AUTHENTICATED
U.S. GOVERNMENT
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FEDERAL REGISTER

Vol. 83 Wednesday,
No. 229 November 28, 2018

Pages 61109–61308

OFFICE OF THE FEDERAL REGISTER

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Presidential Documents

Title 3—

The President

Proclamation 9827 of November 20, 2018

Thanksgiving Day, 2018

By the President of the United States of America

A Proclamation

On Thanksgiving Day, we recall the courageous and inspiring journey of the Pilgrims who, nearly four centuries ago, ventured across the vast ocean to flee religious persecution and establish a home in the New World. They faced illness, harsh conditions, and uncertainty, as they trusted in God for a brighter future. The more than 100 Pilgrims who arrived at Plymouth, Massachusetts, on the Mayflower, instilled in our Nation a strong faith in God that continues to be a beacon of hope to all Americans. Thanksgiving Day is a time to pause and to reflect, with family and friends, on our heritage and the sacrifices of our forebearers who secured the blessings of liberty for an independent, free, and united country.

After surviving a frigid winter and achieving their first successful harvest in 1621, the Pilgrims set aside 3 days to feast and give thanks for God's abundant mercy and blessings. Members of the Wampanoag tribe—who had taught the Pilgrims how to farm in New England and helped them adjust and thrive in that new land—shared in the bounty and celebration. In recognition of that historic event, President George Washington, in 1789, issued a proclamation declaring the first national day of thanksgiving. He called upon the people of the United States to unite in rendering unto God our sincere and humble gratitude ''for his kind care and protection of the People of this Country'' and ''the favorable interpositions of his Providence.'' President Abraham Lincoln revived this tradition as our fractured Nation endured the horrors of the Civil War. Ever since, we have set aside this day to give special thanks to God for the many blessings, gifts, and love he has bestowed on us and our country.

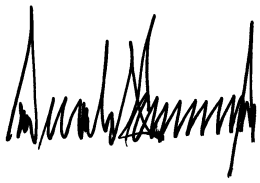
This Thanksgiving, as we gather in places of worship and around tables surrounded by loved ones, in humble gratitude for the bountiful gifts we have received, let us keep in close memory our fellow Americans who have faced hardship and tragedy this year. In the spirit of generosity and compassion, let us joyfully reach out in word and deed, and share our time and resources throughout our communities. Let us also find ways to give to the less fortunate—whether it be in the form of sharing a hearty meal, extending a helping hand, or providing words of encouragement.

We are especially reminded on Thanksgiving of how the virtue of gratitude enables us to recognize, even in adverse situations, the love of God in every person, every creature, and throughout nature. Let us be mindful of the reasons we are grateful for our lives, for those around us, and for our communities. We also commit to treating all with charity and mutual respect, spreading the spirit of Thanksgiving throughout our country and across the world.

Today, we particularly acknowledge the sacrifices of our service members, law enforcement personnel, and first responders who selflessly serve and protect our Nation. This Thanksgiving, more than 200,000 brave American patriots will spend the holiday overseas, away from their loved ones. Because of the men and women in uniform who volunteer to defend our liberty, we are able to enjoy the splendor of the American life. We pray for their safety, and for the families who await their return.

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 Thursday, November 22, 2018, as a National Day of Thanksgiving. I encourage all Americans to gather, in homes and places of worship, to offer a prayer of thanks to God for our many blessings.

IN WITNESS WHEREOF, I have hereunto set my hand this twentieth day of November, 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.



[FR Doc. 2018–25982
Filed 11–27–18; 8:45 am]
Billing code 3295–F9–P

Rules and Regulations

Federal Register

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

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

FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Parts 308 and 327

RIN 3064–AE75

Rules of Practice and Procedure

AGENCY: Federal Deposit Insurance Corporation.

ACTION: Final rule.

SUMMARY: The Federal Deposit Insurance Corporation (FDIC) is amending its rules of practice and procedure to remove duplicative, descriptive regulatory language related to civil money penalty (CMP) amounts that restates existing statutory language regarding such CMPs; codify Congress's recent change to CMP inflation-adjustments in the FDIC's regulations; and direct readers to an annually published notice in the **Federal Register**—rather than the Code of Federal Regulations (CFR)—for information regarding the maximum CMP amounts that can be assessed after inflation adjustments. These revisions are intended to simplify the CFR by removing unnecessary and redundant text and to make it easier for readers to locate the current, inflation-adjusted maximum CMP amounts by presenting these amounts in an annually published chart. Additionally, the FDIC is correcting four errors and revising cross-references currently found in its rules of practice and procedure.

DATES: This rule is effective on January 15, 2019.

FOR FURTHER INFORMATION CONTACT: Graham N. Rehrig, Senior Attorney, Legal Division, (202) 898–3829, *grehrig@fdic.gov;* or Sydney Mayer, Attorney, Legal Division, (202) 898–3669; Federal Deposit Insurance Corporation, 550 17th Street NW, Washington, DC 20429.

SUPPLEMENTARY INFORMATION:

I. Policy Objectives

The policy objective of the Rule is to simplify the presentation of maximum CMP amounts within 12 CFR part 308 to support ease of reference and public understanding. The Rule will amend the presentation of maximum CMP limits to help ensure consistency with similar statutes of other federal financial regulators.[1] Additionally, the Rule will implement recent Office of Management and Budget (OMB) guidance on simplifying the publication of annual inflation adjustments.

II. Background

The FDIC assesses CMPs under section 8(i) of the Federal Deposit Insurance Act (FDIA) (12 U.S.C. 1818) and a variety of other statutes.[2] Congress has established maximum penalties that can be assessed under these statutes. In many cases, these statutes contain multiple penalty tiers, permitting the assessment of penalties at various levels depending on the severity of the misconduct at issue.[3]

Since 1990, Congress has required federal agencies with authority to impose CMPs to periodically adjust the maximum CMP amounts these agencies are authorized to impose.[4] These periodic updates have helped to ''maintain the deterrent effect of civil monetary penalties and promote compliance with the law.''[5] In 2015, Congress revised the process by which federal agencies adjust applicable CMPs for inflation.[6] Under the 2015 Adjustment Act, the FDIC is required to make annual adjustments to its maximum CMP amounts to account for inflation.[7] These adjustments apply to all CMPs covered by the 2015 Adjustment Act.[8] The 2015 Adjustment Act requires annual adjustments be made by January 15 of each year.[9] The FDIC's 2018 adjustments were published on January 12, 2018.[10]

The 2015 Adjustment Act directs federal agencies to follow guidance issued by the OMB by December 15 of each year when calculating new maximum penalty amounts.[11] The OMB issued guidance for the 2018 CMP adjustments on December 15, 2017.[12] The OMB Guidance noted, ''Some agencies have chosen to remove their specific penalty amounts from the CFR and have instead codified the statutory formula for inflation adjustments. Agencies must still calculate and publish their penalty adjustments in the **Federal Register**.''[13]

III. Description and Expected Effects of the Rule

The FDIC is amending its rules of practice and procedure to remove from

[1] *See* 12 CFR 19.240 (2018) and 83 FR 1657 (Jan. 12, 2018) (table containing the CMP adjustments published by the Office of the Comptroller of Currency); 12 CFR 263.65 (2018) (table containing the CMP adjustments published by the Board of Governors of the Federal Reserve System); 12 CFR 747.1001 (2018) (table containing the CMP adjustments published by the National Credit Union Association).

[2] *See, e.g.,* 12 U.S.C. 1972(2)(F) (authorizing the FDIC to impose CMPs for violations of the Bank Holding Company Act of 1970 related to prohibited tying arrangements); 15 U.S.C. 78u–2 (authorizing the FDIC to impose CMPs for violations of certain provisions of the Securities Exchange Act of 1934); 42 U.S.C. 4012a(f) (authorizing the FDIC to impose CMPs for pattern or practice violations of the Flood Disaster Protection Act).

[3] For example, 12 U.S.C. 1818(i)(2) provides for three tiers of CMPs, with the size of the CMP increasing with the gravity of the misconduct.

[4] *See* The Federal Civil Penalties Inflation Adjustment Act of 1990, Public Law 101–410.

[5] *See* section 2 of the Federal Civil Penalties Inflation Adjustment Act of 1990. Public Law 101–410, 104 Stat. 890 (amended 2015) (codified as amended at 28 U.S.C. 2461 note).

[6] *See* The Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, Public Law 114–74, sec. 701, 129 Stat. 584 (2015 Adjustment Act). Although the 2015 Adjustment Act increased the maximum penalty that may be assessed under each applicable statute, the FDIC still possesses discretion to impose CMP amounts below the maximum level in accordance with the severity of the misconduct at issue. When making a determination as to the appropriate level of any given penalty, the FDIC is guided by statutory factors set forth in 12 U.S.C. 1818(i)(2)(G) and those factors identified in the Interagency Policy Statement Regarding the Assessment of CMPs by the Federal Financial Institutions Regulatory Agencies. *See* 63 FR 30227 (June 3, 1998). Such factors include, but are not limited to, the gravity and duration of the misconduct and the intent related to the misconduct.

[7] *See* 2015 Adjustment Act at sec. 701(b).

[8] *See* Public Law 101–410, sec. 3(2), 104 Stat. 890 (amended 2015) (codified as amended at 28 U.S.C. 2461 note).

[9] Public Law 114–74, sec. 701(b), 129 Stat. 584.

[10] *See* 83 FR 1519, *https://www.fdic.gov/news/board/2017/2017-12-19-notice-sum-b-fr.pdf.*

[11] *See* Public Law 114–74, sec. 701(b), 129 Stat. 584.

[12] OMB, Implementation of Penalty Inflation Adjustments for 2018, Pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, M–18–03 (OMB Guidance), *https://www.whitehouse.gov/wp-content/uploads/2017/11/M-18-03.pdf.*

[13] OMB Guidance at 4 (citing 81 FR 41438 (June 27, 2016) (Social Security Administration) (codified at 29 CFR 498.103(g) (2018))).

the CFR descriptive regulatory language related to maximum CMP amounts that duplicates statutory language, codify the statutory formula for inflation adjustments to the maximum CMP amounts, and direct readers to a table published annually in the **Federal Register**, containing the inflation-adjusted maximum CMP amounts. These changes will be consistent with the OMB Guidance and the practices of other Federal regulators.

Currently, 12 CFR 308.116(b) and 308.132(d) contain the maximum CMP amounts that may be assessed for violations of various statutes, along with lengthy descriptions of these statutes. Rather than providing any interpretation of these statutes or providing guidance regarding the assessment of CMPs for violations of these statutes, the descriptive language contained in sections 308.116(b) and 308.132(d) merely restates the enabling statutory language. The FDIC's current format for identifying inflation-adjusted CMP figures differs significantly from the formats published by other prudential regulators [14] and makes it more difficult for readers to locate applicable maximum CMP amounts. Accordingly, the FDIC is removing descriptive language found in sections 308.116(b) and 308.132(d). The FDIC believes that these changes will remove unnecessary and redundant language from the CFR and improve readability.

A sample annual table containing the current maximum CMP amounts appears at the end of this section, for reference. Under the Rule, the FDIC will calculate and publish a similar chart with inflation-adjusted figures in the **Federal Register** on or before January 15 of each calendar year, beginning with the January 15, 2019, annual inflation adjustments.

The FDIC, however, will retain language in section 308.116(a), (c) and (d) concerning violations of the Change in Bank Control Act. These regulations, which the FDIC implemented in 1991, address requests for a hearing, mitigating factors, and the consequences of a respondent's failure to answer.[15] The language in current section 308.116(b)(1)–(3), however, repeats the relevant statutory language of 12 U.S.C. 1817(j)(16)(A)–(D). Further, current section 308.116(b)(4) merely contains inflation adjustments. Therefore, the FDIC is removing current section 308.116(b) and instead directing readers to section 308.132(d) to determine current maximum CMP amounts.

The FDIC is also keeping language concerning the late filing of Call Reports at current section 308.132(d)(1) and (d)(3). 12 U.S.C. 1817(a) provides the maximum CMP amounts for the late filing of Call Reports. In 1991, however, the FDIC issued regulations that further subdivided these amounts based upon the size of the institution and the lateness of the filing.[16] These regulations accordingly differ from other provisions found in section 308.132(d) that simply restate relevant statutory language regarding maximum CMP amounts. The Rule will merge language from current subsections 308.132(d)(1) and (d)(3) into a new section 308.132(e), since, aside from the differing penalty amounts, these two current subsections contain similar language. The new section 308.132(e) will direct readers to the **Federal Register** to determine the applicable inflation-adjusted penalty amounts.

The FDIC is correcting four errors currently located at section 308.132(d)(1) and (d)(3) concerning the maximum amount that generally will be assessed for violations of 12 U.S.C. 1464(v) and 1817(a) regarding the late filing of Call Reports by certain small institutions. The current text contains the inadvertent overstatement of four fractions of an institution's total assets that are paired with correctly stated basis-point figures. These corrections will align the listed fractions of an institution's total assets with the listed basis-point calculations, and these corrections will be reflected in the annual **Federal Register** CMP notice.[17]

Lastly, the FDIC is revising cross-references found at 12 CFR 308.502(a)(6), 12 CFR 308.502(b)(4), 12 CFR 308.530, and 12 CFR 327.3(c) to reflect the revisions to 12 CFR 308.132(d).

Since the Rule will amend the presentation of maximum CMP levels in the **Federal Register**, the FDIC believes the Rule will not pose any regulatory costs to IDIs or cost to the public in general.

SAMPLE CIVIL MONEY PENALTY TABLE

U.S. code citation	Adjusted maximum CMP [18] (beginning January 15, 2018)
12 U.S.C. 1464(v):	
Tier One CMP	$3,928.
Tier Two CMP	$39,278.
Tier Three CMP [19]	$1,963,870.
12 U.S.C. 1467(d)	$9,819.
12 U.S.C. 1817(a):	
Tier One CMP [20]	$3,928.
Tier Two CMP	$39,278.
Tier Three CMP [21]	$1,963,870.
12 U.S.C. 1817(c):	
Tier One CMP	$3,591.
Tier Two CMP	$35,904.
Tier Three CMP [22]	$1,795,216.
12 U.S.C. 1817(j)(16):	
Tier One CMP	$9,819.
Tier Two CMP	$49,096.
Tier Three CMP [23]	$1,963,870.
12 U.S.C. 1818(i)(2): [24]	
Tier One CMP	$9,819.
Tier Two CMP	$49,096.
Tier Three CMP [25]	$1,963,870.
12 U.S.C. 1820(e)(4)	$8,977.
12 U.S.C. 1820(k)(6)	$323,027.
12 U.S.C. 1828(a)(3)	$122.
12 U.S.C. 1828(h): [26]	

[14] The OCC, the FRB, and the National Credit Union Association (NCUA) provide a simplified list in a tabular format, identifying each enabling statute and the associated maximum CMP amount, adjusted for inflation. *See* 12 CFR 19.240 (2018) and 83 FR 1657 (Jan. 12, 2018) (table containing the OCC's CMP adjustments); 12 CFR 263.65 (2018) (table containing the FRB's CMP adjustments); 12 CFR 747.1001 (2018) (table containing the NCUA's CMP adjustments).

[15] *See* 56 FR 37968 (Aug. 9, 1991).

[16] *See* 56 FR 37968, 37992–93 (Aug. 9, 1991).

[17] For example, current section 308.132(d)(1)(i)(A) states, ''the amount assessed shall be the greater of [an inflation-adjusted daily penalty] or 1/1,000th of the institution's total assets (1/10th of a basis point)'' when it should read, ''the amount assessed shall be the greater of [an inflation-adjusted daily penalty] or *1/100,000th* of the institution's total assets (1/10th of a basis point).'' (Emphasis added.)

SAMPLE CIVIL MONEY PENALTY TABLE—Continued

U.S. code citation	Adjusted maximum CMP [18] (beginning January 15, 2018)
For assessments <$10,000	$122.
12 U.S.C. 1829b(j)	$20,521.
12 U.S.C. 1832(c)	$2,852.
12 U.S.C. 1884	$285.
12 U.S.C. 1972(2)(F):	
Tier One CMP	$9,819.
Tier Two CMP	$49,096.
Tier Three CMP [27]	$1,963,870.
12 U.S.C. 3909(d)	$2,443.
15 U.S.C. 78u–2:	
Tier One CMP (individuals)	$9,239.
Tier One CMP (others)	$92,383.
Tier Two CMP (individuals)	$92,383.
Tier Two CMP (others)	$461,916.
Tier Three CMP (individuals)	$184,767.
Tier Three penalty (others)	$923,831.
15 U.S.C. 1639e(k):	
First violation	$11,279.
Subsequent violations	$22,556.
31 U.S.C. 3802	$11,181.
42 U.S.C. 4012a(f)	$2,133.
CFR citation	**Adjusted presumptive CMP (beginning January 15, 2018)**
12 CFR 308.132(e)(1)(i):	
Institutions with $25 million or more in assets:	
1 to 15 days late	$538.
16 or more days late	$1,078.
Institutions with less than 25 million in assets:	
1 to 15 days late [28]	$180.
16 or more days late [29]	$359.
12 CFR 308.132(e)(1)(ii):	
Institutions with $25 million or more in assets:	
1 to 15 days late	$897.
16 or more days late	$1,795.
Institutions with less than $25 million in assets:	
1 to 15 days late	1/50,000th of the institution's total assets.
16 or more days late	1/25,000th of the institution's total assets.
12 CFR 308.132(e)(2)	$39,278.
12 CFR 308.132(e)(3):	
Tier One CMP	$3,928.
Tier Two CMP	$39,278.
Tier Three CMP [30]	$1,963,870.

IV. Alternatives Considered

During preliminary discussions regarding the Rule, the FDIC considered possible alternatives to issuing the Rule. The primary alternative the FDIC considered was to maintain the current statutory language in the CFR and **Federal Register** as well as the CMP presentation format. This alternative (1) keeps the redundant statutory language in the CFR and **Federal Register**, (2) does not improve the clarity and readability of the maximum CMPs, and (3) does not address the fact that the CMP presentation format is inconsistent with the other prudential regulators. Therefore, the FDIC believes the Rule will support ease of reference and public understanding more so than the alternative.

V. Request for Comment

The FDIC believes that these changes to Part 308 are ministerial and technical and that, therefore, notice-and-comment rulemaking is unnecessary. Nonetheless, in the interest of transparency, the FDIC invited comments on all aspects of the Rule in a Notice of Proposed Rulemaking, dated August 3, 2018.[31] Commenters were specifically encouraged to identify any technical issues raised by the Rule. The FDIC provided a 60-day comment period for this Rule, but the agency did not receive any comments.

VI. Regulatory Analysis

Riegle Community Development and Regulatory Improvement Act

Section 302 of the Riegle Community Development and Regulatory Improvement Act of 1994 [32] requires that each Federal banking agency, in determining the effective date and administrative compliance requirements

[18] The maximum penalty amount is per day, unless otherwise indicated.

[19] The maximum penalty amount for an institution is the lesser of this amount or 1 percent of total assets.

[20] 12 U.S.C. 1817(a) provides the maximum CMP amounts for the late filing of Call Reports. In 1991, however, the FDIC issued regulations that further subdivided these amounts based upon the size of the institution and the lateness of the filing. *See* 56 FR 37968, 37992–93 (Aug. 9, 1991), *to be re-codified at* 12 CFR 308.132(e)(1). These adjusted subdivided amounts are found at the end of this chart.

[21] The maximum penalty amount for an institution is the lesser of this amount or 1 percent of total assets.

[22] The maximum penalty amount for an institution is the lesser of this amount or 1 percent of total assets.

[23] The maximum penalty amount for an institution is the lesser of this amount or 1 percent of total assets.

[24] These amounts also apply to CMPs in statutes that cross-reference 12 U.S.C. 1818, such as 12 U.S.C. 2601, 2804(b), 3108(b), 3349(b), 4009(a), 4309(a), 4717(b); 15 U.S.C. 1607(a), 1681s(b), 1691(b), 1691c(a), 1693*o*(a); 42 U.S.C. 3601.

[25] The maximum penalty amount for an institution is the lesser of this amount or 1 percent of total assets.

[26] The $122-per-day maximum CMP under 12 U.S.C. 1828(h), for failure or refusal to pay any assessment, applies only when the assessment is less than $10,000. When the amount of the assessment is $10,000 or more, the maximum CMP under section 1828(h) is 1 percent of the amount of the assessment for each day that the failure or refusal continues.

[27] The maximum penalty amount for an institution is the lesser of this amount or 1 percent of total assets.

[28] The maximum penalty amount for an institution is the greater of this amount or 1/100,000th of the institution's total assets.

[29] The maximum penalty amount for an institution is the greater of this amount or 1/50,000th of the institution's total assets.

[30] The maximum penalty amount for an institution is the lesser of this amount or 1 percent of total assets.

[31] *See* 83 FR 38080, *https://www.gpo.gov/fdsys/pkg/FR-2018-08-03/pdf/2018-16548.pdf.*

[32] 12 U.S.C. 4802.

for new regulations that impose additional reporting, disclosure, or other requirements on insured depository institutions, consider, consistent with principles of safety and soundness and the public interest, any administrative burdens that such regulations would place on depository institutions, including small depository institutions, and customers of depository institutions, as well as the benefits of such regulations. In addition, in order to provide an adequate transition period, new regulations that impose additional reporting, disclosures, or other new requirements on IDIs generally must take effect on the first day of a calendar quarter that begins on or after the date on which the regulations are published in final form.

The Rule will not impose any new or additional reporting, disclosures, or other requirements on insured depository institutions. Therefore, the Rule is not subject to the requirements of this statute.

Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires that, in connection with a rulemaking, an agency prepare and make available for public comment a final regulatory flexibility analysis describing the impact of the rulemaking on small entities.[33] A regulatory flexibility analysis is not required, however, if the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. The Small Business Administration (SBA) has defined ''small entities'' to include banking organizations with total assets less than or equal to $550 million.[34] The FDIC supervises 3,575 depository institutions,[35] of which 2,763 are defined as small banking entities by the terms of the RFA.[36] For the reasons described below and under section 605(b) of the RFA, the FDIC certifies that the Rule will not have a significant economic impact on a substantial number of small entities.

The FDIC believes the amendments to 12 CFR parts 308 and 327 will have a negligible impact on small entities. For a detailed description of the Rule and its expected effects, please review Section III above. The revisions are intended to simplify the text of the CFR by removing unnecessary and redundant text in order to make it easier for readers to reference and understand the current maximum CMP amounts.

Small Business Regulatory Enforcement Fairness Act

The OMB has determined that the Rule is not a ''major rule'' within the meaning of the relevant sections of the Small Business Regulatory Enforcement Act of 1996 (SBREFA).[37] As required by the SBREFA, the FDIC will submit the Rule and other appropriate reports to Congress and the Government Accountability Office for review.

The Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999: Assessment of Federal Regulations and Policies on Families

The FDIC determined that the Rule will not affect family wellbeing within the meaning of section 654 of the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999.[38]

Paperwork Reduction Act

The Rule does not create any new, or revise any existing, collections of information under section 3504(h) of the Paperwork Reduction Act of 1980.[39] Consequently, no information-collection request will be submitted to the OMB for review.

Plain Language Act

Section 722 of the Gramm-Leach-Bliley Act requires the FDIC to use plain language in all proposed and final rules published after January 1, 2000.[40] Accordingly, the FDIC has attempted to write the Rule in clear and comprehensible language.

List of Subjects

12 CFR Part 308

Administrative practice and procedure, Bank deposit insurance, Banks, banking, Claims, Crime, Equal access to justice, Fraud, Investigations, Lawyers, Penalties.

12 CFR Part 327

Bank deposit insurance, Banks, banking, Savings associations.

Authority and Issuance

For the reasons set forth in the preamble, the FDIC amends 12 CFR parts 308 and 327 to read as follows:

PART 308—RULES OF PRACTICE AND PROCEDURE

■ 1. The authority citation for part 308 continues to read as follows:

Authority: 5 U.S.C. 504, 554–557; 12 U.S.C. 93(b), 164, 505, 1464, 1467(d), 1467a, 1468, 1815(e), 1817, 1818, 1819, 1820, 1828, 1829, 1829(b), 1831i, 1831m(g)(4), 1831o, 1831p–1, 1832(c), 1884(b), 1972, 3102, 3108(a), 3349, 3909, 4717, 5412(b)(2)(C), 5414(b)(3); 15 U.S.C. 78(h) and (i), 78o(c)(4), 78o–4(c), 78o–5, 78q–1, 78s, 78u, 78u–2, 78u–3, 78w, 6801(b), 6805(b)(1); 28 U.S.C. 2461 note; 31 U.S.C. 330, 5321; 42 U.S.C. 4012a; Pub. L. 104–134, sec. 31001(s), 110 Stat. 1321; Pub. L. 109–351, 120 Stat. 1966; Pub. L. 111–203, 124 Stat. 1376; Pub. L. 114–74, sec. 701, 129 Stat. 584.

■ 2. Amend § 308.116 by revising paragraph (b) to read as follows:

§ 308.116 Assessment of penalties.

* * * * *

(b) *Maximum penalty amounts.* Under 12 U.S.C. 1817(j)(16), a civil money penalty may be assessed for violations of change in control of insured depository institution provisions in the maximum amounts calculated and published in accordance with § 308.132(d).

* * * * *

■ 3. Amend § 308.132 by revising paragraph (d) and adding paragraph (e) to read as follows:

§ 308.132 Assessment of penalties.

* * * * *

(d) *Maximum civil money penalty amounts.* Under the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, the Board of Directors or its designee may assess civil money penalties in the maximum amounts using the following framework:

(1) *Statutory formula to calculate inflation adjustments.* The FDIC is required by statute to annually adjust for inflation the maximum amount of each civil money penalty within its jurisdiction to administer. The inflation adjustment is calculated by multiplying the maximum dollar amount of the civil money penalty for the previous calendar year by the cost-of-living inflation adjustment multiplier provided annually by the Office of Management and Budget and rounding the total to the nearest dollar.

[33] 5 U.S.C. 601 *et seq.*

[34] The SBA defines a small banking organization as having $550 million or less in assets, where ''a financial institution's assets are determined by averaging the assets reported on its four quarterly financial statements for the preceding year.'' 13 CFR 121.201 n.8 (2018). ''SBA counts the receipts, employees, or other measure of size of the concern whose size is at issue and all of its domestic and foreign affiliates. . . .'' 13 CFR 121.103(a)(6) (2018). Following these regulations, the FDIC uses a covered entity's affiliated and acquired assets, averaged over the preceding four quarters, to determine whether the covered entity is ''small'' for the purposes of RFA.

[35] FDIC-supervised institutions are listed in 12 U.S.C. 1813(q)(2).

[36] Call Report: June 30, 2018.

[37] 5 U.S.C. 801 *et seq.*

[38] Public Law 105–277, 112 Stat. 2681 (1998).

[39] 44 U.S.C. 3501 *et seq.*

[40] Public Law 106–102, 113 Stat. 1338 (Nov. 12, 1999).

(2) *Notice of inflation adjustments.* By January 15 of each calendar year, the FDIC will publish notice in the **Federal Register** of the maximum penalties that may be assessed after each January 15, based on the formula in paragraph (d)(1) of this section, for conduct occurring on or after November 2, 2015.

(e) *Civil money penalties for violations of 12 U.S.C. 1464(v) and 12 U.S.C. 1817(a)*—(1) *Late filing—Tier One penalties.* Where an institution fails to make or publish its Report of Condition and Income (Call Report) within the appropriate time periods, but where the institution maintains procedures in place reasonably adapted to avoid inadvertent error and the late filing occurred unintentionally and as a result of such error, or where the institution inadvertently transmitted a Call Report that is minimally late, the Board of Directors or its designee may assess a Tier One civil money penalty. The amount of such a penalty shall not exceed the maximum amount calculated and published annually in the **Federal Register** under paragraph (d)(2) of this section. Such a penalty may be assessed for each day that the violation continues.

(i) *First offense.* Generally, in such cases, the amount assessed shall be an amount calculated and published annually in the **Federal Register** under paragraph (d)(2) of this section. The **Federal Register** notice will contain a presumptive penalty amount per day for each of the first 15 days for which the failure continues, and a presumptive amount per day for each subsequent days the failure continues, beginning on the 16th day. The annual **Federal Register** notice will also provide penalty amounts that generally may be assessed for institutions with less than $25,000,000 in assets.

(ii) *Subsequent offense.* The FDIC will calculate and publish in the **Federal Register** a presumptive daily Tier One penalty to be imposed where an institution has been delinquent in making or publishing its Call Report within the preceding five quarters. The published penalty shall identify the amount that will generally be imposed per day for each of the first 15 days for which the failure continues, and the amount that will generally be imposed per day for each subsequent day the failure continues, beginning on the 16th day. The annual **Federal Register** notice will also provide penalty amounts that generally may be assessed for institutions with less than $25,000,000 in assets.

(iii) *Lengthy or repeated violations.* The amounts set forth in this paragraph (e)(1) will be assessed on a case-by-case basis where the amount of time of the institution's delinquency is lengthy or the institution has been delinquent repeatedly in making or publishing its Call Reports.

(iv) *Waiver.* Absent extraordinary circumstances outside the control of the institution, penalties assessed for late filing shall not be waived.

(2) *Late-filing—Tier Two penalties.* Where an institution fails to make or publish its Call Report within the appropriate time period, the Board of Directors or its designee may assess a Tier Two civil money penalty for each day the failure continues. The amount of such a penalty will not exceed the maximum amount calculated and published annually in the **Federal Register** under paragraph (d)(2) of this section.

(3) *False or misleading reports or information*—(i) *Tier One penalties.* In cases in which an institution submits or publishes any false or misleading Call Report or information, the Board of Directors or its designee may assess a Tier One civil money penalty for each day the information is not corrected, where the institution maintains procedures in place reasonably adapted to avoid inadvertent error and the violation occurred unintentionally and as a result of such error, or where the institution inadvertently transmits a Call Report or information that is false or misleading. The amount of such a penalty will not exceed the maximum amount calculated and published annually in the **Federal Register** under paragraph (d)(2) of this section.

(ii) *Tier Two penalties.* Where an institution submits or publishes any false or misleading Call Report or other information, the Board of Directors or its designee may assess a Tier Two civil money penalty for each day the information is not corrected. The amount of such a penalty will not exceed the maximum amount calculated and published annually in the **Federal Register** under paragraph (d)(2) of this section.

(iii) *Tier Three penalties.* Where an institution knowingly or with reckless disregard for the accuracy of any Call Report or information submits or publishes any false or misleading Call Report or other information, the Board of Directors or its designee may assess a Tier Three civil money penalty for each day the information is not corrected. The penalty shall not exceed the lesser of 1 percent of the institution's total assets per day or the amount calculated and published annually in the **Federal Register** under paragraph (d)(2) of this section.

(4) *Mitigating factors.* The amounts set forth in paragraphs (e)(1) through (e)(3) of this section may be reduced based upon the factors set forth in paragraph (b) of this section.

■ 4. Amend § 308.502 by revising paragraphs (a)(6) and (b)(4) to read as follows:

§ 308.502 Basis for civil penalties and assessments.

(a) * * *

(6) The amount of any penalty assessed under paragraph (a)(1) of this section will be adjusted for inflation in accordance with § 308.132(d).

* * * * *

(b) * * *

(4) The amount of any penalty assessed under paragraph (a)(1) of this section will be adjusted for inflation in accordance with § 308.132(d).

* * * * *

■ 5. Amend § 308.530 by revising paragraph (d) to read as follows:

§ 308.530 Determining the amount of penalties and assessments.

* * * * *

(d) Civil money penalties that are assessed under this subpart are subject to annual adjustments to account for inflation as required by the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (Pub. L. 114–74, sec. 701, 129 Stat. 584) (*see also* § 308.132(d)).

PART 327—ASSESSMENTS

■ 6. The authority citation for part 327 continues to read as follows:

Authority: 12 U.S.C. 1441, 1813, 1815, 1817–19, 1821.

■ 7. Amend § 327.3 by revising paragraph (c) to read as follows:

§ 327.3 Payment of assessments.

* * * * *

(c) *Necessary action, sufficient funding by institution.* Each insured depository institution shall take all actions necessary to allow the Corporation to debit assessments from the insured depository institution's designated deposit account. Each insured depository institution shall, prior to each payment date indicated in paragraph (b)(2) of this section, ensure that funds in an amount at least equal to the amount on the quarterly certified statement invoice are available in the designated account for direct debit by the Corporation. Failure to take any such action or to provide such funding of the account shall be deemed to constitute nonpayment of the assessment. Penalties for failure to

timely pay assessments will be calculated and published in accordance with 12 CFR 308.132(d).

* * * * *

Dated at Washington, DC, on November 20, 2018.

By order of the Board of Directors.

Federal Deposit Insurance Corporation.

Robert E. Feldman,

Executive Secretary.

[FR Doc. 2018–25660 Filed 11–27–18; 8:45 am]

BILLING CODE 6714–01–P

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

25 CFR Part 175

[190A2100DD/AAKC001030/ A0A501010.999900 253G]

RIN 1076–AF31

Indian Electric Power Utilities

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Final rule.

SUMMARY: This rule revises regulations addressing electric power utilities of the Colorado River, Flathead, and San Carlos Indian irrigation projects to use plain language, update definitions, lengthen a regulatory deadline, and make other minor changes.

DATES: This rule is effective December 28, 2018.

FOR FURTHER INFORMATION CONTACT: David Fisher, Branch Chief Irrigation & Power, Division of Water & Power, Bureau of Indian Affairs, telephone (303) 231–5225, *david.fisher@bia.gov.*

SUPPLEMENTARY INFORMATION:

I. Background
II. Description of Changes
III. Procedural Requirements
A. Regulatory Planning and Review (E.O.s 12866 and 13563) and Reducing Regulation and Controlling Regulatory Costs (E.O. 13771)
B. Regulatory Flexibility Act
C. Small Business Regulatory Enforcement Fairness Act
D. Unfunded Mandates Reform Act
E. Takings (E.O. 12630)
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G. Civil Justice Reform (E.O. 12988)
H. Consultation With Indian Tribes (E.O. 13175)
I. Paperwork Reduction Act
J. National Environmental Policy Act
K. Effects on the Energy Supply (E.O. 13211)

I. Background

Various statutes provide the Bureau of Indian Affairs (BIA) with authority to issue this regulation and for administering electric power utilities for the Colorado River, Flathead (Mission Valley Power), and San Carlos Indian irrigation projects. For example, see 5 U.S.C. 301; 25 U.S.C. 13; 25 U.S.C. 385c; 43 Stat. 475–76; 45 Stat. 210–13; 49 Stat. 1039–40; 49 Stat. 1822–23; 54 Stat. 422; 62 Stat. 269–73; 65 Stat. 254; 99 Stat. 319–20. Each of these power projects provides energy, transmission, and distribution of electrical services to customers in their respective service areas. BIA (or the contracting/compacting Indian Tribe) provides oversight and limited technical assistance for power projects and conducts operations and maintenance of the distribution systems.

The regulations addressing BIA's administration of the power utilities are at 25 CFR part 175, Indian Electric Power Utilities. This final rule updates the regulations for the first time since 1991.

II. Description of Changes

The revisions being finalized today are intended to make the regulations more user-friendly through plain language. The final rule also updates definitions, lengthens the time by which BIA must issue a decision on an appeal from 30 days to 60 days (by referring to 25 CFR 2.19(a)), and requires publication of rate adjustments in the **Federal Register**. These changes were proposed on December 27, 2017 at 82 FR 61193. BIA received no comments relevant to the proposed rule. The final rule makes no changes to the proposed rule. The following tables summarize the final changes:

TABLE 1

Current 25 CFR section	New 25 CFR section	Summary of changes
175.1 Definitions	175. 100 What terms should I know for this part?	Deletes the definitions of ''appellant'' and ''officer-in-charge.'' Adds definitions for ''bill,'' ''CFR,'' ''day(s),'' ''delinquent,'' ''due date,'' ''electric energy,'' ''energy,'' ''fee,'' ''I, me, my, you, and your,'' ''must,'' ''past due bill,'' ''power,'' ''public notice,'' ''purchased power,'' ''taxpayer identification number,'' ''utility(ies),'' and ''we, us, and our.'' Replaces definition of ''Area Director'' with a definition of ''BIA.'' Revises the definition of ''customer,'' ''electric power utility,'' ''electric service,'' ''operations manual,'' ''service,'' ''service fee.'' Revises the definition of ''power rate'' and replaces it with the terms ''rate'' and ''electric power rate.'' Revises the definition of ''service agreement'' and replaces it with the term ''agreement.'' Revises the definition of ''special contract'' and replaces it with the term ''special agreement.''
175.2 Purpose	175.105 What is the purpose of this part?	Revises for plain language.
175.3 Compliance	175.110 Does this part apply to me?	Revises for plain language.
175.4 Authority of area director	N/A	Deletes provisions containing delegations of authority to eliminate possible conflicts with the Departmental Delegations of Authority.
175.5 Operations manual	175.115 How does BIA administer its electric power utilities? 175.120 What are Operations Manuals?	Revises for plain language, deletes specific means by which public notice of changes will be provided, and incorporates instead the definition of ''public notice,'' which provides for publishing information consistent with the operations manual.
175.6 Information collection	175.600 How does the Paperwork Reduction Act affect this part?	Revises for plain language.

TABLE 1—Continued

Current 25 CFR section	New 25 CFR section	Summary of changes
175.10 Revenues collected from power operations.	175.200 Why does BIA collect revenue from you and the other customers it serves, and how is that revenue used? 175.205 When are BIA rates and fees reviewed?	Revises for plain language and deletes amortization as an example for what BIA may use revenue.
175.11 Procedures for setting service fees.	175.210 What is BIA's procedure for setting service fees?	Deletes provisions containing delegations of authority to eliminate possible conflicts with Departmental Delegations of Authority.
175.12 Procedures for adjusting electric power rates except for adjustments due to changes in the cost of purchased power or energy.	175.215 What is BIA's procedure for adjusting electric power rates? 175.220 How long do rate and fee adjustments stay in effect?	Adds a requirement for BIA to publish a proposed rate adjustment in the **Federal Register**.
175.13 Procedures for adjusting electric power rates to reflect changes in the cost of purchased power or energy.	175.235 How does BIA include changes in purchased power costs to our electric power rates?	Revises for plain language.
175.20 Gratuities	N/A	This section is deleted because it is already addressed by other laws.
175.21 Discontinuance of service	175.315 What will happen if I do not pay my bill?	Revises for plain language.
175.22 Requirements for receiving electrical service.	175.125 How do I request and receive service?	Revises for plain language.
175.23 Customer responsibilities	N/A	Deleted because this provision is for a project-specific authority addressed at the local BIA level.
175.24 Utility responsibilities	N/A	Incorporates the substance into sections 175.115 and 175.120, which refer to operations manual instead of setting out responsibilities.
175.30 Billing	175.300 How does BIA calculate my electric bill?	Revises for plain language.
175.31 Methods and terms of payment.	175.310 How do I pay my bill?	Replaces provision stating that the utility may refuse, for cause, to accept personal checks with a general statement that the electric utility that serves you may provide additional requirements.
175.32 Collections	175.315 What will happen if I do not pay my bill? 175.320 What will happen if my service is disconnected and my account remains delinquent?	Revises for plain language.
175.40 Financing of extensions and upgrades.	175.400 Will the utility extend or upgrade its electric system to serve new or increased loads?	Revises to direct customers to contact the electric power utility for more information.
175.50 Obtaining rights-of-way 175.51 Ownership.	175.500 How does BIA manage rights-of-way?	Revises to direct customers to contact the electric power utility for more information.
175.60 Appeals to the area director. 175.61 Appeals to the Interior Board of Indian Appeals. 175.62 Utility actions pending the appeal process.	175.145 Can I appeal a BIA decision?	Combines current sections 175.60 and 175.61 into a paragraph that refers to 25 CFR part 2 rather than explicitly stating appeal procedures. Increases the time by which BIA must issue a decision on an appeal from 30 days to 60 days (*see* 25 CFR 2.19(a)). Adds a new paragraph (b) to clarify that a customer must pay the bill to continue to receive service. Incorporates section 175.62 into new paragraphs (c) through (e).

NEW PROVISIONS

Current 25 CFR section	New final 25 CFR section	Summary of changes
N/A	175.130 What information must I provide when I request service?	New section.
N/A	175.135 Why is BIA collecting this information?	New section.
N/A	175.140 What is BIA's authority to collect my taxpayer identification number?	New section.
N/A	175.225 What is the **Federal Register**, and where can I get it?	New section.
N/A	175.230 Why are changes to purchased power costs not included in the procedure for adjusting electric power rates?	New section.

NEW PROVISIONS—Continued

Current 25 CFR section	New final 25 CFR section	Summary of changes
N/A	175.320 What will happen if my service is disconnected and my account remains delinquent?	New section.
N/A	175.305 When is my bill due?	New section.

III. Procedural Requirements

A. Regulatory Planning and Review (E.O. 12866 and 13563) and Reducing Regulation and Controlling Regulatory Costs (E.O. 13771)

Executive Order (E.O.) 12866 provides that the Office of Information and Regulatory Affairs in the Office of Management and Budget will review all significant rules. The Office of Information and Regulatory Affairs has determined that this rule is not significant.

E.O. 13563 reaffirms the principles of E.O. 12866 while calling for improvements in the nation's regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. The executive order directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. E.O. 13563 emphasizes further that regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. We have developed this rule in a manner consistent with these requirements.

This rule is not an E.O. 13771 regulatory action because this rule is not significant under E.O. 12866.

B. Regulatory Flexibility Act

This document will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) because the rule does not make any changes to electric power rates or service fees.

C. Small Business Regulatory Enforcement Fairness Act

This rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. This rule:

(a) Does not have an annual effect on the economy of $100 million or more;

(b) Will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions;

(c) Does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises.

D. Unfunded Mandates Reform Act

This rule does not impose an unfunded mandate on State, local, or tribal governments or the private sector of more than $100 million per year. The rule does not have a significant or unique effect on State, local, or tribal governments or the private sector. A statement containing the information required by the Unfunded Mandates Reform Act (2 U.S.C. 1531 *et seq.*) is not required.

E. Takings (E.O. 12630)

This rule does not effect a taking of private property or otherwise have taking implications under E.O. 12630. A takings implication assessment is not required.

F. Federalism (E.O. 13132)

Under the criteria in section 1 of E.O. 13132, this rule does not have sufficient Federalism implications to warrant the preparation of a Federalism summary impact statement. A Federalism summary impact statement is not required.

G. Civil Justice Reform (E.O. 12988)

This rule complies with the requirements of E.O. 12988. Specifically, this rule:

(a) Meets the criteria of section 3(a) requiring that all regulations be reviewed to eliminate errors and ambiguity and be written to minimize litigation; and

(b) Meets the criteria of section 3(b)(2) requiring that all regulations be written in clear language and contain clear legal standards.

H. Consultation With Indian Tribes (E.O. 13175 and Departmental Policy)

The Department of the Interior strives to strengthen its government-to-government relationship with Indian Tribes through a commitment to consult with Indian Tribes and recognize their right to self-governance and Tribal sovereignty. We have evaluated this rule under the Department's consultation policy and under the criteria in E.O. 13175 for substantial direct effects on federally recognized Indian Tribes and have consulted with those Tribes served by the electric power utilities subject to this rule. We hosted two in-person Tribal consultation sessions in the vicinity of Tribes served by the electric power utilities: One on April 14, 2016, in Pablo, Montana, and one on April 19, 2016, in Phoenix, Arizona. One Tribe submitted comments on the draft regulation, to which we have responded by letter because the comments are primarily unique to the local utility. We included an offer in the proposed rule for any Tribe that would like additional consultation opportunities on the proposed regulatory changes to contact BIA. No Tribe requested additional consultation opportunities on the rule.

I. Paperwork Reduction Act

The information collection requirements contained in 25 CFR part 175 are authorized by OMB Control Number 1076–0021, with an expiration date of June 30, 2019. A submission to the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*) is not required because this rule would not affect the information collection requirements contained in 25 CFR part 175. We may not conduct or sponsor, and you are not required to respond to, a collection of information unless it displays a currently valid OMB control number.

J. National Environmental Policy Act

This rule does not constitute a major Federal action significantly affecting the quality of the human environment. A detailed statement under the National Environmental Policy Act of 1969 (NEPA) is not required because the rule is covered by a categorical exclusion. This rule is excluded from the requirement to prepare a detailed statement because it is a regulation of an administrative nature. (For further information, see 43 CFR 46.210(i).) We have also determined that the rule does not involve any of the extraordinary circumstances listed in 43 CFR 46.215 that would require further analysis under NEPA.

K. Effects on the Energy Supply (E.O. 13211)

This rule is not a significant energy action under the definition in E.O. 13211. A Statement of Energy Effects is not required.

List of Subjects in 25 CFR Part 175

Administrative practice and procedure, Electric power, Indians—lands, Reporting and recordkeeping requirements.

■ For the reasons given in the preamble, the Department of the Interior amends chapter 1 of title 25 Code of Federal Regulations by revising part 175 to read as follows.

PART 175—ELECTRIC POWER UTILITIES

Subpart A—General Provisions

Sec.
175.100 What terms should I know for this part?
175.105 What is the purpose of this part?
175.110 Does this part apply to me?
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175.300 How does BIA calculate my electric power bill?
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Subpart D—System Extensions and Upgrades, Rights-of-Way, and Paperwork Reduction Act

175.400 Will the utility extend or upgrade its electric system to serve new or increased loads?
175.500 How does BIA manage rights-of-way?
175.600 How does the Paperwork Reduction Act affect this part?

Authority: 5 U.S.C. 301; 25 U.S.C. 13; 25 U.S.C. 385c; 43 Stat. 475–76; 45 Stat. 210–13; 49 Stat. 1039–40; 49 Stat. 1822–23; 54 Stat. 422; 62 Stat. 269–73; 65 Stat. 254; 99 Stat. 319–20.

Subpart A—General Provisions

§ 175.100 What terms I should know for this part?

Agreement means the executed written form between you and the utility providing your service, except for service provided under a Special Agreement.

BIA means the Bureau of Indian Affairs within the United States Department of the Interior or the BIA's authorized representative.

Bill means our written statement notifying you of the charges and/or fees you owe the United States for the administration, operation, maintenance, rehabilitation, and/or construction of the electric power utility servicing you.

CFR means Code of Federal Regulations.

Customer means any person or entity to whom we provide service.

Customer service is the assistance or service provided to customers, except for the actual delivery of electric power or energy. Customer service may include: Line extension, system upgrade, meter testing, connections or disconnection, special meter reading, or other assistance or service as provided in the Operations Manual.

Day(s) means calendar day(s).

Delinquent means an account that has not been paid and settled by the due date.

Due date means the date by which you must pay your bill. The due date is printed on your bill.

Electric energy (see *Electric power*).

Electric power means the energy we deliver to meet customers' electrical needs.

Electric power rate means the charges we establish for delivery of energy to our customers, which includes administration costs and operation and maintenance costs in addition to the cost of purchased power.

Electric power utility means all structures, equipment, components, and human resources necessary for the delivery of electric service.

Electric service means the delivery of electric power by our utility to our customers.

Energy means electric power.

Fee (see *Service fee*).

I, me, my, you, and *your* means all interested parties, especially persons or entities to which we provide service and receive use of our electric power service.

Must means an imperative or mandatory act or requirement.

Operations Manual means the written policies, practices, procedures and requirements of the utility providing your service. The Operations Manual supplements this Part and includes our responsibilities to our customers and our customers' responsibilities to the utility.

Past due bill means a bill that has not been paid by the due date.

Power (see *Energy*).

Public notice is the notice provided by publishing information consistent with the utility's Operations Manual.

Purchased power means the power we must purchase from power marketing providers for resale to our customers to meet changing power demands. Each of our utilities establishes its own power purchasing agreement based on its power demands and firm power availability.

Rate (see *Electric power rate*).

Reserve Funds means funds held in reserve for maintenance, repairs, or unexpected expenses.

Revenue means the monies we collect from our customers through service fees and electric power rates.

Service (see *Electric service*).

Service fee means our charge for providing or performing a specific administrative or customer service.

Special Agreement means a written agreement between you and us for special conditions or circumstances including unmetered services.

Taxpayer identification number means either your Social Security Number or your Employer Identification Number.

Utility(ies) see (*Electric power utility*).

Utility office(s) means our facility used for conducting business with our customers and the general public.

We, us, and *our* means the United States Government, the Secretary of the Interior, the BIA, and all who are authorized to represent us in matters covered under this Part.

§ 175.105 What is the purpose of this part?

The purpose of this part is to establish the regulations for administering BIA electric power utilities.

§ 175.110 Does this part apply to me?

This part applies to you if we provide you service or if you request service from us.

§ 175.115 How does BIA administer its electric power utilities?

We promote efficient administration, operation, maintenance, and construction of our utilities by following and enforcing:

(a) Applicable statutes, regulations, Executive Orders, Indian Affairs manuals, Operations Manuals;

(b) Applicable written policies, procedures, directives, safety codes; and

(c) Utility industry standards.

§ 175.120 What are Operations Manuals?

(a) We maintain an Operations Manual for each of our utilities. Each utility's Operations Manual is available at the utility.

(b) The Operations Manual sets forth the requirements for the administration, management, policies, and responsibilities of that utility and its customers.

(c) We update our Operations Manual for each utility to reflect changing requirements to administer, operate, or maintain that utility.

(d) When we determine it necessary to revise an Operations Manual, we will:

(1) Provide public notice of the proposed revision;

(2) State the effective date of the proposed revision;

(3) State how and when to submit your comments on our proposed revision;

(4) Provide 30 days from the date of the notice to submit your comments; and

(5) Consider your comments and provide notice of our final decision.

§ 175.125 How do I request and receive service?

(a) If you need electrical service in an area where we provide service, you must contact our utility in that service area.

(b) To receive service, you must enter into an Agreement with that utility after it has determined that you have met its requirements.

§ 175.130 What information must I provide when I request service?

At a minimum, you must provide the utility with the following information when you request service:

(a) Your full legal name or the legal name of the entity needing service;

(b) Your taxpayer identification number;

(c) Your billing address;

(d) Your service address; and

(e) Any additional information required by the utility.

§ 175.135 Why is BIA collecting this information?

We are collecting this information so we can:

(a) Provide you with service;

(b) Bill you for the service we provide; and

(c) Account for monies you pay us, including any deposits as outlined in the Operations Manual.

§ 175.140 What is BIA's authority to collect my tax payer identification number?

We are required to collect your taxpayer identification number under the authority of, and as prescribed in, the Debt Collection Improvement Act of 1996, Public Law 104–134 (110 Stat. 1321–364).

§ 175.145 Can I appeal a BIA decision?

(a) You may appeal a decision in accordance with the procedures set out in 25 CFR part 2, unless otherwise prohibited by law.

(b) If the appeal involves the discontinuation of service, the utility is not required to resume the service during the appeal process unless the customer meets the utility's requirements.

(c) If you appeal your bill, you must pay your bill in accordance with this part to continue to receive service from us.

(1) If the appeal involves the amount of your bill, the bill will be considered paid under protest until the final decision has been rendered on appeal.

(2) If you appeal your bill but do not pay the bill in full, you may not continue to receive service from us. If the final decision rendered in the appeal requires payment of the bill, the bill will be handled as a delinquent account and the amount of the bill may be subject to interest, penalties, and administrative costs pursuant to 31 U.S.C. 3717 and 31 CFR 901.9.

(3) If the appeal involves an electric power rate, the rate will be applied and remain in effect subject to the final decision on the appeal.

Subpart B—Service Fees, Electric Power Rates, and Revenues

§ 175.200 Why does BIA collect revenue from you and the other customers it serves, and how is that revenue used?

(a) The revenue we collect from you and the other customers is authorized by 25 U.S.C. 385c (60 Stat. 895, as amended by 65 Stat. 254).

(b) The revenue we collect may be used to:

(1) Pay for operation and maintenance of the utility;

(2) Maintain Reserve Funds to:

(i) Make repairs and replacements to the utility;

(ii) Defray emergency expenses;

(iii) Ensure the continuous operation of the power system; and

(iv) Pay other allowable expenses and obligations to the extent required or permitted by law.

§ 175.205 When are BIA rates and fees reviewed?

We review our rates and fees at least annually to:

(a) Determine if our financial requirements are being met to ensure the reliable operation of the utility serving you; and

(b) Determine if revenues are sufficient to meet the statutory requirements.

§ 175.210 What is BIA's procedure for adjusting service fees?

If, based on our annual review, we determine our service fees need to be adjusted:

(a) We will notify you at least 30 days prior to the effective date of the adjustment; and

(b) We will publish a schedule of the adjusted service fees in a local newspaper(s) and post them in the local utility office serving you.

§ 175.215 What is BIA's procedure for adjusting electric power rates?

