannot be short-term, limited-duration insurance or excepted benefits, and, if the requirements under 29 CFR 2510.3–1(l) are met, a statement that the individual health insurance coverage enrolled in is not subject to the Employee Retirement Income Security Act (ERISA).

(B) A statement of the right of the participant to opt out of and waive future reimbursements from the HRA, as set forth under paragraph (c)(4) of this section.

(C) A description of the potential availability of the premium tax credit if the participant opts out of and waives future reimbursements from the HRA and the HRA is not affordable for one or more months under § 1.36B–2(c)(5) of this chapter, a statement that even if the participant opts out of and waives future reimbursements from an HRA, the offer will prohibit the participant (and, potentially, the participant's dependents) from receiving a premium tax credit for the participant's coverage (or the dependent's coverage, if applicable) on the Exchange (as defined in 45 CFR 155.20) for any month that the HRA is affordable under § 1.36B–2(c)(5) of this chapter, and a statement that, if the participant is a former employee, the offer of the HRA does not render the participant ineligible for the premium tax credit regardless of whether it is affordable under § 1.36B–2(c)(5) of this chapter;

(D) A statement that if the participant accepts the HRA, the participant may not claim a premium tax credit for the participant's Exchange coverage for any month the HRA may be used to reimburse medical care expenses of the participant and a premium tax credit may not be claimed for the Exchange coverage of the participant's dependents for any month the HRA may be used to reimburse medical care expenses of the dependents.

(E) A statement that the participant must inform any Exchange to which the participant applies for advance payments of the premium tax credit of the availability of the HRA, the self-only HRA amount available for the plan year (or the maximum dollar amount available for the plan year if the HRA provides for reimbursements up to a single dollar amount regardless of whether a participant has self-only or family coverage) as set forth in the written notice in accordance with paragraph (c)(6)(ii)(A) of this section, the number of months in the plan year the HRA is available to the participant, whether the HRA is also available to the participant's dependents, and whether the participant is a current employee or former employee.

(F) A statement that the participant should retain the written notice because it may be needed to determine whether the participant is allowed a premium tax credit on the participant's individual income tax return and, if so, the months the participant is allowed the premium tax credit.

(G) A statement that the HRA may not reimburse any medical care expense unless the substantiation requirement set forth in paragraph (c)(5) of this section is satisfied.

(H) A statement that it is the responsibility of the participant to inform the HRA if the participant or any dependent whose medical care expenses are reimbursable by the HRA is no longer enrolled in individual health insurance coverage.

(d) *Classes of employees*—(1) *List of classes.* Participants may be treated as belonging to a class of employees based on whether they are, or are not, included in the classes described in this paragraph (d)(1). If the HRA is offered to former employees, former employees are considered to be in the same class in which they were in immediately before separation from service. (See paragraph (d)(2) of this section for additional rules regarding the definition of ''full-time employees,'' ''part-time employees,'' and ''seasonal employees.'')

(i) Full-time employees, defined to mean either full-time employees under section 4980H and the regulations thereunder (§ 54.4980H–1(a)(21) of this part) or employees who are not part-time employees (as described in § 1.105–11(c)(2)(iii)(C) of this chapter);

(ii) Part-time employees, defined to mean either employees who are not full-time employees under section 4980H and § 54.4980H–1 and –3 of this part or part-time employees as described in § 1.105–11(c)(2)(iii)(C) of this chapter;

(iii) Seasonal employees, defined to mean seasonal employees as described in either § 54.4980H–1(a)(38) of this part or § 1.105–11(c)(2)(iii)(C) of this chapter;

(iv) Employees included in a unit of employees covered by a collective bargaining agreement in which the plan

sponsor participates (as described in § 1.105–11(c)(2)(iii)(D) of this chapter);

(v) Employees who have not satisfied a waiting period for coverage (if the waiting period complies with § 54.9815–2708 of this part);

(vi) Employees who have not attained age 25 prior to the beginning of the plan year (as described in § 1.105–11(c)(2)(iii)(B) of this chapter);

(vii) Non-resident aliens with no U.S.-based income (as described in § 1.105–11(c)(2)(iii)(E) of this chapter);

(viii) Employees whose primary site of employment is in the same rating area as defined in 45 CFR 147.102(b); or

(ix) A group of participants described as a combination of two or more of the classes of employees set forth in paragraphs (d)(1)(i) through (viii) of this section. (For example, part-time employees included in a unit of employees covered by a collective bargaining agreement could be one class of employees and full-time employees included in a unit of employees covered by the same collective bargaining agreement could be another class of employees.)

(2) *Consistency requirement.* For any plan year, a plan sponsor may define ''full-time employee,'' ''part-time employee,'' and ''seasonal employee'' in accordance with the relevant provisions of section 105(h) and § 1.105–11 of this chapter or of section 4980H and § 54.4980H–1 and –3 of this part if:

(i) To the extent applicable under the HRA for the plan year, each of the three classes of employees are defined in accordance with either section 105(h) or section 4980H for the plan year; and

(ii) The HRA plan document sets forth the applicable definitions prior to the beginning of the plan year in which the definitions will apply.

(e) *Examples.* The following examples illustrate the provisions of paragraphs (c)(2) and (3) of this section. In each example, the HRA may reimburse any medical care expenses, including premiums for individual health insurance coverage.

(1) Example 1. (i) *Facts.* For 2020, Plan Sponsor X offers the following to its employees. Full-time employees in rating area A are offered $2,000 each in an HRA. Part-time employees in rating area A are offered $500 each in an HRA. All employees in rating area B are offered a traditional group health plan.

(ii) *Conclusion.* The requirements of paragraphs (c)(2) and (3) of this section are satisfied in this *Example 1.*

(2) Example 2. (i) *Facts.* For 2020, Plan Sponsor Y offers the following to its employees. Employees covered by a collective bargaining agreement in which Plan Sponsor Y participates are offered a traditional group health plan (as required by the collective bargaining agreement). All other employees (non-collectively bargained employees) are offered the following amounts in an HRA: $1,000 each for employees age 25 to 35; $2,000 each for employees age 36 to 45; $2,500 each for employees age 46 to 55; and $4,000 each for employees over age 55. Non-collectively bargained employees who have not attained age 25 by January 1, 2020 are not offered an HRA or a traditional group health plan.

(ii) *Conclusion.* The requirements of paragraphs (c)(2) and (3) of this section are satisfied in this *Example 2.*

(3) Example 3. (i) *Facts.* For 2020, Plan Sponsor Z offers the following amounts in an HRA to its employees who have completed the plan's waiting period, which complies with the requirements for waiting periods in § 54.9815–2708 of this part: $1,500, if the employee is the only individual covered by the HRA; $3,500, if the employee and one additional family member are covered by the HRA; and $5,000, if the employee and more than one additional family member are covered by the HRA.

(ii) *Conclusion.* The requirements of paragraphs (c)(2) and (3) of this section are satisfied in this *Example 3.*

(f) *Applicability date.* This section applies to plan years beginning on or after January 1, 2020.

■ **Par. 6.** Section 54.9815–2711 is amended by revising paragraphs (c), (d), and (e) to read as follows:

§ 54.9815–2711 No lifetime or annual limits.

* * * * *

(c) *Definition of essential health benefits.* The term ''essential health benefits'' means essential health benefits under section 1302(b) of the Patient Protection and Affordable Care Act. For this purpose, a group health plan or a health insurance issuer that is not required to provide essential health benefits under section 1302(b) must define ''essential health benefits'' in a manner that is consistent with the following paragraphs (c)(1) or (2):

(1) For plan years beginning before January 1, 2020, one of the EHB-benchmark plans applicable in a State under 45 CFR 156.110, and including coverage of any additional required benefits that are considered essential health benefits consistent with 45 CFR 155.170(a)(2), or one of the three Federal Employee Health Benefits Program (FEHBP) plan options as defined by 45 CFR 156.100(a)(3), and including coverage of additional required benefits under 45 CFR 156.110; or

(2) For plan years beginning on or after January 1, 2020, an EHB-benchmark plan selected by a State in accordance with the available options and requirements for EHB-benchmark plan selection at 45 CFR 156.111, including an EHB-benchmark plan in a State that takes no action to change its EHB-benchmark plan and thus retains the EHB-benchmark plan applicable in that State for the prior year in accordance with 45 CFR 156.111(d)(1), and including coverage of any additional required benefits that are considered essential health benefits consistent with 45 CFR 155.170(a)(2).

(d) *Health reimbursement arrangements (HRAs) and other account-based group health plans*—(1) *In general.* If an HRA or other account-based group health plan is integrated with another group health plan or individual health insurance coverage and the other group health plan or individual health insurance coverage, as applicable, separately is subject to and satisfies the requirements in PHS Act section 2711 and paragraph (a)(2) of this section, the fact that the benefits under the HRA or other account-based group health plan are limited does not cause the HRA or other account-based group health plan to fail to meet the requirements of PHS Act section 2711 and paragraph (a)(2) of this section. Similarly, if an HRA or other account-based group health plan is integrated with another group health plan or individual health insurance coverage and the other group health plan or individual health insurance coverage, as applicable, separately is subject to and satisfies the requirements in PHS Act section 2713 and § 54.9815–2713(a)(1) of this part, the fact that the benefits under the HRA or other account-based group health plan are limited does not cause the HRA or other account-based group health plan to fail to meet the requirements of PHS Act section 2713 and § 54.9815–2713(a)(1) of this part. For this purpose, all individual health insurance coverage, except for coverage that consists solely of excepted benefits, is treated as being subject to and complying with PHS Act sections 2711 and 2713.

(2) *Requirements for an HRA or other account-based group health plan to be integrated with another group health plan.* An HRA or other account-based group health plan is integrated with another group health plan for purposes of PHS Act section 2711 and paragraph (a)(2) of this section if it meets the requirements under one of the integration methods set forth in paragraph (d)(2)(i) or (ii) of this section. For purposes of the integration methods under which an HRA or other account-based group health plan is integrated with another group health plan, integration does not require that the HRA or other account-based group health plan and the other group health plan with which it is integrated share

the same plan sponsor, the same plan document or governing instruments, or file a single Form 5500, if applicable. An HRA or other account-based group health plan integrated with another group health plan for purposes of PHS Act section 2711 and paragraph (a)(2) of this section may not be used to purchase individual health insurance coverage unless that coverage consists solely of excepted benefits, as defined in 45 CFR 148.220.

(i) *Method for integration with a group health plan: Minimum value not required.* An HRA or other account-based group health plan is integrated with another group health plan for purposes of this paragraph if:

(A) The plan sponsor offers a group health plan (other than the HRA or other account-based group health plan) to the employee that does not consist solely of excepted benefits;

(B) The employee receiving the HRA or other account-based group health plan is actually enrolled in a group health plan (other than the HRA or other account-based group health plan) that does not consist solely of excepted benefits, regardless of whether the plan is offered by the same plan sponsor (referred to as non-HRA group coverage);

(C) The HRA or other account-based group health plan is available only to employees who are enrolled in non-HRA group coverage, regardless of whether the non-HRA group coverage is offered by the plan sponsor of the HRA or other account-based group health plan (for example, the HRA may be offered only to employees who do not enroll in an employer's group health plan but are enrolled in other non-HRA group coverage, such as a group health plan maintained by the employer of the employee's spouse);

(D) The benefits under the HRA or other account-based group health plan are limited to reimbursement of one or more of the following—co-payments, co-insurance, deductibles, and premiums under the non-HRA group coverage, as well as medical care expenses that do not constitute essential health benefits as defined in paragraph (c) of this section; and

(E) Under the terms of the HRA or other account-based group health plan, an employee (or former employee) is permitted to permanently opt out of and waive future reimbursements from the HRA or other account-based group health plan at least annually and, upon termination of employment, either the remaining amounts in the HRA or other account-based group health plan are forfeited or the employee is permitted to permanently opt out of and waive future reimbursements from the HRA or other account-based group health plan (see paragraph (d)(3) of this section for additional rules regarding forfeiture and waiver).

(ii) *Method for integration with another group health plan: Minimum value required.* An HRA or other account-based group health plan is integrated with another group health plan for purposes of this paragraph if:

(A) The plan sponsor offers a group health plan (other than the HRA or other account-based group health plan) to the employee that provides minimum value pursuant to section 36B(c)(2)(C)(ii) and § 1.36B–6 of this chapter;

(B) The employee receiving the HRA or other account-based group health plan is actually enrolled in a group health plan (other than the HRA or other account-based group health plan) that provides minimum value pursuant to section 36B(c)(2)(C)(ii) and § 1.36B–6 of this chapter regardless of whether the plan is offered by the plan sponsor of the HRA or other account-based group health plan (referred to as non-HRA MV group coverage);

(C) The HRA or other account-based group health plan is available only to employees who are actually enrolled in non-HRA MV group coverage, regardless of whether the non-HRA MV group coverage is offered by the plan sponsor of the HRA or other account-based group health plan (for example, the HRA may be offered only to employees who do not enroll in an employer's group health plan but are enrolled in other non-HRA MV group coverage, such as a group health plan maintained by an employer of the employee's spouse); and

(D) Under the terms of the HRA or other account-based group health plan, an employee (or former employee) is permitted to permanently opt out of and waive future reimbursements from the HRA or other account-based group health plan at least annually, and, upon termination of employment, either the remaining amounts in the HRA or other account-based group health plan are forfeited or the employee is permitted to permanently opt out of and waive future reimbursements from the HRA or other account-based group health plan (see paragraph (d)(3) of this section for additional rules regarding forfeiture and waiver).

(3) *Forfeiture.* For purposes of integration under paragraphs (d)(2)(i)(E) and (d)(2)(ii)(D) of this section, forfeiture or waiver occurs even if the forfeited or waived amounts may be reinstated upon a fixed date, a participant's death, or the earlier of the two events (the reinstatement event). For this purpose, coverage under an HRA or other account-based group health plan is considered forfeited or waived prior to a reinstatement event only if the participant's election to forfeit or waive is irrevocable, meaning that, beginning on the effective date of the election and through the date of the reinstatement event, the participant and the participant's beneficiaries have no access to amounts credited to the HRA or other account-based group health plan. This means that upon and after reinstatement, the reinstated amounts under the HRA or other account-based group health plan may not be used to reimburse or pay medical care expenses incurred during the period after forfeiture and prior to reinstatement.

(4) *Requirements for an HRA or other account-based group health plan to be integrated with individual health insurance coverage.* An HRA or other account-based group health plan is integrated with individual health insurance coverage (and treated as complying with PHS Act sections 2711 and 2713) if the HRA or other account-based group health plan meets the requirements of § 54.9802–4(c) of this part.

(5) *Integration with Medicare parts B and D.* For employers that are not required to offer their non-HRA group health plan coverage to employees who are Medicare beneficiaries, an HRA or other account-based group health plan that may be used to reimburse premiums under Medicare part B or D may be integrated with Medicare (and deemed to comply with PHS Act sections 2711 and 2713) if the requirements of this paragraph (d)(5) are satisfied with respect to employees who would be eligible for the employer's non-HRA group health plan but for their eligibility for Medicare (and the integration rules under paragraphs (d)(2)(i) and (ii) of this section continue to apply to employees who are not eligible for Medicare):

(i) The plan sponsor offers a group health plan (other than the HRA or other account-based group health plan and that does not consist solely of excepted benefits) to employees who are not eligible for Medicare;

(ii) The employee receiving the HRA or other account-based group health plan is actually enrolled in Medicare part B or D;

(iii) The HRA or other account-based group health plan is available only to employees who are enrolled in Medicare part B or D; and

(iv) The HRA or other account-based group health plan complies with paragraphs (d)(2)(i)(E) and (d)(2)(ii)(D) of this section.

(6) *Definitions.* The following definitions apply for purposes of this section.

(i) *Account-based group health plan.* An account-based group health plan is an employer-provided group health plan that provides reimbursements of medical care expenses with the reimbursement subject to a maximum fixed dollar amount for a period. An HRA is a type of account-based group health plan. An account-based group health plan does not include a qualified small employer health reimbursement arrangement, as defined in section 9831(d)(2).

(ii) *Medical care expenses.* Medical care expenses means expenses for medical care as defined under section 213(d).

(e) *Applicability date.* The provisions of this section are applicable to group health plans and health insurance issuers for plan years beginning on or after January 1, 2020. Until [APPLICABILITY DATE OF FINAL RULE], plans and issuers are required to continue to comply with the corresponding sections of 26 CFR part 54, contained in the 26 CFR subchapter D, revised as of April 1, 2018.

■ **Par 7.** Section 54.9831–1 is amended by revising paragraph (c)(3)(i) and adding paragraph (c)(3)(viii) to read as follows:

§ 54.9831–1 Special rules relating to group health plans.

* * * * *

(c) * * *

(3) * * *

(i) *In general.* Limited-scope dental benefits, limited-scope vision benefits, or long-term care benefits are excepted if they are provided under a separate policy, certificate, or contract of insurance, or are otherwise not an integral part of a group health plan as described in paragraph (c)(3)(ii) of this section. In addition, benefits provided under a health flexible spending arrangement (health FSA) are excepted benefits if they satisfy the requirements of paragraph (c)(3)(v) of this section; benefits provided under an employee assistance program are excepted benefits if they satisfy the requirements of paragraph (c)(3)(vi) of this section; benefits provided under limited wraparound coverage are excepted benefits if they satisfy the requirements of paragraph (c)(3)(vii) of this section; and benefits provided under a health reimbursement arrangement or other account-based group health plan, other than a health FSA, are excepted benefits if they satisfy the requirements of paragraph (c)(3)(viii) of this section.

* * * * *

(viii) *Health reimbursement arrangements (HRAs) and other account-based group health plans.* Benefits provided under an HRA or other account-based group health plan, other than a health FSA, are excepted if they satisfy all of the requirements of this paragraph (c)(3)(viii). See paragraph (c)(3)(v) of this section of these regulations for the circumstances in which benefits provided under a health FSA are excepted benefits. For purposes of this paragraph, the term ''HRA or other account-based group health plan'' has the same meaning as ''account based group health plan'' set forth in § 54.9815–2711(d)(6)(i) of this part, except that the term does not include health FSAs.

(A) *Otherwise not an integral part of the plan.* Other group health plan coverage that is not limited to excepted benefits and that is not an HRA or other account-based group health plan must be made available by the same plan sponsor for the plan year to the participant.

(B) *Benefits are limited in amount—*

(*1*) *Limit on annual amounts made available.* The amounts newly made available for each plan year under the HRA or other account-based group health plan do not exceed $1,800. In the case of any plan year beginning after December 31, 2020, the dollar amount in the preceding sentence shall be increased by an amount equal to such dollar amount multiplied by the cost-of-living adjustment. The cost of living adjustment is the percentage (if any) by which the C–CPI–U for the preceding calendar year exceeds the C–CPI–U for calendar year 2019. The term ''C–CPI–U'' means the Chained Consumer Price Index for All Urban Consumers as published by the Bureau of Labor Statistics of the Department of Labor. The C–CPI–U for any calendar year is the average of the C–CPI–U as of the close of the 12-month period ending on August 31 of such calendar year. The values of the C–CPI–U used for any calendar year shall be the latest values so published as of the date on which the Bureau publishes the initial value of the C–CPI–U for the month of August for the preceding calendar year. Any such increase that is not a multiple of $50 shall be rounded to the next lowest multiple of $50.

(*2*) *Carryover amounts.* If the terms of the HRA or other account-based group health plan allow unused amounts to be made available to participants and dependents in later plan years, such carryover amounts are disregarded for purposes of determining whether benefits are limited in amount.

(*3*) *Multiple HRAs or other account-based group health plans.* If the plan sponsor provides more than one HRA or other account-based group health plan to the participant for the same time period, the amounts made available under all such plans are aggregated to determine whether the benefits are limited in amount.

(C) *Prohibition on reimbursement of certain health insurance premiums.* The HRA or other account-based group health plan must not reimburse premiums for individual health insurance coverage, group health plan coverage (other than COBRA continuation coverage or other continuation coverage), or Medicare parts B or D, except that the HRA or other account-based group health plan may reimburse premiums for such coverage that consists solely of excepted benefits.

(D) *Uniform availability.* The HRA or other account-based group health plan is made available under the same terms to all similarly situated individuals, as defined in § 54.9802–1(d) of this part, regardless of any health factor (as described in § 54.9802–1(a)).

* * * * *

DEPARTMENT OF LABOR

Employee Benefits Security Administration

29 CFR Chapter XXV

For the reasons stated in the preamble, the Department of Labor proposes to amend 29 CFR parts 2510 and 2590 as set forth below:

PART 2510—DEFINITION OF TERMS USED IN SUBCHAPTERS C, D, E, F, G, AND L OF THIS CHAPTER

■ 8. The authority citation for part 2510 is revised to read as follows:

Authority: 29 U.S.C. 1002(1), 1002(3), 1002(2), 1002(5), 1002(16), 1002(21), 1002(37), 1002(38), 1002(40), 1002(42), 1031, and 1135; Secretary of Labor's Order No. 1–2011, 77 FR 1088 (Jan. 9, 2012); Secs. 2510.3–21, 2510.3–101 and 2510.3–102 also issued under sec. 102 of Reorganization Plan No. 4 of 1978, 5 U.S.C. App. at 237 (2012), E.O. 12108, 44 FR 1065 (Jan. 3, 1979) and 29 U.S.C. 1135 note. Sec. 2510.3–38 is also issued under sec. 1, Pub. L. 105–72, 111 Stat. 1457 (1997).

■ 9. In § 2510.3–1, add paragraph (l) to read as follows:

§ 2510.3–1 Employee welfare benefit plan.

* * * * *

(l) *Health reimbursement arrangements (HRAs) and other account-based group health plans that reimburse individual health insurance coverage.* For purposes of title I of the

Act and this chapter, the terms ''employee welfare benefit plan'' and ''welfare plan'' shall not include individual health insurance coverage the premiums of which are reimbursed by a health reimbursement arrangement (HRA) (or other account-based group health plan), including an HRA or other account-based group health plan integrated with individual health insurance coverage (as described in § 2590.702–2 of this chapter), an HRA that covers less than two current employees (as described in § 2590.732(b) of this chapter) and that reimburses premiums for individual health insurance coverage, a qualified small employer health reimbursement arrangement (QSEHRA), as defined in section 9831(d)(2) of the Code, or an arrangement under which an employer allows employees to pay the portion of the premium for individual health insurance coverage that is not covered by an HRA or other account-based group health plan with which the coverage is integrated or that is not covered by a QSEHRA by using a salary reduction arrangement in a cafeteria plan under section 125 of the Code (supplemental salary reduction arrangement), if all the conditions of this paragraph (l) are satisfied.

(1) The purchase of any individual health insurance coverage is completely voluntary for participants and beneficiaries. The fact that a plan sponsor requires such coverage to be purchased as a condition for participation in an HRA or supplemental salary reduction arrangement does not make the purchase involuntary.

(2) The employer, employee organization, or other plan sponsor does not select or endorse any particular issuer or insurance coverage. In contrast, providing general contact information regarding availability of health insurance in a state (such as providing information regarding *www.HealthCare.gov* or contact information for a state insurance commissioner's office) or providing general health insurance educational information (such as the uniform glossary of health coverage and medical terms available at: *https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/laws/affordable-care-act/for-employers-and-advisers/sbc-uniform-glossary-of-coverage-and-medical-terms-final.pdf*) is permitted.

(3) Reimbursement for nongroup health insurance premiums is limited solely to individual health insurance coverage, as defined in § 2590.701–2 of this chapter.

(4) The employer, employee organization, or other plan sponsor receives no consideration in the form of cash or otherwise in connection with the employee's selection or renewal of any individual health insurance coverage.

(5) Each plan participant is notified annually that the individual health insurance coverage is not subject to title I of ERISA. For an HRA that is integrated with individual health insurance coverage, the notice must meet the notice requirement set forth in § 2590.702–2(c)(6) of this chapter. A QSEHRA or an HRA not subject to the notice requirement set forth in § 2590.702–2(c)(6) of this chapter may use the following language to satisfy this condition: ''The individual health insurance coverage that is paid for by this plan, if any, is not subject to the rules and consumer protections of the Employee Retirement Income Security Act. You should contact your state insurance department for more information regarding your rights and responsibilities if you purchase individual health insurance coverage.'' A supplemental salary reduction arrangement is not required to provide this notice as the notice will be provided by the HRA or the QSEHRA that such an arrangement supplements.

PART 2590—RULES AND REGULATIONS FOR GROUP HEALTH PLANS

■ 10. The authority citation for part 2590 continues to read as follows:

Authority: 29 U.S.C. 1027, 1059, 1135, 1161–1168, 1169, 1181–1183, 1181 note, 1185, 1185a, 1185b, 1191, 1191a, 1191b, and 1191c; sec. 101(g), Pub. L. 104–191, 110 Stat. 1936; sec. 401(b), Pub. L. 105–200, 112 Stat. 645 (42 U.S.C. 651 note); sec. 512(d), Pub. L. 110–343, 122 Stat. 3881; sec. 1001, 1201, and 1562(e), Pub. L. 111–148, 124 Stat. 119, as amended by Pub. L. 111–152, 124 Stat. 1029; Division M, Pub. L. 113–235, 128 Stat. 2130; Secretary of Labor's Order 1–2011, 77 FR 1088 (Jan. 9, 2012).

■ 11. Section § 2590.701–2 is amended by revising the definition of ''group health insurance coverage'' to read as follows:

§ 2590.701–2 Definitions.

* * * * *

Group health insurance coverage means health insurance coverage offered in connection with a group health plan. Individual health insurance coverage reimbursed by the arrangements described in 29 CFR 2510.3–1(l) is not offered in connection with a group health plan, and is not group health insurance coverage, provided all the conditions in 29 CFR 2510.3–1(*l*) are satisfied.

* * * * *

■ 12. Add § 2590.702–2 to read as follows:

§ 2590.702–2 Special rule allowing integration of health reimbursement arrangements (HRAs) and other account-based group health plans with individual health insurance coverage and prohibiting discrimination in HRAs and other account-based group health plans.

(a) *Scope.* This section applies to health reimbursement arrangements (HRAs) and other account-based group health plans, as defined in § 2590.715–2711(d)(6)(i) of this part. For ease of reference, the term ''HRA'' is used in this section to include other account-based group health plans.

(b) *Purpose.* This section provides the conditions that an HRA must satisfy in order to be integrated with individual health insurance coverage for purposes of Public Health Service Act (PHS Act) sections 2711 and 2713 and § 2590.715–2711(d)(4) of this part. Some of the conditions set forth in this section specifically relate to compliance with PHS Act sections 2711 and 2713 and some relate to the effect of having or being offered an HRA on eligibility for the premium tax credit under section 36B of the Internal Revenue Code (Code). In addition, this section provides conditions that an HRA integrated with individual health insurance coverage must satisfy in order to comply with the nondiscrimination provisions in section 702 of ERISA and section 2705 of the PHS Act (which is incorporated in ERISA section 715) and that are consistent with the provisions of the Patient Protection and Affordable Care Act, Public Law 111–148 (124 Stat. 119 (2010)), and the Health Care and Education Reconciliation Act of 2010, Public Law 111–152 (124 Stat. 1029 (2010)), each as amended, that are designed to create a competitive individual market. These conditions are intended to prevent an HRA plan sponsor from intentionally or unintentionally, directly or indirectly, steering any participants or dependents with adverse health factors away from its traditional group health plan, if any, and toward individual health insurance coverage.

(c) *General rule.* An HRA will be considered to be integrated with individual health insurance coverage for purposes of PHS Act sections 2711 and 2713 and § 2590.715–2711(d)(4) of this part and will not be considered to discriminate in violation of ERISA section 702 and PHS Act section 2705 solely because it offers an HRA

integrated with individual health insurance coverage, provided that the conditions of this paragraph (c) are satisfied.

(1) *Enrollment in individual health insurance coverage.* The HRA must require that the participant and any dependent(s) are enrolled in individual health insurance coverage that is subject to and complies with the requirements in PHS Act sections 2711 and 2713 for each month that the individual(s) are covered by the HRA. For this purpose, all individual health insurance coverage, except for individual health insurance coverage that consists solely of excepted benefits, is treated as being subject to and complying with PHS Act sections 2711 and 2713. References to individual health insurance coverage in this paragraph (c) do not include individual health insurance coverage that consists solely of excepted benefits. The HRA must also provide that, subject to applicable COBRA or other continuation of coverage requirements, if any individual covered by the HRA ceases to be covered by such individual health insurance coverage, the individual may not seek reimbursement under the HRA for claims that are incurred after the individual health insurance coverage ceases. In addition, subject to applicable COBRA or other continuation of coverage requirements, if the participant and all of the dependents covered by the participant's HRA cease to be covered by such individual health insurance coverage, the participant must forfeit the HRA.

(2) *No traditional group health plan may be offered to same participants.* To the extent a plan sponsor offers any class of employees (as defined in paragraph (d) of this section) an HRA integrated with individual health insurance coverage, the plan sponsor may not also offer a traditional group health plan to the same class of employees. For this purpose, a traditional group health plan is any group health plan other than either an account-based group health plan or a group health plan that consists solely of excepted benefits. Therefore, a plan sponsor may not offer a choice between an HRA integrated with individual health insurance coverage or a traditional group health plan to any participant.

(3) *Same terms requirement.* To the extent a plan sponsor offers an HRA integrated with individual health insurance coverage to a class of employees described in paragraph (d) of this section, the HRA must be offered on the same terms to all participants within the class, except as provided in paragraphs (c)(3)(i) and (ii) of this section and except that the HRA will not fail to be treated as provided on the same terms even if the plan sponsor offers the HRA to some, but not all, former employees within a class of employees. However, if a plan sponsor offers the HRA to one or more former employees within a class of employees, the HRA must be offered to the former employee(s) on the same terms as to all other employees within the class. Also, amounts that are not used to reimburse medical care expenses (as defined in § 2590.715–2711(d)(6)(ii) of this part) for any plan year that are made available to participants in later plan years are disregarded for purposes of determining whether an HRA is offered on the same terms, provided that the method for determining whether participants have access to unused amounts in future years, and the methodology and formula for determining the amounts of unused funds which they may access in future years, is the same for all participants in a class of employees. In addition, the ability to pay the portion of the premium for individual health insurance coverage that is not covered by the HRA, if any, by using a salary reduction arrangement under section 125 of the Code is considered to be a term of the HRA for purposes of this paragraph; therefore, an HRA shall fail to be treated as provided on the same terms unless such a salary reduction arrangement, if made available to any participant in a class of employees, is made available on the same terms to all participants (other than former employees) in the class of employees. Further, the HRA shall not fail to be treated as provided on the same terms because the maximum dollar amount made available to participants in a class of employees to reimburse medical care expenses for any plan year increases:

(i) As the age of the participant increases, so long as the same maximum dollar amount attributable to the increase in age is made available to all participants in that class of employees who are the same age; or

(ii) As the number of the participant's dependents who are covered under the HRA increases, so long as the same maximum dollar amount attributable to the increase in family size is made available to all participants in that class of employees with the same number of dependents covered by the HRA.