Except for purchased power costs, if we determine electric power rates need to be adjusted, we will:

(a) Hold public meetings and notify you of their respective time, date, and location by newspaper notice and a notice posted in the utility office serving you;

(b) Provide you notice at least 15 days prior to the meeting;

(c) Provide you a description of the proposed rate adjustment;

(d) Provide you information on how, where, and when to submit comments on our proposed rate adjustment;

(e) Make a final determination on the proposed rate adjustment after all comments have been received, reviewed, and evaluated; and

(f) Publish the proposed rate adjustment and the final rate in the **Federal Register** if we determine the rate adjustment is necessary.

§ 175.220 How long do rate and fee adjustments stay in effect?

These adjustments remain in effect until we conduct a review and determine adjustments are necessary.

§ 175.225 What is the Federal Register, and where can I get it?

The **Federal Register** is the official daily publication for rules, proposed rules, and notices of official actions by Federal agencies and organizations, as

well as Executive Orders and other Presidential Documents and is produced by the Government Printing Office (GPO). You can get **Federal Register** publications by:

(a) Visiting *www.federalregister.gov* or *www.gpo.gov/fdsys;*

(b) Writing to the GPO at Superintendent of Documents, P.O. Box 371954, Pittsburgh, PA 15250–7954; or

(c) Calling the GPO at (202) 512–1800.

§ 175.230 Why are changes to purchased power costs not included in the procedure for adjusting electric power rates?

Changes to purchased power costs are not included in the procedure for adjusting electric power rates because unforeseen increases in the cost of purchased power are:

(a) Not under our control;

(b) Determined by current market rates; and

(c) Subject to market fluctuations that can occur at an undetermined time and frequency.

§ 175.235 How does BIA include changes in purchased power costs in electric power rates?

When our cost of purchased power changes:

(a) We determine the effect of the change;

(b) We adjust the purchased power component of your bill accordingly;

(c) We add the purchased power adjustment to the existing electric power rate and put it into effect immediately;

(d) The purchased power adjustment remains in effect until we determine future adjustments are necessary;

(e) We must publish in the local newspaper and post at our office a notice of the purchase power adjustment and the basis for the adjustment; and

(f) Our decision to make a purchased power adjustment must be final.

Subpart C—Billing, Payments, and Collections

§ 175.300 How does BIA calculate my electric power bill?

(a) We calculate your electric power bill based on the:

(1) Current rate schedule for your type service; and

(2) Applicable service fees for your type service.

(b) If you have a metered service we must:

(1) Read your meter monthly;

(2) Calculate your bill based on your metered energy consumption; and

(3) Issue your bill monthly, unless otherwise provided in a Special Agreement.

(c) If we are unable to calculate your metered energy consumption, we must make a reasonable estimate based on one of the following reasons:

(1) Your meter has failed;

(2) Your meter has been tampered with; or

(3) Our utility personnel are unable to read your meter.

(d) If you have an unmetered service, we calculate your bill in accordance with your Special Agreement.

§ 175.305 When is my bill due?

The due date is provided on your bill.

§ 175.310 How do I pay my bill?

You may pay your bill by any of the following methods:

(a) In person at our utility office;

(b) Mail your payment to the address stated on your bill; or

(c) As further provided by the electric utility that serves you.

§ 175.315 What will happen if I do not pay my bill?

(a) If you do not pay your bill prior to the close of business on the due date, your bill will be past due.

(b) If your bill is past due we may:

(1) Disconnect your service; and

(2) Not reconnect your service until your bill, including any applicable fees, is paid in full.

(c) Specific regulations regarding non-payment can be found in 25 CFR 143.5(c).

§ 175.320 What will happen if my service is disconnected and my account remains delinquent?

(a) If your service has been disconnected and you still have an outstanding balance, we will assess you interest, penalties, and administrative costs in accordance with 31 CFR 901.9.

(b) We must forward your delinquent balance to the United States Treasury if it is not paid within 180 days after the original due date in accordance with 31 CFR 901.1.

Subpart D—System Extensions and Upgrades, Rights-of-Way, and Paperwork Reduction Act

§ 175.400 Will the utility extend or upgrade its electric system to serve new or increased loads?

The utility may extend or upgrade its electric system to serve new or increased loads. Contact your electric power utility providing service in your area for further information on new or increased loads.

§ 175.500 How does BIA manage rights-of-way?

Contact your electric power utility providing service in your area for further information on rights-of-way.

§ 175.600 How does the Paperwork Reduction Act affect this part?

The collection of information contained in this part have been approved by the Office of Management and Budget under 44 U.S.C. 3501 *et seq.* and assigned OMB Control Number 1076–0021. Response is required to obtain a benefit. A Federal agency may not conduct or sponsor, and you are not required to respond to, a collection of information unless the form or regulation requesting the information displays a currently valid OMB Control Number. Send comments regarding this collection of information, including suggestions for reducing the burden, to the Information Collection Clearance Officer—Indian Affairs, 1849 C Street NW, Washington, DC 20240.

Dated: October 31, 2018.

Tara Sweeney,

Assistant Secretary—Indian Affairs.

[FR Doc. 2018–25943 Filed 11–27–18; 8:45 am]

BILLING CODE 4337–15–P

DEPARTMENT OF EDUCATION

34 CFR Parts 86 and 668

Waiver of Certain Consumer Information Requirements for Foreign Institutions of Higher Education

AGENCY: Office of Postsecondary Education, Department of Education.

ACTION: Waiver.

SUMMARY: The Secretary identifies specific provisions governing the student loan programs authorized by title IV of the Higher Education Act of 1965, as amended (HEA), that do not apply to foreign institutions.

DATES: November 28, 2018.

FOR FURTHER INFORMATION CONTACT: Ashley Higgins, U.S. Department of Education, 400 Maryland Avenue SW, Room 294–20, Washington, DC 20202. Telephone: (202) 453–6097. Email: *Ashley.Higgins@ed.gov.*

SUPPLEMENTARY INFORMATION: The Department of Education's (Department) regulations governing the eligibility of foreign institutions to participate in the title IV, HEA student loan programs provide that, ''[a] foreign institution must comply with all requirements for eligible and participating institutions except when made inapplicable by the HEA or when the Secretary, through publication in the **Federal Register**, identifies specific provisions as inapplicable to foreign institutions.'' 34 CFR 600.51(c)(1). In this document, we identify specific provisions that do not

apply to foreign institutions of higher education.

I. Regulatory Consumer Information Requirements Inapplicable to Foreign Institutions of Higher Education

Transfer of Credit Policies and Articulation Agreements (34 CFR 668.43(a)(11))

Requirement: Each institution must disclose and make available to prospective and enrolled students a statement of the school's transfer of credit policies that includes, at a minimum—

- Any established criteria the school uses regarding the transfer of credit earned at another school; and
- A list of schools with which the school has established an articulation agreement.

Reason: The Secretary believes this requirement is inapplicable to foreign institutions because American students attending a foreign institution are unlikely to need this information. Transfer of credit rules at foreign institutions generally apply to credits earned at institutions in the institution's home country and are of limited use to American students seeking to transfer credits earned at U.S. institutions.

Copyright Infringement Policies and Sanctions, Including Computer Use and File Sharing (34 CFR 668.43(a)(10))

Requirement: Institutions must readily make available to current and prospective students the institution's policies and sanctions related to copyright infringement, including—

- A statement that explicitly informs students that unauthorized distribution of copyrighted material, including unauthorized peer-to-peer file sharing, may subject them to civil and criminal liabilities;
- A summary of the penalties for violation of Federal copyright laws; and
- The institution's policies with respect to unauthorized peer-to-peer file sharing, including disciplinary actions taken against students who engage in illegal downloading or unauthorized distribution of copyrighted materials using the institution's information technology system.

Reason: U.S. copyright laws do not apply in foreign countries and the rules and penalties mentioned in this provision would not apply to U.S. students while attending a foreign institution. Therefore, the Secretary believes that it is unnecessary for foreign institutions to disclose rules and policies that are not applicable to the institution and its students and that may be incompatible with the laws of the country in which the institution is located.

School and Program Accreditation, Approval, or Licensure (34 CFR 668.43(a)(6))

Requirement: Each institution must make available to prospective and enrolled students—

- Names of associations, agencies, or governmental bodies that accredit, approve, or license the institution and its programs; and
- Procedures for obtaining or reviewing documents describing accreditation, approval, or licensing.

Reason: Unlike domestic institutions, foreign institutions do not need to be accredited by a body recognized by the Secretary to participate in the title IV, HEA programs. In addition, the requirements for licensing institutions vary by country. Although the foreign institution must have approval of the government of the country in which the institution is located to operate in order to participate in the title IV, HEA programs, the Secretary does not believe accreditation and licensure information, as described for U.S. Institutions will be available at all foreign institutions.

Drug and Alcohol Abuse Prevention Program (34 CFR 86.100 and 86.103; 20 U.S.C. 1011i)

Requirement: Each institution must annually distribute in writing to each student and employee—

- Standards of conduct that clearly prohibit the unlawful possession, use, or distribution of illicit drugs and alcohol by students and employees on the institution's property or as part of any of the institution's activities;
- A description of the applicable legal sanctions under local, State, or Federal law for the unlawful possession or distribution of illicit drugs and alcohol;
- A description of the health risks associated with the use of illicit drugs and the abuse of alcohol;
- A description of available counseling, treatment, rehabilitation, or re-entry programs; and
- A clear statement that the institution will impose disciplinary sanctions for violation of the standards of conduct and a description of those sanctions.

In addition, each institution must make available, upon request, to the Department and to the public, the information distributed to students and employees and the results of a biennial review of the institution's program to—

- Determine the effectiveness of the program and implement needed changes;
- Determine the number of drug and alcohol-related violations and fatalities that occur on the institution's campus or as part of the institution's activities, and are reported to campus officials;
- Determine the number and type of sanctions that are imposed by the institution; and
- Ensure that sanctions are consistently enforced.

Reason: U.S. drug laws do not apply in foreign countries and the rules and penalties mentioned in this provision would not apply to U.S. students while they are attending a foreign institution. Therefore, the Secretary believes that it is unnecessary for foreign institutions to disclose rules and policies that are not applicable to the institution and its students and that may be incompatible with the laws of the country in which the institution is located.

Completion/Graduation and Transfer-Out Rates for Students Receiving Athletically Related Student Aid (34 CFR 668.41(f) and 668.48)

Requirement: Each institution must produce by July 1 each year a report that will be provided to a prospective student athlete and the student's parents, high school guidance counselor, and coach at the time the institution offers athletically related student aid.

Reason: The college athletics structure in the United States is unique. As a rule, foreign institutions do not have competitive intercollegiate sports programs for which they offer full or partial athletic scholarships. In those countries where athletic scholarships are available, they exist on a far more limited scale than is the case in the United States. Because of this, the Secretary believes that it is unreasonable to hold foreign institutions to the same standards as American institutions given the differences between our systems.

Intercollegiate Athletic Program Participation Rates and Financial Support (Equity in Athletics Disclosure Act) (34 CFR 668.41(g) and 668.47(c))

Requirement: The Equity in Athletics Disclosure Act (EADA) is intended to provide prospective students information about an institution's efforts to provide equitable athletic opportunities for its men and women students. Any coeducational institution of higher education that participates in a title IV, HEA program and has an intercollegiate athletic program must prepare an annual EADA report. The report includes participation rates, financial support, and other information on men's and women's intercollegiate athletic programs. Institutions must also

submit their EADA report to the Department.

Reason: The college athletics structure in the United States is unique. Foreign institutions do not generally have significant numbers of U.S. students participating in competitive intercollegiate sports programs for whom this information would be relevant. Moreover, we are not aware of other countries that require compilation of this or similar information for disclosure to students. Because of this, the Secretary believes that it is unreasonable to hold foreign institutions to the same standards as American institutions given the differences between our systems.

Completion/Graduation and Transfer-Out Rates (Including Disaggregated Completion/Graduation Rates) (34 CFR 668.41(d) and 668.45)

Requirement: Each institution must annually make available to prospective and enrolled students the completion or graduation rate of certificate- or degree-seeking, first-time, full-time, undergraduate students. The data are to be available by July 1 each year for the most recent cohort that has had 150 percent of normal time for completion by August 31 of the prior year.

If the information is requested by a prospective student, it must be made available prior to the student's enrolling or entering into any financial obligation with the institution. The disaggregated rates have to be disclosed only if the number of students in each group is sufficient to yield statistically reliable information and not reveal personally identifiable information about an individual student.

Reason: The Secretary is aware that the laws of other countries may not allow for data to be disaggregated in the way required by these regulations. This situation could make the disclosure both inconsistent with the laws of those countries and unhelpful for American students.

Placement in Employment (34 CFR 668.41(d))

Requirement: Institutions must make available to current and prospective students information regarding the placement in employment of, and types of employment obtained by, graduates of the institution's degree or certificate programs. Under this provision, institutions are not required to calculate placement rates, but an institution must disclose any placement rates it calculates for the school or any program.

Reason: This information is not likely to be helpful to American students studying in foreign institutions, most of whom eventually return to the United States, because it would be based on the placement of students from the institution who work in the institution's host country where conditions for employment may be different.

Job Placement Rates (34 CFR 668.14(b)(10))

Requirement: An institution that advertises job placement rates as a means of recruiting students to enroll must make available to prospective students, at or before the time the prospective student applies for enrollment—

- The most recent available data concerning employment statistics and graduation statistics;
- Any other information necessary to substantiate the truthfulness of the advertisements; and
- Relevant State licensing requirements of the State in which the institution is located for any job for which the course of instruction is designed to prepare students.

Reason: Because American students studying in foreign schools may eventually return to the United States and may not be permitted to work in a foreign country, this information is not likely to be helpful to those students since most of the students in the school are likely to work in the host country where conditions for employment may be different. In addition, the Secretary believes that it is unreasonable to require foreign institutions to track international placements. Moreover, foreign institutions of higher education are not located in a State for which they could provide information on licensing requirements.

Types of Graduate and Professional Education in Which the Institution's Graduates Enroll (34 CFR 668.41(d)(6))

Requirement: Institutions must make available to current and prospective students information regarding the types of graduate and professional education in which graduates of the institution's four-year degree programs enroll. Institutions must identify the source of the information, and any timeframes and methodology associated with it.

Reason: This information is not likely to be helpful to American students studying in foreign institutions, most of whom eventually return to the United States, because most of the students included in the institution's report would be likely to pursue graduate school in the institution's host country where conditions may be different.

Retention Rate (34 CFR 668.41(d)(3))

Requirement: Institutions must make available to current and prospective students the retention rate of certificate or degree seeking, first-time, undergraduate students as reported to the Integrated Postsecondary Education Data System (IPEDS).

Reason: This requirement specifically refers to the retention rate reported to IPEDS. Foreign institutions do not submit information to IPEDS and are not otherwise required to calculate or disclose a retention rate.

Security Report—Missing Person Notification Policy (34 CFR 668.46(b)(14) and 668.46(h))

Requirement: An institution that provides any on-campus student housing facility must include in its annual security report a statement of policy regarding missing student notification procedures for students who reside in on-campus housing.

Reason: This requirement is implemented and administered in connection with the Clery Act, from which Congress specifically exempted foreign institutions. As a result, the Secretary believes requiring foreign institutions to comply with this requirement is inappropriate.

Fire Safety Report (34 CFR 668.41(e) and 668.49)

Requirement: By October 1 of each year, an institution that maintains any on-campus student housing facility must distribute an annual fire safety report, or provide a notice of the report, to all enrolled students and current employees.

Reason: This provision is implemented and administered in connection with the Clery Act, from which Congress specifically exempted foreign institutions. As a result, the Secretary believes requiring foreign institutions to comply with this requirement is inappropriate.

Fire Log (34 CFR 668.49(d))

Requirement: An institution that maintains on-campus student housing facilities must maintain a written, easily understood fire log that records, by the date that the fire was reported, any fire that occurred in an on-campus student housing facility. This log must include the nature, date, time, and general location of each fire.

Reason: This requirement is implemented and administered in connection with the Clery Act, from which Congress specifically exempted foreign institutions. As a result, the Secretary believes requiring foreign

institutions to comply with this requirement is inappropriate.

State Grant Assistance (34 CFR 668.14(b)(11))

Requirement: Institutions must inform all eligible borrowers enrolled in the institution about the availability of and their eligibility for grant assistance from the State in which the institution is located, and provide sources of information about grant assistance from other States to borrowers from other States.

Reason: This requirement is inapplicable to foreign institutions because this requirement applied exclusively to student borrowers with Federal Family Education Loan (FFEL) program loans. No new FFEL loans have been made since July 1, 2010, and it is highly unlikely that current students at foreign institutions have FFEL loans.

II. Non-Regulatory Consumer Information Requirements Inapplicable to Foreign Institutions of Higher Education

Notice of Federal Student Financial Aid Penalties for Drug Law Violations (20 U.S.C. 1092(k))

Requirement: Each institution must provide to every student upon enrollment a separate, clear, and conspicuous written notice with information on the penalties associated with drug-related offenses under section 484(r) of the HEA. Institutions must also timely notify each student who has lost eligibility for any grant, loan, or work-study assistance as a result of penalties under section 484(r)(1) of the HEA of the loss of eligibility and the ways in which to regain eligibility under section 484(r)(2) of the HEA.

Reason: U.S. drug laws do not apply in foreign countries and the rules and penalties mentioned in this provision would not apply to U.S. students while they are attending a foreign institution. Therefore, the Secretary believes that it is unnecessary for foreign institutions to disclose rules and policies that are not applicable to the institution and its students and that may be incompatible with the laws of the country in which the institution is located.

Vaccinations Policy (20 U.S.C. 1092(a)(1))

Requirement: Institutions must make available to current and prospective students information about institutional policies regarding vaccinations.

Reason: These requirements were created to address specific public health issues in the United States. Any U.S. students seeking to study at a foreign institution must comply with requirements for entry into the institution's home country, including those related to vaccinations. As a result, the Secretary believes that it is inappropriate to apply vaccination requirements in the HEA to foreign institutions.

Student Body Diversity (20 U.S.C. 1092(a)(1)(Q))

Requirement: Institutions must make available to current and prospective students information about student body diversity, including the percentage of enrolled, full-time students in the following categories:

- Male.
- Female.
- Self-identified members of a major racial or ethnic group.
- Federal Pell Grant recipients.

Reason: Foreign institutions are not eligible to participate in the Pell Grant Program. Further, the racial and ethnic groups used for this disclosure are defined in IPEDS, a system that foreign institutions do not use, and other countries may have different definitions and reporting laws regarding gender, racial, and ethnic groups. For these reasons, the Secretary believes it is impractical for foreign institutions to comply with this requirement.

Textbook Information (20 U.S.C. 1015b)

Requirement: To the maximum extent practicable, and in a manner of the institution's choosing, each institution must disclose on its internet course schedule used for preregistration and registration purposes, the International Standard Book Number (ISBN) and retail price information of required and recommended textbooks and supplemental materials for each course listed. If the ISBN is not available, the institution must include in the internet course schedule the author, title, publisher, and copyright date for the textbook or supplemental material.

If a college bookstore is operated by or affiliated with the institution, the institution must make available as soon as practicable the most accurate information available regarding—

- The institution's course schedule for the subsequent academic period;
- The information provided for students regarding the required and recommended textbooks and supplemental materials for each course or class; and
- The number of students enrolled in each course or class and the maximum student enrollment for each course or class.

Reason: The textbook requirements were created to address concerns specific to the United States involving the price of textbooks. These concerns are less apparent at foreign institutions. English language programs offered by foreign institutions generally use the international editions of texts, which are usually available for purchase at prices far below those of American editions.[1] Accordingly, the Secretary is exempting foreign institutions from these requirements.

Accountability for Programs That Prepare Teachers (20 U.S.C. 1022d–1022g)

Requirement: Each institution that provides a teacher preparation program and admits students receiving Federal student financial aid must provide a report annually to the State and to the general public. The States must submit to the Department, and make available to the public, an annual report containing institutional and State-level information. The Department makes the State reports available to the public.

Reason: Foreign institutions are not located in a State and are not required to prepare or submit this report.

Voter Registration Forms (20 U.S.C. 1094(a)(23))

Requirement: Each institution must—

- Make a good faith effort to distribute a mail voter registration form to each student enrolled in a degree or certificate program and physically in attendance at the institution;
- Make the voter registration form widely available to students; and
- Request the forms from the State 120 days prior to the deadline for registering to vote within the State.

Reason: Because foreign institutions are not in a State, this requirement does not apply.

Constitution Day (36 U.S.C. 106)

Requirement: Constitution Day is September 17 of each year, commemorating the September 17, 1787 signing of the U.S. Constitution. Institutions that receive Federal funds are required to hold an appropriate educational program about the Constitution for their students.

Reason: The Secretary believes that it is inappropriate to require institutions located outside the U.S. to conduct an educational program on another nation's Constitution.

Accessible Format: Individuals with disabilities can obtain this document in an accessible format (*e.g.,* braille, large

[1] Lewin, Tamar. (2003, October 21). Students Find $100 Textbooks Cost $50, Purchased Overseas. *The New York Times,* Retrieved from *https://www.nytimes.com/2003/10/21/us/students-find-100-textbooks-cost-50-purchased-overseas.html.*

print, audiotape or compact disc) on request to the program contact person listed under **FOR FURTHER INFORMATION CONTACT**.

If you use a telecommunications device for the deaf or a text telephone, call the Federal Relay Service, toll free, at 1–800–877–8339.

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You may also access documents of the Department published in the **Federal Register** by using the article search feature at: *www.federalregister.gov.* Specifically, through the advanced search feature at this site, you can limit your search to documents published by the Department.

Dated: November 23, 2018.

Betsy DeVos,

Secretary of Education.

[FR Doc. 2018–25929 Filed 11–23–18; 4:15 pm]

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LIBRARY OF CONGRESS

Copyright Royalty Board

37 CFR Part 380

[Docket No. 14–CRB–0001–WR (2016–2020) COLA 2019]

Cost of Living Adjustment to Royalty Rates for Webcaster Statutory License

AGENCY: Copyright Royalty Board (CRB), Library of Congress.

ACTION: Final rule; cost of living adjustment.

SUMMARY: The Copyright Royalty Judges announce a cost of living adjustment (COLA) in the royalty rates that commercial and noncommercial noninteractive webcasters pay for eligible transmissions pursuant to the statutory licenses for the public performance of and for the making of ephemeral reproductions of sound recordings.

DATES:

Effective date: January 1, 2019.

Applicability dates: These rates are applicable to the period January 1, 2019, through December 31, 2019.

FOR FURTHER INFORMATION CONTACT: Anita Blaine, CRB Program Assistant, by telephone at (202) 707–7658 or by email at *crb@loc.gov.*

SUPPLEMENTARY INFORMATION: Sections 112(e) and 114(f) of the Copyright Act, title 17 of the United States Code, create statutory licenses for certain digital performances of sound recordings and the making of ephemeral reproductions to facilitate transmission of those sound recordings. On May 2, 2016, the Copyright Royalty Judges (Judges) adopted final regulations governing the rates and terms of copyright royalty payments under those licenses for the license period 2016–2020 for performances of sound recordings via eligible transmissions by commercial and noncommercial noninteractive webcasters. *See* 81 FR 26316.

Pursuant to those regulations, at least 25 days before January 1 of each year from 2017 to 2020, the Judges shall publish in the **Federal Register** notice of a COLA applicable to the royalty fees for performances of sound recordings via eligible transmissions by commercial and noncommercial noninteractive webcasters. 37 CFR 380.10.

The adjustment in the royalty fee shall be based on a calculation of the percentage increase in the CPI–U from the CPI–U published in November 2015 (237.838), according to the formula $(1 + (C_y - 237.838)/237.838) \times R_{2016}$, where C_y is the CPI–U published by the Secretary of Labor before December 1 of the preceding year and R_{2016} is the royalty rate for 2016; *i.e.,* for commercial webcasters $0.0022 per subscription performance or $0.0017 per nonsubscription performance, or for noncommercial webcasters $0.0018 per performance for all digital audio transmissions in excess of 159,140 Aggregate Tuning Hours (ATH) in a month on a channel or station. The adjustment shall be rounded to the nearest fourth decimal place. 37 CFR 380.10(c). The CPI–U published by the Secretary of Labor from the most recent index published before December 1, 2018, is 252.885.[1] Applying the formula in 37 CFR 380.10(c) and rounding to the nearest fourth decimal place results in an increase in the rates for 2019.

The 2019 rate for eligible transmission of sound recordings by commercial webcasters is a rate of $0.0023 per subscription performance and a rate of $0.0018 per nonsubscription performance.

Application of the increase to rates for noncommercial webcasters results in a 2019 rate of $0.0019 per performance for all digital audio transmissions in excess of 159,140 ATH in a month on a channel or station.

As provided in 37 CFR 380.10(d), the royalty fee for making ephemeral recordings under section 112 of the Copyright Act to facilitate digital transmission of sound recordings under section 114 of the Copyright Act is included in the section 114 royalty fee and comprises 5% of the total fee.

List of Subjects in 37 CFR Part 380

Copyright, Sound recordings.

Final Regulations

In consideration of the foregoing, the Judges amend part 380 of title 37 of the Code of Federal Regulations as follows:

PART 380—RATES AND TERMS FOR TRANSMISSIONS BY ELIGIBLE NONSUBSCRIPTION SERVICES AND NEW SUBSCRIPTION SERVICES AND FOR THE MAKING OF EPHEMERAL REPRODUCTIONS TO FACILITATE THOSE TRANSMISSIONS

■ 1. The authority citation for part 380 continues to read as follows:

Authority: 17 U.S.C. 112(e), 114(f), 804(b)(3).

■ 2. Section 380.10 is amended by revising paragraph (a) to read as follows:

§ 380.10 Royalty fees for the public performance of sound recordings and the making of ephemeral recordings.

(a) *Royalty fees.* For the year 2019, Licensees must pay royalty fees for all Eligible Transmissions of sound recordings at the following rates:

(1) *Commercial webcasters:* $0.0023 per performance for subscription services and $0.0018 per performance for nonsubscription services.

(2) *Noncommercial webcasters.* $500 per year for each channel or station and $0.0019 per performance for all digital audio transmissions in excess of 159,140 ATH in a month on a channel or station.

* * * * *

Suzanne M. Barnett,

Chief Copyright Royalty Judge.

[FR Doc. 2018–25908 Filed 11–27–18; 8:45 am]

BILLING CODE 1410–72–P

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[1] As announced on November 14, 2018, by the Bureau of Labor Statistics in its *News Release—Consumer Price Index October 2018, available at http://www.bls.gov/news.release/pdf/cpi.pdf* at 4.

LIBRARY OF CONGRESS

Copyright Royalty Board

37 CFR Part 381

[Docket No. 16–CRB–0002–PBR (2018–2022) COLA (2019)]

Cost of Living Adjustment to Public Broadcasters Compulsory License Royalty Rate

AGENCY: Copyright Royalty Board, Library of Congress.

ACTION: Final rule; cost of living adjustment.

SUMMARY: The Copyright Royalty Judges announce a cost of living adjustment (COLA) to the royalty rate that noncommercial radio stations at certain colleges, universities, and other educational institutions that are not affiliated with National Public Radio must pay for the use in 2019 of published nondramatic musical compositions in the SESAC repertory pursuant to the statutory license under the Copyright Act for noncommercial broadcasting. Because the current rates did not become final until January 2018, the revised regulation includes the revised rate for 2018 that reflects the cost of living adjustment announced in 2017.

DATES:

Effective date: December 28, 2018.

Applicability dates: These rates are applicable to the period beginning January 1, 2019, and ending December 31, 2019.

FOR FURTHER INFORMATION CONTACT: Anita Blaine, CRB Program Assistant, by telephone at (202) 707–7658 or by email at *crb@loc.gov.*

SUPPLEMENTARY INFORMATION: Section 118 of the Copyright Act, title 17 of the United States Code, creates a statutory license for the use of published nondramatic musical works and published pictorial, graphic, and sculptural works in connection with noncommercial broadcasting.

On January 19, 2018, the Copyright Royalty Judges (Judges) adopted final regulations governing the rates and terms of copyright royalty payments under section 118 of the Copyright Act for the license period 2018–2022. *See* 83 FR 2743. Pursuant to these regulations, on or before December 1 of each year, the Judges shall publish in the **Federal Register** notice of the change in the cost of living and a revised schedule of the rates codified at § 381.5(c)(3) relating to compositions in the repertory of SESAC. The adjustment, fixed to the nearest dollar, shall be the greater of (1) the change in the cost of living as determined by the Consumer Price Index (all consumers, all items) (''CPI–U'') ''during the period from the most recent index published prior to the previous notice to the most recent index published prior to December 1, of that year'' or (2) 1.5%. 37 CFR 381.10.

The change in the cost of living as determined by the CPI–U during the period from the most recent index published prior to the previous notice, *i.e.,* before December 1, 2017,[1] to the most recent index published before December 1, 2018, is 2.5%.[2] In accordance with 37 CFR 381.10(b), the Judges announce that the COLA for calendar year 2019 shall be 2.5%. Application of the 2.5% COLA to the 2018 rate for the performance of published nondramatic musical compositions in the repertory of SESAC—$155 per station[3]—results in an adjusted rate of $159 per station.

List of Subjects in 37 CFR Part 381

Copyright, Music, Radio, Television, Rates.

Final Regulations

In consideration of the foregoing, the Judges amend part 381 of title 37 of the Code of Federal Regulations as follows:

PART 381—USE OF CERTAIN COPYRIGHTED WORKS IN CONNECTION WITH NONCOMMERCIAL EDUCATIONAL BROADCASTING

■ 1. The authority citation for part 381 continues to read as follows:

Authority: 17 U.S.C. 118, 801(b)(1), and 803.

■ 2. Section 381.5 is amended by revising paragraphs (c)(3)(i) and (ii) to read as follows:

§ 381.5 Performance of musical compositions by public broadcasting entities licensed to colleges and universities.

* * * * *

(c) * * *

(3) * * *

(i) 2018: $155 per station.

(ii) 2019: $159 per station.

* * * * *

Suzanne M. Barnett,

Chief Copyright Royalty Judge.

[FR Doc. 2018–25906 Filed 11–27–18; 8:45 am]

BILLING CODE 1410–72–P

[1] *See* Cost of Living Adjustment to Satellite Carrier Compulsory License Royalty Rates, 82 FR 55946 (Nov. 27, 2017) (previous notice of the change in cost of living).

[2] On November 14, 2018, the Bureau of Labor Statistics announced that the CPI–U increased 2.5% over the last 12 months.

[3] The 2018 rate is calculated by applying a 2% COLA (based on the CPI–U published in November 2017) to the rate for 2017 ($152). *See https://www.bls.gov/news.release/archives/cpi_11152017.htm* (last accessed on November 14, 2018).

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Copyright Royalty Board

37 CFR Part 386

[Docket No. 18–CRB–0011–SA–COLA (2019)]

Cost of Living Adjustment to Satellite Carrier Compulsory License Royalty Rates

AGENCY: Copyright Royalty Board (CRB), Library of Congress.

ACTION: Final rule; cost of living adjustment.

SUMMARY: The Copyright Royalty Judges announce a cost of living adjustment (COLA) of 2.5% in the royalty rates satellite carriers pay for a compulsory license under the Copyright Act. The COLA is based on the change in the Consumer Price Index from October 2017 to October 2018.

DATES:

Effective date: January 1, 2019.

Applicability dates: These rates are applicable to the period January 1, 2019, through December 31, 2019.

FOR FURTHER INFORMATION CONTACT: Anita Blaine, CRB Program Assistant, by telephone at (202) 707–7658 or by email at *crb@loc.gov.*

SUPPLEMENTARY INFORMATION: The satellite carrier compulsory license establishes a statutory copyright licensing scheme for the distant retransmission of television programming by satellite carriers. 17 U.S.C. 119. Congress created the license in 1988 and has reauthorized the license for additional five-year periods, most recently with the passage of the STELA Reauthorization Act of 2014, Public Law 113–200.

On August 31, 2010, the Copyright Royalty Judges (Judges) adopted rates for the section 119 compulsory license for the 2010–2014 term. *See* 75 FR 53198. The rates were proposed by Copyright Owners and Satellite Carriers[1] and were unopposed. *Id.* Section 119(c)(2) of the Copyright Act provides that, effective January 1 of each

[1] Program Suppliers and Joint Sports Claimants comprised the Copyright Owners while DIRECTV, Inc., DISH Network, LLC, and National Programming Service, LLC, comprised the Satellite Carriers.

year, the Judges shall adjust the royalty fee payable under Section 119(b)(1)(B) ''to reflect any changes occurring in the cost of living as determined by the most recent Consumer Price Index (for all consumers and for all items) [CPI–U] published by the Secretary of Labor before December 1 of the preceding year.'' Section 119 also requires that ''[n]otification of the adjusted fees shall be published in the **Federal Register** at least 25 days before January 1.'' 17 U.S.C. 119(c)(2).

The change in the cost of living as determined by the CPI–U during the period from the most recent index published before December 1, 2017, to the most recent index published before December 1, 2018, is 2.5%.[2] Application of the 2.5% COLA to the current rate for the secondary transmission of broadcast stations by satellite carriers for private home viewing—28 cents per subscriber per month—results in a rate of 29 cents per subscriber per month (rounded to the nearest cent). *See* 37 CFR 386.2(b)(1). Application of the 2.5% COLA to the current rate for viewing in commercial establishments—58 cents per subscriber per month—results in a rate of 59 cents per subscriber per month (rounded to the nearest cent). *See* 37 CFR 386.2(b)(2).

List of Subjects in 37 CFR Part 386

Copyright, Satellite, Television.

Final Regulations

In consideration of the foregoing, the Judges amend part 386 of title 37 of the Code of Federal Regulations as follows:

PART 386—ADJUSTMENT OF ROYALTY FEES FOR SECONDARY TRANSMISSIONS BY SATELLITE CARRIERS

■ 1. The authority citation for part 386 continues to read as follows:

Authority: 17 U.S.C. 119(c), 801(b)(1).

■ 2. Section 386.2 is amended by adding paragraphs (b)(1)(x) and (b)(2)(x) to read as follows:

§ 386.2 Royalty fee for secondary transmission by satellite carriers.

* * * * *

(b) * * *

(1) * * *

(x) 2019: 29 cents per subscriber per month.

(2) * * *

(x) 2019: 59 cents per subscriber per month.

Suzanne M. Barnett,

Chief Copyright Royalty Judge.

[FR Doc. 2018–25907 Filed 11–27–18; 8:45 am]

BILLING CODE 1410–72–P

[2] On November 14, 2018, the Bureau of Labor Statistics announced that the CPI–U increased 2.5% over the last 12 months.

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 51

[EPA–HQ–OAR–2017–0175; FRL–9987–02–OAR]

RIN 2060–AT52

Air Quality: Revision to the Regulatory Definition of Volatile Organic Compounds—Exclusion of cis-1,1,1,4,4,4-hexafluorobut-2-ene (HFO–1336mzz–Z)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: On May 1, 2018, the U.S. Environmental Protection Agency (EPA) published a proposed rule seeking comments in response to a petition requesting the revision of the EPA's regulatory definition of volatile organic compounds (VOC) to exempt *cis*-1,1,1,4,4,4-hexafluorobut-2-ene (also known as HFO–1336mzz–Z; CAS number 692–49–9). The EPA is now taking final action to revise the regulatory definition of VOC under the Clean Air Act (CAA). This final action adds HFO–1336mzz–Z to the list of compounds excluded from the regulatory definition of VOC on the basis that this compound makes a negligible contribution to tropospheric ozone (O_3) formation.

DATES: This final rule is effective on January 28, 2019.

ADDRESSES: The EPA has established a docket for this action under Docket ID No. EPA–HQ–OAR–2017–0175. All documents in the docket are listed on the *https://www.regulations.gov* website. Although listed in the index, some information is not publicly available, *e.g.,* Confidential Business Information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted materials, is not placed on the internet and will be publicly available only in hard copy form. Publicly available docket materials are available electronically through *https://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Dr. Souad Benromdhane, Office of Air Quality Planning and Standards, Health and Environmental Impacts Division, Mail Code C539–07, Environmental Protection Agency, Research Triangle Park, NC 27711; telephone: (919) 541–4359; fax number: (919) 541–5315; email address: *benromdhane.souad@epa.gov.*

SUPPLEMENTARY INFORMATION:

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I. Does this action apply to me?

Entities potentially affected by this final rule include, but are not necessarily limited to, the following: State and local air pollution control agencies that adopt and implement regulations to control air emissions of VOC; and industries manufacturing and/or using HFO–1336mzz–Z for use in polyurethane rigid insulating foams, refrigeration, and air conditioning. Potential entities that may be affected by this action include:

TABLE 1—POTENTIALLY AFFECTED ENTITIES BY NORTH AMERICAN INDUSTRIAL CLASSIFICATION SYSTEM (NAICS) CODE

Category	NAICS code	Description of regulated entities
Industry	326140	Polystyrene Foam Product Manufacturing.
Industry	326150	Urethane and Other Foam Product (except Polystyrene) Manufacturing.
Industry	333415	Air-Conditioning and Warm Air Heating Equipment and Commercial and Industrial Refrigeration Equipment Manufacturing.
Industry	3363	Motor Vehicle Parts Manufacturing.
Industry	336611	Ship Building and Repairing.
Industry	336612	Boat Building.
Industry	339999	All other Miscellaneous Manufacturing.

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities that might be affected by this deregulatory action. This table lists the types of entities that the EPA is now aware of that could potentially be affected to some extent by this action. Other types of entities not listed in the table could also be affected to some extent. To determine whether your entity is directly or indirectly affected by this action, you should consult your state or local air pollution control and/or air quality management agencies.

II. Background

A. The EPA's VOC Exemption Policy

Tropospheric O_3, commonly known as smog, is formed when VOC and nitrogen oxides (NO_X) react in the atmosphere in the presence of sunlight. Because of the harmful health effects of O_3, the EPA and state governments limit the amount of VOC that can be released into the atmosphere. VOC form O_3 through atmospheric photochemical reactions, and different VOC have different levels of reactivity. That is, different VOC do not react to form O_3 at the same speed or do not form O_3 to the same extent. Some VOC react slowly or form less O_3; therefore, changes in their emissions have limited effects on local or regional O_3 pollution episodes. It has been the EPA's policy since 1971, that certain organic compounds with a negligible level of reactivity should be excluded from the regulatory definition of VOC in order to focus VOC control efforts on compounds that significantly affect O_3 concentrations. The EPA also believes that exempting such compounds creates an incentive for industry to use negligibly reactive compounds in place of more highly reactive compounds that are regulated as VOC. The EPA lists compounds that it has determined to be negligibly reactive in its regulations as being excluded from the regulatory definition of VOC (40 CFR 51.100(s)).

The CAA requires the regulation of VOC for various purposes. Section 302(s) of the CAA specifies that the EPA has the authority to define the meaning of ''VOC'' and, hence, what compounds shall be treated as VOC for regulatory purposes. The policy of excluding negligibly reactive compounds from the regulatory definition of VOC was first laid out in the ''Recommended Policy on Control of Volatile Organic Compounds'' (42 FR 35314, July 8, 1977) (from here forward referred to as the 1977 Recommended Policy) and was supplemented subsequently with the ''Interim Guidance on Control of Volatile Organic Compounds in Ozone State Implementation Plans'' (70 FR 54046, September 13, 2005) (from here forward referred to as the 2005 Interim Guidance). The EPA uses the reactivity of ethane as the threshold for determining whether a compound has negligible reactivity. Compounds that are less reactive than, or equally reactive to, ethane under certain assumed conditions may be deemed negligibly reactive and, therefore, suitable for exemption from the regulatory definition of VOC. Compounds that are more reactive than ethane continue to be considered VOC for regulatory purposes and, therefore, are subject to control requirements. The selection of ethane as the threshold compound was based on a series of smog chamber experiments that underlay the 1977 Recommended Policy.

The EPA has used three different metrics to compare the reactivity of a specific compound to that of ethane: (i) The rate constant for reaction with the hydroxyl radical (OH) (known as k_{OH}); (ii) the maximum incremental reactivity (MIR) on a reactivity per unit mass basis; and (iii) the MIR expressed on a reactivity per mole basis. Differences between these three metrics are discussed below.

The k_{OH} is the rate constant of the reaction of the compound with the OH radical in the air. This reaction is often, but not always, the first and rate-limiting step in a series of chemical reactions by which a compound breaks down in the air and contributes to O_3 formation. If this step is slow, the compound will likely not form O_3 at a very fast rate. The k_{OH} values have long been used by the EPA as metrics of photochemical reactivity and O_3-forming activity, and they were the basis for most of the EPA's early exemptions of negligibly reactive compounds from the regulatory definition of VOC. The k_{OH} metric is inherently a molar-based comparison, *i.e.,* it measures the rate at which molecules react.

The MIR, both by mole and by mass, is a more updated metric of photochemical reactivity derived from a computer-based photochemical model, and it has been used as a metric of reactivity since 1995. This metric considers the complete O_3-forming activity of a compound over multiple hours and through multiple reaction pathways, not merely the first reaction step with OH. Further explanation of the MIR metric can be found in Carter (1994).

The EPA has considered the choice between MIRs with a molar or mass basis for the comparison to ethane in past rulemakings and guidance. In the 2005 Interim Guidance, the EPA stated:

> [A] comparison to ethane on a mass basis strikes the right balance between a threshold that is low enough to capture compounds that significantly affect ozone concentrations and a threshold that is high enough to exempt some compounds that may usefully substitute for more highly reactive compounds.
>
> When reviewing compounds that have been suggested for VOC-exempt status, EPA will continue to compare them to ethane using k_{OH} expressed on a molar basis and MIR values expressed on a mass basis.

The 2005 Interim Guidance notes that the EPA will consider a compound to be negligibly reactive if it is equally as or less reactive than ethane based on either k_{OH} expressed on a molar basis *or* MIR values expressed on a mass basis.

The molar comparison of MIR is more consistent with the original smog chamber experiments, which compared equal molar concentrations of individual VOCs, supporting the selection of ethane as the threshold, while the mass-based comparison of MIR is consistent with how MIR values and other reactivity metrics are applied

in reactivity-based emission limits. It is, however, important to note that the mass-based comparison is slightly less restrictive than the molar-based comparison in that a few more compounds would qualify as negligibly reactive.

Given the two goals of the exemption policy articulated in the 2005 Interim Guidance, the EPA believes that ethane continues to be an appropriate threshold for defining negligible reactivity. And, to encourage the use of environmentally beneficial substitutions, the EPA believes that a comparison to ethane on a mass basis strikes the right balance between a threshold that is low enough to capture compounds that significantly affect O_3 concentrations and a threshold that is high enough to exempt some compounds that may usefully substitute for more highly reactive compounds.

The 2005 Interim Guidance also noted that concerns have sometimes been raised about the potential impact of a VOC exemption on environmental endpoints other than O_3 concentrations, including fine particle formation, air toxics exposures, stratospheric O_3 depletion, and climate change. The EPA has recognized, however, that there are existing regulatory or non-regulatory programs that are specifically designed to address these issues, and the EPA continues to believe in general that the impacts of VOC exemptions on environmental endpoints other than O_3 formation can be adequately addressed by these programs. The VOC exemption policy is intended to facilitate attainment of the O_3 National Ambient Air Quality Standards (NAAQS) and VOC exemption decisions will continue to be based primarily on consideration of a compound's contribution to O_3 formation. However, if the EPA determines that a particular VOC exemption is likely to result in a significant increase in the use of a compound and that the increased use would pose a significant risk to human health or the environment that would not be addressed adequately by existing programs or policies, then the EPA may exercise its judgment accordingly in deciding whether to grant an exemption.

B. Petition To List HFO–1336mzz–Z as an Exempt Compound

DuPont Chemicals & Fluoroproducts (DuPont) submitted a petition to the EPA on February 14, 2014, requesting that *cis*-1,1,1,4,4,4-hexafluorobut-2-ene (HFO–1336mzz–Z; CAS number 692–49–9) be exempted from the regulatory definition of VOC. The petition was based on the argument that HFO–1336mzz–Z has low reactivity relative to ethane. The petitioner indicated that HFO–1336mzz–Z may be used in a variety of applications as a replacement for foam expansion or blowing agents with higher global warming potential (GWP) (≤700 GWP) for use in polyurethane rigid insulating foams, among others. It is also a new developmental refrigerant as a potential working fluid for Organic Rankine Cycles (ORC).[1]

To support its petition, DuPont referenced several documents, including one peer-reviewed journal article on HFO–1336mzz–Z reaction rates (Baasandorj, M. *et al.,* 2011). DuPont also provided a supplemental technical report on the MIR of HFO–1336mzz–Z (Carter, 2011a). Per this report, the MIR of HFO–1336mzz–Z is 0.04 gram (g) O_3/g HFO–1336mzz–Z on the mass-based MIR scale. This reactivity rate is 86 percent lower than that of ethane (0.28 g O_3/g ethane). The reactivity rate k_{OH} for the gas-phase reaction of OH radicals with HFO–1336mzz–Z (k_{OH}) has been measured to be $4.91 \times 10_{-13}$ centimeter (cm)^3/molecule-seconds at ~296 degrees Kelvin (K) (Pitts *et al.,* 1983, Baasandorj *et al.,* 2011). This k_{OH} rate is twice as high as that of ethane (k_{OH} of ethane = $2.4 \times 10_{-13}$ cm^3/molecule-sec at ~298 K) and, therefore, suggests that HFO–1336mzz–Z is twice as reactive as ethane. In most cases, chemicals with high k_{OH} values also have high MIR values, but for HFO–1336mzz–Z, the products that are formed in subsequent reactions are expected to be poly fluorinated compounds, which do not contribute to O_3 formation (Baasandorj *et al.,* 2011). Based on the current scientific understanding of tetrafluoroalkene reactions in the atmosphere, it is unlikely that the actual O_3 impact on a mass basis would equal or exceed that of ethane in the scenarios used to calculate VOC reactivity (Baasandorj *et al.,* 2011; Carter, 2011a).

To address the potential for stratospheric O_3 impacts, the petitioner contended that, because the atmospheric lifetime of HFO–1336mzz–Z due to loss by OH reaction was estimated to be ~20 days and it does not contain chlorine or bromine, it is not expected to contribute to the depletion of the stratospheric O_3 layer.

III. The EPA's Assessment of the Petition

On May 1, 2018, the EPA published a proposed rulemaking (83 FR 19026) seeking comments in response to the petition to revise the EPA's regulatory definition of VOC for exemption of HFO–1336mzz–Z. The EPA is taking final action to respond to the petition by exempting HFO–1336mzz–Z from the regulatory definition of VOC. This action is based on consideration of the compound's low contribution to tropospheric O_3 and the low likelihood of risk to human health or the environment, including stratospheric O_3 depletion, toxicity, and climate change. Additional information on these topics is provided in the following sections.

A. Contribution to Tropospheric Ozone Formation

As noted in studies cited by the petitioner, HFO–1336mzz–Z has a MIR value of 0.04 g O_3/g VOC for ''averaged conditions,'' versus 0.28 g O_3/g VOC for ethane (Carter, 2011). Therefore, the EPA considers HFO–1336mzz–Z to be negligibly reactive and eligible for VOC-exempt status in accordance with the Agency's long-standing policy that compounds should so qualify where either reactivity metric (k_{OH} expressed on a molar basis or MIR expressed on a mass basis) indicates that the compound is less reactive than ethane. While the overall atmospheric reactivity of HFO–1336mzz–Z was not studied in an experimental smog chamber, the chemical mechanism derived from other chamber studies (Carter, 2011) was used to model the complete formation of O_3 for an entire single day under realistic atmospheric conditions (Carter, 2011a). Therefore, the EPA believes that the MIR value calculated in the Carter study submitted by the petitioner is reliable.

Table 2 presents three reactivity metrics for HFO–1336mzz–Z as they compare to ethane.

[1] Konstantinos Kontomaris, 2014, HFO–1336mzz–Z High Temperature Chemical Stability and Use as a Working Fluid in Organic Rankine Cycles. International Refrigeration and Air Conditioning Conference. Purdue University: *https://www.chemours.com/Refrigerants/en_US/products/Opteon/Stationary_Refrigeration/assets/downloads/2014_Purdue-Paper-Opteon-MZ.pdf.*

TABLE 2—REACTIVITIES OF ETHANE AND HFO–1336MZZ–Z

Compound	k_{OH} (cm^3/molecule-sec)	Maximum incremental reactivity (MIR) (g O_3/mole VOC)	Maximum incremental reactivity (MIR) (g O_3/g VOC)
Ethane	2.4×10^{-13}	8.4	0.28
HFO–1336mzz–Z	4.91×10^{-13}	6.6	0.04

Notes:
1. k_{OH} value at 298 K for ethane is from Atkinson *et al.,* 2006 (page 3626).
2. k_{OH} value at 296 K for HFO–1336mzz–Z is from Baasandorj, 2011.
3. Mass-based MIR value (g O_3/g VOC) of ethane is from Carter, 2011.
4. Mass-based MIR value (g O_3/g VOC) of HFO–1336mzz–Z is from a supplemental report by Carter, 2011a.
5. Molar-based MIR (g O_3/mole VOC) values were calculated from the mass-based MIR (g O_3/g VOC) values using the number of moles per gram of the relevant organic compound.

The reaction rate of HFO–1336mzz–Z with the OH radical (k_{OH}) has been measured to be 4.91×10^{-13} cm^3/molecule-sec (Baasandorj *et al.,* 2011); other reactions with O_3 and the nitrate radical were negligibly small. The corresponding reaction rate of ethane with OH is $2.4 \times 10^{-13}$$cm^3$/molecule-sec (Atkinson *et al.,* 2006). The data in Table 2 show that HFO–1336mzz–Z has a higher k_{OH} value than ethane, meaning that it initially reacts twice as fast in the atmosphere as ethane. However, the resulting unsaturated fluorinated compounds in the atmosphere are short lived and react more slowly to form O_3 (Baasandorj *et al.,* 2011). The mass based MIR is 0.04 g O_3/g VOC and much lower than that of ethane.

A molecule of HFO–1336mzz–Z is less reactive than a molecule of ethane in terms of complete O_3-forming activity as shown by the molar-based MIR (g O_3/mole VOC) values. One gram of HFO–1336mzz–Z has a lower capacity than one gram of ethane to form O_3 in terms of a mass-based MIR. Thus, following the 2005 Interim Guidance in striking a balance between reactivity on a molar basis as well as a gram basis, the EPA finds HFO–1336mzz–Z to be eligible for exemption from the regulatory definition of VOC based on both the molar- and mass-based MIR.

B. Potential Impacts on Other Environmental Endpoints

The EPA's decision to exempt HFO–1336mzz–Z from the regulatory definition of VOC is based on our findings above. However, as noted in the 2005 Interim Guidance, the EPA reserves the right to exercise its judgment in certain cases where an exemption is likely to result in a significant increase in the use of a compound and a subsequent significantly increased risk to human health or the environment. In this case, the EPA does not find that exemption of HFO–1336mzz–Z would result in an increase of risk to human health or the environment, with regard to stratospheric O_3 depletion, toxicity and climate change. Additional information on these topics is provided in the following sections.

1. Contribution to Stratospheric Ozone Depletion

HFO–1336mzz–Z is unlikely to contribute to the depletion of the stratospheric O_3 layer. The O_3 depletion potential (ODP) of HFO–1336mzz–Z is expected to be negligible based on several lines of evidence: The absence of chlorine or bromine in the compound and the atmospheric reactions described in Carter (2008). Because HFO–1336mzz–Z has a k_{OH} value that is twice as high as that of ethane (see section III.A ''Contribution to Tropospheric Ozone Formation''), it will decay before it has a chance to reach the stratosphere and, thus, will not participate in O_3 destruction.

2. The Significant New Alternatives Policy (SNAP) Program Acceptability Findings

The SNAP program is the EPA's program to evaluate and regulate substitutes for end-uses historically using O_3-depleting chemicals. Under section 612(c) of the CAA, the EPA is required to identify and publish lists of acceptable and unacceptable substitutes for class I or class II O_3-depleting substances. Per the SNAP program findings, the ODP of HFO–1336mzz–Z is zero. The SNAP program has listed HFO–1336mzz–Z as an acceptable substitute for a number of foam blowing end-uses provided in 79 FR 62863, October 21, 2014 (USEPA, 2014), and as an acceptable substitute in the refrigeration and air conditioning sector in heat transfer, as well as in chillers and industrial process air conditioning provided in 81 FR 32241, May 23, 2016 (USEPA, 2016).

3. Toxicity

Based on screening assessments of the health and environmental risks of HFO–1336mzz–Z, the SNAP program anticipated that users will be able to use the compound without significantly greater health risks than presented by use of other available substitutes for the same uses (USEPA, 2014, 2016).

The EPA anticipates that HFO–1336mzz–Z will be used consistent with the recommendations specified in the material safety data sheet (SDS) (DuPont, 2011). According to the SDS, potential health effects from inhalation of HFO–1336mzz–Z include skin or eye irritation or frostbite. Exposure to high concentrations of HFO–1336mzz–Z from misuse or intentional inhalation abuse may cause irregular heartbeat. In addition, HFO–1336mzz–Z could cause asphyxiation if air is displaced by vapors in a confined space. The Workplace Environmental Exposure Limit (WEEL) committee of the Occupational Alliance for Risk Science (OARS) reviewed available animal toxicity data and recommends a WEEL for the workplace of 500 parts per million (ppm) (3350 mg/m^3) time-weighted average (TWA) for an 8-hour workday as provided in the OARS (OARS, 2014).[2] This WEEL was derived based on reduced male body weight in the 13-week rat inhalation toxicity study (Dupont, 2011). The WEEL is also protective against skeletal fluorosis, which may occur at higher exposures because of metabolism. The EPA anticipates that users will be able to meet the WEEL and address potential health risks by following requirements and recommendations in the SDS and other safety precautions common to the refrigeration and air conditioning industry.

[2] Occupational Alliance for Risk Science (OARS–WEELs)—HFO–1336mzz–Z, 2014: *https://www.tera.org/OARS/HFO-1336mzz-Z%20WEEL%20FINAL.pdf.*

HFO–1336mzz–Z is not regulated as a hazardous air pollutant (HAP) under title I of the CAA. Also, it is not listed as a toxic chemical under section 313 of the Emergency Planning and Community Right-to-Know Act (EPCRA).

The Toxic Substances Control Act (TSCA) gives the EPA authority to assess and prevent potential unreasonable risks to human health and the environment before a new chemical substance is introduced into commerce. Section 5 of TSCA requires manufacturers and importers to notify the EPA before manufacturing or importing a new chemical substance by submitting a Premanufacture Notice (PMN) prior to the manufacture (including import) of the chemical. Under the TSCA New Chemicals Program, the EPA then assesses whether an unreasonable risk may, or will, be presented by the expected manufacturing, processing, distribution in commerce, use, and disposal of the new substance. The EPA has determined, however, that domestic manufacturing, use in non-industrial products, or use other than as described in the PMN may cause serious chronic health effects. To mitigate risks identified during the PMN review of HFO–1336mzz–Z, the EPA issued a Significant New Use Rule (SNUR) under TSCA on June 5, 2015, to require persons to submit a Significant New Use Notice (SNUN) to the EPA at least 90 days before they manufacture or process HFO–1336mzz–Z for uses other than those described in the PMN (80 FR 32003, 32005, June 5, 2015). The required notification will provide the EPA with the opportunity to evaluate the intended use and, if necessary, to prohibit or limit that activity before it occurs. The EPA, therefore, believes that existing programs address the risk of toxicity associated with the use of HFO–1336mzz–Z.

4. Contribution to Climate Change

The Intergovernmental Panel on Climate Change (IPCC) Fifth Assessment Report (IPCC AR5) estimated the lifetime of HFO–1336mzz–Z to be approximately 22 days (Baasandorj *et al.,* 2011), and the gas-phase degradation of HFO–1336–mzz–Z is not expected to lead to a significant formation of atmospherically long-lived species. The radiative efficiency of HFO–1336–mzz–Z was calculated to be 0.38 watts per square meter at the earth's surface per part per billion concentration of the material ($W\ m^{-2}\ ppb^{-1}$) based on Baasandorj *et al.,* 2011. The report estimated the resulting 100-year GWP to be 9, meaning that, over a 100-year period, one ton of HFO–1336mzz–Z traps 9 times as much warming energy as one ton of carbon dioxide (CO_2) (IPCC, 2013). HFO–1336mzz–Z's GWP of 9 is lower than those of some of the substitutes in a variety of foam blowing end-uses and in centrifugal and positive displacement chillers, heat transfer, and industrial process air conditioning. HFO–1336mzz–Z was developed to replace other chemicals used for similar end-uses with GWP ranging from 725 to 5,750 such as CFC–11, CFC–113, HCFC–141b and HCFC–22. The petitioner claims that HFO–1336mzz–Z is a better alternative to other substitutes in foam expansion or blowing agents for use in polyurethane rigid insulating foams. Thermal test data and energy efficiency trials indicate that HFO–1336mzz–Z will provide superior insulating value and, thus, reduces climate change impacts both directly by its relatively low GWP and indirectly by decreasing energy consumption throughout the lifecycle of insulated foams in appliances, buildings, refrigerated storage and transportation.

C. Response to Comments and Conclusion

The EPA received five comments on the May 1, 2018, notice of proposed rulemaking. One commenter supported the proposed action to exempt HFO–1336mzz–Z from the EPA's definition of VOC in 40 CFR 51.100(s), one opposed the proposed action, and three raised issues that were outside the scope of this rulemaking including a discussion about air and water quality in Asia and Mexico, and climate change. These three anonymous comments failed to identify any specific issue that is germane to our proposal to exempt HFO–1336mzz–Z. Substantial comments and the EPA's responses are provided below.

Comment: One commenter (ID: EPA–HQ–OAR–2017–0175–0010) expressed concern that ''the EPA should not exempt HFO–1336mzz–Z . . . [and that] . . . surely there is a reason it was . . . [regulated as a VOC] in the first place.'' The commenter expressed skepticism that ''other regulatory groups outside of the EPA'' would prevent the compound from being used, if there were other environmental impacts than O_3, once the EPA exempted this compound. This commenter also expressed concern that the petitioner's data ''could potentially be biased'' and they ''. . . would like to read a proposal that gets its information from a more unbiased source and considers how it will deal with possible drawbacks of deregulating HFO–1336mzz–Z.''

Response: The commenter appears to state that HFO–1336mzz–Z should not be exempted from the definition of VOC simply because it is currently included in the definition of VOC. This is a circular argument, and, if followed, the EPA would never be able to exempt any substances from the definition of VOC, even where, as here, scientific data supported such an exemption. The commenter does not provide any scientific evidence that rebuts the petitioner's data supporting the demonstration that HFO–1336mzz–Z is eligible for this exemption.

The reason HFO–1336mzz–Z is currently regulated as a VOC is because it meets the EPA's definition of VOC in 40 CFR 51.100(s) as ''any compound of carbon, excluding carbon monoxide, carbon dioxide, carbonic acid . . . *which participates in atmospheric photochemical reactions.*'' [emphasis added] The petitioner submitted data to the EPA that show HFO–1336mzz–Z negligibly participates in atmospheric photochemical reactions, presenting a better environmental alternative for similar industrial applications, and therefore should be excluded from the definition of VOC. As explained above, our approval would allow states to encourage VOC substitutions with negligibly reactive compounds that would reduce O_3 formation.

The EPA would like to clarify the statement in the proposal which referred to ''existing regulatory or non-regulatory programs that are specifically designed to address'' other environmental issues besides tropospheric O_3 formation, such as fine particle formation, air toxics exposures, stratospheric O_3 depletion, and climate change. When referring to existing regulatory or non-regulatory programs, the EPA was not referring to ''other regulatory groups outside of the EPA,'' as the commenter suggested. Rather, Congress has granted the EPA with other authorities under the CAA that allow the Agency to address these issues specifically (*e.g.,* NAAQS program for fine particle pollution; section 112 for air toxics). As stated in the 2005 Interim Guidance, where an exemption is likely to result in a significant increase in the use of a compound and a subsequent significantly increased risk to human health or the environment, the EPA reserves the right to exercise its judgment and choose not to grant a petition for an exemption from the definition of VOC, even where the substance meets the reactivity metrics. However, as explained in section III.B. of this final rule, the EPA does not believe an exemption of HFO–1336mzz–

Z will lead to significant environmental impacts.

To the extent the commenter is raising concerns that the EPA's action will result in non-EPA organizations treating HFO–1336mzz–Z differently, we note that this action does not prohibit state and local air pollution regulatory agencies from regulating HFO–1336mzz–Z. Some local agencies continue restrictions on the use of certain compounds that have been excluded from the definition of VOC by the EPA.

With respect to the comment that the petitioner's data could potentially be biased, the EPA uses credible, peer-reviewed information in its review of VOC exemption petitions. In this regard, and as discussed in our proposed rule and in this action, we note that the journal article submitted by DuPont on HFO–1336mzz–Z reaction rates was performed by the National Oceanic and Atmospheric Administration and published in *The Journal of Physical Chemistry,* a peer-reviewed journal. The other primary document relied on to support the exemption petition was authored by the researcher who developed the MIR scale (Carter, 2011a). Staff in the EPA's Office of Research and Development reviewed these documents as part of the petition assessment process and find that they are consistent with current understanding of atmospheric chemistry. We are not aware of information that would indicate they are biased.

Therefore, for reasons discussed above, the EPA is finalizing this rule with no changes. The EPA finds that HFO–1336mzz–Z is negligibly reactive with respect to its contribution to tropospheric O_3 formation and, thus, may be exempted from the EPA's definition of VOC in 40 CFR 51.100(s). HFO–1336mzz–Z has been listed as acceptable for use in several industrial and commercial refrigeration and air conditioning end-uses, as well as for use as a blowing agent under the SNAP program (USEPA, 2014, 2016). The EPA has also determined that exemption of HFO–1336mzz–Z from the regulatory definition of VOC will not result in an increase of risk to human health and the environment, and, to the extent that use of this compound does have impacts on other environmental endpoints, those impacts are adequately managed by existing programs. For example, HFO–1336mzz–Z has a similar or lower stratospheric O_3 depletion potential than available substitutes in those end-uses, and the toxicity risk from using HFO–1336mzz–Z is not significantly greater than the risk from using other available alternatives for the same uses. The EPA has concluded that non-tropospheric O_3-related risks associated with potential increased use of HFO–1336mzz–Z are adequately managed by SNAP. The EPA does not expect significant use of HFO–1336mzz–Z in applications not covered by the SNAP program. To the extent that the compound is used in other applications not already reviewed under SNAP or under the New Chemicals Program under TSCA, the SNUR in place under TSCA requires that any significant new use of a chemical be reported to the EPA using a SNUN. Any significant new use of HFO–1336mzz–Z would, thus, need to be evaluated by the EPA, and the EPA will continually review the availability of acceptable substitute chemicals under the SNAP program.

IV. Final Action

The EPA is responding to the petition by revising its regulatory definition of VOC at 40 CFR 51.100(s) to add HFO–1336mzz–Z to the list of compounds that are exempt from the regulatory definition of VOC because it is less reactive than ethane based on a comparison of mass-based MIR and molar-based MIR metrics and is, therefore, considered negligibly reactive. As a result of this action, if an entity which uses or produces this compound and is subject to the EPA regulations limiting the use of VOC in a product, limiting the VOC emissions from a facility, or otherwise controlling the use of VOC for purposes related to attaining the O_3 NAAQS, this compound will not be counted as a VOC in determining whether these regulatory obligations have been met. This action would affect whether this compound is considered a VOC for state regulatory purposes to reduce O_3 formation, if a state relies on the EPA's regulatory definition of VOC. States are not obligated to exclude from control as a VOC those compounds that the EPA has found to be negligibly reactive. However, no state may take credit for controlling this compound in its O_3 control strategy. Consequently, reductions in emissions for this compound will not be considered or counted in determining whether states have met the rate of progress requirements for VOC in State Implementation Plans or in demonstrating attainment of the O_3 NAAQS.

V. Statutory and Executive Order Reviews

Additional information about these statutes and Executive Orders can be found at *https://www2.epa.gov/laws-regulations/laws-and-executive-orders.*

A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review

This action is not a significant regulatory action and was, therefore, not submitted to the Office of Management and Budget (OMB) for review.

B. Executive Order 13771: Reducing Regulations and Controlling Regulatory Costs

This action is considered an Executive Order 13771 deregulatory action. This final rule provides meaningful burden reduction by exempting HFO–1336mzz–Z from the VOC regulatory definition and relieving manufacturers, distributers, and users from recordkeeping or reporting requirements. This action is voluntary in nature and has non-quantifiable cost savings given the unpredictability in who or how much of it will be used.

C. Paperwork Reduction Act (PRA)

This action does not impose an information collection burden under the PRA. It does not contain any recordkeeping or reporting requirements.

D. Regulatory Flexibility Act (RFA)

I certify that this action will not have a significant economic impact on a substantial number of small entities under the RFA. This action will not impose any requirements on small entities. This action removes HFO–1336mzz–Z from the regulatory definition of VOC and, thereby, relieves manufacturers, distributers, and users of the compound from tropospheric O_3 requirements to control emissions of the compound.

E. Unfunded Mandates Reform Act (UMRA)

This action does not contain any unfunded mandate as described in UMRA, 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments. This action imposes no enforceable duty on any state, local or tribal governments, or the private sector.

F. Executive Order 13132: Federalism

This action does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government.

G. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

This action does not have tribal implications, as specified in Executive Order 13175. This final rule removes HFO–1336mzz–Z from the regulatory definition of VOC and, thereby, relieves manufacturers, distributers and users from tropospheric O_3 requirements to control emissions of the compound. Thus, Executive Order 13175 does not apply to this action.

H. Executive Order 13045: Protection of Children From Environmental Health and Safety Risks

This action is not subject to Executive Order 13045, because it is not economically significant as defined in Executive Order 12866, and because the EPA does not believe the environmental health or safety risks addressed by this action present a disproportionate risk to children. Since HFO–1336mzz–Z is utilized in specific industrial applications where children are not present and dissipates quickly (*e.g.,* lifetime of 22 days) with short-lived end products, there is no exposure or disproportionate risk to children. This action removes HFO–1336mzz–Z from the regulatory definition of VOC and, thereby, relieves manufacturers, distributers and users from tropospheric O_3 requirements to control emissions of the compound.

I. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution or Use

This action is not subject to Executive Order 13211, because it is not a significant regulatory action under Executive Order 12866.

J. National Technology Transfer and Advancement Act (NTTAA)

This rulemaking does not involve technical standards.

K. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

The EPA believes that this action does not have disproportionately high and adverse human health or environmental effects on minority populations, low-income populations and/or indigenous peoples, as specified in Executive Order 12898 (59 FR 7629 February 16, 1994). This action removes HFO–1336mzz–Z from the regulatory definition of VOC and, thereby, relieves manufacturers, distributers, and users of the compound from tropospheric O_3 requirements to control emissions of the compound.

L. Congressional Review Act (CRA)

This action is subject to the CRA, and the EPA will submit a rule report to each House of the Congress and to the Comptroller General of the United States. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

M. Judicial Review

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the District of Columbia Circuit Court within 60 days from the date the final action is published in the **Federal Register**. Filing a petition for review by the Administrator of this final action does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review must be filed, and shall not postpone the effectiveness of such action. Thus, any petitions for review of this action related to the exemption of HFO–1336mzz–Z from the regulatory definition of VOC must be filed in the Court of Appeals for the District of Columbia Circuit within 60 days from the date the final action is published in the **Federal Register**.

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List of Subjects in 40 CFR Part 51

Environmental protection, Administrative practice and procedure, Air pollution control, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

Dated: November 16, 2018.

Andrew R. Wheeler,

Acting Administrator.

For reasons stated in the preamble, part 51 of chapter I of title 40 of the Code of Federal Regulations is amended as follows:

PART 51—REQUIREMENTS FOR PREPARATION, ADOPTION, AND SUBMITTAL OF IMPLEMENTATION PLANS

■ 1. The authority citation for part 51 continues to read as follows:

Authority: 23 U.S.C. 101; 42 U.S.C. 7401–7671q.

Subpart F—Procedural Requirements

■ 2. Section 51.100 is amended by revising paragraph (s)(1) introductory text to read as follows:

§ 51.100 Definitions.

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(1) This includes any such organic compound other than the following, which have been determined to have negligible photochemical reactivity: Methane; ethane; methylene chloride (dichloromethane); 1,1,1-trichloroethane (methyl chloroform); 1,1,2-trichloro-1,2,2-trifluoroethane (CFC–113); trichlorofluoromethane (CFC–11); dichlorodifluoromethane (CFC–12); chlorodifluoromethane (HCFC–22); trifluoromethane (HFC–23); 1,2-dichloro 1,1,2,2-tetrafluoroethane (CFC–114); chloropentafluoroethane (CFC–115); 1,1,1-trifluoro 2,2-dichloroethane (HCFC–123); 1,1,1,2-tetrafluoroethane (HFC–134a); 1,1-dichloro 1-fluoroethane (HCFC–141b); 1-chloro 1,1-difluoroethane (HCFC–142b); 2-chloro-1,1,1,2-tetrafluoroethane (HCFC–124); pentafluoroethane (HFC–125); 1,1,2,2-tetrafluoroethane (HFC–134); 1,1,1-trifluoroethane (HFC–143a); 1,1-difluoroethane (HFC–152a); parachlorobenzotrifluoride (PCBTF); cyclic, branched, or linear completely methylated siloxanes; acetone; perchloroethylene (tetrachloroethylene); 3,3-dichloro-1,1,1,2,2-pentafluoropropane (HCFC–225ca); 1,3-dichloro-1,1,2,2,3-pentafluoropropane (HCFC–225cb); 1,1,1,2,3,4,4,5,5,5-decafluoropentane (HFC 43–10mee); difluoromethane (HFC–32); ethylfluoride (HFC–161); 1,1,1,3,3,3-hexafluoropropane (HFC–236fa); 1,1,2,2,3-pentafluoropropane (HFC–245ca); 1,1,2,3,3-pentafluoropropane (HFC–245ea); 1,1,1,2,3-pentafluoropropane (HFC–245eb); 1,1,1,3,3-pentafluoropropane (HFC–245fa); 1,1,1,2,3,3-hexafluoropropane (HFC–236ea); 1,1,1,3,3-pentafluorobutane (HFC–365mfc); chlorofluoromethane (HCFC–31); 1 chloro-1-fluoroethane (HCFC–151a); 1,2-dichloro-1,1,2-trifluoroethane (HCFC–123a); 1,1,1,2,2,3,3,4,4-nonafluoro-4-methoxy-butane ($C_4F_9OCH_3$ or HFE–7100); 2-(difluoromethoxymethyl)-1,1,1,2,3,3,3-heptafluoropropane ($(CF_3)_2CFCF_2OCH_3$); 1-ethoxy-1,1,2,2,3,3,4,4,4-nonafluorobutane ($C_4F_9OC_2H_5$ or HFE–7200); 2-(ethoxydifluoromethyl)-1,1,1,2,3,3,3-heptafluoropropane ($(CF_3)_2CFCF_2OC_2H_5$); methyl acetate; 1,1,1,2,2,3,3-heptafluoro-3-methoxy-propane (n-C3F7OCH3, HFE–7000); 3-ethoxy- 1,1,1,2,3,4,4,5,5,6,6,6-dodecafluoro-2-(trifluoromethyl) hexane (HFE–7500); 1,1,1,2,3,3,3-heptafluoropropane (HFC 227ea); methyl formate (HCOOCH3); 1,1,1,2,2,3,4,5,5,5-decafluoro-3-methoxy-4-trifluoromethyl-pentane (HFE–7300); propylene carbonate; dimethyl carbonate; *trans*-1,3,3,3-tetrafluoropropene; HCF_2OCF_2H (HFE–134); $HCF_2OCF_2OCF_2H$ (HFE–236cal2); $HCF_2OCF_2CF_2OCF_2H$ (HFE–338pcc13); $HCF_2OCF_2OCF_2CF_2OCF_2H$ (H-Galden 1040x or H-Galden ZT 130 (or 150 or 180)); *trans* 1-chloro-3,3,3-trifluoroprop-1-ene; 2,3,3,3-tetrafluoropropene; 2-amino-2-methyl-1-propanol; t-butyl acetate; 1,1,2,2- Tetrafluoro -1-(2,2,2-trifluoroethoxy) ethane; *cis*-1,1,1,4,4,4-hexafluorobut-2-ene (HFO–1336mzz-Z); and perfluorocarbon compounds which fall into these classes:

* * * * *

[FR Doc. 2018–25891 Filed 11–27–18; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 76

[MB Docket No. 17–105; FCC 18–150]

Procedural Revisions to the Filing of Open Video System Certification Applications

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In this document, the Federal Communications Commission (FCC or Commission) modernizes the Open Video System (OVS) filing procedures by specifying that OVS applications be required to send certification applications, including FCC Form 1275 and all attachments, as well as notices of intent, via electronic email (email) delivery to a designated Commission email address. The FCC also eliminates certain existing requirements associated with the rule. Parties wishing to respond to a FCC Form 1275 filing must submit comments or oppositions via electronic mail (email).

DATES: *Effective date:* November 28, 2018.

FOR FURTHER INFORMATION CONTACT: For additional information on this proceeding, contact Sonia Greenaway Mickle, *Sonia.Greenaway@fcc.gov,* of the Policy Division, Media Bureau, (202) 418–1419.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Order, FCC 18–150, adopted and released on October 25, 2018. The full text of this document is available for public inspection and copying during regular business hours in the FCC Reference Center, Federal Communications Commission, 445 12th Street SW, Room CY–A257, Washington, DC 20554. This document will also be available via ECFS at *http://fjallfoss.fcc.gov/ecfs/*. Documents will be available electronically in ASCII, Microsoft Word, and/or Adobe Acrobat. Copies of the materials can be obtained from the FCC's Reference Information Center at (202) 418–0270. Alternative formats are available for people with disabilities (Braille, large print, electronic files, audio format), by sending an email to *fcc504@fcc.gov* or calling the Commission's Consumer and Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (TTY).

Synopsis

1. The Commission in this Order establishes electronic filing procedures for parties seeking to operate an Open Video System (OVS) to submit a certification application and notice of intent. By replacing our current paper filing requirements for OVS applications and notices with an electronic filing system, this Order modernizes our regulations, reduces burdens for OVS applicants, and increases the efficiency of the Commission's processing of applications.

2. The Telecommunications Act of 1996 added section 653 to the Communications Act of 1934, as amended (the Act), establishing OVS as a new framework for entry into the multichannel video programming distribution marketplace.[1] Any party

[1] Telecommunications Act of 1996, Public Law 104–104, 110 Stat. 56, approved February 8, 1996. An open video system is similar to a cable system in that it is a facilities-based system for the delivery of video programming. Unlike cable systems, however, open video systems must set aside up to two thirds of their channel capacity for the delivery of independent programming of third parties. The OVS framework was established to provide competition and lower barriers to entry in the provision of video programming to consumers. *See Implementation of Section 302 of the Telecommunications Act of 1996, Open Video Systems,* 11 FCC Rcd 18223, 18227, para. 2–3 (1996) *(Second Report and Order).* The approach developed for the OVS model provides streamlined

seeking to operate an OVS must file an application to be certified as an OVS operator on FCC Form 1275 [2] as well as a ''notice of intent'' to establish an OVS.[3] At present, parties cannot file these documents electronically. Instead, they must file paper copies of both documents with the Office of the Secretary and the Office of the Chief of the Media Bureau [4] and file the certification application on a computer disk. The documents are then delivered to the Media Bureau staff who process and review them. After a Form 1275 certification application is processed by Media Bureau staff, a public notice is published on the Commission's website. Comments or oppositions to certification applications must be filed within five calendar days of the date the application is received at the Commission.[5] Pursuant to Section 653, the Commission must act to approve or disapprove any OVS certification request within ten days of its receipt.[6] To implement this statutory requirement, the Commission's rules provide that ''[i]f the Commission does not disapprove the certification application within ten days after receipt of an applicant's request, the certification application will be deemed approved.'' [7] Media Bureau staff also provide public notice of OVS notices of intent.[8]

3. Because electronic filing is a more modern and efficient way for parties to file and for Commission staff to receive applications, we conclude that the OVS paper filing requirements have outlived their usefulness. The Commission has moved to electronic filing for other applications and filings.[9] Moreover, the nature of the OVS application process necessitates immediate receipt by appropriate staff, which can better be assured via electronic means. On several recent occasions, tracking down OVS applications mailed to Commission headquarters has been time consuming for staff and has caused processing delays. In addition, the requirement to file the certification application on a computer disk is an unnecessary, duplicative, and outdated mode of information delivery. Given the very short deadline by which the Commission must act on OVS certification applications, processing delays and outdated requirements have proven to be problematic for both the staff of the Media Bureau and OVS applicants.[10]

4. Therefore, we modify the procedural rules for the filing of OVS certification applications and notices of intent to make the process less burdensome for applicants and to ensure that these documents are timely received by Commission staff.[11] We conclude that the most efficient process is for OVS applicants to send certification applications, including FCC Form 1275 and all attachments, as well as notices of intent, via electronic mail (email) delivery to a designated Commission email address.[12] Specifically, under the rule we adopt here, when filing a certification application or notice of intent, applicants will be required to send all documents to the following email address: *OVS@fcc.gov*. Comments or oppositions also will be required to be sent via email to this same designated email address.[13] The rule changes in this Order do not affect the requirement that the certification application must be served on all local communities in which the applicant intends to operate.[14] We note that the rule changes adopted herein involve a non-substantive change to an approved information collection for which we must obtain Office of Management and Budget (OMB) approval under the Paperwork Reduction Act (PRA) before the rule changes can take effect. To expedite the ability of parties and staff to utilize these new procedures, we make these rule revisions effective upon publication of the Order in the **Federal Register**. The requirement that publication of a ''substantive'' rule be made at least 30 days before its effective date does not apply to the procedural rules adopted in this Order.[15]

regulations and reduced regulatory burdens. *See* 47 U.S.C. 573(c).

[2] 47 U.S.C. 573(a)(1); 47 CFR 76.1502. The Form 1275 includes facts and representations regarding the OVS applicant and system information, including the anticipated communities or area to be served upon completion of the open video system. *See https://transition.fcc.gov/Forms/Form1275/1275.pdf*.

[3] 47 CFR 76.1503(b)(1). In order to commence the channel allocation process, an OVS operator is required to file a notice of intent with the Commission. A notice of intent provides details regarding the operator's projected channel capacity, service area, and other technical information about the operator's system. *Second Report and Order,* 11 FCC Rcd at 18252, para. 45.

[4] *See Second Report and Order,* 11 FCC Rcd at 18247, para. 34 (1996) (stating that ''hard copies of the [Form 1275] certification forms be filed with the Office of the Secretary, Federal Communications Commission''); *see also id.* at Appendix C (''A hard copy of FCC Form 1275 and all attachments must be filed with the Office of the Secretary, Federal Communications Commission . . . and with the Office of the Bureau Chief, Cable Services Bureau''). The Cable Services Bureau was superseded by the Media Bureau in 2002. *See Establishment of the Media Bureau and Other Organizational Changes,* Order, 17 FCC Rcd 4510 (2002); *see also* 47 CFR 76.1503(b)(1) (stating that Notices of Intent must be filed with the Secretary of the Federal Communications Commission and directed to the Media Bureau). Some of the specific filing requirements do not appear in the OVS rules, but in other locations such as in the instructions for FCC Form 1275.

[5] 47 CFR 76.1502(e)(1).

[6] 47 U.S.C. 573(a)(1).

[7] 47 CFR 76.1502(f).

[8] 47 CFR 76.1503(b)(1).

[9] *See, e.g., Amendment of Certain of the Commission's Part 1 Rules of Practice and Procedure Relating to the Filing of Formal Complaints Under Section 208 of the Communications Act and Pole Attachment Complaints Under Section 224 of the Communications Act,* Order, 79 FR 73844, Dec. 12, 2014, 29 FCC Rcd 14078 (2014).

[10] In at least one recent case, an OVS application was received by Media Bureau staff weeks after it was received at the Commission. The Media Bureau failed to have an opportunity to place the application on Public Notice or to review and assess the application within the ten-day timeframe specified by the Communications Act and the Commission's rules, and the application was deemed approved by operation of law. After reviewing the OVS certification application, it was deemed deficient, requiring the Media Bureau to adopt a *sua sponte* Order on Reconsideration revoking the OVS certification. *See Digital Broadcasting Certification to Operate an Open Video System,* 32 FCC Rcd 3149 (MB 2017).

[11] The rule revisions adopted in this Order and set forth in the Final Rules section are procedural in nature. Because they modify existing agency procedural rules, notice and comment procedures are not required under the Administrative Procedure Act. *See* 5 U.S.C. 553(b) (stating that notice and comment requirements do not apply to rules of agency procedure); *Amendment of Certain of the Commission's Part 1 Rules of Practice and Procedure and Part 0 Rules of Commission Organization,* Notice of Proposed Rulemaking, 75 FR 14401, March 25, 2010, 25 FCC Rcd 2430, 2430, para. 1 n.1; 2434, para. 11 n.15; 2436, para. 16 n.23 (2010); *Amendment of Certain of the Commission's Part 1 Rules of Practice and Procedure and Part 0 Rules of Commission Organization,* Report and Order, 76 FR 24383, May 2, 2011, 26 FCC Rcd 1594, 1598, para. 10 n.23; 1600, para. 15 n.44 (2011) (notice and comment is not required for procedural changes).

[12] Because the certification application will be electronically delivered to a designated OVS email box, a specific cover sheet identifying the filing as an ''OVS Certification Application'' and ''Attention: Media Bureau'' is no longer necessary. Therefore, we are eliminating the requirement that a cover sheet be filed with a certification application, comments, or oppositions. *See* 47 CFR 76.1502(d)(2), (e)(2). We also are eliminating the cover sheet requirements for notices of intent. *See* 47 CFR 76.1503(b)(1). In addition, computer disks are no longer required to be filed.

[13] *See* the Final Rules section. As under the current rule, comments or oppositions to a certification must be served on the party that filed the certification. 47 CFR 76.1502(e)(1).

[14] *See* 47 CFR 76.1502(d)(1)*; see also* 47 CFR 76.1502(f) (requiring that, if an application is disapproved, a refiled application must be served on any objecting party or parties and on all local communities in which the applicant intends to operate); 47 CFR 76.1503(b)(1)(viii) (requiring that a notice of intent be served on all local franchising authorities).

[15] *See* 5 U.S.C. 553(d)(3) (stating that publication of a ''substantive'' rule shall be made not less than 30 days before its effective date, except . . . as otherwise provided by the agency for good cause found and published with the rule). We anticipate that these new procedures will significantly decrease the likelihood that a certification

Continued

5. *Paperwork Reduction Act.* This document contains a non-substantive and non-material modification of information collection requirements that were previously reviewed and approved by OMB pursuant to the Paperwork Reduction Act of 1995 (PRA), Public Law 104–13.[16] Filing burdens are reduced with the use of email filings to the Commission.

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

7. Accordingly, *it is ordered* that part 76 of the Commission's rules *is amended,* as set forth in the Final Rules section, pursuant to the authority contained in sections 4(i), 303(r), and 653 of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 303(r), and 573.

8. *It is further ordered* that this Order and the rule changes adopted herein shall be effective upon publication in the **Federal Register**.

List of Subjects in 47 CFR Part 76

Administrative practice and procedure, Cable television, Reporting and recordkeeping requirements.

Federal Communications Commission.

Katura Jackson,

Federal Register Liaison Officer, Office of the Secretary.

Final Rules

For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR part 76 as follows:

PART 76—MULTICHANNEL VIDEO AND CABLE TELEVISION SERVICE

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

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

■ 2. Amend § 76.1502 by revising paragraphs (d), (e)(2), and (f) to read as follows:

§ 76.1502 Certification.

* * * * *

(d)(1) All open video system certification applications, including FCC Form 1275 and all attachments, must be filed via electronic mail (email) at the following address: *OVS@fcc.gov.* The subject line shall read ''Open Video System Certification Application.'' Open video system certification applications will not be considered properly filed unless filed as described in this paragraph (d).

(2) On or before the date an FCC Form 1275 is filed with the Commission, the applicant must serve a copy of its filing on all local communities identified pursuant to paragraph (c)(6) of this section and must include a statement informing the local communities of the Commission's requirements in paragraph (e) of this section for filing oppositions and comments. Service by mail is complete upon mailing, but if mailed, the served documents must be postmarked at least 3 days prior to the filing of the FCC Form 1275 with the Commission.

(e) * * *

(2) Parties wishing to respond to a FCC Form 1275 filing must submit comments or oppositions via electronic mail (email) at the following address: *OVS@fcc.gov.* The subject line shall read ''Open Video System Certification Application Comments.'' Comments and oppositions will not be considered properly filed unless filed as described in this paragraph (e).

(f) If the Commission does not disapprove the certification application within ten days after receipt of an applicant's request, the certification application will be deemed approved. If disapproved, the applicant may file a revised certification or refile its original submission with a statement addressing the issues in dispute in accordance with the procedures described in paragraph (d) of this section. Such refilings must be served on any objecting party or parties and on all local communities in which the applicant intends to operate pursuant to instructions in paragraph (d)(2) of this section. The Commission will consider any revised or refiled FCC Form 1275 to be a new proceeding and any party who filed comments regarding the original FCC Form 1275 will have to refile their original comments if they think such comments should be considered in the subsequent proceeding.

■ 3. Amend § 76.1503 by revising paragraph (b)(1) introductory text to read as follows:

§ 76.1503 Carriage of video programming providers on open video systems.

* * * * *

(b) * * *

(1) *Notification.* An open video system operator shall file a ''Notice of Intent'' to establish an open video system, which the Commission will release in a Public Notice. The Notice of Intent must be filed via electronic mail (email) at the following address: *OVS@fcc.gov.* The subject line shall read ''Open Video System Notice of Intent.'' An Open Video system notice of intent will not be considered properly filed unless filed as described in this paragraph (b). This Notice of Intent shall include the following information:

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[FR Doc. 2018–25913 Filed 11–27–18; 8:45 am]

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application will fail to reach Media Bureau staff prior to the time that it is deemed approved. We likewise expect that, since the new procedures will decrease filing burdens on applicants and other filers, no filing party or opponent of an OVS application is likely to be prejudiced by the rules taking effect upon publication of the Order in the **Federal Register**.

[16] *See* OMB, Notice of Office of Management and Budget Action, ICR Reference No. 201604–3060–006, OMB Control No. 3060–0700 (May 23, 2016), *https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201604-3060-006#* (select the ''Retrieve Notice of Action (NOA)'' hyperlink); 5 CFR 1320.5(g) (stating that an agency may not make ''a substantive or material modification to a collection of information'' after such collection of information has been approved by OMB, unless the modification has been submitted to OMB for review and approval under 5 U.S.C. part 1320).

Proposed Rules

Federal Register
Vol. 83, No. 229
Wednesday, November 28, 2018

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

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 17

RIN 2900–AP46

Prosthetic and Rehabilitative Items and Services

AGENCY: Department of Veterans Affairs.

ACTION: Supplemental notice of proposed rulemaking.

SUMMARY: On October 16, 2017, the Department of Veterans Affairs published a proposed rulemaking to amend its regulations on the provision of prosthetic and rehabilitative items and services. This supplemental notice of proposed rulemaking (SNPRM) provides clarification about provisions of that proposed rulemaking and seeks additional public comments on them. This SNPRM also provides notice regarding certain communications between VA and external parties regarding the proposed rule, and a summary of these communications has been added to the public docket of this rulemaking.

DATES: Comments must be received by VA on or before December 28, 2018.

ADDRESSES: Written comments may be submitted by through *http://www.Regulations.gov*; by mail or hand-delivery to Director, Regulations Management (00REG), Department of Veterans Affairs, 810 Vermont Avenue NW, Room 1063B, Washington, DC 20420; or by fax to (202) 273–9026. Comments should indicate that they are submitted in response to ''RIN 2900–AP46, Prosthetic and rehabilitative items and services; Supplemental notice of proposed rulemaking''. Copies of comments received will be available for public inspection in the Office of Regulation Policy and Management, Room 1063B, between the hours of 8:00 a.m. and 4:30 p.m. Monday through Friday (except holidays). Please call (202) 461–4902 for an appointment. (This is not a toll-free number.) In addition, during the comment period, comments may be viewed online through the Federal Docket Management System (FDMS) at *http://www.Regulations.gov*.

FOR FURTHER INFORMATION CONTACT: Penny Nechanicky, National Program Director for Prosthetic and Sensory Aids Service (10P4RK), Department of Veterans Affairs, 810 Vermont Avenue NW, Washington, DC 20420; (202) 461–0337. (This is not a toll-free number.)

SUPPLEMENTARY INFORMATION: On October 16, 2017, VA published a proposal to amend VA regulations governing the provision of prosthetic and rehabilitative items and services to eligible veterans. **Federal Register** (82 FR 48018). That rulemaking proposed to reorganize and update the regulations on prosthetic and rehabilitative items and define the types of items and services available to eligible veterans. That rulemaking also proposed to eliminate the existing prosthetics regulations at section 17.150 of title 38, Code of Federal Regulations (CFR) and establish entirely new sections at §§ 17.3200, *et seq.*

VA asked for comments on the proposed rule on or before December 15, 2017, and we received 305 comments. A number of those commenters raised concerns about proposed § 17.3240, ''Furnishing Authorized Items and Services,'' and whether the proposal would alter VA's current practices regarding veterans' choice, particularly with regard to the provision of artificial limbs, as reflected, in part, in two Veterans Health Administration (VHA) Handbooks. Commenters also raised concerns about whether the proposal conflicts with the Veterans Access, Choice, and Accountability Act of 2014 (''Choice Act''), which established VA's Veterans Choice Program.

With this SNPRM, we seek to clarify the intended effect of proposed § 17.3240, explain our current practices and processes relating to that provision, and request additional comments on it. We also propose edits to proposed § 17.3240 as explained in more detail below. We will address all of the comments that VA received on the proposed rule and any comments VA receives on this SNPRM in our final rulemaking.

We clarify that the proposed rule and this SNPRM would not result in a different experience for most veterans receiving prosthetics and related care from VA. In proposed § 17.3240, we are codifying our current practice of providing all prosthetic and rehabilitative items and services under § 17.3230. With regard to the provision of artificial limbs under the proposed rule, we propose to revise VHA's existing policies that allow veterans to choose the provider of artificial limbs in limited circumstances. We also propose to align policies and practices to be consistent with the provision of all other prosthetic and rehabilitative items and services, with the community care authorities (*e.g.,* Choice Act), and with our current national preferred process for the provision of artificial limbs (which we intend to continue as the national standard pursuant to this rulemaking). This current national preferred process would be implemented pursuant to this rulemaking as it will provide consistency in how artificial limbs are provided throughout VA. In the provision of artificial limbs across VHA, medical facilities have not consistently applied certain provisions of its current handbooks, specifically paragraph 6.c.(1)(b) of VHA Handbook 1173.2 and paragraphs 4.c. and 7.a. of VHA Handbook 1173.3, as written, and these policies have led to ambiguity and misinterpretation within VA and by the public. Pursuant to this rulemaking, VA proposes to revise these policies, as following them as written in these two handbooks could limit consideration of important factors, such as the veteran's clinical needs. It was not our intent that VA clinical providers would not be involved in this very important decision on how the veteran's needs can be best met. As prosthetists have varying levels of expertise and familiarity with artificial limbs, if VA followed these policies as written, VA would not be able to confirm or validate that the prosthetist chosen by the veteran would be the most appropriate prosthetist to provide the artificial limb and associated services.

Following these policies would also not be consistent with our contracting authorities, such as the Federal Acquisition Regulations (FAR) and VA Acquisition Regulations (VAAR). These policies have been left to each medical facility to interpret and apply, which has resulted in inconsistent application across the country. In a 2012 audit of the management and acquisition of

prosthetic limbs within VHA, VA's Office of the Inspector General (OIG) found varying procurement practices among different test regions in VHA ''[d]ue to the inconsistencies in the available guidance.'' See, *Veterans Health Administration, Audit of the Management and Acquisition of Prosthetic Limbs,* Report No. 11–02254–102, VA OIG, Office of Audits and Evaluations, March 8, 2012, page 9. The OIG concluded that such variability led to ''overlap and gaps in services'' and that ''contracting staff may be performing unnecessary workload.'' *Id.* The OIG further concluded that ''[i]t is important that VHA monitors contract workload and ensures the contracts it awards and administers are necessary to support veterans' requirements.'' *Id.* Through this rulemaking, we seek to create a uniform standard and process for the provision of artificial limbs to ensure all VA medical facilities are in alignment with the current process for the provision of all other prosthetic and rehabilitative items and services, and with our current national preferred process for the provision of artificial limbs, which we intend to continue pursuant to this rulemaking. In the following paragraphs, we will explain our processes for the provision of all prosthetic and rehabilitative items and services, as well as artificial limbs, and address certain public comments regarding proposed § 17.3240.

General Current Process for the Provision of Prosthetic and Rehabilitative Items and Services Other Than Artificial Limbs

The current decision making process for providing prosthetic and rehabilitative items and services starts with a clinical evaluation of a veteran's needs by a VA health care provider or authorized community (*i.e.,* non-Department) provider. The decision on the prosthetic or rehabilitative item or service to be provided to the veteran is a clinical decision made by the veteran's health care provider, in consultation with the veteran, and results in a prescription for a prosthetic or rehabilitative item or service. This ensures that the veteran's clinical needs will be met by the item or service prescribed, that the item or service prescribed is safe, that the veteran is involved in this process because he or she is a necessary member of the health care delivery team, and that the item or service will serve as a direct and active component of the eligible veteran's medical treatment and rehabilitation. A VA prosthetics representative at a VA medical facility then determines how best to provide the item or service to the veteran. While sections 1701 and 1710 of title 38, United States Code (U.S.C.), require VA to furnish medical services, including medically necessary prosthetic and rehabilitative items and services to certain eligible veterans and authorize VA to provide them to other eligible veterans, the decision as to how VA provides such items and services is discretionary. As explained at 82 FR 48025, if VA has the capacity or inventory to directly provide such item or service, VA will do so. VA may use authorized community vendors on a case-by-case basis to provide greater access, lower cost, and a wider range of items and services. Pursuant to the FAR, VA utilizes national and regional agreements to provide prosthetic and rehabilitative items and services and also, on a case by case basis, enters into agreements with vendors in the community who are not part of these national or regional agreements in the instance that VA is unable to provide these items and services directly or pursuant to an existing agreement. While VA has general authority to provide necessary health care services to eligible veterans, VA's authority to provide such services through community sources is constrained by statute and regulation. For example, except where authorized, VA complies with the FAR and the VAAR, which ensure that the prescribed items and services meet the veteran's clinical needs and that VA obtains such items and services in a fiscally responsible and legally sufficient manner.

We note that the decision of *what* prosthetic or rehabilitative item or service is to be provided is a clinical decision and results in a prescription. The decision of *how* that prescribed item or service is provided is a separate decision, and VA retains the authority to make this determination. As long as the prescribed item or service (whether prescribed by a VA or an authorized community provider) serves as a direct and active component of the veteran's medical treatment and rehabilitation, VA prosthetics representatives will honor the prescription and procure the prescribed item or service for the veteran. While the veteran's clinical needs are always considered in the determination of how the item or service is procured, administrative factors are also considered on a case by case basis, as explained in more detail throughout this SNPRM. Under the proposed rulemaking and this SNPRM, we would continue to ensure that the veteran's clinical needs drive how the agency determines whether VA can directly provide the prescribed item or service, or whether VA will use an authorized vendor in the community to provide the item or service. VA's procurement practices with respect to prosthetic and rehabilitative items and services are aimed at ensuring that veterans' needs are met with the most appropriate and highest quality items and services in a consistent manner throughout VA and that VA complies with Federal and VA acquisition regulations as applicable.

Current National Preferred Process for the Provision of Artificial Limbs

As previously discussed, there is some variation in the provision of artificial limbs throughout VHA, specifically with regard to the role of the veteran and the clinician in the determination of how prescribed items and services are provided. The following is a discussion on the current national preferred process for the provision of such items and encompasses the process VA intends to continue pursuant to proposed § 17.3240. Similar to the provision of other prosthetic and rehabilitative items and services under proposed 38 CFR 17.3230 as explained above, in the instance of the provision of an artificial limb, VA first requires an evaluation of a veteran's clinical need for such item. This evaluation is typically done by the amputee clinic team. If a veteran has been evaluated by an authorized community provider, any prescription for an artificial limb and related components written by that authorized community provider is referred to the amputee clinic team, particularly because the authorized community provider may not specialize in artificial limb evaluation. Oftentimes, the prescription does not contain sufficient information for VA to provide directly or through a VA-authorized prosthetist all the components, accessories, supplies, and related services necessary to fabricate an artificial limb. Furthermore, agreements with VA-authorized prosthetists for the artificial limb and related services must include Healthcare Common Procedure Coding System (HCPCS) codes, which VA determines based on an evaluation of the patient by the amputee clinic team. The amputee clinic team conducts an assessment to determine the veteran's clinical needs, and along with the veteran, identifies the appropriate artificial limb and related components needed and makes a determination on how the item(s) will be provided. As discussed in the previous section, this decision is in consultation with the veteran and prioritizes veterans' clinical needs. Generally, if a VA medical

facility accessible to the veteran offers the orthotic and prosthetic services that meet the veteran's clinical needs, then VA provides the limb and all associated services (*e.g.,* fitting, minor repairs, routine servicing) directly to the veteran. If VA's decision is that the veteran should receive the item and services from a community (*i.e.,* non-Department) prosthetist, VA utilizes its established orthotic and prosthetic agreements in the region to authorize a community prosthetist to provide the artificial limb and associated services to the veteran. The veteran is able to select, in consultation with his or her VA clinician or amputee clinic team, from a list of vendors in the geographic area that have an existing agreement with VA and are able to meet the veteran's clinical needs. While most facilities have a number of established agreements already in place for use, in the instance that there is no prosthetist under an established agreement that is able to meet the veteran's clinical needs, VA and the veteran will work together to identify the appropriate community prosthetist, and VA would seek to establish an agreement with that prosthetist for the needed artificial limb and related services. In purchasing such items and services, VA complies with the FAR and VAAR as applicable. We note that some of the above process may vary if the veteran is eligible for the Veterans Choice Program, operated pursuant to § 17.1500 *et seq.* Under proposed § 17.3240, we would standardize this process of determining whether to directly provide the artificial limb and associated services or whether to use a VA-authorized vendor (*i.e.,* a community/non-Department prosthetist). This would result in several benefits. First, it would ensure VA provides such items and services in a consistent and standardized manner throughout VA, which would also be consistent with the provision of all other prosthetic and rehabilitative items and services. Second, it would be consistent with the current national preferred practice, while also ensuring compliance with Federal acquisition requirements. Finally, and most importantly, this would ensure veterans receive the most appropriate and highest quality item or service that meets their clinical needs. We note that VA retains authority over this determination to ensure that there is consistency across VHA in the provision of these prescribed items and services, and for quality control purposes.

Public Comments About Proposed § 17.3240

Many commenters raised concerns about VA's statement in the proposed rule at 82 FR 48025 that the decision as to whether VA or a VA-authorized vendor (*i.e.,* community/non-Department vendor) will furnish the prescribed item or service to the veteran is an administrative business decision; the commenters stated that this is instead a clinical issue that should also be based on the veterans' preferences. Some commenters were concerned that making this an administrative business decision would restrict veterans' choice of providers and delay care. We agree and now clarify that our description of the proposed rule failed to state that clinical decisions are necessary to issue the clinically-appropriate prosthetic or rehabilitative item or service to a veteran. Furthermore, as mentioned in the discussions above, the decision about what item or service VA will provide to the veteran is a clinical decision made by the veteran's health care provider, in consultation with the veteran, which results in a medical prescription. Additionally, there is a related decision about *how* VA will provide the prescribed items and services (whether by VA or by a VA-authorized vendor). The veteran's clinical needs will drive this determination. However, while the clinical needs are always part of this determination, VA may consider administrative factors when making this determination. Such administrative factors considered may include, but would not be limited to, VA capacity and availability, geographic availability, and cost. We note that VA capacity and availability can refer to whether a VA medical facility has the resources and equipment to fabricate an authorized item or service, and whether VA providers are available and have the skills, abilities, and experience to provide an authorized item or service. For example, a VA prosthetist may have the ability to fabricate an artificial limb, but may not be able to fabricate the limb because of his or her workload. In that instance, VA may determine that an authorized VA vendor will provide the authorized item or service. If the authorized item or service requires certain expertise or experience that a VA provider does not have, VA may determine that an authorized VA vendor will provide that item or service instead. Relatedly, some VA medical facilities have laboratories in which artificial limbs can be fabricated while others do not, and this would be a consideration in determining whether VA or an authorized VA vendor provides the artificial limb. We also note that how geographic availability is considered in this determination of whether VA or an authorized VA vendor provides the authorized item or service will vary. There would be no set distance or mileage that we would define when considering geographic availability in this determination, as this can be dependent on the health and mobility of the veteran and his or her clinical needs. For example, in considering geographic availability, a veteran amputee who has no other medical conditions that would limit his or her mobility and may have regular access to a vehicle will likely have substantially different clinical needs in this regard than a veteran amputee with medical conditions that impede his or her mobility and who may lack dependable access to a vehicle. For veterans who have mobility issues, geographic availability can vary significantly. In such situations, it would be appropriate for the provider to consider whether a specific limb under consideration can be fabricated, serviced, and repaired by a VA or non-VA prosthetist. We further note that although cost is not a factor providers consider when determining which item or service to prescribe, it may be relevant in determining whether VA or an authorized VA vendor provides the prescribed item or service. For example, if an authorized vendor sells the authorized item at a lower cost than what it would cost VA to provide the item itself, then VA may decide to procure the item from the authorized VA vendor based on cost.

While the factors VA considers in making the determination of how to provide the authorized item or service will vary, we would continue to ensure that the veteran's clinical needs drive how the agency determines whether VA can directly provide the prescribed item or service, or whether VA will use an authorized vendor in the community to provide the item or service, while also ensuring that VA is administering these benefits in a fiscally responsible and consistent manner.

Other commenters expressed concern that administrative business decisions would not be consistent with other authorities, particularly the Choice Act. First, we note that since the publication of the proposed rule in October 2017, the President signed into law the VA MISSION Act of 2018 (Pub. L. 115–182). Section 143 of this Act provides that VA may not use the Choice Act authority to furnish care and services after June 6, 2019. While we address, in this SNPRM, the concerns regarding the Choice Act that were raised by commenters, we

realize that these concerns and our responses will become moot once VA's authority to furnish care and services pursuant to the Choice Act ends. As a result of the VA MISSION Act of 2018, VA is developing new regulations for the new Veterans Community Care Program required by section 101 of that Act and will also be revising or eliminating the regulations implementing the Choice Act; should any further revisions to VA's prosthetic regulations be needed as a result of these efforts, VA will address those changes through a subsequent rulemaking and further explain or modify these regulations as necessary.

We note that eligibility for the Veterans Choice Program implemented pursuant to the Choice Act is dependent on meeting certain criteria defined in § 17.1510. In comparison, eligibility for prosthetics and rehabilitative items and services is set forth in proposed § 17.3220, which would only require that the veteran be enrolled in VA health care pursuant to § 17.36 or exempt from enrollment under § 17.37, or that the veteran be otherwise receiving care or services under chapter 17 of title 38 U.S.C. If the veteran meets any of these criteria, he or she would be eligible to receive a prosthetic or rehabilitative item or service so long as such item or service serves as a direct and active component of the veteran's treatment or rehabilitation. Similar to the Choice Program, factors such as geographic availability are considered in making the determination. However, VA always considers clinical factors in making the determination of who will provide the prescribed item or service. While the eligibility criteria for when a veteran is able to seek care from a community provider under the Veterans Choice Program are generally administrative, the determination of who provides the prosthetic and rehabilitative item or service under § 17.3240 is both administrative and clinical. We note that this latter determination is broader and less stringent than the determination under the Veterans Choice Program and provides the veteran with input into whether VA or an authorized VA vendor provides him or her with the prescribed item or service.

Relatedly, general concerns were raised that proposed § 17.3240 is inconsistent with the Choice Act. While VA may not use the Choice Act to furnish care and services after June 6, 2019, as described above, we believe these authorities are consistent with one another, or where they are potentially inconsistent, they are so in a way to the benefit of the veteran in that this proposed rule is broader and less stringent than the eligibility requirements under the Veterans Choice Program. We note that the Choice Act requires VA approval prior to obtaining care from a community provider, and there are specific criteria that veterans and community providers must meet for care to be authorized and approved. See §§ 17.1500 *et seq.* If a veteran is eligible and approved by VA to seek care outside VA under § 17.1510, that veteran may obtain care from eligible entities and providers under § 17.1530. An agreement must be in place prior to the authorized care being furnished, and the agreement or authorization for care must be specific as to the care to be provided to the veteran. If the authorized entity or provider prescribes a prosthetic or rehabilitative item or service, VA would then proceed to procure that item or service as long as it is part of the original authorized care and serves as a direct and active component of the veteran's treatment or rehabilitation. In this context, the proposed rule as modified by this SNPRM is consistent with the Choice Act, as the Choice Act requires VA to authorize prosthetic and rehabilitative items and services from a VA-authorized vendor in the community prior to those items or services being provided. See, *e.g.,* Public Law 113–146, sec. 101(a)(1)(A), (c)(1)(B)(i), (d)(4)(B)(iii), and (h). See also 38 CFR 17.1505 (the definition of appointment, in particular), 17.1510(d) (''prior to obtaining authorization for care''), 17.1515(a), and 17.1535(c). Thus, proposed § 17.3240 is consistent with, and less restrictive than, the Choice Act.