(4) *Opt out.* Under the terms of the HRA, a participant who is otherwise eligible for coverage must be permitted to opt out of and waive future reimbursements from the HRA at least annually, and, upon termination of employment, either the remaining amounts in the HRA are forfeited or the participant is permitted to permanently opt out of and waive future reimbursements from the HRA.

(5) *Reasonable procedures for verification and substantiation*—(i) *General rule for verification of individual health insurance coverage for the plan year.* The HRA must implement, and comply with, reasonable procedures to verify that participants and dependents are, or will be, enrolled in individual health insurance coverage for the plan year. The reasonable procedures may include a requirement that a participant substantiate enrollment by providing either:

(A) A document from a third party (for example, the issuer) showing that the participant and any dependents covered by the HRA are, or will be, enrolled in individual health insurance coverage (for example, an insurance card or an explanation of benefits document pertaining to the relevant time period); or

(B) An attestation by the participant stating that the participant and dependent(s) covered by the HRA are or will be enrolled in individual health insurance coverage, the date coverage began or will begin, and the name of the provider of the coverage.

(ii) *Coverage substantiation with each request for reimbursement of medical care expenses.* Following the initial verification of coverage, with each new request for reimbursement of an incurred medical care expense for the same plan year, the HRA may not reimburse participants for any medical care expenses unless, prior to each reimbursement, the participant provides substantiation (which may be in the form of a written attestation) that the participant and if applicable, the dependent whose medical care expenses are requested to be reimbursed continue to be enrolled in individual health insurance coverage for the month during which the medical care expenses were incurred. The attestation may be part of the form used for requesting reimbursement.

(iii) *Reliance on substantiation.* For purposes of this paragraph (c)(5), an HRA may rely on the participant's documentation or attestation unless the HRA has actual knowledge that any individual covered by the HRA is not, or will not be, enrolled in individual health insurance coverage for the plan year or the month, as applicable.

(6) *Notice requirement*—(i) *Timing.* The HRA must provide a written notice to each participant at least 90 days before the beginning of each plan year or, for a participant who is not eligible to participate at the beginning of the

plan year (or who is not eligible to participate at the time the notice is provided at least 90 days before the beginning of the plan year), no later than the date on which the participant is first eligible to participate in the HRA.

(ii) *Content.* The notice must include all the information described in this paragraph (c)(6)(ii) (and may include any additional information as long as it does not conflict with the required information set forth in paragraph (c)(6)(ii)(A) through (H) of this section).

(A) A description of the terms of the HRA, including the maximum dollar amount available for each participant (including the self-only HRA amount available for the plan year (or the maximum dollar amount available for the plan year if the HRA provides for reimbursements up to a single dollar amount regardless of whether a participant has self-only or family coverage)), any rules regarding the proration of the maximum dollar amount applicable to any participant who is not eligible to participate in the HRA for the entire plan year, whether the participant's family members are eligible for the HRA, a statement that the HRA is not a qualified small employer health reimbursement arrangement, a statement that the HRA requires the participant and any dependents to be enrolled in individual health insurance coverage, a statement that the participant is required to substantiate the existence of such enrollment, a statement that the coverage enrolled in cannot be short-term, limited-duration insurance or excepted benefits, and, if the requirements under § 2510.3–1(l) of this chapter are met, a statement that the individual health insurance coverage enrolled in is not subject to the Employee Retirement Income Security Act (ERISA).

(B) A statement of the right of the participant to opt out of and waive future reimbursements from the HRA, as set forth under paragraph (c)(4) of this section.

(C) A description of the potential availability of the premium tax credit if the participant opts out of and waives future reimbursements from the HRA and the HRA is not affordable for one or more months under 26 CFR 1.36B–2(c)(5), a statement that even if the participant opts out of and waives future reimbursements from an HRA, the offer will prohibit the participant (and, potentially, the participant's dependents) from receiving a premium tax credit for the participant's coverage (or the dependent's coverage, if applicable) on the Exchange (as defined in 45 CFR 155.20) for any month that the HRA is affordable under 26 CFR 1.36B–2(c)(5), and a statement that, if the participant is a former employee, the offer of the HRA does not render the participant ineligible for the premium tax credit regardless of whether it is affordable under 26 CFR 1.36B–2(c)(5).

(D) A statement that if the participant accepts the HRA, the participant may not claim a premium tax credit for the participant's Exchange coverage for any month the HRA may be used to reimburse medical care expenses of the participant and a premium tax credit may not be claimed for the Exchange coverage of the participant's dependents for any month the HRA may be used to reimburse medical care expenses of the dependents.

(E) A statement that the participant must inform any Exchange to which the participant applies for advance payments of the premium tax credit of the availability of the HRA, the self-only HRA amount available for the plan year (or the maximum dollar amount available for the plan year if the HRA provides for reimbursements up to a single dollar amount regardless of whether a participant has self-only or family coverage) as set forth in the written notice in accordance with paragraph (c)(6)(ii)(A) of this section, the number of months in the plan year the HRA is available to the participant, whether the HRA is also available to the participant's dependents, and whether the participant is a current employee or former employee.

(F) A statement that the participant should retain the written notice because it may be needed to determine whether the participant is allowed a premium tax credit on the participant's individual income tax return and, if so, the months the participant is allowed the premium tax credit.

(G) A statement that the HRA may not reimburse any medical care expense unless the substantiation requirement set forth in paragraph (c)(5) of this section is satisfied.

(H) A statement that it is the responsibility of the participant to inform the HRA if the participant or any dependent whose medical care expenses are reimbursable by the HRA is no longer enrolled in individual health insurance coverage.

(d) *Classes of employees*—(1) *List of classes.* Participants may be treated as belonging to a class of employees based on whether they are, or are not, included in the classes described in this paragraph (d)(1). If the HRA is offered to former employees, former employees are considered to be in the same class in which they were in immediately before separation from service. (See paragraph (d)(2) of this section for additional rules regarding the definition of ''full-time employees,'' ''part-time employees,'' and ''seasonal employees.'')

(i) Full-time employees, defined to mean either full-time employees under section 4980H of the Code and the regulations thereunder (26 CFR 54.4980H–1(a)(21)) or employees who are not part-time employees (as described in 26 CFR 1.105–11(c)(2)(iii)(C));

(ii) Part-time employees, defined to mean either employees who are not full-time employees under section 4980H of the Code and 26 CFR 54.4980H–1 and –3 or part-time employees as described in 26 CFR 1.105–11(c)(2)(iii)(C);

(iii) Seasonal employees, defined to mean seasonal employees as described in either 26 CFR 54.4980H–1(a)(38) or 26 CFR 1.105–11(c)(2)(iii)(C);

(iv) Employees included in a unit of employees covered by a collective bargaining agreement in which the plan sponsor participates (as described in 26 CFR 1.105–11(c)(2)(iii)(D));

(v) Employees who have not satisfied a waiting period for coverage (if the waiting period complies with § 2590.715–2708 of this part);

(vi) Employees who have not attained age 25 prior to the beginning of the plan year (as described in 26 CFR 1.105–11(c)(2)(iii)(B));

(vii) Non-resident aliens with no U.S.-based income (as described in 26 CFR 1.105–11(c)(2)(iii)(E));

(viii) Employees whose primary site of employment is in the same rating area as defined in 45 CFR 147.102(b); or

(ix) A group of participants described as a combination of two or more of the classes of employees set forth in paragraphs (d)(1)(i) through (viii) of this section. (For example, part-time employees included in a unit of employees covered by a collective bargaining agreement could be one class of employees and full-time employees included in a unit of employees covered by the same collective bargaining agreement could be another class of employees.)

(2) *Consistency requirement.* For any plan year, a plan sponsor may define ''full-time employee,'' ''part-time employee,'' and ''seasonal employee'' in accordance with the relevant provisions of section 105(h) of the Code and 26 CFR 1.105–11 or of section 4980H of the Code and 26 CFR 54.4980H–1 and –3 if:

(i) To the extent applicable under the HRA for the plan year, each of the three classes of employees are defined in accordance with either section 105(h) of the Code or section 4980H of the Code for the plan year; and

(ii) The HRA plan document sets forth the applicable definitions prior to the beginning of the plan year in which the definitions will apply.

(e) *Examples.* The following examples illustrate the provisions of paragraphs (c)(2) and (3) of this section. In each example, the HRA may reimburse any medical care expenses, including premiums for individual health insurance coverage.

(1) Example 1. (i) *Facts.* For 2020, Plan Sponsor X offers the following to its employees. Full-time employees in rating area A are offered $2,000 each in an HRA. Part-time employees in rating area A are offered $500 each in an HRA. All employees in rating area B are offered a traditional group health plan.

(ii) *Conclusion.* The requirements of paragraphs (c)(2) and (3) of this section are satisfied in this *Example 1.*

(2) Example 2. (i) *Facts.* For 2020, Plan Sponsor Y offers the following to its employees. Employees covered by a collective bargaining agreement in which Plan Sponsor Y participates are offered a traditional group health plan (as required by the collective bargaining agreement). All other employees (non-collectively bargained employees) are offered the following amounts in an HRA: $1,000 each for employees age 25 to 35; $2,000 each for employees age 36 to 45; $2,500 each for employees age 46 to 55; and $4,000 each for employees over age 55. Non-collectively bargained employees who have not attained age 25 by January 1, 2020 are not offered an HRA or a traditional group health plan.

(ii) *Conclusion.* The requirements of paragraphs (c)(2) and (3) of this section are satisfied in this *Example 2.*

(3) Example 3. (i) *Facts.* For 2020, Plan Sponsor Z offers the following amounts in an HRA to its employees who have completed the plan's waiting period, which complies with the requirements for waiting periods in § 2590.715–2708 of this part: $1,500, if the employee is the only individual covered by the HRA; $3,500, if the employee and one additional family member are covered by the HRA; and $5,000, if the employee and more than one additional family member are covered by the HRA.

(ii) *Conclusion.* The requirements of paragraphs (c)(2) and (3) of this section are satisfied in this *Example 3.*

(f) *Applicability date.* This section applies to plan years beginning on or after January 1, 2020.

■ 13. Section 2590.715–2711 is amended by revising paragraphs (c), (d), and (e) to read as follows:

§ 2590.715–2711 No lifetime or annual limits.

* * * * *

(c) *Definition of essential health benefits.* The term ''essential health benefits'' means essential health benefits under section 1302(b) of the Patient Protection and Affordable Care Act. For this purpose, a group health plan or a health insurance issuer that is not required to provide essential health benefits under section 1302(b) must define ''essential health benefits'' in a manner that is consistent with the following paragraphs (c)(1) or (2):

(1) For plan years beginning before January 1, 2020, one of the EHB-benchmark plans applicable in a State under 45 CFR 156.110, and including coverage of any additional required benefits that are considered essential health benefits consistent with 45 CFR 155.170(a)(2), or one of the three Federal Employee Health Benefits Program (FEHBP) plan options as defined by 45 CFR 156.100(a)(3), and including coverage of additional required benefits under 45 CFR 156.110; or

(2) For plan years beginning on or after January 1, 2020, an EHB-benchmark plan selected by a State in accordance with the available options and requirements for EHB-benchmark plan selection at 45 CFR 156.111, including an EHB-benchmark plan in a State that takes no action to change its EHB-benchmark plan and thus retains the EHB-benchmark plan applicable in that State for the prior year in accordance with 45 CFR 156.111(d)(1), and including coverage of any additional required benefits that are considered essential health benefits consistent with 45 CFR 155.170(a)(2).

(d) *Health reimbursement arrangements (HRAs) and other account-based group health plans*—(1) *In general.* If an HRA or other account-based group health plan is integrated with another group health plan or individual health insurance coverage and the other group health plan or individual health insurance coverage, as applicable, separately is subject to and satisfies the requirements in PHS Act section 2711 and paragraph (a)(2) of this section, the fact that the benefits under the HRA or other account-based group health plan are limited does not cause the HRA or other account-based group health plan to fail to meet the requirements of PHS Act section 2711 and paragraph (a)(2) of this section. Similarly, if an HRA or other account-based group health plan is integrated with another group health plan or individual health insurance coverage and the other group health plan or individual health insurance coverage, as applicable, separately is subject to and satisfies the requirements in PHS Act section 2713 and § 2590.715–2713(a)(1) of this part, the fact that the benefits under the HRA or other account-based group health plan are limited does not cause the HRA or other account-based group health plan to fail to meet the requirements of PHS Act section 2713 and § 2590.715–2713(a)(1) of this part. For this purpose, all individual health insurance coverage, except for coverage that consists solely of excepted benefits, is treated as being subject to and complying with PHS Act sections 2711 and 2713.

(2) *Requirements for an HRA or other account-based group health plan to be integrated with another group health plan.* An HRA or other account-based group health plan is integrated with another group health plan for purposes of PHS Act section 2711 and paragraph (a)(2) of this section if it meets the requirements under one of the integration methods set forth in paragraph (d)(2)(i) or (ii) of this section. For purposes of the integration methods under which an HRA or other account-based group health plan is integrated with another group health plan, integration does not require that the HRA or other account-based group health plan and the other group health plan with which it is integrated share the same plan sponsor, the same plan document or governing instruments, or file a single Form 5500, if applicable. An HRA or other account-based group health plan integrated with another group health plan for purposes of PHS Act section 2711 and paragraph (a)(2) of this section may not be used to purchase individual health insurance coverage unless that coverage consists solely of excepted benefits, as defined in 45 CFR 148.220.

(i) *Method for integration with a group health plan: Minimum value not required.* An HRA or other account-based group health plan is integrated with another group health plan for purposes of this paragraph if:

(A) The plan sponsor offers a group health plan (other than the HRA or other account-based group health plan) to the employee that does not consist solely of excepted benefits;

(B) The employee receiving the HRA or other account-based group health plan is actually enrolled in a group health plan (other than the HRA or other account-based group health plan) that does not consist solely of excepted benefits, regardless of whether the plan is offered by the same plan sponsor (referred to as non-HRA group coverage);

(C) The HRA or other account-based group health plan is available only to employees who are enrolled in non-HRA group coverage, regardless of whether the non-HRA group coverage is offered by the plan sponsor of the HRA or other account-based group health plan (for example, the HRA may be offered only to employees who do not enroll in an employer's group health

plan but are enrolled in other non-HRA group coverage, such as a group health plan maintained by the employer of the employee's spouse);

(D) The benefits under the HRA or other account-based group health plan are limited to reimbursement of one or more of the following—co-payments, co-insurance, deductibles, and premiums under the non-HRA group coverage, as well as medical care expenses that do not constitute essential health benefits as defined in paragraph (c) of this section; and

(E) Under the terms of the HRA or other account-based group health plan, an employee (or former employee) is permitted to permanently opt out of and waive future reimbursements from the HRA or other account-based group health plan at least annually and, upon termination of employment, either the remaining amounts in the HRA or other account-based group health plan are forfeited or the employee is permitted to permanently opt out of and waive future reimbursements from the HRA or other account-based group health plan (see paragraph (d)(3) of this section for additional rules regarding forfeiture and waiver).

(ii) *Method for integration with another group health plan: Minimum value required.* An HRA or other account-based group health plan is integrated with another group health plan for purposes of this paragraph if:

(A) The plan sponsor offers a group health plan (other than the HRA or other account-based group health plan) to the employee that provides minimum value pursuant to Code section 36B(c)(2)(C)(ii) and 26 CFR 1.36B–6;

(B) The employee receiving the HRA or other account-based group health plan is actually enrolled in a group health plan (other than the HRA or other account-based group health plan) that provides minimum value pursuant to Code section 36B(c)(2)(C)(ii) and 26 CFR 1.36B–6, regardless of whether the plan is offered by the plan sponsor of the HRA or other account-based group health plan (referred to as non-HRA MV group coverage);

(C) The HRA or other account-based group health plan is available only to employees who are actually enrolled in non-HRA MV group coverage, regardless of whether the non-HRA MV group coverage is offered by the plan sponsor of the HRA or other account-based group health plan (for example, the HRA may be offered only to employees who do not enroll in an employer's group health plan but are enrolled in other non-HRA MV group coverage, such as a group health plan maintained by an employer of the employee's spouse); and

(D) Under the terms of the HRA or other account-based group health plan, an employee (or former employee) is permitted to permanently opt out of and waive future reimbursements from the HRA or other account-based group health plan at least annually, and, upon termination of employment, either the remaining amounts in the HRA or other account-based group health plan are forfeited or the employee is permitted to permanently opt out of and waive future reimbursements from the HRA or other account-based group health plan (see paragraph (d)(3) of this section for additional rules regarding forfeiture and waiver).

(3) *Forfeiture.* For purposes of integration under paragraphs (d)(2)(i)(E) and (d)(2)(ii)(D) of this section, forfeiture or waiver occurs even if the forfeited or waived amounts may be reinstated upon a fixed date, a participant's death, or the earlier of the two events (the reinstatement event). For this purpose, coverage under an HRA or other account-based group health plan is considered forfeited or waived prior to a reinstatement event only if the participant's election to forfeit or waive is irrevocable, meaning that, beginning on the effective date of the election and through the date of the reinstatement event, the participant and the participant's beneficiaries have no access to amounts credited to the HRA or other account-based group health plan. This means that upon and after reinstatement, the reinstated amounts under the HRA or other account-based group health plan may not be used to reimburse or pay medical care expenses incurred during the period after forfeiture and prior to reinstatement.

(4) *Requirements for an HRA or other account-based group health plan to be integrated with individual health insurance coverage.* An HRA or other account-based group health plan is integrated with individual health insurance coverage (and treated as complying with PHS Act sections 2711 and 2713) if the HRA or other account-based group health plan meets the requirements of § 2590.702–2(c) of this part.

(5) *Integration with Medicare parts B and D.* For employers that are not required to offer their non-HRA group health plan coverage to employees who are Medicare beneficiaries, an HRA or other account-based group health plan that may be used to reimburse premiums under Medicare part B or D may be integrated with Medicare (and deemed to comply with PHS Act sections 2711 and 2713) if the requirements of this paragraph (d)(5) are satisfied with respect to employees who would be eligible for the employer's non-HRA group health plan but for their eligibility for Medicare (and the integration rules under paragraphs (d)(2)(i) and (ii) of this section continue to apply to employees who are not eligible for Medicare):

(i) The plan sponsor offers a group health plan (other than the HRA or other account-based group health plan and that does not consist solely of excepted benefits) to employees who are not eligible for Medicare;

(ii) The employee receiving the HRA or other account-based group health plan is actually enrolled in Medicare part B or D;

(iii) The HRA or other account-based group health plan is available only to employees who are enrolled in Medicare part B or D; and

(iv) The HRA or other account-based group health plan complies with paragraphs (d)(2)(i)(E) and (d)(2)(ii)(D) of this section.

(6) *Definitions.* The following definitions apply for purposes of this section.

(i) *Account-based group health plan.* An account-based group health plan is an employer-provided group health plan that provides reimbursements of medical care expenses with the reimbursement subject to a maximum fixed dollar amount for a period. An HRA is a type of account-based group health plan. An account-based group health plan does not include a qualified small employer health reimbursement arrangement, as defined in Code section 9831(d)(2).

(ii) *Medical care expenses.* Medical care expenses means expenses for medical care as defined under Code section 213(d).

(e) *Applicability date.* The provisions of this section are applicable to group health plans and health insurance issuers for plan years beginning on or after January 1, 2020. Until [APPLICABILITY DATE OF FINAL RULE], plans and issuers are required to continue to comply with the corresponding sections of this part, contained in the 29 CFR parts 1927 to end edition, revised as of July 1, 2018.

■ 14. Section 2590.732 is amended by revising paragraph (c)(3)(i) and adding paragraph (c)(3)(viii) to read as follows:

§ 2590.732 Special rules relating to group health plans.

* * * * *

(c) * * *

(3) * * *

(i) *In general.* Limited-scope dental benefits, limited-scope vision benefits,

or long-term care benefits are excepted if they are provided under a separate policy, certificate, or contract of insurance, or are otherwise not an integral part of a group health plan as described in paragraph (c)(3)(ii) of this section. In addition, benefits provided under a health flexible spending arrangement (health FSA) are excepted benefits if they satisfy the requirements of paragraph (c)(3)(v) of this section; benefits provided under an employee assistance program are excepted benefits if they satisfy the requirements of paragraph (c)(3)(vi) of this section; benefits provided under limited wraparound coverage are excepted benefits if they satisfy the requirements of paragraph (c)(3)(vii) of this section; and benefits provided under a health reimbursement arrangement or other account-based group health plan, other than a health FSA, are excepted benefits if they satisfy the requirements of paragraph (c)(3)(viii) of this section.

* * * * *

(viii) *Health reimbursement arrangements (HRAs) and other account-based group health plans.* Benefits provided under an HRA or other account-based group health plan, other than a health FSA, are excepted if they satisfy all of the requirements of this paragraph (c)(3)(viii). See paragraph (c)(3)(v) of this section of these regulations for the circumstances in which benefits provided under a health FSA are excepted benefits. For purposes of this paragraph, the term ''HRA or other account-based group health plan'' has the same meaning as ''account-based group health plan'' set forth in § 2590.715–2711(d)(6)(i) of this part, except that the term does not include health FSAs.

(A) *Otherwise not an integral part of the plan.* Other group health plan coverage that is not limited to excepted benefits and that is not an HRA or other account-based group health plan must be made available by the same plan sponsor for the plan year to the participant.

(B) *Benefits are limited in amount—* (*1*) *Limit on annual amounts made available.* The amounts newly made available for each plan year under the HRA or other account-based group health plan do not exceed $1,800. In the case of any plan year beginning after December 31, 2020, the dollar amount in the preceding sentence shall be increased by an amount equal to such dollar amount multiplied by the cost-of-living adjustment. The cost of living adjustment is the percentage (if any) by which the C–CPI–U for the preceding calendar year exceeds the C–CPI–U for calendar year 2019. The term ''C–CPI–U'' means the Chained Consumer Price Index for All Urban Consumers as published by the Bureau of Labor Statistics of the Department of Labor. The C–CPI–U for any calendar year is the average of the C–CPI–U as of the close of the 12-month period ending on August 31 of such calendar year. The values of the C–CPI–U used for any calendar year shall be the latest values so published as of the date on which the Bureau publishes the initial value of the C–CPI–U for the month of August for the preceding calendar year. Any such increase that is not a multiple of $50 shall be rounded to the next lowest multiple of $50.

(*2*) *Carryover amounts.* If the terms of the HRA or other account-based group health plan allow unused amounts to be made available to participants and dependents in later plan years, such carryover amounts are disregarded for purposes of determining whether benefits are limited in amount.

(*3*) *Multiple HRAs or other account-based group health plans.* If the plan sponsor provides more than one HRA or other account-based group health plan to the participant for the same time period, the amounts made available under all such plans are aggregated to determine whether the benefits are limited in amount.

(C) *Prohibition on reimbursement of certain health insurance premiums.* The HRA or other account-based group health plan must not reimburse premiums for individual health insurance coverage, group health plan coverage (other than COBRA continuation coverage or other continuation coverage), or Medicare parts B or D, except that the HRA or other account-based group health plan may reimburse premiums for such coverage that consists solely of excepted benefits.

(D) *Uniform availability.* The HRA or other account-based group health plan is made available under the same terms to all similarly situated individuals, as defined in § 2590.702(d) of this part, regardless of any health factor (as described in § 2590.702(a)).

* * * * *

Department of Health and Human Services

45 CFR Chapter 1

For the reasons stated in the preamble, the Department of Health and Human Services proposes to amend 45 CFR parts 144, 146, 147, and 155 as set forth below:

PART 144—REQUIREMENTS RELATING TO HEALTH INSURANCE COVERAGE

■ 15. The authority citation for part 144 is revised to read as follows:

Authority: 42 U.S.C. 300gg through 300gg–63, 300gg–91, and 300gg–92.

■ 16. Section 144.103 is amended by revising the definition of ''Group health insurance coverage'' to read as follows:

§ 144.103 Definitions.

* * * * *

Group health insurance coverage means health insurance coverage offered in connection with a group health plan. Individual health insurance coverage reimbursed by the arrangements described in 29 CFR 2510.3–1(l) is not offered in connection with a group health plan, and is not group health insurance coverage, provided all the conditions in 29 CFR 2510.3–1(l) are satisfied.

* * * * *

PART 146—REQUIREMENTS FOR THE GROUP HEALTH INSURANCE MARKET

■ 17. The authority citation for part 146 continues to read as follows:

Authority: 42 U.S.C. 300gg–1 through 300gg–5, 300gg–11 through 300gg–23, 300gg–91, and 300gg–92.

■ 18. Add § 146.123 to read as follows:

§ 146.123 Special rule allowing integration of health reimbursement arrangements (HRAs) and other account-based group health plans with individual health insurance coverage and prohibiting discrimination in HRAs and other account-based group health plans.

(a) *Scope.* This section applies to health reimbursement arrangements (HRAs) and other account-based group health plans, as defined in § 147.126(d)(6)(i) of this subchapter. For ease of reference, the term ''HRA'' is used in this section to include other account-based group health plans.

(b) *Purpose.* This section provides the conditions that an HRA must satisfy in order to be integrated with individual health insurance coverage for purposes of Public Health Service Act (PHS Act) sections 2711 and 2713 and § 147.126(d)(4) of this subchapter. Some of the conditions set forth in this section specifically relate to compliance with PHS Act sections 2711 and 2713 and some relate to the effect of having or being offered an HRA on eligibility for the premium tax credit under section 36B of the Internal Revenue Code (Code). In addition, this section provides conditions that an HRA

integrated with individual health insurance coverage must satisfy in order to comply with the nondiscrimination provisions in section 2705 of the PHS Act) and that are consistent with the provisions of the Patient Protection and Affordable Care Act, Public Law 111–148 (124 Stat. 119 (2010)), and the Health Care and Education Reconciliation Act of 2010, Public Law 111–152 (124 Stat. 1029 (2010)), each as amended, that are designed to create a competitive individual market. These conditions are intended to prevent an HRA plan sponsor from intentionally or unintentionally, directly or indirectly, steering any participants or dependents with adverse health factors away from its traditional group health plan, if any, and toward individual health insurance coverage.

(c) *General rule.* An HRA will be considered to be integrated with individual health insurance coverage for purposes of PHS Act sections 2711 and 2713 and § 147.126(d)(4) of this subchapter and will not be considered to discriminate in violation of PHS Act section 2705 solely because it offers an HRA integrated with individual health insurance coverage, provided that the conditions of this paragraph (c) are satisfied.

(1) *Enrollment in individual health insurance coverage.* The HRA must require that the participant and any dependent(s) are enrolled in individual health insurance coverage that is subject to and complies with the requirements in PHS Act sections 2711 and 2713 for each month that the individual(s) are covered by the HRA. For this purpose, all individual health insurance coverage, except for individual health insurance coverage that consists solely of excepted benefits, is treated as being subject to and complying with PHS Act sections 2711 and 2713. References to individual health insurance coverage in this paragraph (c) do not include individual health insurance coverage that consists solely of excepted benefits. The HRA must also provide that, subject to applicable COBRA or other continuation of coverage requirements, if any individual covered by the HRA ceases to be covered by such individual health insurance coverage, the individual may not seek reimbursement under the HRA for claims that are incurred after the individual health insurance coverage ceases. In addition, subject to applicable COBRA or other continuation of coverage requirements, if the participant and all of the dependents covered by the participant's HRA cease to be covered by such individual health insurance coverage, the participant must forfeit the HRA.

(2) *No traditional group health plan may be offered to same participants.* To the extent a plan sponsor offers any class of employees (as defined in paragraph (d) of this section) an HRA integrated with individual health insurance coverage, the plan sponsor may not also offer a traditional group health plan to the same class of employees. For this purpose, a traditional group health plan is any group health plan other than either an account-based group health plan or a group health plan that consists solely of excepted benefits. Therefore, a plan sponsor may not offer a choice between an HRA integrated with individual health insurance coverage or a traditional group health plan to any participant.

(3) *Same terms requirement.* To the extent a plan sponsor offers an HRA integrated with individual health insurance coverage to a class of employees described in paragraph (d) of this section, the HRA must be offered on the same terms to all participants within the class, except as provided in paragraphs (c)(3)(i) and (ii) of this section and except that the HRA will not fail to be treated as provided on the same terms even if the plan sponsor offers the HRA to some, but not all, former employees within a class of employees. However, if a plan sponsor offers the HRA to one or more former employees within a class of employees, the HRA must be offered to the former employee(s) on the same terms as to all other employees within the class. Also, amounts that are not used to reimburse medical care expenses (as defined in § 147.126(d)(6)(ii) of this subchapter) for any plan year that are made available to participants in later plan years are disregarded for purposes of determining whether an HRA is offered on the same terms, provided that the method for determining whether participants have access to unused amounts in future years, and the methodology and formula for determining the amounts of unused funds which they may access in future years, is the same for all participants in a class of employees. In addition, the ability to pay the portion of the premium for individual health insurance coverage that is not covered by the HRA, if any, by using a salary reduction arrangement under section 125 of the Code is considered to be a term of the HRA for purposes of this paragraph; therefore, an HRA shall fail to be treated as provided on the same terms unless such a salary reduction arrangement, if made available to any participant in a class of employees, is made available on the same terms to all participants (other than former employees) in the class of employees. Further, the HRA shall not fail to be treated as provided on the same terms because the maximum dollar amount made available to participants in a class of employees to reimburse medical care expenses for any plan year increases:

(i) As the age of the participant increases, so long as the same maximum dollar amount attributable to the increase in age is made available to all participants in that class of employees who are the same age; or

(ii) As the number of the participant's dependents who are covered under the HRA increases, so long as the same maximum dollar amount attributable to the increase in family size is made available to all participants in that class of employees with the same number of dependents covered by the HRA.

(4) *Opt out.* Under the terms of the HRA, a participant who is otherwise eligible for coverage must be permitted to opt out of and waive future reimbursements from the HRA at least annually, and, upon termination of employment, either the remaining amounts in the HRA are forfeited or the participant is permitted to permanently opt out of and waive future reimbursements from the HRA.