In addition to the Choice Act, commenters raised concerns about whether the proposed rule would implicate other community care authorities, such as 38 U.S.C. 8153 and 1703. Sections 8153 and 1703 are used by VA to obtain medical care in the community; however, we note that section 1703 will be revised significantly by 101 of the VA MISSION Act of 2018. These changes will become effective when VA publishes regulations implementing section 101 of the VA MISSION Act of 2018. The proposed rule, as amended by this SNPRM, would not limit, impact, or be inconsistent with VA's existing or future authorities under sections 8153 and 1703. These are not authorities that we have used to purchase prescribed prosthetic and rehabilitative items or services. Similar to the Choice Program, if the entity or provider authorized under sections 1703 and 8153 to provide care to a veteran prescribes a prosthetic or rehabilitative item or service, VA would then proceed to procure that item or service as long as it is part of the original authorized care and serves as a direct and active component of the veteran's treatment or rehabilitation. VA would then use its prosthetic procurement authorities (*i.e.,* 38 U.S.C. 8123, FAR, and VAAR) to obtain the prescribed prosthetic and rehabilitative items and services. In this context, the proposed rule as modified by this SNPRM is consistent with sections 1703 and 8153. Similar to the Choice Act, these authorities have separate eligibility criteria than what is in proposed § 17.3220. See 38 U.S.C. 1703, 8153, and 38 CFR 17.52. We note that proposed § 17.3220 would be less restrictive than the eligibility criteria for these community care programs, as these community care authorities require facilities to consider only certain factors when determining whether a veteran may obtain care outside VA. For example, pursuant to 38 CFR 17.52, in instances when VA facilities are incapable of furnishing care due to geographic inaccessibility or are not capable of furnishing care or services required, VA may contract with non-VA facilities for the care. As the regulations implementing these community care authorities are undergoing revision due to the enactment of the VA MISSION Act of 2018, should any further revisions to VA's prosthetic regulations be needed as a result, VA will address those changes through a subsequent rulemaking and further explain or modify these regulations as necessary.

Additionally, we note that 38 U.S.C. 1703 distinguishes between veterans with service connected and nonservice connected disabilities when determining their eligibility to obtain care outside VA under that authority. Section 101 of the VA MISSION Act of 2018 will revise section 1703 to remove this distinction, and to the extent necessary, such elimination would be reflected under these prosthetics regulations. We note that the proposed prosthetics regulations, as amended by this SNPRM, do not distinguish between veterans with service connected conditions and nonservice connected conditions.

Commenters also raised concerns about the authority for proposed § 17.3240, as VA did not cite to or reference the statutory authority for that section. As mentioned previously in this discussion, 38 U.S.C. 1710, the authorizing statute, requires VA to furnish medical services to certain eligible veterans and authorizes VA to provide them to other eligible veterans. See also, 38 U.S.C. 1701(6), which defines the term ''medical services'' in

a manner that covers prosthetic and rehabilitative items and services. Sections 1701 and 1710 do not, however, mandate how VA provides these items and services. In other words, how VA provides them is discretionary, and VA proposes § 17.3240 pursuant to this authority.

VA also received many comments stating that the proposed rule contradicted existing VHA policies and practices relating to the provision of artificial limbs and the veteran's choice of provider. We note that VHA Handbooks 1173.2 ''Furnishing Prosthetic Appliances and Services'' and 1173.3 ''Amputee Clinic Teams and Artificial Limbs'' indicate that a veteran is able to choose his or her prosthetist, including community (*i.e.,* non-Department) prosthetists, if the veteran has a preexisting relationship with that prosthetist. VHA Handbook 1173.2 paragraph 6.c.(1)(b) states that, ''Eligible veterans will select their provider for artificial limbs from the listing of contract vendors, including capable VA Prosthetic and Orthotic Laboratories. Service connected veterans who have obtained their most recent limb from a non-contract provider will be allowed to have their subsequent limb manufactured by the VA non-contract provider as long as the prosthetist is willing to accept the geographic VA preferred provider payment rate for the State in which the prosthetist performs this service.'' Paragraph 4.c. of VHA Handbook 1173.3 states, ''Eligible veterans, as identified in VHA Handbook 1173.1, who have previously received artificial limbs from commercial sources, will continue to have their choice of vendors on contract with VA or their non-contract prosthetist, providing the prosthetist accepts the VA preferred provider rate for the geographic area.'' Paragraph 7.a. of that same Handbook further states, ''Eligible veterans will be permitted to obtain authorized artificial limbs and/or terminal devices from any commercial artificial limb dealer who is under a current local contract to the VA or the veteran's preferred prosthetist who agrees to accept the preferred provider rate.''

As mentioned previously in this document, these provisions in these two handbooks have not been consistently applied as written throughout VA's medical facilities in the provision of artificial limbs. We propose to revise these policies, because following them as written has resulted in inconsistent application, and ambiguity and misinterpretation within VA and by the public. Additionally, as prosthetists have varying levels of expertise and familiarity with artificial limbs, if VA followed these policies as written, VA would not be able to confirm or validate that the prosthetist chosen by the veteran would be the most appropriate prosthetist to provide the artificial limb and associated services. It was not our intent that VA clinical providers would not be involved in this very important decision on how the veteran's needs can be best met. As previously mentioned, the veteran and the VA provider would work together to determine what item or service is needed to meet the veteran's clinical needs, and who may be able to provide such item or service. The veteran's preferences will be part of that decision with the VA provider. Through this rulemaking, we seek to ensure a standardized and consistent process across VA for the provision of artificial limbs that is consistent with the current national preferred process and with the process for the provision of all other prosthetic and rehabilitative items and services.

After this rulemaking is final, VA will rescind VHA Handbooks 1173.2 and 1173.3 and develop new policies to update and clarify its procedures, consistent with this regulation.

Corrections to Proposed § 17.3240

Based on these comments received and the discussion above, VA now proposes to revise the language of § 17.3240, as proposed in 82 FR 48018. In revised proposed § 17.3240(a)(1), we would state that VA providers will prescribe items and services based on the veteran's clinical needs and will do so in consultation with the veteran. Once the prescribed item or service is determined to be authorized under § 17.3230, VA will determine whether VA or a VA-authorized vendor will furnish authorized items and services under § 17.3230 to veterans eligible for such items and services under § 17.3220. We would add paragraph (a)(2) to § 17.3240 to state that this determination on whether VA or a VA-authorized vendor will furnish the authorized item or service under § 17.3230 will be based on, but not limited to, such factors as the veteran's clinical needs, VA capacity and availability, geographic availability, and cost.

Revising the language of § 17.3240, as proposed in 82 FR 48018, would codify our current practices and the current national preferred process for the provision of artificial limbs; it also would clarify that the item or service that is authorized is prescribed based on the veteran's clinical needs and is done in consultation with the veteran. In response to many comments regarding this clinical decision and the veteran's involvement in that decision, we explicitly note that the prescription is clinical and based on the veteran's clinical needs. For similar reasons, we would also clarify that the prescription is generated in consultation with the veteran. This would be explained in proposed 17.3240(a)(1).

Additionally, as mentioned, we received comments that the decision on how to provide an authorized item or service should not be administrative, but rather clinical. Relatedly, at least one commenter raised the concern that we did not identify or explain the factors we would use in making this determination. In response to the comments received, we would revise proposed § 17.3240 to clarify that the determination on how the item or service is provided is based on clinical and administrative factors. In proposed § 17.3240(a)(2), we would list factors that would be considered when procuring and providing the authorized item or service. This list of factors is non-exhaustive. Not all factors would be considered in every instance, as the provision of each authorized item or service will vary, and additional factors could be considered as needed. For example, a specific wheelchair may be prescribed as that may be the only wheelchair that would meet the veteran's clinical needs, and there may be only one manufacturer of that wheelchair. In that instance, if the wheelchair meets the direct and active component standard, it will be authorized and VA would proceed to procure that wheelchair directly from the manufacturer without consideration of the other factors. Additionally, a provider may prescribe diabetic shoes to meet a veteran's clinical needs, and if VA has those in its inventory, it will provide those to the veteran. If there are none in inventory and VA needs to procure the prescribed shoes, then we will look at our existing contracts to purchase such items. Additional factors such as cost may be considered in that instance to ensure that we are being fiscally responsible. As explained previously, VA capacity and availability can refer to whether a VA medical facility has the resources and equipment to fabricate an authorized item or service, or whether VA providers are available or have the skills, abilities, and experience to provide an authorized item or service. With regard to geographic availability, we note that how this factor may be considered would vary. There would be no set distance or mileage that we would define when considering geographic

availability in this determination, as this can be dependent on the health and mobility of the veteran and his or her clinical needs. Although cost is not a factor providers consider when determining which item or service to prescribe, it may be relevant in determining whether VA or an authorized VA vendor provides the prescribed item or service, as an authorized vendor may sell the authorized item at a lower cost than what it would cost VA to provide the item itself.

How the authorized item or service is obtained and provided to the veteran will vary based on each individual case. However, we note that the veteran's clinical needs are always prioritized when VA determines how to provide the authorized item or service. Proposed § 17.3240 would ensure that VA is fiscally responsible. VA retains authority over this determination of how the authorized item or service is provided to ensure that there is consistency across VHA in the provision of authorized prosthetic and rehabilitative items and services, and to ensure quality control.

One commenter also noted that we incorrectly referenced proposed § 17.3210 in proposed § 17.3240. Proposed § 17.3210 is the section on definitions whereas proposed § 17.3220 is the section on eligibility. In order to correctly reference the eligibility section, we would update proposed § 17.3240 to refer to § 17.3220 instead of § 17.3210.

As previously mentioned, since the publication of VA's proposed rule in October 2017, the President signed into law the VA MISSION Act of 2018 (Pub. L. 115–182). VA is working to implement this new authority, and should any further revisions to VA's prosthetic regulations be needed as a result of this recently enacted legislation, VA will address those changes through subsequent rulemaking related specifically to the VA MISSION Act of 2018.

Certain Communications Between VA and External Parties

The Office of the VA Secretary also received two inquiry letters during the public comment period for the proposed rule. One from former Senator Bob Dole and the other from Peter Thomas, General Counsel for the National Association for the Advancement of Orthotics and Prosthetics. Both of these letters were treated as public comments and added to docket ID VA–2017–VHA–0023 in *regulations.gov*. Both of these letters raised concerns regarding proposed § 17.3240 and were similar to the public comments we received that led to the proposed clarification of that section in this SNPRM. The VA Secretary at the time and VHA's Executive in Charge, respectively, responded to these two inquiries in letters sent to Senator Dole and Mr. Thomas.

The letters stated the intent and purpose of the proposed rule to organize and update the current prosthetic and rehabilitative items and services regulations and define the items and services available. These letters also explained that these rules were proposed in order to ensure standardization and consistency in the provision of such items and services throughout VA, while also ensuring that veterans receive the most appropriate and highest quality items. The then-Secretary's letter to Senator Dole further explained that VA was codifying its practice of determining whether VA has the capacity or capability to provide items and services directly to veterans, or whether a VA-authorized vendor may be utilized, which is based on several factors including the veteran's clinical needs, costs of items and services, or wider selection of items and services. In both letters, VA stated that these letters would be treated as public comments and that VA will consider and respond to their issues in the final rulemaking. Additionally, the Department's letters containing our responses to the two letters have been made publicly available in the supplemental notice of proposed rulemaking docket.

On June 14, 2018, VHA met with individuals from McGuire Woods Consulting, who represent American Orthotic and Prosthetic Association (AOPA), at their request, to discuss several prosthetic issues, including the proposed rulemaking at 82 FR 48018 (RIN 2900–AP46). During this discussion, VHA was asked the status of RIN 2900–AP46 and where VHA thought the policy on veterans being able to see outside providers was going. VHA explained that we will continue to provide the necessary care inside and outside VA and that reducing the amount of care in the community is not our intent. With regard to RIN 2900–AP46, VHA conveyed that it received comments, including those of AOPA; is considering these comments; and is drafting the final rule, which will have to be approved by the Administration, and VHA cannot say when it anticipates the final rule to be published. VHA was also asked about the impact of the VA MISSION Act of 2018 on RIN 2900–AP46. VHA stated that this Act will provide more flexibility to provide care in the community and that VHA did not believe the Act would affect the provision of prosthetic and rehabilitative items and services. A summary of this meeting has been made publicly available in the supplemental notice of proposed rulemaking.

Lastly, the House Veterans' Affairs Committee, Health Subcommittee, held a roundtable regarding prosthetics issues on July 25, 2018. VA was a participant at this roundtable. During this roundtable, concerns were raised about the proposed rule, RIN 2900–AP46, that were similar to those concerns raised during the public comment period. Within this SNPRM, we have addressed these concerns, which were similar to those raised during the public comment period.

Based on all of the comments received regarding proposed § 17.3240, we propose to revise the text of proposed § 17.3240 as explained previously in this SNPRM.

Effect of Rulemaking

The Code of Federal Regulations, as proposed to be revised by the proposed rulemaking at 82 FR 48018 and this SNPRM, would represent the exclusive legal authority on this subject. No contrary guidance or procedures would be authorized. All VA guidance would be read to conform with the proposed rulemaking at 82 FR 48018 and this SNPRM if possible or, if not possible, such guidance would be superseded by this SNPRM and the proposed rulemaking at 82 FR 48018.

Paperwork Reduction Act

This SNPRM contains no provisions constituting a collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3521).

Regulatory Flexibility Act

The Secretary hereby certifies that this SNPRM would not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act, 5 U.S.C. 601–612. Therefore, pursuant to 5 U.S.C. 605(b), these amendments would be exempt from the initial and final regulatory flexibility analysis requirements of 5 U.S.C. 603 and 604.

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) 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.

This rule is not an Executive Order 13771 regulatory action because this rule is not significant 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 the 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.''

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 SNPRM would have no such effect on State, local, and tribal governments, or on the private sector.

Catalog of Federal Domestic Assistance

The Catalog of Federal Domestic Assistance numbers and titles for the programs affected by this document are 64.009, Veterans Medical Care Benefits; 64.013, Veterans Prosthetic Appliances.

List of Subjects in 38 CFR Part 17

Administrative practice and procedure, Government contracts, Health care, Health facilities, Health professions, Medical devices, 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: November 5, 2018.

Consuela Benjamin,

Regulations Development Coordinator, Office of Regulation Policy & Management, Office of the Secretary, Department of Veterans Affairs.

For the reasons set forth in the preamble, we propose to amend 38 CFR part 17 as follows:

PART 17—MEDICAL

■ 1. The authority citation for part 17 continues to read as follows:

Authority: 38 U.S.C. 501, and as noted in specific sections.

■ 2. Add § 17.3240, to read as follows:

§ 17.3240 Furnishing authorized items and services.

(a)(1) VA providers will prescribe items and services based on the veteran's clinical needs and will do so in consultation with the veteran. Once the prescribed item or service is determined to be authorized under § 17.3230, VA will determine whether VA or a VA-authorized vendor will furnish authorized items and services under § 17.3230 to veterans eligible for such items and services under § 17.3220.

(2) This determination on whether VA or a VA-authorized vendor will furnish the authorized item or service under § 17.3230 will be based on, but not limited to, such factors as the veteran's clinical needs, VA capacity and availability, geographic availability, and cost.

(b) Except for emergency care reimbursable under 38 CFR 17.120 through 17.132 or 38 CFR 17.1000 through 17.1008, prior authorization of items and services under § 17.3230 is required for VA to reimburse VA-authorized vendors for furnishing such items or services to veterans. Prior authorization must be obtained from VA by contacting any VA medical facility.

[FR Doc. 2018–24474 Filed 11–27–18; 8:45 am]

BILLING CODE 8320–01–P

Notices

Federal Register

Vol. 83, No. 229

Wednesday, November 28, 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.

COMMISSION ON CIVIL RIGHTS

Agenda and Notice of Public Meeting of the Vermont Advisory Committee

AGENCY: Commission on Civil Rights.

ACTION: Announcement of meeting.

SUMMARY: Notice is hereby given, pursuant to the provisions of the rules and regulations of the U.S. Commission on Civil Rights (Commission), and the Federal Advisory Committee Act (FACA) that a planning meeting of the Vermont Advisory Committee to the Commission will be convened by teleconference call at 11:00 a.m. (EST) on Friday, December 7, 2018. The purpose of the meeting is for discussing the proposal on school to prison pipeline issues in Vermont.

DATES: Friday, December 7, 2018, at 11:00 a.m. EST.

Public Call-In Information: Conference call-in number: 1–877–260–1479 and conference call 2568802.

FOR FURTHER INFORMATION CONTACT: Evelyn Bohor at *ero@usccr.gov* or by phone at 202–376–7533.

SUPPLEMENTARY INFORMATION: Interested members of the public may listen to the discussion by calling the following toll-free conference call-in number: 1–877–260–1479 and conference call 2568802. Please be advised that before placing them into the conference call, the conference call operator will ask callers to provide their names, their organizational affiliations (if any), and email addresses (so that callers may be notified of future meetings). Callers can expect to incur charges for calls they initiate over wireless lines, and the Commission will not refund any incurred charges. Callers will incur no charge for calls they initiate over land-line connections to the toll-free conference call-in number.

Persons with hearing impairments may also follow the discussion by first calling the Federal Relay Service at 1–800–977–8339 and providing the operator with the toll-free conference call-in number: 1–877–260–1479 and conference call 2568802.

Members of the public are invited to make statements during the open comment period of the meeting or submit written comments. The comments must be received in the regional office approximately 30 days after each scheduled meeting. Written comments may be mailed to the Eastern Regional Office, U.S. Commission on Civil Rights, 1331 Pennsylvania Avenue, Suite 1150, Washington, DC 20425, faxed to (202) 376–7548, or emailed to Evelyn Bohor at *ero@usccr.gov.* Persons who desire additional information may contact the Eastern Regional Office at (202) 376–7533.

Records and documents discussed during the meeting will be available for public viewing as they become available at *https://www.facadatabase.gov/FACA/FACAPublicViewCommitteeDetails?id=a10t0000001gzmXAAQ,* click the ''Meeting Details'' and ''Documents'' links. Records generated from this meeting may also be inspected and reproduced at the Eastern Regional Office, as they become available, both before and after the meetings. Persons interested in the work of this advisory committee are advised to go to the Commission's website, *www.usccr.gov,* or to contact the Eastern Regional Office at the above phone numbers, email or street address.

Agenda

Friday, December 7, 2018 at 11 a.m. (EST)

- Rollcall
- Project Planning
- Other Business
- Open Comment
- Adjourn.

Dated: November 21, 2018.

David Mussatt,

Supervisory Chief, Regional Programs Unit.

[FR Doc. 2018–25905 Filed 11–27–18; 8:45 am]

BILLING CODE 6335–01–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: North Pacific Observer Program.

OMB Control Number: 0648–0318.

Form Number(s): None.

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

Number of Respondents: 875.

Average Hours per Response: 5 minutes to request full observer coverage, placement in or removed from the Electronic Monitoring (EM) selection pool, close an EM trip in ODDS, pre-cruise meeting notification, physical examination verification, update to provider information; 15 minutes to log a fishing trip in ODDS; 48 hours for a Vessel Monitoring Plan; 1 hour to submit EM data, and observer training registration; 30 minutes for request small catcher/processor placement in partial coverage category; 4 hours for appeals; 2 minutes to notify observer before handling the vessel's Bering Sea pollock catch; 8 hours for candidates' college transcripts and statements; 7 minutes for observer briefing registration, projected observer assignments, and observer deployment and logistics reports; 30 minutes for observer debriefing registration, observer provider contracts, invoice copies, and industry request for assistance; 12 minutes for certificates of insurance; 2 hours for other reports; 60 hours for observer provider permit application.

Burden Hours: 15,871.

Needs and Uses: This request is for an extension of a currently approved information collection.

The North Pacific Observer Program (Observer Program) is implemented under the authority of section 313 of the Magnuson-Stevens Fishery Conservation and Management Act and regulations at 50 CFR 679. Through the

Observer Program, the National Marine Fisheries Service (NMFS) collects the data necessary to conserve and manage the groundfish and halibut fisheries off Alaska. Observers collect biological samples and fishery-dependent information used to estimate total catch and interactions with protected species. Managers use data collected by observers to manage groundfish and prohibited species catch within established limits and to document and reduce fishery interactions with protected resources. Scientists use observer data to assess fish stocks, to provide scientific information for fisheries and ecosystem research and fishing fleet behavior, to assess marine mammal interactions with fishing gear, and to assess fishing interactions with habitat.

All vessels and processors that participate in federally managed or parallel groundfish and halibut fisheries off Alaska are assigned to one of two categories: (1) The full observer coverage category, where vessels and processors obtain observer coverage by contracting directly with observer providers; or (2) the partial coverage category, where NMFS, in consultation with the North Pacific Fishery Management Council determines when and where observer coverage is needed. Some vessels and processors may be in full coverage for part of the year and partial coverage at other times of the year depending on the observer coverage requirements for specific fisheries. Funds for deploying observers on vessels in the partial coverage category are provided through a system of fees based on the gross ex-vessel value of retained groundfish and halibut. This observer fee is assessed on all landings by vessels that are not otherwise in full coverage. Information collected for the observer fee is approved under OMB Control No. 0648–0711.

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

Frequency: On occasion, weekly and annually.

Respondent's Obligation: Required to obtain or retain benefits.

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: November 23, 2018.

Sarah Brabson,

NOAA PRA Clearance Officer.

[FR Doc. 2018–25917 Filed 11–27–18; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Proposed Information Collection; Comment Request; External Needs Assessment for NOAA Education Products and Programs

AGENCY: National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice.

SUMMARY: The Department of Commerce, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995.

DATES: Written comments must be submitted on or before January 28, 2019.

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 Bruce Moravchik, National Ocean Service (NOS), 1305 East-West Hwy., Bldg. SSMC4, Silver Springs, MD 20910–3278, (240) 533–0874, *bruce.moravchik@noaa.gov* or Shannon Ricles, NOS, Monitor National Marine Sanctuary, 100 Museum Dr., Newport News, VA 23602, (757) 591–7328, *shannon.ricles@noaa.gov.*

SUPPLEMENTARY INFORMATION:

I. Abstract

This request is for a new voluntary information collection.

NOAA Office of Education is sponsoring a voluntary multi-question survey to assess the needs of educators pertaining to future NOAA multimedia products and programs. In developing multimedia materials that convey NOAA's science, service and stewardship, the Agency must insure that these resources are of the highest quality and meet the needs of formal and informal educators across the United States. To achieve this goal, it will be necessary to conduct surveys identifying the types of educational programs and products of the highest interest and greatest need by formal and informal educators. By surveying external educators to gather this information, budget expenditures will be used optimally to develop appropriate products and programs most desired by educators to support and enhance Ocean, Earth science, and related STEM education subjects throughout our nation.

II. Method of Collection

The voluntary needs assessment mechanism will be distributed via email with a link to a Google form to external educators subscribed to NOAA education programs as well as their partners email distribution lists. The voluntary needs assessment mechanism will also be distributed in person (paper and electronically) at education conferences, workshops, and other venues hosting educators.

III. Data

OMB Control Number: 0648–xxxx.

Form Number(s): None.

Type of Review: New information collection.

Affected Public: Individuals or households; Business or other for-profit organizations; Not-for-profit institutions.

Estimated Number of Respondents: 1,000 annually.

Estimated Time per Response: Five minutes per survey.

Estimated Total Annual Burden Hours: 83 hours.

Estimated Total Annual Cost to Public: $0.00 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: November 23, 2018.

Sarah Brabson,

NOAA PRA Clearance Officer.

[FR Doc. 2018–25918 Filed 11–27–18; 8:45 am]

BILLING CODE 3510–12–P

CONSUMER PRODUCT SAFETY COMMISSION

[CPSC Docket No. 19–C0002]

EKO Development, Ltd. and EKO USA, LLC, Provisional Acceptance of a Settlement Agreement and Order

AGENCY: Consumer Product Safety Commission.

ACTION: Notice.

SUMMARY: It is the policy of the Commission to publish settlements which it provisionally accepts under the Consumer Product Safety Act in the **Federal Register** in accordance with the terms of the Consumer Product Safety Commission's regulations. Published below is a provisionally-accepted Settlement Agreement with EKO Development, Ltd. and EKO USA, LLC, containing a civil penalty in the amount of one million dollars ($1,000,000), subject to the terms and conditions of the Settlement Agreement.[1]

DATES: Any interested person may ask the Commission not to accept this agreement or otherwise comment on its contents by filing a written request with the Office of the Secretary by December 13, 2018.

ADDRESSES: Persons wishing to comment on this Settlement Agreement should send written comments to Comment 19–C0002, Office of the Secretary, Consumer Product Safety Commission, 4330 East West Highway, Room 820, Bethesda, Maryland 20814–4408.

FOR FURTHER INFORMATION CONTACT: Michele Melnick, Trial Attorney, Division of Compliance, Office of the General Counsel, Consumer Product Safety Commission, 4330 East West Highway, Bethesda, Maryland 20814–4408; telephone (301) 504–7592.

SUPPLEMENTARY INFORMATION: The text of the Agreement and Order appears below.

Dated: November 23, 2018.

Alberta E. Mills,

Secretary.

UNITED STATES OF AMERICA CONSUMER PRODUCT SAFETY COMMISSION

In the Matter of: EKO DEVELOPMENT, LTD. and EKO USA, LLC
CPSC Docket No.: 19–C0002

SETTLEMENT AGREEMENT

1. In accordance with the Consumer Product Safety Act, 15 U.S.C. §§ 2051-2089 (''CPSA'') and 16 C.F.R. § 1118.20, EKO Development, Ltd. and EKO USA, LLC (collectively, ''EKO'') and the United States Consumer Product Safety Commission (''Commission''), through its staff, hereby enter into this Settlement Agreement (''Agreement''). The Agreement and the incorporated attached Order resolve staff's charges set forth below.

THE PARTIES

2. The Commission is an independent federal regulatory agency, established pursuant to, and responsible for, the enforcement of the CPSA, 15 U.S.C. §§ 2051–2089. By executing the Agreement, staff is acting on behalf of the Commission, pursuant to 16 C.F.R. § 1118.20(b). The Commission issues the Order under the provisions of the CPSA.

3. EKO Development, Ltd. (''EKO Development'') is a corporation, organized and existing under the laws of China, with its principal place of business in China. EKO USA, LLC (''EKO USA'') is a corporation, organized and existing under the laws of the state of Nevada, with its principal place of business in Stuart, Florida.

STAFF CHARGES

4. Between November 2013 and May 2015, EKO manufactured approximately 367,000 EKO Sensible Eco Living Trash Cans (''Subject Products'' or ''Trash Cans''). The Trash Cans are 80 liter stainless steel, metal-cylinder Trash Cans with a black plastic protective collar in the opening on the back of the Trash Can.

5. The Trash Cans were sold exclusively at Costco Wholesale Corporation at its warehouse stores throughout the United States from December 2013 through May 2015.

6. The Trash Cans are a ''consumer product,'' ''distribut[ed] in commerce,'' as those terms are defined or used in sections 3(a)(5) and (8) of the CPSA, 15 U.S.C. § 2052(a)(5) and (8). EKO is a ''manufacturer'' as such term is defined in section 3(a)(11) of the CPSA, 15 U.S.C. § 2052(a)(11).

7. The Trash Cans contain a defect which could create a substantial product hazard or create an unreasonable risk of serious injury because the black plastic protective collar in the opening on the back of the Trash Can can detach from the sharp metal handle, posing a laceration hazard to consumers.

8. Beginning in April 2014, EKO received complaints from consumers who received laceration injuries, including some serious injuries as defined in 16 C.F.R. § 1115.6(c), from the sharp metal handle of the Trash Cans.

9. In August 2014, EKO approved a design change to the Trash Cans to add a two-piece plastic handle cover to address the laceration hazard. The design change was implemented on the Trash Cans that were produced in August 2014 and shipped to Costco in September 2014.

10. Despite having information that reasonably supported the conclusion that the Trash Cans contained a defect or created an unreasonable risk of serious injury or death, EKO did not notify the Commission immediately of such defect or risk, as required by sections 15(b)(3) and (4) of the CPSA, 15 U.S.C. §§ 2064(b)(3) and (4).

11. EKO and the CPSC jointly announced a recall of 367,000 Trash Cans on July 17, 2015, because the Trash Cans posed a laceration risk to consumers.

12. In failing to immediately inform the Commission about the defect or unreasonable risk associated with the Trash Cans, EKO knowingly violated section 19(a)(4) of the CPSA, 15 U.S.C. § 2068(a)(4), as the term ''knowingly'' is defined in section 20(d) of the CPSA, 15 U.S.C. § 2069(d).

13. Pursuant to Section 20 of the CPSA, 15 U.S.C. § 2069, EKO is subject to civil penalties for its knowing violation of section 19(a)(4) of the CPSA, 15 U.S.C. § 2068(a)(4).

RESPONSE OF EKO

14. EKO's settlement of this matter does not constitute an admission of staff's charges as set forth in paragraphs 4 through 13 above.

15. EKO Development, Ltd. is a small Chinese company based in Guangzhou, China. EKO was completely unaware of the CPSC reporting requirements. EKO relied upon its third party insurance administrator to handle the claims received from consumers and was never advised of the potential obligation to report under sections 15(b)(3) and (4) of the CPSA, 15 U.S.C. § 2064(b)(3) and (4).

[1] The Commission voted 3–2 to provisionally accept the proposed Settlement Agreement and Order regarding EKO Development, Ltd. and EKO USA, LLC. Acting Chairman Buerkle, Commissioner Baiocco and Commissioner Feldman voted to provisionally accept the Settlement Agreement and Order. Commissioner Adler and Commissioner Kaye voted to take other action. Commissioner Adler and Commissioner Kaye submitted a joint dissenting opinion regarding the matter. The dissenting opinion is available on the CPSC website, *www.cpsc.gov.*

Upon learning about the claims from the sharp edge, EKO immediately re-designed the Trash Can so that all new products would have a two-piece black plastic collar, permanently covering the sharp edge. Upon learning of the potential obligation to report from its retailer customer in May 2015, EKO immediately hired legal counsel in the U.S., reported the issue and conducted a recall of the Trash Can.

AGREEMENT OF THE PARTIES

16. Under the CPSA, the Commission has jurisdiction over the matter involving the Trash Cans and over EKO.

17. The parties enter into the Agreement for settlement purposes only. The Agreement does not constitute an admission by EKO or a determination by the Commission that EKO violated the CPSA's reporting requirements.

18. In settlement of staff's charges, and to avoid the cost, distraction, delay, uncertainty, and inconvenience of protracted litigation, EKO shall pay a civil penalty in the amount of one million dollars (US $1,000,000). EKO shall pay the one million dollar (US $1,000,000) civil penalty in installments, with $250,000 to be paid within thirty (30) calendar days after the Firm receives service of the Commission's final Order accepting the Agreement (''Final Acceptance''); $250,000 to be paid ninety (90) days after Final Acceptance; $250,000 to be paid one hundred eighty (180) days after Final Acceptance; and $250,000 to be paid one (1) year after Final Acceptance. EKO shall also provide a written affirmation to CPSC's Office of the General Counsel within sixty (60) days after Final Acceptance declaring that EKO has implemented and will enforce a written comprehensive compliance program pursuant to paragraph 27, below.

19. EKO, through its Principal or Chief Executive Officer, shall notify CPSC's General Counsel in writing at least ten (10) calendar days after any reorganization, consolidation, merger, acquisition, dissolution, assignment, sale, transfer, or similar transaction or series of transactions resulting in a successor entity to EKO, the transfer or disposition of substantially all of the assets of EKO, or any other changes in corporate structure that may affect EKO's obligations arising out of this Agreement.

20. All payments to be made under the Agreement shall constitute debts owing to the United States and shall be made by electronic wire transfer to the United States via: *http://www.pay.gov* for allocation to, and credit against, the payment obligations of EKO under this Agreement.

21. This Agreement has been compromised by the Commission pursuant to its statutory authority under Section 20(c), which requires the Commission to consider, among other things, the appropriateness of the penalty to the size of the business of the person charged, including how to mitigate undue adverse economic impacts on small businesses. EKO represents and warrants that the financial statements of the Firm provided to the Commission and written representations in connection with the matters addressed in this Agreement are complete, accurate, and current, have been prepared on a consistent basis throughout the periods indicated and fairly present the financial condition and results of operations and cash flow of the Firm as of the dates, and for the periods, indicated therein. EKO shall notify the Commission in writing if any information supplied in connection with this Agreement is discovered to be inaccurate or untrue, and shall provide the Commission with documents or information that contain information that accurately conveys such financial information.

22. The parties agree that immediately upon the occurrence of an ''Event of Default,'' the entire penalty amount ($1,000,000), plus any accrued and unpaid interest, minus any payments by EKO, shall be come due and payable, and the Commission may take further action as warranted without notice or further action by any party. An ''Event of Default'' means:

a. a failure of the Firm to pay the $1,000,000 (or any portion thereof) when due and payable, as set forth in paragraph 18 above;

b. a breach of any representation or warranty of the Firm made in this Agreement or in connection with this Agreement as it pertains to the Firm's financial status;

c. a failure by the Firm to observe or perform any of its obligations or agreements as set forth in the Agreement, including the agreement to implement and enforce a compliance program designed to ensure compliance with the CPSA, including section 19(a), as set forth in paragraph 27 below; or

d. a failure by the Firm to comply with CPSA sections 15(b) and 19(a) for three years after the effective date of this Agreement.

23. All unpaid amounts, if any, due and owing under the Agreement shall constitute a debt due and immediately owing by EKO to the United States, and interest shall accrue and be paid by EKO at the federal legal rate of interest set forth at 28 U.S.C. § 1961(a) and (b) from the date of Default, until all amounts due have been paid in full (hereinafter ''Default Payment Amount'' and ''Default Interest Balance''). EKO shall consent to a Consent Judgment in the amount of the Default Payment Amount and Default Interest Balance, and the United States, at its sole option, may collect the entire Default Payment Amount and Default Interest Balance, or exercise any other rights granted by law or in equity, including, but not limited to, referring such matters for private collection; and EKO agrees not to contest, and hereby waives and discharges any defenses, to any collection action undertaken by the United States, or its agents or contractors, pursuant to this paragraph. EKO shall pay the United States all reasonable costs of collection and enforcement under this paragraph, respectively, including reasonable attorney's fees and expenses.

24. After staff receives this Agreement executed on behalf of EKO, staff shall promptly submit the Agreement to the Commission for provisional acceptance. Promptly following provisional acceptance of the Agreement by the Commission, the Agreement shall be placed on the public record and published in the **Federal Register**, in accordance with the procedures set forth in 16 C.F.R. § 1118.20(e). If the Commission does not receive any written request not to accept the Agreement within fifteen (15) calendar days, the Agreement shall be deemed finally accepted on the 16th calendar day after the date the Agreement is published in the **Federal Register**, in accordance with 16 C.F.R. § 1118.20(f).

25. This Agreement is conditioned upon, and subject to, the Commission's final acceptance, as set forth above, and it is subject to the provisions of 16 C.F.R. § 1118.20(h). Upon the later of: (i) the Commission's final acceptance of this Agreement and service of the accepted Agreement upon EKO, and (ii) the date of the issuance of the final Order, this Agreement shall be in full force and effect and shall be binding upon the parties.

26. Effective upon the later of: (i) the Commission's final acceptance of this Agreement and service of the accepted Agreement upon EKO, and (ii) the date of the issuance of the final Order, for good and valuable consideration, EKO hereby expressly and irrevocably waives and agrees not to assert any past, present or future rights to the following, in connection with the matter described in this Agreement: (i) an administrative or judicial hearing; (ii) judicial review or other challenge or contest of the

Commission's actions; (iii) a determination by the Commission of whether EKO failed to comply with the CPSA and the underlying regulations; (iv) a statement of findings of fact and conclusions of law; and (v) any claims under the Equal Access to Justice Act.

27. EKO shall create, maintain and enforce a compliance program designed to ensure compliance with the CPSA, including section 19(a), of the CPSA with respect to any consumer product imported, manufactured, distributed or sold by EKO, and which shall contain the following elements: (i) written standards, policies and procedures, including those designed to ensure that information that may relate to or impact CPSA compliance (including information obtained by quality control personnel) is conveyed effectively to personnel responsible for CPSA compliance, whether or not an injury is referenced; (ii) a mechanism for confidential employee reporting of compliance-related questions or concerns to either a compliance officer or to another senior manager with authority to act as necessary; (iii) effective communication of company compliance-related policies and procedures regarding the CPSA to all applicable employees through training programs or otherwise; (iv) EKO's senior management participation in a compliance committee responsible for the review and oversight of compliance matters related to the CPSA; (v) retention of all CPSA compliance-related records, and availability of such records to staff upon request; and (vi) procedures designed to ensure that: information required to be disclosed by EKO to the Commission is recorded, processed and reported in accordance with applicable law; that all reporting made to the Commission is timely, truthful, complete, accurate and in accordance with applicable law; and that prompt disclosure is made to EKO's management of any significant deficiencies or material weaknesses in the design or operation of such internal controls that are reasonably likely to affect adversely, in any material respect, EKO's ability to record, process and report to the Commission in accordance with applicable law.

28. Upon reasonable request of staff, EKO shall provide written documentation of its internal controls and procedures, including, but not limited to, the effective dates of the procedures and improvements thereto. EKO shall cooperate fully and truthfully with staff and shall make available all non-privileged information and materials, and personnel deemed necessary by staff to evaluate EKO's compliance with the terms of the Agreement.

29. The parties acknowledge and agree that the Commission may publicize the terms of the Agreement and Order including disclosing the name of the Subject Products in this or other public announcements.

30. EKO represents that the Agreement: (i) is entered into freely and voluntarily, without any degree of duress or compulsion whatsoever; (ii) has been duly authorized; and (iii) constitutes the valid and binding obligation of EKO, enforceable against EKO in accordance with its terms. EKO will not directly or indirectly receive any reimbursement, indemnification, insurance-related payment or other payment in connection with the civil penalty to be paid by EKO pursuant to the Agreement and Order.

31. The signatories represent that they are duly authorized to execute this Agreement.

32. The Agreement is governed by the law of the United States.

33. The Agreement and Order shall apply to, and be binding upon, EKO and each of its parents, successors, subsidiaries, divisions, agents, foreign or domestic corporate affiliates, transferees, and assigns, and a violation of the Agreement or Order may subject EKO, and each of its parents, successors, subsidiaries, divisions, agents, foreign or domestic corporate affiliates, transferees, and assigns, to appropriate legal action.

34. The Agreement and the Order constitute the complete agreement between the parties on the subject matter contained therein. The Agreement may be used in interpreting the Order. Understandings, agreements, representations, or interpretations apart from those contained in the Agreement and the Order may not be used to vary or contradict their terms. For purposes of construction, the Agreement shall be deemed to have been drafted by both of the parties and shall not, therefore, be construed against any party, for that reason, in any subsequent dispute.

35. The Agreement may not be waived, amended, modified or otherwise altered, except as in accordance with the provisions of 16 C.F.R. § 1118.20(h). The Agreement may be executed in counterparts.

36. If any provision of the Agreement or the Order is held to be illegal, invalid, or unenforceable under present or future laws effective during the terms of the Agreement and Order, such provision shall be fully severable. The balance of the Agreement and the Order shall remain in full force and effect, unless the Commission and EKO agree in writing that severing the provision materially affects the purpose of the Agreement and the Order.

EKO DEVELOPMENT LTD.

Dated: October 31, 2018

By: _____

James Chen
Principal, EKO Development Ltd.
Flat 1013–1015, R & F Profit Plaza, No. 76
Guangzhou Avenue West, Guangzhou, China

EKO USA, LLC

Dated: October 31, 2018

By: _____

James Chen
Principal, EKO USA LLC
2672 SE Willoughby Blvd.
Stuart, Florida 34994

Dated: October 31, 2018

By: _____

David H. Baker
1701 Pennsylvania Avenue, N.W.,
Suite 200
Washington, D.C. 20006
Counsel to EKO Development Ltd.

U.S. CONSUMER PRODUCT SAFETY COMMISSION

4330 East West Highway
Bethesda, Maryland 20814

Patricia M. Hanz
General Counsel

Mary B. Murphy
Assistant General Counsel

Dated: November 1, 2018

By: _____

Michele Melnick
Trial Attorney
Division of Compliance
Office of the General Counsel

United States of America Consumer Product Safety Commission

In the Matter of: EKO Development, Ltd. and EKO USA, LLC

CPSC Docket No.: 19–C0002

ORDER

Upon consideration of the Settlement Agreement entered into between EKO Development, Ltd. and EKO USA, LLC (collectively, ''EKO'') and the U.S. Consumer Product Safety Commission (''Commission''), and the Commission having jurisdiction over the subject matter and over EKO, and it appearing that the Settlement Agreement and the Order are in the public interest, it is:

Ordered that the Settlement Agreement be, and is, hereby, accepted; and it is

Further Ordered that EKO shall comply with the terms of the Settlement Agreement and shall pay a civil penalty in the amount of one million dollars ($1,000,000), subject to the terms and conditions of the Settlement Agreement. Upon the occurrence of an Event of Default, as defined in the Settlement Agreement, the entire penalty amount of

$1,000,000, plus any accrued and unpaid interest, minus any penalty amounts paid by EKO, shall immediately become due and payable and the Commission may take further action as warranted.

Provisionally accepted and provisional Order issued on the 20th day of November, 2018.

By Order of the Commission:

Alberta Mills,
Secretary, U.S. Consumer Product Safety Commission.

[FR Doc. 2018–25928 Filed 11–27–18; 8:45 am]

BILLING CODE 6355–01–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID: DOD–2018–OS–0096]

Proposed Collection; Comment Request

AGENCY: Office of the Under Secretary of Defense for Intelligence, DoD.

ACTION: Information collection notice.

SUMMARY: In compliance with the *Paperwork Reduction Act of 1995,* the Office of the Under Secretary of Defense for Intelligence 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 January 28, 2019.

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 the Defense Security Service, Program Integration Office, Project Integration Office Process and Governance Manager, ATTN: Chris Kubricky, Quantico, VA 22134 or call the Program Integration Office at (571)–305–6243.

SUPPLEMENTARY INFORMATION:

Title; Associated Form; and OMB Number: Department of Defense National Industrial Security Program (NISP) Contractor Classification System; DD Form 254; OMB Control Number 0704–0567.

Needs and Uses: This collection is a revision to the collection under OMB Control Number 0704–0567 (DD254) approved in November 2017. Pursuant to 48 CFR, part 27, in conjunction with subpart 4.4 of the Federal Acquisition Regulation, contracting officers shall determine whether access to classified information may be required by a contractor during contract performance. When access to classified information is required, DoD Components shall use the ''Contract Security Classification Specification,'' DD Form 254, as an attachment to contracts or agreements requiring access to classified information by U.S. contractors. The NISP Contract Classification System (NCCS) will be the new electronic repository for the DD254. It will expedite the processing and distribution of contract classification specifications for contracts requiring access to classified information. NCCS will also provide for workflow processes to share data for: the Facility Clearance Request (FCL), the Request for Approval to Subcontract, and National Interest Determination (NID) which are already approved by the Office of Management and Budget (OMB) control number 0704–0571 for the National Industrial Security System (NISS). Respondents can register for and request access to NCCS at: *https://wawf.eb.mil/.*

Affected Public: Business or other for profit.

Annual Burden Hours: 37,461.67.

Number of Respondents: 3,211.

Responses per Respondent: 10.

Annual Responses: 32,110.

Average Burden per Response: 70 minutes.

Frequency: On Occasion.

The DD Form 254 is used to identify the classified areas of information involved in a contract and to identify the specific items of information that require protection. DoD Components, non-DoD agencies with formal agreements with DoD for industrial security services, or U.S. contractors under DoD security cognizance in the NISP, provide guidance in the body of the DD Form 254 or its attachments for contracts or other agreements requiring access to classified information.

The respondent is a cleared contractor facility in the NISP under the security cognizance of the Defense Security Service (DSS). Pursuant to security classification guidance of the NISPOM, DoD 5220.22–M, the NISP contractors must provide contract security classification specifications with any contract or agreement that they propose or award. DD Form 254 is the official vehicle for providing this information.

A respondent submits completed DD Forms 254 with any attachments to the applicable subcontractor and to the DoD NISP Cognizant Security Office (*i.e.,* DSS) for evaluation. In the event that the Government Contracting Activity (GCAs) is a foreign government or an activity of the North Atlantic Treaty Organization, a security aspects letter serves as the equivalent of a DD Form 254 to provide security classification guidance. Both U.S. Government and contractor respondents will be required to electronically complete and submit the DD Form 254 with attachments through the NISP Contracts Classification System (NCCS). Those USG respondents that have a legacy electronic 254 system and will have to interface their data into NCCS, in coordination with DoD.

Dated: November 23, 2018.

Shelly E. Finke,
Alternate OSD Federal Register, Liaison Officer, Department of Defense.

[FR Doc. 2018–25941 Filed 11–27–18; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

Charter Renewal of Department of Defense Federal Advisory Committees

AGENCY: Department of Defense.

ACTION: Renewal of Federal Advisory Committee.

SUMMARY: The Department of Defense is publishing this notice to announce that it is renewing the charter for the Vietnam War commemoration Advisory Committee (''the Committee'').

FOR FURTHER INFORMATION CONTACT: Jim Freeman, Advisory Committee Management Officer for the Department of Defense, 703–692–5952.

SUPPLEMENTARY INFORMATION: The Committee's charter is being renewed in accordance with the Federal Advisory Committee Act (FACA) of 1972 (5 U.S.C., App) and 41 CFR 102–3.50(d). The Committee's charter and contact information for the Committee's Designated Federal Officer (DFO) can be found at *https://www.facadatabase.gov/FACA/apex/FACAPublicAgencyNavigation.*

The Committee provides the Secretary of Defense and the Deputy Secretary of Defense, through the Chief Management Officer (CMO) independent advice and recommendations on the Department of Defense (DoD) program on how to best achieve the following objectives in commemorating the 50th Anniversary of the Vietnam War, as referenced in section 598(c) of Public Law 110–181: (a) Thank and honor veterans of the Vietnam War, including personnel who were held as prisoners of war or listed as missing in action, for their service and sacrifice on behalf of the United States and to thank and honor the families of these veterans; (b) highlight the service of the Armed Forces during the Vietnam War and the contributions of Federal agencies and governmental and non-governmental organizations that served with, or in support of, the Armed Forces; (c) Pay tribute to the contributions made on the home front by the people of the United States during the Vietnam War; (d) Highlight the advances in technology, science, and medicine related to military research conducted during the Vietnam War; and (e) Recognize the contributions and sacrifices made by the allies of the United States during the Vietnam War.

The Committee will be composed of no more than 20 members that will represent Vietnam Veterans, their families, and the American public. Candidates for the Committee will be selected from the Military Services (both retired veterans and active members who served during the Vietnam era), the DoD, the Department of State, the Department of Veterans Affairs, and the Intelligence Community. In addition, candidates from nongovernmental organizations that support veterans or contribute to the public's understanding of the Vietnam War will be selected. All members of the Committee are appointed to provide advice on the basis of their best judgment and without representing any particular point of view and in a manner that is free from conflict of interest. Except for reimbursement of official Committee-related travel and per diem, Committee members serve without compensation.

The public or interested organizations may submit written statements to the Committee membership about the Committee's mission and functions. Written statements may be submitted at any time or in response to the stated agenda of planned meeting of the Committee. All written statements shall be submitted to the DFO for the Committee, and this individual will ensure that the written statements are provided to the membership for their consideration.

Dated: November 19, 2018.

Shelly Finke,

Alternate OSD Federal Register, Liaison Officer, Department of Defense.

[FR Doc. 2018–25933 Filed 11–27–18; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID: DOD–2018–OS–0097]

Proposed Collection; Comment Request

AGENCY: Office of the Under Secretary of Defense for Personnel and Readiness, DoD.

ACTION: Information collection notice.

SUMMARY: In compliance with the *Paperwork Reduction Act of 1995,* the Office of the Under Secretary of Defense for Personnel and Readiness 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 January 28, 2019.

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 the Military Community Support Program, 4800 Mark Center Drive, Alexandria, VA 22350, ATTN: Spouse Education and Career Opportunities, or call 1–888–363–6431.

SUPPLEMENTARY INFORMATION:

Title; Associated Form; and OMB Number: My Career Advanced Account (MyCAA) Scholarship Program; OMB Control Number 0704–XXXX.

Needs and Uses: This information collection is necessary to support the MyCAA scholarship program, a career development and employment assistance program intended to assist military spouses pursue licenses, certificates, certifications or associate's degrees necessary for gainful employment in high demand, high growth portable career fields and occupations.

Affected Public: Individuals or households.

Annual Burden Hours: 5,412.25.

Number of Respondents: 10,148.

Responses per Respondent: 3.4.

Annual Responses: 34,503.

Average Burden per Response: 9.4118 minutes.

Frequency: On occasion.

Dated: November 23, 2018.

Shelly E. Finke,

Alternate OSD Federal Register, Liaison Officer, Department of Defense.

[FR Doc. 2018–25938 Filed 11–27–18; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID: DOD–2018–OS–0095]

Proposed Collection; Comment Request

AGENCY: Office of the Secretary of Defense, DOD.

ACTION: Information collection notice.

SUMMARY: As part of a Federal Government-wide effort to streamline the process to seek feedback from the public on service delivery, we are seeking comment on the development of the following proposed Generic Information Collection Request (Generic ICR): ''Fast Track Generic Clearance for the Collection of Qualitative Feedback on Agency Service Delivery'' for approval under the Paperwork Reduction Act (PRA). This notice announces our intent to submit this collection to OMB for approval and solicits comments on specific aspects for the proposed information collection.

DATES: Consideration will be given to all comments received by January 28, 2019.

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 Information Collections Branch, Directives Division, Attn: Mr. Frederick Licari, 4800 Mark Center Drive, Suite 02G09, Alexandria, VA 22350–3100, Phone: 571–372–0493.

SUPPLEMENTARY INFORMATION:

Title; Associated Form; and OMB Number: Fast Track Generic Clearance for the Collection of Qualitative Feedback on Agency Service Delivery; OMB Control Number 0704–0553.

Needs and Uses: The proposed information collection activity provides a means to garner qualitative customer and stakeholder feedback in an efficient, timely manner, in accordance with the Administration's commitment to improving service delivery. By qualitative feedback, we mean information that provides useful insights on perceptions and opinions, but are not statistical surveys that yield quantitative results that can be generalized to the population of study. This feedback will provide insights into customer or stakeholder perceptions, experiences and expectations, provide an early warning of issues with service, or focus attention on areas where communication, training or changes in operations might improve delivery of products or services. These collections will allow for ongoing, collaborative and actionable communications between the Agency and its customers and stakeholders. It will also allow feedback to contribute directly to the improvement of program management.

The solicitation of feedback will target areas such as: Timeliness, appropriateness, accuracy of information, courtesy, efficiency of service delivery, and resolution of issues with service delivery. Responses will be assessed to plan and inform efforts to improve or maintain the quality of service offered to the public. If this information is not collected, vital feedback from customers and stakeholders on the Agency's services will be unavailable.

The Agency will only submit a collection for approval under this generic clearance if it meets the following conditions:

- The collections are voluntary;
- The collections are low-burden for respondents (based on considerations of total burden hours, total number of respondents, or burden-hours per respondent) and are low-cost for both the respondents and the Federal Government;
- The collections are noncontroversial and do not raise issues of concern to other Federal agencies;
- Any collection is targeted to the solicitation of opinions from respondents who have experience with the program or may have experience with the program in the near future;
- Personally identifiable information (PII) is collected only to the extent necessary and is not retained;
- Information gathered will be used only internally for general service improvement and program management purposes and is not intended for release outside of the agency;
- Information gathered will not be used for the purpose of substantially informing influential policy decisions; and
- Information gathered will yield qualitative information; the collections will not be designed or expected to yield statistically reliable results or used as though the results are generalizable to the population of study.

Feedback collected under this generic clearance provides useful information, but it does not yield data that can be generalized to the overall population. This type of generic clearance for qualitative information will not be used for quantitative information collections that are designed to yield reliably actionable results, such as monitoring trends over time or documenting program performance. Such data uses require more rigorous designs that address: The target population to which generalizations will be made, the sampling frame, the sample design (including stratification and clustering), the precision requirements or power calculations that justify the proposed sample size, the expected response rate, methods for assessing potential nonresponse bias, the protocols for data collection, and any testing procedures that were or will be undertaken prior to fielding the study. Depending on the degree of influence the results are likely to have, such collections may still be eligible for submission for other generic mechanisms that are designed to yield quantitative results.

As a general matter, information collections will not result in any new system of records containing privacy information and will not ask questions of a sensitive nature, such as sexual behavior and attitudes, religious beliefs, and other matters that are commonly considered private.

Affected Public: Individuals or Households; Business or Other For-Profit; Not-For-Profit Institutions; Farms; Federal Government; State, Local, or Tribal Government.

Estimated Annual Number of Respondents: 100,000.

Below we provide projected average burden estimates for the next three years.

Average Expected Annual Number of Activites: 100.

Average Number of Respondents per Activity: 1,000.

Responses per Respondent: 1.

Annual Burden Hours: 16,667.

Number of Respondents: 1,000.

Annual Responses: 100,000.

Average Burden per Response: 10 minutes.

Frequency: On Occasion.

Dated: November 23, 2018.

Shelly E. Finke,

Alternate OSD Federal Register, Liaison Officer, Department of Defense.

[FR Doc. 2018–25939 Filed 11–27–18; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER19–381–000]

Power Holding LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced proceeding of Power Holding 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 December 11, 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: November 21, 2018.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2018–25926 Filed 11–27–18; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 2727–092]

Notice of Availability of Draft Environmental Assessment: Black Bear Hydro Partners, LLC

In accordance with the National Environmental Policy Act of 1969 and the Federal Energy Regulatory Commission's (Commission) regulations, 18 CFR part 380, the Office of Energy Projects has reviewed the application for the relicensing of the Ellsworth Hydroelectric Project, located on the Union River, in Hancock County, Maine, and has prepared a Draft Environmental Assessment (DEA) for the project.

The DEA contains staff's analysis of the potential environmental impacts of the project and concludes that licensing the project, with appropriate environmental protective measures, would not constitute a major federal action that would significantly affect the quality of the human environment.

A copy of the DEA is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's website at *http://www.ferc.gov* using the eLibrary link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, contact FERC Online Support at *FERCOnlineSupport@ferc.gov,* (866) 208–3676 (toll free), or (202) 502–8659 (TTY).

You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via email of new filings and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

Any comments should be filed within 60 days from the date of this notice.

The Commission strongly encourages electronic filing. Please file comments using the Commission's eFiling system at *http://www.ferc.gov/docs-filing/efiling.asp.* Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp.* You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support. In lieu of electronic filing, please send a paper copy to: Secretary, Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426. The first page of any filing should include docket number P–2727–092.

For further information, contact Dr. Nicholas Palso at (202) 502–8854, or at *nicholas.palso@ferc.gov.*

Dated: November 21, 2018.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2018–25920 Filed 11–27–18; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 14892–000]

Notice of Preliminary Permit Application Accepted for Filing and Soliciting Comments, Motions To Intervene, and Competing Applications: Badger Mountain Hydro, LLC

On October 2, 2018, Badger Mountain Hydro, LLC filed an application for a preliminary permit, pursuant to section 4(f) of the Federal Power Act, proposing to study the feasibility of the Badger Mountain Pumped Storage Project (project) to be located near East Wenatchee in Douglas County, Washington. The sole purpose of a preliminary permit, if issued, is to grant the permit holder priority to file a license application during the permit term. A preliminary permit does not authorize the permit holder to perform any land-disturbing activities or otherwise enter upon lands or waters owned by others without the owners' express permission.

The proposed project will be a closed-loop pumped storage project with initial fill and make up water coming from local water rights holders, tentatively

identified as the Greater Wenatchee Irrigation District. Water would be delivered from the District's Veedol Tank via an approximately 0.7-mile-long, 12-inch-diameter buried steel pipe to a new lower reservoir. The proposed project would consist of: An upper 5- to 40-foot-high, 7,500-foot-long zoned earth/rockfill ring dam enclosing the 70-acre upper reservoir with storage capacity of 2,000 acre-feet; a lower 35-foot-high, 540-foot-long zoned earth/rockfill primary dam and 10-foot-high, 830-foot-long earthen supplemental dam enclosing the 80-acre lower reservoir with storage capacity of 2,600 acre-feet; a 600-foot-long, 14-foot-diameter unlined or concrete-lined low pressure tunnel; a 30-foot-diameter, 50-foot-high concrete surge tank; two 5,200-foot-long, 10-foot-diameter steel penstocks; a powerhouse with a 220-foot-high, 65-foot-diameter steel and concrete shaft, and two 150-megawatt (MW) reversible pump-turbines/motor-generators for a total installed capacity of 300 MW; a 1,200-foot-long, 17-foot-diameter concrete-lined tailrace tunnel; a 230-kilovolt (kV), 3.7-mile-long transmission line interconnecting with the existing Puget Sound Energy Rocky Reach-Cascade transmission line, and a possible second transmission line interconnecting with the existing 230-kV Bonneville Power Administration Rocky Reach-Columbia transmission line 500 feet from the powerhouse.

The estimated average annual generation of the project would be 473,040 megawatt-hours.

Applicant Contact: Matthew Shapiro, CEO, Gridflex Energy, LLC, 1210 W. Franklin St. #2, Boise, ID 837021, phone (208) 246–9925.

FERC Contact: Peter McBride, (202) 502–8132, *peter.mcbride@ferc.gov.*

Deadline for filing comments, motions to intervene, competing applications (without notices of intent), or notices of intent to file competing applications: 60 days from the issuance of this notice. Competing applications and notices of intent must meet the requirements of 18 CFR 4.36.

The Commission strongly encourages electronic filing. Please file comments, motions to intervene, notices of intent, and competing applications using the Commission's eFiling system at *http://www.ferc.gov/docs-filing/efiling.asp.* Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp.* You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov,* (866) 208–3676 (toll free), or (202) 502–8659 (TTY). In lieu of electronic filing, please send a paper copy to: Secretary, Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426. The first page of any filing should include docket number P–14892–000.

More information about this project, including a copy of the application, can be viewed or printed on the eLibrary link of Commission's website at *http://www.ferc.gov/docs-filing/elibrary.asp.* Enter the docket number (P–14892) in the docket number field to access the document. For assistance, contact FERC Online Support.

Dated: November 21, 2018.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2018–25923 Filed 11–27–18; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER13–1667–004.
Applicants: Battery Utility of Ohio, LLC.
Description: Notice of Change in Status of Battery Utility of Ohio, LLC.
Filed Date: 11/20/18.
Accession Number: 20181120–5221.
Comments Due: 5 p.m. ET 12/11/18.

Docket Numbers: ER17–1609–002.
Applicants: Carroll County Energy LLC.
Description: Notice of Non-Material Change in Status of Carroll County Energy LLC.
Filed Date: 11/20/18.
Accession Number: 20181120–5254.
Comments Due: 5 p.m. ET 12/11/18.

Docket Numbers: ER18–2516–000.
Applicants: Willow Springs Solar, LLC.
Description: Amendment to September 28, 2018 Willow Springs Solar, LLC tariff filing.
Filed Date: 11/20/18.
Accession Number: 20181120–5219.
Comments Due: 5 p.m. ET 11/27/18.

Docket Numbers: ER19–104–001.
Applicants: El Paso Electric Company.
Description: Tariff Amendment: Concurrence of EPE to APS Service Agreement No. 367 to be effective 9/7/2018.
Filed Date: 11/20/18.
Accession Number: 20181120–5167.
Comments Due: 5 p.m. ET 12/11/18.

Docket Numbers: ER19–381–000.
Applicants: Power Holding LLC.
Description: Baseline eTariff Filing: Application for Market Based Rate to be effective 11/21/2018.
Filed Date: 11/20/18.
Accession Number: 20181120–5175.
Comments Due: 5 p.m. ET 12/11/18.

Docket Numbers: ER19–382–000.
Applicants: Duke Energy Carolinas, LLC.
Description: § 205(d) Rate Filing: DEC-City of Concord NITSA (SA–150) Amendment to be effective 1/1/2019.
Filed Date: 11/20/18.
Accession Number: 20181120–5176.
Comments Due: 5 p.m. ET 12/11/18.

Docket Numbers: ER19–383–000.
Applicants: PJM Interconnection, L.L.C.
Description: § 205(d) Rate Filing: Revisions to OATT and OA re Regulation Market Clearing Price to be effective 1/21/2019.
Filed Date: 11/20/18.
Accession Number: 20181120–5182.
Comments Due: 5 p.m. ET 12/11/18.

Docket Numbers: ER19–384–000.
Applicants: Pacific Gas and Electric Company.
Description: Request for One-time Limited Tariff Waiver, et al. of Pacific Gas and Electric Company under ER19–384.
Filed Date: 11/20/18.
Accession Number: 20181120–5218.
Comments Due: 5 p.m. ET 11/30/18.

Docket Numbers: ER19–385–000.
Applicants: NRG Power Marketing LLC.
Description: Application to Recover Fuel Procurement Costs of NRG Power Marketing, LLC.
Filed Date: 11/20/18.
Accession Number: 20181120–5223.
Comments Due: 5 p.m. ET 12/11/18.

Docket Numbers: ER19–386–000.
Applicants: PJM Interconnection, L.L.C.
Description: § 205(d) Rate Filing: Amendment to ISA, SA No. 2278, Queue# None (Consent) to be effective 4/1/2010.
Filed Date: 11/21/18.
Accession Number: 20181121–5054.
Comments Due: 5 p.m. ET 12/12/18.

Docket Numbers: ER19–387–000.
Applicants: PJM Interconnection, L.L.C.
Description: § 205(d) Rate Filing: Original ISA and CSA, SA Nos. 5231 and 5232; Queue No. AC1–048/AC2–053 to be effective 10/23/2018.
Filed Date: 11/21/18.
Accession Number: 20181121–5061.
Comments Due: 5 p.m. ET 12/12/18.

Take notice that the Commission received the following qualifying facility filings:

Docket Numbers: QF18–452–000.

Applicants: North American Natural Resources, Inc.

Description: Refund Report of North American Natural Resources, Inc.

Filed Date: 11/20/18.

Accession Number: 20181120–5217.

Comments Due: 5 p.m. ET 12/11/18.

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: November 21, 2018.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2018–25925 Filed 11–27–18; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP15–138–005]

Notice of Application: Transcontinental Gas Pipe Line Company, LLC

Take notice that on November 14, 2018, Transcontinental Gas Pipe Line Company, LLC (Transco), P.O. Box 1396, Houston, TX 77251–1396, filed an application under section 7(c) of the Natural Gas Act (NGA) requesting authorization to amend its certificate of public convenience and necessity, granted by the Commission on February 3, 2017 in Docket No. CP15–138, which authorized the Atlantic Sunrise Project. Herein, Transco requests authorization to amend its Atlantic Sunrise Project certificate to allow any of the existing compressor units at Compressor Station 605 and Compressor Station 610 to be operated above their currently certificated horsepower. Transco states that the total horsepower utilized at Compressor Station 605 will not exceed the station's total certificated horsepower of 30,000 horsepower and that the total horsepower utilized at Compressor Station 610 will not exceed the station's total certificated horsepower of 40,000 horsepower, all as more fully set forth in the application which is on file with the Commission and open to public inspection. The filing may also be viewed on the web at *http://www.ferc.gov* using the eLibrary link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, contact FERC at *FERCOnlineSupport@ferc.gov* or call toll-free, (866) 208–3676 or TTY, (202) 502–8659.

Any questions regarding the application should be directed to Bill Hammons at Transcontinental Gas Pipe Line Company, LLC, Post Office Box 1396, Houston, TX 77251 or at (713) 215–2130.

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.

There are two ways to become involved in the Commission's review of this project. First, any person wishing to obtain legal status by becoming a party to the proceedings for this project should, on or before the comment date stated below file with the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426, a motion to intervene in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.214 or 385.211) and the Regulations under the NGA (18 CFR 157.10). A person obtaining party status will be placed on the service list maintained by the Secretary of the Commission and will receive copies of all documents filed by the applicant and by all other parties. A party must submit 3 copies of filings made in the proceeding with the Commission and must mail a copy to the applicant and to every other party. Only parties to the proceeding can ask for court review of Commission orders in the proceeding.

However, a person does not have to intervene in order to have comments considered. The second way to participate is by filing with the Secretary of the Commission, as soon as possible, an original and two copies of comments in support of or in opposition to this project. The Commission will consider these comments in determining the appropriate action to be taken, but the filing of a comment alone will not serve to make the filer a party to the proceeding. The Commission's rules require that persons filing comments in opposition to the project provide copies of their protests only to the party or parties directly involved in the protest.

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 commentors will be placed on the Commission's environmental mailing list and will be notified of any meetings associated with the Commission's environmental review process. Environmental commentors will not be required to serve copies of filed documents on all other parties. However, the non-party commentors will not receive copies of all documents filed by other parties or issued by the Commission and will not have the right to seek court review of the Commission's final order.

As of the February 27, 2018 date of the Commission's order in Docket No. CP16–4–001, the Commission will apply its revised practice concerning out-of-time motions to intervene in any new Natural Gas Act section 3 or section 7 proceeding.[1] Persons desiring to become a party to a certificate proceeding are to intervene in a timely manner. If seeking to intervene out-of-time, the movant is required to show good cause why the time limitation should be waived, and should provide justification by reference to factors set forth in Rule 214(d)(1) of the Commission's Rules and Regulations.[2]

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 3 copies of the protest or intervention to the Federal Energy Regulatory Commission,

[1] *Tennessee Gas Pipeline Company, L.L.C.,* 162 FERC 61,167 at 50 (2018).

[2] 18 CFR 385.214(d)(1).

888 First Street NE, Washington, DC 20426.

Comment Date: December 12, 2018.

Dated: November 21, 2018.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2018–25919 Filed 11–27–18; 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: RP19–304–000.
Applicants: Alliance Pipeline L.P.
Description: § 4(d) Rate Filing: APL Waiver and Future Default Filing to be effective 12/20/2018.
Filed Date: 11/20/18.
Accession Number: 20181120–5083.
Comments Due: 5 p.m. ET 12/3/18.

Docket Numbers: RP19–305–000.
Applicants: Rockies Express Pipeline LLC.
Description: § 4(d) Rate Filing: Neg Rate 2018–11–20 BP 553076 to be effective 11/21/2018.
Filed Date: 11/20/18.
Accession Number: 20181120–5092.
Comments Due: 5 p.m. ET 12/3/18.

Docket Numbers: RP19–306–000.
Applicants: Greylock Pipeline, LLC.
Description: eTariff filing per 1430: 501 G filing.
Filed Date: 11/20/18.
Accession Number: 20181120–5102.
Comments Due: 5 p.m. ET 11/26/18.

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: November 21, 2018.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2018–25924 Filed 11–27–18; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP18–534–000]

Notice of Availability of the Environmental Assessment for the Proposed Northern Natural Gas Company Northern Lights 2019 Expansion and Rochester Projects

The staff of the Federal Energy Regulatory Commission (FERC or Commission) has prepared an environmental assessment (EA) for the Northern Lights 2019 Expansion Project and the Rochester Project, proposed by Northern Natural Gas Company (Northern) in the above-referenced docket. Considering both projects, Northern requests authorization to construct, operate, and maintain new natural gas facilities in Carver, Freeborn, Hennepin, Le Sueur, Morrison, Mower, Olmsted, Rice, Steele, and Wright Counties, Minnesota, and to uprate the maximum allowable operating pressure (MAOP) of a line segment. The projects would allow Northern to provide 138,504 dekatherms per day of new firm natural gas transportation service to serve increased markets for industrial, commercial, and residential uses.

The EA assesses the potential environmental effects of the construction and operation of the Northern Lights 2019 Expansion Project and the Rochester Project in accordance with the requirements of the National Environmental Policy Act (NEPA). The FERC staff concludes that approval of the proposed projects, with appropriate mitigating measures, would not constitute a major federal action significantly affecting the quality of the human environment.

The Minnesota Pollution Control Agency participated as a cooperating agency in the preparation of the EA. A cooperating agency has jurisdiction by law or special expertise regarding environmental impacts involved with the proposal, and is involved in the NEPA analysis.

The proposed projects includes the following facilities (all located in Minnesota):

Rochester Project

- Approximately 12.6 miles of new 16-inch-diameter pipeline in Olmsted County;
- Increase of MAOP on an existing 8-mile-long segment of 16-inch-diameter pipeline in Freeborn and Mower Counties;
- A new town border station with receiver in Olmsted County;
- Relocation of a regulator from Freeborn to Mower County; and
- Appurtenant facilities including two valves and a pig launcher at milepost 0.0 of the Rochester Greenfield Lateral.

Northern Lights 2019 Project

- Approximately 10.0 miles of new 24-inch-diameter pipeline in Hennepin and Wright Counties;
- Approximately 4.3 miles of new 8-inch-diameter pipeline loop extension in Morrison County;
- Approximately 1.6 miles of new 6-inch-diameter pipeline looping in Le Sueur County;
- Approximately 3.1 miles of new 24-inch-diameter pipeline extension in Carver County;
- Aa new 11,153-horsepower (hp) compressor station in Carver County;
- Aan additional 15,900 hp of compression at the existing Faribault Compressor Station in Rice County;
- An additional 15,900 hp of compression at the existing Owatonna Compressor Station in Steele County; and
- Appurtenant facilities including valves, pig launchers, and pig receivers.

The Commission mailed a copy of the *Notice of Availability* to federal, state, and local government representatives and agencies; elected officials; environmental and public interest groups; Native American tribes; potentially affected landowners and other interested individuals and groups; and newspapers and libraries in the project areas. The EA is only available in electronic format. It may be viewed and downloaded from the FERC's website (*www.ferc.gov*), on the Environmental Documents page (*https://www.ferc.gov/industries/gas/enviro/eis.asp*). In addition, the EA may be accessed by using the eLibrary link on the FERC's website. Click on the eLibrary link (*https://www.ferc.gov/docs-filing/elibrary.asp*), click on General Search, and enter the docket number in the Docket Number field, excluding the last three digits (*i.e.* CP18–534). Be sure you have selected an appropriate date range. For assistance, please contact FERC Online Support at *FercOnlineSupport@ferc.gov*

or toll free at (866) 208–3676, or for TTY, contact (202) 502–8659.

Any person wishing to comment on the EA may do so. Your comments should focus on EA's disclosure and discussion of potential environmental effects, reasonable alternatives, and measures to avoid or lessen environmental impacts. The more specific your comments, the more useful they will be. To ensure that the Commission has the opportunity to consider your comments prior to making its decision on these projects, it is important that we receive your comments in Washington, DC on or before 5:00 p.m. Eastern Time on December 21, 2018.

For your convenience, there are three methods you can use to file your comments to the Commission. The Commission encourages electronic filing of comments and has staff available to assist you at (866) 208–3676 or *FercOnlineSupport@ferc.gov.* Please carefully follow these instructions so that your comments are properly recorded.

(1) You can file your comments electronically using the eComment feature on the Commission's website (*www.ferc.gov*) under the link to Documents and Filings. This is an easy method for submitting brief, text-only comments on a project;

(2) You can also file your comments electronically using the eFiling feature on the Commission's website (*www.ferc.gov*) under the link to Documents and Filings. With eFiling, you can provide comments in a variety of formats by attaching them as a file with your submission. New eFiling users must first create an account by clicking on eRegister. You must select the type of filing you are making. If you are filing a comment on a particular project, please select Comment on a Filing; or

(3) You can file a paper copy of your comments by mailing them to the following address. Be sure to reference the project docket number (CP18534–000) with your submission: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE, Room 1A, Washington, DC 20426.

Any person seeking to become a party to the proceeding must file a motion to intervene pursuant to Rule 214 of the Commission's Rules of Practice and Procedures (18 CFR 385.214). Motions to intervene are more fully described at *http://www.ferc.gov/resources/guides/how-to/intervene.asp.* Only intervenors have the right to seek rehearing or judicial review of the Commission's decision. The Commission may grant affected landowners and others with environmental concerns intervenor status upon showing good cause by stating that they have a clear and direct interest in this proceeding which no other party can adequately represent. Simply filing environmental comments will not give you intervenor status, but you do not need intervenor status to have your comments considered.

Additional information about the projects is available from the Commission's Office of External Affairs, at (866) 208–FERC, or on the FERC website (*www.ferc.gov*) using the eLibrary link. The eLibrary link also provides access to the texts of all formal documents issued by the Commission, such as orders, notices, and rulemakings.

In addition, the Commission offers a free service called eSubscription which allows you to keep track of all formal issuances and submittals in specific dockets. This can reduce the amount of time you spend researching proceedings by automatically providing you with notification of these filings, document summaries, and direct links to the documents. Go to *www.ferc.gov/docs-filing/esubscription.asp.*

Dated: November 21, 2018.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2018–25922 Filed 11–27–18; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Submission for OMB Review

AGENCY: Office of Planning, Research, and Evaluation, Administration for Children and Families, HHS.

ACTION: Request for public comment.

Title: Evaluation of Employment Coaching for TANF and Related Populations—Second Follow-Up Survey (OMB #0970–0506)

SUMMARY: The Administration for Children and Families (ACF) is proposing an additional data collection activity as part of the Evaluation of Employment Coaching for TANF and Related Populations. The Office of Management and Budget (OMB) Office of Information and Regulatory Affairs approved this information collection in March 2018 (0970–0506). ACF is proposing a second follow-up survey conducted as part of the evaluation.

DATES: *Comments due within 30 days of publication.* OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment is best assured of having its full effect if OMB receives it within 30 days of publication.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent directly to the following: Office of Management and Budget, Paperwork Reduction Project, Email: *OIRA_SUBMISSION@OMB.EOP.GOV*, Attn: Desk Officer for the Administration for Children and Families.

Copies of the proposed collection may be obtained by writing to the Administration for Children and Families, Office of Planning, Research and Evaluation, 330 C Street SW, Washington, DC 20201, Attn: OPRE Reports Clearance Officer. All requests should be identified by the title of the information collection. Email address: *OPREinfocollection@acf.hhs.gov.*

SUPPLEMENTARY INFORMATION: This study will provide an opportunity to learn more about the potential of coaching to help clients achieve self-sufficiency and other desired employment-related outcomes. It will take place over five years in the following employment programs: MyGoals for Employment Success in Baltimore, MyGoals for Employment Success in Houston, Family Development and Self-Sufficiency program in Iowa, LIFT in New York City, Chicago, and Los Angeles; Work Success in Utah; and Goal4 It! in Jefferson County, Colorado. Together, these programs will include Temporary Assistance for Needy Families (TANF) agencies and other public or private employment programs that serve low-income individuals. Each site will have a robust coaching component and the capacity to conduct a rigorous impact evaluation. This study will provide information on whether coaching helps people obtain and retain jobs, advance in their careers, move toward self-sufficiency, and improve their overall well-being. To meet these objectives, this study includes an impact and implementation study, as approved by OMB.

This submission builds on the existing impact study, which randomly assigned participants to either a ''program group,'' who were paired with a coach, or to a ''control group,'' who were not paired with a coach. The effectiveness of the coaching will be determined by differences between members of the program and control groups in outcomes such as obtaining and retaining employment, earnings,

measures of self-sufficiency, and measures of self-regulation.

The proposed information collection activity is a second follow-up survey, which will be available to participants approximately 21 months after random assignment. The second follow-up survey will provide rigorous evidence on whether the coaching interventions are effective, for whom, and under what circumstances.

Respondents: Individuals enrolled in the Evaluation of Employment Coaching for TANF and Related Populations. All participants will be able to opt out of participating in the data collection activities.

Annual Burden Estimates:

Instrument	Total number of respondents	Annual number of respondents	Number of responses per respondent	Average burden hours per response	Annual burden hours
Second follow-up survey	4,800	1,600	1	1	1,600

Estimated Total Annual Burden Hours: 1,600.

Authority: Section 413 of the Social Security Act, as amended by the FY 2017 Consolidated Appropriations Act, 2017 (Pub. L. 115–31).

Mary B. Jones,

ACF/OPRE Certifying Officer.

[FR Doc. 2018–25512 Filed 11–27–18; 8:45 am]

BILLING CODE 4184–09–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Federal Financial Participation in State Assistance Expenditures; Federal Matching Shares for Medicaid, the Children's Health Insurance Program, and Aid to Needy Aged, Blind, or Disabled Persons for October 1, 2019 Through September 30, 2020

AGENCY: Office of the Secretary, DHHS.

ACTION: Notice.

DATES: The percentages listed in Table 1 will be effective for each of the four quarter-year periods beginning October 1, 2019 and ending September 30, 2020.

FOR FURTHER INFORMATION CONTACT: Rose Chu, Office of Health Policy, Office of the Assistant Secretary for Planning and Evaluation, Room 447D—Hubert H. Humphrey Building, 200 Independence Avenue SW, Washington, DC 20201, (202) 690–6870.

SUPPLEMENTARY INFORMATION: The Federal Medical Assistance Percentages (FMAP), Enhanced Federal Medical Assistance Percentages (eFMAP), and disaster-recovery FMAP adjustments for Fiscal Year 2020 have been calculated pursuant to the Social Security Act (the Act). These percentages will be effective from October 1, 2019 through September 30, 2020. This notice announces the calculated FMAP rates, in accordance with sections 1101(a)(8) and 1905(b) of the Act, that the U.S. Department of Health and Human Services (HHS) will use in determining the amount of federal matching for state medical assistance (Medicaid), Temporary Assistance for Needy Families (TANF) Contingency Funds, Child Support Enforcement collections, Child Care Mandatory and Matching Funds of the Child Care and Development Fund, Title IV–E Foster Care Maintenance payments, Adoption Assistance payments and Kinship Guardianship Assistance payments, and the eFMAP rates for the Children's Health Insurance Program (CHIP) expenditures. Table 1 gives figures for each of the 50 states, the District of Columbia, Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands. This notice reminds states of adjustments available for states meeting requirements for disproportionate employer pension or insurance fund contributions and adjustments for disaster recovery. At this time, no state qualifies for such adjustments, and territories are not eligible.

This notice also contains the increased eFMAPs for CHIP as authorized under section 2705(b) of the Act, as amended by the HEALTHY KIDS Act of 2017, for fiscal year 2020 (October 1, 2019 through September 30, 2020).

Programs under title XIX of the Act exist in each jurisdiction. Programs under titles I, X, and XIV operate only in Guam and the Virgin Islands. The percentages in this notice apply to state expenditures for most medical assistance and child health assistance, and assistance payments for certain social services. The Act provides separately for federal matching of administrative costs.

Sections 1905(b) and 1101(a)(8)(B) of the Social Security Act (the Act) require the Secretary of HHS to publish the FMAP rates each year. The Secretary calculates the percentages, using formulas in sections 1905(b) and 1101(a)(8), and calculations by the Department of Commerce of average income per person in each state and for the United States (meaning, for this purpose, the fifty states and the District of Columbia). The percentages must fall within the upper and lower limits specified in section 1905(b) of the Act. The percentages for the District of Columbia, Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Northern Mariana Islands are specified in statute, and thus are not based on the statutory formula that determines the percentages for the 50 states.

Federal Medical Assistance Percentage (FMAP)

Section 1905(b) of the Act specifies the formula for calculating FMAPs as follows:

> ''Federal medical assistance percentage'' for any state shall be 100 per centum less the state percentage; and the state percentage shall be that percentage which bears the same ratio to 45 per centum as the square of the per capita income of such state bears to the square of the per capita income of the continental United States (including Alaska) and Hawaii; except that (1) the Federal medical assistance percentage shall in no case be less than 50 per centum or more than 83 per centum . . . .

Section 1905(b) further specifies that the FMAP for Puerto Rico, the Virgin Islands, Guam, the Northern Mariana Islands, and American Samoa shall be 55 percent. Section 4725(b) of the Balanced Budget Act of 1997 amended section 1905(b) to provide that the FMAP for the District of Columbia, for purposes of titles XIX and XXI, shall be 70 percent. For the District of Columbia, we note under Table 1 that other rates may apply in certain other programs. In addition, we note the rate that applies for Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands in certain other programs pursuant to section 1118 of the Act. The rates for the States, District of Columbia and the territories are displayed in Table 1, Column 1.

Section 1905(y) of the Act, as added by section 2001 of the Patient Protection and Affordable Care Act of 2010 (''Affordable Care Act''), provides for a significant increase in the FMAP for

medical assistance expenditures for newly eligible individuals described in section 1902(a)(10)(A)(i)(VIII) of the Act, as added by the Affordable Care Act (the new adult group); ''newly eligible'' is defined in section 1905(y)(2)(A) of the Act. The FMAP for the new adult group is 100 percent for Calendar Years 2014, 2015, and 2016, gradually declining to 90 percent in 2020, where it remains indefinitely. In addition, section 1905(z) of the Act, as added by section 10201 of the Affordable Care Act, provides that states that offered substantial health coverage to certain low-income parents and nonpregnant, childless adults on the date of enactment of the Affordable Care Act, referred to as ''expansion states,'' shall receive an enhanced FMAP beginning in 2014 for medical assistance expenditures for nonpregnant childless adults who may be required to enroll in benchmark coverage under section 1937 of the Act. These provisions are discussed in more detail in the Medicaid Program: Eligibility Changes Under the Affordable Care Act of 2010 proposed rule published on August 17, 2011 (76 FR 51148, 51172) and the final rule published on March 23, 2012 (77 FR 17144, 17194). This notice is not intended to set forth the matching rates for the new adult group as specified in section 1905(y) of the Act or the matching rates for nonpregnant, childless adults in expansion states as specified in section 1905(z) of the Act.

Other Adjustments to the FMAP

For purposes of Title XIX (Medicaid) of the Social Security Act, the Federal Medical Assistance Percentage (FMAP), defined in section 1905(b) of the Social Security Act, for each state beginning with fiscal year 2006, can be subject to an adjustment pursuant to section 614 of the Children's Health Insurance Program Reauthorization Act of 2009 (CHIPRA), Public Law 111–3. Section 614 of CHIPRA stipulates that a state's FMAP under Title XIX (Medicaid) must be adjusted in two situations.

In the first situation, if a state experiences no growth or positive growth in total personal income and an employer in that state has made a significantly disproportionate contribution to an employer pension or insurance fund, the state's FMAP must be adjusted. The adjustment involves disregarding the significantly disproportionate employer pension or insurance fund contribution in computing the per capita income for the state (but not in computing the per capita income for the United States). Employer pension and insurance fund contributions are significantly disproportionate if the increase in contributions exceeds 25 percent of the total increase in personal income in that state. A **Federal Register** Notice with comment period was published on June 7, 2010 (75 FR 32182) announcing the methodology for calculating this adjustment; a final notice was published on October 15, 2010 (75 FR 63480).

The second situation arises if a state experiences negative growth in total personal income. Beginning with Fiscal Year 2006, section 614(b)(3) of CHIPRA specifies that, for the purposes of calculating the FMAP for a calendar year in which a state's total personal income has declined, the portion of an employer pension or insurance fund contribution that exceeds 125 percent of the amount of such contribution in the previous calendar year shall be disregarded in computing the per capita income for the state (but not in computing the per capita income for the United States).

No Federal source of reliable and timely data on pension and insurance contributions by individual employers and states is currently available. We request that states report employer pension or insurance fund contributions to help determine potential FMAP adjustments for states experiencing significantly disproportionate pension or insurance contributions and states experiencing a negative growth in total personal income. See also the information described in the January 21, 2014 **Federal Register** notice (79 FR 3385).

Section 2006 of the Affordable Care Act provides a special adjustment to the FMAP for certain states recovering from a major disaster. This notice does not contain an FY 2020 adjustment for a major statewide disaster for any state (territories are not eligible for FMAP adjustments) because no state had a recent major statewide disaster and had its FMAP decreased by at least three percentage points from FY 2019 to FY 2020. See information described in the December 22, 2010 **Federal Register** notice (75 FR 80501).

Enhanced Federal Medical Assistance Percentage (eFMAP) for CHIP

Section 2105(b) of the Act specifies the formula for calculating the eFMAP rates as follows:

> [T]he ''enhanced FMAP'', for a state for a fiscal year, is equal to the Federal medical assistance percentage (as defined in the first sentence of section 1905(b)) for the state increased by a number of percentage points equal to 30 percent of the number of percentage points by which (1) such Federal medical assistance percentage for the state, is less than (2) 100 percent; but in no case shall the enhanced FMAP for a state exceed 85 percent.

Section 2105(b) of the Social Security Act, as amended by Section 2101 of the Affordable Care Act, specifies a modified eFMAP for FY2016–FY2019, providing that the FMAP under section 1905(b) for the state for the fiscal year shall be increased by 23 percentage points, but in no case shall exceed 100 percent. Section 3005 of the HEALTHY KIDS Act further amended Section 2105(b) to specify a modified eFMAP for FY2020, providing that the FMAP under section 1905(b) for the state for the fiscal year shall be increased by 11.5 percentage points, with the sum not to exceed 100 percent, during the period that begins on October 1, 2019, and ends on September 30, 2020.

The eFMAP rates are used in the Children's Health Insurance Program under Title XXI, and in the Medicaid program for expenditures for medical assistance provided to certain children as described in sections 1905(u)(2) and 1905(u)(3) of the Act. There is no specific requirement to publish the eFMAP rates. We include them in this notice for the convenience of the states, and display both the eFMAP rates that would apply if section 2105(b) had not been amended by the HEALTHY KIDS Act (Table 1, Column 2) and the increased eFMAP rates as calculated pursuant to the amendments made by the HEALTHY KIDS Act (Table 1, Column 3), for comparison.

(Catalog of Federal Domestic Assistance Program Nos. 93.558: TANF Contingency Funds; 93.563: Child Support Enforcement; 93.596: Child Care Mandatory and Matching Funds of the Child Care and Development Fund; 93.658: Foster Care Title IV–E; 93.659: Adoption Assistance; 93.769: Ticket-to-Work and Work Incentives Improvement Act (TWWIIA) Demonstrations to Maintain Independence and Employment; 93.778: Medical Assistance Program; 93.767: Children's Health Insurance Program)

Alex M. Azar II,

Secretary, Department of Health and Human Services.

TABLE 1—FEDERAL MEDICAL ASSISTANCE PERCENTAGES AND ENHANCED FEDERAL MEDICAL ASSISTANCE PERCENTAGES, EFFECTIVE OCTOBER 1, 2019–SEPTEMBER 30, 2020

[Fiscal year 2020]

State	Federal Medical Assistance Percentages	Enhanced Federal Medical Assistance Percentages	Enhanced Federal Medical Assistance Percentages with 11.5 Pt inc ***
Alabama	71.97	80.38	91.88
Alaska	50.00	65.00	76.50
American Samoa *	55.00	68.50	80.00
Arizona	70.02	79.01	90.51
Arkansas	71.42	79.99	91.49
California	50.00	65.00	76.50
Colorado	50.00	65.00	76.50
Connecticut	50.00	65.00	76.50
Delaware	57.86	70.50	82.00
District of Columbia **	70.00	79.00	90.50
Florida	61.47	73.03	84.53
Georgia	67.30	77.11	88.61
Guam *	55.00	68.50	80.00
Hawaii	53.47	67.43	78.93
Idaho	70.34	79.24	90.74
Illinois	50.14	65.10	76.60
Indiana	65.84	76.09	87.59
Iowa	61.20	72.84	84.34
Kansas	59.16	71.41	82.91
Kentucky	71.82	80.27	91.77
Louisiana	66.86	76.80	88.30
Maine	63.80	74.66	86.16
Maryland	50.00	65.00	76.50
Massachusetts	50.00	65.00	76.50
Michigan	64.06	74.84	86.34
Minnesota	50.00	65.00	76.50
Mississippi	76.98	83.89	95.39
Missouri	65.65	75.96	87.46
Montana	64.78	75.35	86.85
Nebraska	54.72	68.30	79.80
Nevada	63.93	74.75	86.25
New Hampshire	50.00	65.00	76.50
New Jersey	50.00	65.00	76.50
New Mexico	72.71	80.90	92.40
New York	50.00	65.00	76.50
North Carolina	67.03	76.92	88.42
North Dakota	50.05	65.04	76.54
Northern Mariana Islands *	55.00	68.50	80.00
Ohio	63.02	74.11	85.61
Oklahoma	66.02	76.21	87.71
Oregon	61.23	72.86	84.36
Pennsylvania	52.25	66.58	78.08
Puerto Rico *	55.00	68.50	80.00
Rhode Island	52.95	67.07	78.57
South Carolina	70.70	79.49	90.99
South Dakota	57.62	70.33	81.83
Tennessee	65.21	75.65	87.15
Texas	60.89	72.62	84.12
Utah	68.19	77.73	89.23
Vermont	53.86	67.70	79.20
Virgin Islands *	55.00	68.50	80.00
Virginia	50.00	65.00	76.50
Washington	50.00	65.00	76.50
West Virginia	74.94	82.46	93.96
Wisconsin	59.36	71.55	83.05
Wyoming	50.00	65.00	76.50

* For purposes of section 1118 of the Social Security Act, the percentage used under titles I, X, XIV, and XVI will be 75 per centum.

** The values for the District of Columbia in the table were set for the state plan under titles XIX and XXI and for capitation payments and disproportionate share hospital (DSH) allotments under those titles. For other purposes, the percentage for DC is 50.00, unless otherwise specified by law.

*** Section 3005 of the HEALTHY KIDS Act amended Section 2105(b) of the Social Security Act specifying that the enhanced FMAP for states will be calculated by adding 11.5 percentage points to the state's FMAP as provided under section 1905(b) of the Social Security Act, with the sum not to exceed 100 percent, for the period that begins on October 1, 2019 and ends on September 30, 2020 (fiscal year 2020).

[FR Doc. 2018–25944 Filed 11–27–18; 8:45 am]
BILLING CODE P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R5–ES–2014–0047; FXES11160500000–189–FF05E00000]

Habitat Conservation Plan and Draft Environmental Assessment, North Allegheny Wind Facility, Incidental Take Permit Application for Indiana Bat, Blair and Cambria Counties, Pennsylvania

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of availability; notice of receipt of permit application; 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 (ESA). We have received an application from North Allegheny Wind, LLC (NAW) for a 25-year ITP for take of the federally endangered Indiana bat incidental to otherwise lawful activities associated with operation of its North Allegheny Wind Facility, an existing 35-turbine wind farm in Blair and Cambria Counties, Pennsylvania. NAW has proposed a conservation program to minimize and mitigate for the impacts of the incidental take as described in its Draft North Allegheny Wind Indiana Bat Habitat Conservation Plan (HCP). Pursuant to the ESA and the National Environmental Policy Act, we announce the availability of NAW's ITP application, including its HCP, and the Service's draft environmental assessment, for public review and comment. 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 December 28, 2018. Comments submitted electronically using *regulations.gov* (see **ADDRESSES**) must be received by 11:59 p.m. Eastern Standard Time on the closing date.

ADDRESSES: *Obtaining documents:*

- *Internet:* You may obtain copies of the draft HCP and draft environmental assessment (EA) online in Docket No. FWS–R5–ES–2014–0047 at *http://www.regulations.gov.*
- *U.S. Mail:* Copies of the draft documents are available from the U.S. Fish and Wildlife Service, Pennsylvania Field Office, 110 Radnor Road, Suite 101, State College, PA 16801. Please note that your request is in reference to the NAW HCP.
- *In-person:* Copies of the draft documents are available for public review during regular business hours at the Pennsylvania Field Office, 110 Radnor Road, Suite 101, State College, PA 16801. Call 814–234–4090 to make an appointment.

Submitting Comments: You may submit comments by one of the following methods:

- *Online: http://www.regulations.gov.* Follow the instructions for submitting comments on Docket No. FWS–R5–ES–2018–0047.
- *U.S. mail or hand-delivery:* Public Comments Processing, Attn: Docket No. FWS–R5–ES–2018–0047; U.S. Fish and Wildlife Service; MS: BPHC; 5275 Leesburg Pike, Falls Church, VA 22041–3803.

We will post all comments on *http://www.regulations.gov.* This generally means that we will post any personal information you provide online (see Public Availability of Comments under **SUPPLEMENTARY INFORMATION**).

We request that you send comments by only the methods described above.

FOR FURTHER INFORMATION CONTACT: Robert Anderson, by phone at 814–234–4090, x7447, or by mail at Pennsylvania Field Office, U.S. Fish and Wildlife Service, 110 Radnor Road, Suite 101, State College, PA 16801.

SUPPLEMENTARY INFORMATION:

Background

Section 9 of the Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531 *et seq.*), and its implementing regulations prohibit the ''take'' of animal species listed as endangered or threatened. Take is defined under the ESA as to ''harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect listed animal species, or to attempt to engage in such conduct'' (16 U.S.C. 1538). However, under section 10(a) of the ESA, we may issue permits to authorize incidental take of listed 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. Regulations governing incidental take permits for endangered and threatened species, respectively, are found in the Code of Federal Regulations at 50 CFR 17.22 and 50 CFR 17.32.

Applicant's Proposed Project

North Allegheny Wind, LLC (NAW) is seeking a permit for the incidental take of the federally endangered Indiana bat (*Myotis sodalis*) for a term of 25 years. Incidental take of this species may occur due to operation of 35 wind turbines. The proposed conservation strategy in the applicant's proposed HCP is designed to avoid, minimize, and mitigate the impacts of the covered activity on the covered species. The biological goals and objectives are to minimize potential take of Indiana bats through on-site minimization measures and to provide habitat conservation measures for Indiana bats to offset any unavoidable impacts during operation of the project.

The HCP provides on-site avoidance and minimization measures, which include turbine operational adjustments. The estimated level of Indiana bat take from the project is four Indiana bats and an estimated reproductive potential of 3.2 bats over the 25-year project duration. To provide a conservation benefit to the Indiana bat, NAW will fund and implement one or more of the following types of mitigation projects to meet the mitigation needs of the Indiana bat: Protection of a hibernaculum, as well as surrounding buffer land necessary to ensure that the protection of the hibernaculum is successful; Protection of land that functions as summer habitat for one or more maternity colonies; and protection of summer and/or swarming habitat near a hibernaculum.

National Environmental Policy Act

The issuance of an ITP is a Federal action that triggers the need for compliance with NEPA (42 U.S.C. 4321 *et seq.*). We have prepared a draft EA that analyzes the environmental impacts on the human environment resulting from three alternatives: A no-action alternative, the proposed action, and an alternative consisting of feathering below the manufacturer's cut-in wind speed.

Next Steps

We will evaluate the plan and comments we receive to determine whether the permit application meets the requirements of section 10(a) of the ESA (16 U.S.C. 1531 *et seq.*). We will also evaluate whether issuance of a section 10(a)(1)(B) permit would comply with section 7 of the ESA by conducting an intra-Service section 7 consultation. We will use the results of this consultation, in combination with the above findings, in our final analysis to determine whether to issue a permit. If the requirements are met, we will issue the permit to the applicant.

Public Comments

The Service invites the public to comment on the proposed HCP and draft EA during a 30-day public comment period (see **DATES**). You may submit comments by one of the methods shown under **ADDRESSES**.

Public Availability of Comments

We will post on *http://regulations.gov* all public comments and information received electronically or via hardcopy. All comments received, including names and addresses, will become part of the administrative 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 can request in your comment that we withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so. All submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, will be made available for public disclosure in their entirety.

Authority

This notice is provided pursuant to section 10(c) of the ESA (16 U.S.C. 1531 *et seq.*) and NEPA regulations (40 CFR 1506.6).

Dated: June 28, 2018.

Spencer Simon,

Acting Assistant Regional Director, Ecological Services, Northeast Region.

Editorial note: THIS DOCUMENT WAS RECEIVED AT THE OFFICE OF THE FEDERAL REGISTER ON NOVEMBER 23, 2018.

[FR Doc. 2018–25916 Filed 11–27–18; 8:45 am]

BILLING CODE 4333–15–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[Docket No. FWS–HQ–MB–2018–0048; FXMB 12320900000//189//FF09M29000]

Draft List of Bird Species to Which the Migratory Bird Treaty Act Does Not Apply

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of availability; request for comments.

SUMMARY: We, the U.S. Fish and Wildlife Service, are publishing a draft list of the nonnative bird species that have been introduced by humans into the United States or U.S. territories and to which the Migratory Bird Treaty Act (MBTA) does not apply. The Migratory Bird Treaty Reform Act (MBTRA) of 2004 amends the MBTA by stating that the MBTA applies only to migratory bird species that are native to the United States or U.S. territories, and that a native migratory bird species is one that is present as a result of natural biological or ecological processes. The MBTRA requires that we publish a list of all nonnative, human-introduced bird species to which the MBTA does not apply. We published that list in 2005, and are starting the process to update it with this notice. This notice identifies those species that are not protected by the MBTA, even though they belong to biological families referred to in treaties that the MBTA implements, as their presence in the United States or U.S. territories is solely the result of intentional or unintentional human-assisted introductions. This notice presents a draft list of species that are not protected by the MBTA to reflect current taxonomy, to remove one species that no longer occurs in a protected family, and to remove one species as a result of new distributional records documenting its natural occurrence in the United States.

DATES: We will accept comments received or postmarked on or before January 28, 2019. Comments submitted electronically using the Federal eRulemaking Portal (see **ADDRESSES**, below) must be received by 11:59 p.m. Eastern Time on the closing date.

ADDRESSES:

Written comments: You may submit comments by one of the following methods:

(1) *Electronically:* Go to the Federal eRulemaking Portal: *http://www.regulations.gov.* In the Search box, enter FWS–HQ–MB–2018–0048, which is the docket number for this notice. Then, click on the Search button. On the resulting page, in the Search panel on the left side of the screen, under the Document Type heading, click on the Notice box to locate this document. You may submit a comment by clicking on ''Comment Now!''

(2) *By hard copy:* Submit by U.S. mail or hand-delivery to: Public Comments Processing, Attn: FWS–HQ–MB–2018–0048, U.S. Fish and Wildlife Service, MS: BPHC, 5275 Leesburg Pike, Falls Church, VA 22041–3803.

We request that you send comments only by the methods described above. We will post all comments on *http://www.regulations.gov.* This generally means that we will post any personal information you provide us (see Public Comments, below, for more information).

Document availability: The complete file for this notice is available for inspection, by appointment. Contact Eric L. Kershner, Chief of the Branch of Conservation, Permits, and Regulations; Division of Migratory Bird Management; U.S. Fish and Wildlife Service; MS:MB; 5275 Leesburg Pike, Falls Church, VA 22041–3803; (703) 358–2376.

FOR FURTHER INFORMATION CONTACT:

Eric L. Kershner, (703) 358–2376.

SUPPLEMENTARY INFORMATION:

What is the purpose of this notice?

The purpose of this notice is to provide the public with an opportunity to review and comment on a draft updated list of ''all nonnative, human-introduced bird species to which the Migratory Bird Treaty Act (16 U.S.C. 703 *et seq.*) does not apply,'' as described in the MBTRA of 2004. The MBTRA states that ''[a]s necessary, the Secretary may update and publish the list of species exempted from protection of the Migratory Bird Treaty Act.''

This notice is strictly informational. It merely updates our list of the bird species to which the MBTA does not apply. The presence or absence of a species on this list has no legal effect. This list does not change the protections that any of these species might receive under such agreements as the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES; T.I.A.S. 8249), the Endangered Species Act of 1973 (16 U.S.C. 1531 *et seq.*), or the Wild Bird Conservation Act of 1992 (16 U.S.C. 4901 *et seq.*). Regulations implementing the MBTA are found in parts 10, 20, and 21 of title 50 of the Code of Federal Regulations (CFR). The list of migratory birds covered by the MBTA is located at 50 CFR 10.13. Elsewhere in today's **Federal Register**, we propose to revise the list of migratory bird species that are protected under the MBTA at 50 CFR 10.13.

For more information, refer to our notice published in the **Federal Register** on January 4, 2005, at 70 FR 372.

What criteria did we use to identify bird species not protected by the MBTA?

The criteria remain the same as stated in our notice published on March 15, 2010, at 70 FR 12710.

Summary of Updates to the 2010 List of Bird Species Not Protected by the MBTA

This notice presents a draft list of species that are not protected by the MBTA to reflect current taxonomy, to remove one species that no longer occurs in a protected family, and to remove one species as a result of new distributional records documenting its natural occurrence in the United States. The taxonomical updates are presented in the draft list below. Japanese Bush-Warbler (*Cettia diphone*) and Red-Legged Honeycreeper (*Cyanerpes cyaneus*) appeared on the March 15, 2010, list (70 FR 12710), but are not on this draft list because Japanese Bush-Warbler (*Cettia diphone*) no longer occurs in a protected family due to changes in taxonomy, and new distributional records document the natural occurrence of Red-Legged Honeycreeper (*Cyanerpes cyaneus*) in the United States.

The Draft List

What are the nonnative, human-introduced bird species to which the MBTA does not apply that belong to biological families of migratory birds covered under any of the migratory bird conventions with Great Britain (for Canada), Mexico, Russia, or Japan?

We made this draft list as comprehensive as possible by including all nonnative, human-assisted species that belong to any of the families referred to in the treaties and whose occurrence(s) in the United States or U.S. territories have been documented in the scientific literature. It is not, however, an exhaustive list of all the nonnative species that could potentially appear in the United States or U.S. territories as a result of human assistance. New species of nonnative birds are being reported annually in the United States, and it is impossible to predict which species might appear in the near future.

The appearance of a species on this list does not preclude its addition to the list of migratory birds protected by the MBTA (50 CFR 10.13) at some later date should substantial evidence come to light confirming natural occurrence in the United States or U.S. territories. The 123 species on this list are arranged by family according to the American Ornithological Society (AOS) (1998, as amended and following taxonomy in the AOS 2017 supplement). Within families, species are arranged alphabetically by scientific name. Common and scientific names follow Clements et al. (2017); any names occurring differently in the AOS 2017 supplement are in parentheses.