(5) *Reasonable procedures for verification and substantiation*—(i) *General rule for verification of individual health insurance coverage for the plan year.* The HRA must implement, and comply with, reasonable procedures to verify that participants and dependents are, or will be, enrolled in individual health insurance coverage for the plan year. The reasonable procedures may include a requirement that a participant substantiate enrollment by providing either:

(A) A document from a third party (for example, the issuer) showing that the participant and any dependents covered by the HRA are, or will be, enrolled in individual health insurance coverage (for example, an insurance card or an explanation of benefits document pertaining to the relevant time period); or

(B) An attestation by the participant stating that the participant and dependent(s) covered by the HRA are or will be enrolled in individual health insurance coverage, the date coverage began or will begin, and the name of the provider of the coverage.

(ii) *Coverage substantiation with each request for reimbursement of medical care expenses.* Following the initial verification of coverage, with each new request for reimbursement of an incurred medical care expense for the

same plan year, the HRA may not reimburse participants for any medical care expenses unless, prior to each reimbursement, the participant provides substantiation (which may be in the form of a written attestation) that the participant and if applicable, the dependent whose medical care expenses are requested to be reimbursed continue to be enrolled in individual health insurance coverage for the month during which the medical care expenses were incurred. The attestation may be part of the form used for requesting reimbursement.

(iii) *Reliance on substantiation.* For purposes of this paragraph (c)(5), an HRA may rely on the participant's documentation or attestation unless the HRA has actual knowledge that any individual covered by the HRA is not, or will not be, enrolled in individual health insurance coverage for the plan year or the month, as applicable.

(6) *Notice requirement*—(i) *Timing.* The HRA must provide a written notice to each participant at least 90 days before the beginning of each plan year or, for a participant who is not eligible to participate at the beginning of the plan year (or who is not eligible to participate at the time the notice is provided at least 90 days before the beginning of the plan year), no later than the date on which the participant is first eligible to participate in the HRA.

(ii) *Content.* The notice must include all the information described in this paragraph (c)(6)(ii) (and may include any additional information as long as it does not conflict with the required information set forth in paragraph (c)(6)(ii)(A) through (H) of this section).

(A) A description of the terms of the HRA, including the maximum dollar amount available for each participant (including the self-only HRA amount available for the plan year (or the maximum dollar amount available for the plan year if the HRA provides for reimbursements up to a single dollar amount regardless of whether a participant has self-only or family coverage)), any rules regarding the proration of the maximum dollar amount applicable to any participant who is not eligible to participate in the HRA for the entire plan year, whether the participant's family members are eligible for the HRA, a statement that the HRA is not a qualified small employer health reimbursement arrangement, a statement that the HRA requires the participant and any dependents to be enrolled in individual health insurance coverage, a statement that the participant is required to substantiate the existence of such enrollment, a statement that the coverage enrolled in cannot be short-term, limited-duration insurance or excepted benefits, and, if the requirements under 29 CFR 2510.3–1(l) are met, a statement that the individual health insurance coverage enrolled in is not subject to the Employee Retirement Income Security Act (ERISA).

(B) A statement of the right of the participant to opt out of and waive future reimbursements from the HRA, as set forth under paragraph (c)(4) of this section.

(C) A description of the potential availability of the premium tax credit if the participant opts out of and waives future reimbursements from the HRA and the HRA is not affordable for one or more months under 26 CFR 1.36B–2(c)(5), a statement that even if the participant opts out of and waives future reimbursements from an HRA, the offer will prohibit the participant (and, potentially, the participant's dependents) from receiving a premium tax credit for the participant's coverage (or the dependent's coverage, if applicable) on the Exchange (as defined in 45 CFR 155.20) for any month that the HRA is affordable under 26 CFR 1.36B–2(c)(5), and a statement that, if the participant is a former employee, the offer of the HRA does not render the participant ineligible for the premium tax credit regardless of whether it is affordable under 26 CFR 1.36B–2(c)(5);

(D) A statement that if the participant accepts the HRA, the participant may not claim a premium tax credit for the participant's Exchange coverage for any month the HRA may be used to reimburse medical care expenses of the participant and a premium tax credit may not be claimed for the Exchange coverage of the participant's dependents for any month the HRA may be used to reimburse medical care expenses of the dependents.

(E) A statement that the participant must inform any Exchange to which the participant applies for advance payments of the premium tax credit of the availability of the HRA, the self-only HRA amount available for the plan year (or the maximum dollar amount available for the plan year if the HRA provides for reimbursements up to a single dollar amount regardless of whether a participant has self-only or family coverage) as set forth in the written notice in accordance with paragraph (c)(6)(ii)(A) of this section, the number of months in the plan year the HRA is available to the participant, whether the HRA is also available to the participant's dependents, and whether the participant is a current employee or former employee.

(F) A statement that the participant should retain the written notice because it may be needed to determine whether the participant is allowed a premium tax credit on the participant's individual income tax return and, if so, the months the participant is allowed the premium tax credit.

(G) A statement that the HRA may not reimburse any medical care expense unless the substantiation requirement set forth in paragraph (c)(5) of this section is satisfied.

(H) A statement that it is the responsibility of the participant to inform the HRA if the participant or any dependent whose medical care expenses are reimbursable by the HRA is no longer enrolled in individual health insurance coverage.

(d) *Classes of employees*—(1) *List of classes.* Participants may be treated as belonging to a class of employees based on whether they are, or are not, included in the classes described in this paragraph (d)(1). If the HRA is offered to former employees, former employees are considered to be in the same class in which they were in immediately before separation from service. (See paragraph (d)(2) of this section for additional rules regarding the definition of ''full-time employees,'' ''part-time employees,'' and ''seasonal employees.'')

(i) Full-time employees, defined to mean either full-time employees under section 4980H of the Code and the regulations thereunder (26 CFR 54.4980H–1(a)(21)) or employees who are not part-time employees (as described in 26 CFR 1.105–11(c)(2)(iii)(C));

(ii) Part-time employees, defined to mean either employees who are not full-time employees under section 4980H of the Code and 26 CFR 54.4980H–1 and –3 or part-time employees as described in 26 CFR 1.105–11(c)(2)(iii)(C);

(iii) Seasonal employees, defined to mean seasonal employees as described in either 26 CFR 54.4980H–1(a)(38) or 26 CFR 1.105–11(c)(2)(iii)(C);

(iv) Employees included in a unit of employees covered by a collective bargaining agreement in which the plan sponsor participates (as described in 26 CFR 1.105–11(c)(2)(iii)(D));

(v) Employees who have not satisfied a waiting period for coverage (if the waiting period complies with § 147.116 of this subchapter);

(vi) Employees who have not attained age 25 prior to the beginning of the plan year (as described in 26 CFR 1.105–11(c)(2)(iii)(B));

(vii) Non-resident aliens with no U.S.-based income (as described in 26 CFR 1.105–11(c)(2)(iii)(E));

(viii) Employees whose primary site of employment is in the same rating area as defined in § 147.102(b) of this subchapter; or

(ix) A group of participants described as a combination of two or more of the classes of employees set forth in paragraphs (d)(1)(i) through (viii) of this section. (For example, part-time employees included in a unit of employees covered by a collective bargaining agreement could be one class of employees and full-time employees included in a unit of employees covered by the same collective bargaining agreement could be another class of employees.)

(2) *Consistency requirement.* For any plan year, a plan sponsor may define ''full-time employee,'' ''part-time employee,'' and ''seasonal employee'' in accordance with the relevant provisions of sections 105(h) of the Code and 26 CFR 1.105–11 or of section 4980H of the Code and 26 CFR 54.4980H–1 and –3 if:

(i) To the extent applicable under the HRA for the plan year, each of the three classes of employees are defined in accordance with either section 105(h) of the Code or section 4980H of the Code for the plan year; and

(ii) The HRA plan document sets forth the applicable definitions prior to the beginning of the plan year in which the definitions will apply.

(e) *Examples.* The following examples illustrate the provisions of paragraphs (c)(2) and (3) of this section. In each example, the HRA may reimburse any medical care expenses, including premiums for individual health insurance coverage.

(1) Example 1. (i) *Facts.* For 2020, Plan Sponsor X offers the following to its employees. Full-time employees in rating area A are offered $2,000 each in an HRA. Part-time employees in rating area A are offered $500 each in an HRA. All employees in rating area B are offered a traditional group health plan.

(ii) *Conclusion.* The requirements of paragraphs (c)(2) and (3) of this section are satisfied in this *Example 1.*

(2) Example 2. (i) *Facts.* For 2020, Plan Sponsor Y offers the following to its employees. Employees covered by a collective bargaining agreement in which Plan Sponsor Y participates are offered a traditional group health plan (as required by the collective bargaining agreement). All other employees (non-collectively bargained employees) are offered the following amounts in an HRA: $1,000 each for employees age 25 to 35; $2,000 each for employees age 36 to 45; $2,500 each for employees age 46 to 55; and $4,000 each for employees over age 55. Non-collectively bargained employees who have not attained age 25 by January 1, 2020 are not offered an HRA or a traditional group health plan.

(ii) *Conclusion.* The requirements of paragraphs (c)(2) and (3) of this section are satisfied in this *Example 2.*

(3) Example 3. (i) *Facts.* For 2020, Plan Sponsor Z offers the following amounts in an HRA to its employees who have completed the plan's waiting period, which complies with the requirements for waiting periods in § 147.116 of this subchapter: $1,500, if the employee is the only individual covered by the HRA; $3,500, if the employee and one additional family member are covered by the HRA; and $5,000, if the employee and more than one additional family member are covered by the HRA.

(ii) *Conclusion.* The requirements of paragraphs (c)(2) and (3) of this section are satisfied in this *Example 3.*

(f) *Applicability date.* This section applies to plan years beginning on or after January 1, 2020.

■ 19. Section 146.145 is amended by revising paragraph (b)(3)(i) and adding paragraph (b)(3)(viii) to read as follows:

§ 146.145 Special rules relating to group health plans.

* * * * *

(b) * * *

(3) * * *

(i) *In general.* Limited-scope dental benefits, limited-scope vision benefits, or long-term care benefits are excepted if they are provided under a separate policy, certificate, or contract of insurance, or are otherwise not an integral part of a group health plan as described in paragraph (b)(3)(ii) of this section. In addition, benefits provided under a health flexible spending arrangement (health FSA) are excepted benefits if they satisfy the requirements of paragraph (b)(3)(v) of this section; benefits provided under an employee assistance program are excepted benefits if they satisfy the requirements of paragraph (b)(3)(vi) of this section; benefits provided under limited wraparound coverage are excepted benefits if they satisfy the requirements of paragraph (b)(3)(vii) of this section; and benefits provided under a health reimbursement arrangement or other account-based group health plan, other than a health FSA, are excepted benefits if they satisfy the requirements of paragraph (b)(3)(viii) of this section.

* * * * *

(viii) *Health reimbursement arrangements (HRAs) and other account-based group health plans.* Benefits provided under an HRA or other account-based group health plan, other than a health FSA, are excepted if they satisfy all of the requirements of this paragraph (b)(3)(viii). See paragraph (b)(3)(v) of this section for the circumstances in which benefits provided under a health FSA are excepted benefits. For purposes of this paragraph, the term ''HRA or other account-based group health plan'' has the same meaning as ''account-based group health plan'' set forth in § 147.126(d)(6)(i) of this subchapter, except that the term does not include health FSAs.

(A) *Otherwise not an integral part of the plan.* Other group health plan coverage that is not limited to excepted benefits and that is not an HRA or other account-based group health plan must be made available by the same plan sponsor for the plan year to the participant.

(B) *Benefits are limited in amount—* (*1*) *Limit on annual amounts made available.* The amounts newly made available for each plan year under the HRA or other account-based group health plan do not exceed $1,800. In the case of any plan year beginning after December 31, 2020, the dollar amount in the preceding sentence shall be increased by an amount equal to such dollar amount multiplied by the cost-of-living adjustment. The cost of living adjustment is the percentage (if any) by which the C–CPI–U for the preceding calendar year exceeds the C–CPI–U for calendar year 2019. The term ''C–CPI–U'' means the Chained Consumer Price Index for All Urban Consumers as published by the Bureau of Labor Statistics of the Department of Labor. The C–CPI–U for any calendar year is the average of the C–CPI–U as of the close of the 12-month period ending on August 31 of such calendar year. The values of the C–CPI–U used for any calendar year shall be the latest values so published as of the date on which the Bureau publishes the initial value of the C–CPI–U for the month of August for the preceding calendar year. Any such increase that is not a multiple of $50 shall be rounded to the next lowest multiple of $50.

(*2*) *Carryover amounts.* If the terms of the HRA or other account-based group health plan allow unused amounts to be made available to participants and dependents in later plan years, such carryover amounts are disregarded for purposes of determining whether benefits are limited in amount.

(*3*) *Multiple HRAs or other account-based group health plans.* If the plan sponsor provides more than one HRA or other account-based group health plan to the participant for the same time period, the amounts made available under all such plans are aggregated to determine whether the benefits are limited in amount.

(C) *Prohibition on reimbursement of certain health insurance premiums.* The HRA or other account-based group health plan must not reimburse

premiums for individual health insurance coverage, group health plan coverage (other than COBRA continuation coverage or other continuation coverage), or Medicare parts B or D, except that the HRA or other account-based group health plan may reimburse premiums for such coverage that consists solely of excepted benefits.

(D) *Uniform availability.* The HRA or other account-based group health plan is made available under the same terms to all similarly-situated individuals, as defined in § 146.121(d) of this part, regardless of any health factor (as described in § 146.121(a)).

* * * * *

PART 147—HEALTH INSURANCE REFORM REQUIREMENTS FOR THE GROUP AND INDIVIDUAL HEALTH INSURANCE MARKETS

■ 20. The authority citation for part 147 is revised to read as follows:

Authority: 42 U.S.C. 300gg through 300gg–63, 300gg–91, and 300gg–92, as amended.

■ 21. Section 147.126 is amended by revising paragraphs (c), (d), and (e) to read as follows:

§ 147.126 No lifetime or annual limits.

* * * * *

(c) *Definition of essential health benefits.* The term ''essential health benefits'' means essential health benefits under section 1302(b) of the Patient Protection and Affordable Care Act. For this purpose, a group health plan or a health insurance issuer that is not required to provide essential health benefits under section 1302(b) must define ''essential health benefits'' in a manner that is consistent with the following paragraphs (c)(1) or (2):

(1) For plan years beginning before January 1, 2020, one of the EHB-benchmark plans applicable in a State under 45 CFR 156.110, and including coverage of any additional required benefits that are considered essential health benefits consistent with 45 CFR 155.170(a)(2), or one of the three Federal Employee Health Benefits Program (FEHBP) plan options as defined by 45 CFR 156.100(a)(3), and including coverage of additional required benefits under 45 CFR 156.110; or

(2) For plan years beginning on or after January 1, 2020, an EHB-benchmark plan selected by a State in accordance with the available options and requirements for EHB-benchmark plan selection at 45 CFR 156.111, including an EHB-benchmark plan in a State that takes no action to change its EHB-benchmark plan and thus retains the EHB-benchmark plan applicable in that State for the prior year in accordance with 45 CFR 156.111(d)(1), and including coverage of any additional required benefits that are considered essential health benefits consistent with 45 CFR 155.170(a)(2).

(d) *Health reimbursement arrangements (HRAs) and other account-based group health plans*—(1) *In general.* If an HRA or other account-based group health plan is integrated with another group health plan or individual health insurance coverage and the other group health plan or individual health insurance coverage, as applicable, separately is subject to and satisfies the requirements in PHS Act section 2711 and paragraph (a)(2) of this section, the fact that the benefits under the HRA or other account-based group health plan are limited does not cause the HRA or other account-based group health plan to fail to meet the requirements of PHS Act section 2711 and paragraph (a)(2) of this section. Similarly, if an HRA or other account-based group health plan is integrated with another group health plan or individual health insurance coverage and the other group health plan or individual health insurance coverage, as applicable, separately is subject to and satisfies the requirements in PHS Act section 2713 and § 147.130(a)(1) of this subchapter, the fact that the benefits under the HRA or other account-based group health plan are limited does not cause the HRA or other account-based group health plan to fail to meet the requirements of PHS Act section 2713 and § 147.130(a)(1) of this subchapter. For this purpose, all individual health insurance coverage, except for coverage that consists solely of excepted benefits, is treated as being subject to and complying with PHS Act sections 2711 and 2713.

(2) *Requirements for an HRA or other account-based group health plan to be integrated with another group health plan.* An HRA or other account-based group health plan is integrated with another group health plan for purposes of PHS Act section 2711 and paragraph (a)(2) of this section if it meets the requirements under one of the integration methods set forth in paragraph (d)(2)(i) or (ii) of this section. For purposes of the integration methods under which an HRA or other account-based group health plan is integrated with another group health plan, integration does not require that the HRA or other account-based group health plan and the other group health plan with which it is integrated share the same plan sponsor, the same plan document or governing instruments, or file a single Form 5500, if applicable. An HRA or other account-based group health plan integrated with another group health plan for purposes of PHS Act section 2711 and paragraph (a)(2) of this section may not be used to purchase individual health insurance coverage unless that coverage consists solely of excepted benefits, as defined in § 148.220 of this subchapter.

(i) *Method for integration with a group health plan: Minimum value not required.* An HRA or other account-based group health plan is integrated with another group health plan for purposes of this paragraph if:

(A) The plan sponsor offers a group health plan (other than the HRA or other account-based group health plan) to the employee that does not consist solely of excepted benefits;

(B) The employee receiving the HRA or other account-based group health plan is actually enrolled in a group health plan (other than the HRA or other account-based group health plan) that does not consist solely of excepted benefits, regardless of whether the plan is offered by the same plan sponsor (referred to as non-HRA group coverage);

(C) The HRA or other account-based group health plan is available only to employees who are enrolled in non-HRA group coverage, regardless of whether the non-HRA group coverage is offered by the plan sponsor of the HRA or other account-based group health plan (for example, the HRA may be offered only to employees who do not enroll in an employer's group health plan but are enrolled in other non-HRA group coverage, such as a group health plan maintained by the employer of the employee's spouse);

(D) The benefits under the HRA or other account-based group health plan are limited to reimbursement of one or more of the following—co-payments, co-insurance, deductibles, and premiums under the non-HRA group coverage, as well as medical care expenses that do not constitute essential health benefits as defined in paragraph (c) of this section; and

(E) Under the terms of the HRA or other account-based group health plan, an employee (or former employee) is permitted to permanently opt out of and waive future reimbursements from the HRA or other account-based group health plan at least annually and, upon termination of employment, either the remaining amounts in the HRA or other account-based group health plan are forfeited or the employee is permitted to permanently opt out of and waive future reimbursements from the HRA or other account-based group health plan (see paragraph (d)(3) of this section for

additional rules regarding forfeiture and waiver).

(ii) *Method for integration with another group health plan: Minimum value required.* An HRA or other account-based group health plan is integrated with another group health plan for purposes of this paragraph if:

(A) The plan sponsor offers a group health plan (other than the HRA or other account-based group health plan) to the employee that provides minimum value pursuant to Code section 36B(c)(2)(C)(ii) and 26 CFR 1.36B–6;

(B) The employee receiving the HRA or other account-based group health plan is actually enrolled in a group health plan (other than the HRA or other account-based group health plan) that provides minimum value pursuant to Code section 36B(c)(2)(C)(ii) and 26 CFR 1.36B–6, regardless of whether the plan is offered by the plan sponsor of the HRA or other account-based group health plan (referred to as non-HRA MV group coverage);

(C) The HRA or other account-based group health plan is available only to employees who are actually enrolled in non-HRA MV group coverage, regardless of whether the non-HRA MV group coverage is offered by the plan sponsor of the HRA or other account-based group health plan (for example, the HRA may be offered only to employees who do not enroll in an employer's group health plan but are enrolled in other non-HRA MV group coverage, such as a group health plan maintained by an employer of the employee's spouse); and

(D) Under the terms of the HRA or other account-based group health plan, an employee (or former employee) is permitted to permanently opt out of and waive future reimbursements from the HRA or other account-based group health plan at least annually, and, upon termination of employment, either the remaining amounts in the HRA or other account-based group health plan are forfeited or the employee is permitted to permanently opt out of and waive future reimbursements from the HRA or other account-based group health plan (see paragraph (d)(3) of this section for additional rules regarding forfeiture and waiver).

(3) *Forfeiture.* For purposes of integration under paragraphs (d)(2)(i)(E) and (d)(2)(ii)(D) of this section, forfeiture or waiver occurs even if the forfeited or waived amounts may be reinstated upon a fixed date, a participant's death, or the earlier of the two events (the reinstatement event). For this purpose, coverage under an HRA or other account-based group health plan is considered forfeited or waived prior to a reinstatement event only if the participant's election to forfeit or waive is irrevocable, meaning that, beginning on the effective date of the election and through the date of the reinstatement event, the participant and the participant's beneficiaries have no access to amounts credited to the HRA or other account-based group health plan. This means that upon and after reinstatement, the reinstated amounts under the HRA or other account-based group health plan may not be used to reimburse or pay medical care expenses incurred during the period after forfeiture and prior to reinstatement.

(4) *Requirements for an HRA or other account-based group health plan to be integrated with individual health insurance coverage.* An HRA or other account-based group health plan is integrated with individual health insurance coverage (and treated as complying with PHS Act sections 2711 and 2713) if the HRA or other account-based group health plan meets the requirements of 45 CFR 146.123(c).

(5) *Integration with Medicare parts B and D.* For employers that are not required to offer their non-HRA group health plan coverage to employees who are Medicare beneficiaries, an HRA or other account-based group health plan that may be used to reimburse premiums under Medicare part B or D may be integrated with Medicare (and deemed to comply with PHS Act sections 2711 and 2713) if the requirements of this paragraph (d)(5) are satisfied with respect to employees who would be eligible for the employer's non-HRA group health plan but for their eligibility for Medicare (and the integration rules under paragraphs (d)(2)(i) and (ii) of this section continue to apply to employees who are not eligible for Medicare):

(i) The plan sponsor offers a group health plan (other than the HRA or other account-based group health plan and that does not consist solely of excepted benefits) to employees who are not eligible for Medicare;

(ii) The employee receiving the HRA or other account-based group health plan is actually enrolled in Medicare part B or D;

(iii) The HRA or other account-based group health plan is available only to employees who are enrolled in Medicare part B or D; and

(iv) The HRA or other account-based group health plan complies with paragraphs (d)(2)(i)(E) and (d)(2)(ii)(D) of this section.

(6) *Definitions.* The following definitions apply for purposes of this section.

(i) *Account-based group health plan.* An account-based group health plan is an employer-provided group health plan that provides reimbursements of medical care expenses with the reimbursement subject to a maximum fixed dollar amount for a period. An HRA is a type of account-based group health plan. An account-based group health plan does not include a qualified small employer health reimbursement arrangement, as defined in Code section 9831(d)(2).

(ii) *Medical care expenses.* Medical care expenses means expenses for medical care as defined under Code section 213(d).

(e) *Applicability date.* The provisions of this section are applicable to group health plans and health insurance issuers for plan years beginning on or after January 1, 2020. Until [APPLICABILITY DATE OF FINAL RULE] plans and issuers are required to continue to comply with the corresponding sections of this subchapter B, contained in the 45 CFR, subtitle A, parts 1–199, revised as of July 1, 2018.

PART 155—EXCHANGE ESTABLISHMENT STANDARDS AND OTHER RELATED STANDARDS UNDER THE AFFORDABLE CARE ACT

■ 22. The authority citation for part 155 is revised to read as follows:

Authority: 42 U.S.C. 18021–18024, 18031–18033, 18041–18042, 18051, 18054, 18071, and 18081–18083.

■ 23. Section 155.420 is amended
■ a. By revising paragraph (a)(4)(iii) introductory text;
■ b. By adding paragraph (b)(2)(vi);
■ c. By revising paragraph (c)(2);
■ d. In paragraph (d)(12) by removing ''; or'' and adding ''; '' in its place;
■ e. In paragraph (d)(13) by removing the period at the end of the paragraph and adding ''; or'' in its place; and
■ f. By adding paragraph (d)(14).

The revisions and additions read as follows:

§ 155.420 Special enrollment periods.

* * * * *

(a) * * *

(4) * * *

(iii) For the other triggering events specified in paragraph (d) of this section, except for paragraphs (d)(2)(i), (d)(4), and (d)(6)(i) and (ii) of this section for becoming newly eligible for cost sharing reductions, and paragraphs (d)(8), (9), (10), (12), and (14) of this section:

* * * * *

(b) * * *

(2) * * *

(vi) If a qualified individual, enrollee, or dependent gains access to a health reimbursement arrangement or other account-based group health plan integrated with individual health insurance coverage or is provided a qualified small employer health reimbursement arrangement, each as described in paragraph (d)(14) of this section, and if the plan selection is made before the day of the triggering event, the Exchange must ensure that coverage is effective on the first day of the month following the date of the triggering event or, if the triggering event is on the first day of a month, on the date of the triggering event. If the plan selection is made on or after the day of the triggering event, the Exchange must ensure that the coverage effective date is on the first day of the following month.

* * * * *

(c) * * *

(2) *Advanced availability.* A qualified individual or his or her dependent who is described in paragraph (d)(1), (d)(6)(iii), or (d)(14) of this section has 60 days before or after the triggering event to select a QHP. At the option of the Exchange, a qualified individual or his or her dependent who is described in paragraph (d)(7) of this section; who is described in paragraph (d)(6)(iv) of this section and becomes newly eligible for advance payments of the premium tax credit as a result of a permanent move to a new State; or who is described in paragraph (d)(3) of this section and becomes newly eligible for enrollment in a QHP through the Exchange because he or she newly satisfies the requirements under § 155.305(a)(2), has 60 days before or after the triggering event to select a QHP.

* * * * *

(d) * * *

(14) The qualified individual, enrollee, or dependent gains access to and enrolls in a health reimbursement arrangement or other account-based group health plan (as defined in 45 CFR 147.126(d)(6)(i)) that will be integrated with individual health insurance coverage, in accordance with 45 CFR 146.123(c), or is provided a qualified small employer health reimbursement arrangement, as defined in section 9831(d)(2) of the Internal Revenue Code.

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Part III

Department of Transportation

Federal Highway Administration
Federal Railroad Administration
Federal Transit Administration

23 CFR Parts 771 and 774
49 CFR Parts 264 and 622
Environmental Impacts and Related Procedures; Final Rule

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

23 CFR Parts 771 and 774

Federal Railroad Administration

49 CFR Part 264

Federal Transit Administration

49 CFR Part 622

[Docket No. FHWA–2015–0011]

RIN 2125–AF60; 2130–AC64; 2132–AB26

Environmental Impacts and Related Procedures

AGENCY: Federal Highway Administration (FHWA), Federal Railroad Administration (FRA), Federal Transit Administration (FTA), Department of Transportation (DOT).

ACTION: Final rule.

SUMMARY: This final rule amends FHWA and FTA regulations implementing the National Environmental Policy Act (NEPA) and Section 4(f) requirements. In addition, through this final rule, FRA is joining those regulations, making them FRA's NEPA and Section 4(f) implementing regulations. The FHWA, FRA and FTA (hereafter collectively referred to as ''the Agencies'') modified the NEPA and Section 4(f) regulations to reflect various provisions of the Moving Ahead for Progress in the 21st Century Act (MAP–21) and the Fixing America's Surface Transportation (FAST) Act. The Agencies have also revised the Environmental Impact and Related Procedures regulations to reflect various procedural changes, such as including a new section on combined final environmental impact statement/record of decision documents, and to improve readability and reflect current practice. This final rule also amends the Parks, Recreation Areas, Wildlife and Waterfowl Refuges, and Historic Sites regulations to reflect new exceptions created by the FAST Act.

DATES: Effective on November 28, 2018.

FOR FURTHER INFORMATION CONTACT: For the Federal Highway Administration: Emily Biondi, Office of Project Delivery and Environmental Review, HEPE, (202) 366–9482, *Emily.Biondi@dot.gov,* or Diane Mobley, Office of the Chief Counsel, (202) 366–1366, *Diane.Mobley@dot.gov.* For FRA: Michael Johnsen, Office of Program Delivery, (202) 493–1310, *Michael.Johnsen@dot.gov,* or Christopher Van Nostrand, Office of Chief Counsel, (202) 493–6058, *Christopher.Vannostrand@dot.gov.* For FTA: Megan Blum, Office of Planning and Environment, (202) 366–0463, *Megan.Blum@dot.gov,* or Nancy-Ellen Zusman, Office of Chief Counsel, (312) 353–2577, *NancyEllen.Zusman@dot.gov.* The Agencies are located at 1200 New Jersey Ave. SE, Washington, DC 20590–0001. Office hours are from 8:00 a.m. to 4:30 p.m. E.T., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Background

The MAP–21 (Pub. L. 112–141, 126 Stat. 405) and the FAST Act (Pub. L. 114–94, 129 Stat. 1312) contained new requirements that the Agencies must meet in complying with NEPA (42 U.S.C. 4321 *et seq.*) and Section 4(f) (23 U.S.C. 138 and 49 U.S.C. 303). Through this final rule, the Agencies are revising the regulations that implement NEPA at 23 CFR part 771—Environmental Impact and Related Procedures, and Section 4(f) at 23 CFR part 774—Parks, Recreation Areas, Wildlife and Waterfowl Refuges, and Historic Sites. The final rule modifies 23 CFR part 771 to implement MAP–21 (sections 1302, 1305, 1315, 1319, 1320(d), 20003, 20016, and 20017) and the FAST Act (sections 1304 and 11503). This final rule also modifies 23 CFR part 774 to reflect MAP–21 (sections 1119(c)(2) and 1122) and the FAST Act (section 1303 and 11502).

In addition, the final rule establishes 23 CFR parts 771 and 774 as FRA's NEPA implementing procedures and FRA's Section 4(f) implementing regulations, respectively. As described in the supplemental notice of proposed rulemaking, discussed later in this document, the procedures outlined in these regulations will apply to all environmental reviews where FRA is the lead agency and initiated after the effective date of the final rule. The FRA will continue to apply its FRA's Procedures for Considering Environmental Impacts [1] (FRA Procedures) to projects initiated before the effective date of this final rule.

As appropriate, FRA intends to issue further direction for its practitioners and project sponsors clarifying what information should be included in FRA's environmental documents. However, until that time, FRA will rely on certain sections of FRA Procedures as guidance. In particular, FRA will continue to look to Section 10, Environmental Assessment Process, Section 11, Finding of No Significant Impact, and Section 14, Contents of an Environmental Impact Statement of the FRA Procedures. Project sponsors should contact FRA headquarters with any questions about FRA's expectations for the content of environmental documents.

Once FRA has completed the environmental review of projects initiated before the date of this final rule, FRA plans to rescind the FRA Procedures.

Lastly, the Agencies are modifying the NEPA implementing procedures through this final rule to reflect current Agency practice, as well as to improve readability consistent with Executive Order 13563, ''Improving Regulation and Regulatory Review'' (2011).