Family Anatidae

Mandarin Duck, *Aix galericulata*
Egyptian Goose, *Alopochen aegyptiaca*
Philippine Duck, *Anas luzonica*
Graylag Goose, *Anser anser*
Domestic Goose, *Anser anser 'domesticus'*
Swan Goose, *Anser cygnoides*
Bar-headed Goose, *Anser indicus*
Red-breasted Goose, *Branta ruficollis*
Ringed Teal, *Callonetta leucophrys*
Maned Duck, *Chenonetta jubata*
Coscoroba Swan, *Coscoroba coscoroba*
Black Swan, *Cygnus atratus*
Black-necked Swan, *Cygnus melancoryphus*
Mute Swan, *Cygnus olor*
White-faced Whistling-Duck, *Dendrocygna viduata*
Rosy-billed Pochard, *Netta peposaca*
Red-crested Pochard, *Netta rufina*
Cotton Pygmy-Goose, *Nettapus coromandelianus*
Orinoco Goose, *Oressochen jubatus* (*Neochen jubata*)
Hottentot Teal, *Spatula hottentota*
Ruddy Shelduck, *Tadorna ferruginea*
Common Shelduck, *Tadorna tadorna*

Family Phoenicopteridae

Lesser Flamingo, *Phoeniconaias minor*
Chilean Flamingo, *Phoenicopterus chilensis*

Family Columbidae

Nicobar Pigeon, *Caloenas nicobarica*
Asian Emerald Dove, *Chalcophaps indica*
Rock Pigeon, *Columba livia*
Common Wood-Pigeon, *Columba palumbus*
Luzon Bleeding-heart, *Gallicolumba luzonica*
Diamond Dove, *Geopelia cuneata*
Bar-shouldered Dove, *Geopelia humeralis*
Zebra Dove, *Geopelia striata*
Spinifex Pigeon, *Geophaps plumifera*
Partridge Pigeon, *Geophaps smithii*
Wonga Pigeon, *Leucosarcia melanoleuca*
Crested Pigeon, *Ocyphaps lophotes*
Common Bronzewing, *Phaps chalcoptera*
Blue-headed Quail-Dove, *Starnoenas cyanocephala*
Island Collared-Dove, *Streptopelia bitorquata*
Spotted Dove, *Streptopelia chinensis*
Eurasian Collared-Dove, *Streptopelia decaocto*
African Collared-Dove, *Streptopelia roseogrisea*

Family Trochilidae

Black-throated Mango, *Anthracothorax nigricollis*

Family Rallidae

Gray-cowled Wood-Rail, *Aramides cajaneus*

Family Gruiidae

Demoiselle Crane, *Anthropoides virgo*
Sarus Crane, *Antigone antigone*
Black Crowned-Crane, *Balearica pavonina*
Gray Crowned-Crane, *Balearica regulorum*

Family Charadriidae

Southern Lapwing, *Vanellus chilensis*
Spur-winged Lapwing, *Vanellus spinosus*

Family Laridae

Silver Gull, *Chroicocephalus novaehollandiae*

Family Ciconiidae

Abdim's Stork, *Ciconia abdimii*
White Stork, *Ciconia ciconia*
Woolly-necked Stork, *Ciconia episcopus*
Black-necked Stork, *Ephippiorhynchus asiaticus*

Family Phalacrocoracidae

Red-legged Cormorant, *Phalacrocorax gaimardi*

Family Anhingidae

Oriental Darter, *Anhinga melanogaster*

Family Pelecanidae

Great White Pelican, *Pelecanus onocrotalus*
Pink-backed Pelican, *Pelecanus rufescens*

Family Threskiornithidae

Eurasian Spoonbill, *Platalea leucorodia*
Sacred Ibis, *Threskiornis aethiopicus*

Family Cathartidae

King Vulture, *Sarcoramphus papa*

Family Accipitridae

Great Black Hawk, *Buteogallus urubitinga*
Variable Hawk, *Geranoaetus polyosoma*
Griffon-type Old World vulture, *Gyps* sp.
Bateleur, *Terathopius ecaudatus*

Family Strigidae

Spectacled Owl, *Pulsatrix perspicillata*

Family Corvidae

Black-throated Magpie-Jay, *Calocitta colliei*
White-necked Raven, *Corvus albicollis*
Carrion Crow, *Corvus corone*
Cuban Crow, *Corvus nasicus*
House Crow, *Corvus splendens*
Azure Jay, *Cyanocorax caeruleus*
San Blas Jay, *Cyanocorax sanblasianus*
Rufous Treepie, *Dendrocitta vagabunda*

Eurasian Jay, *Garrulus glandarius*
Red-billed Chough, *Pyrrhocorax pyrrhocorax*
Red-billed Blue-Magpie, *Urocissa erythroryncha*

Family Alaudidae

Japanese Skylark, *Alauda japonica*
Wood Lark, *Lullula arborea*
Calandra Lark, *Melanocorypha calandra*
Mongolian Lark, *Melanocorypha mongolica*

Family Paridae

Eurasian Blue Tit, *Cyanistes caeruleus*
Great Tit, *Parus major*
Varied Tit, *Sittiparus varius*

Family Cinclidae

White-throated Dipper, *Cinclus cinclus*

Family Sylviidae

Eurasian Blackcap, *Sylvia atricapilla*

Family Muscicapidae

Indian Robin, *Copsychus fulicatus*
White-rumped Shama, *Copsychus malabaricus*
Oriental Magpie-Robin, *Copsychus saularis*
European Robin, *Erithacus rubecula*
Japanese Robin, *Larvivora akahige*
Ryukyu Robin, *Larvivora komadori*
Common Nightingale, *Luscinia megarhynchos*

Family Turdidae

Song Thrush, *Turdus philomelos*
Red-throated Thrush, *Turdus ruficollis*

Family Prunellidae

Dunnock, *Prunella modularis*

Family Fringillidae

European Goldfinch, *Carduelis carduelis*
European Greenfinch, *Chloris chloris*
White-rumped Seedeater, *Crithagra leucopygia*
Yellow-fronted Canary, *Crithagra mozambica*
Eurasian Linnet, *Linaria cannabina*
Parrot Crossbill, *Loxia pytyopsittacus*
Island Canary, *Serinus canaria*
Red Siskin, *Spinus cucullatus*
Hooded Siskin, *Spinus magellanicus*

Family Emberizidae

Yellowhammer, *Emberiza citrinella*

Family Icteridae

Venezuelan Troupial, *Icterus icterus*
Spot-breasted Oriole, *Icterus pectoralis*
Montezuma Oropendola, *Psarocolius montezuma*
Red-breasted Meadowlark, *Sturnella militaris*

Family Cardinalidae

Orange-breasted Bunting, *Passerina leclancherii*
Red-hooded Tanager, *Piranga rubriceps*

Family Thraupidae

Yellow Cardinal, *Gubernatrix cristata*
Greater Antillean Bullfinch, *Loxigilla violacea*
Cuban Bullfinch, *Melopyrrha nigra*
Yellow-billed Cardinal, *Paroaria capitata*
Red-crested Cardinal, *Paroaria coronata*
Red-cowled Cardinal, *Paroaria dominicana*
Red-capped Cardinal, *Paroaria gularis*
Saffron Finch, *Sicalis flaveola*
Blue-gray Tanager, *Thraupis episcopus*
Cuban Grassquit, *Tiaris canorus*

Public Comments

We request comments or information on this draft list from other concerned governmental agencies, the scientific community, industry, or any other interested parties.

Please include sufficient information with your submission (such as electronic copies of scientific journal articles or other publications, preferably in English) to allow us to verify any scientific or commercial information you include.

You may submit your comments and materials concerning this draft list by one of the methods listed in **ADDRESSES**. We request that you send comments only by the methods described in **ADDRESSES**.

If you submit information via *http://www.regulations.gov,* your entire submission—including any personal identifying information—will be posted on the website. If your submission is made via a hardcopy that includes personal identifying information, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so. We will post all hardcopy submissions on *http://www.regulations.gov.*

Comments and materials we receive will be available for public inspection on *http://www.regulations.gov,* or by appointment, during normal business hours, at the U.S. Fish and Wildlife Service, Division of Migratory Bird Management (see **ADDRESSES**).

Author

The author of this notice is Jo Anna Lutmerding, U.S. Fish and Wildlife Service, Division of Migratory Bird Management, 5275 Leesburg Pike, Falls Church, VA 22041.

References Cited

American Ornithological Society. 2017. Fifty-eighth to the American Ornithological Society's Check-list of North American Birds. Auk 134:751–773.

American Ornithologists' Union. 1998. Check-list of North American birds: the species of birds of North America from the Arctic through Panama, including the West Indies and Hawaiian Islands. 7th edition. Washington, DC.

Clements, J.F., T.S. Schulenberg, M.J. Iliff, D. Roberson, T.A. Fredericks, B.L. Sullivan, and C.L. Wood. 2017. The eBird/Clements checklist of birds of the world: v2017. Downloaded from *http://www.birds.cornell.edu/clementschecklist/download/.*

Authority

The authority for this notice is the Migratory Bird Treaty Reform Act of 2004 (Division E, Title I, Sec. 143 of the Consolidated Appropriations Act, 2005; Pub. L. 108–447), and the Migratory Bird Treaty Act (16 U.S.C. 703–712).

Dated: November 5, 2018.

James W. Kurth,

Deputy Director, U.S. Fish and Wildlife Service, Exercising the Authority of the Director, U.S. Fish and Wildlife Service.

[FR Doc. 2018–25631 Filed 11–27–18; 8:45 am]

BILLING CODE 4333–15–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R1–ES–2018–N136; FXES11130600000–190–FF01E00000]

Endangered Species; Receipt of Recovery Permit Application

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of receipt of a permit application; request for comments.

SUMMARY: We, the U.S. Fish and Wildlife Service, have received an application for a permit to conduct activities intended to enhance the propagation and survival of endangered plant species under the Endangered Species Act of 1973, as amended. We invite the public and local, State, Tribal, and Federal agencies to comment on this application. Before issuing the requested permit, we will take into consideration any information that we receive during the public comment period.

DATES: We must receive your written comments on or before December 28, 2018.

ADDRESSES: *Document availability and comment submission:* Submit requests for a copy of the application and related documents and submit any comments by one of the following methods. All requests and comments should specify the applicant name and application number (*i.e.,* Colorado State University TE–07859D–0):

- *Email: permitsR1ES@fws.gov.*
- *U.S. Mail:* Marilet Zablan, Program Manager, Restoration and Endangered Species Classification, Ecological Services, U.S. Fish and Wildlife Service, Pacific Regional Office, 911 NE 11th Avenue, Portland, OR 97232–4181.

FOR FURTHER INFORMATION CONTACT: Colleen Henson, Recovery Permit Coordinator, Ecological Services, (503) 231–6131 (phone); *permitsR1ES@fws.gov* (email). Individuals who are hearing or speech impaired may call the Federal Relay Service at 1–800–877–8339 for TTY assistance.

SUPPLEMENTARY INFORMATION: We, the U.S. Fish and Wildlife Service, invite the public to comment on an application for a permit under section 10(a)(1)(A) of the Endangered Species Act, as amended (ESA; 16 U.S.C. 1531 *et seq.*). The requested permit would allow the applicant to conduct activities intended to promote recovery of species that are listed as endangered under the ESA.

Background

With some exceptions, the ESA prohibits activities that constitute take of listed species unless a Federal permit is issued that allows such activity. The ESA's definition of ''take'' includes such activities as pursuing, harassing, trapping, capturing, or collecting in addition to hunting, shooting, harming, wounding, or killing.

A recovery permit issued by us under section 10(a)(1)(A) of the ESA authorizes the permittee to conduct activities with endangered or threatened species for scientific purposes that promote recovery or for enhancement of propagation or survival of the species. These activities often include such prohibited actions as capture and collection. Our regulations implementing section 10(a)(1)(A) for these permits are found in the Code of Federal Regulations at 50 CFR 17.22 for endangered wildlife species, 50 CFR 17.32 for threatened wildlife species, 50 CFR 17.62 for endangered plant species, and 50 CFR 17.72 for threatened plant species.

Permit Application Available for Review and Comment

Proposed activities in the following permit request are for the recovery and enhancement of propagation or survival of the species in the wild. The ESA requires that we invite public comment before issuing this permit. Accordingly, we invite local, State, Tribal, and Federal agencies and the public to submit written data, views, or arguments with respect to this application. The comments and recommendations that will be most useful and likely to influence agency decisions are those supported by quantitative information or studies.

Application No.	Applicant, city, state	Species	Location	Take activity	Permit action
TE–07859D–0 ...	Colorado State University, Fort Collins, CO.	*Eugenia bryanii* (no common name), *Heritiera longipetiolata* (ufa-halom tanu), *Serianthes nelsonii* (hayun lagu).	Guam	Remove and reduce to possession including collection, propagation, and salvage.	New.

Public Availability of Comments

Written comments we receive become part of the administrative 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 can request in your comment that we withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so. All submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, will be made available for public disclosure in their entirety.

Next Steps

If we decide to issue a permit to the applicant listed in this notice, we will publish a notice in the **Federal Register**.

Authority

We publish this notice under section 10(c) of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Sarah B. Hall,

Acting Assistant Regional Director—Ecological Services, Pacific Region.

[FR Doc. 2018–25915 Filed 11–27–18; 8:45 am]

BILLING CODE 4333–15–P

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

[190A2100DD/AAKC001030/A0A501010.999900]

HEARTH Act Approval of Quinault Indian Nation's Business and Residential Leasing Regulations

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Notice.

SUMMARY: On October 31, 2018, the Bureau of Indian Affairs (BIA) approved the Quinault Indian Nation's (Tribe) leasing regulations under the Helping Expedite and Advance Responsible Tribal Homeownership Act of 2012 (HEARTH Act). With this approval, the Tribe is authorized to enter into residential and business leases without further BIA approval.

FOR FURTHER INFORMATION CONTACT: Ms. Sharlene Round Face, Bureau of Indian Affairs, Division of Real Estate Services, 1849 C Street NW, MS–4642–MIB, Washington, DC 20240, at (202) 208–3615.

SUPPLEMENTARY INFORMATION:

I. Summary of the HEARTH Act

The HEARTH Act makes a voluntary, alternative land leasing process available to Tribes, by amending the Indian Long-Term Leasing Act of 1955, 25 U.S.C. 415. The HEARTH Act authorizes Tribes to negotiate and enter into agricultural and business leases of Tribal trust lands with a primary term of 25 years, and up to two renewal terms of 25 years each, without the approval of the Secretary of the Interior (Secretary). The HEARTH Act also authorizes Tribes to enter into leases for residential, recreational, religious, or educational purposes for a primary term of up to 75 years without the approval of the Secretary. Participating Tribes develop Tribal leasing regulations, including an environmental review process, and then must obtain the Secretary's approval of those regulations prior to entering into leases. The HEARTH Act requires the Secretary to approve Tribal regulations if the Tribal regulations are consistent with the

Department of the Interior's (Department) leasing regulations at 25 CFR part 162 and provide for an environmental review process that meets requirements set forth in the HEARTH Act. This notice announces that the Secretary, through the Assistant Secretary—Indian Affairs, has approved the Tribal regulations for the Quinault Indian Nation.

II. Federal Preemption of State and Local Taxes

The Department's regulations governing the surface leasing of trust and restricted Indian lands specify that, subject to applicable Federal law, permanent improvements on leased land, leasehold or possessory interests, and activities under the lease are not subject to State and local taxation and may be subject to taxation by the Indian Tribe with jurisdiction. See 25 CFR 162.017. As explained further in the preamble to the final regulations, the Federal government has a strong interest in promoting economic development, self-determination, and Tribal sovereignty. 77 FR 72,440, 72,447–48 (December 5, 2012). The principles supporting the Federal preemption of State law in the field of Indian leasing and the taxation of lease-related interests and activities applies with equal force to leases entered into under Tribal leasing regulations approved by the Federal government pursuant to the HEARTH Act.

Section 5 of the Indian Reorganization Act, 25 U.S.C. 5108, preempts State and local taxation of permanent improvements on trust land. *Confederated Tribes of the Chehalis Reservation* v. *Thurston County,* 724 F.3d 1153, 1157 (9th Cir. 2013) (citing *Mescalero Apache Tribe* v. *Jones,* 411 U.S. 145 (1973)). Similarly, section 5108 preempts State taxation of rent payments by a lessee for leased trust lands, because ''tax on the payment of rent is indistinguishable from an impermissible tax on the land.'' *See Seminole Tribe of Florida* v. *Stranburg,* No. 14–14524, *13–*17, n.8 (11th Cir. 2015). In addition, as explained in the preamble to the revised leasing regulations at 25 CFR part 162, Federal courts have applied a balancing test to determine whether State and local taxation of non-Indians on the reservation is preempted. *White Mountain Apache Tribe* v. *Bracker,* 448 U.S. 136, 143 (1980). The *Bracker* balancing test, which is conducted against a backdrop of ''traditional notions of Indian self-government,'' requires a particularized examination of the relevant State, Federal, and Tribal interests. We hereby adopt the *Bracker* analysis from the preamble to the surface leasing regulations, 77 FR at 72,447–48, as supplemented by the analysis below.

The strong Federal and Tribal interests against State and local taxation of improvements, leaseholds, and activities on land leased under the Department's leasing regulations apply equally to improvements, leaseholds, and activities on land leased pursuant to Tribal leasing regulations approved under the HEARTH Act. Congress's overarching intent was to ''allow Tribes to exercise greater control over their own land, support self-determination, and eliminate bureaucratic delays that stand in the way of homeownership and economic development in Tribal communities.'' 158 Cong. Rec. H. 2682 (May 15, 2012). The HEARTH Act was intended to afford Tribes ''flexibility to adapt lease terms to suit [their] business and cultural needs'' and to ''enable [Tribes] to approve leases quickly and efficiently.'' *Id.* at 5–6.

Assessment of State and local taxes would obstruct these express Federal policies supporting Tribal economic development and self-determination, and also threaten substantial Tribal interests in effective Tribal government, economic self-sufficiency, and territorial autonomy. *See Michigan* v. *Bay Mills Indian Community,* 134 S. Ct. 2024, 2043 (2014) (Sotomayor, J., concurring) (determining that ''[a] key goal of the Federal Government is to render Tribes more self-sufficient, and better positioned to fund their own sovereign functions, rather than relying on Federal funding''). The additional costs of State and local taxation have a chilling effect on potential lessees, as well as on a Tribe that, as a result, might refrain from exercising its own sovereign right to impose a Tribal tax to support its infrastructure needs. *See id.* at 2043–44 (finding that State and local taxes greatly discourage Tribes from raising tax revenue from the same sources because the imposition of double taxation would impede Tribal economic growth).

Similar to BIA's surface leasing regulations, Tribal regulations under the HEARTH Act pervasively cover all aspects of leasing. *See* 25 U.S.C. 415(h)(3)(B)(i) (requiring Tribal regulations be consistent with BIA surface leasing regulations). Furthermore, the Federal government remains involved in the Tribal land leasing process by approving the Tribal leasing regulations in the first instance and providing technical assistance, upon request by a Tribe, for the development of an environmental review process. The Secretary also retains authority to take any necessary actions to remedy violations of a lease or of the Tribal regulations, including terminating the lease or rescinding approval of the Tribal regulations and reassuming lease approval responsibilities. Moreover, the Secretary continues to review, approve, and monitor individual Indian land leases and other types of leases not covered under the Tribal regulations according to the Part 162 regulations.

Accordingly, the Federal and Tribal interests weigh heavily in favor of preemption of State and local taxes on lease-related activities and interests, regardless of whether the lease is governed by Tribal leasing regulations or Part 162. Improvements, activities, and leasehold or possessory interests may be subject to taxation by the Quinault Indian Nation.

Dated: October 31, 2018.

Tara Sweeney,

Assistant Secretary—Indian Affairs.

[FR Doc. 2018–25942 Filed 11–27–18; 8:45 am]

BILLING CODE 4337–15–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[L11100000 DS0000 LXSS036E0000 LLWY1610000]

Notice of Intent for the Potential Amendment to the Approved Resource Management Plan for the Buffalo Field Office, Wyoming, and To Prepare an Associated Supplemental Environmental Impact Statement

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of intent.

SUMMARY: In accordance with the National Environmental Policy Act of 1969, as amended (NEPA), and the Federal Land Policy and Management Act of 1976, as amended (FLPMA), the Bureau of Land Management (BLM) Wyoming Buffalo Field Office intends to prepare a Supplemental Environmental Impact Statement (EIS) and potential amendment for the 2015 Buffalo Field Office Approved Resource Management Plan (RMP). The Supplemental EIS is in response to a United States District Court, District of Montana, opinion and order (Western Organization of Resource Councils, et al vs BLM). This notice announces the beginning of the scoping process to solicit public comments and identify issues presented in the opinion and order.

DATES: To ensure that we can adequately consider all comments, the

BLM must receive written comments by December 28, 2018. The BLM will announce a public scoping meeting during this period through local news media, newsletters, our ePlanning website, and the BLM website (*http://www.blm.gov/wyoming*) at least 15 days prior to the meeting. The BLM will provide additional opportunities for public participation upon publication of the Draft Supplemental EIS.

ADDRESSES: You may submit comments on issues, planning criteria, and resource information by any of the following methods:

- *Website: http://go.usa.gov/x9PT8.*
- *Mail:* Buffalo RMP SEIS, Attn: Thomas Bills, Project Manager, BLM Buffalo Field Office, 1425 Fort Street, Buffalo, WY 82834.

FOR FURTHER INFORMATION CONTACT: Thomas (Tom) Bills, RMP Supplemental EIS Project Manager; Telephone 307–684–1133; or at the above mailing address or website. 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, seven days a week, to leave a message or question with the above individual. You will receive a reply during normal business hours.

SUPPLEMENTARY INFORMATION: The BLM is preparing this Supplemental EIS in response to a United States District Court of Montana opinion and order (*Western Organization of Resource Councils, et al.* v. *BLM;* CV 16–21–GF–BMM; 3/26/2018 and 7/31/2018).

In September 2015, the BLM approved the Record of Decision for Approved RMPs and Amendments in the Rocky Mountain Region, which included Wyoming's Buffalo Field Office. The 2015 Buffalo Approved RMP provides a single, comprehensive land use plan that guides management of BLM-administered lands and minerals in the Buffalo Field Office. The plan provides goals, objectives, land use allocations, and management direction for the BLM-administered surface and mineral estate based on the BLM's multiple use and sustained yield mission, unless otherwise specified by law (FLPMA Sec. 102(c), 43 U.S.C. 1701 *et seq.*). The Buffalo Field Office manages approximately 800,000 acres of surface land and 4.7 million acres of mineral estate in Campbell, Johnson, and Sheridan counties in north-central Wyoming.

On March 26, 2018, the U.S. District Court concluded: (1) NEPA requires the BLM to consider an alternative that would decrease the amount of coal potentially available for leasing, which requires updated coal screening that considers climate change impacts to assess the amount of recoverable coal available in the Approved RMP; (2) the BLM must supplement the Buffalo Final EIS with an analysis of the environmental consequences of downstream combustion of federal coal, oil, and gas open to development under the RMP; and (3) The BLM must provide additional justification and analysis of global warming potential over an appropriate planning period consistent with evolving science. The purpose of this public scoping process is to solicit public input that will influence the scope of the Buffalo Supplemental EIS with respect to the U.S. District Court's determinations.

There are currently 13 operating coal mines in the planning area. All are in Campbell County (part of the Antelope Mine is in Converse County). There are presently two proposed mining operations on existing Federal coal leases or on privately owned coal in the planning area. One of these proposed mining operations is located in Sheridan County. All of the existing or proposed mining operations are surface coal mines, using truck/shovel or dragline mining methods.

The 2015 Buffalo RMP relied on coal screening completed during a 2001 RMP update. The 2001 screening reviewed 567,200 acres in two areas identified as acceptable for potential coal leasing in the Buffalo Field Office (494,000 acres in Campbell County and 73,200 acres in Sheridan County), containing an estimated 50.25 billion tons of coal. Based on the update, the BLM determined that 63,600 acres containing more than 6.2 billion tons of coal are unsuitable for surface coal mining operations, while the remainder of the coal lands in these areas remains available for further consideration for coal leasing. The BLM completed and documented surface owner consultation. The BLM estimates about 26 billion tons of coal would be developed under the Approved RMP in the areas made available for coal leasing under the 2001 coal screening. Since 1985, about 10.8 billion tons of coal within the planning area either were leased or are under consideration for leasing. The BLM has projected that the areas it screened and deemed acceptable for leasing will meet the anticipated demand for coal reserves. The BLM determined a new coal screening is not necessary in the Buffalo Field Office because no new lands have been nominated for analysis since the previous screenings, but BLM Wyoming will analyze the downstream impacts of developing federal minerals.

Call for Coal and Other Resource Information

The BLM requests that industry, state and local governments, and the public provide relevant coal resource data that can help inform this planning effort. Specifically, the BLM requests information on the development potential (*e.g.,* location, quality, and quantity) of BLM-administered coal mineral estate, and on surface resource values related to multiple use conflicts.

The purpose of this request is to ensure BLM Wyoming has sufficient information and data to consider a reasonable range of resource uses, management options, and alternatives for managing BLM-administered coal mineral estate. The BLM will use this information to complete the Supplemental EIS and formulate alternatives that identify areas acceptable for further leasing consideration.

Proprietary data marked as confidential may be submitted in response to this call for coal and other resource information. Please submit all proprietary information to the Buffalo Field Manager at the address listed above. The BLM will treat submissions marked as ''Confidential'' in accordance with the laws and regulations governing the confidentiality of such information.

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, the BLM cannot guarantee that it will be able to do so.

Authority: 43 CFR 1610.2(c) and 3420.1–2.

Dated: November 16, 2018.

Mary Jo Rugwell,

State Director.

[FR Doc. 2018–25845 Filed 11–27–18; 8:45 am]

BILLING CODE 4310–22–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLMT930000 L16100000 DS0000 LXSS036E0000 19X]

Notice of Intent for the Potential Amendment to the Approved Resource Management Plan for the Miles City Field Office, Montana, and To Prepare an Associated Supplemental Environmental Impact Statement

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of intent.

SUMMARY: In accordance with the National Environmental Policy Act of 1969, as amended (NEPA), and the Federal Land Policy and Management act of 1976, as amended (FLPMA), the Bureau of Land Management (BLM), Miles City Field Office, Miles City, Montana, intends to prepare a Supplemental Environmental Impact Statement (EIS) and potential amendment for the 2015 Miles City Field Office Approved Resource Management Plan (RMP). The Supplemental EIS is in response to a United States District Court, District of Montana, opinion and order (Western Organization of Resource Councils, et al vs BLM). This notice announces the beginning of the scoping process to solicit public comments and identify issues presented in the opinion and order.

DATES: To ensure that comments will be considered, the BLM must receive written comments by December 28, 2018. The BLM will announce a public scoping meeting through local news media, newsletters, e-Planning, and the BLM website *https://www.blm.gov/montana-dakotas* at least 15 days prior to the meeting. The BLM will provide additional opportunities for public participation upon publication of the Draft Supplemental EIS.

ADDRESSES: You may submit comments on issues, planning criteria, and resource information by any of the following methods:

- *Website: https://go.usa.gov/xPv49.*
- *Mail:* Miles City RMP Draft Supplemental EIS; Amy Waring, Supplemental EIS Project Manager; Montana/Dakotas State Office, 5001 Southgate Dr., Billings, MT 59101.

FOR FURTHER INFORMATION CONTACT: Amy Waring, Supplemental EIS Project Manager; telephone (406) 896–5095; email *awaring@blm.gov;* or at the mailing address or website listed earlier (see **ADDRESSES**). 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 individuals 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 individuals. You will receive a reply during normal business hours.

SUPPLEMENTARY INFORMATION: The Supplemental EIS is in response to a United States Montana District court opinion and order (*Western Organization of Resource Councils, et al.* vs *BLM; CV 16–21–GF–BMM;* 3/26/2018 and 7/31/2018).

In September 2015, the BLM approved the Record of Decision for the Approved RMPs and Amendments in the Rocky Mountain Region, which included the Montana Miles City Field Office. The 2015 Miles City Approved RMP provides a single, comprehensive land use plan that guides management of BLM-administered surface and mineral estate in the Miles City Field Office. The plan provides goals, objectives, land use allocations, and management direction for the BLM-administered surface and mineral estate based on multiple use and sustained yield, unless otherwise specified by law (FLPMA Sec. 102(c), 43 U.S.C. 1701 *et seq.*). The Miles City Field Office manages approximately 2.7 million surface acres and 10.6 million acres of Federal mineral estate across 17 counties in eastern Montana.

On March 26, 2018, the U.S. District Court concluded: (1) NEPA requires the BLM to consider an alternative that would decrease the amount of coal potentially available for leasing, which requires conducting new coal screening that considers climate change impacts to assess the amount of recoverable coal available in the Approved RMP, (2) The BLM must supplement the Miles City Final EIS with an analysis of the environmental consequences of downstream combustion of coal, oil, and gas open to development under the Approved RMP; and (3) The BLM must provide additional justification and analysis of global warming potential over an appropriate planning period consistent with evolving science.

The purpose of this public scoping process is to solicit public input that will influence the scope of the environmental analysis with respect to the three conclusions by the U.S. District Court.

There are currently five active coal mining operations in or adjacent to the planning area, four of which operate on Federal coal leases, and are administered by the BLM (Decker, Rosebud, Savage, and Spring Creek), and one mine (Absaloka) that operates entirely on two Indian coal leases. In addition, two additional mines are proposed, the Big Metal Mine (Indian reserves) and Otter Creek Mine (currently private reserves). The Miles City Field Office also authorizes a domestic coal license to a private individual in Fallon County for home heating.

The 2015 Approved RMP relied upon coal screening completed during two previous RMP revisions: Big Dry (1996) and Powder River (1985). These planning efforts identified approximately 68.38 billion tons of coal that are available for further consideration for coal leasing across the Miles City Field Office (62.20 billion tons in the Power River RMP and 6.18 billion tons of coal in the Big Dry RMP). A reasonable foreseeable development scenario (RFD) was developed for the Final EIS based upon the U.S. Energy Information Administration projections in order for specialists to analyze the potential effects related to Federal coal leasing. The RFD was based upon continued operations of the five existing mines, with no new mines being developed over the 20-year planning timeframe. The RFD did not consider leasing of the entire 68.38 billion tons of coal that may be available. The air quality analysis estimated annual emissions from the RFD estimate of 56.2 million tons of Federal and 26.8 million tons of non-Federal coal produced per year, based upon coal production limits prescribed in each associated Montana Air Quality Permit issued by the Montana Department of Environmental Quality for the five operating mines.

As defined in 43 CFR 3420.1–4, the four principal factors the BLM must consider for coal resource development during land use planning include:

1. Estimate coal development potential, and consider only those areas that have development potential for further consideration for leasing.
2. Apply the unsuitability criteria set out in 43 CFR subpart 3461 to the BLM-administered coal mineral estate to identify areas unsuitable for all, or certain stipulated methods of mining.
3. Consider multiple land use management conflicts which may eliminate coal deposits from further consideration for leasing to protect other resource values and land uses that are locally, regionally or nationally important or unique, that are not included in the unsuitability criteria.
4. Consult with qualified surface owners, as defined in 43 CFR 3400.0–5, whose lands overlie BLM-administered coal mineral estate to determine preference for or against mining by

other than underground mining techniques.

Call for Coal and Other Resource Information

The BLM requests that industry, State and local governments, and the public interested in coal management in the planning area provide the BLM relevant coal resource data that can help inform this project. Specifically, the BLM requests information on the development potential (*e.g.,* location, quality, and quantity) of BLM-administered coal mineral estate, and on surface resource values related to multiple use conflicts.

The purpose of this request is to assure that the planning effort has sufficient information and data to consider a reasonable range of resource uses, management options, and alternatives for management of the BLM-administered Federal coal mineral estate. The BLM will use this information to complete the Supplemental EIS and formulate alternatives that identify areas acceptable for further consideration for leasing.

Proprietary data marked as ''Confidential'' may be submitted in response to this request for coal and other resource information. Please submit all proprietary information submissions to the Montana/Dakotas State Director at the address listed above. The BLM will treat submissions marked as ''Confidential'' in accordance with the laws and regulations governing the confidentiality of such information.

Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can request us to withhold your personal identifying information from public review, BLM cannot guarantee that it will be able to do so.

(Authority: 43 CFR 1610.2(c) and 3420.1–2)

Jon K. Raby,

Acting State Director.

[FR Doc. 2018–25847 Filed 11–27–18; 8:45 am]

BILLING CODE 4310–DN–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–D–COS–POL–26833; PPWODIREP0][PPMPSAS1Y.YP0000]

Notice of the December 5, 2018, Meeting of the National Park System Advisory Board

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: In accordance with the Federal Advisory Committee Act of 1972, the National Park Service is hereby giving notice that the National Park System Advisory Board (Board) will meet as noted below. This notice is being published less than 15 days prior to the meeting date due to unexpected administrative delays.

DATES: The meeting will be held on Wednesday, December 5, 2018, from 9:30 a.m. to 5:00 p.m. (EASTERN).

ADDRESSES: The meeting will be conducted in the Jefferson Room of the Courtyard Marriott Washington, DC/Foggy Bottom, 515 20th Street NW, Washington, DC 20006, telephone (202) 263–7435.

FOR FURTHER INFORMATION CONTACT: Shirley Sears, Office of Policy, National Park Service, 1849 C Street NW, Mail Stop 2659, Washington, DC 20240, telephone (202) 354–3955, or email *shirley_sears@nps.gov.*

SUPPLEMENTARY INFORMATION: The Board has been established by authority of the Secretary of the Interior (Secretary) under 54 U.S.C. 100906, and is regulated by the Federal Advisory Committee Act.

The Board will convene at 9:30 a.m. and adjourn at 5:00 p.m. The board will have briefings on the priorities and programs of the National Park Service, including the National Historic Landmarks and National Natural Landmarks programs. The meeting will be open to the public. There will also be a public comment period. The final agenda will be posted to the Board's website prior to the meeting at *https://www.nps.gov/advisoryboard.htm.* The order of the agenda may be changed, if necessary.

The Board also will permit attendees to address the Board, but may restrict the length of the presentations, as necessary, to allow the Board to complete its agenda within the allotted time.

Anyone may file with the Board a written statement concerning matters to be discussed.

Statements should be sent to *shirley_sears@nps.gov.*

Public Disclosure of Information: 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.

Alma Ripps,

Chief, Office of Policy.

[FR Doc. 2018–25934 Filed 11–27–18; 8:45 am]

BILLING CODE 4312–52–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 337–TA–1121]

Certain Earpiece Devices and Components Thereof: Notice of a Commission Determination Not To Review an Initial Determination Granting a Motion for Leave To Amend the Complaint and Notice of Investigation

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined not to review an initial determination (''ID'') (Order No. 10) of the presiding administrative law judge (''ALJ''), granting complainant's motion for leave to amend the complaint and Notice of Investigation to correct the name and/or address of two existing respondents.

FOR FURTHER INFORMATION CONTACT: Cathy Chen, Esq., Office of the General Counsel, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436, telephone (202) 205–2392. Copies of non-confidential documents filed in connection with this investigation are or will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436, telephone (202) 205–2000. General information concerning the Commission may also be obtained by accessing its internet server at *https://www.usitc.gov.* The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at *https://edis.usitc.gov.* Hearing-impaired

persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205–1810.

SUPPLEMENTARY INFORMATION: The Commission instituted this investigation on June 29, 2018, based on a complaint filed on behalf of Bose Corporation of Framingham, Massachusetts (''Bose''). 83 FR 30,776 (Jun. 29, 2018). The complaint alleges violations of Section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337 (''section 337''), based upon the importation into the United States, the sale for importation, and the sale within the United States after importation of certain earpiece devices and components thereof by reason of infringement of one or more of U.S. Patent Nos.: 9,036,852; 9,036,853; 9,042,590; 8,311,253; 8,249,287; and 9,398,364. The complaint further alleges that an industry in the United States exists as required by section 337. The Notice of Investigation named numerous respondents, including iHip of Edison, New Jersey; and SMARTOMI Products, Inc. (''Smartomi'') of Ontario, Canada. The Office of Unfair Import Investigations (''OUII'') was named as a party in this investigation.

On October 4, 2018, Bose filed a motion to amend the notice of investigation and for leave to file an amended complaint in order to correct the name and/or address of two existing respondents. Order No. 10 at 1 (Oct. 29, 2018). Specifically, Bose sought to correct the name of respondent iHip to Zeikos, Inc., and to correct the name of respondent Smartomi to V4ink, Inc. (''V4ink''). *Id.* Bose also sought to correct the address of the latter respondent because the Smartomi address cited in the original complaint, 2760 E Philadelphia Street, Ontario, Canada 91761, is the registered agent for V4ink. *Id.* Bose since learned that V4ink's principal place of business is 1251 S Rockfeller Ave Unit B, Ontario, Canada 91761–2238. *Id.* No response was filed. *Id.*

On October 29, 2018, the ALJ issued the subject ID granting the motion. *Id.* at 2. The ALJ found that good cause exists to amend the complaint and notice of investigation, and that there is no evidence of any prejudice to the parties in the investigation. *Id.* No petitions for review were filed.

The Commission has determined not to review the ID.

The authority for the Commission's determination is contained in section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and in Part 210 of the Commission's Rules of Practice and Procedure (19 CFR part 210).

By order of the Commission.
Issued: November 23, 2018.

Katherine Hiner,

Supervisory Attorney.

[FR Doc. 2018–25940 Filed 11–27–18; 8:45 am]

BILLING CODE 7020–02–P

NUCLEAR REGULATORY COMMISSION

[NRC–2018–0228]

Information Collection: Operators' Licenses

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, Operators' Licenses.

DATES: Submit comments by January 28, 2019. 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–2018–0228. 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: O1–F21, 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–2018–0228 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–2018–0228.
- *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 is available in ADAMS under Accession No. ML18218A114.
- *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 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

Please include Docket ID NRC–2018–0228 in the subject line of your comment submission, in order to ensure that the NRC is able to make your comment submission available to the public in this docket.

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. The NRC will post all comment submissions at *http://www.regulations.gov* as well as enter the comment submissions into ADAMS, and the NRC does not routinely edit comment submissions 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

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 below.

1. *The title of the information collection:* Operators' Licenses.
2. *OMB approval number:* 3150–0018.
3. *Type of submission:* Extension.
4. *The form number, if applicable:* Not applicable.
5. *How often the collection is required or requested:* As necessary for the NRC to meet its responsibilities to determine the eligibility for applicants and operators.
6. *Who will be required or asked to respond:* Holders of, and applicants for, facility (*i.e.,* nuclear power and non-power research and test reactor) operating licenses and individual operator licensees.
7. *The estimated number of annual responses:* 449 (353 reporting responses + 96 recordkeepers).
8. *The estimated number of annual respondents:* 96.
9. *The estimated number of hours needed annually to comply with the information collection requirement or request:* 172,915 hours (150,869 hours reporting + 22,046 hours recordkeeping).
10. *Abstract:* Part 55 of title 10 of the *Code of Federal Regulations* (10 CFR), ''Operators' Licenses,'' specifies information and data to be provided by applicants and facility licensees so that the NRC may make determinations concerning the licensing and requalification of operators for nuclear reactors, as necessary to promote public health and safety. The reporting and recordkeeping requirements contained in 10 CFR part 55 are mandatory for the affected facility licensees and applicants.

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 November, 2018.

For the Nuclear Regulatory Commission.

David C. Cullison,

NRC Clearance Officer, Office of the Chief Information Officer.

[FR Doc. 2018–25936 Filed 11–27–18; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2018–0047]

Information Collection: Domestic Licensing of Source Material

AGENCY: Nuclear Regulatory Commission.

ACTION: Notice of submission to the Office of Management and Budget; request for comment.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) has recently submitted a request for renewal of an existing collection of information to the Office of Management and Budget (OMB) for review. The information collection is entitled, Domestic Licensing of Source Material.

DATES: Submit comments by December 28, 2018.

ADDRESSES: Submit comments directly to the OMB reviewer at: OMB Office of Information and Regulatory Affairs (3150–0020), Attn: Desk Officer for the Nuclear Regulatory Commission, 725 17th Street NW, Washington, DC 20503; email: *oira_submission@omb.eop.gov.*

FOR FURTHER INFORMATION CONTACT: David Cullison, NRC Clearance 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–2018–0047 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–2018–0047.
- *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 and burden spreadsheet are available in ADAMS under Accession Nos. ML18289A608 and ML18289A625.
- *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 comment submissions are not routinely edited to remove such information before making the comment submissions available to the public or entering the comment into ADAMS.

II. Background

Under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the NRC recently submitted a request for renewal of an existing collection of information to OMB for review entitled, Domestic Licensing of Source Material. The NRC hereby informs potential respondents that an agency may not conduct or sponsor, and that a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

The NRC published a **Federal Register** notice with a 60-day comment period on this information collection on August 1, 2018 (83 FR 37537).

1. *The title of the information collection:* Domestic Licensing of Source Material.

2. *OMB approval number:* 3150–0020.

3. *Type of submission:* Revision.

4. *The form number, if applicable:* Not applicable.

5. *How often the collection is required or requested:* Reports required under part 40 of title 10 of the *Code of Federal Regulations* (10 CFR) are collected and evaluated on a continuing basis as events occur. There is a one-time submittal of information to receive a license. Renewal applications need to be submitted every 15 to 40 years. Information in previous applications may be referenced without being resubmitted. In addition, recordkeeping must be performed on an on-going basis.

6. *Who will be required or asked to respond:* Applicants for and holders of NRC licenses authorizing the receipt, possession, use, or transfer of radioactive source material.

7. *The estimated number of annual responses:* 1,390 (750 reporting responses + 6 third party disclosure responses + 634 recordkeepers).

8. *The estimated number of annual respondents:* 634.

9. *The estimated number of hours needed annually to comply with the information* collection requirement or request: 16,928 (11,366 reporting + 5,544 recordkeeping + 18 third party disclosure).

10. *Abstract:* The NRC regulations in 10 CFR part 40 establish procedures and criteria for the issuance of licenses to receive title to, receive, possess, use, transfer, or deliver source and byproduct material. The application, reporting, recordkeeping, and third party notification requirements are necessary to permit the NRC to make a determination as to whether the possession, use, and transfer of source and byproduct material is in conformance with the Commission's regulations for protection of public health and safety.

Dated at Rockville, Maryland, this 23rd day of November 2018.

For the Nuclear Regulatory Commission.

David C. Cullison,

NRC Clearance Officer, Office of the Chief Information Officer.

[FR Doc. 2018–25935 Filed 11–27–18; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[NRC 2018–0151]

Information Collection: NRC Form 531, "Request for Taxpayer Identification Number"

AGENCY: Nuclear Regulatory Commission.

ACTION: Notice of submission to the Office of Management and Budget; request for comment.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) has recently submitted a request for revision of an existing collection of information to the Office of Management and Budget (OMB) for review. The information collection is entitled, NRC Form 531, ''Request for Taxpayer Identification Number.''

DATES: Submit comments by December 28, 2018.

ADDRESSES: Submit comments directly to the OMB reviewer at: OMB Office of Information and Regulatory Affairs (3150–0188), Attn: Desk Officer for the Nuclear Regulatory Commission, 725 17th Street NW, Washington, DC 20503; email: *oira_submission@omb.eop.gov.*

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–2018–0151 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–2018–0151. A copy of the collection of information and related instructions may be obtained without charge by accessing Docket ID NRC–2018–0151 on this website.
- *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.* A copy of the collection of information and related instructions may be obtained without charge by accessing ADAMS Accession No. M18291B056. The supporting statement and Request for Taxpayer Identification Number is available in ADAMS under Accession No. ML18114A258.
- *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 Information Services, 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 comment submissions are not routinely edited to remove such information before making the comment submissions available to the public or entering the comment into ADAMS.

II. Background

Under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the NRC recently submitted a request for renewal of an existing collection of information to OMB for review entitled, NRC Form 531, ''Request for Taxpayer Identification Number.'' The NRC hereby informs potential respondents that an agency may not conduct or sponsor, and that a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

The NRC published a **Federal Register** notice with a 60-day comment

period on this information collection on August 1, 2018 (83 FR 37528).

1. *The title of the information collection:* NRC Form 531, ''Request for Taxpayer Identification Number.''

2. *OMB approval number:* 3150–0188.

3. *Type of submission:* Extension.

4. *The form number if applicable:* NRC Form 531.

5. *How often the collection is required or requested:* Licensees are only required to submit once, however, a continuous monthly request is sent until the licensee submits the Taxpayer Identification Number.

6. *Who will be required or asked to respond:* NRC Form 531 is used to collect TINs and information sufficient to identify the licensee or applicant for licenses, certificates, approvals and registrations.

7. *The estimated number of annual responses:* 300 responses.

8. *The estimated number of annual respondents:* 300 respondents.

9. *An estimate of the total number of hours needed annually to comply with the information collection requirement or request:* 75 hours.

10. *Abstract:* The Debt Collection Improvement Act of 1996 requires that agencies collect taxpayer identification numbers (TINs) from individuals who do business with the Government, including contractors and recipients of credit, licenses, permits, and benefits. The TIN will be used to process all electronic payments (refunds) made to licensees by electronic funds transfer by the Department of the Treasury. The Department of the Treasury will use the TIN to determine whether the refund can be used to administratively offset any delinquent debts reported to the Treasury by other government agencies. In addition, the TIN will be used to collect and report to the Department of the Treasury any delinquent indebtedness arising out of the licensee's or applicant's relationship with the NRC.

Dated at Rockville, Maryland, this 23rd of November, 2018.

For the Nuclear Regulatory Commission.

David C. Cullison,

NRC Clearance Officer, Office of the Chief Information Officer.

[FR Doc. 2018–25937 Filed 11–27–18; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket Nos. 50–317, 50–318, 72–8, 50–333, 72–12, 50–220, 50–410, 72–1036; NRC–2018–0262]

Exelon Generation Company, LLC; Calvert Cliffs Nuclear Power Plant, Units 1 and 2; Calvert Cliffs Independent Spent Fuel Storage Installation; James A. FitzPatrick Nuclear Power Plant; Nine Mile Point Nuclear Station, Units 1 and 2

AGENCY: Nuclear Regulatory Commission.

ACTION: Environmental assessment and finding of no significant impact; issuance.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is considering a request to amend licenses held by Exelon Generation Company, LLC (Exelon, the licensee) for the operation of Calvert Cliffs Nuclear Power Plant (Calvert Cliffs), Units 1 and 2; James A. FitzPatrick Nuclear Power Plant (FitzPatrick); and Nine Mile Point Nuclear Station (Nine Mile Point), Units 1 and 2 (the facilities). Amending these operating licenses would also affect the independent spent fuel storage installations (ISFSIs) at each facility. The proposed license amendments would revise the emergency response organization (ERO) positions identified in the emergency plan for each facility. The NRC is issuing an environmental assessment (EA) and finding of no significant impact (FONSI) associated with the proposed license amendments.

DATES: The EA and FONSI referenced in this document are available on November 28, 2018.

ADDRESSES: Please refer to Docket ID NRC–2018–0262 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–2018–0262. Address any 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 each document referenced (if it is available in ADAMS) is provided the first time that it is mentioned in this document. In addition, for the convenience of the reader, the ADAMS accession numbers are provided in a table in the ''Availability of Documents'' section of this document.
- *NRC's PDR:* You may examine and purchase copies of public documents at the NRC's PDR, Room O1–F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.

FOR FURTHER INFORMATION CONTACT: Blake A. Purnell, Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–1380; email: *Blake.Purnell@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Introduction

The NRC is considering a request by Exelon to amend the following operating licenses: (1) Renewed Facility Operating License Nos. DPR–53 and DPR–69 for Calvert Cliffs, Units 1 and 2, respectively, located in Calvert County, Maryland; (2) Renewed Facility Operating License No. DPR–59 for FitzPatrick located in Oswego County, New York; and (3) Renewed Facility Operating License Nos. DPR–63 and NPF–69 for Nine Mile Point, Units 1 and 2, respectively, located in Oswego County, New York. Amending these operating licenses would also affect the Calvert Cliffs ISFSI (Renewed License No. SNM–2505) and the generally licensed FitzPatrick and Nine Mile Point ISFSIs, which are co-located with the reactor facilities.

In accordance with section 51.21 of title 10 of the *Code of Federal Regulations* (10 CFR), the NRC prepared the following EA that analyzes the environmental impacts of the proposed licensing action. Based on the results of this EA, and in accordance with 10 CFR 51.31(a), the NRC has determined not to prepare an environmental impact statement for the proposed licensing action, and is issuing a FONSI.

II. Environmental Assessment

Description of the Proposed Action

The proposed action would revise the ERO positions identified in the emergency plan for each facility, including the on-shift, minimum, and full-augmentation ERO staffing

requirements. The proposed revisions include eliminating ERO positions; adding ERO positions; changing position descriptions, duties, and duty locations; and relocating certain position descriptions to other parts of the emergency plan or to implementing procedures.

The proposed action is in accordance with the licensee's application dated August 31, 2018 (ADAMS Package Accession No. ML18249A096).

Need for the Proposed Action

Nuclear power plant owners, Federal agencies, and State and local officials work together to create a system for emergency preparedness and response that will serve the public in the unlikely event of an emergency. An effective emergency preparedness program decreases the likelihood of an initiating event at a nuclear power reactor proceeding to a severe accident. Emergency preparedness cannot affect the probability of the initiating event, but a high level of emergency preparedness increases the probability of accident mitigation if the initiating event proceeds beyond the need for initial operator actions.

Each licensee is required to establish an emergency plan to be implemented in the event of an accident, in accordance with 10 CFR 50.47 and appendix E to 10 CFR part 50. The emergency plan covers preparation for evacuation, sheltering, and other actions to protect individuals near plants in the event of an accident.

The NRC, as well as other Federal and State regulatory agencies, reviews emergency plans to ensure that they provide reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency.

In addition to this EA, the NRC is conducting a safety assessment of Exelon's proposed changes to the emergency plan for each facility. This safety review will be documented in a separate safety evaluation. The safety evaluation of the proposed changes to the emergency plans will determine whether there continues to be reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency at Calvert Cliffs, FitzPatrick, or Nine Mile Point, in accordance with the standards of 10 CFR 50.47(b) and the requirements in appendix E to 10 CFR part 50.

The proposed action would align the emergency plans for the facilities with the NRC's alternative guidance for EROs provided in a June 12, 2018, letter to the Nuclear Energy Institute (ADAMS Accession No. ML18022A352). This alternative guidance is also included in draft Revision 2 to NUREG–0654/FEMA–REP–1, ''Criteria for Preparation and Evaluation of Radiological Emergency Response Plans and Preparedness in Support of Nuclear Power Plants'' (ADAMS Accession Nos. ML14163A605 and ML17083A815). This change would provide Exelon with greater flexibility in staffing ERO positions. Additionally, this change reflects changes in NRC regulations and guidance, as well as advances in technologies and best practices, that have occurred since NUREG–0654/FEMA–REP–1, Revision 1, was published in 1980. The application indicates that Exelon provided the State of New York a draft of the license amendment request for FitzPatrick and Nine Mile Point, and that the State of New York had no concerns. The application also indicates that Exelon provided the State of Maryland a draft of the license amendment request for Calvert Cliffs, and that the State of Maryland found the proposed changes acceptable.

Environmental Impacts of the Proposed Action

The proposed action consists of changes related to staffing positions, position descriptions, duties, and duty locations specified in the emergency plans for Calvert Cliffs, FitzPatrick, and Nine Mile Point. The on-shift, minimum, and full-augmentation ERO staffing requirements listed in the emergency plan would be revised. The revisions include eliminating ERO positions; adding ERO positions; changing position descriptions, duties, and duty locations; and relocating certain position descriptions to other parts of the emergency plan or to implementing procedures.

With regard to potential nonradiological environmental impacts, the proposed changes would have no impacts on land use or water resources, including terrestrial and aquatic biota, as they involve no new construction, ground disturbing activities, or modification of plant operational systems. There would be no changes to the quality or quantity of nonradiological effluents and no changes to the plants' National Pollutant Discharge Elimination System permits. The overall staffing levels are not expected to increase; therefore, worker vehicle air emissions are not expected to increase and established threshold emissions set forth in 40 CFR 93.153(b) for designated nonattainment or maintenance areas would not be exceeded. Since the proposed changes will not increase staffing levels and will not involve ground disturbing activities, modification of plant operation systems, or new construction, there would be no noticeable effect on socioeconomic conditions in the region, no environment justice impacts, and no impacts to historic and cultural resources from the proposed changes. Therefore, there would be no significant nonradiological environmental impacts associated with the proposed action.

With regard to potential radiological environmental impacts, if the NRC staff's safety review of the proposed changes to the licensee's emergency plans determines that the emergency plans would continue to meet the standards of 10 CFR 50.47(b) and the requirements in appendix E to 10 CFR part 50, then the proposed action would not increase the probability or consequences of radiological accidents. Additionally, the NRC staff has concluded that the proposed changes would have no radiological environmental impacts. There would be no change to the types or amounts of radioactive effluents that may be released and, therefore, no change in occupational or public radiation exposure from the proposed changes. Moreover, no changes would be made to plant buildings or the site property from the proposed changes. Therefore, there would be no significant radiological environmental impacts associated with the proposed action.

Environmental Impacts of the Alternatives to the Proposed Action

As an alternative to the proposed action, the NRC staff considered denial of the license amendment request (*i.e.,* the ''no-action'' alternative). Denial of the license amendment request would result in no change in current environmental impacts. Accordingly, the environmental impacts of the proposed action and the no-action alternative would be similar.

Alternative Use of Resources

There are no unresolved conflicts concerning alternative uses of available resources under the proposed action.

Agencies and Persons Consulted

No additional agencies or persons were consulted regarding the environmental impact of the proposed action. However, in accordance with 10 CFR 50.91, the licensee provided copies of its application to the States of New York and Maryland, and the NRC staff will consult with these states prior to issuance of the amendments.

III. Finding of No Significant Impact

The licensee has requested license amendments pursuant to 10 CFR 50.54(q) to revise the ERO positions identified in the emergency plans for Calvert Cliffs, FitzPatrick, and Nine Mile Point by eliminating ERO positions; adding ERO positions; changing position descriptions, duties, and duty locations; and relocating certain position descriptions to other parts of the emergency plan or to implementing procedures. The NRC is considering issuing the requested amendments. The proposed action would not significantly affect plant safety, would not have a significant adverse effect on the probability of an accident occurring, and would not have any significant radiological or nonradiological impacts. The reason the environment would not be significantly affected is because the proposed changes are not expected to increase the overall staffing levels and do not involve any construction or modification of the specified facilities. This FONSI incorporates by reference the EA in Section II of this notice. Therefore, the NRC concludes that the proposed action would not have a significant effect on the quality of the human environment. Accordingly, the NRC has determined there is no need to prepare an environmental impact statement for the proposed action.

Previous considerations regarding the environmental impacts of operating Calvert Cliffs, Units 1 and 2; Calvert Cliffs ISFSI; FitzPatrick; and Nine Mile Point, Units 1 and 2, in accordance with their renewed operating licenses, are described in the documents listed in the table in Section IV.

This FONSI and other related environmental documents may be examined, and/or copied for a fee, at the NRC's PDR, located at One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852. Publicly-available records are also accessible online in the ADAMS Public Documents collection at *http://www.nrc.gov/reading-rm/adams.html.* Persons who do not have access to ADAMS or who encounter problems in accessing the documents located in ADAMS should contact the NRC's PDR reference staff by telephone at 1–800–397–4209 or 301–415–4737, or by email to *pdr.resource@nrc.gov.*

IV. Availability of Documents

The documents identified in the following table are available to interested persons through one or more of the following methods, as indicated.

Document	ADAMS Accession No.
Exelon, License Amendment Request for Approval of Changes to Emergency Plan Staffing Requirements, dated August 31, 2018.	ML18249A096
NRC letter to the Nuclear Energy Institute, Alternative Guidance for Licensee Emergency Response Organizations, dated June 12, 2018.	ML18022A352
NUREG-0654/FEMA-REP-1, draft Revision 2, ''Criteria for Preparation and Evaluation of Radiological Emergency Response Plans and Preparedness in Support of Nuclear Power Plants''.	ML14163A605 and ML17083A815
NUREG-1437, Supplement 1, ''Generic Environmental Impact Statement for License Renewal of Nuclear Plants: Regarding the Calvert Cliffs Nuclear Power Plant,'' Final Report, dated October 1999.	ML063400277
NRC, ''Environmental Assessment for the Proposed Renewal of U.S. Nuclear Regulatory Commission License No. SNM–2505 for Exelon Generation Corporation [sic], LLC's Calvert Cliffs Independent Spent Fuel Storage Installation,'' dated October 2014.	ML14282A278
NUREG-1437, Supplement 31, ''Generic Environmental Impact Statement for License Renewal of Nuclear Plants: Regarding James A. FitzPatrick Nuclear Power Plant,'' Final Report, dated January 2008.	ML080170183
NUREG-1437, Supplement 24, ''Generic Environmental Impact Statement for License Renewal of Nuclear Plants: Regarding James A. FitzPatrick Nuclear Power Plant,'' Final Report, dated May 2006.	ML061290310

Dated at Rockville, Maryland, on November 23, 2018.

For the Nuclear Regulatory Commission.

Blake A. Purnell,

Project Manager, Plant Licensing Branch III, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation.

[FR Doc. 2018–25930 Filed 11–27–18; 8:45 am]

BILLING CODE 7590–01–P

OFFICE OF PERSONNEL MANAGEMENT

Information Collection: RI 20–126—Certification of Qualifying District of Columbia Service Under Section 1905 of Public Law 111–84

AGENCY: Office of Personnel Management.

ACTION: 60-Day notice and request for comments.

SUMMARY: The Retirement Services, Office of Personnel Management (OPM) offers the general public and other federal agencies the opportunity to comment on the revision of a currently approved information collection, RI 20–126—Certification of Qualifying District of Columbia Service under Section 1905 of Public Law 111–84.

DATES: Comments are encouraged and will be accepted until January 28, 2019.

ADDRESSES: Interested persons are invited to submit written comments on the proposed information collection to Retirement Services, Office of Personnel Management, 1900 E Street NW, Washington, DC 20415, Attention: Alberta Butler, Room 2347–E, or sent via electronic mail to *Alberta.Butler@opm.gov.*

FOR FURTHER INFORMATION CONTACT: A copy of this information collection instrument with applicable supporting documentation, may be obtained by contacting the Retirement Services Publications Team, Office of Personnel Management, 1900 E Street NW, Room 3316–L, Washington, DC 20415, Attention: Cyrus S. Benson, or sent via electronic mail to *Cyrus.Benson@opm.gov* or faxed to (202) 606–0910 or via telephone at (202) 606–4808.

SUPPLEMENTARY INFORMATION: As required by the Paperwork Reduction Act of 1995 (Pub. L. 104–13, 44 U.S.C. chapter 35) OPM is soliciting comments for this collection (OMB No. 3206–0268). We are particularly interested in comments that:

1. Evaluate whether the proposed collection of information is necessary for the proper performance of functions of the agency, including whether the information will have practical utility;
2. Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
3. Enhance the quality, utility, and clarity of the information to be collected; and
4. Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other

technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submissions of responses.

RI 20–126 is used to certify that an employee performed certain service with the District of Columbia (DC) that qualifies under section 1905 of Public Law 111–84 for determining retirement eligibility. However, this service cannot be used in the computation of a retirement benefit.

Analysis

Agency: Retirement Operations, Retirement Services, Office of Personnel Management.

Title: Certification of Qualifying District of Columbia Service under Section 1905 of Public Law 111–84 (RI 20–126).

OMB Number: 3206–0268.

Frequency: On occasion.

Affected Public: Individuals or households.

Number of Respondents: 1,000.

Estimated Time per Respondent: 30 minutes.

Total Burden Hours: 500 hours.

Office of Personnel Management.

Alexys Stanley,

Regulatory Affairs Analyst.

[FR Doc. 2018–25902 Filed 11–27–18; 8:45 am]

BILLING CODE 6325–38–P

OFFICE OF PERSONNEL MANAGEMENT

Submission for Review: Notice of Change in Student's Status, RI 25–15

AGENCY: U.S. Office of Personnel Management.

ACTION: 60-Day notice and request for comments.

SUMMARY: The Retirement Services, Office of Personnel Management (OPM) offers the general public and other Federal agencies the opportunity to comment on a revised information collection request (ICR), Notice of Change in Student's Status, RI 25–15.

DATES: Comments are encouraged and will be accepted until January 28, 2019.

ADDRESSES: Interested persons are invited to submit written comments on the proposed information collection to, Retirement Services, U.S. Office of Personnel Management, 1900 E Street, NW, Washington, DC 20415, Attention: Alberta Butler, Room 2347E, or sent by email to *Alberta.Butler@opm.gov.*

FOR FURTHER INFORMATION CONTACT: A copy of this ICR with applicable supporting documentation, may be obtained by contacting the Retirement Services Publications Team, Office of Personnel Management, 1900 E Street NW, Room 3316–L, Washington, DC 20415, Attention: Cyrus S. Benson, or sent by email *to Cyrus.Benson@opm.gov* or faxed to (202) 606–0910 or via telephone at (202) 606–4808.

SUPPLEMENTARY INFORMATION: As required by the Paperwork Reduction Act of 1995 (Pub. L. 104–13, 44 U.S.C. chapter 35) as amended by the Clinger-Cohen Act (Pub. L. 104–106), OPM is soliciting comments for this collection (OMB No. 3206–0042). The Office of Management and Budget is particularly interested in comments that:

1. Evaluate whether the proposed collection of information is necessary for the proper performance of functions of the agency, including whether the information will have practical utility;

2. Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

3. Enhance the quality, utility, and clarity of the information to be collected; and

4. Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submissions of responses.

RI 25–15, Notice of Change in Student's Status, is used to collect sufficient information from adult children of deceased Federal employees or annuitants to assure that the child continues to be eligible for payments from OPM.

Analysis

Agency: Retirement Operations, Retirement Services, Office of Personnel Management.

Title: Notice of Change in Student's Status.

OMB: 3206–0042.

Frequency: On occasion.

Affected Public: Individuals or Households.

Number of Respondents: 2,500.

Estimated Time per Respondent: 20 minutes.

Total Burden Hours: 835.

U.S. Office of Personnel Management.

Alexys Stanley,

Regulatory Affairs Analyst.

[FR Doc. 2018–25904 Filed 11–27–18; 8:45 am]

BILLING CODE 6325–38–P

OFFICE OF PERSONNEL MANAGEMENT

Submission for Review: Reinstatement of a Previously Approved Information Collection With Revision, Office of Personnel Management (OPM) Standard Form (SF) 15, Application for 10-Point Veteran Preference, OMB No. 3206–0001

AGENCY: Office of Personnel Management.

ACTION: 30-Day notice and request for comments.

SUMMARY: The Office of Personnel Management (OPM)'s Talent Acquisition and Workforce Shaping Center offers the general public and other Federal agencies the opportunity to comment on a request for reinstatement of a revised information collection for the Standard Form (SF) 15, *Application for 10-Point Veteran Preference.* As required by the Paperwork Reduction Act of 1995, as amended by the Clinger-Cohen Act, OPM is soliciting comments for this collection. The information collection was previously published in the **Federal Register** on November 21, 2017, allowing for a 60-day public comment period. Two comments were received for this information collection. The purpose of this notice is to allow an additional 30 days for public comments.

DATES: Comments are encouraged and will be accepted until December 28, 2018. This process is conducted in accordance with 5 CFR 1320.1.

ADDRESSES: Interested persons are invited to submit written comments on the revised information collection to Kimberly A. Holden, Deputy Associate Director for Talent Acquisition and Workforce Shaping, Employee Services, U.S. Office of Personnel Management, Room 6351D, 1900 E Street NW, Washington, DC 20415–9700; email *employ@opm.gov*; or fax (202) 606–2329; and to *OMB Designee,* OPM Desk Officer, Office of Management and Budget, Office of Information and Regulatory Affairs, New Executive Office Building NW, Room 10235, Washington, DC 20503; email *oira_submission@omb.eop.gov*; or fax (202) 395–6974.

FOR FURTHER INFORMATION CONTACT: A copy of this information collection request, with applicable supporting documentation, may be obtained by contacting the Office of Information and Regulatory Affairs, Office of Management Budget, 725 17th Street NW, Washington, DC 20503, Attention: Desk Officer for the Office of Personnel Management or sent via email to

oira_submission@omb.eop.gov or faxed to (202) 395–6974.

SUPPLEMENTARY INFORMATION: The Office of Management and Budget is particularly interested in comments that:

1. Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
2. Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
3. Enhance the quality, utility, and clarity of the information to be collected; and
4. Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submissions of responses.

The SF 15, *Application for 10-Point Veteran Preference,* is used by veterans as both a request for preference and a guide to determine the appropriate documentation to submit to support their claims of 10-point veterans' preference when applying for Federal employment. The SF 15, and the accompanying documentation, is used by agencies, OPM examining offices, and agency appointing officials to adjudicate individuals' claims for veterans' preference in accordance with the Veterans' Preference Act of 1944, as amended. The proposed revisions to the SF 15 are necessary to update language as a result of the enactment of the Gold Star Fathers Act of 2015 (Pub. L. 114–62), derived veterans' preference for parents, and to make additional corrections on the form, as follows:

- Page 1, Item 9 is revised to reflect derived veterans' preference for parents.
- Page 2, Item A, 4th bullet is corrected to read that certification is of an expected discharge or release from active duty service in the armed forces under honorable conditions not later than 120 days after the date the certification is submitted.
- Page 2, Items C and F are corrected to reflect derived veterans' preference for parents.
- Several punctuation errors are corrected.

Comments

OPM received comments from two Federal agencies. One agency commented that the form has practical utility and is needed to properly adjudicate veterans' preference in case exam announcements. The same agency agreed with OPM's analysis and commented that the changes in the form are likely to provide small increases in the quality, utility and clarity of the information to be collected. This agency made three suggestions on the content of the form. First, on Page 2, Item F, the agency suggested changing ''physician'' to ''health care provider'' to be more in line with current regulations and to recognize that patients may be treated by someone other than a physician. OPM agrees and is changing ''physician'' to ''licensed medical professional.''

Second, the agency asked to have the veteran's signature block added back on the form to certify that the applicant has read, understood, and is providing accurate information. OPM is not adopting this suggestion. Many veterans and other applicants claiming 10-point veterans' preference complete an electronic version of the SF 15 which can make signing the form difficult. After an offer of employment is made and/or at the time of appointment, an applicant signs the Optional Form (OF) 306, *Declaration for Federal Employment,* certifying that all application material submitted is true, correct, complete, and made in good faith. This covers the SF 15 submitted at the time of application and, therefore, it is unnecessary for the applicant to sign the SF 15 separately.

Third, the agency suggested adding web links to the general veteran information from OPM to assist applicants. OPM is adopting this suggestion and adding the OPM web address in the instructions section on the form.

To minimize the burden of collection of information on veterans, another agency suggested adding a statement on page 2 to indicate that questions 1–7 only need to be answered if the person claiming preference is not the veteran. OPM is adopting this suggestion. This same agency suggested adding clarity to item C on page 2 to state that ''all of the following'' must be included in the documentation provided by spouses and parents. OPM is adopting this suggestion.

The SF 15 will continue to be available as a PDF fillable form for applicant use. The only acceptable version of this form will be as stated above, but consistent with current practice, the form may be submitted electronically or in hard copy. The SF 15 will be obtainable on the OPM website at *https://www.opm.gov/forms/standard-forms/.*

Analysis

Agency: Talent Acquisition and Workforce Shaping, Office of Personnel Management.

Title: SF 15, *Application for 10-Point Veteran Preference.*

OMB Number: 3206–0001.

Affected Public: Disabled Veterans.

Number of Respondents: 18,418.

Estimated Time per Respondent: 33.5 minutes.

Total Burden Hours: 10,283 hours.

Office of Personnel Management.

Alexys Stanley,

Regulatory Affairs Analyst.

[FR Doc. 2018–25903 Filed 11–27–18; 8:45 am]

BILLING CODE 6325–39–P

OFFICE OF PERSONNEL MANAGEMENT

Information Collection: Application for Death Benefits Under the Federal Employees Retirement System (SF 3104); and Documentation & Elections in Support of Application for Death Benefits When Deceased Was an Employee at the Time of Death (SF 3104B)

AGENCY: Office of Personnel Management.

ACTION: 60-Day notice and request for comments.

SUMMARY: The Retirement Services, Office of Personnel Management (OPM) offers the general public and other federal agencies the opportunity to comment on the revision of a currently approved information collection, Application for Death Benefits under the Federal Employees Retirement System (SF 3104); and Documentation & Elections in Support of Application for Death Benefits When Deceased Was an Employee at the Time of Death (SF 3104B).

DATES: Comments are encouraged and will be accepted until January 28, 2019.

ADDRESSES: Interested persons are invited to submit written comments on the proposed information collection to Retirement Services, Office of Personnel Management, 1900 E Street NW, Washington, DC 20415, Attention: Alberta Butler, Room 2347–E, or sent via electronic mail to *Alberta.Butler@opm.gov.*

FOR FURTHER INFORMATION CONTACT: A copy of this information collection instrument with applicable supporting documentation, may be obtained by contacting the Retirement Services Publications Team, Office of Personnel Management, 1900 E Street NW, Room

3316–L, Washington, DC 20415, Attention: Cyrus S. Benson, or sent via electronic mail to *Cyrus.Benson@opm.gov* or faxed to (202) 606–0910 or via telephone at (202) 606–4808.

SUPPLEMENTARY INFORMATION:

As required by the Paperwork Reduction Act of 1995 (Pub. L. 104–13, 44 U.S.C. chapter 35) OPM is soliciting comments for this collection (OMB No. 3206–0172). We are particularly interested in comments that:

1. Evaluate whether the proposed collection of information is necessary for the proper performance of functions of the agency, including whether the information will have practical utility;
2. Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
3. Enhance the quality, utility, and clarity of the information to be collected; and
4. Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submissions of responses.

SF 3104, Application for Death Benefits under the Federal Employees Retirement System, is needed to collect information so that OPM can pay death benefits to the survivor of Federal employees and annuitants. SF 3104B, Documentation in Support of Application for Death Benefits When Deceased Was an Employee at the Time of Death, is needed for deaths in service so that survivors can make the needed elections regarding health benefits, military service and payment of the death benefit.

Analysis

Agency: Retirement Operations, Retirement Services, Office of Personnel Management.

Title: Application for Death Benefits under the Federal Employees Retirement System and Documentation & Elections in Support of Application for Death Benefits When Deceased Was an Employee at the Time of Death.

OMB Number: 3206–0172.

Frequency: On occasion.

Affected Public: Individuals or households.

Number of Respondents: SF 3104 = 12,734 and SF 3104B = 4,017.

Estimated Time per Respondent: 60 minutes.

Total Burden Hours: 16,751 hours.

Office of Personnel Management.

Alexys Stanley,

Regulatory Affairs Analyst.

[FR Doc. 2018–25901 Filed 11–27–18; 8:45 am]

BILLING CODE 6325–38–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–84644; File No. SR–NYSENAT–2018–24]

Self-Regulatory Organizations; NYSE National, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Its Certificate of Incorporation and Bylaws

November 21, 2018.

Pursuant to Section 19(b)(1) [1] of the Securities Exchange Act of 1934 (''Act'') [2] and Rule 19b–4 thereunder,[3] notice is hereby given that on November 20, 2018, NYSE National, Inc. (''Exchange'' or ''NYSE National'') 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 Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend its certificate of incorporation and bylaws to (1) harmonize certain provisions thereunder with similar provisions in the governing documents of the Exchange's national securities exchange affiliates and parent companies; and (2) make clarifying and updating changes. The proposed rule change is available on the Exchange's website at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

(1) Generally [sic]

The Exchange proposes to the amend the Amended and Restated Certificate of Incorporation of the Exchange (''Exchange Certificate'') and the Fifth Amended and Restated Bylaws of the Exchange (''Exchange Bylaws'') to (1) harmonize certain provisions thereunder with similar provisions in the governing documents of the Exchange's national securities exchange affiliates [4] and parent companies; and (2) make clarifying and updating changes.

The Exchange is owned by NYSE Group, Inc. (''NYSE Group''), which in turn is indirectly wholly owned by NYSE Holdings LLC (''NYSE Holdings''). NYSE Holdings is a wholly owned subsidiary of Intercontinental Holdings, Inc. (''ICE Holdings''), which is in turn wholly owned by the Intercontinental Exchange, Inc. (''ICE'').[5]

The Exchange operates as a separate self-regulatory organization and has rules and membership rosters distinct from the rules and membership rosters of the other NYSE Group Exchanges. At the same time, however, the Exchange believes it is important for each of the NYSE Group Exchanges to have a consistent approach to corporate governance in certain matters, to simplify complexity and create greater

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

[4] The Exchange has four registered national securities exchange affiliates: NYSE Arca, Inc. (''NYSE Arca''), New York Stock Exchange LLC (''NYSE''), NYSE American LLC (''NYSE American''), and Chicago Stock Exchange, Inc. (''CHX'' and together with the Exchange, NYSE Arca, NYSE American, and NYSE, the ''NYSE Group Exchanges''). CHX has filed to change its name to NYSE Chicago, Inc. *See* Exchange Act Release No. 84494 (October 26, 2018) (SR–CHX–2018–05) (''NYSE Chicago Release'') (notice of filing and immediate effectiveness of proposal to reflect name changes of the Exchange and its direct parent company and to amend certain corporate governance provisions). The rule changes set forth in the NYSE Chicago Release will become operative upon the Second Amended and Restated Certificate of Incorporation of Chicago Stock Exchange, Inc. (''NYSE Chicago Certificate'') becoming effective pursuant to its filing with the Secretary of State of the State of Delaware.

[5] *See* Exchange Act Release No. 79902 (January 30, 2017), 82 FR 9258 (February 3, 2017) (SR–NSX–2016–16) (order approving proposed rule change in connection with proposed acquisition of the Exchange by NYSE Group, Inc.).

consistency among the NYSE Group Exchanges.[6]

Because the Exchange is a Delaware corporation, most of the proposed changes are based on the governing documents of CHX, which is also a Delaware corporation, and NYSE Arca, which is a Delaware non-stock corporation, as the most comparable NYSE Group Exchanges.[7] The proposed Exchange Certificate and Exchange Bylaws reflect the expectation that the Exchange will continue to be operated with a governance structure substantially similar to that of other NYSE Group Exchanges, primarily CHX and NYSE Arca.

The other changes described herein would become operative upon the Exchange Certificate becoming effective pursuant to its filing with the Secretary of State of the State of Delaware.

The proposed amendments described below are primarily based on the Second Amended and Restated Certificate of Incorporation of Chicago Stock Exchange, Inc. (''NYSE Chicago Certificate''), the Second Amended and Restated By-Laws of NYSE Chicago, Inc. (''NYSE Chicago Bylaws''),[8] and the Amended and Restated Bylaws of NYSE Arca, Inc. (''NYSE Arca Bylaws''). In addition, the amendments to the indemnification provisions are based on the Eighth Amended and Restated Bylaws of Intercontinental Exchange, Inc. (''ICE Bylaws'') and the Sixth Amended and Restated Bylaws of Intercontinental Exchange Holdings, Inc. (''ICE Holdings Bylaws'').

Proposed Amendments to the Exchange Certificate

The Exchange proposes to amend the Exchange Certificate as follows.

Introductory Paragraph

In a non-substantive change, the Exchange proposes to delete the sentence stating ''[t]he Certificate of Incorporation was restated on June 29, 2006, December 30, 2011, and February 18, 2015.''

Article FIRST

In a non-substantive change, the Exchange proposes to replace ''NYSE NATIONAL, INC.'' with ''NYSE National, Inc.'' in Article FIRST, to reflect that the legal name of the Exchange is not entirely in capital letters.

Article SECOND and Certificate of Change of Registered Agent and/or Registered Office

In a non-substantive change, the Exchange proposes to update the address of the registered office and name of the registered agent, as previously filed, and, because such address and office are no longer the initial address and office, delete the word ''initial'' from the provision. The Exchange also proposes to delete the ''Certificate of Change of Registered Agent and/or Registered Office.''[9]

Article FIFTH

Current paragraph (b) of Article FIFTH (Removal of Directors) provides that any director may be removed from office by a vote of the stockholders at any time with or without cause, except that Non-Affiliated Directors, as defined in the Exchange Bylaws, may only be removed for cause. The Exchange proposes to amend the definition of ''cause'' to provide that the list set forth in the provision is inclusive. The Exchange notes that the revised provision would be consistent with Article FIFTH(b) of the NYSE Chicago Certificate.[10]

Article EIGHTH

In a non-substantive change, the Exchange proposes to correct a typographical error in the title of Article EIGHTH, correcting ''Liabilitv'' with ''Liability''.

Article NINTH

In a non-substantive change, the Exchange proposes to amend Article NINTH to replace a reference to ''Delaware'' with ''the State of Delaware.''

Date

The Exchange proposes to update the date in the final paragraph.

Proposed Amendments to the Exchange Bylaws

The Exchange proposes to amend the Exchange Bylaws as follows.

Conforming Changes

In non-substantive changes, the Exchange proposes to delete the cover page and table of contents of the Exchange Bylaws, and amend the title to reflect that the proposed Exchange Bylaws are the ''Sixth Amended and Restated Bylaws of NYSE National, Inc.''

Article III (Board of Directors)

Section 3.6 (Vacancies): Section 3.6(a)(i) provides that any vacancy on the Board may be filled by the Chairman of the Board, subject to the approval by a majority of the directors then in office, and that any vacancy will be filled with a person who satisfies the classification associated with the vacant seat.

In an administrative change, the Exchange proposes to add that that the stockholders may also fill any vacancy, and those vacancies resulting from removal from office by a vote of the stockholders for cause may be filled by a vote of the stockholders at the same meeting at which such removal occurs. Because, under Section 3.2(a), the stockholders determine the number of directors, a new directorship may be created. Accordingly, the Exchange proposes to add to Section 3.6(a)(i) that any newly created directorship will be filled with a person who satisfies the classification associated with the seat.

The first two sentences of the amended paragraph would be as follows (additions *italicized*):

Notwithstanding any provision herein to the contrary, any vacancy in the Board, however occurring, including a vacancy resulting from an increase in the number of the directors, may be filled *(i)* by the Chairman of the Board, subject to the approval by a majority of the directors then in office*, or (ii) by action taken by the stockholders of the Exchange, and those vacancies resulting from removal from office by a vote of the stockholders for cause may be filled by a vote of the stockholders at the same meeting at which such removal occurs.* Any vacancy *or newly-created directorship* will be filled with a person who satisfies the classification (*e.g.,* public) associated with the vacant seat.

[6] *See* NYSE Chicago Release, *supra* note 4, at 3.

[7] The other NYSE Group Exchanges, NYSE and NYSE American, are limited liability companies organized under New York and Delaware limited liability company law, respectively.

[8] The NYSE Chicago Certificate and NYSE Chicago Bylaws have been filed with the SEC, and will become operative when the NYSE Chicago Certificate becomes effective pursuant to its filing with the Secretary of State of the State of Delaware. *See* NYSE Chicago Release, *supra* note 4, at 4.

[9] *See* Exchange Act Release No. 82925 (March 22, 2018), 83 FR 13165 (March 27, 2018) (SR–NYSENAT–2018–04).

[10] *See* NYSE Chicago Release, *supra* note 4, at 14. *See also* Eighth Amended and Restated Bylaws of Cboe BZX Exchange, Inc. (''Cboe BZX Bylaws''), Section 3.4(c) (providing that ''[n]o Representative Director may be removed from office by a vote of the stockholders at any time except for cause, which shall *include, but not limited to,* (i) a breach of a Representative Director's duty of loyalty to the Corporation or its stockholders, (ii) acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law, (iii) transactions from which a Representative Director derived an improper personal benefit, or (iv) a failure of a Representative Director to be free from a statutory disqualification (as defined in Section 3(a)(39) of the Act)'') (emphasis added; NYSE Operating Agreement, Article II, Section 2.03(l) (providing that cause ''shall include, without limitation, the failure of [a] Director to be free of any statutory disqualification . . .''); and NYSE American Operating Agreement, Article II, Section 2.03(l) (same).

The change would be consistent with clause (ii) of Article II, Section 5 of the NYSE Chicago Bylaws, which was amended at the time of its acquisition by ICE.[11]

Section 3.7 (Removal): Section 3.7 provides that any director may be removed from office by a vote of the stockholders at any time with or without cause, except that non-affiliated directors may only be removed for cause. The Exchange proposes to amend the definition of ''cause'' to provide that the list set forth in the provision is inclusive, by replacing ''mean only'' with ''include.'' As a result of the proposed amendment, the definition of ''cause'' would be substantially similar to the definition in Article FIFTH(b) of the NYSE Chicago Certificate.

In a non-substantive change, the Exchange proposes to amend clause (iii) to replace a reference to ''Delaware'' with ''the State of Delaware.''

Section 3.9 (Regular Meetings): Section 3.9 specifies that regular meetings may be held, with or without notice, at such time or place as the Board may specify in a resolution. The Exchange proposes an administrative change to eliminate the requirement for a Board resolution. The change would be consistent with the governing documents of the other NYSE Group Exchanges, which do not require a board resolution in order to call a meeting.[12]

Section 3.10 (Special Meetings): Paragraph (a) of Section 3.10 permits special meetings of the Board to be called on two days' notice to each Director by the Chairman or the Chief Executive Officer, or by the Secretary upon the request of any three Directors. In an administrative change, The Exchange proposes to reduce the minimum notice requirement from two days to one day, consistent with Article II, Section 9(a) of the NYSE Chicago Bylaws.[13] The Exchange believes that reducing the minimum notice requirement to one day is reasonable as it would facilitate the Board meeting quickly.

Paragraph (b) of Section 3.10 requires the person calling a special meeting to fix the time and place at which the meeting will be held, and deems notice to be given five business days after deposit in the United States mail. In an administrative change, the Exchange proposes to:

- Eliminate the requirement that the person calling the special meeting fix the time and place of the meeting, as Article III, Section 3.8 already addresses the place and mode of Board meetings;
- state that notice may be given by written, electronic or telephonic means; and
- reduce the period for deemed notice of mailed notice from five to two business days.

The changes would be consistent with Article II, Section 9(b) of the NYSE Chicago Bylaws.

Sections 3.11 (Voting; Quorum and Action by the Board) and 3.14 (Action in Lieu of Meeting): Section 3.11 provides that the presence of a majority of the directors then in office shall constitute a quorum for Board meetings. Section 3.14 provides that, unless otherwise restricted by statute, the Exchange Certificate or the Exchange By-Laws, action may be taken without a meeting if certain procedural requirements are met. The Exchange proposes to make the following administrative changes to the provisions:

- In Section 3.11, the Exchange proposes to clarify that the proposed quorum requirement would apply ''[e]xcept as otherwise required by law'' [14] and to change a reference to ''statute'' with ''law.''
- In Section 3.14, the Exchange proposes to replace ''restricted by statute'' with ''provided by law.''

The change to add an exception to Section 3.11 would allow the written notice to be consistent with both applicable law and the Exchange Bylaws, should applicable law set forth specific requirements that differ from the Bylaw provision. The Exchange proposes to change ''statute'' to ''law,'' as the latter is a broader term, which includes non-statutory law, such as common law. The changes would be consistent with the NYSE Chicago Bylaws.[15]

Article IV (Stockholders)

Sections 4.1 (Annual Meeting), 4.2 (Special Meetings), and 4.4 (Quorum and Vote Required for Action): Among other provisions, Sections 4.1 and 4.2 set forth the notice requirements for annual and special meetings of stockholders. Section 4.4 sets forth the quorum and voting requirements. For the reasons set forth above, the Exchange proposes to make the following administrative changes to the provisions:

- The Exchange proposes to add ''[e]xcept as otherwise provided by law,'' before the sentences in Sections 4.1 and 4.2 that set forth the written notice requirements.[16]
- In Section 4.4, the Exchange proposes to replace ''statute'' with ''law'' in paragraph (a) and ''Statute'' with ''General Corporation Law of the State of Delaware'' in paragraph (b).

The changes would be consistent with the NYSE Chicago Bylaws.[17]

Section 4.3 (List of Stockholders): Section 4.3 provides that the Secretary or a designated person shall have charge of the stock ledger of the Exchange and, before every stockholder meeting, shall prepare a list of stockholders entitled to vote. In an administrative change, the Exchange proposes to amend the provision such that, as permitted by Section 219(a) of the DGCL, the ''Exchange'' keeps the ledger and prepares the list of stockholders.[18] The change would be consistent with Article III, Section 4 of the NYSE Chicago Bylaws.[19]

Section 4.6 (Action in Lieu of Meeting): Section 4.6 permits stockholder action to be taken by written consent and provides certain requirements related to such written consent. In an administrative change, the Exchange proposes to amend the provisions to permit stockholder action to be taken by written consent and to the extent provided by the DGCL, but only if the matter to be voted upon were approved by the Board and the Board had directed that the matter be brought before the stockholders. The amended provision would be substantially similar

[11] *See* Exchange Act Release No. 83635 (July 13, 2018), 83 FR 34182 (July 19, 2018) (SR–CHX–2018–004), and Partial Amendment No. 2 to SR–CHX–2018–004 (June 11, 2018).

[12] *See* NYSE Arca Bylaws, Article III, Section 3.05; NYSE Chicago Bylaws, Article II, Section 8; NYSE Operating Agreement, Article II, Section 2.03(c); and NYSE American Operating Agreement, Article II, Section 2.03(c).

[13] *See* NYSE Chicago Release, *supra* note 4, at 24. One day of notice would be consistent with the bylaws of other national securities exchanges. *See* NYSE Operating Agreement, Article II, Section 2.03(c) (requiring 12 or 24 hours of notice, with the exception of mailed notice); NYSE American Operating Agreement, Article II, Section 2.03(c) (requiring 12 or 24 hours of notice, with the exception of mailed notice); Cboe BZX Bylaws, Section 3.11 (requiring 24 hours of notice); Tenth Amended and Restated Bylaws of Cboe Exchange, Inc. (''Cboe Exchange Bylaws''), Section 3.11 (requiring 24 hours of notice); and Bylaws of Nasdaq, Inc., Article IV, Section 4.12 (requiring that notice be sent no later than ''the day before the day'' of the meeting, with the exception of mailed notice).

[14] *See, e.g.* DCGL Section 141(b).

[15] *See* NYSE Chicago Bylaws, Article II, Sections 10 and 13; and NYSE Chicago Release, *supra* note 4, at 26–27.

[16] *See* Del. Code tit. 8, § 222.

[17] *See* NYSE Chicago Bylaws, Article III, Sections 1, 2, and 5(b); and NYSE Chicago Release, *supra* note 4, at 29–31.

[18] Del. Code tit. 8, § 219(a).

[19] *See* NYSE Chicago Release, *supra* note 4, at 30.

to Article III, Section 7 of the NYSE Chicago Bylaws.[20]

Article V (Committees)

Section 5.2 (Appointment; Vacancies; and Removal): Section 5.2(b) provides that any vacancy in a Board committee shall be filled by the Chief Executive Officer with the approval of the Board. Consistent with the DGCL and Article IV, Section 2(b) of the NYSE Chicago Bylaws,[21] the Exchange proposes to provide that only the Board can fill a vacancy in a Board committee.

Section 5.6 (Regulatory Oversight Committee): Section 5.6 establishes the powers and responsibilities of the Regulatory Oversight Committee, and is substantially the same as the related provisions in the governing documents of the other NYSE Group Exchanges. [22] Among other things, the provision states that ''[t]he Board may, on affirmative vote of a majority of directors, at any time remove a member of the ROC for cause.'' The Exchange proposes to add language clarifying that the majority affirmative vote requirement is based on the ''directors then in office,'' as opposed to total number of seats on the Board. The change would be consistent with Article IV, Section 6 of the NYSE Chicago Bylaws.[23]

Article VII (Indemnification)

Current Article VII includes provisions related to indemnification by the Exchange. As a wholly-owned subsidiary of ICE, the Exchange believes it appropriate to harmonize the Exchange's indemnification provisions with those of ICE and the Exchange's intermediate holding company, ICE Holdings.[24] The same change was made to Article VI of the NYSE Chicago Bylaws.[25]

Accordingly, the Exchange proposes to delete the text of Section 7.1 (Indemnification) in its entirety and replace it with proposed text that is substantially similar to the CHX, ICE and ICE Holdings provisions, with the exception of changes to be consistent with the Exchange Bylaws' terminology.[26] The proposed text follows:

(a) The Exchange shall, to the fullest extent permitted by law, as those laws may be amended and supplemented from time to time, indemnify any director or officer made, or threatened to be made, a party to any action, suit or proceeding, whether criminal, civil, administrative or investigative, by reason of being a director or officer of the Exchange or a predecessor corporation or, at the Exchange's request, a director, officer, partner, member, employee or agent of another corporation or other entity; provided, however, that the Exchange shall indemnify any director or officer in connection with a proceeding initiated by such person only if such proceeding was authorized in advance by the Board of Directors of the Exchange. The indemnification provided for in this Section 7.1 shall: (i) Not be deemed exclusive of any other rights to which those indemnified may be entitled under any bylaw, agreement or vote of stockholders or disinterested directors or otherwise, both as to action in their official capacities and as to action in another capacity while holding such office; (ii) continue as to a person who has ceased to be a director or officer; and (iii) inure to the benefit of the heirs, executors and administrators of an indemnified person.

(b) Expenses incurred by any such person in defending a civil or criminal action, suit or proceeding by reason of the fact that he is or was a director or officer of the Exchange (or was serving at the Exchange's request as a director, officer, partner, member, employee or agent of another corporation or other entity) shall be paid by the Exchange in advance of the final disposition of such action, suit or proceeding upon receipt of an undertaking by or on behalf of such director or officer to repay such amount if it shall ultimately be determined that he or she is not entitled to be indemnified by the Exchange as authorized by law. Notwithstanding the foregoing, the Exchange shall not be required to advance such expenses to a person who is a party to an action, suit or proceeding brought by the Exchange and approved by a majority of the Board of Directors of the Exchange that alleges willful misappropriation of corporate assets by such person, disclosure of confidential information in violation of such person's fiduciary or contractual obligations to the Exchange or any other willful and deliberate breach in bad faith of such person's duty to the Exchange or its stockholders.

(c) The foregoing provisions of this Section 7.1 shall be deemed to be a contract between the Exchange and each director or officer who serves in such capacity at any time while this bylaw is in effect, and any repeal or modification thereof shall not affect any rights or obligations then existing with respect to any state of facts then or theretofore existing or any action, suit or proceeding theretofore or thereafter brought based in whole or in part upon any such state of facts. The rights provided to any person by this bylaw shall be enforceable against the Exchange by such person, who shall be presumed to have relied upon it in serving or continuing to serve as a director or officer or in such other capacity as provided above.

(d) The Board of Directors in its discretion shall have power on behalf of the Exchange to indemnify any person, other than a director or officer, made or threatened to be made a party to any action, suit or proceeding, whether criminal, civil, administrative or investigative, by reason of the fact that such person, or his or her testator or intestate, is or was an officer, employee or agent of the Exchange or, at the Exchange's request, is or was serving as a director, officer, partner, member, employee or agent of another corporation or other entity.

(e) To assure indemnification under this Section 7.1 of all directors, officers, employees and agents who are determined by the Exchange or otherwise to be or to have been ''fiduciaries'' of any employee benefit plan of the Exchange that may exist from time to time, Section 145 of the Delaware General Corporation Law shall, for the purposes of this Section 7.1, be interpreted as follows: An ''other enterprise'' shall be deemed to include such an employee benefit plan, including without limitation, any plan of the Exchange that is governed by the Act of Congress entitled ''Employee Retirement Income Security Act of 1974,'' as amended from time to time; the Exchange shall be deemed to have requested a person to serve an employee benefit plan where the performance by such person of his duties to the Exchange also imposes duties on, or otherwise involves services by, such person to the plan or participants or beneficiaries of the plan; excise taxes assessed on a person with respect to an employee benefit plan pursuant to such Act of Congress shall be deemed ''fines.''

[20] *See id.,* at 31–32.

[21] *See* Del. Code tit. 8, § 141(c)(1).

[22] *See* NYSE Arca Rule 3.3; NYSE Operating Agreement, Article II, Section 2.03(h)(ii); NYSE American Operating Agreement, Article II, Section 2.03(h)(ii); NYSE Chicago Bylaws, Article IV, Section 6.

[23] *See* NYSE Chicago Release, *supra* note 4, at 35. The Exchange understands that NYSE, NYSE American, and NYSE Arca propose to file similar changes to their respective ROC provisions.

[24] *See* ICE Bylaws, Article X, Section 10.6, and ICE Holdings Bylaws, Article X, Section 10.6.

[25] *See* NYSE Chicago Release, *supra* note 4, at 41. The Exchange understands that NYSE, NYSE American, and NYSE Arca propose to file similar changes to their respective indemnification provisions.

[26] For example, proposed Section 7.1 uses ''officer'' instead of ''Senior Officers,'' ''Exchange'' instead of ''Corporation,'' and ''Section 7.1'' instead of ''Section 10.6.''

Article IX (Certificates of Stock and Their Transfer)

Section 9.1 (Form and Execution of Certificates): Section 9.1 provides requirements related to the execution of stockholder certificates. The Exchange proposes to amend the requirements to provide that the certificate may be signed by ''any two authorized officers,'' instead of listing the specific officers authorized to execute a certificate, which better reflects the requirements of Section 158 of the DGCL.[27] The change would be consistent with Article VIII, Section 1 of the NYSE Chicago Bylaws.[28]

Article XI (General Provisions)

Section 11.2 (Dividends): Section 11.2 permits the Board to declare dividends. The Exchange proposes to replace the phrase ''[s]ubject to any provisions of any applicable statute,'' which qualifies the Board's authority to issue dividends, with ''[s]ubject to any applicable law'' so as to eliminate redundant language and clarify that proposed Section 11.2 would be subject to any non-statutory law, such as common law. The change would be consistent with Article X, Section 2 of the NYSE Chicago Bylaws.[29]

Section 11.4 (Subsidiaries): Section 11.4 authorizes the Board to constitute any officer of the Exchange to vote the stock of any subsidiary corporation on behalf of the Exchange. In an administrative change, the Exchange proposes to add a second sentence stating that ''[i]n the absence of specific action by the Board of Directors, the Chief Executive Officer and Secretary of the Exchange shall have authority to represent the Exchange and to vote, on behalf of the Exchange, the securities of other corporations, both domestic and foreign, held by the Exchange.''

The Exchange believes that permitting the Secretary of the Exchange to act on behalf of the Exchange pursuant to proposed Section 4 is appropriate given that the Secretary is frequently tasked to execute the Exchange's actions, especially as it relates to corporate governance. Under Section 11.4, the Board may constitute any officer of the Exchange, which includes the Secretary, to vote the stock of any subsidiary of the Exchange. The Board has approved the proposed changes to the Bylaws, including the proposed changes to Section 11.4. By approving the proposed changes to Section 11.4, the Board granted the Secretary the authority described therein. Moreover, proposed Section 11.4 would continue to permit the Board to revoke such voting power or constitute another officer with such voting power. The change would be consistent with Article X, Section 4 of the NYSE Chicago Bylaws.[30]

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Exchange Act,[31] in general, and furthers the objectives of Section 6(b)(1)[32] in particular, in that it enables the Exchange to be so organized as to have the capacity to be able to carry out the purposes of the Exchange Act and to comply, and to enforce compliance by its exchange members and persons associated with its exchange members, with the provisions of the Exchange Act, the rules and regulations thereunder, and the rules of the Exchange. The Exchange also believes that the proposed rule change is consistent with Section 6(b)(5) of the Exchange Act,[33] in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest.

The Exchange believes that the proposed amendments to harmonize certain provisions of the Exchange Certificate and Bylaws with similar provisions of the governing documents of other NYSE Group Exchanges, ICE and ICE Holdings would contribute to the orderly operation of the Exchange and would enable the Exchange to be so organized as to have the capacity to carry out the purposes of the Exchange Act and comply with the provisions of the Exchange Act by its members and persons associated with members. For example, the proposed changes would create greater conformity between the Exchange's provisions relating to stockholders, officers, and stock certificates and those of its affiliates, particularly CHX and NYSE Arca. The Exchange believes that such conformity would streamline the NYSE Group Exchanges' corporate processes, create more equivalent governance processes among them, and also provide clarity to the Exchange's members, which is beneficial to both investors and the public interest. At the same time, the Exchange will continue to operate as a separate self-regulatory organization and to have rules and membership rosters distinct from the rules and membership rosters of the other NYSE Group Exchanges.

The Exchange also believes that the greater consistency among the governing documents of the NYSE Group Exchanges, ICE and ICE Holdings would promote the maintenance of a fair and orderly market, the protection of investors and the protection of the public interest. Indeed, the proposed amendments would make the corporate requirements and administrative processes relating to the Board, Board committees, officers, stockholders, and other corporate matters more similar to those of the NYSE Group Exchanges, in particular CHX and NYSE Arca, which have been established as fair and designed to protect investors and the public interest.[34]

The proposed amendments to clarify the meaning of certain provisions of the Exchange Certificate and the Exchange Bylaws, to better comport certain provisions with the DGCL and to effect non-substantive changes would facilitate the Exchange's continued compliance with the Exchange Certificate and Bylaws and applicable law, which would further enable the Exchange to be so organized as to have the capacity to be able to carry out the purposes of the Exchange Act and to comply, and to enforce compliance by its exchange members and persons associated with its exchange members, with the provisions of the Exchange Act, the rules and regulations thereunder, and the rules of the Exchange. Such amendments would also remove impediments to and perfects the mechanism of a free and open market by removing confusion that may result from corporate governance provisions that are either unclear or inconsistent with the governing law.

The Exchange also believes that the proposed amendments would remove impediments to and perfect the mechanism of a free and open market by ensuring that persons subject to the Exchange's jurisdiction, regulators, and the investing public can more easily navigate and understand the governing documents. The Exchange further believes that the proposed amendments would not be inconsistent with the public interest and the protection of investors because investors will not be harmed and in fact would benefit from

[27] *See* Del. Code tit. 8, § 158.

[28] *See* NYSE Chicago Release, *supra* note 4, at 47.

[29] *See id.,* at 51.

[30] *See id.,* at 51–52.

[31] 15 U.S.C. 78f(b).

[32] 15 U.S.C. 78f(b)(1).

[33] 15 U.S.C. 78f(b)(5).

[34] *See* NYSE Chicago Release, *supra* note 4, Exchange Act Release Nos. 83303 (May 22, 2018), 83 FR 24517 (May 29, 2018) (SR–CHX–2018–004); and 81419 (August 17, 2017), 82 FR 40044 (August 23, 2017) (SR–NYSEArca–2017–40).

increased transparency and clarity, thereby reducing potential confusion.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Exchange Act. The proposed rule change is not intended to address competitive issues but rather is concerned solely with the corporate governance and administration of the Exchange.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act [35] and Rule 19b–4(f)(6) thereunder.[36] Because the proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative prior to 30 days from the date on which it was filed, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act and Rule 19b–4(f)(6)(iii) thereunder.

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B) [37] of the Act to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NYSENAT–2018–24 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–NYSENAT–2018–24. 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 a.m. and 3 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–NYSENAT–2018–24 and should be submitted on or before December 19, 2018.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[38]

Brent J. Fields,

Secretary.

[FR Doc. 2018–25896 Filed 11–27–18; 8:45 am]

BILLING CODE 8011–01–P

[35] 15 U.S.C. 78s(b)(3)(A)(iii).

[36] 17 CFR 240.19b–4(f)(6).

[37] 15 U.S.C. 78s(b)(2)(B).

[38] 17 CFR 200.30–3(a)(12).

DEPARTMENT OF THE TREASURY

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Multiple Departmental Offices 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 December 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:

Departmental Offices (DO)

1. Title: Reporting of International Capital and Foreign Currency Transactions and Positions

OMB Control Number: 1505–0149.

Type of Review: Extension without change of a currently approved collection.

Description: 31 CFR part 128 establishes general guidelines for reporting on U.S. claims on, and liabilities to foreigners; on transactions in securities with foreigners; and on monetary reserve of the U.S. It also establishes guidelines for reporting on the foreign currency of U.S. persons. It includes a record keeping requirement in section 128.5.

Form: None.

Affected Public: Businesses or other for-profits.

Estimated Number of Respondents: 2,134.

Frequency of Response: On occasion.

Estimated Total Number of Annual Responses: 21,568.

Estimated Time per Response: 20 minutes.

Estimated Total Annual Burden Hours: 7,189.

2. Title: Request for Transfer of Property Seized/Forfeited by a Treasury Agency

OMB Control Number: 1505–0152.

Type of Review: Revision of a currently approved collection.

Description: Form TD F 92–22.46 is necessary for the application for receipt of seized assets by State and Local Law Enforcement agencies.

Form: TD F 92–22.46.

Affected Public: State and local governments.

Estimated Number of Respondents: 1,000.

Frequency of Response: On occasion.

Estimated Total Number of Annual Responses: 7,000.

Estimated Time per Response: 30 minutes.

Estimated Total Annual Burden Hours: 3,500.

3. Title: Assessment of Fees on Large Bank Holding Companies and Nonbank Financial Companies

OMB Control Number: 1505–0245.

Type of Review: Revision of a currently approved collection.

Description: The Financial Research Fund (FRF) Preauthorized Payment Agreement form will collect information with respect to the final rule (31 CFR part 150) on the assessment of fees on large bank holding companies and nonbank financial companies supervised by the Federal Reserve Board to cover the expenses of the FRF.

Form: TD F 105.1.

Affected Public: Businesses or other for-profits.

Estimated Number of Respondents: 39.

Frequency of Response: Once.

Estimated Total Number of Annual Responses: 39.

Estimated Time per Response: 15 minutes.

Estimated Total Annual Burden Hours: 10.

Authority: 44 U.S.C. 3501 *et seq.*

Dated: November 21, 2018.

Spencer W. Clark,

Treasury PRA Clearance Officer.

[FR Doc. 2018–25909 Filed 11–27–18; 8:45 am]

BILLING CODE 4810–25–P

DEPARTMENT OF THE TREASURY

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Generic Clearance for Meaningful Access Information Collections

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 December 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:

Bureau of Engraving and Printing (BEP)

Title: Generic Clearance for Meaningful Access Information Collections (Conferences).

OMB Control Number: 1520–0009.

Type of Review: Extension without change of a currently approved collection.

Description: A court order was issued in *American Council of the Blind* v. *Paulson,* 591 F. Supp. 2d 1 (D.D.C. 2008) (''ACB v. Paulson'') requiring the Department of the Treasury and BEP to ''provide meaningful access to United States currency for blind and other visually impaired persons, which steps shall be completed, in connection with each denomination of currency, not later than the date when a redesign of that denomination is next approved by the Secretary of the Treasury . . .''

In compliance with the court's order, BEP intends to meet individually with blind and visually impaired persons and request their feedback about tactile features that BEP is considering for possible incorporation into the next U.S. paper currency redesign. BEP employees will attend national conventions and conferences for disabled persons. At those gatherings, BEP employees will invite blind and visually impaired persons to provide feedback about certain tactile features being considered for inclusion in future United States currency paper designs.

Form: None.

Affected Public: Individuals and households.

Estimated Number of Respondents: 650.

Frequency of Response: Once.

Estimated Total Number of Annual Responses: 650.

Estimated Time per Response: 1 hour.

Estimated Total Annual Burden Hours: 650.

Authority: 44 U.S.C. 3501 *et seq.*

Dated: November 21, 2018.

Spencer W. Clark,

Treasury PRA Clearance Officer.

[FR Doc. 2018–25910 Filed 11–27–18; 8:45 am]

BILLING CODE 4840–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0208]

Agency Information Collection Activity Under OMB Review: Department of Veterans Affairs Acquisition Regulation; Architect-Engineer Fee Proposal; Contractor Production Report; Daily Log and Contract Progress Report

AGENCY: Office of Acquisition and Logistics, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995, this notice announces that the Office of Acquisition and Logistics, Department of Veterans Affairs, will submit the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden and it includes the actual data collection instrument.

DATES: Comments must be submitted on or before December 28, 2018.

ADDRESSES: Submit written comments on the collection of information through

www.Regulations.gov, or to Office of Information and Regulatory Affairs, Office of Management and Budget, Attn: VA Desk Officer; 725 17th St. NW, Washington, DC 20503 or sent through electronic mail to *oira_submission@omb.eop.gov.* Please refer to ''OMB Control No. 2900–0208'' in any correspondence.

FOR FURTHER INFORMATION CONTACT: Rafael Taylor, Procurement Policy and Warrant Management Service (003A2A), Department of Veterans Affairs, 425 I Street NW, Washington, DC 20001, (202) 382–2787 or email *Rafael.Taylor@va.gov.* Please refer to ''OMB Control No. 2900–0208'' in any correspondence.

SUPPLEMENTARY INFORMATION:

Authority: 44 U.S.C. 3501–21.

Title: Department of Veterans Affairs Acquisition Regulation (VAAR): VA Form 6298 (formerly 10–6298), Architect-Engineer Fee Proposal; VA Form 10101, Contractor Production Report (formerly VA Form 10–6131, Daily Log and VA Form 10–6001a, Contract Progress Report).

OMB Control Number: 2900–0208.

Type of Review: Renewal with changes of a currently approved collection.

Abstract: This Paperwork Reduction Act (PRA) submission seeks renewal with changes of Office of Management and Budget (OMB) approval No. 2900–0208 as follows:

- Replace both existing VA Form 10–6131 (Daily Log (Contract Progress Report—Formal Contract)) and VA Form 10–6001a (Contract Progress Report) with one new form, which combines the intended purpose for VA Form 10–6131 and VA Form 10–6001a. The new combined form would now read: ''VA Form 10101, Contractor Production Report.''
- Renumber VA Form 10–6298 Architect-Engineer Fee Proposal, to ''VA Form 6298,'' and revise the content in the form with updated thresholds and FAR citations.

The above proposed revisions do not change the currently approved burden hours. The actual VA Form 10101 and VA Form 6298 can be located at VA Forms website *https://www.va.gov/vaforms/default.asp.*

The Department of Veterans Affairs, Office of Construction and Facilities Management (CFM), manages a multimillion-dollar construction program that involves the design and construction of medical centers, and other VA facilities including building improvements and conversions. The actual construction work is contracted out to private construction firms.

VA Form 6298 (formerly 10–6298), Architect-Engineer Fee Proposal: The use of this form is mandatory for obtaining the proposal and supporting cost or pricing data from the contractor and subcontractor in the negotiation of all architect-engineer contracts for design services when the contract price is estimated to be $50,000 or more. It is also used in obtaining proposals and supporting cost or pricing data for architect-engineer services for research study, seismic study, master planning study, construction management and other related services contracts. A Contractor Production Report is also used, but supplemented or modified as needed for the particular project type. (VA Acquisition Regulation (VAAR) 836.606–71, Architect-engineer's proposal, and VAAR 853.236–70.)

VA Form 10101, Contractor Production Report (formerly VA Form 10–6131), Daily Log—Formal Contract, and VA Form 10–6001a, Contract Progress Report, depending on the size of the contract: Is used to record the data necessary to ensure the contractor provides sufficient labor and materials to accomplish the contract work. Contractors are required to guarantee the performance of the work necessary to complete the project. VAAR 852.236–79 details what needs to be addressed by the contractor on the Contractor Production Report. Failure to receive information from the Contractor Production Report could result in a claim for non-performance and construction delays against the Government if the Government were unable to collect this information to administer the contract.

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 **Federal Register** Notice with a 60-day comment period soliciting comments on this collection of information was published at 83 FR 45482 on September 7, 2018.

Affected Public: Business or other for-profit and not-for-profit institutions.

Estimated Annual Burden: VA Form 6298—1,000 Burden Hours. VA Form 10101—4,341 Burden Hours.

Estimated Average Burden per Respondent: VA Form 6298—4 Hours. VA Form 10101—24 Minutes.

Frequency of Response: On occasion.

Estimated Number of Respondents: VA Form 6298—250. VA Form 10101—10,853.

By direction of the Secretary:

Cynthia D. Harvey-Pryor,

Government Information Specialist, Department of Veterans Affairs.