Notices of Proposed Rulemaking (MAP–21 and FAST Act)

On November 20, 2015, at 80 FR 72624, FHWA and FTA published a notice of proposed rulemaking (NPRM) proposing amendments to 23 CFR parts 771 and 774 to account for the changes made by MAP–21 and to reflect various readability changes (MAP–21 NPRM). The FAST Act was signed on December 4, 2015. Certain FAST Act provisions affected portions of the regulatory provisions addressed in the MAP–21 NPRM, and other FAST Act provisions required rulemaking. On September 29, 2017, at 82 FR 45530, the Agencies proposed additional amendments to reflect FAST Act provisions in a supplemental notice of proposed rulemaking (FAST Act SNPRM). The FAST Act SNPRM also proposed to add FRA to parts 771 and 774.

All substantive comments received on the MAP–21 NPRM and the FAST Act SNPRM were considered when developing this final rule. The docket contains a redline of parts 771 and 774 showing all changes.

Summary of Comments and Responses

The Agencies received 14 comment letters in response to the MAP–21 NPRM. Comment letters were submitted by six State departments of transportation (State DOTs); three transit agencies; three surface transportation interest groups (trade associations); one regional transportation agency; and three citizens.

In response to the FAST Act SNPRM, the Agencies received 12 comment letters from the following groups: 1 citizen; 4 trade associations; 1 public transportation agency; 3 resource/regulatory agencies; 2 State DOTs; and 1 Indian Tribe. The Agencies received 33 other comment letters that were deemed to be outside of scope of this

[1] FRA's Procedures for Considering Environmental Impacts, 64 FR 28545 (May 26, 1999), as modified by 78 FR 2713 (Jan. 14, 2013).

rulemaking and therefore are not addressed further.

The following comment summaries reflect the significant comments received on both the MAP–21 NPRM and FAST Act SNPRM, the Agencies' responses to those comments, and any additional minor clarifications made by the Agencies after further consideration. The summaries are organized by regulatory section number. Any MAP–21 NPRM or FAST Act SNPRM proposals not specifically addressed below are being finalized as previously proposed.

General

The Agencies made various nonsubstantive changes to their NEPA implementing regulations. The Agencies changed many instances of ''will'' or ''shall'' to ''must'' unless it did not make sense to do so. The Agencies also changed all document references to lowercase (*e.g.,* ''notice of intent,'' ''record of decision,'' ''environmental impact statement'').

MAP–21 NPRM—General Comments

Two transit agencies supported the Agencies' efforts to improve and streamline environmental review regulations. One trade association supported the Agencies' efforts to ensure the joint environmental regulations provide guidance to project sponsors without imposing rigid requirements. One State DOT provided a general statement of support for the proposed revisions to the NEPA and Section 4(f) regulations. The Agencies appreciate the support and input provided by all commenters regarding the MAP–21-related proposals.

One transit agency sought clarification on how joint lead agencies are applied to the NEPA process. The transit agency asked if it would become a joint lead agency when it prepares an environmental assessment on behalf of FTA and when and how determinations would be made on which entity would serve as the joint lead agency. They also inquired if there would be instances when a non-Federal agency applicant would serve as a joint lead agency. Typically, the applicant (*e.g.,* State DOTs, public transportation agencies, and local governments) serves as a joint lead agency with the Federal lead agency. Lead agency determinations are made early in the environmental review process. Generally, the applicant will inform the Federal lead agency of its intent to conduct an environmental review for a proposed project that it anticipates will require an approval from that Federal lead agency (*i.e.,* is requesting financial assistance for construction). The applicant should contact the Federal lead agency prior to making any project decisions, such as finalizing the project's purpose and need. The Agencies plan to provide more information regarding joint lead agencies in a forthcoming update to the ''SAFETEA–LU Environmental Review Process Final Guidance.''

One trade association encouraged FHWA and FTA to expedite review of projects in finalizing the proposed rule. A regional transportation agency similarly encouraged the Agencies to use the rulemaking in a way that seeks to maximize opportunities for environmental streamlining. Five State DOTs also provided a general statement of support for efforts to streamline the project delivery and environmental review process. One trade association provided a letter of support for the proposed MAP–21 updates, specifically stating that ''all of the revisions . . . will have a positive impact on the project review and approval process'' and noting support for the combined final environmental impact statement/record of decision (FEIS/ROD) and errata sheet approaches and identification of a single lead modal agency. The Agencies appreciate the commenters' support as we continue to focus on expedited review of projects.

FAST Act SNPRM—General Comments

Three trade associations provided comments that generally supported the proposed rulemaking, and noted that the proposed changes to part 771 are consistent with the FAST Act and MAP–21, and will improve the efficiency of the NEPA process. The Agencies appreciate the commenters' support as we continue to focus on expedited review of projects.

Two trade associations generally supported the proposal to add FRA to 23 CFR parts 771 and 774. These commenters noted that one common set of procedures, modified, as appropriate, to reflect the differences in each Agency's program, will result in a more efficient and timely review process. One trade association suggested applying part 771 to railroad projects will facilitate preparing single documents to support decisions from the operating administrations (OAs). Another trade association supported FRA's proposal to apply part 771 to its actions, stating that it will be especially helpful for multimodal projects that require preparation of a single NEPA document to support multiple decisions. The Agencies appreciate the commenter's support of FRA's proposal to join part 771. As described in the FAST Act SNPRM, FRA is joining the FHWA and FTA NEPA implementing regulations to comply with section 11503 of the FAST Act (49 U.S.C. 24201). In addition, applying the same procedures as the two other OAs responsible for surface transportation will result in a more efficient and predictable review for project sponsors.

However, to clarify the timing of this final rule's applicability to FRA's actions, the Agencies are adding a new § 771.109(a)(4), which, consistent with the SNPRM preamble, states that FRA will apply the procedures described in this final rule to actions inititated after its effective date. The Agencies have also modified § 771.109(a)(3) to add a reference to FHWA and FTA.

One trade association commented that the Agencies failed to respond to the comments it submitted on FRA's June 9, 2016, **Federal Register** notice (81 FR 37237) in which FRA requested the public's views on applying part 771 to railroad projects. The commenter repeated its suggestion that FRA develop its own regulations, rather than join part 771, because of the unique needs of railroads. The Agencies addressed the trade association's comment in the ''Applicability of 23 CFR part 771 to FRA Actions'' section of the FAST Act SNPRM. As described in that section, FRA determined that applying 23 CFR part 771 to railroad projects is the most efficient way to comply with section 11503 of the FAST Act. In addition, aligning FRA's procedures with FHWA and FTA will provide a more consistent and predictable process for potential project sponsors, especially those that engage in environmental reviews for more than one mode of surface transportation. As noted in the FAST Act SNPRM, the Agencies modified part 771 where necessary to reflect the differences among the three modes of transportation.

FAST Act SNPRM—Cross-Agency CE

One trade association suggested that DOT OAs should be able to use another OA's categorical exclusions (CEs). In addition, one State DOT and one trade association requested that the Agencies issue guidance regarding the application of CEs for multimodal projects referenced in title 49 U.S.C. 304. The U.S. Department of Transportation previously issued guidance on the application of 49 U.S.C. 304;[2] the Agencies have not supplemented this guidance. After considering the public

[2] Guidance on the Application of Categorical Exclusions for Multimodal Projects under 49 U.S.C. 304, available at: *https://www.transportation.gov/transportation-policy/permittingcenter/section-1310-guidance-application-categorical-exclusions.*

comments regarding the use of another mode's CEs, the Agencies decided to include a new paragraph at §§ 771.116(d), 771.117(h), and 771.118(e) that allows FHWA, FTA, and FRA to use each other's CEs. The Agencies currently share environmental review process regulations and their actions are, in many cases, very similar (*e.g.,* approving construction of new surface transportation projects). As such, the Agencies have determined it is appropriate to have the option to use each other's CE lists where the CE approved for an OA is applicable to the proposed action. This approach would allow for increased efficiencies while not functionally expanding the type of projects for which the CE was originally established. This option includes the opportunity for consultation as necessary to ensure the appropriate application of the CE. It should be noted that the analysis of unusual circumstances would still be considered in the application of the CE as defined in § 771.116(b), § 771.117(b), and § 771.118(b). To accommodate the new language, § 771.118(e) is now redesignated § 771.118(f). The FHWA and FRA language is the same as the FTA language, modified only by changing FTA to FHWA or FRA, as applicable.

771.105 Policy

One regional transportation agency suggested revising § 771.105(f) to include a reference to all of the other laws considered during the NEPA review by adding the phrase ''or required by law.'' The Agencies decline to include the proposed language because it is the Agencies' policy, which is consistent with the Council on Environmental Quality's (CEQ) NEPA implementing regulations, that compliance with all of the Federal environmental requirements (*e.g.,* laws, regulations, and Executive Orders) be included in the NEPA review and documentation. *See* 40 CFR 1500.2(c). As a result, costs incurred by an applicant preparing an environmental document requested by the Administration would be eligible for financial assistance.

771.107 Definitions

Administration Action

One citizen commented that the definition for Administration Action is too narrow because it does not include acquisition of rolling stock, and requested that the word construction be replaced with final design activities, property acquisition, purchase of construction materials or rolling stock, or project construction. This commenter also stated the exceptions in § 771.113(d) do not need to be mentioned in this definition because allowing one of the excepted activities is an Administration action that is permitted prior to completion of the NEPA process. In addition, one regional transportation agency proposed inserting a statement regarding NEPA compliance at the end of the definition. The Agencies do not intend for the definition of Administration Action to be read so narrowly as to preclude additional activities. However, the Agencies do not believe it is necessary to add the proposed expansive list to the definition itself; those activities could be Administration actions but the Agencies are opting to present a non-exclusive list in order to maintain flexibility. The Agencies also decline to include the recommendation to refer to NEPA compliance because the activities listed in the paragraph require compliance with NEPA, and the paragraph would become circular in rationale. The only substantive changes to this definition that the Agencies are including are those proposed in the FAST Act SNPRM.

Programmatic Approaches

Five State DOTs and a trade association suggested revisions to the programmatic approaches definition that they assert would more closely match the language in 23 U.S.C. 139(b)(3)(A)(iii), which refers to programmatic approaches being consistent with NEPA. The Agencies agree that the definition of programmatic approaches should reflect the statutory language and have modified the definition accordingly.

Project Sponsor

A regional transportation agency commented that the project sponsor definition is vague and requested the Agencies clarify the activities the project sponsor is authorized to undertake on behalf of the applicant. The Agencies agree that the definition of project sponsor should be further clarified to acknowledge that the project sponsor may undertake some activities for the applicant and are therefore modifying the definition. However, the Agencies also note that when the project sponsor is a private institution or firm, § 771.109(c)(6) limits those activities to providing technical studies and commenting on environmental review documents.

771.109 Applicability and Responsibilities

Regarding § 771.109(b)(1), one public commenter asked whether FHWA/FTA staff can realistically ensure mitigation commitments are implemented. The FHWA and FTA, in collaboration with project sponsors, strive to have sufficient staff to ensure mitigation commitments are implemented and to effectively administer the Federal-aid highway program and the environmental review process for federally funded transit projects.

The Agencies are modifying § 771.109(b)(1) by changing ''applicant'' in the first sentence to ''project sponsor.'' The Agencies are engaging more frequently on projects advanced by private entities so it is appropriate to use the broader ''project sponsor'' to clarify that a private entity seeking funding or another approval from one of the Agencies may be required to carry out mitigation commitments identified during the environmental review process.

One transit agency requested that a timeframe be specified for participating agencies to provide their comments in § 771.109(c)(7). The commenter suggested that the Agencies specify that the coordination plan contain timeframes that participating agencies are obligated to follow, and that failure to adhere to those timeframes would result in an agency's concurrence. One State DOT similarly commented that the language in this section does not address assumption of concurrence for participating agencies that do not concur on the schedule as part of the coordination plan. This commenter recommended that the final rule include clarification regarding how the lead agencies will satisfy their responsibilities under 23 U.S.C. 139(g) when the circumstance arises that one or more participating agencies do not concur or respond to the request for concurrence on a schedule for completion of the environmental review process. Two trade associations also expressed concern for a lead agency's responsibility in this scenario and provided recommendations to remedy this concern.

In response to the requests for clarifications regarding comment periods and timeframes, the Agencies note that 23 U.S.C. 139(g)(2)(B) clearly states the lead agency will provide no more than a 60-day comment period for the draft EIS review and no more than a 30-day comment period for all other comment periods in the environmental review process. Lead agencies can rely on the statutory reference to support

their comment deadlines in their requests for comments and in the development of the timeframes contained in the coordination plan.

The Agencies appreciate the comments regarding participating agency concurrence and how to proceed when there is no response or concurrence from the participating agency. The Agencies previously determined that these scenarios should be addressed in guidance.[3] The Agencies' existing guidance specifically addresses this, providing that the Agencies will assume a participating agency's concurrence if the participating agency fails to provide a written response on the proposed project schedule within the deadline established by the lead agency. In the absence of specific statutory authority for the Agencies to mandate concurrence from a participating agency, the Agencies will continue to address participating agency concurrence/non-concurrence in guidance.

Also within § 771.109(c)(7), one citizen suggested replacing the phrase ''as appropriate'' because this language may cause agencies to expect a prompt from a lead agency when feedback is necessary. The commenter suggested language for rewording that would alert agencies as to what is available to them for comment. A trade association stated that language in the section should be stronger because the clear intent of the amendments to section 139 in the FAST Act was to direct, or at least encourage, participating agencies to focus their comments on the areas within the expertise and that language, in some form, should be included in the actual text of the section. The Agencies removed ''as appropriate'' to strengthen the paragraph so that it is clear that participating agencies are expected to comment within their area of special expertise or jurisdiction. The Agencies are also deleting ''if any'' from the second sentence to make the sentence more concise. The Agencies decline to insert the citizen's proposed language in order to preserve the flexibility in the section. The lead agencies will specifically identify what input they are seeking (*e.g.,* comment responses, methodology feedback) from participating agencies.

Regarding § 771.109(e), specifically FRA's use of a qualified third-party contractor to prepare an EIS in certain circumstances (*i.e.,* when FRA is the lead Federal agency, there is no applicant acting as a joint-lead agency, and the project sponsor is a private entity), one transit agency sought additional assurance that this paragraph would not limit a public applicant's choice to prepare an EA or EIS using its in-house resources because of a precedent set for a private entity under this paragraph. The third-party contracting arrangement described in § 771.109(e) would not prohibit a public agency from preparing environmental documents using in-house expertise instead of consultant support. As described in the FAST Act SNPRM, third-party contracting is intended to address situations where a project sponsor is a private entity, and there is no other applicant acting as a lead agency. Consistent with FRA practice and the 40 Most Asked Questions Concerning CEQ's National Environmental Policy Act memorandum,[4] third-party contracting is a mechanism allowing FRA to satisfy its obligations under 40 CFR 1506.5(c). To address the commenter's concerns, the Agencies are making minor edits to this section to clarify the third-party contracting process.

771.111 Early Coordination, Public Involvement, and Project Development

In § 771.111(a)(1), five State DOTs and one trade association recommended revising the second sentence to reflect that there are multiple ways that early coordination reduces delays and conflicts. In this same section, one regional transportation agency suggested adding ''reducing costs'' as one of the activities that contribute to minimizing or eliminating delay. The Agencies accept the proposed recommendation to the second sentence to recognize the multiple avenues available to reduce delay and conflict. The Agencies decline to add ''reducing costs'' as a way to minimize or eliminate delay because it is more an indirect factor.

For § 771.111(a)(2), five State DOTs and a trade association requested that § 771.111(a)(2) be clearer regarding the ability to adopt or rely on planning process products in the environmental review process. Specifically, the commenters suggested that deleting the reference to 23 CFR part 450, Appendix A would be contrary to FHWA and FTA's intent to be more encompassing. One trade association commented on § 771.111(a)(2)(i), expressing support for the characterization of the new statutory authority for adopting planning-level decisions in the NEPA process and agreed with the text of the proposed rule in this section. That trade association also noted that FRA could, in some circumstances, rely on planning-level decisions as the basis for eliminating alternatives. The Agencies accept the suggestion to clarify and are including the citation to 23 CFR part 450 Appendix A. The Agencies agree with the need to call attention to Appendix A. With respect to FRA's use of planning-level decisions in its alternatives analysis, FRA will rely on such decisions when defining the reasonable range of alternatives for analysis under NEPA where appropriate and allowed by law. Applicants seeking to eliminate alternatives based on past planning processes should contact FRA headquarters for further direction.

In § 771.111(a)(3), one regional transportation agency proposed revising the language to add a reference to other approvals. One State agency expressed support for the proposed addition of the environmental checklist to § 771.111(a)(3) as a means to promote consistency among FHWA, FRA, and FTA and identify potential issues early in the environmental review process. The Agencies appreciate the support and accept the regional transportation agency's recommendation with modifications. It is important that the applicant notify the Administration as early as possible when a Federal action may be undertaken so the Administration can inform the applicant of likely requirements early in the environmental review process, as well as the class of action.

One regional transportation agency proposed revising § 771.111(b) to add a requirement to inform the project sponsor or applicant of the probable class of action to maximize early coordination. The Agencies decline the recommendation because a project's class of action is identified in consultation with the project sponsor, though the Agencies are responsible for the final decision regarding the class of action. The project initiation process will be discussed in further detail in the Agencies' forthcoming update to the ''SAFETEA–LU Environmental Review Process Final Guidance.''

One State agency commented on § 771.111(d), stating that State wildlife agencies should be identified as cooperating agencies because of their regulatory authority and special expertise on wildlife and wildlife resources. The commenter further noted that a State DOT authorized to act as a lead agency for NEPA should similarly

[3] Question 12 of the Fixing America's Surface Transportation Act (FAST): Questions and Answers on the procedural changes to 23 U.S.C. 139 as they relate to Federal Highway Administration (FHWA), Federal Railroad Administration (FRA), & Federal Transit Administration (FTA) projects guidance, issued June 2017, available at: *https://www.environment.fhwa.dot.gov/legislation/authorizations/fastact/qa_23USC_changes_1304.aspx.*

[4] 46 FR 18026 (March 23, 1981).

recognize wildlife agencies as cooperating agencies during the environmental review process. The Agencies decline to specifically identify State wildlife agencies in paragraph (d) as such a reference would be too narrow and would not capture all the agencies that might be a cooperating agency. The Agencies revisited the paragraph, however, and made non-substantive clarification revisions; the changes do not affect the content or intent of the previously proposed language.

One trade association expressed concerns with the proposal that FRA apply the factors listed in § 771.111(f) to its railroad projects. The commenter is concerned that these factors were developed to apply to public transportation projects and are ill-suited to projects on private railroad infrastructure. The commenter further stated that freight railroad projects are governed by the individual priorities and needs of each railroad, and are not subject to the State and local planning provisions that apply to transit and highway projects. With respect to the commenter's concerns with FRA's application of the factors described in § 771.111(f) to railroad projects, the Agencies disagree that these factors cannot be applied to projects on private railroad infrastructure. While these factors are specific to part 771, the obligation to appropriately define the scope of an environmental review is a general NEPA principle. For past projects, FRA has considered factors similar to § 771.111(f) when defining the scope of its environmental reviews and has determined that the § 771.111(f) factors are appropriate for future railroad projects, regardless of who owns the railroad infrastructure. Although freight railroad projects are not governed by State and local planning processes, in most cases, such a railroad project requiring an FRA action may still be subject to NEPA, and therefore part 771 would apply (*e.g.,* there is an FRA action where FRA is providing Federal financial assistance for improvements to the freight railroad infrastructure).

To improve readability, the Agencies removed the statutory reference and footnote in § 771.111(h)(2)(viii) and replaced it with a direct citation to the Agencies Section 4(f) implementing regulations that specifically address the requirements for public notice and an opportunity for public review and comment on a Section 4(f) *de minimis* impact finding. This change does not affect the content or intent of the previous language; however, it does reduce the number of footnotes within the current regulation while also linking the Agencies implementing regulations more clearly. One Federal agency recommended acknowledging in this footnote that FRA intends to use FHWA and FTA Section 4(f) policy guidance, as stated in the preamble, to provide further clarity to its applicants and projects sponsors and highlight current practice. The Agencies proposed deleting this outdated footnote in the MAP–21 NPRM because the *de minimis* guidance is now included in the Section 4(f) Policy Paper.[5] The FHWA developed the Section 4(f) Policy Paper. The FTA applies the Section 4(f) Policy Paper to public transportation projects[6] and FRA intends to continue using the Section 4(f) Policy Paper for its railroad projects. In addition, FRA is evaluating whether to adopt, in whole or in part, any of the existing FHWA Programmatic 4(f) Evaluations, described in footnote 1 to 23 CFR 774.3.

One trade association expressed concerns with the proposal that FRA apply the public involvement procedures in § 771.111(i) that apply to FTA's capital projects. The commenter distinguished between public transportation systems (*i.e.,* highway and transit projects) and projects on infrastructure owned by freight railroads. The commenter stated that railroads would be constrained in their ability to solicit full public participation because the reason a railroad proposes a project often involves confidential business information about customers. The commenter proposed striking the reference to ''FRA programs'' from this section. The Agencies decline to make the proposed change. Section 771.111(i) describes the activities Applicants should engage in as part of the NEPA process. Because Applicants are limited to Federal, State, local or federally recognized Indian Tribal governmental units in the definition of Applicant under § 771.107, a privately owned freight railroad would not be subject to these requirements. The FRA is always responsible for ensuring the appropriate level of public involvement during the NEPA process. Where a freight railroad is a project sponsor, as defined by in § 771.107, FRA will coordinate with the railroad as appropriate, including on the railroad's participation in the public involvement process.

771.113 Timing of Administration Activities

One trade association supported the proposed language with the understanding that the environmental review process definition is broad enough to capture early planning activities and activities that could be covered under a CE. The Agencies interpret this comment as pertaining to language changes made in § 771.113(a). The Agencies confirm that the environmental review process covers early scoping activities and CEs. The environmental review process does not include early planning activities, but the Agencies encourage such activities to support future NEPA reviews.

One regional transportation agency suggested adding identification of mitigation required by law to the second sentence of § 771.113(a) to recognize mitigation that may be required under other environmental laws such as the Clean Water Act or the Endangered Species Act. The Agencies partially accept the commenter's suggestion and revised the language to include the identification of mitigation measures. However, the Agencies determined referencing only mitigation required by law is too narrow.

For § 771.113(d), one citizen requested another exception to meet changes to FTA's small capital project grants (*i.e.,* section 5307 and 5309 grant programs) under MAP–21 because projects receiving those grants may include final design activities that would be conducted concurrently with the environmental review process. MAP–21 eliminated the former distinction between preliminary engineering and final design for these projects. This commenter proposed new exception language to reflect those grants, but FTA declines to accept the suggestion. How a particular discretionary funding program is structured is irrelevant to FTA's prohibition of final design-like activities because they tend to prejudice the consideration of alternatives. There is an exception to that rule in 23 U.S.C. 139(f)(4)(D) for taking the preferred alternative to a higher level of design for purposes of mitigation when the proper circumstances exist.

One citizen provided support for the FRA-specific exception added in § 771.113(d)(4) because of the explanation that it will be not be applied broadly, but rather, on a case-by-case basis to be efficient with the resources acquired by FRA. One trade association also commented on this section, and recommended adding a similar exception for FHWA and FTA to

[5] Section 4(f) Policy Paper (Policy Paper), available at: *http://www.environment.fhwa.dot.gov/4f/4fpolicy.pdf*

[6] FTA Use of the FHWA Section 4(f) Policy Paper memorandum, Nov. 9, 2012, available at: *https://www.transit.dot.gov/regulations-and-guidance/environmental-programs/november-9-2012-memorandum.*

make case-by-case determinations allowing activities (including purchases) that would not improperly influence the outcome of the NEPA process, such as the acquisition of long-lead time construction materials or equipment. The FHWA and FTA decline to extend the § 771.113(d)(4) exemption covering limited advanced purchases of railroad components or materials to their programs. Such purchases are not allowed under FHWA procurement practices. In certain circumstances, FTA may allow limited advance purchase of railroad components or materials where the acquisitions would have independent utility from the overall action. Because FTA can already allow the action, FTA determined it does not need to revise regulation text to reflect the practice. The FRA is making a minor modification to this paragraph for clarity, however.

771.115 Classes of Actions

One regional transportation agency noted that programmatic approaches provide significant cost and time savings, and as such, the Agencies should encourage and, where appropriate, require them. Accordingly, the commenter recommended revising § 771.115 to state that programmatic approaches ''shall be used where practicable for any class of action.'' The Agencies decline to make the recommended edit because there is no statutory language that authorizes the mandatory language. The Agencies encourage the use of programmatic actions, where appropriate.

The Agencies are modifying § 771.115(c)(4) by deleting ''FHWA action,'' § 771.115(c)(5) by deleting ''FTA action,'' and § 771.115(c)(6) by deleting ''FRA action'' because the actions listed in those sections are appropriately analyzed in an environmental impact statement regardless of which of the Agencies is conducting the environmental review.

For § 771.115(c), one citizen noted that the need for public involvement remains on certain transit projects that are known upfront to have no significant environmental impacts but may affect the lives of people who use transit in ways they need to know. Although a CE does not include any formal public involvement requirements, in certain situations, public involvement can accompany a CE, if appropriate. Alternatively, when public involvement seems prudent due to potential impacts or environmental controversy, FTA may choose to consider an EA, particularly if those impacts affect an environmental justice community. The FTA's Standard Operating Procedure No. 2, Project Initiation and Determining NEPA Class of Action, further explains FTA's approach to this topic.[7]

One regional transportation agency suggested striking the phrase ''the appropriate environmental document'' and adding a reference to FONSIs and EISs in § 771.115(c). The regional transportation agency suggested this substituted language because the EA is an environmental document. The Agencies decline the proposed revision based on the definition of an EA. The Agencies do not want to preclude the use of a CE in scenarios where there is a change in project scope.

771.116 FRA Categorical Exclusions

One State DOT and three trade associations expressed general support for the proposed addition of FRA's newly expanded CE list into this part as § 771.116. One trade association also supported the proposed FRA CEs, specifically identifying the proposed CEs covering geotechnical investigations and property acquisitions as being useful. The commenter noted that consistency among FHWA, FRA, and FTA will help streamline the environmental review process.

The Agencies are proposing a minor modification to § 771.116(c) to prevent any appearance of a conflict with the limitations on a project sponsor's participation described in § 771.109(c)(6).

One trade association opposed the proposed elimination of FRA's CE (previously in section 4(c)(6) of the FRA Procedures) covering, ''Changes in plans for an FRA action for which an environmental document has been prepared, where the changes would not alter the environmental impacts of the action.'' The commenter disagreed that § 771.129(c) addresses the types of activities previously covered by the FRA CE and requested that the Agencies add the original CE to the final rule. The CE at section (4)(c)(6) of the FRA Procedures served much the same function as the re-evaluation process outlined in § 771.129. The underlying purpose is to determine whether project changes or new information require FRA to undertake additional environmental review. By joining part 771, FRA is aligning its NEPA practice with FHWA and FTA, including the process for re-evaluating environmental documents consistent with § 771.129. This consistency should help streamline environmental reviews and provide certainty for FRA's project sponsors and applicants. Keeping the CE at section 4(c)(6) of the FRA Procedures and applying § 771.129 could create unnecessary confusion, undermining FRA's goal of creating consistency with FHWA and FTA practice.

One Tribal historic preservation office objected to FRA's CEs covering activities within railroad rights-of-way. The commenter stated that the CEs will lead to ''abuse or misuse'' and expressed concerns that they could result in adverse effects to archaeological sites and properties of religious and cultural significance. The FRA has significant experience applying CEs to proposed actions within railroad rights-of-way and believes that the CEs are appropriately limited to avoid misapplication. In addition, the decision to apply a CE is one FRA makes on a project-by-project basis. In making that project-specific decision, FRA will consider the unusual circumstances listed in § 771.116(b), which includes § 771.116(b)(3) covering significant impact to properties protected by Section 4(f) requirements or Section 106 of the National Historic Preservation Act (Section 106). This would include a consideration of potential effects to archaeological sites and properties of religious and cultural significance to Tribes.

The Tribal historic preservation office requested that the Agencies define the terms improvements and upgrade because the terms may include different types of activities, some of which might result in adverse effects under the National Historic Preservation Act or significant impacts under NEPA. The FRA declines to add definitions of the terms improvements and upgrades in the final rule. In the CE in § 771.116(c)(22), the term improvements is already described. When developing this CE in 2013, FRA drafted the proposed CEs to clearly describe each eligible category of action, including necessary spatial, temporal, or geographic limitations, and provided demonstrative examples of the types of actions that would typically be covered under the text of the CE. With respect to the term upgrades, FRA intended for it to read as part of the repair or replacement activity. In some cases, the railroad infrastructure damaged by a natural disaster or catastrophic failure was constructed before the development of modern safety and design standards. Therefore, FRA determined that allowing applicants to use new codes and standards when repairing or replacing damaged infrastructure would

[7] Project Initiation and Determining NEPA Class of Action, issued Aug. 2016, available at: *https://www.transit.dot.gov/regulations-and-guidance/environmental-programs/environmental-standard-operating-procedures.*

result in no or minimal environmental impacts, and therefore the activities are appropriate for categorical exclusion. The same is true for upgrades necessary to address existing conditions. It is reasonable for an applicant to modify or upgrade infrastructure, as necessary, to accommodate the circumstances at the time of the repair or replacement activity occurs and not be constrained to the conditions that existed when the railroad infrastructure was originally constructed.

The Tribal historic preservation office noted that five of the CEs listed in FRA's July 5, 2016, notice identified as ''most frequently used'' cover activities within existing rights-of-way and existing railroad facilities, and those that are consistent with existing land use. Those CEs are found in §§ 771.116(c)(9) (covering maintenance or repair of existing railroad facilities), (c)(12) (covering minor rail line additions), (c)(17) (covering the rehabilitation, reconstruction, or replacement of bridges), (c)(21) (covering the assembly or construction of certain facilities or stations), and (c)(22) (covering track and track structure maintenance and improvements). The commenter assumed that these types of activities were appropriate because they occurred in areas that are previously disturbed or covered in fill. The commenter indicated that even where right-of-way is in use, there may still be archaeological or cultural resources present and identified the CE in § 771.116(c)(21) as presenting a ''significant threat'' to such resources. The commenter asked how FRA would identify and document what areas have been previously disturbed, indicating that in its experience, Federal agencies are unable or unwilling to document the extent of previous disturbance. The commenter also requested that FRA consider ground disturbance in terms of both vertical and horizontal dimensions. The commenter suggested that vertical disturbance is not always considered, and that categorically excluded projects involving ground disturbance should not affect undisturbed areas.

The FRA establishes CEs based on its past experience with railroad project construction and operation, and after determining the category of actions do not individually or cumulatively have a significant effect on a human environment and an opportunity for public review and comment. The FRA has a long history applying the CEs identified by the commenter and have not found them to pose a significant threat to cultural resources. As discussed above, FRA decides whether to apply a CE on a project-by-project basis and will do so after considering the factors listed in § 771.116(b). The FRA makes this decision after reviewing necessary technical information, which may include results of site visits or archaeological surveys, or documentation that illustrates past ground disturbance such as photographs, maps, or construction or engineering plans from previous construction activities. In doing so, FRA typically considers the extent of existing ground disturbance in terms of both vertical and horizontal dimensions. In addition, as the commenter notes in its comment letter, even where an action is appropriate for a CE, FRA must still demonstrate compliance with Section 106, which includes a consideration of potential impacts to archaeological resources that may be present beneath railroad rights-of-way.

The Tribal historic preservation office suggested an action would not be eligible for a CE if archaeological sites or property of religious or cultural significance to federally recognized Tribes or Native Hawaiian organizations was present and as such, agencies would therefore need to know the exact location of such resources before determining whether a CE was appropriate. The commenter reminded the Agencies of the importance of consultation with Native American Tribes and noted that the failure to do so would risk failing to identify natural, cultural, and historic resource and underestimating the significance of those sites. The commenter expressed concerns that the CEs would diminish Native American Tribes' ability to consult and requested that FRA continue to consult with Tribes for each action to determine whether a CE is appropriate. The commenter supported FRA's practice of evaluating projects on a case-by-case when determining whether to apply a CE. The commenter also reminded the Agencies that complying with NEPA does not satisfy obligations under Section 106. The FRA appreciates the commenter's support of FRA's standard practice. The FRA agrees that complying with NEPA does not automatically satisfy its Section 106 responsibilities. Where possible and appropriate, FRA completes the required Section 106 review, including consultation with appropriate consulting parties, including Tribes, concurrently with its review of the proposed action under NEPA. The FRA does not approve the use of a CE until the Section 106 process is complete.

The Tribal historic preservation office requested that the final rule or any future guidance address post-review discoveries, require project sponsors stop construction work if a potential historic property is discovered, and notify the lead agency, which would then notify other appropriate parties (*e.g.,* State Historic Preservation Officer (SHPO) or Tribal Historic Preservation Officer (THPO)). The FRA does not believe it is appropriate to address the process for post-review discoveries as part of this rulemaking. The Advisory Council for Historic Preservation addresses post-review discoveries in its regulations at 36 CFR 800.13, which FRA follows. However, the steps the commenter identifies in its comment letter are consistent with FRA expectations and practice. For example, for construction projects in areas of known archaeological sensitivity, it is common for FRA to require the project sponsor to develop and implement an Unanticipated Discoveries Plan, which includes stop-work and notification protocols, and measures to secure the discovery. Such plans are developed in consultation with the relevant SHPO or THPO and other Section 106 consulting parties, including Tribes.

The Agencies are modifying § 771.116(c)(7) by changing the term ''action'' to ''activity'' in order to correct an oversight in the SNPRM. This change makes the CE consistent with the FRA's September, 2017 Categorical Exclusion Substantiation, which the Agencies provided for public review in the SNPRM docket.

The Agencies are modifying § 771.116(c)(9) by moving the limitation on the use of the CE (*i.e.,* ''where the maintenance or repair activities do not change the existing character of the facility'') to the beginning of the CE for clarity.

771.117 FHWA Categorical Exclusions and 771.118 FTA Categorical Exclusions

One State DOT recommended reorganizing § 771.117, noting that it has become fragmented and increasingly difficult to implement. In particular, the commenter highlighted difficulty with projects requiring if-then analyses of the CEs at § 771.118(c)(26), (27), and (28), which are conditioned on meeting the requirements in § 771.118(e), but would otherwise fall under § 771.118(d)(13). Finally, the commenter noted that the CE at § 771.118(c)(23) could overlap with a number of other § 771.118(c) and (d) CEs. The FHWA appreciates the comments regarding the organization of § 771.117. The FHWA determined it will consider this change in future rulemaking efforts, where appropriate.

One transit agency, three trade associations, and two State DOTs suggested the current definition of

''operational right-of-way'' in §§ 771.17(c)(22) and 771.118(c)(12) should be more broadly construed. The trade associations highlighted MAP–21 language stating that the CE should apply to any project within an existing right-of-way. One trade association opined that as long as a right-of-way was properly obtained for any purpose, the CE should apply because the environmental review had already been conducted on existing right-of-way. The transit agency noted that the final sentence of the existing definition may at times be unclear. The transit agency opined that though ''disturbance'' or ''maintenance'' of certain rights-of-way has not occurred for many years, those rights-of-way should fall within the operational right-of-way definition. One State DOT noted that the addition of these terms created an additional burden to make distinctions for land within a transportation right-of-way in order to be able to apply the CE.

Two trade associations recommended the Agencies redraft §§ 771.117(c)(22) and 771.118(c)(12) to conform with the definition in Section 1316 of MAP–21 and noted that the addition of the terms *previously disturbed* and *maintained for* have restricted the availability of the CE. Several commenters proposed text for the CE designating all rights-of-way acquired for construction, operation, or mitigation of an existing transportation facility, including the features associated with the physical footprint of the transportation facility, such as the roadway, bridges, interchanges, culverts, drainage, fixed guideways, mitigation areas, clear zone, traffic control signage, landscaping, any rest areas with direct access to a controlled access highway, areas maintained for safety and security of a transportation facility, parking facilities with direct access to an existing transportation facility, transit power substations, transit venting structures, and transit maintenance facilities.

The Agencies agree with the concern in the comments that the definition of operational right-of-way in the regulation is narrower than the definition provided in the statute. As a result, this final rule revises the definition, in both §§ 771.117(c)(22) and 771.118(c)(12), to return to the broad statutory language. The revised definition continues to include examples of features of the right-of-way, which the Agencies edited slightly to be mode-neutral and to recognize that there may be other features that are not enumerated in the regulation. While the revised regulatory text includes a number of illustrative examples of features in the operational right-of-way, the Agencies emphasize the defining sentence of the statute, which is now incorporated in the regulatory text verbatim: Existing operational right-of-way ''means *all* real property interests acquired for the construction, operation, or mitigation of a project'' (emphasis added). The Agencies specially underscore the word ''all.'' As a clarifying example, if title 23 (or certain title 49) funds were authorized for the acquisition of the real property, then that property was acquired for an eligible purpose, which was construction, operation, or mitigation, and thus is part of the operational right-of-way. Real property interests acquired with title 23 funds, or otherwise conveyed for title 23 purposes, are eligible for this categorical exclusion as long as those interests continue to be used in accordance with § 710.403(b). This change expands the applicability of the operational right-of-way CE from the existing regulation and ensures that the Agencies interpret it consistent with the statute.

771.119 Environmental Assessments

One trade association and one public transit agency provided comments in response to FTA's contractor scope of work language in §§ 771.119(a)(2) and 771.123(d). The trade association noted that the Agencies' proposed approach in ensuring a contractor's scope of work not be finalized until the early coordination activities or scoping is completed is well-intended but is likely to be difficult to implement for many agencies due to contracting process. According to the commenter, a transportation agency typically enters into a scope of work for the overall project, including activities supporting early coordination, and to separate these stages into separate and consecutive approvals would require contract amendments or change orders to contracts that may conflict with professional service contract standards. The public transit agency provided similar comments regarding the contractor scope of work proposal. The public transportation agency interprets the provision to mean that transit authorities would not be able to finalize a statement of work for NEPA consultants until FTA has concurred. If FTA does not concur, a transit authority may have to restart its procurement process, which could cause significant delay. The FTA acknowledges the comments, and that the timing of this review could be challenging. The FTA will change ''will'' to ''should'' and otherwise maintain the language as previously proposed. The purpose of adding language regarding finalizing a contractor's scope of work once early coordination or scoping is completed was to place a renewed focus on the accuracy and efficiency of those activities. This will help ensure the scope of the project accurately reflects the scope of work required. The Agencies do not intend or envision this language as a hindrance to contracting practices. Rather, the timing of this approval will improve decision making during the EA's environmental review process, resulting in a sounder environmental document.

For § 771.119(a)(2), one public transit agency sought clarification on how to determine whether the scope of work is finalized. The commenter thought this section of the NPRM would result in multi-stage procurement for consultant services or more difficult and less specific consultant scope, which would potentially require multiple change orders. The Agencies clarify what finalized would typically mean by providing an example. In an ideal scenario for an FTA funded project, the project sponsor would contact FTA during the planning process or prior to project initiation in the environmental review process. The FTA would then work with the project sponsor to determine the appropriate project scope. Once the project scope is determined, a project sponsor would contract with a consultant, if it chooses, to complete activities required for the EA. The FTA would expect that the contractor would be procured, and the scope of activities necessary for the EA would be finalized in a scope of work by the conclusion of early coordination or scoping for the EA.

One trade association requested the Agencies affirmatively state that they do not envision reviewing or approving any consultant's scope of work. The FTA does not envision approving a contractor's scope of work but may review the contractor's proposed scope of work for the EA for compliance with NEPA requirements, consistent with their respective responsibilities for the environmental review process on federally funded projects.

One transit agency sought clarification on § 771.119(a)(3) regarding FRA's conflict of interest disclosure statement requirement. Specifically, the commenter inquired as to whether there will be a template for that disclosure statement provided to applicants, or if the applicants can use a statement they choose. The commenter also noted that this requirement could exacerbate what it views as a trend where contractors focus on engineering work rather than responding to solicitations for planning work. The FRA plans to develop a

template conflict of interest form, which it would make available to applicants on a project-by-project basis. While the Agencies understand that contractors may decide to choose engineering over planning work, the Agencies cannot control the business decisions of private companies. In addition, the conflict of interest disclosure requirement does not necessarily prohibit all post-environmental review work on a project. Applicants with questions about what activities a contractor can engage in after executing a NEPA conflict of interest disclosure should contact FRA or FTA headquarters, as applicable.

One Federal agency submitted an informal comment regarding § 771.119(b). This commenter noted that while § 771.119(d) requires the applicant to send notices of availability for EAs to affected parts of Federal, State, and local governments, § 771.119(b) only requires applicants to complete early consultation with interested agencies. The commenter cited examples of projects where the first opportunity for review was when it received a notice of availability for an EA, which can create permitting complications in certain instances. The commenters recommended modifying § 771.119(b) to mirror § 771.119(d). The Agencies decline to make the recommended change because § 771.119(b) pertains only to the scope of an EA. Scope of work for an EA is addressed in § 771.119(a)(2).

One citizen expressed support for requiring consultation prior to finalizing any EA scope of work in § 771.119(b) and asked whether the proposed revision allows the consultant, acting on behalf of the applicant, to complete the consultation. Consistent with this part, a consultant may act on behalf of an applicant, but the applicant retains full responsibility for the consultant's action.

One regional transportation agency described programmatic approaches as an important streamlining tool. For that reason, the commenter suggested revising § 771.119(b), regarding actions that require an EA, by adding a clear reference to programmatic approaches. The Agencies decline to make the recommended revision. An EA encompasses an evaluation on whether significant impacts may result from the project. As each project may involve different potential impacts, an EA does not readily lend itself to a programmatic approach.

One public transit agency provided a comment expressing concern about the timing of making a document publicly available but did not provide a citation. The Agencies believe this comment was made in regard to the proposed changes in § 771.119(c). The commenter expressed concern that the requirement could convert a parallel document approval process into a sequential one, which could delay projects for those agencies that need authorization from FTA as well as the transit agency board. In the commenter's case, the board approval process is a public process. The commenter requested (1) the final regulatory language acknowledge that the board approval process simultaneously satisfies the prerequisite for public release, and (2) assurance that the public board approval process can be conducted at the same time that the FTA approval process is completed. The Agencies acknowledge that where local approval of an EA is required (*e.g.,* a board action), the local approval process can occur concurrently with the Federal agency review and approval (*e.g.,* FTA's review and approval of an EA before it is posted for public comment). However, consistent with this section, the EA may not be made available to the public until after the Federal agency has approved the EA. Because the proposed changes in § 771.119(c) do not affect that practice, the Agencies will not further revise the language.

One citizen proposed that the encouragement in § 771.111(i)(3) that EAs be posted on the web should be repeated in § 771.119(d). The Agencies appreciate the comment, and accepted the commenter's proposed revisions with modifications.

One citizen proposed clarifying § 771.119(g). The Agencies acknowledge the comment, but because some of the proposed changes may affect the text's meaning, they decline the suggested changes. Additionally, the section is existing regulatory language not affected by MAP–21 or the FAST Act.

771.121 Findings of No Significant Impact

For § 771.121(b), a citizen suggested that the encouragement in § 771.111(i)(4) that FONSIs be posted on the web should be repeated here. The Agencies added a reference to this section. The language is consistent with other paragraphs within 23 CFR part 771.

771.123 Draft Environmental Impact Statements

Regarding § 771.123(b), five State DOTs and a trade association recommended this section expressly recognize Appendix A to 23 CFR part 450 as a means by which planning process products can be adopted or relied upon in the environmental review process and add a reference to Appendix A in this section. The Agencies are accepting the recommended additions. Similar to the accepted revision in § 771.111(a)(2), the revised § 771.123(b) will cite to 23 CFR part 450 Appendix A.

A regional transportation agency proposed a revision to the language in the final sentence of § 771.123(b), to add the feasibility of using a programmatic approach as part of the list of things the scoping process will be used to identify. The Agencies decline to accept the suggested edit because programmatic approaches are not identified in statute as a mandatory requirement.

A Federal agency commenter suggested adding cooperating and participating agency(s) to the end of the first sentence of § 771.123(c) because it believes the intent of 23 U.S.C. 139(c)(6)(C) is that the lead agency consider and respond to comments within a participating or a cooperating agency's special expertise or jurisdiction. The commenter concluded that this is best achieved by ensuring EIS preparation describes participating agency involvement. The Agencies recognize the important role that cooperating and participating agencies have in developing a draft EIS, but decline to make the proposed change, as the draft EIS itself is usually drafted by the lead agency and/or the applicant. Participating and cooperating agency roles, including providing comments on draft documents, are described in § 771.109(c)(7).

A regional transportation agency commented on §§ 771.123(c) and (d) and expressed concern that, when read together, these sections could prevent environmental consultant procurement by a project sponsor or applicant to prepare an EIS. The commenters recommended the Agencies clarify that applicants or project sponsors, aside from the lead agency, can directly contract with environmental consultants to prepare a draft EIS. The Agencies agree that applicants and certain project sponsors can directly contract with environmental consultants to prepare a draft EIS. However, the Agencies disagree that the language should be revised. The sections do not prevent applicants who choose to contract with environmental consultants to prepare a draft EIS from being considered joint lead agencies. However, it is important to note that project sponsors that are private institutions or firms cannot be lead agencies or contract directly with consultants to prepare a draft EIS.

A transit agency sought clarification in § 771.123(d) on whether there will be a uniform conflict of interest statement or a template of such a statement

provided to applicants. There is not a uniform conflict of interest statement that applies to all the Agencies. For FTA projects, there is a conflict of interest statement template for projects requiring an EIS or an EA. The project sponsor should work with the FTA Regional Office to execute the appropriate conflict of interest statement for the project at issue. As discussed in response to the transit agency's comments on § 771.119(a)(3), FRA plans to develop a conflict of interest template. The FHWA does not use a template conflict of interest form. The Agencies are modifying § 771.123(d) to address FRA's conflict of interest disclosure statements for a contractor preparing an EIS. This requirement will mirror FRA's requirements for an EA in § 771.119.

A Federal agency supported the language in § 771.123(e) that provides a comment opportunity on a preferred alternative before issuing a record of decision (ROD) or a combined FEIS/ROD. To provide additional clarity, the commenter suggested adding the phrase ''of the preferred alternative'' to the end of this paragraph. The Agencies agree with the suggestion and accept the proposal.

A transit agency expressed concern with the language in proposed § 771.123(e) that recommends agencies provide the public with an opportunity after issuance of the DEIS to review the impacts, if a preferred alternative is not identified in the DEIS. The commenter stated the proposal creates additional procedural and circulation requirements, and noted the reason for such additional procedural requirements is unclear because impacts for all alternatives, including the preferred alternative, are identified in the DEIS. The commenter suggested keeping the language encouraging identification of a preferred alternative in the DEIS without reference to additional public review and circulation periods beyond what is already required. The Agencies decline to make the suggested change. While the Agencies encourage identifying the preferred alternative in the DEIS, sometimes this is not possible. Regardless, the public should have an opportunity to review an alternative's impacts after its selection as the preferred alternative and before the lead agency makes its decision. This does not create additional requirements as the public review must still occur; consistent with DOT guidance on combined FEIS/ROD documents,[8] the public review can occur as part of the DEIS review (preferred) or as a separate step between the DEIS and FEIS.

A regional transportation agency commented on § 771.123(e) and suggested clarifying that the opportunity to review impacts of a preferred alternative, where the DEIS did not identify any preferred alternative, does not constitute a second comment period on the entire DEIS. Rather, this comment period should be solely for evaluating the impacts of the preferred alternative. In addition, the commenter requested the Agencies limit any comment period to 30 days. Similarly, in regard to § 771.123(e), a citizen asserted that the second sentence is wrong and should be deleted. The commenter noted that other agencies and the public must be given an opportunity to review the impacts presented in the DEIS without regard to whether the DEIS identifies the preferred alternative.

The Agencies are revising § 771.123(e) by adding ''of the preferred alternative'' to the end of the paragraph to clarify that the review pertains to the preferred alternative's impacts. In addition, the Agencies highlight that the statutory default comment period for a preferred alternative issued post-DEIS is 30 days per 23 U.S.C. 139(g)(2)(B). The Agencies agree that other agencies and the public may comment on a DEIS regardless of whether it identifies a preferred alternative, but decline the suggested deletion. To clarify, as drafted, the paragraph's intent is not to describe the DEIS public comment period, but rather, the process for commenting on a preferred alternative identified after publication of the DEIS.

Regarding § 771.123(f), a transit agency sought clarification on whether there would be a specified level of detail that corresponds to some progression beyond 30 percent design and preliminary engineering, and how that specificity should be determined on a project. In addition, a regional transportation agency suggested revising § 771.123(f) to allow for developing a preferred alternative to a higher level of detail to comply with other legal requirements including permitting. The Agencies accept the changes to include the phrase ''with other legal requirements, including permitting'' into the regulation as recommended by the commenters. To address concerns regarding developing a preferred alternative to a higher level of detail, the Agencies will revise § 771.123(f) by adding a footnote referencing the FHWA preliminary design order (FHWA Order 6640.1A).

One citizen commenter suggested that the encouragement to post draft EISs on the web in § 771.111(i)(3) should be repeated at the end of § 771.123(h). A regional transportation agency also recommended that the final regulations recognize opportunities for electronic document transmission and posting documents on a project website, particularly when a statute does not expressly require paper copies. The Agencies accept this recommendation.

A regional transportation agency recommended revising § 771.123(j) by replacing the descriptor of an action as ''proposed for FHWA funding'' and instead suggested referring to this as an Administration action to encompass approvals by the Agencies that are not federally funded. The Agencies decline the recommended change. Under 23 U.S.C. 128, FHWA is required to conduct public hearings, and this specifically applies to State DOTs.

771.124 Final Environmental Impact Statement/Record of Decision Document

A regional transportation agency expressed support for the use of combined FEIS/RODs. It also requested the Agencies provide clarification regarding the circumstances where it is not practicable to use a combined FEIS/ROD, including confirmation that lead agencies can use a combined FEIS/ROD for controversial projects and projects where an EIS evaluates more than one alternative. The Agencies decline any change to regulatory text. Previous guidance has been issued on the use of a combined FEIS/ROD.[9] Forthcoming, updated ''SAFETEA–LU Environmental Review Process Final Guidance'' incorporating the FAST Act changes to 23 U.S.C. 139 will also provide additional guidance on this matter.

In keeping with its comment on § 771.123(c), a Federal agency commenter similarly recommended revising § 771.124(a)(1) to read ''in cooperation with the applicant (if not a lead agency), cooperating and participating agency(s).'' The Agencies decline the suggested change consistent with their response to the same comment under § 771.123(c).

[8] Interim Guidance on MAP–21 Section 1319 Accelerated Decisionmaking in Environmental Reviews, January 14, 2013, available at: *https://www.fhwa.dot.gov/map21/guidance/guideaccdecer.cfm.*

[9] Interim Guidance on MAP–21 Section 1319 Accelerated Decisionmaking in Environmental Reviews, January 14, 2013, available at: *https://www.fhwa.dot.gov/map21/guidance/guideaccdecer.cfm.* Question 17 of the *FAST Act: Questions and Answers on the procedural changes to 23 U.S.C. 139 as they relate to FHWA, FRA & FTA projects guidance,* issued June 2017, available at: *https://www.transit.dot.gov/sites/fta.dot.gov/files/docs/regulations-and-guidance/environmental-programs/61226/fasts1304qsas.pdf.*

A citizen noted the combined FEIS/ROD process makes no provision for pre-decision referrals to CEQ as envisioned by 40 CFR 1504.3 and proposed language to explicitly direct this. The Agencies decline to make the proposed change. Referrals to CEQ would be made at the DEIS stage when the lead agencies anticipate issuing a combined FEIS/ROD. Any additional wait times are not consistent with statutory language.

The Agencies are modifying § 771.124(b) to capture the requirement included in § 771.125(f), but with modifications. The Agencies are requiring that the combined FEIS/ROD be publicly available after filing the document with EPA, but unlike the FEIS section, are not referring to a formal public review because there is no pre-decision waiting period associated with a combined FEIS/ROD.

771.125 Final Environmental Impact Statements

For § 771.125(e) and (f), a citizen asserted that the proposed language regarding publication and public availability of final EISs retains its pre-internet tone and requirements, and ignores the current widespread use of the internet and electronic devices for reading documents. The commenter noted that revisions should encourage use of the internet and electronic devices to facilitate public and interagency availability of the document, but should also acknowledge the need for hardcopy distribution for those without access to the internet and electronic devices or who prefer hard copies. The same comment applies to § 771.124 on combined FEIS/RODs and to § 771.127 on RODs. The Agencies agree with the citizen's suggestion and have included this in §§ 771.125(f) and 771.127(a)

771.127 Record of Decision

A regional transportation agency suggested revising § 771.127(b) to recognize that the Agencies can issue a revised or amended ROD to approve an alternative that was not identified as the preferred alternative when it was fully evaluated in the draft EIS or final EIS. The Agencies recognize that under a combined FEIS/ROD process, the draft EIS will have identified the preferred alternative and other alternatives, allowing for adequate public comment. The Agencies have revised the language in § 771.127(b) to allow for the selection of an alternative fully evaluated in a draft EIS or combined FEIS/ROD in addition to the other conditions described in regulation. A revised or amended ROD can now include the selection of an alternative fully evaluated in the draft EIS or combined FEIS/ROD circumstances.

771.139 Limitations on Actions

One State DOT supported the proposal to amend § 771.139 to reflect the 2-year statute of limitations applicable to railroad projects approved by the FRA, but recommended that it be revised to be tied to project type, as indicated in the statute, rather than by agency alone. A trade association similarly expressed support for amending part 771 to include the statute of limitations period applicable to railroad projects approved by FRA, but recommended editing the rule text to clarify which projects are subject to the 150-day limitations period and which projects are subject to the 2-year limitations period.

Additionally, the trade association opined that the language in 23 U.S.C. 139(*l*) applies to all Federal agency actions for the highway, transit or railroad projects, and that this is not clear from the proposed rule text. The commenter recommended language changes to clarify the applicability of the limitations on claims and proposed additional definitions. The Agencies are revising the language for clarity, but decline to define the terms highway project, transit project, and railroad project. Section 771.139 implements the limitations on claims language from 23 U.S.C. 139(*l*) for approvals or decisions for an Administration action, which may include decisions and approvals issued by other agencies relating to the project. These time periods do not lengthen any shorter time period for seeking judicial review that otherwise is established by the Federal law under which judicial review is allowed.

23 CFR Part 774

General

One trade association supported reducing Section 4(f) requirements for common post-1945 bridge types and historic railroad and rail transit lines. The commenter also acknowledged that steps to preserve portions of historic bridges will be necessary in certain instances, but the majority of bridge improvements in this class will not affect anything of historical significance. The Agencies appreciate the support.

774.11 Applicability

One public transit agency supported expanding § 774.11(i) to provide more direction to applicants regarding adequate documentation, but noted concern that the proposed use of ''government document'' and ''government map'' may invite dispute on what constitutes ''government'' and the extent to which the property-owning jurisdiction's documents qualify. The commenter noted that even though it is a government agency, its documents and maps are not commonly referred to or understood as government maps or government documents, and that the title ''government'' would be reserved for city or county governments. The commenter proposed replacing ''government document'' with ''a document of public record'' and replacing ''government map'' with ''a map of public record.'' The Agencies agreed with the proposed edits and have incorporated changes at § 774.11(i)(1), (i)(1)(i), (i)(2), (i)(2)(i), and (i)(2)(ii).

Section 774.13 Exceptions

One trade association and one State DOT provided comments on the proposed changes to § 774.13. Regarding § 774.13(a)(1), the trade association supported the language proposed, noting that it appropriately reflects the statute's objective.

For § 774.13(a)(2), the trade association commenter supported the text of the proposed rule regarding improvements. In this same section, the State DOT commenter suggested that the term ''railroad or rail transit lines or elements thereof'' be defined in the statute, not just this rulemaking. The trade association commenter supported the broad interpretation the Agencies provide in the preamble for this same term (*i.e.,* including all elements related to the historic or current transportation function such as railroad or rail transit track, elevated support structure, rights-of-way, substations, communication devices and maintenance facilities) but requested that this interpretation be included in the regulatory text. In response to these comments, the Agencies have defined the term *railroad or rail transit line elements* in § 774.17 by providing a non-exclusive list of such elements. The Agencies included bridges and tunnels in the definition because Congress, by excluding certain bridges and tunnels from the FAST Act section 11502 (23 U.S.C. 138(f)/49 U.S.C. 303(h)) exemption, clearly intended that other bridges and tunnels should be considered elements of the railroad or transit line and therefore subject to the exemption (the Agencies incorporated this exclusion from the exception in paragraph (a)(2)(ii)). The Agencies also added railway-highway crossings to the railroad or rail transit line elements definition to clarify, as discussed in the FAST Act SNPRM preamble, the Agencies' intent to include projects for the elimination of

hazards at railway-highway crossings—whether at-grade or grade-separated—within this exception. Such safety projects are funded by FHWA under 23 U.S.C. 130.

The State DOT commenter recommended that the stations referred to in § 774.13(a)(2)(i) be further defined to specify whether it means the building itself or can include other associated elements and facilities. The trade association commenter also requested clarification on the definition of stations, recommending that the term be defined to include the station building and not the associated tracks, yards, electrification and communication infrastructure, or other ancillary facilities. The Agencies are including a definition of a station in § 774.17. The new definition only applies to Section 4(f) analyses and not for other purposes.

Both commenters suggested that the Agencies misinterpreted 49 U.S.C. 303(h) in the proposed regulation regarding exceptions detailed in 49 U.S.C. 303(h)(2). These commenters noted that the proposed language excludes bridges or tunnels on railroad lines that have been abandoned or transit lines not in use, over which regular service has never operated, and that have not been railbanked or otherwise reserved for the transportation of goods or passengers. The commenters stated that the statute uses the term ''or'' rather than ''and'' in this context—implying that the facility is excluded if either condition is met, whereas the proposed text implies that both conditions need to be met in order for the facility to be excluded. The Agencies have determined that the proposed regulatory text accurately reflects the exceptions language in 49 U.S.C. 303(h)(2). The exceptions in 49 U.S.C. 303(h)(2)(a) applies to stations, or bridges or tunnels located on railroad lines that have been abandoned or transit lines not in use. In addition, 49 U.S.C. 303(h)(2)(B) clarifies that the exception in 49 U.S.C. 303(h)(2)(A)(ii) does not apply to all bridges and tunnels, specifically bridges or tunnels located on railroad or transit lines over which service has been discontinued, or that have been railbanked or otherwise reserved for the transportation of goods or passengers. Therefore, for the exception to apply, the bridge or tunnel must meet the requirements in 49 U.S.C. 303(h)(2)(A)(ii) and not be the type of bridge or tunnel detailed in 49 U.S.C. 303(h)(2)(B). Using ''and'' in § 774.13(a)(2)(ii) captures the clarification in 49 U.S.C. 303(h)(2)(B) that the exception does not apply to all bridges and tunnels.

In addition, the State DOT supported expanding the list of activities in § 774.13(a)(3) to mirror the activities included in § 774.13(a)(2). For this same section, the public transit commenter suggested expanding this list to include maintenance, preservation, rehabilitation, operation, modernization, reconstruction, and replacement. The trade association commenter also supported changing the list of activities in this exemption to mirror those in § 774.13(a)(2) because it would provide consistency in the application of the exemption to different types of historic transportation facilities and help to avoid confusion. The Agencies agree with the commenters and revised § 774.13(a)(3) to match the activities found in § 774.13(a)(2).

In response to the Agencies' request in the FAST Act SNPRM, the State DOT commented on whether the two conditions specified in this exemption under § 774.13(a)(3)(i) and (ii) would adequately protect significant historic transportation facilities in the case of projects to operate, modernize, reconstruct or replace the transportation facility. The commenter supported keeping the two existing conditions. The trade association commenter similarly supported these existing conditions and noted that the SHPO concurrence in a no adverse effect finding gives substantial assurance that historic facilities will be protected. Based on that feedback and upon further consideration, the Agencies decided to keep the two conditions and have added new text to allow the Agencies to apply this exemption where an activity is covered by a Section 106 program alternative. Section 774.13(a)(3)(ii) was also revised to accommodate Section 106 program alternatives. These proposed changes create the necessary consistency between § 774.13(a)(3)(i) and (a)(3)(ii) as SHPOs are not always given a role in determining whether an activity is subject to a program alternative. Rather, that determination is appropriately made by the lead agency.

A citizen objected to a phrase used in §§ 774.13(g)(1), 774.15(a), (d) and (f), and 774.17 that the Agencies did not propose changing (*i.e.,* an activity, feature, or attribute that qualifies the property for Section 4(f) protection) on grounds that the phrase is confusing and conflicts with the statute. The commenter did not propose any alternative language. The Agencies reviewed the phrase (as well as substantially similar phrasing found in §§ 774.3(c) and 774.5(b)) and decline to change it in any of the instances because identifying the important activities, features, and attributes of Section 4(f) properties is central to the procedures the Agencies created to implement the statute's preservation mandate. The phrase has been in use for many years and, in the Agencies' experience, it provides clarity, not confusion, to focus on the specific activities, features, and attributes that are to be protected.

49 CFR Part 264

The Agencies are adding an additional citation to the list of authorities and modifying the heading of 49 CFR 264.101. These changes are administrative in nature and address oversights in the FAST Act SNPRM. They do not change the substance of the section.

Rulemaking Analyses and Notices

Statutory/Legal Authority for This Rulemaking

The Agencies derive explicit authority for this rulemaking action from 49 U.S.C. 322(a). The Secretary delegated this authority to prescribe regulations in 49 U.S.C. 322(a) to the Agencies' Administrators under 49 CFR 1.81(a)(3). The Secretary also delegated authority to the Agencies' Administrators to implement NEPA and Section 4(f), the statutes implemented by this rule, in 49 CFR 1.81(a)(4) and (a)(5). Moreover, the CEQ regulations that implement NEPA provide at 40 CFR 1507.3 that Federal agencies shall continue to review their policies and NEPA implementing procedures and revise them as necessary to ensure full compliance with the purposes and provisions of NEPA.

Rulemaking Analyses and Notices

The Agencies considered all comments received before the close of business on the comment closing date indicated above. The comments are available for examination in the docket (FHWA–2015–0011) at *www.regulations.gov.* The Agencies also considered commenters received after the comment closing date to the extent practicable.

Executive Order 12866 (Regulatory Planning and Review), Executive Order 13563 (Improving Regulation and Regulatory Review), Executive Order 13771 (Reducing Regulation and Controlling Regulatory Costs), and DOT Regulatory Policies and Procedures

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and

equity). The Agencies have determined that this action would not be a significant regulatory action under section 3(f) of Executive Order 12866 and would not be significant within the meaning of U.S. Department of Transportation Regulatory Policies and Procedures. Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. This action complies with E.O.s 12866, 13563, and 13771 to improve regulation.

The Agencies determined this rule is not an Executive Order 13771 regulatory action because this rule is not significant under Executive Order 12866. This final rule is considered an Exective Order 13771 deregulatory action. The Agencies expect minor cost savings that cannot be quantified. The Agencies do not have specific data to assess the economic impact of this final rule because such data does not exist and would be difficult to develop. This final rule modifies 23 CFR parts 771 and 774 in order to be consistent with changes introduced by MAP–21 and the FAST Act, to make the regulation more consistent with the FHWA and FTA practices, and to add FRA to parts 771 and 774. The Agencies anticipate that the changes in this final rule would enable projects to move more expeditiously through the Federal environmental review process. It would reduce the preparation of extraneous environmental documentation and analysis not needed for compliance with NEPA or Section 4(f) while still ensuring that projects are built in an environmentally responsible manner and consistent with Federal law.

Regulatory Flexibility Act

In compliance with the Regulatory Flexibility Act (Pub. L. 96–354, 5 U.S.C. 601–612), the Agencies have evaluated the effects of this rule on small entities and anticipate that this action would not have a significant economic impact on a substantial number of small entities. ''Small entities'' include small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations under 50,000. The revisions to 23 CFR parts 771 and 774 are expected to expedite environmental review and thus are anticipated to be less burdensome than any current impact on small business entities.

We hereby certify that this regulatory action would not have a significant economic impact on a substantial number of small entities.

Unfunded Mandates Reform Act of 1995

This final rule would not impose unfunded mandates as defined by the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4, 109 Stat. 48). This final rule will not result in the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector, of $151 million or more in any one year (2 U.S.C. 1532). In addition, the definition of ''Federal mandate'' in the Unfunded Mandates Reform Act excludes financial assistance of the type in which State, local, or Tribal governments have authority to adjust their participation in the program in accordance with changes made in the program by the Federal Government.

Executive Order 13132 (Federalism Assessment)

Executive Order 13132 requires agencies to ensure meaningful and timely input by State and local officials in the development of regulatory policies that may have a substantial, direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. The Agencies analyzed this action in accordance with the principles and criteria contained in Executive Order 13132 and determined that it would not have sufficient federalism implications to warrant the preparation of a federalism assessment. The Agencies have also determined that this final rule would not preempt any State law or State regulation or affect the States' ability to discharge traditional State governmental functions.

Executive Order 13175 (Tribal Consultation)

The Agencies have analyzed this action under Executive Order 13175, and determined that it would not have substantial direct effects on one or more Indian Tribes; would not impose substantial direct compliance costs on Indian Tribal governments; and would not preempt Tribal law. Therefore, a Tribal summary impact statement is not required.

Executive Order 13211 (Energy Effects)

The Agencies have analyzed this action under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. The Agencies have determined that this action is not a significant energy action under Executive Order 13211 because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. Therefore, a Statement of Energy Effects under Executive Order 13211 is not required.

Executive Order 12372 (Intergovernmental Review)

The DOT's regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities (49 CFR part 17) apply to this program. The Agencies solicited comments on this issue with the proposed rulemakings but did not receive any comments pertaining to Executive Order 12372.

Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501, *et seq.*), Federal agencies must obtain approval from the Office of Management and Budget for each collection of information they conduct, sponsor, or require through regulations. The Agencies have determined that this final rule does not contain collection of information requirements for the purposes of the PRA.

Executive Order 12988 (Civil Justice Reform)

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

Executive Order 13045 (Protection of Children)

The Agencies have analyzed this action under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. The Agencies certify that this action would not be an economically significant rule and would not cause an environmental risk to health or safety that may disproportionately affect children.

Executive Order 12630 (Taking of Private Property)

The Agencies do not anticipate that this action would affect a taking of private property or otherwise have taking implications under Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights.

National Environmental Policy Act

Agencies are required to adopt implementing procedures for NEPA that establish specific criteria for, and identification of, three classes of actions: Those that normally require preparation of an EIS; those that normally require preparation of an EA; and those that are categorically

excluded from further NEPA review (40 CFR 1507.3(b)). The CEQ regulations do not direct agencies to prepare a NEPA analysis or document before establishing agency procedures (such as this regulation) that supplement the CEQ regulations for implementing NEPA. The changes in this rule are part of those agency procedures, and therefore establishing the proposed changes does not require preparation of a NEPA analysis or document. Agency NEPA procedures are generally procedural guidance to assist agencies in the fulfillment of agency responsibilities under NEPA, but are not the agency's final determination of what level of NEPA analysis is required for a particular proposed action. The requirements for establishing agency NEPA procedures are set forth at 40 CFR 1505.1 and 1507.3.

Regulation Identifier Number

A regulation identifier number (RIN) is assigned to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. The RIN contained in the heading of this document can be used to cross reference this action with the Unified Agenda.

List of Subjects

23 CFR Part 771

Environmental review process, Environmental protection, Grant programs—transportation, Highways and roads, Historic preservation, Programmatic approaches, Public lands, Railroads, Recreation areas, Reporting and recordkeeping requirements.

23 CFR Part 774

Environmental protection, Grant programs—transportation, Highways and roads, Historic preservation, Public transportation, Public lands, Railroads, Recreation areas, Reporting and recordkeeping requirements, Wildlife Refuges.

49 CFR Part 264

Environmental impact statements, Environmental review process, Environmental protection, Grant programs—transportation, Programmatic approaches, Railroads, Reporting and recordkeeping requirements.

49 CFR Part 622

Environmental impact statements, Environmental review process, Grant programs—transportation, Historic preservation, Programmatic approaches, Public lands, Public transportation, Recreation areas, Reporting and recordkeeping requirements, Transit.

Issued in Washington, DC on October 19, 2018, under authority delegated in 49 CFR 1.85 and 1.91:

Brandye L. Hendrickson,

Deputy Administrator, Federal Highway Administration.

Ronald L. Batory,

Administrator, Federal Railroad Administration.

K. Jane Williams,

Acting Administrator, Federal Transit Administration.

In consideration of the foregoing, the Agencies amend title 23, Code of Federal Regulations parts 771 and 774, and title 49, Code of Federal Regulations parts 264 and 622, as follows:

Title 23—Highways

■ 1. Revise part 771 to read as follows:

PART 771—ENVIRONMENTAL IMPACT AND RELATED PROCEDURES

Sec.

771.101 Purpose.
771.103 [Reserved]
771.105 Policy.
771.107 Definitions.
771.109 Applicability and responsibilities.
771.111 Early coordination, public involvement, and project development.
771.113 Timing of Administration activities.
771.115 Classes of actions.
771.116 FRA categorical exclusions.
771.117 FHWA categorical exclusions.
771.118 FTA categorical exclusions.
771.119 Environmental assessments.
771.121 Findings of no significant impact.
771.123 Draft environmental impact statements.
771.124 Final environmental impact statement/record of decision document.
771.125 Final environmental impact statements.
771.127 Record of decision.
771.129 Re-evaluations.
771.130 Supplemental environmental impact statements.
771.131 Emergency action procedures.
771.133 Compliance with other requirements.
771.137 International actions.
771.139 Limitations on actions.

Authority: 42 U.S.C. 4321 *et seq.;* 23 U.S.C. 106, 109, 128, 138, 139, 315, 325, 326, and 327; 49 U.S.C. 303; 49 U.S.C. 24201; 40 CFR parts 1500–1508; 49 CFR 1.81, 1.85, and 1.91; Pub. L. 109–59, 119 Stat. 1144, Sections 6002 and 6010; Pub. L. 112–141, 126 Stat. 405, Sections 1315, 1316, 1317, 1318, and 1319; and Public Law 114–94, 129 Stat. 1312, Sections 1304 and 1432.

§ 771.101 Purpose.

This part prescribes the policies and procedures of the Federal Highway Administration (FHWA), the Federal Railroad Administration (FRA), and the Federal Transit Administration (FTA) for implementing the National Environmental Policy Act of 1969 as amended (NEPA), and supplements the NEPA regulations of the Council on Environmental Quality (CEQ), 40 CFR parts 1500 through 1508 (CEQ regulations). Together these regulations set forth all FHWA, FRA, FTA, and U.S. Department of Transportation (DOT) requirements under NEPA for the processing of highway, public transportation, and railroad actions. This part also sets forth procedures to comply with 23 U.S.C. 109(h), 128, 138, 139, 325, 326, and 327; 49 U.S.C. 303; 49 U.S.C. 24201; and 5323(q); Public Law 112–141, 126 Stat. 405, section 1301 as applicable; and Public Law 114–94, 129 Stat. 1312, section 1304.

§ 771.103 [Reserved]

§ 771.105 Policy.

It is the policy of the Administration that:

(a) To the maximum extent practicable and consistent with Federal law, all environmental investigations, reviews, and consultations be coordinated as a single process, and compliance with all applicable environmental requirements be reflected in the environmental review document required by this part.[1]

(b) Programmatic approaches be developed for compliance with environmental requirements (including the requirements found at 23 U.S.C. 139(b)(3)), coordination among agencies and/or the public, or to otherwise enhance and accelerate project development.

(c) Alternative courses of action be evaluated and decisions be made in the best overall public interest based upon a balanced consideration of the need for safe and efficient transportation; of the social, economic, and environmental impacts of the proposed transportation improvement; and of national, State, and local environmental protection goals.

(d) Public involvement and a systematic interdisciplinary approach be essential parts of the development process for proposed actions.

(e) Measures necessary to mitigate adverse impacts be incorporated into the action. Measures necessary to mitigate adverse impacts are eligible for Federal funding when the Administration determines that:

[1] FHWA, FRA, and FTA have supplementary guidance on environmental documents and procedures for their programs available on the internet at *http://www.fhwa.dot.gov*, *http://www.fra.dot.gov*, and *http://www.fta.dot.gov*, or in hardcopy by request.

(1) The impacts for which the mitigation is proposed actually result from the Administration action; and

(2) The proposed mitigation represents a reasonable public expenditure after considering the impacts of the action and the benefits of the proposed mitigation measures. In making this determination, the Administration will consider, among other factors, the extent to which the proposed measures would assist in complying with a Federal statute, executive order, or Administration regulation or policy.

(f) Costs incurred by the applicant for the preparation of environmental documents requested by the Administration be eligible for Federal assistance.

(g) No person, because of handicap, age, race, color, sex, or national origin, be excluded from participating in, or denied benefits of, or be subject to discrimination under any Administration program or procedural activity required by or developed pursuant to this part.

§ 771.107 Definitions.

The definitions contained in the CEQ regulations and in titles 23 and 49 of the United States Code are applicable. In addition, the following definitions apply to this part.

Action. A highway, transit, or railroad project proposed for U.S. DOT funding. It also can include activities such as joint and multiple use permits, changes in access control, or rulemakings, which may or may not involve a commitment of Federal funds.

Administration. The FHWA, FRA, or FTA, whichever is the designated Federal lead agency for the proposed action. A reference herein to the Administration means the FHWA, FRA, or FTA, or a State when the State is functioning as the FHWA, FRA, or FTA in carrying out responsibilities delegated or assigned to the State in accordance with 23 U.S.C. 325, 326, or 327, or other applicable law. A reference herein to the FHWA, FRA, or FTA means the State when the State is functioning as the FHWA, FRA, or FTA respectively in carrying out responsibilities delegated or assigned to the State in accordance with 23 U.S.C. 325, 326, or 327, or other applicable law. Nothing in this definition alters the scope of any delegation or assignment made by FHWA, FRA, or FTA.

Administration action. FHWA, FRA, or FTA approval of the applicant's request for Federal funds for construction. It also can include approval of activities, such as joint and multiple use permits, changes in access control, rulemakings, etc., that may or may not involve a commitment of Federal funds.

Applicant. Any Federal, State, local, or federally recognized Indian Tribal governmental unit that requests funding approval or other action by the Administration and that the Administration works with to conduct environmental studies and prepare environmental review documents. When another Federal agency, or the Administration itself, is implementing the action, then the lead agencies (as defined in this section) may assume the responsibilities of the applicant in this part. If there is no applicant, then the Federal lead agency will assume the responsibilities of the applicant in this part.

Environmental studies. The investigations of potential environmental impacts to determine the environmental process to be followed and to assist in the preparation of the environmental document.

Lead agencies. The Administration and any other agency designated to serve as a joint lead agency with the Administration under 23 U.S.C. 139(c)(3) or under the CEQ regulations.

Participating agency. A Federal, State, local, or federally recognized Indian Tribal governmental unit that may have an interest in the proposed project and has accepted an invitation to be a participating agency or, in the case of a Federal agency, has not declined the invitation in accordance with 23 U.S.C. 139(d)(3).

Programmatic approaches. An approach that reduces the need for project-by-project reviews, eliminates repetitive discussion of the same issue, or focuses on the actual issues ripe for analyses at each level of review, consistent with NEPA and other applicable law.

Project sponsor. The Federal, State, local, or federally recognized Indian Tribal governmental unit, or other entity, including any private or public-private entity that seeks Federal funding or an Administration action for a project. Where it is not the applicant, the project sponsor may conduct some of the activities on the applicant's behalf.

Section 4(f). Refers to 49 U.S.C. 303 and 23 U.S.C. 138 (as implemented by 23 CFR part 774).

§ 771.109 Applicability and responsibilities.

(a)(1) The provisions of this part and the CEQ regulations apply to actions where the Administration exercises sufficient control to condition the permit, project, or other approvals. Steps taken by the applicant that do not require Federal approvals, such as preparation of a regional transportation plan, are not subject to this part.

(2) This part does not apply to or alter approvals by the Administration made prior to November 28, 2018.

(3) For FHWA and FTA, environmental documents accepted or prepared after November 28, 2018 must be developed in accordance with this part.

(4) FRA will apply this part to actions initiated after November 28, 2018.

(b)(1) The project sponsor, in cooperation with the Administration, is responsible for implementing those mitigation measures stated as commitments in the environmental documents prepared pursuant to this part unless the Administration approves of their deletion or modification in writing. The FHWA will ensure that this is accomplished as a part of its stewardship and oversight responsibilities. The FRA and FTA will ensure implementation of committed mitigation measures through incorporation by reference in the grant agreement, followed by reviews of designs and construction inspections.

(2) When entering into Federal-aid project agreements pursuant to 23 U.S.C. 106, FHWA must ensure that the State highway agency constructs the project in accordance with and incorporates all committed environmental impact mitigation measures listed in approved environmental review documents.

(c) The following roles and responsibilities apply during the environmental review process:

(1) The lead agencies are responsible for managing the environmental review process and the preparation of the appropriate environmental review documents.

(2) Any State or local governmental entity applicant that is or is expected to be a direct recipient of funds under title 23, U.S. Code or chapter 53 of title 49, U.S. Code for the action, or is or is expected to be a direct recipient of financial assistance for which FRA is responsible (*e.g.,* Subtitle V of Title 49, U.S. Code) must serve as a joint lead agency with the Administration in accordance with 23 U.S.C. 139, and may prepare environmental review documents if the Administration furnishes guidance and independently evaluates the documents.

(3) The Administration may invite other Federal, State, local, or federally recognized Indian Tribal governmental units to serve as joint lead agencies in accordance with the CEQ regulations. If the applicant is serving as a joint lead

agency under 23 U.S.C. 139(c)(3), then the Administration and the applicant will decide jointly which other agencies to invite to serve as joint lead agencies.

(4) When the applicant seeks an Administration action other than the approval of funds, the Administration will determine the role of the applicant in accordance with the CEQ regulations and 23 U.S.C. 139.

(5) Regardless of its role under paragraphs (c)(2) through (c)(4) of this section, a public agency that has statewide jurisdiction (for example, a State highway agency or a State department of transportation) or a local unit of government acting through a statewide agency, that meets the requirements of section 102(2)(D) of NEPA, may prepare the EIS and other environmental review documents with the Administration furnishing guidance, participating in the preparation, and independently evaluating the document. All FHWA applicants qualify under this paragraph.

(6) Subject to paragraph (e) of this section, the role of a project sponsor that is a private institution or firm is limited to providing technical studies and commenting on environmental review documents.

(7) A participating agency must provide input during the times specified in the coordination plan under 23 U.S.C. 139(g) and within the agency's special expertise or jurisdiction. Participating agencies provide comments and concurrence on the schedule within the coordination plan.

(d) When entering into Federal-aid project agreements pursuant to 23 U.S.C. 106, the State highway agency must ensure that the project is constructed in accordance with and incorporates all committed environmental impact mitigation measures listed in approved environmental review documents unless the State requests and receives written FHWA approval to modify or delete such mitigation features.

(e) When FRA is the lead Federal agency, the project sponsor is a private entity, and there is no applicant acting as a joint-lead agency, FRA and the project sponsor may agree to use a qualified third-party contractor to prepare an EIS. Under this arrangement, a project sponsor retains a contractor to assist FRA in conducting the environmental review. FRA selects, oversees, and directs the preparation of the EIS and retains ultimate control over the contractor's work. To enter into a third-party contract, FRA, the project sponsor, and the contractor will enter into a memorandum of understanding (MOU) that outlines at a minimum the conditions and procedures to be followed in carrying out the MOU and the responsibilities of the parties to the MOU. FRA may require use of a third-party contractor for preparation of an EA at its discretion.

§ 771.111 Early coordination, public involvement, and project development.

(a)(1) Early coordination with appropriate agencies and the public aids in determining the type of environmental review documents an action requires, the scope of the document, the level of analysis, and related environmental requirements. These activities contribute to reducing or eliminating delay, duplicative processes, and conflict, including by incorporating planning outcomes that have been reviewed by agencies and Indian Tribal partners in project development.

(2)(i) The information and results produced by or in support of the transportation planning process may be incorporated into environmental review documents in accordance with 40 CFR parts 1500 through 1508, 23 CFR part 450, 23 CFR part 450 Appendix A, or 23 U.S.C. 139(f), 168, or 169, as applicable.

(ii) The planning process described in paragraph (a)(2)(i) of this section may include mitigation actions consistent with a programmatic mitigation plan developed pursuant to 23 U.S.C. 169 or from a programmatic mitigation plan developed outside of that framework.

(3) Applicants intending to apply for funds or request Administration action should notify the Administration at the time that a project concept is identified. When requested, the Administration will advise the applicant, insofar as possible, of the probable class of action (see § 771.115) and related environmental laws and requirements and of the need for specific studies and findings that would normally be developed during the environmental review process. A lead agency, in consultation with participating agencies, must develop an environmental checklist, as appropriate, to assist in resource and agency identification.

(b)(1) The Administration will identify the probable class of action as soon as sufficient information is available to identify the probable impacts of the action.

(2) For projects to be evaluated with an EIS, the Administration must respond in writing to a project sponsor's formal project notification within 45 days of receipt.

(c) When the FHWA, FRA, or FTA are jointly involved in the development of an action, or when the FHWA, FRA, or FTA act as a joint lead agency with another Federal agency, a mutually acceptable process will be established on a case-by-case basis. A project sponsor may request the Secretary to designate the lead Federal agency when project elements fall within the expertise of multiple U.S. DOT agencies.

(d) During early coordination, the lead agencies may invite other agencies that may have an interest in the action to participate. The lead agencies must, however, invite such agencies if the action is subject to the project development procedures in 23 U.S.C. 139 within 45 days from publication of the notice of intent.[2] Any such agencies with special expertise concerning the action may also be invited to become cooperating agencies. Any such agencies with jurisdiction by law concerning the action must be invited to become cooperating agencies.

(e) Other States and Federal land management entities that may be significantly affected by the action or by any of the alternatives must be notified early and their views solicited by the applicant in cooperation with the Administration. The Administration will provide direction to the applicant on how to approach any significant unresolved issues as early as possible during the environmental review process.

(f) Any action evaluated under NEPA as a categorical exclusion (CE), environmental assessment (EA), or environmental impact statement (EIS) must:

(1) Connect logical termini and be of sufficient length to address environmental matters on a broad scope;

(2) Have independent utility or independent significance, *i.e.,* be usable and be a reasonable expenditure even if no additional transportation improvements in the area are made; and

(3) Not restrict consideration of alternatives for other reasonably foreseeable transportation improvements.

(g) For major transportation actions, the tiering of EISs as discussed in the CEQ regulation (40 CFR 1502.20) may be appropriate. The first tier EIS would focus on broad issues such as general location, mode choice, and areawide air quality and land use implications of the major alternatives. The second tier would address site-specific details on project impacts, costs, and mitigation measures.

(h) For the Federal-aid highway program:

[2] The Administration has guidance on 23 U.S.C. 139 available at *http://www.fhwa.dot.gov* or in hard copy upon request.

(1) Each State must have procedures approved by the FHWA to carry out a public involvement/public hearing program pursuant to 23 U.S.C. 128 and 139 and CEQ regulations.

(2) State public involvement/public hearing procedures must provide for:

(i) Coordination of public involvement activities and public hearings with the entire NEPA process;

(ii) Early and continuing opportunities during project development for the public to be involved in the identification of social, economic, and environmental impacts, as well as impacts associated with relocation of individuals, groups, or institutions;

(iii) One or more public hearings or the opportunity for hearing(s) to be held by the State highway agency at a convenient time and place for any Federal-aid project that requires significant amounts of right-of-way, substantially changes the layout or functions of connecting roadways or of the facility being improved, has a substantial adverse impact on abutting property, otherwise has a significant social, economic, environmental or other effect, or for which the FHWA determines that a public hearing is in the public interest;

(iv) Reasonable notice to the public of either a public hearing or the opportunity for a public hearing. Such notice will indicate the availability of explanatory information. The notice must also provide information required to comply with public involvement requirements of other laws, executive orders, and regulations;

(v) Explanation at the public hearing of the following information, as appropriate:

(A) The project's purpose, need, and consistency with the goals and objectives of any local urban planning,

(B) The project's alternatives and major design features,

(C) The social, economic, environmental, and other impacts of the project,

(D) The relocation assistance program and the right-of-way acquisition process, and

(E) The State highway agency's procedures for receiving both oral and written statements from the public;

(vi) Submission to the FHWA of a transcript of each public hearing and a certification that a required hearing or hearing opportunity was offered. The transcript will be accompanied by copies of all written statements from the public, both submitted at the public hearing or during an announced period after the public hearing;

(vii) An opportunity for public involvement in defining the purpose and need and the range of alternatives, for any action subject to the project development procedures in 23 U.S.C. 139; and

(viii) Public notice and an opportunity for public review and comment on a Section 4(f) *de minimis* impact finding, in accordance with 23 CFR 774.5(b)(2)(i).

(i) Applicants for FRA programs or the FTA capital assistance program:

(1) Achieve public participation on proposed actions through activities that engage the public, including public hearings, town meetings, and charrettes, and seek input from the public through scoping for the environmental review process. Project milestones may be announced to the public using electronic or paper media (*e.g.,* newsletters, note cards, or emails) pursuant to 40 CFR 1506.6. For actions requiring EISs, an early opportunity for public involvement in defining the purpose and need for the action and the range of alternatives must be provided, and a public hearing will be held during the circulation period of the draft EIS.

(2) May participate in early scoping as long as enough project information is known so the public and other agencies can participate effectively. Early scoping constitutes initiation of NEPA scoping while local planning efforts to aid in establishing the purpose and need and in evaluating alternatives and impacts are underway. Notice of early scoping must be made to the public and other agencies. If early scoping is the start of the NEPA process, the early scoping notice must include language to that effect. After development of the proposed action at the conclusion of early scoping, FRA or FTA will publish the notice of intent if it is determined at that time that the proposed action requires an EIS. The notice of intent will establish a 30-day period for comments on the purpose and need, alternatives, and the scope of the NEPA analysis.

(3) Are encouraged to post and distribute materials related to the environmental review process, including, environmental documents (*e.g.,* EAs and EISs), environmental studies (*e.g.,* technical reports), public meeting announcements, and meeting minutes, through publicly-accessible electronic means, including project websites. Applicants should keep these materials available to the public electronically until the project is constructed and open for operations.

(4) Should post all findings of no significant impact (FONSIs), combined final environmental impact statements (final EISs)/records of decision (RODs), and RODs on a project website until the project is constructed and open for operation.

(j) Information on the FHWA environmental process may be obtained from: FHWA Director, Office of Project Development and Environmental Review, Federal Highway Administration, Washington, DC 20590, or *www.fhwa.dot.gov.* Information on the FRA environmental process may be obtained from: FRA Chief, Environmental and Corridor Planning Division, Office of Program Delivery, Federal Railroad Administration, Washington, DC 20590, or *www.fra.dot.gov.* Information on the FTA environmental process may be obtained from: FTA Director, Office of Environmental Programs, Federal Transit Administration, Washington, DC 20590 or *www.fta.dot.gov.*

§ 771.113 Timing of Administration activities.

(a) The lead agencies, in cooperation with the applicant and project sponsor, as appropriate, will perform the work necessary to complete the environmental review process. This work includes drafting environmental documents and completing environmental studies, related engineering studies, agency coordination, public involvement, and identification of mitigation measures. Except as otherwise provided in law or in paragraph (d) of this section, final design activities, property acquisition, purchase of construction materials or rolling stock, or project construction must not proceed until the following have been completed:

(1)(i) The Administration has classified the action as a CE;

(ii) The Administration has issued a FONSI; or

(iii) The Administration has issued a combined final EIS/ROD or a final EIS and ROD;

(2) For actions proposed for FHWA funding, the Administration has received and accepted the certifications and any required public hearing transcripts required by 23 U.S.C. 128;

(3) For activities proposed for FHWA funding, the programming requirements of 23 CFR part 450, subpart B, and 23 CFR part 630, subpart A, have been met.

(b) For FHWA actions, completion of the requirements set forth in paragraphs (a)(1) and (2) of this section is considered acceptance of the general project location and concepts described in the environmental review documents unless otherwise specified by the approving official.

(c) Letters of Intent issued under the authority of 49 U.S.C. 5309(g) are used

by FTA to indicate an intention to obligate future funds for multi-year capital transit projects. Letters of Intent will not be issued by FTA until the NEPA process is completed.

(d) The prohibition in paragraph (a)(1) of this section is limited by the following exceptions:

(1) Early acquisition, hardship and protective acquisitions of real property in accordance with 23 CFR part 710, subpart E for FHWA. Exceptions for the acquisitions of real property are addressed in paragraphs (c)(6) and (d)(3) of § 771.118 for FTA.

(2) The early acquisition of right-of-way for future transit use in accordance with 49 U.S.C. 5323(q) and FTA guidance.

(3) A limited exception for rolling stock is provided in 49 U.S.C. 5309(l)(6).

(4) FRA may make exceptions on a case-by-case basis for purchases of railroad components or materials that can be used for other projects or resold.

§ 771.115 Classes of actions.

There are three classes of actions that prescribe the level of documentation required in the NEPA process. A programmatic approach may be used for any class of action.

(a) *EIS (Class I).* Actions that significantly affect the environment require an EIS (40 CFR 1508.27). The following are examples of actions that normally require an EIS:

(1) A new controlled access freeway.

(2) A highway project of four or more lanes on a new location.

(3) Construction or extension of a fixed transit facility (*e.g.,* rapid rail, light rail, commuter rail, bus rapid transit) that will not be located primarily within an existing transportation right-of-way.

(4) New construction or extension of a separate roadway for buses or high occupancy vehicles not located within an existing transportation right-of-way.

(5) New construction or extension of a separate roadway for buses not located primarily within an existing transportation right-of-way.

(6) New construction of major railroad lines or facilities (*e.g.,* terminal passenger stations, freight transfer yards, or railroad equipment maintenance facilities) that will not be located within an existing transportation right-of-way.

(b) *CE (Class II).* Actions that do not individually or cumulatively have a significant environmental effect are excluded from the requirement to prepare an EA or EIS. A specific list of CEs normally not requiring NEPA documentation is set forth in § 771.117(c) for FHWA actions or pursuant to § 771.118(c) for FTA actions. When appropriately documented, additional projects may also qualify as CEs pursuant to § 771.117(d) for FHWA actions or pursuant to § 771.118(d) for FTA actions. FRA's CEs are listed in § 771.116.

(c) *EA (Class III).* Actions for which the Administration has not clearly established the significance of the environmental impact. All actions that are not EISs or CEs are EAs. All actions in this class require the preparation of an EA to determine the appropriate environmental document required.

§ 771.116 FRA categorical exclusions.

(a) CEs are actions that meet the definition contained in 40 CFR 1508.4, and, based on FRA's past experience with similar actions, do not involve significant environmental impacts. They are actions that do not induce significant impacts to planned growth or land use for the area; do not require the relocation of significant numbers of people; do not have a significant impact on any natural, cultural, recreational, historic or other resource; do not involve significant air, noise, or water quality impacts; do not have significant impacts on travel patterns; or do not otherwise, either individually or cumulatively, have any significant environmental impacts.

(b) Any action that normally would be classified as a CE but could involve unusual circumstances will require FRA, in cooperation with the applicant, to conduct appropriate environmental studies to determine if the CE classification is proper. Such unusual circumstances include:

(1) Significant environmental impacts;

(2) Substantial controversy on environmental grounds;

(3) Significant impact on properties protected by Section 4(f) requirements or Section 106 of the National Historic Preservation Act; or

(4) Inconsistencies with any Federal, State, or local law, requirement or administrative determination relating to the environmental aspects of the action.

(c) Actions that FRA determines fall within the following categories of FRA CEs and that meet the criteria for CEs in the CEQ regulation (40 CFR 1508.4) and paragraph (a) of this section may be designated as CEs only after FRA approval. FRA may request the applicant or project sponsor submit documentation to demonstrate that the specific conditions or criteria for these CEs are satisfied and that significant environmental effects will not result.

(1) Administrative procurements (*e.g.,* for general supplies) and contracts for personal services, and training.

(2) Personnel actions.

(3) Planning or design activities that do not commit to a particular course of action affecting the environment.

(4) Localized geotechnical and other investigations to provide information for preliminary design and for environmental analyses and permitting purposes, such as drilling test bores for soil sampling; archeological investigations for archeology resources assessment or similar survey; and wetland surveys.

(5) Internal orders, policies, and procedures not required to be published in the **Federal Register** under the Administrative Procedure Act, 5 U.S.C. 552(a)(1).

(6) Rulemakings issued under section 17 of the Noise Control Act of 1972, 42 U.S.C. 4916.

(7) Financial assistance to an applicant where the financial assistance funds an activity that is already completed, such as refinancing outstanding debt.

(8) Hearings, meetings, or public affairs activities.

(9) Maintenance or repair of existing railroad facilities, where such activities do not change the existing character of the facility, including equipment; track and bridge structures; electrification, communication, signaling, or security facilities; stations; tunnels; maintenance-of-way and maintenance-of-equipment bases.

(10) Emergency repair or replacement, including reconstruction, restoration, or retrofitting, of an essential rail facility damaged by the occurrence of a natural disaster or catastrophic failure. Such repair or replacement may include upgrades to meet existing codes and standards as well as upgrades warranted to address conditions that have changed since the rail facility's original construction.

(11) Operating assistance to a railroad to continue existing service or to increase service to meet demand, where the assistance will not significantly alter the traffic density characteristics of existing rail service.

(12) Minor rail line additions, including construction of side tracks, passing tracks, crossovers, short connections between existing rail lines, and new tracks within existing rail yards or right-of-way, provided that such additions are not inconsistent with existing zoning, do not involve acquisition of a significant amount of right-of-way, and do not significantly alter the traffic density characteristics of the existing rail lines or rail facilities.

(13) Acquisition or transfer of real property or existing railroad facilities, including track and bridge structures; electrification, communication, signaling or security facilities; stations; and maintenance of way and maintenance of equipment bases or the right to use such real property and railroad facilities, for the purpose of conducting operations of a nature and at a level of use similar to those presently or previously existing on the subject properties or facilities.

(14) Research, development, or demonstration activities on existing railroad lines or facilities, such as advances in signal communication or train control systems, equipment, or track, provided that such activities do not require the acquisition of a significant amount of right-of-way and do not significantly alter the traffic density characteristics of the existing rail line or facility.

(15) Promulgation of rules, the issuance of policy statements, the waiver or modification of existing regulatory requirements, or discretionary approvals that do not result in significantly increased emissions of air or water pollutants or noise.

(16) Alterations to existing facilities, locomotives, stations, and rail cars in order to make them accessible for the elderly and persons with disabilities, such as modifying doorways, adding or modifying lifts, constructing access ramps and railings, modifying restrooms, and constructing accessible platforms.

(17) The rehabilitation, reconstruction or replacement of bridges, the rehabilitation or maintenance of the rail elements of docks or piers for the purposes of intermodal transfers, and the construction of bridges, culverts, or grade separation projects that are predominantly within existing right-of-way and that do not involve extensive in-water construction activities, such as projects replacing bridge components including stringers, caps, piles, or decks, the construction of roadway overpasses to replace at-grade crossings, construction or reconstruction of approaches or embankments to bridges, or construction or replacement of short span bridges.

(18) Acquisition (including purchase or lease), rehabilitation, transfer, or maintenance of vehicles or equipment, including locomotives, passenger coachers, freight cars, trainsets, and construction, maintenance or inspection equipment, that does not significantly alter the traffic density characteristics of an existing rail line.

(19) Installation, repair and replacement of equipment and small structures designed to promote transportation safety, security, accessibility, communication or operational efficiency that take place predominantly within the existing right-of-way and do not result in a major change in traffic density on the existing rail line or facility, such as the installation, repair or replacement of surface treatments or pavement markings, small passenger shelters, passenger amenities, benches, signage, sidewalks or trails, equipment enclosures, and fencing, railroad warning devices, train control systems, signalization, electric traction equipment and structures, electronics, photonics, and communications systems and equipment, equipment mounts, towers and structures, information processing equipment, and security equipment, including surveillance and detection cameras.

(20) Environmental restoration, remediation, pollution prevention, and mitigation activities conducted in conformance with applicable laws, regulations and permit requirements, including activities such as noise mitigation, landscaping, natural resource management activities, replacement or improvement to storm water oil/water separators, installation of pollution containment systems, slope stabilization, and contaminated soil removal or remediation activities.

(21) Assembly or construction of facilities or stations that are consistent with existing land use and zoning requirements, do not result in a major change in traffic density on existing rail or highway facilities, and result in approximately less than ten acres of surface disturbance, such as storage and maintenance facilities, freight or passenger loading and unloading facilities or stations, parking facilities, passenger platforms, canopies, shelters, pedestrian overpasses or underpasses, paving, or landscaping.

(22) Track and track structure maintenance and improvements when carried out predominantly within the existing right-of-way that do not cause a substantial increase in rail traffic beyond existing or historic levels, such as stabilizing embankments, installing or reinstalling track, re-grading, replacing rail, ties, slabs and ballast, installing, maintaining, or restoring drainage ditches, cleaning ballast, constructing minor curve realignments, improving or replacing interlockings, and the installation or maintenance of ancillary equipment.

(d) Any action qualifying as a CE under § 771.117 or § 771.118 may be approved by FRA when the applicable requirements of those sections have been met. FRA may consult with FHWA or FTA to ensure the CE is applicable to the proposed action.

§ 771.117 FHWA categorical exclusions.

(a) CEs are actions that meet the definition contained in 40 CFR 1508.4, and, based on FHWA's past experience with similar actions, do not involve significant environmental impacts. They are actions that: Do not induce significant impacts to planned growth or land use for the area; do not require the relocation of significant numbers of people; do not have a significant impact on any natural, cultural, recreational, historic or other resource; do not involve significant air, noise, or water quality impacts; do not have significant impacts on travel patterns; or do not otherwise, either individually or cumulatively, have any significant environmental impacts.

(b) Any action that normally would be classified as a CE but could involve unusual circumstances will require the FHWA, in cooperation with the applicant, to conduct appropriate environmental studies to determine if the CE classification is proper. Such unusual circumstances include:

(1) Significant environmental impacts;

(2) Substantial controversy on environmental grounds;

(3) Significant impact on properties protected by Section 4(f) requirements or Section 106 of the National Historic Preservation Act; or

(4) Inconsistencies with any Federal, State, or local law, requirement or administrative determination relating to the environmental aspects of the action.

(c) The following actions meet the criteria for CEs in the CEQ regulations (40 CFR 1508.4) and paragraph (a) of this section and normally do not require any further NEPA approvals by the FHWA:

(1) Activities that do not involve or lead directly to construction, such as planning and research activities; grants for training; engineering to define the elements of a proposed action or alternatives so that social, economic, and environmental effects can be assessed; and Federal-aid system revisions that establish classes of highways on the Federal-aid highway system.

(2) Approval of utility installations along or across a transportation facility.

(3) Construction of bicycle and pedestrian lanes, paths, and facilities.

(4) Activities included in the State's highway safety plan under 23 U.S.C. 402.

(5) Transfer of Federal lands pursuant to 23 U.S.C. 107(d) and/or 23 U.S.C. 317 when the land transfer is in support of an action that is not otherwise subject to FHWA review under NEPA.

(6) The installation of noise barriers or alterations to existing publicly owned buildings to provide for noise reduction.

(7) Landscaping.

(8) Installation of fencing, signs, pavement markings, small passenger shelters, traffic signals, and railroad warning devices where no substantial land acquisition or traffic disruption will occur.

(9) The following actions for transportation facilities damaged by an incident resulting in an emergency declared by the Governor of the State and concurred in by the Secretary, or a disaster or emergency declared by the President pursuant to the Robert T. Stafford Act (42 U.S.C. 5121):

(i) Emergency repairs under 23 U.S.C. 125; and

(ii) The repair, reconstruction, restoration, retrofitting, or replacement of any road, highway, bridge, tunnel, or transit facility (such as a ferry dock or bus transfer station), including ancillary transportation facilities (such as pedestrian/bicycle paths and bike lanes), that is in operation or under construction when damaged and the action:

(A) Occurs within the existing right-of-way and in a manner that substantially conforms to the preexisting design, function, and location as the original (which may include upgrades to meet existing codes and standards as well as upgrades warranted to address conditions that have changed since the original construction); and

(B) Is commenced within a 2-year period beginning on the date of the declaration.

(10) Acquisition of scenic easements.

(11) Determination of payback under 23 U.S.C. 156 for property previously acquired with Federal-aid participation.

(12) Improvements to existing rest areas and truck weigh stations.

(13) Ridesharing activities.

(14) Bus and rail car rehabilitation.

(15) Alterations to facilities or vehicles in order to make them accessible for elderly and handicapped persons.

(16) Program administration, technical assistance activities, and operating assistance to transit authorities to continue existing service or increase service to meet routine changes in demand.

(17) The purchase of vehicles by the applicant where the use of these vehicles can be accommodated by existing facilities or by new facilities that themselves are within a CE.

(18) Track and railbed maintenance and improvements when carried out within the existing right-of-way.

(19) Purchase and installation of operating or maintenance equipment to be located within the transit facility and with no significant impacts off the site.

(20) Promulgation of rules, regulations, and directives.

(21) Deployment of electronics, photonics, communications, or information processing used singly or in combination, or as components of a fully integrated system, to improve the efficiency or safety of a surface transportation system or to enhance security or passenger convenience. Examples include, but are not limited to, traffic control and detector devices, lane management systems, electronic payment equipment, automatic vehicle locaters, automated passenger counters, computer-aided dispatching systems, radio communications systems, dynamic message signs, and security equipment including surveillance and detection cameras on roadways and in transit facilities and on buses.

(22) Projects, as defined in 23 U.S.C. 101, that would take place entirely within the existing operational right-of-way. Existing operational right-of-way means all real property interests acquired for the construction, operation, or mitigation of a project. This area includes the features associated with the physical footprint of the project including but not limited to the roadway, bridges, interchanges, culverts, drainage, clear zone, traffic control signage, landscaping, and any rest areas with direct access to a controlled access highway. This also includes fixed guideways, mitigation areas, areas maintained or used for safety and security of a transportation facility, parking facilities with direct access to an existing transportation facility, transportation power substations, transportation venting structures, and transportation maintenance facilities.

(23) Federally funded projects:

(i) That receive less than $5,000,000 (as adjusted annually by the Secretary to reflect any increases in the Consumer Price Index prepared by the Department of Labor, see *www.fhwa.dot.gov* or *www.fta.dot.gov*) of Federal funds; or

(ii) With a total estimated cost of not more than $30,000,000 (as adjusted annually by the Secretary to reflect any increases in the Consumer Price Index prepared by the Department of Labor, see *www.fhwa.dot.gov* or *www.fta.dot.gov*) and Federal funds comprising less than 15 percent of the total estimated project cost.

(24) Localized geotechnical and other investigation to provide information for preliminary design and for environmental analyses and permitting purposes, such as drilling test bores for soil sampling; archeological investigations for archeology resources assessment or similar survey; and wetland surveys.

(25) Environmental restoration and pollution abatement actions to minimize or mitigate the impacts of any existing transportation facility (including retrofitting and construction of stormwater treatment systems to meet Federal and State requirements under sections 401 and 402 of the Federal Water Pollution Control Act (33 U.S.C. 1341; 1342)) carried out to address water pollution or environmental degradation.

(26) Modernization of a highway by resurfacing, restoration, rehabilitation, reconstruction, adding shoulders, or adding auxiliary lanes (including parking, weaving, turning, and climbing lanes), if the action meets the constraints in paragraph (e) of this section.

(27) Highway safety or traffic operations improvement projects, including the installation of ramp metering control devices and lighting, if the project meets the constraints in paragraph (e) of this section.

(28) Bridge rehabilitation, reconstruction, or replacement or the construction of grade separation to replace existing at-grade railroad crossings, if the actions meet the constraints in paragraph (e) of this section.

(29) Purchase, construction, replacement, or rehabilitation of ferry vessels (including improvements to ferry vessel safety, navigation, and security systems) that would not require a change in the function of the ferry terminals and can be accommodated by existing facilities or by new facilities that themselves are within a CE.

(30) Rehabilitation or reconstruction of existing ferry facilities that occupy substantially the same geographic footprint, do not result in a change in their functional use, and do not result in a substantial increase in the existing facility's capacity. Example actions include work on pedestrian and vehicle transfer structures and associated utilities, buildings, and terminals.

(d) Additional actions that meet the criteria for a CE in the CEQ regulations (40 CFR 1508.4) and paragraph (a) of this section may be designated as CEs only after Administration approval unless otherwise authorized under an

executed agreement pursuant to paragraph (g) of this section. The applicant must submit documentation that demonstrates that the specific conditions or criteria for these CEs are satisfied, and that significant environmental effects will not result. Examples of such actions include but are not limited to:

(1)–(3) [Reserved]

(4) Transportation corridor fringe parking facilities.

(5) Construction of new truck weigh stations or rest areas.

(6) Approvals for disposal of excess right-of-way or for joint or limited use of right-of-way, where the proposed use does not have significant adverse impacts.

(7) Approvals for changes in access control.

(8) Construction of new bus storage and maintenance facilities in areas used predominantly for industrial or transportation purposes where such construction is not inconsistent with existing zoning and located on or near a street with adequate capacity to handle anticipated bus and support vehicle traffic.

(9) Rehabilitation or reconstruction of existing rail and bus buildings and ancillary facilities where only minor amounts of additional land are required, and there is not a substantial increase in the number of users.

(10) Construction of bus transfer facilities (an open area consisting of passenger shelters, boarding areas, kiosks and related street improvements) when located in a commercial area or other high activity center in which there is adequate street capacity for projected bus traffic.

(11) Construction of rail storage and maintenance facilities in areas used predominantly for industrial or transportation purposes where such construction is not inconsistent with existing zoning, and where there is no significant noise impact on the surrounding community.

(12) Acquisition of land for hardship or protective purposes. Hardship and protective buying will be permitted only for a particular parcel or a limited number of parcels. These types of land acquisition qualify for a CE only where the acquisition will not limit the evaluation of alternatives, including shifts in alignment for planned construction projects, which may be required in the NEPA process. No project development on such land may proceed until the NEPA process has been completed.

(i) Hardship acquisition is early acquisition of property by the applicant at the property owner's request to alleviate particular hardship to the owner, in contrast to others, because of an inability to sell his property. This is justified when the property owner can document on the basis of health, safety or financial reasons that remaining in the property poses an undue hardship compared to others.

(ii) Protective acquisition is done to prevent imminent development of a parcel that may be needed for a proposed transportation corridor or site. Documentation must clearly demonstrate that development of the land would preclude future transportation use and that such development is imminent. Advance acquisition is not permitted for the sole purpose of reducing the cost of property for a proposed project.

(13) Actions described in paragraphs (c)(26), (c)(27), and (c)(28) of this section that do not meet the constraints in paragraph (e) of this section.

(e) Actions described in (c)(26), (c)(27), and (c)(28) of this section may not be processed as CEs under paragraph (c) if they involve:

(1) An acquisition of more than a minor amount of right-of-way or that would result in any residential or non-residential displacements;

(2) An action that needs a bridge permit from the U.S. Coast Guard, or an action that does not meet the terms and conditions of a U.S. Army Corps of Engineers nationwide or general permit under section 404 of the Clean Water Act and/or section 10 of the Rivers and Harbors Act of 1899;

(3) A finding of ''adverse effect'' to historic properties under the National Historic Preservation Act, the use of a resource protected under 23 U.S.C. 138 or 49 U.S.C. 303 (section 4(f)) except for actions resulting in *de minimis* impacts, or a finding of ''may affect, likely to adversely affect'' threatened or endangered species or critical habitat under the Endangered Species Act;

(4) Construction of temporary access or the closure of existing road, bridge, or ramps that would result in major traffic disruptions;

(5) Changes in access control;

(6) A floodplain encroachment other than functionally dependent uses (*e.g.,* bridges, wetlands) or actions that facilitate open space use (*e.g.,* recreational trails, bicycle and pedestrian paths); or construction activities in, across or adjacent to a river component designated or proposed for inclusion in the National System of Wild and Scenic Rivers.

(f) Where a pattern emerges of granting CE status for a particular type of action, the FHWA will initiate rulemaking proposing to add this type of action to the list of categorical exclusions in paragraph (c) or (d) of this section, as appropriate.

(g) FHWA may enter into programmatic agreements with a State to allow a State DOT to make a NEPA CE certification or determination and approval on FHWA's behalf, for CEs specifically listed in paragraphs (c) and (d) of this section and that meet the criteria for a CE under 40 CFR 1508.4, and are identified in the programmatic agreement. Such agreements must be subject to the following conditions:

(1) The agreement must set forth the State DOT's responsibilities for making CE determinations, documenting the determinations, and achieving acceptable quality control and quality assurance;

(2) The agreement may not have a term of more than five years, but may be renewed;

(3) The agreement must provide for FHWA's monitoring of the State DOT's compliance with the terms of the agreement and for the State DOT's execution of any needed corrective action. FHWA must take into account the State DOT's performance when considering renewal of the programmatic CE agreement; and

(4) The agreement must include stipulations for amendment, termination, and public availability of the agreement once it has been executed.

(h) Any action qualifying as a CE under § 771.116 or § 771.118 may be approved by FHWA when the applicable requirements of those sections have been met. FHWA may consult with FRA or FTA to ensure the CE is applicable to the proposed action.

§ 771.118 FTA categorical exclusions.

(a) CEs are actions that meet the definition contained in 40 CFR 1508.4, and, based on FTA's past experience with similar actions, do not involve significant environmental impacts. They are actions that: Do not induce significant impacts to planned growth or land use for the area; do not require the relocation of significant numbers of people; do not have a significant impact on any natural, cultural, recreational, historic or other resource; do not involve significant air, noise, or water quality impacts; do not have significant impacts on travel patterns; or do not otherwise, either individually or cumulatively, have any significant environmental impacts.

(b) Any action that normally would be classified as a CE but could involve unusual circumstances will require FTA, in cooperation with the applicant, to conduct appropriate environmental

studies to determine if the CE classification is proper. Such unusual circumstances include:

(1) Significant environmental impacts;

(2) Substantial controversy on environmental grounds;

(3) Significant impact on properties protected by Section 4(f) requirements or Section 106 of the National Historic Preservation Act; or

(4) Inconsistencies with any Federal, State, or local law, requirement or administrative determination relating to the environmental aspects of the action.

(c) Actions that FTA determines fall within the following categories of FTA CEs and that meet the criteria for CEs in the CEQ regulation (40 CFR 1508.4) and paragraph (a) of this section normally do not require any further NEPA approvals by FTA.

(1) Acquisition, installation, operation, evaluation, replacement, and improvement of discrete utilities and similar appurtenances (existing and new) within or adjacent to existing transportation right-of-way, such as: Utility poles, underground wiring, cables, and information systems; and power substations and utility transfer stations.

(2) Acquisition, construction, maintenance, rehabilitation, and improvement or limited expansion of stand-alone recreation, pedestrian, or bicycle facilities, such as: A multiuse pathway, lane, trail, or pedestrian bridge; and transit plaza amenities.

(3) Activities designed to mitigate environmental harm that cause no harm themselves or to maintain and enhance environmental quality and site aesthetics, and employ construction best management practices, such as: Noise mitigation activities; rehabilitation of public transportation buildings, structures, or facilities; retrofitting for energy or other resource conservation; and landscaping or re-vegetation.

(4) Planning and administrative activities that do not involve or lead directly to construction, such as: Training, technical assistance and research; promulgation of rules, regulations, directives, or program guidance; approval of project concepts; engineering; and operating assistance to transit authorities to continue existing service or increase service to meet routine demand.

(5) Activities, including repairs, replacements, and rehabilitations, designed to promote transportation safety, security, accessibility and effective communication within or adjacent to existing right-of-way, such as: The deployment of Intelligent Transportation Systems and components; installation and improvement of safety and communications equipment, including hazard elimination and mitigation; installation of passenger amenities and traffic signals; and retrofitting existing transportation vehicles, facilities or structures, or upgrading to current standards.

(6) Acquisition or transfer of an interest in real property that is not within or adjacent to recognized environmentally sensitive areas (*e.g.,* wetlands, non-urban parks, wildlife management areas) and does not result in a substantial change in the functional use of the property or in substantial displacements, such as: Acquisition for scenic easements or historic sites for the purpose of preserving the site. This CE extends only to acquisitions and transfers that will not limit the evaluation of alternatives for future FTA-assisted projects that make use of the acquired or transferred property.

(7) Acquisition, installation, rehabilitation, replacement, and maintenance of vehicles or equipment, within or accommodated by existing facilities, that does not result in a change in functional use of the facilities, such as: equipment to be located within existing facilities and with no substantial off-site impacts; and vehicles, including buses, rail cars, trolley cars, ferry boats and people movers that can be accommodated by existing facilities or by new facilities that qualify for a categorical exclusion.

(8) Maintenance, rehabilitation, and reconstruction of facilities that occupy substantially the same geographic footprint and do not result in a change in functional use, such as: Improvements to bridges, tunnels, storage yards, buildings, stations, and terminals; construction of platform extensions, passing track, and retaining walls; and improvements to tracks and railbeds.

(9) Assembly or construction of facilities that is consistent with existing land use and zoning requirements (including floodplain regulations) and uses primarily land disturbed for transportation use, such as: Buildings and associated structures; bus transfer stations or intermodal centers; busways and streetcar lines or other transit investments within areas of the right-of-way occupied by the physical footprint of the existing facility or otherwise maintained or used for transportation operations; and parking facilities.

(10) Development of facilities for transit and non-transit purposes, located on, above, or adjacent to existing transit facilities, that are not part of a larger transportation project and do not substantially enlarge such facilities, such as: Police facilities, daycare facilities, public service facilities, amenities, and commercial, retail, and residential development.

(11) The following actions for transportation facilities damaged by an incident resulting in an emergency declared by the Governor of the State and concurred in by the Secretary, or a disaster or emergency declared by the President pursuant to the Robert T. Stafford Act (42 U.S.C. 5121):

(i) Emergency repairs under 49 U.S.C. 5324; and

(ii) The repair, reconstruction, restoration, retrofitting, or replacement of any road, highway, bridge, tunnel, or transit facility (such as a ferry dock or bus transfer station), including ancillary transportation facilities (such as pedestrian/bicycle paths and bike lanes), that is in operation or under construction when damaged and the action:

(A) Occurs within the existing right-of-way and in a manner that substantially conforms to the preexisting design, function, and location as the original (which may include upgrades to meet existing codes and standards as well as upgrades warranted to address conditions that have changed since the original construction); and

(B) Is commenced within a 2-year period beginning on the date of the declaration.

(12) Projects, as defined in 23 U.S.C. 101, that would take place entirely within the existing operational right-of-way. Existing operational right-of-way means all real property interests acquired for the construction, operation, or mitigation of a project. This area includes the features associated with the physical footprint of the project including but not limited to the roadway, bridges, interchanges, culverts, drainage, clear zone, traffic control signage, landscaping, and any rest areas with direct access to a controlled access highway. This also includes fixed guideways, mitigation areas, areas maintained or used for safety and security of a transportation facility, parking facilities with direct access to an existing transportation facility, transportation power substations, transportation venting structures, and transportation maintenance facilities.

(13) Federally funded projects:

(i) That receive less than $5,000,000 (as adjusted annually by the Secretary to reflect any increases in the Consumer Price Index prepared by the Department of Labor, see *www.fhwa.dot.gov* or *www.fta.dot.gov*) of Federal funds; or

(ii) With a total estimated cost of not more than $30,000,000 (as adjusted annually by the Secretary to reflect any increases in the Consumer Price Index prepared by the Department of Labor, see *www.fhwa.dot.gov* or *www.fta.dot.gov*) and Federal funds comprising less than 15 percent of the total estimated project cost.

(14) Bridge removal and bridge removal related activities, such as in-channel work, disposal of materials and debris in accordance with applicable regulations, and transportation facility realignment.

(15) Preventative maintenance, including safety treatments, to culverts and channels within and adjacent to transportation right-of-way to prevent damage to the transportation facility and adjoining property, plus any necessary channel work, such as restoring, replacing, reconstructing, and rehabilitating culverts and drainage pipes; and, expanding existing culverts and drainage pipes.

(16) Localized geotechnical and other investigations to provide information for preliminary design and for environmental analyses and permitting purposes, such as drilling test bores for soil sampling; archeological investigations for archeology resources assessment or similar survey; and wetland surveys.

(d) Additional actions that meet the criteria for a CE in the CEQ regulations (40 CFR 1508.4) and paragraph (a) of this section may be designated as CEs only after FTA approval. The applicant must submit documentation that demonstrates that the specific conditions or criteria for these CEs are satisfied and that significant environmental effects will not result. Examples of such actions include but are not limited to:

(1) Modernization of a highway by resurfacing, restoring, rehabilitating, or reconstructing shoulders or auxiliary lanes (*e.g.,* lanes for parking, weaving, turning, climbing).

(2) Bridge replacement or the construction of grade separation to replace existing at-grade railroad crossings.

(3) Acquisition of land for hardship or protective purposes. Hardship and protective buying will be permitted only for a particular parcel or a limited number of parcels. These types of land acquisition qualify for a CE only where the acquisition will not limit the evaluation of alternatives, including shifts in alignment for planned construction projects, which may be required in the NEPA process. No project development on such land may proceed until the NEPA process has been completed.

(i) Hardship acquisition is early acquisition of property by the applicant at the property owner's request to alleviate particular hardship to the owner, in contrast to others, because of an inability to sell his property. This is justified when the property owner can document on the basis of health, safety or financial reasons that remaining in the property poses an undue hardship compared to others.

(ii) Protective acquisition is done to prevent imminent development of a parcel that may be needed for a proposed transportation corridor or site. Documentation must clearly demonstrate that development of the land would preclude future transportation use and that such development is imminent. Advance acquisition is not permitted for the sole purpose of reducing the cost of property for a proposed project.

(4) Acquisition of right-of-way. No project development on the acquired right-of-way may proceed until the NEPA process for such project development, including the consideration of alternatives, has been completed.

(5) [Reserved]

(6) Facility modernization through construction or replacement of existing components.

(7) Minor transportation facility realignment for rail safety reasons, such as improving vertical and horizontal alignment of railroad crossings, and improving sight distance at railroad crossings.

(8) Modernization or minor expansions of transit structures and facilities outside existing right-of-way, such as bridges, stations, or rail yards.

(e) Any action qualifying as a CE under § 771.116 or § 771.117 may be approved by FTA when the applicable requirements of those sections have been met. FTA may consult with FHWA or FRA to ensure the CE is applicable to the proposed action.

(f) Where a pattern emerges of granting CE status for a particular type of action, FTA will initiate rulemaking proposing to add this type of action to the appropriate list of categorical exclusions in this section.

§ 771.119 Environmental assessments.

(a)(1) The applicant must prepare an EA in consultation with the Administration for each action that is not a CE and does not clearly require the preparation of an EIS, or where the Administration concludes an EA would assist in determining the need for an EIS.

(2) When FTA or the applicant, as joint lead agency, select a contractor to prepare the EA, then the contractor must execute an FTA conflict of interest disclosure statement. The statement must be maintained in the FTA Regional Office and with the applicant. The contractor's scope of work for the preparation of the EA should not be finalized until the early coordination activities or scoping process found in paragraph (b) of this section is completed (including FTA approval, in consultation with the applicant, of the scope of the EA content).

(3) When FRA or the applicant, as joint lead agency, select a contractor to prepare the EA, then the contractor must execute an FRA conflict of interest disclosure statement. In the absence of an applicant, FRA may require private project sponsors to provide a third-party contractor to prepare the EA as described in 771.109(e).

(b) For actions that require an EA, the applicant, in consultation with the Administration, must, at the earliest appropriate time, begin consultation with interested agencies and others to advise them of the scope of the project and to achieve the following objectives: Determine which aspects of the proposed action have potential for social, economic, or environmental impact; identify alternatives and measures that might mitigate adverse environmental impacts; and identify other environmental review and consultation requirements that should be performed concurrently with the EA. The applicant must accomplish this through early coordination activities or through a scoping process. The applicant must summarize the public involvement process and include the results of agency coordination in the EA.

(c) The Administration must approve the EA before it is made available to the public as an Administration document.

(d) The applicant does not need to circulate the EA for comment, but the document must be made available for public inspection at the applicant's office and at the appropriate Administration field offices or, for FRA at Headquarters, for 30 days and in accordance with paragraphs (e) and (f) of this section. The applicant must send the notice of availability of the EA, which briefly describes the action and its impacts, to the affected units of Federal, Tribal, State and local government. The applicant must also send notice to the State intergovernmental review contacts established under Executive Order 12372. To minimize hardcopy requests and printing costs, the Administration

encourages the use of project websites or other publicly accessible electronic means to make the EA available.

(e) When a public hearing is held as part of the environmental review process for an action, the EA must be available at the public hearing and for a minimum of 15 days in advance of the public hearing. The applicant must publish a notice of the public hearing in local newspapers that announces the availability of the EA and where it may be obtained or reviewed. Any comments must be submitted in writing to the applicant or the Administration during the 30-day availability period of the EA unless the Administration determines, for good cause, that a different period is warranted. Public hearing requirements are as described in § 771.111.

(f) When a public hearing is not held, the applicant must place a notice in a newspaper(s) similar to a public hearing notice and at a similar stage of development of the action, advising the public of the availability of the EA and where information concerning the action may be obtained. The notice must invite comments from all interested parties. Any comments must be submitted in writing to the applicant or the Administration during the 30-day availability period of the EA unless the Administration determines, for good cause, that a different period is warranted.

(g) If no significant impacts are identified, the applicant must furnish the Administration a copy of the revised EA, as appropriate; the public hearing transcript, where applicable; copies of any comments received and responses thereto; and recommend a FONSI. The EA should also document compliance, to the extent possible, with all applicable environmental laws and executive orders, or provide reasonable assurance that their requirements can be met.

(h) When the FHWA expects to issue a FONSI for an action described in § 771.115(a), copies of the EA must be made available for public review (including the affected units of government) for a minimum of 30 days before the FHWA makes its final decision (See 40 CFR 1501.4(e)(2)). This public availability must be announced by a notice similar to a public hearing notice.

(i) If, at any point in the EA process, the Administration determines that the action is likely to have a significant impact on the environment, the preparation of an EIS will be required.

(j) If the Administration decides to apply 23 U.S.C. 139 to an action involving an EA, then the EA must be prepared in accordance with the applicable provisions of that statute.

§ 771.121 Findings of no significant impact.

(a) The Administration will review the EA, comments submitted on the EA (in writing or at a public hearing or meeting), and other supporting documentation, as appropriate. If the Administration agrees with the applicant's recommendations pursuant to § 771.119(g), it will issue a separate written FONSI incorporating by reference the EA and any other appropriate environmental documents.

(b) After the Administration issues a FONSI, a notice of availability of the FONSI must be sent by the applicant to the affected units of Federal, State and local government, and the document must be available from the applicant and the Administration upon request by the public. Notice must also be sent to the State intergovernmental review contacts established under Executive Order 12372. To minimize hardcopy requests and printing costs, the Administration encourages the use of project websites or other publicly accessible electronic means to make the FONSI available.

(c) If another Federal agency has issued a FONSI on an action that includes an element proposed for Administration funding or approval, the Administration will evaluate the other agency's EA/FONSI. If the Administration determines that this element of the project and its environmental impacts have been adequately identified and assessed and concurs in the decision to issue a FONSI, the Administration will issue its own FONSI incorporating the other agency's EA/FONSI. If environmental issues have not been adequately identified and assessed, the Administration will require appropriate environmental studies.

§ 771.123 Draft environmental impact statements.

(a) A draft EIS must be prepared when the Administration determines that the action is likely to cause significant impacts on the environment. When the applicant, after consultation with any project sponsor that is not the applicant, has notified the Administration in accordance with 23 U.S.C. 139(e), and the decision has been made by the Administration to prepare an EIS, the Administration will issue a notice of intent (40 CFR 1508.22) for publication in the **Federal Register**. Applicants are encouraged to announce the intent to prepare an EIS by appropriate means at the State or local level.

(b)(1) After publication of the notice of intent, the lead agencies, in cooperation with the applicant (if not a lead agency), will begin a scoping process that may take into account any planning work already accomplished, in accordance with 23 CFR 450.212, 450.318, 23 CFR part 450 Appendix A, or any applicable provisions of the CEQ regulations at 40 CFR parts 1500–1508. The scoping process will be used to identify the purpose and need, the range of alternatives and impacts, and the significant issues to be addressed in the EIS and to achieve the other objectives of 40 CFR 1501.7. Scoping is normally achieved through public and agency involvement procedures required by § 771.111. If a scoping meeting is to be held, it should be announced in the Administration's notice of intent and by appropriate means at the State or local level.

(2) The lead agencies must establish a coordination plan, including a schedule, within 90 days of notice of intent publication.

(c) The draft EIS must be prepared by the lead agencies, in cooperation with the applicant (if not a lead agency). The draft EIS must evaluate all reasonable alternatives to the action and document the reasons why other alternatives, which may have been considered, were eliminated from detailed study. The range of alternatives considered for further study must be used for all Federal environmental reviews and permit processes, to the maximum extent practicable and consistent with Federal law, unless the lead and participating agencies agree to modify the alternatives in order to address significant new information and circumstances or to fulfill NEPA responsibilities in a timely manner, in accordance with 23 U.S.C. 139(f)(4)(B). The draft EIS must also summarize the studies, reviews, consultations, and coordination required by environmental laws or executive orders to the extent appropriate at this stage in the environmental process.

(d) Any of the lead agencies may select a consultant to assist in the preparation of an EIS in accordance with applicable contracting procedures and with 40 CFR 1506.5(c). When FTA or the applicant, as joint lead agency, select a contractor to prepare the EIS, then the contractor must execute an FTA conflict of interest disclosure statement. The statement must be maintained in the FTA Regional Office and with the applicant. The contractor's scope of work for the preparation of the EIS will not be finalized until the early coordination activities or scoping process found in paragraph (b) of this

section is completed (including FTA approval, in consultation with the applicant, of the scope of the EIS content). When FRA or the applicant, as joint lead agency, select a contractor to prepare the EIS, then the contractor must execute an FRA conflict of interest disclosure statement.

(e) The draft EIS should identify the preferred alternative to the extent practicable. If the draft EIS does not identify the preferred alternative, the Administration should provide agencies and the public with an opportunity after issuance of the draft EIS to review the impacts of the preferred alternative.

(f) At the discretion of the lead agency, the preferred alternative (or portion thereof) for a project, after being identified, may be developed to a higher level of detail than other alternatives in order to facilitate the development of mitigation measures or compliance with other legal requirements, including permitting. The development of such higher level of detail must not prevent the lead agency from making an impartial decision as to whether to accept another alternative that is being considered in the environmental review process.[3]

(g) The Administration, when satisfied that the draft EIS complies with NEPA requirements, will approve the draft EIS for circulation by signing and dating the cover sheet. The cover sheet should include a notice that after circulation of the draft EIS and consideration of the comments received, the Administration will issue a combined final EIS/ROD document unless statutory criteria or practicability considerations preclude issuance of the combined document.

(h) A lead, joint lead, or a cooperating agency must be responsible for publication and distribution of the EIS. Normally, copies will be furnished free of charge. However, with Administration concurrence, the party requesting the draft EIS may be charged a fee that is not more than the actual cost of reproducing the copy or may be directed to the nearest location where the statement may be reviewed. To minimize hardcopy requests and printing costs, the Administration encourages the use of project websites or other publicly accessible electronic means to make the draft EIS available.

(i) The applicant, on behalf of the Administration, must circulate the draft EIS for comment. The draft EIS must be made available to the public and transmitted to agencies for comment no later than the time the document is filed with the Environmental Protection Agency in accordance with 40 CFR 1506.9. The draft EIS must be transmitted to:

(1) Public officials, interest groups, and members of the public known to have an interest in the proposed action or the draft EIS;

(2) Cooperating and participating agencies. The draft EIS must also be transmitted directly to appropriate State and local agencies, and to the State intergovernmental review contacts established under Executive Order 12372; and

(3) States and Federal land management entities that may be significantly affected by the proposed action or any of the alternatives. These transmittals must be accompanied by a request that such State or entity advise the Administration in writing of any disagreement with the evaluation of impacts in the statement. The Administration will furnish the comments received to the applicant along with a written assessment of any disagreements for incorporation into the final EIS.

(j) When a public hearing on the draft EIS is held (if required by § 771.111), the draft EIS must be available at the public hearing and for a minimum of 15 days in advance of the public hearing. The availability of the draft EIS must be mentioned, and public comments requested, in any public hearing notice and at any public hearing presentation. If a public hearing on an action proposed for FHWA funding is not held, a notice must be placed in a newspaper similar to a public hearing notice advising where the draft EIS is available for review, how copies may be obtained, and where the comments should be sent.

(k) The **Federal Register** public availability notice (40 CFR 1506.10) must establish a period of not fewer than 45 days nor more than 60 days for the return of comments on the draft EIS unless a different period is established in accordance with 23 U.S.C. 139(g)(2)(A). The notice and the draft EIS transmittal letter must identify where comments are to be sent.

§ 771.124 Final environmental impact statement/record of decision document.

(a)(1) After circulation of a draft EIS and consideration of comments received, the lead agencies, in cooperation with the applicant (if not a lead agency), must combine the final EIS and ROD, to the maximum extent practicable, unless:

(i) The final EIS makes substantial changes to the proposed action that are relevant to environmental or safety concerns; or

(ii) There are significant new circumstances or information relevant to environmental concerns that bear on the proposed action or the impacts of the proposed action.

(2) When the combined final EIS/ROD is a single document, it must include the content of a final EIS presented in § 771.125 and present the basis for the decision as specified in 40 CFR 1505.2, summarize any mitigation measures that will be incorporated in the project, and document any required Section 4(f) approval in accordance with part 774 of this chapter.

(3) If the comments on the draft EIS are minor and confined to factual corrections or explanations that do not warrant additional agency response, an errata sheet may be attached to the draft statement pursuant to 23 U.S.C. 139(n)(1) and 40 CFR 1503.4(c), which together must then become the combined final EIS/ROD.

(4) A combined final EIS/ROD will be reviewed for legal sufficiency prior to issuance by the Administration.

(5) The Administration must indicate approval of the combined final EIS/ROD by signing the document. The provision on Administration's Headquarters prior concurrence in § 771.125(c) applies to the combined final EIS/ROD.

(b) The **Federal Register** public availability notice published by EPA (40 CFR 1506.10) will not establish a waiting period or a period of time for the return of comments on a combined final EIS/ROD. When filed with EPA, the combined final EIS/ROD must be available at the applicant's offices and at appropriate Administration offices. A copy should also be made available at institutions such as local government offices, libraries, and schools, as appropriate. To minimize hardcopy requests and printing costs, the Administration encourages the use of project websites or other publicly accessible electronic means to make the combined final EIS/ROD available.

§ 771.125 Final environmental impact statements.

(a)(1) After circulation of a draft EIS and consideration of comments received, a final EIS must be prepared by the lead agencies, in cooperation with the applicant (if not a lead agency). The final EIS must identify the preferred alternative and evaluate all reasonable alternatives considered. It must also discuss substantive comments received on the draft EIS and responses thereto, summarize public involvement, and

[3] FHWA Order 6640.1A clarifies the Federal Highway Administration's (FHWA) policy regarding the permissible project related activities that may be advanced prior to the conclusion of the NEPA process.

describe the mitigation measures that are to be incorporated into the proposed action. Mitigation measures presented as commitments in the final EIS will be incorporated into the project as specified in paragraphs (b) and (d) of § 771.109. The final EIS should also document compliance, to the extent possible, with all applicable environmental laws and executive orders, or provide reasonable assurance that their requirements can be met.

(2) Every reasonable effort must be made to resolve interagency disagreements on actions before processing the final EIS. If significant issues remain unresolved, the final EIS must identify those issues and the consultations and other efforts made to resolve them.

(b) The final EIS will be reviewed for legal sufficiency prior to Administration approval.

(c) The Administration will indicate approval of the EIS for an action by signing and dating the cover page. Final EISs prepared for actions in the following categories will be submitted to the Administration's Headquarters for prior concurrence:

(1) Any action for which the Administration determines that the final EIS should be reviewed at the Headquarters office. This would typically occur when the Headquarters office determines that:

(i) Additional coordination with other Federal, State or local governmental agencies is needed;

(ii) The social, economic, or environmental impacts of the action may need to be more fully explored;

(iii) The impacts of the proposed action are unusually great; (iv) major issues remain unresolved; or

(iv) The action involves national policy issues.

(2) Any action to which a Federal, State or local government agency has indicated opposition on environmental grounds (which has not been resolved to the written satisfaction of the objecting agency).

(d) Approval of the final EIS is not an Administration action as defined in § 771.107 and does not commit the Administration to approve any future request for financial assistance to fund the preferred alternative.

(e) The initial publication of the final EIS must be in sufficient quantity to meet the request for copies that can be reasonably expected from agencies, organizations, and individuals. Normally, copies will be furnished free of charge. However, with Administration concurrence, the party requesting the final EIS may be charged a fee that is not more than the actual cost of reproducing the copy or may be directed to the nearest location where the statement may be reviewed.

(f) The final EIS must be transmitted to any persons, organizations, or agencies that made substantive comments on the draft EIS or requested a copy, no later than the time the document is filed with EPA. In the case of lengthy documents, the agency may provide alternative circulation processes in accordance with 40 CFR 1502.19. The applicant must also publish a notice of availability in local newspapers and make the final EIS available through the mechanism established pursuant to DOT Order 4600.13, which implements Executive Order 12372. When filed with EPA, the final EIS must be available for public review at the applicant's offices and at appropriate Administration offices. A copy should also be made available for public review at institutions such as local government offices, libraries, and schools, as appropriate. To minimize hardcopy requests and printing costs, the Administration encourages the use of project websites or other publicly accessible electronic means to make the final EIS available.

(g) The final EIS may take the form of an errata sheet pursuant to 23 U.S.C. 139(n)(1) and 40 CFR 1503.4(c).

§ 771.127 Record of decision.

(a) When the final EIS is not combined with the ROD, the Administration will complete and sign a ROD no sooner than 30 days after publication of the final EIS notice in the **Federal Register** or 90 days after publication of a notice for the draft EIS, whichever is later. The ROD will present the basis for the decision as specified in 40 CFR 1505.2, summarize any mitigation measures that will be incorporated in the project, and document any required Section 4(f) approval in accordance with part 774 of this chapter. To minimize hardcopy requests and printing costs, the Administration encourages the use of project websites or other publicly accessible electronic means to make the ROD available.

(b) If the Administration subsequently wishes to approve an alternative that was not identified as the preferred alternative but was fully evaluated in the draft EIS, combined FEIS/ROD, or final EIS, or proposes to make substantial changes to the mitigation measures or findings discussed in the ROD, a revised or amended ROD must be subject to review by those Administration offices that reviewed the final EIS under § 771.124(a) or § 771.125(c). To the extent practicable, the approved revised or amended ROD must be provided to all persons, organizations, and agencies that received a copy of the final EIS.

§ 771.129 Re-evaluations.

The Administration must determine, prior to granting any new approval related to an action or amending any previously approved aspect of an action, including mitigation commitments, whether an approved environmental document remains valid as described in this section.

(a) The applicant must prepare a written evaluation of the draft EIS, in cooperation with the Administration, if an acceptable final EIS is not submitted to the Administration within three years from the date of the draft EIS circulation. The purpose of this evaluation is to determine whether or not a supplement to the draft EIS or a new draft EIS is needed.

(b) The applicant must prepare a written evaluation of the final EIS before the Administration may grant further approvals if major steps to advance the action (*e.g.,* authority to undertake final design, authority to acquire a significant portion of the right-of-way, or approval of the plans, specifications and estimates) have not occurred within three years after the approval of the final EIS, final EIS supplement, or the last major Administration approval or grant.

(c) After the Administration issues a combined final EIS/ROD, ROD, FONSI, or CE designation, the applicant must consult with the Administration prior to requesting any major approvals or grants to establish whether or not the approved environmental document or CE designation remains valid for the requested Administration action. These consultations will be documented when determined necessary by the Administration.

§ 771.130 Supplemental environmental impact statements.

(a) A draft EIS, final EIS, or supplemental EIS may be supplemented at any time. An EIS must be supplemented whenever the Administration determines that:

(1) Changes to the proposed action would result in significant environmental impacts that were not evaluated in the EIS; or

(2) New information or circumstances relevant to environmental concerns and bearing on the proposed action or its impacts would result in significant environmental impacts not evaluated in the EIS.

(b) However, a supplemental EIS will not be necessary where:

(1) The changes to the proposed action, new information, or new

circumstances result in a lessening of adverse environmental impacts evaluated in the EIS without causing other environmental impacts that are significant and were not evaluated in the EIS; or

(2) The Administration decides to approve an alternative fully evaluated in an approved final EIS but not identified as the preferred alternative. In such a case, a revised ROD must be prepared and circulated in accordance with § 771.127(b).

(c) Where the Administration is uncertain of the significance of the new impacts, the applicant will develop appropriate environmental studies or, if the Administration deems appropriate, an EA to assess the impacts of the changes, new information, or new circumstances. If, based upon the studies, the Administration determines that a supplemental EIS is not necessary, the Administration must so indicate in the project file.

(d) A supplement is to be developed using the same process and format (*i.e.,* draft EIS, final EIS, and ROD) as an original EIS, except that scoping is not required.

(e) In some cases, an EA or supplemental EIS may be required to address issues of limited scope, such as the extent of proposed mitigation or the evaluation of location or design variations for a limited portion of the overall project. Where this is the case, the preparation of a supplemental document must not necessarily:

(1) Prevent the granting of new approvals;

(2) Require the withdrawal of previous approvals; or

(3) Require the suspension of project activities, for any activity not directly affected by the supplement. If the changes in question are of such magnitude to require a reassessment of the entire action, or more than a limited portion of the overall action, the Administration must suspend any activities that would have an adverse environmental impact or limit the choice of reasonable alternatives, until the supplemental document is completed.

§ 771.131 Emergency action procedures.

Responses to some emergencies and disasters are categorically excluded under § 771.117 for FHWA, § 771.118 for FTA, or § 771.116 for FRA. Otherwise, requests for deviations from the procedures in this part because of emergency circumstances (40 CFR 1506.11) must be referred to the Administration's Headquarters for evaluation and decision after consultation with CEQ.

§ 771.133 Compliance with other requirements.

(a) The combined final EIS/ROD, final EIS or FONSI should document compliance with requirements of all applicable environmental laws, executive orders, and other related requirements. If full compliance is not possible by the time the combined final EIS/ROD, final EIS or FONSI is prepared, the combined final EIS/ROD, final EIS or FONSI should reflect consultation with the appropriate agencies and provide reasonable assurance that the requirements will be met. Approval of the environmental document constitutes adoption of any Administration findings and determinations that are contained therein. The FHWA's approval of an environmental document constitutes its finding of compliance with the report requirements of 23 U.S.C. 128.

(b) In consultation with the Administration and subject to Administration approval, an applicant may develop a programmatic approach for compliance with the requirements of any law, regulation, or executive order applicable to the project development process.

§ 771.137 International actions.

(a) The requirements of this part apply to:

(1) Administration actions significantly affecting the environment of a foreign nation not participating in the action or not otherwise involved in the action.

(2) Administration actions outside the U.S., its territories, and possessions that significantly affect natural resources of global importance designated for protection by the President or by international agreement.

(b) If communication with a foreign government concerning environmental studies or documentation is anticipated, the Administration must coordinate such communication with the Department of State through the Office of the Secretary of Transportation.

§ 771.139 Limitations on actions.

Notices announcing decisions by the Administration or by other Federal agencies on a transportation project may be published in the **Federal Register** indicating that such decisions are final within the meaning of 23 U.S.C. 139(*l*). Claims arising under Federal law seeking judicial review of any such decisions are time barred unless filed within 150 days after the date of publication of the limitations on claims notice by FHWA or FTA. Claims arising under Federal law seeking judicial review of any such decisions are time barred unless filed within 2 years after the date of publication of the limitations on claims notice by FRA. These time periods do not lengthen any shorter time period for seeking judicial review that otherwise is established by the Federal law under which judicial review is allowed.[4] This provision does not create any right of judicial review or place any limit on filing a claim that a person has violated the terms of a permit, license, or approval.

PART 774—PARKS, RECREATION AREAS, WILDLIFE AND WATERFOWL REFUGES, AND HISTORIC SITES (SECTION 4(f))

■ 2. Revise the authority citation for part 774 to read as follows:

Authority: 23 U.S.C. 103(c), 109(h), 138, 325, 326, 327 and 204(h)(2); 49 U.S.C. 303; Section 6009 of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (Pub. L. 109–59, Aug. 10, 2005, 119 Stat. 1144); 49 CFR 1.81 and 1.91; and, Pub. L. 114–94, 129 Stat. 1312, Sections 1303 and 11502.

■ 3. Amend § 774.3 by revising footnote 1 to read as follows:

§ 774.3 Section 4(f) approvals.

* * * * *

[1] FHWA Section 4(f) Programmatic Evaluations can be found at *www.environment.fhwa.dot.gov/4f/4fnationwideevals.asp.*

* * * * *

■ 4. Amend § 774.11 by revising paragraph (i) to read as follows:

§ 774.11 Applicability.

* * * * *

(i) When a property is formally reserved for a future transportation facility before or at the same time a park, recreation area, or wildlife and waterfowl refuge is established, and concurrent or joint planning or development of the transportation facility and the Section 4(f) resource occurs, then any resulting impacts of the transportation facility will not be considered a use as defined in § 774.17.

(1) Formal reservation of a property for a future transportation use can be demonstrated by a document of public record created prior to or contemporaneously with the establishment of the park, recreation

[4] The FHWA published a detailed discussion of the Department's interpretation of 23 U.S.C. 139(*l*), together with information applicable to FHWA projects about implementation procedures for 23 U.S.C. 139(*l*), in appendix E to the ''SAFETEA–LU Environmental Review Process: Final Guidance,'' dated November 15, 2006. The implementation procedures in appendix E apply only to FHWA projects. The section 6002 guidance, including appendix E, is available at *http://www.fhwa.dot.gov/,* or in hard copy by request.

area, or wildlife and waterfowl refuge. Examples of an adequate document to formally reserve a future transportation use include:

(i) A map of public record that depicts a transportation facility on the property;

(ii) A land use or zoning plan depicting a transportation facility on the property; or

(iii) A fully executed real estate instrument that references a future transportation facility on the property.

(2) Concurrent or joint planning or development can be demonstrated by a document of public record created after, contemporaneously with, or prior to the establishment of the Section 4(f) property. Examples of an adequate document to demonstrate concurrent or joint planning or development include:

(i) A document of public record that describes or depicts the designation or donation of the property for both the potential transportation facility and the Section 4(f) property; or

(ii) A map of public record, memorandum, planning document, report, or correspondence that describes or depicts action taken with respect to the property by two or more governmental agencies with jurisdiction for the potential transportation facility and the Section 4(f) property, in consultation with each other.

■ 5. Amend § 774.13 by revising paragraphs (a) and (e), and the introductory text of paragraph (g), to read as follows:

§ 774.13 Exceptions.

* * * * *

(a) The use of historic transportation facilities in certain circumstances:

(1) Common post-1945 concrete or steel bridges and culverts that are exempt from individual review under 54 U.S.C. 306108.

(2) Improvement of railroad or rail transit lines that are in use or were historically used for the transportation of goods or passengers, including, but not limited to, maintenance, preservation, rehabilitation, operation, modernization, reconstruction, and replacement of railroad or rail transit line elements, except for:

(i) Stations;

(ii) Bridges or tunnels on railroad lines that have been abandoned, or transit lines not in use, over which regular service has never operated, and that have not been railbanked or otherwise reserved for the transportation of goods or passengers; and

(iii) Historic sites unrelated to the railroad or rail transit lines.

(3) Maintenance, preservation, rehabilitation, operation, modernization, reconstruction, or replacement of historic transportation facilities, if the Administration concludes, as a result of the consultation under 36 CFR 800.5, that:

(i) Such work will not adversely affect the historic qualities of the facility that caused it to be on or eligible for the National Register, or this work achieves compliance with Section 106 through a program alternative under 36 CFR 800.14; and

(ii) The official(s) with jurisdiction over the Section 4(f) resource have not objected to the Administration conclusion that the proposed work does not adversely affect the historic qualities of the facility that caused it to be on or eligible for the National Register, or the Administration concludes this work achieves compliance with 54 U.S.C. 306108 (Section 106) through a program alternative under 36 CFR 800.14.

* * * * *

(e) Projects for the Federal lands transportation facilities described in 23 U.S.C. 101(a)(8).

* * * * *

(g) Transportation enhancement activities, transportation alternatives projects, and mitigation activities, where:

* * * * *

■ 6. Amend § 774.15 by revising paragraph (f)(2) to read as follows:

§ 774.15 Constructive use determinations.

* * * * *

(f) * * *

(2) For projected noise levels:

(i) The impact of projected traffic noise levels of the proposed highway project on a noise-sensitive activity do not exceed the FHWA noise abatement criteria as contained in Table 1 in part 772 of this chapter; or

(ii) The projected operational noise levels of the proposed transit or railroad project do not exceed the noise impact criteria for a Section 4(f) activity in the FTA guidelines for transit noise and vibration impact assessment or the moderate impact criteria in the FRA guidelines for high-speed transportation noise and vibration impact assessment;

* * * * *

■ 7. Amend § 774.17 by revising the definitions for ''Administration,'' ''CE,'' and ''ROD,'' and adding definitions for ''Railroad or Rail Transit Line Elements'' and ''Stations'' to read as follows:

§ 774.17 Definitions.

* * * * *

Administration. The FHWA, FRA, or FTA, whichever is approving the transportation program or project at issue. A reference herein to the Administration means the State when the State is functioning as the FHWA, FRA, or FTA in carrying out responsibilities delegated or assigned to the State in accordance with 23 U.S.C. 325, 326, 327, or other applicable law.

* * * * *

CE. Refers to a categorical exclusion, which is an action with no individual or cumulative significant environmental effect pursuant to 40 CFR 1508.4 and § 771.116, § 771.117, or § 771.118 of this chapter; unusual circumstances are taken into account in making categorical exclusion determinations.

* * * * *

Railroad or rail transit line elements. Railroad or rail transit line elements include the elements related to the operation of the railroad or rail transit line, such as the railbed, rails, and track; tunnels; elevated support structures and bridges; substations; signal and communication devices; maintenance facilities; and railway-highway crossings.

ROD. Refers to a record of decision prepared pursuant to 40 CFR 1505.2 and §§ 771.124 or 771.127 of this chapter.

* * * * *

Station. A station is a platform and the associated building or structure such as a depot, shelter, or canopy used by intercity or commuter rail transportation passengers for the purpose of boarding and alighting a train. A station does not include tracks, railyards, or electrification, communications or signal systems, or equipment. A platform alone is not considered a station.

* * * * *

Title 49—Transportation

PART 264—ENVIRONMENTAL IMPACT AND RELATED PROCEDURES

■ 8. Revise the authority citation for part 264 to read as follows:

Authority: 42 U.S.C. 4321 *et seq.;* 49 U.S.C. 303; 23 U.S.C. 139; 40 CFR parts 1500–1508; 49 CFR 1.81; Pub. L. 112–141, 126 Stat. 405, Section 1319; and Pub. L. 114–94, 129 Stat. 1312, Sections 1432, 11502, and 11503.

■ 9. Revise the heading for part 264 to read as set forth above.

■ 10. Revise § 264.101 to read as follows:

§ 264.101 Cross reference to environmental impact and related procedures.

The procedures for complying with the National Environmental Policy Act of 1969, as amended (42 U.S.C. 4321 *et seq.*), and related statutes, regulations,

and orders are set forth in part 771 of title 23 of the Code of Federal Regulations. The procedures for complying with 49 U.S.C. 303, commonly known as ''Section 4(f),'' are set forth in part 774 of title 23 of the Code of Federal Regulations. The procedures for complying with the surface transportation project delivery program application requirements and termination are set forth in part 773 of title 23 of the Code of Federal Regulations.

PART 622—ENVIRONMENTAL IMPACT AND RELATED PROCEDURES

■ 11. Revise the authority citation for part 622 to read as follows:

Authority: 42 U.S.C. 4321 *et seq.;* 49 U.S.C. 303 and 5323(q); 23 U.S.C. 139 and 326; Pub. L. 109–59, 119 Stat. 1144, Sections 6002 and 6010; 40 CFR parts 1500–1508; 49 CFR 1.81; Pub. L. 112–141, 126 Stat. 405, Sections 1315, 1316, 1317, 1318, and 1319; and Pub. L. 114–94, 129 Stat. 1312, Sections 1314 and 1432.

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Part IV

The President

Proclamation 9810—United Nations Day, 2018

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Presidential Documents

Title 3—

The President

Proclamation 9810 of October 23, 2018

United Nations Day, 2018

By the President of the United States of America

A Proclamation

On United Nations Day, we recognize the many ways the United Nations has contributed to peace and security among nations. Since it was founded more than 70 years ago with the aim of breaking the cycle of global conflict, the United Nations has provided a forum for nations to resolve conflicts peacefully in an increasingly complex world. The United States is committed to the organization's future and is confident that responsibility more equally shared among member states will lead to greater effectiveness and efficiency.

The United States has, since the beginning, provided leadership and vision to the United Nations. Today, the United States continues to drive the United Nations forward, insisting on fundamental reforms that are needed to enable the organization to respond to the unique and evolving problems of the 21st century. Only when each country does its part can the highest aspirations of the United Nations be realized, and the financial responsibility for an organization like the United Nations must be equitably shared among its member states. Additionally, in recent months, the United States has pressed for crucial changes to improve the organization's performance, accountability, and responsiveness. The United States pursuit of reform, however, does not end there. Earlier this year, the United States sent a clear message about the need for change by withdrawing from the flawed United Nations Human Rights Council, which repeatedly rejected necessary reforms. We will not return until real reform is enacted, and we will not hesitate to take the measures necessary to protect America's interests or to better enable the United Nations to fulfill its purpose.

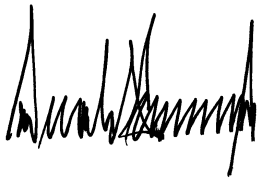
The United Nations is an important forum for addressing the international challenges we face today. In the past year, the United States has taken bold steps, with the support of the United Nations, to address the global threat of nuclear proliferation; worked with partners to increase their capacity for sustained humanitarian response and with donors and implementing organizations to make humanitarian aid more efficient; supported United Nations Security Council action to improve the international response to regional conflicts; and brought attention to human rights abuses. The great progress achieved on these fronts harbingers the limitless potential of the United Nations to help confront these and other challenges.

When the United Nations lives up to its lofty ideals, it is an invaluable forum for cooperation among the peoples of the world. On this day, we celebrate the combined efforts of member states to achieve the United Nations' goals of international peace and security and developing friendly relations among nations. We also acknowledge all the men and women who are serving around the world in peacekeeping and humanitarian missions, and all those who work to keep our world safe from weapons of mass destruction.

NOW, THEREFORE, I, DONALD J. TRUMP, President of the United States of America, by virtue of the authority vested in me by the Constitution and the laws of the United States, do hereby proclaim October 24, 2018, as United Nations Day. I urge the Governors of the 50 States, the Governor of the Commonwealth of Puerto Rico, and the officials of all other areas

under the flag of the United States, to observe United Nations Day with appropriate ceremonies and activities.

IN WITNESS WHEREOF, I have hereunto set my hand this twenty-third day of October, in the year of our Lord two thousand eighteen, and of the Independence of the United States of America the two hundred and forty-third.



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