[FR Doc. 2018–25911 Filed 11–27–18; 8:45 am]

BILLING CODE 8320–01–P

FEDERAL REGISTER

Vol. 83 Wednesday,

No. 229 November 28, 2018

Part II

Federal Housing Finance Agency

12 CFR Parts 1290 and 1291

Affordable Housing Program Amendments; Rules

FEDERAL HOUSING FINANCE AGENCY

12 CFR Parts 1290 and 1291

RIN 2590–AA83

Affordable Housing Program Amendments

AGENCY: Federal Housing Finance Agency.

ACTION: Final rule.

SUMMARY: The Federal Housing Finance Agency (FHFA or Agency) is amending its regulation addressing requirements for the Federal Home Loan Banks' (Banks) Affordable Housing Program (AHP or Program). The final rule amends the regulation to: Provide the Banks additional authority to allocate their AHP funds; authorize the Banks to establish separate competitive funds that target specific affordable housing needs in their districts; provide the Banks additional flexibility in designing their project selection scoring systems to address affordable housing needs in their districts; remove the requirement for retention agreements for owner-occupied units where the AHP subsidy is used solely for rehabilitation; provide for a calculation of household subsidy repayment amount that prioritizes return of the household's investment in the housing to the household; reduce administrative burdens related to calculating and obtaining household subsidy repayments based on net proceeds of the sale of a home; further align certain project monitoring requirements with those of other federal government funding programs; clarify the requirements for remediating AHP noncompliance; clarify certain operational requirements; and streamline and reorganize the regulation.

DATES: *Effective date:* This final rule is effective on December 28, 2018.

Compliance dates: For applicable compliance dates, see the discussions under §§ 1290.8 and 1291.2 in Section I. of the **SUPPLEMENTARY INFORMATION** below.

FOR FURTHER INFORMATION CONTACT: Ted Wartell, Manager, Office of Housing and Community Investment, 202–649–3157, *ted.wartell@fhfa.gov;* Marcea Barringer, Senior Policy Analyst, Office of Housing and Community Investment, 202–649–3275, *marcea.barringer@fhfa.gov;* Marshall Adam Pecsek, Senior Counsel, Office of General Counsel, 202–649–3380, *marshall.pecsek@fhfa.gov;* or Sharon Like, Managing Associate General Counsel, Office of General Counsel, 202–649–3057, *sharon.like@fhfa.gov.* These are not toll-free numbers. The mailing address is: Federal Housing Finance Agency, 400 Seventh Street SW, Washington, DC 20219. The telephone number for the Telecommunications Device for the Hearing Impaired is 800–877–8339.

SUPPLEMENTARY INFORMATION:

I. Sections 1291.2 and 1290.8—Compliance Dates

Section 1291.2 of the final rule provides generally, that through December 31, 2020, a Bank may comply with either the AHP regulation in effect immediately prior to this final rule's effective date, or this final rule. On and after January 1, 2021, a Bank must comply with this final rule. However, for the owner-occupied retention agreement requirements in § 1291.15(a)(7), the final rule provides that through December 31, 2019, a Bank may comply with either § 1291.9(a)(7) of the AHP regulation in effect immediately prior to this final rule's effective date, or § 1291.15(a)(7) of this final rule. On and after January 1, 2020, a Bank must comply with § 1291.15(a)(7) of the final rule. Regarding proxies for determining a subsequent purchaser's income, the final rule provides that a Bank shall comply with § 1291.15(a)(7)(ii)(B) of the final rule on the date set forth in the FHFA guidance on proxies referenced therein.

Similarly, § 1290.8 of the final rule provides that through December 31, 2020, a Bank must comply with either prior part 1290 (Community Support Requirements regulation) or this part 1290. On and after January 1, 2021, a Bank must comply with this part 1290.

The proposed rule did not address effective or compliance dates. The Banks requested that the final rule not become effective for at least two years. They stressed that the proposed substantive changes to the regulation, especially the proposed outcome-based scoring framework, would require extensive changes to their existing scoring, information and reporting systems, as well as education and training of Bank staff, members, and potential project sponsors. Bank staff indicated that they would need to consult with their Bank Advisory Councils, boards of directors, and board committees on changes to their Program, including systems and procedures. They would need to seek approval by their boards of changes to their policies for their General Funds and Homeownership Set-Aside Programs, and for establishment of Targeted Funds, along with related changes to their AHP Implementation Plans and Targeted Community Lending Plans (TCLPs). The Banks typically hold their AHP funding rounds in the spring or summer of each year, and would need sufficient time to publish their revised AHP Implementation Plans and TCLPs, and announce their AHP funding allocations, well in advance of the start of that calendar year.

In view of the publication of the final rule late in 2018, FHFA recognizes that it may not be feasible for the Banks to complete all of the above actions in time for implementation of revised Programs for 2019 or 2020, even though the final rule does not adopt the proposed outcome-based scoring framework and instead adopts a scoring framework more similar to the existing scoring requirements of the Competitive Application Program. A January 1, 2021 compliance date for the final rule, thus, is warranted. However, there are certain changes in the final rule that will benefit households without requiring significant changes to the Banks' information systems and, therefore, can be implemented more quickly. In particular, the final rule establishes a compliance date of January 1, 2020 by which the Banks must implement the new owner-occupied retention agreement provisions in § 1291.15(a)(7), including the requirement to calculate AHP subsidy repayment based on net proceeds and household's investment (§ 1291.15(a)(7)(v)), the *de minimis* subsidy repayment exception of $2,500 or less (§ 1291.15(a)(7)(ii)(C)), and the elimination of the requirement for owner-occupied retention agreements for rehabilitation (§ 1291.15(a)(7)). Prior to January 1, 2020, or such earlier compliance date as the Bank elects, a Bank must continue to comply with the current regulation, including its requirement that subsidy be recovered only from ''net gain,'' a concept that in many respects resembles the more clearly articulated standards of ''net proceeds'' and ''household's investment'' in the final rule.

Because some Banks may find it feasible to implement certain provisions of the final rule before the applicable compliance dates, such as the provisions benefiting households, provisions easing operational burdens, or provisions for the establishment of Targeted Funds, the final rule provides that a Bank may choose to comply with any provision of the final rule before the applicable compliance date. A Bank that chooses to comply with a specific provision before the applicable compliance date must also comply with all other provisions related to that specific provision in part 1291 and § 1290.6. For example, if a Bank decides

to establish a Targeted Fund before January 1, 2021 pursuant to § 1291.20(b), the Bank must also comply with the funding allocation and phase-in requirements for Targeted Funds in §§ 1291.20(b)(1) and 1291.12(c)(1), respectively, must amend its AHP Implementation Plan to include its requirements for the Targeted Fund pursuant to § 1291.13(b)(3), and must amend its Targeted Community Lending Plan to include the specific housing needs to be addressed by the Targeted Fund pursuant to § 1290.6(a)(5)(vi).

II. Background

A. Overview of Current Program

The Federal Home Loan Bank Act (Bank Act) requires each Bank to establish a Program to provide subsidies for long-term, low- and moderate-income, owner-occupied and affordable rental housing. Each Bank is required to allocate annually 10 percent of its prior year's net income to fund its Program to help subsidize the purchase, construction, and rehabilitation of affordable rental and owner-occupied housing. Homeowners and homebuyers receiving AHP subsidies must be low- or moderate-income (incomes at or below 80 percent of area median income (AMI)). For rental housing, at least 20 percent of the units must be occupied by very low-income households (incomes at or below 50 percent of AMI) and must be affordable (rents charged do not exceed 30 percent of income).[1]

The current AHP regulation authorizes the Banks to establish and administer two programs for awarding AHP subsidies: a mandatory Competitive Application Program (referred to in the proposed and final rules as the ''General Fund''); and an optional Homeownership Set-Aside Program.[2] Each Bank must allocate annually at least 65 percent of its required annual AHP contribution to its Competitive Application Program, and may allocate annually up to the greater of $4.5 million or 35 percent of its required annual AHP contribution to its Homeownership Set-Aside Program.[3]

Under the Competitive Application Program, members apply to the Banks for AHP subsidies on behalf of project sponsors, which are typically nonprofit affordable housing developers, but may include for-profit organizations. The Banks are required to develop and implement a scoring system subject to requirements in the regulation, which serves as a mechanism for evaluating and selecting the project applications to receive AHP subsidies. Under the Homeownership Set-Aside Program, members apply to the Banks for grants, which are provided to low- or moderate-income homebuyers or homeowners for purchasing or rehabilitating homes.

The AHP has played an important role in facilitating the Banks' support of their members' efforts to meet the affordable housing needs of their communities. Between 1990 and 2017, the Banks awarded approximately $5.8 billion in AHP subsidies to assist the financing of over 865,000 affordable housing units. AHP subsidies have proven particularly effective in leveraging additional public and private resources for funding affordable housing projects that present underwriting challenges, such as projects for homeless households and special needs populations. For example, project sponsors have used AHP funds in conjunction with a number of different federal and state funding sources, including Low-Income Housing Tax Credits (LIHTC or tax credits), to develop rental housing for very low-income households. For 2018, the Banks' combined required annual AHP contribution is approximately $384,310,000.

B. AHP Regulatory History

FHFA and one of its predecessor agencies, the Federal Housing Finance Board (Finance Board), have engaged in numerous rulemakings over the years to revise, clarify, and streamline the AHP requirements as the Program has evolved and housing markets have changed. Successive rulemakings progressively devolved specific AHP application approval and governance authorities from the Finance Board to the Banks in order to enhance the ability of the Banks to address specific affordable housing needs in their respective districts.

The genesis of the current AHP rulemaking was the Notice of Regulatory Review published in the **Federal Register** in 2013 requesting comment on FHFA's existing regulations for purposes of improving their effectiveness and reducing their burden. In response, the Banks jointly submitted a letter to FHFA commenting on the AHP and other FHFA regulations. The letter contended that prescriptive, outdated, or ambiguous provisions of the AHP regulation created inefficiencies and uncertain risk exposures, and recommended that FHFA review the regulation and consider clarifications and enhancements to further empower the Banks in the management of their Programs.

In response to the Banks' recommendations, FHFA undertook a comprehensive review of the AHP regulation, including AHP issues on which FHFA had provided regulatory guidance. To further inform the review, FHFA conducted outreach with the Banks and a wide range of AHP stakeholders. The Banks and stakeholders uniformly expressed support for the AHP, and noted the critical role it plays in affordable housing initiatives throughout the country and its longstanding reputation as a well-managed program. At the same time, the Banks and stakeholders offered a number of specific recommendations to improve the operation of the AHP. The recommendations were directed largely at: (1) Expanding the Banks' authority to allocate their AHP funds; (2) providing the Banks authority to devise their own project selection methods, including the use of non-competitive processes; (3) clarifying the requirements for determining a project's need for AHP subsidy; (4) aligning the project monitoring requirements with those of other major funding sources; (5) clarifying the Banks' authorities to resolve project noncompliance; (6) clarifying certain operational requirements; and (7) codifying FHFA regulatory guidance in the regulation. Based on FHFA's analyses of the recommendations and its review of the Program, FHFA published a proposed rule to amend the AHP regulation, which is discussed below.

C. Proposed Rule

On March 14, 2018, FHFA published a Notice of Proposed Rulemaking (NPRM or proposed rule) in the **Federal Register** to amend the AHP regulation.[4] Taking into account the Banks' and stakeholders' input and recommendations discussed above, the proposed rule would have significantly altered how the Banks approach and implement their AHP project selection responsibilities. The proposed rule would have replaced the current project selection scoring process, a front-end process that requires the Banks to allocate at least 50 percent of the total points for scoring applications to specific statutory and regulatory priorities set forth in the regulation, with a back-end process using a scoring process and ''outcome-based approach'' for project selection. Under the proposal, each Bank would have been

[1] *See* 12 U.S.C. 1430(j).

[2] *See* 12 CFR part 1291.

[3] Where a Bank allocates the alternative maximum amount of $4.5 million to its Homeownership Set-Aside Program, the Bank may allocate less than 65 percent of its total AHP funds to its Competitive Application Program.

[4] *See* 83 FR 11344 (Mar. 14, 2018).

required to establish its own scoring system containing Bank-identified district housing needs priorities for awarding AHP subsidies, subject to meeting certain FHFA-prescribed outcome requirements for statutory and regulatory priorities set forth in the proposed rule. Each Bank would have been evaluated according to whether a certain percentage of its total AHP funds was awarded to projects or households that met the applicable priorities. The NPRM stated that the proposal would address many of the Banks' and stakeholders' concerns by providing the Banks greater flexibility to design their competitive application programs while continuing to ensure the programs fulfilled the statutory requirements.

The NPRM also proposed additional options for the Banks to allocate their total annual AHP contributions. Each Bank would have been required to allocate at least 50 percent of its total annual AHP contribution to its General Fund, down from the current 65 percent. Each Bank also would have been authorized to allocate up to 40 percent of its required annual AHP contribution to a maximum of three ''Targeted Funds,'' a new type of competitive application fund under the AHP, to address specific affordable housing needs within its district, subject to a phase-in period. In addition, the proposed rule would have increased the maximum percentage of a Bank's total annual AHP contribution that could be allocated to its Homeownership Set-Aside Program from 35 to 40 percent, with the existing alternate threshold of $4.5 million retained.

The proposed rule also would have eliminated the current requirement for an owner-occupied unit retention agreement, under which AHP-assisted households must repay AHP subsidy to the Bank under certain circumstances if they sell or refinance their homes during the AHP five-year retention period. The NPRM discussed that this would ease the administrative burdens on the Banks of recovering subsidy repayments from households, and enhance households' ability to build wealth, which appear to outweigh the retention agreements' potential to deter rare instances of flipping.

In addition, the proposed rule would streamline the responsibilities of the parties involved in monitoring projects for compliance with AHP income targeting and rent requirements by aligning the AHP project monitoring requirements with those of certain other government funding programs. For example, the proposal would remove certain back-up documentation requirements for the initial monitoring of AHP projects that have received LIHTC, and for initial and long-term monitoring of AHP projects that have received funding from certain other federal government programs.

In addition, the proposed rule would clarify a number of operational responsibilities. For example, the proposed rule would clarify the process and responsibilities of the various parties for remediating AHP noncompliance. The proposed rule also would have clarified the process for determining a project's need for AHP subsidy.

Finally, the proposed rule would streamline and reorganize the regulation to enhance its utility and readability.

D. Overview of Comments Received on the Proposed Rule

The NPRM initially provided the public 60 days to submit comments on the proposed rule. The Agency received numerous requests from commenters to extend the comment period by an additional 30 days. FHFA also identified an error in the calculation of the outcome requirement in the proposed rule text and related preamble discussion. In response to the requests for an extension of the comment period and to correct the error in the outcome calculation and encourage comments on the corrected calculation, FHFA published a notice in the **Federal Register** containing the corrected calculation and extending the comment period by an additional 30 days.[5] The extended comment period ended on June 12, 2018.

FHFA received 394 comment letters in response to the proposed rule. Of those letters, 251 expressed unique comments and recommendations, with the remaining 143 being form letters or requests to extend the original 60-day comment period. The Presidents of the eleven Banks submitted a joint comment letter. Nine Banks also submitted individual comment letters. FHFA received 16 comment letters from the Banks' boards of directors, Affordable Housing Advisory Councils (Bank Advisory Councils), and Community Investment Officers (CIOs). Eighteen members of Congress representing the states of Arkansas, Louisiana, Mississippi, New Mexico, and Texas co-signed a comment letter. A member of Congress representing the state of New Jersey also submitted a comment letter. FHFA received 99 letters from trade associations, nonprofit organizations, and state and local government organizations. Lenders such as banks, credit unions, and Community Development Financial Institutions (CDFIs) submitted 50 comment letters. Nonprofit and for-profit developers submitted 204 comment letters. Individuals submitted the remaining 13 comment letters.

FHFA also held a number of webinars and meetings with Bank representatives and stakeholders to describe the content of the proposed rule, discuss issues raised by the proposed rule, and obtain clarifications of specific comments made in the letters.[6]

Six proposals received the most comments: The outcome-based approach for project selection; the authority for the Banks to establish Targeted Funds; the increase in the maximum permissible annual funding allocation to a Bank's Homeownership Set-Aside Program from 35 to 40 percent; the removal of the requirement for owner-occupied retention agreements; a clarification of the ''cure-first'' requirement for project noncompliance; and the responsibility of the full board of directors to approve strategic AHP decisions. The comments on these six proposals and FHFA's decisions in the final rule are discussed in Section III., below. Comments on other provisions of the proposed rule are discussed under each applicable provision in the Section-by-Section Analysis in Section IV., below.

III. Discussion of Comments on Key Proposals and Decisions in the Final Rule

A. Proposed Outcome-Based Approach for Project Selection

Final rule. The final rule does not adopt the proposal for an outcome-based framework for project selection. Instead, the final rule amends the current regulatory scoring framework for project selection to provide the Banks with additional flexibility in designing their project selection scoring systems to address affordable housing needs in their districts, similar to the recommendations made by the Banks in their joint comment letter, but with certain changes to reflect particular policy objectives.

Current regulation. The current AHP regulation prescribes a scoring-based project selection system based on a 100-point scale, under which each Bank must allocate:

- At least 5 points each to two priorities derived from the statute (combined 10 points minimum);

[5] *See* 83 FR 19188 (May 2, 2018).

[6] Summaries of each of these meetings are available on FHFA's website at: *https://www.fhfa.gov/SupervisionRegulation/Rules/Pages/Comment-List.aspx?RuleID=612.*

• At least 5 points each to four regulatory priorities addressing specific housing needs set forth in the regulation, and at least 20 points for the regulatory priority for income targeting (a combined 40 points minimum for the five regulatory priorities).

• The remaining maximum of 50 points to one or more housing needs specified under the first Bank district priority (from 12 eligible housing needs specified in the regulation, and to one or more housing needs in the Banks' districts selected by the Banks under the second Bank district priority (with at least 5 points allocated to each Priority).

Proposed rule. The proposed rule would have authorized the Banks to design their own scoring systems, subject to an outcome-based framework under which a specified percentage of each Bank's total annual AHP funds would be required to be awarded to projects meeting specific outcome requirements established by FHFA in the proposed rule. As discussed in Section II.B. and C. above, the proposal was intended to address the Banks' and stakeholders' input on the AHP by providing the Banks greater flexibility to design their competitive application programs to meet their district housing needs while continuing to ensure the Programs fulfill the statutory requirements. The proposed outcome requirements would have included the three statutory priorities for: (1) Projects sponsored by a government or nonprofit entity; (2) use of donated or conveyed government property; and (3) purchase of homes by low- or moderate-income households. Each Bank would have been required to award at least 55 percent of its total AHP funds to projects meeting the donated or conveyed government properties priority or government or nonprofit sponsorship priority, and to award at least 10 percent of its total AHP funds to households or projects meeting the priority for purchase of homes by low- or moderate-income households.

In addition, the proposed outcome requirements would have included four regulatory priorities, with specified eligible housing needs included under each of the regulatory priorities, for: (1) Very low-income targeting for rental units; (2) underserved communities and populations; (3) creating economic opportunity; and (4) affordable housing preservation. Each Bank would have been required to ensure that at least 55 percent of all rental units in rental projects receiving AHP awards were targeted to very low-income households (households with incomes at or below 50 percent AMI). In addition, each Bank would have been required to award at least 55 percent of its total AHP funds to projects, in the aggregate, meeting at least two of the three other regulatory priorities.

The proposed rule would have permitted the Banks to re-rank the order of applications, by replacing a higher scoring application that does not contribute to meeting the outcome requirements with a lower scoring project that does, in order to enable the Banks to meet the outcome requirements. If a Bank failed to fulfill the outcome requirements, FHFA would have the authority to require the Bank to develop and implement a housing plan for addressing the Bank's noncompliance, or to order the Bank to reimburse its AHP Fund in the amount of funds necessary to address the dollar shortfall.

Comments. A large majority of commenters addressed the proposed outcome-based framework for project selection. Most commenters, including several Banks, several trade associations, numerous lenders, many nonprofit and for-profit developers, and some members of Congress, expressed reservations about, or opposition to, the proposed approach. Many of these commenters asserted that the proposal was too prescriptive and complicated, and would result in unintended consequences, such as increased Program complexity, preferences for certain types of projects, and reduced transparency of the AHP. While not explicitly expressing support for the proposal, several commenters acknowledged the potential benefits of the proposed outcome-based approach. For example, a nonprofit intermediary recognized that the approach may facilitate the Banks' ability to increase the diversity of populations receiving AHP funds, as well as fulfill a broader range of district affordable housing needs. Several commenters, including a number of Banks, also acknowledged that the proposed regulatory priorities under the outcome-based approach were germane to the affordable housing needs of their districts.

However, most of the commenters expressed concern that the proposal would or might restrict the Banks' and members' ability to address the particular housing needs of local communities, which some of these commenters described as a ''hallmark'' of the AHP, in favor of a national housing needs focus. Some Bank Advisory Councils also expressed concern that the proposal would diminish the role of the Bank Advisory Councils in identifying the affordable housing needs of the districts. Several commenters focused on the proposed percentages that the Banks would be required to meet under the outcome requirements, raising concerns that requiring mathematical calculations of dollar amounts and numbers of rental units would increase the Program's complexity. Many commenters, including the Banks, a Bank Advisory Council, and a trade association, strongly objected to the proposal to permit the Banks to re-rank the order of scored applications as a way to meet the proposed outcome requirements. Commenters expressed concern that the ability to re-rank scored applications would undermine the integrity, predictability, simplicity, and transparency of the AHP, and deter project sponsors from submitting applications to the Program.

Numerous commenters, including the Banks, a trade association, and lenders, strongly opposed the proposed enforcement provisions for Bank noncompliance with the proposed outcome requirements. Commenters stated that requiring a Bank to reimburse its AHP Fund in the amount of any dollar shortfall would impose a ''penalty'' and ''undue and severe punishment'' on the Bank. A Bank noted that requiring such reimbursement would result in a Bank contributing annually more than the statutorily required 10 percent of its net income to its AHP for the particular year. Commenters also suggested that a reimbursement requirement would lead to reductions in the diversity of the projects awarded AHP funds, as the Banks would select conventional and unchallenging housing needs as part of their scoring systems in order to ensure fulfillment of the proposed outcome requirements and avoid having to reimburse their AHP Funds.

The eleven Banks jointly submitted a proposal for project selection based on the current regulatory scoring system, with certain changes to the regulatory priorities and required minimum allocations of scoring points. The Banks' proposal is discussed further below under § 1291.26 (Scoring Criteria for the General Fund) in Section IV.

Decision in the final rule. The final rule does not adopt the proposed outcome-based framework. Instead, the final rule amends the current regulatory scoring framework to provide the Banks with additional flexibility in designing their project selection scoring systems to address affordable housing needs in their districts, similar to the recommendations made by the Banks in their joint comment letter but with certain changes to reflect particular policy objectives. Revisions to the existing regulatory scoring system

include broader regulatory priorities encompassing more housing needs and additional discretion in allocating scoring points under the Bank district priority.

FHFA's analyses of the Banks' awards in recent years indicate that most, if not all, of the Banks would have readily met the proposed outcome requirements, especially with the correction to the calculation of the proposed outcome requirement for the three regulatory priorities, while having increased flexibility to target district housing needs. However, the Banks and other commenters expressed concern about the proposed outcome requirements, especially the prospect of accountability for noncompliance with the outcome requirements and the potential to have to reimburse their AHP Funds for any dollar shortfall. Because FHFA has decided not to implement the proposed outcome-based approach, the proposed enforcement provisions for Bank noncompliance with the outcome requirements (proposed §§ 1291.48 and 1291.49) are moot and, therefore, not adopted in the final rule.

The Agency finds the Banks' proposal for project selection, which is based on both the current scoring system and specific regulatory priorities in the proposed rule, to be a reasonable approach, subject to certain changes to achieve specific policy objectives. The revised scoring-based framework in the final rule is discussed in Section IV. below, under § 1291.25 (Scoring Methodologies), and § 1291.26 (Scoring Criteria for the General Fund).

B. Authority for the Banks To Establish Targeted Funds

Final rule. Consistent with the proposed rule, the final rule authorizes the Banks to establish funds targeted to address specific affordable housing needs within their districts that are either unmet, have proven difficult to address through the Bank's General Fund, or align with objectives identified in their strategic plans (referred to as ''Targeted Funds'').

The final rule requires the Banks to adopt and implement parameters to ensure that each Targeted Fund is designed to receive a sufficient number of applicants for the amount of AHP funds allocated to the Targeted Fund such that administration of each Targeted Fund results in a robust competitive scoring process. These parameters include requirements that a Bank must specify the particular type of affordable housing needs the Bank plans to address through any Targeted Funds in its TCLP, and that a Bank must publish its TCLP at least 90 days before the first day that applications may be submitted for that Targeted Fund (unless the Targeted Fund is specifically targeted to address a federal or state-declared disaster). Further, the final rule requires a Bank to establish a minimum of three scoring criteria for each Targeted Fund that assist the Bank in selecting the projects that meet the specified affordable housing needs to be addressed by the Targeted Fund. In addition, the final rule provides that a Bank may not allocate more than 50 points to any one scoring criterion. The final rule also implements a phase-in period for establishing Targeted Funds. A Bank would be limited initially to establishing one Targeted Fund to which it could allocate up to 20 percent of its total annual AHP funds. In the second year, the Bank could establish two Targeted Funds with a maximum allocation of 30 percent, and in the third year three Targeted Funds with a maximum allocation of 40 percent.

Current regulation. The current regulation does not authorize a Bank to establish Targeted Funds.

Proposed rule. The proposed rule would authorize the Banks to establish up to three competitive Targeted Funds, and to allocate a maximum of 40 percent of their total annual AHP funds to establish such Targeted Funds, subject to the phase-in requirements described above. The Banks would use these funds to address specific affordable housing needs within their districts that are unmet, have proven difficult to address through the existing General Fund, or align with objectives identified in their strategic plans. FHFA's intent in proposing this authority was to help address challenges the Banks experience when trying to target specific affordable housing needs within their districts, especially in a single AHP funding round. Banks report that the existing regulatory scoring requirements can affect their efforts to fully address affordable housing needs within their districts. Establishing a Targeted Fund with a dedicated funding allocation to a particular housing need would enable competitive projects serving that housing need to receive awards pursuant to the competitive process under that Targeted Fund, while other projects would receive awards under the General Fund, thereby serving multiple housing needs in the same AHP funding round. The Banks would be required to adopt and implement controls to ensure that each Targeted Fund is designed to receive sufficient numbers of applicants for the amount of AHP funds allocated to the Targeted Fund to enable the Bank to facilitate a genuinely competitive scoring process.

Comments. FHFA received a mix of comments in support of and opposition to the proposal to authorize Targeted Funds. A nonprofit organization commented that Targeted Funds would enhance the interaction between a Bank's board of directors and its Bank Advisory Council. The commenter also noted that Targeted Funds would provide each Bank greater opportunities to address varying market needs, reach more underserved communities, and possibly expand the geographical footprint of its AHP. The Banks and several Bank Advisory Councils stated that Targeted Funds would prove beneficial by providing the Banks with the ability to target specific affordable housing needs within their districts. The Banks also commented that the use of Targeted Funds would provide additional flexibility and responsiveness to changing housing needs by permitting the Banks to establish and tailor separate scoring priorities. The Banks and Bank Advisory Councils stated, however, that implementation of the proposed outcome-based framework would undermine the potential benefits of Targeted Funds. They also asserted that FHFA's proposed regulatory priorities under the outcome-based framework would drive the scoring process and overshadow the local needs of each district.

Several commenters, including the Banks, Bank Advisory Councils, a trade association, and a policy organization, supported the proposed maximum 40 percent funding allocation for Targeted Funds. In contrast, a nonprofit advocacy organization and a government entity expressed concern that the proposal would lead to a decrease in funding for affordable rental housing. A nonprofit intermediary supported Targeted Funds, but recommended that the Banks be permitted to allocate an unspecified percentage that is less than 40 percent to their Targeted Funds to ensure that a majority of the Banks' AHP subsidies remain available under the General Fund to address a broad spectrum of affordable housing needs within each district. A nonprofit developer asserted that Targeted Funds would compel project sponsors to apply for AHP subsidy under both the General Fund and the Targeted Fund, resulting in costly compliance and administration expenses for the Banks, members, and project sponsors.

The Banks expressed concern that the proposed regulatory language requiring each Bank to adopt and implement controls to ensure that each Targeted Fund receives sufficient numbers of applicants for the amount of AHP funds

allocated to the Targeted Fund is vague, complex, and undefined.

Decision in the final rule. FHFA has considered the comments received on the proposal for Targeted Funds and continues to be persuaded that Targeted Funds may increase the flexibility of the Banks to emphasize multiple housing needs in a given year, thereby enhancing their ability to address specific affordable housing needs in their districts. The Agency also continues to be persuaded that the Banks should be permitted to allocate up to 40 percent of their total annual AHP funds to Targeted Funds. Although a number of commenters expressed concern that allocation of AHP funds to Targeted Funds would potentially reduce the total amount of AHP funds available for affordable rental housing, they offered no support to substantiate their concerns that the Banks would target their Targeted Funds for owner-occupied housing. The 40 percent limit would provide the Banks significant flexibility to allocate AHP subsidy to Targeted Funds, which could include Targeted Funds for owner-occupied housing or rental housing. In fact, the Banks indicated that they would likely use Targeted Funds for rental housing. The final rule requires that the Banks allocate at least 50 percent of their total annual AHP funds to the competitive General Fund. The final rule also allows a Bank to allocate up to 35 percent of its total annual AHP funds to optional, noncompetitive Homeownership Set-Aside Programs, which are discussed further under § 1291.12 (Allocation of Required Annual AHP Contribution) below. Thus, the final rule ensures that the Banks award a majority of their AHP funds through competitive processes (for example, 50 percent for the General Fund plus 15 percent for Targeted Funds, or 65 percent for the General Fund).

FHFA also considered the Banks' concerns about the proposed language that each Targeted Fund have controls for ensuring that it is designed to receive sufficient numbers of applicants for the amount of AHP funds allocated to the Targeted Fund. The requirement that the Targeted Fund be *designed* to receive sufficient numbers of applicants pertains to the scope and scoring methodology of the Targeted Fund, and is not a guarantee of the actual number of applicants received.

FHFA also acknowledges the commenter's concern that project sponsors may feel compelled to submit applications for the same project to both the General Fund and any applicable Targeted Fund at a Bank. While the final rule does not prohibit applicants from applying to both Funds in the same year, FHFA does not anticipate this becoming a significant problem for the Banks and project sponsors due to the limited scope of Targeted Funds, and the time involved in completing multiple applications. The specific requirements in the final rule for establishing and administering Targeted Funds are discussed under § 1291.20(b)(1) in Section IV., below.

C. Proposed Increase in the Maximum Permissible Annual Funding Allocation for Homeownership Set-Aside Programs

Final rule. In a change from the proposed rule, the final rule retains the current maximum permissible annual funding allocation of 35 percent for Homeownership Set-Aside Programs. The final rule also retains the current alternate maximum permissible annual funding allocation of $4.5 million for such Programs.

Current regulation. The current regulation authorizes each Bank, in its discretion, to allocate annually up to the greater of $4.5 million or 35 percent of the Bank's annual required AHP contribution for Homeownership Set-Aside Programs.

Proposed rule. The proposed rule would have increased the current maximum permissible annual funding allocation for Homeownership Set-Aside Programs from 35 to 40 percent, and would have retained the current alternate maximum permissible annual funding allocation of $4.5 million. The NPRM noted that the current regulation allows the Banks to establish more than one Homeownership Set-Aside Program to address the homeownership needs of different populations, such as military veterans or disaster victims. FHFA stated that the increase in the maximum percentage allocation amount would enhance the ability of the Banks and their members to meet the demand for set-aside funds and provide more assistance to low- or moderate-income homebuyers and homeowners, including first-time homebuyers. FHFA also noted that the increase would assist Bank members by enhancing their ability to access a wider customer base, originate new mortgages for low- and moderate-income households, and fulfill their obligations under the federal Community Reinvestment Act.

FHFA acknowledged that the increase could result in a smaller amount of funds allocated by the Banks to their competitive application programs, which could result in reduced funding for rental projects. However, FHFA considered the proposal to be reasonable given the significant demand for set-aside funds and stakeholder requests that the Agency provide the Banks additional flexibility to target specific housing needs in their districts.

Comments. The commenters were divided over the proposal. The Banks, Bank Advisory Councils, several nonprofit organizations, and trade associations supported the proposal. Some nonprofit organizations and trade associations expressed support for the proposed amendments that would expand and enhance the reach of the Homeownership Set-Aside Programs. One trade association supported the proposed increase, expressing the hope that it would help increase the supply of entry-level homes, as well as improve the affordability of the homes. A nonprofit organization stated that the proposal would increase the number of low- and moderate-income homebuyers or homeowners that would be able to purchase or rehabilitate their homes. A trade association suggested that FHFA index the dollar cap for the $4.5 million alternate maximum allocation to address further erosion of the funds' purchasing power as mortgage rates and home prices rise.

Numerous nonprofit organizations opposed the proposed increase on the basis that it would effectively reduce AHP funding for rental housing. Commenters noted the important role the AHP plays in supporting the preservation and expansion of rental properties for very low-income and extremely low-income households. A nonprofit organization cited data derived from the American Community Survey describing the Nation's significant shortage of affordable rental housing, including for extremely low-income households (incomes of less than 30 percent of AMI or less than the federal poverty line). Another nonprofit organization acknowledged the importance of promoting homeownership for lower income households, but opposed the proposed increase without an offsetting increase in funding for affordable rental projects, to help address the significant need for such housing nationwide. Several nonprofit organizations that advocate for the development of multifamily housing also opposed the proposal on the basis that a reduction in the amount the Banks must allocate to their General Funds would run counter to the promotion, development, and preservation of rental housing. One of the nonprofit organizations urged FHFA to maintain the existing funding allocation cap of 35 percent because it ensures that a minimum 65 percent of each Bank's total annual AHP contribution is available to fund rental projects. The commenter also implied

that funding for the General Fund should have priority over funding for Homeownership Set-Aside Programs because rental housing projects must address the accessibility needs of future residents, while single-family homeownership programs do not.

Decision in the final rule. In response to the commenters' concerns and the continued need for affordable rental housing, FHFA has decided to retain the existing maximum permissible funding allocation of 35 percent of a Bank's required annual AHP contribution for Homeownership Set-Aside Programs. The final rule also retains the alternate $4.5 million threshold.

The continued need for affordable rental housing is supported by the Joint Center for Housing Studies of Harvard University in its annual overview of the housing conditions in the United States. The organization's report, *The State of the Nation's Housing 2018,* examined and assessed the Nation's progress in producing decent and affordable homes for all households.[7] The report found that more than 38 million households in the U.S. have housing cost burdens that leave little income to pay for food, healthcare, and other basic necessities. The report determined that more than 11 million renters are severely cost burdened because they pay more than half their incomes for housing. The report also found that for every 100 extremely low-income renters, only 35 rental units were affordable and available in 2016—a nationwide shortfall of more than 7.2 million units. Very low-income renter households also faced a shortfall of 56 affordable and available rental units per 100 households. The report concluded that conditions at the low end of the affordable housing rental market would probably remain exceptionally tight over the long term in the face of strong demand and diminishing supply.[8]

In addition, under the new authority for the Banks to establish Targeted Funds for homeownership or rental projects, the Banks may increase their focus on homeownership needs by establishing Targeted Funds for homeownership. This mitigates the need to increase the maximum permissible annual funding allocation for Homeownership Set-Aside Programs.

The final rule does not adopt the commenter's recommendation to index the alternate $4.5 million maximum threshold. FHFA has analyzed whether revisions to the $4.5 million limit would be necessary and concluded that the Banks' need for, or use of, the $4.5 million maximum is unlikely to change.

The specific requirements for establishing, funding, and administering Homeownership Set-Aside Programs are discussed below in §§ 1291.12 and 1291.40 through 1291.44 of Section IV.

D. Proposed Elimination of the Requirement for Owner-Occupied Retention Agreements

Final rule. In a change from the proposed rule, the final rule eliminates the current requirement for owner-occupied retention agreements where households use the AHP subsidy solely for rehabilitation of a unit, but retains it in other circumstances.

Current regulation. The current regulation requires owner-occupied retention agreements where a household uses the AHP subsidy for purchase, for purchase in conjunction with rehabilitation, or solely for rehabilitation of a unit. Members must ensure that the AHP-assisted owner-occupied unit is subject to a five-year deed restriction or other legally enforceable retention agreement or mechanism requiring that, in the case of a sale or refinancing of the unit prior to the end of the retention period, the household repays the Bank an amount equal to a pro rata share of the AHP subsidy that financed the purchase, construction, or rehabilitation of the unit, reduced for every year the household owned the unit, from any net gain realized upon the sale or refinancing, unless either the unit is purchased by a very low-, or low- or moderate-income household or, following a refinancing, the unit remains subject to a retention agreement or other appropriate mechanism as described in the regulation.

Proposed rule. The proposed rule would have eliminated the retention agreement requirement for all owner-occupied units, regardless of how the subsidy was used by the household. The NPRM did not specifically address or request comment on whether the elimination of owner-occupied retention agreements should apply only where the AHP subsidy is used for rehabilitation without an accompanying purchase of the unit.

FHFA noted in the NPRM that the purpose of retention agreements is to deter flipping of homes, and also discussed the moral hazard risk that may be associated with the use of subsidy intended to provide housing to low- or moderate-income households to flip properties. However, as also noted in the NPRM, homes purchased by AHP-assisted households are not typically located in neighborhoods with rapidly appreciating house prices that would encourage flipping, and most AHP-assisted households do not sell their homes during the five-year retention period. Moreover, the NPRM indicated that the underlying policy of the AHP is to enable low- and moderate-income households to receive the benefits of homeownership, including appreciation in the value of their homes, which would weigh in favor of a reduction in the amount of subsidy repaid by the household when selling or refinancing the unit.

Comments. The NPRM specifically requested comments on the advantages and disadvantages of the AHP owner-occupied retention agreement, whether eliminating it would impact FHFA's ability to ensure that AHP funds are being used for the statutorily intended purposes, whether there are ways to deter flipping other than a retention agreement, and whether the proposed increase in the maximum permissible grant to households from $15,000 to $22,000 under the Homeownership Set-Aside Program should impact the decision on whether to eliminate retention agreements.

The majority of commenters who addressed the proposal to eliminate the requirement for owner-occupied retention agreements generally opposed it. A number of nonprofit advocacy organizations asserted that elimination of owner-occupied retention agreements would, by increasing homeowner equity, expose subsidy recipients to greater risks of fraud and abuse by predatory lenders and unscrupulous investors. These commenters also stated that the use of owner-occupied retention agreements has played an important role in preventing waste and abuse of AHP subsidies for homeownership.

Several nonprofit organizations asserted that retention agreements play an important role in deterring property flipping. These commenters noted that organizations that provide access for homeownership opportunities to lower-income families frequently employ retention agreements, often in the form of subordinate liens. They stated that this strategy has proven extremely effective in protecting homeowners from predatory lenders and preventing the loss of homeowner equity and subsidies through flipping. They suggested that FHFA provide the Banks with discretion on whether to use retention agreements as the Banks deem appropriate, to ensure protection of homeowner equity and AHP subsidies. A state housing

[7] *See* Joint Center for Housing Studies of Harvard University, State of the Nation's Housing 2018 (2018), *available at http://www.jchs.harvard.edu/sites/default/files/Harvard_JCHS_State_of_the_Nations_Housing_2018.pdf* (last accessed 11/15/2018).

[8] *Id.*

agency emphasized the benefits of having owner-occupied retention agreements when recipients receive substantial amounts of grant funds. Although one of the Banks discounted property flipping as a substantial risk, the Bank stated that predatory lending does pose risks for AHP-assisted households.

A nonprofit organization commented that while flipping in the AHP may be rare, it is rare precisely because of the retention agreement and not because homes purchased by AHP-assisted households are not typically located in neighborhoods with rapidly appreciating housing prices, as FHFA indicated in the NPRM. The commenter stated that it has seen evidence of flipping and other forms of fraud (specifically, the use of ''straw buyers''), and that these material risks are largely unrecognized because of the effectiveness of retention agreements like those in the AHP.

Several commenters, including all of the Banks and a number of nonprofit organizations, recommended that FHFA authorize the Banks to use retention agreements in their discretion, based on criteria determined by each Bank, which would enable the Banks to address the different housing markets both across and within their districts, differences in eligible uses of AHP grants (*e.g.,* down payment, closing costs, rehabilitation), and grant amounts among the Banks' General Funds and Homeownership Set-Aside Programs. The Banks stated that their Bank Advisory Councils and boards of directors have the necessary experience, knowledge, and familiarity with local real estate markets to determine whether the need for retention agreements exists in each market. Several of the Banks indicated that, if given the discretion, they would choose not to use retention agreements.

One Bank and a commercial lender specifically opposed requiring retention agreements where AHP subsidies are used for rehabilitation of units for elderly households and special needs households, such as persons with disabilities. The Bank noted that changes in circumstances related to households' ages or health could affect their need to sell their homes, and retention agreements requiring repayment of AHP subsidy upon sale would unduly burden these households.

Decision in the final rule. In a significant change from the proposed rule, the final rule retains the current requirement for owner-occupied retention agreements where a household uses the AHP subsidy for purchase, or for purchase in conjunction with rehabilitation, of a unit, but eliminates the requirement for an owner-occupied retention agreement where a household uses the AHP subsidy for rehabilitation without an accompanying purchase.

Many of the commenters tied their strong support for owner-occupied retention agreements to their view that the agreements help deter flipping or other types of fraud, although neither supporting data nor studies were provided to support those views. Due to the volume of comments FHFA received, particularly from organizations with extensive experience with the AHP and similar programs that offer comparable homeownership assistance, FHFA is persuaded that retention agreements may play a relevant role in deterring abuse and flipping, as well as protecting homeowners from predatory schemes. The use of retention agreements in connection with AHP subsidies provided for home purchase, and rehabilitation with an accompanying purchase, aligns with approaches of other down payment assistance providers that require retention agreements for purchase of homes, including the U.S. Department of Housing and Urban Development's (HUD) HOME Investment Partnerships Program (HOME), certain private lenders, and state and local agencies. However, as further discussed below under § 1291.15(a)(7) in Section IV., the final rule adopts several requirements for owner-occupied retention agreements that are intended to ease the operational burdens on the Banks and members, and reduce the financial burden on AHP-assisted households, by minimizing the frequency and amount of AHP subsidy repayments by such households.

In contrast, where the AHP subsidy is used solely for rehabilitation of homes, with no accompanying purchase, flipping of the homes is unlikely. Many of the recipients of AHP subsidy for rehabilitation are long-term homeowners, typically elderly households or persons with disabilities. These homeowners often need AHP funds for rehabilitation of their homes, such as installing a wheelchair ramp or repairing a leaky roof, to enable them to remain in their homes and, therefore, are less likely to move from their homes within a five-year period. In addition, the requirement to repay AHP subsidy may impose a financial burden on such households in the event that they are required to sell their homes to pay expenses associated with a change in life circumstances, such as the need to move to an assisted living facility or nursing home.

E. Clarification of the ''Cure-First'' Requirement for Project Noncompliance

Final rule. The final rule adopts the sequence of remedial steps in the event of project noncompliance set forth in the proposed rule, with clarification of the ''cure-first'' step to indicate that a project sponsor or owner must make a reasonable effort to cure the noncompliance, and if the noncompliance cannot be cured within a reasonable period of time, the Bank must proceed to the next step of evaluating the project for a modification.

Current regulation. The current regulation specifies three types of remedial actions to address AHP project noncompliance resulting from the actions or omissions of a project sponsor or project owner, but does not specify the order in which a Bank must pursue these remedies. The remedial actions are: (1) Cure by the project sponsor or owner of the noncompliance within a reasonable period of time; (2) modification of the terms of the approved AHP application; or (3) recovery of the AHP subsidy or settlement for less than the full amount of subsidy due. FHFA may require the Bank to reimburse its AHP Fund in the amount of the shortfall, unless: (1) The Bank has sufficient documentation showing that the sum agreed to be repaid under the settlement is reasonably justified, based on the facts and circumstances of the noncompliance; or (2) the Bank obtains a determination from FHFA that the sum agreed to be repaid under the settlement is reasonably justified, based on the facts and circumstances of the noncompliance.

Proposed rule. The proposed rule would require the following sequence of remedial steps in the event of project noncompliance: (1) The project sponsor or owner must cure the noncompliance within a reasonable period of time; (2) if the project sponsor or owner cannot cure the noncompliance within a reasonable period of time, the Bank must determine whether the circumstances of the noncompliance can be eliminated through a modification of the terms of the approved application under proposed § 1291.27; and (3) if the circumstances of the noncompliance cannot be eliminated through a cure or modification, the Bank (or member if so delegated) shall make a demand on the project sponsor or owner for repayment of the full amount of the AHP not used in compliance with the AHP application commitments, and if that demand is unsuccessful, the member, in

consultation with the Bank, shall make reasonable efforts to collect the AHP subsidy from the project sponsor or owner, which may include settlement for less than the full amount due. The NPRM emphasized the importance of first requiring the project sponsor or owner to cure project noncompliance within a reasonable timeframe, stating that the objective of the AHP is to provide affordable housing for eligible households for the duration of the AHP retention period, so recovery of AHP subsidy should be the last resort. Cure of noncompliance is preferable to modification of the commitments in the AHP application or recovery of AHP subsidy as it holds the project sponsor to its AHP application commitments, which result in greater benefits to eligible households than if the commitments are reduced through modification or eliminated by recovery of the subsidy.

The proposed rule also would have added a new section addressing remedial actions that FHFA could take if a Bank failed to comply with the proposed outcome requirements and FHFA determined that compliance was feasible. The proposed remedial authority would have included: Requiring the Bank to develop and implement a housing plan approved by FHFA; describing the specific actions the Bank will take to comply with the outcome requirements for the next calendar year; or requiring the Bank to reimburse its AHP Fund for the difference in the amount of AHP funds required to meet the outcome requirements and the amount the Bank actually awarded.

Comments. The Agency received numerous comments expressing concern about the proposed ''cure-first'' requirement for addressing project noncompliance. Commenters asserted that the Banks can address compliance issues more effectively and efficiently through modification of the project's application commitments. The Banks and a nonprofit homeless services agency stated that the ''cure-first'' requirement might increase costs and delay disbursement of funds, and the nonprofit organization indicated that it could result in termination of a project in a tight housing market like Boston. Other commenters expressed concern that a ''cure-first'' requirement would force developers to make ''feigned attempts'' to cure unresolvable issues. A nonprofit developer asserted that the proposal for subsidy repayment would not take into account the cause of the failure of a project, including fires or earthquakes. The Bank Advisory Councils commented that some projects naturally meet the ''good cause'' requirement for modification because the project sponsors, owners, or members have no control over the noncompliance.

A trade association stated that a ''cure-first'' requirement could cause problems for members that provide equity for projects or that have committed construction or permanent financing. A nonprofit organization commented that focusing on curing noncompliance first might result in displacement of residents from the project.

Decision in the final rule. Modification of a project's AHP application commitments should not be the first option for a Bank to address project noncompliance. Inherent in a competitive application program is an award recipient's responsibility to fulfill the commitments in its application. A Bank should expect and require project sponsors or owners to make a reasonable effort to comply with their AHP application commitments before agreeing to modify a project. It is also preferable that recovery of AHP subsidy be the last option for curing noncompliance because the objective of the AHP is to provide affordable housing for eligible households for the duration of the AHP retention period. If subsidy is repaid for noncompliant units for the remainder of the AHP retention period, those units would no longer be subject to AHP income targeting and rent restrictions.

Commenters described, and FHFA acknowledges, that there are cases where sound reasons exist for why a project sponsor or owner may be unable to meet its AHP application commitments. Further, there may be cases where project sponsors or owners cannot cure noncompliance because it is beyond their control to cure. However, commenters appeared to misread the language of the proposed ''cure-first'' provision to require project sponsors or owners to cure noncompliance regardless of the causes of the noncompliance, including noncompliance beyond their control to cure, thereby preventing the Banks from moving to modifications as a remedy for the noncompliance. This was not the intent of the proposed ''cure-first'' provision, as indicated by the language in the following paragraph of the proposed rule stating that ''[i]f the project sponsor or project owner cannot cure the noncompliance within a reasonable period of time, the Bank shall determine whether the circumstances of the noncompliance can be eliminated through a modification . . . .'' If cure of the noncompliance is beyond the control of the project sponsor or owner, they may be unable to cure the noncompliance within a reasonable period of time. The project sponsor or owner does not have to try to cure noncompliance that is incurable; it would simply provide a reasonable written justification to the Bank indicating why it could not cure the noncompliance. If the justification is reasonable, the Bank would then evaluate whether it could approve a modification under the rule's modification requirements.

In view of the apparent misunderstanding of the ''cure-first'' provision, FHFA has clarified the language in §§ 1291.29(a)(1) and 1291.60(b)(1) of the final rule by adding that project sponsors or owners must ''make a reasonable effort'' to cure the noncompliance, and adding a statement immediately following that one that if the noncompliance cannot be cured within a reasonable period of time, the requirements for a modification in the next paragraph shall apply.

Because the final rule does not adopt the proposed outcome-based scoring framework, the proposed remedial actions for failure to meet the outcome requirements are moot and, thus, not adopted in the final rule. Other remedies provisions related to AHP noncompliance are discussed below under §§ 1291.60 through 1291.65 in Section IV.

F. Responsibility of Full Board of Directors for Strategic AHP Decisions

Final rule. In a change from the proposed rule, the final rule retains the current authority for a Bank's board of directors to delegate to a board committee the responsibility to meet quarterly with the Bank Advisory Council, and to approve or disapprove applications for AHP subsidies and alternates. Consistent with the proposed rule, the final rule adopts the proposed prohibition on a Bank's board delegating to a board committee the responsibility to approve General Fund, Targeted Fund, and Homeownership Set-Aside Program policies, the AHP Implementation Plan, and the TCLP.

Current regulation. The current regulation provides that a Bank's Advisory Council shall meet with representatives of the Bank's board of directors at least quarterly to provide advice on ways in which the Bank can better carry out its housing finance and community lending mission, and permits that responsibility to be delegated to a committee of the board but not to Bank officers or other Bank employees. The requirement for board representatives to meet quarterly with

the Bank Advisory Council is a Bank Act requirement.[9] The current regulation also permits the board to delegate to a committee of the board, but not to Bank officers or other Bank employees, the responsibility to appoint the Bank Advisory Council members. In addition, the current regulation permits the board to delegate the responsibility for approving or disapproving AHP applications and alternates, and for adopting its AHP Implementation Plan, Homeownership Set-Aside Program, and conflict of interest policies, to a committee of the board, but not to Bank officers or other Bank employees.

Proposed rule. The proposed rule would have extended the existing prohibition on the board delegating certain AHP responsibilities to Bank officers and other Bank employees to include a prohibition on delegating such responsibilities to board committees. Specifically, the full board, instead of a board committee, would have been required to meet quarterly with the Bank Advisory Council, to approve General Fund, Targeted Fund, and Homeownership Set-Aside Program policies, to approve and amend the AHP Implementation Plan and the TCLP, and to approve or disapprove applications for AHP subsidies and alternates. As stated in the NPRM, the goal of the proposed non-delegation provisions was to engage the full board in developing and adopting strategic decisions for the AHP, as part of the overall strategic planning of the Bank. FHFA noted that while it anticipated that the AHP responsibilities currently assigned to the board committees would remain largely unchanged in response to the proposal, the full board would have more engagement with board committee recommendations and decisions.

Comments. A number of commenters disagreed with the Agency's rationale for encouraging full board engagement in AHP strategic responsibilities. They stated that involving more board members in the intricacies of AHP organizational planning and reporting would dilute the influence and housing expertise of the board committees tasked with AHP responsibilities. They stated that the proposal would create inefficiencies and could result in less integration of the board committees' contributions into the board's decisions on Bank housing activities than the existing practices employed by the Banks. One Bank stated that a board's ability to use board committees effectively, including the ability to delegate AHP responsibilities to a board committee, is a fundamental component of board governance best practices, and the proposal would be an unnecessary encroachment on the boards' ability to oversee Bank operations.

Several Banks and their Bank Advisory Councils described the Banks' board committee structures and corporate governance principles to demonstrate that their full boards are fully engaged and aware of all AHP responsibilities and initiatives. A number of commenters stated that the Banks' AHP governance structures and processes work effectively, with the board housing committees providing reports to the full board. A Bank cited FHFA's regulation at 12 CFR 1239.3, which authorizes the Banks to model their corporate governance and indemnification practices on the Revised Model Business Corporation Act (RMBCA), as support for maintaining the existing AHP regulatory requirements concerning board delegations. The Bank also referred to FHFA's regulation at 12 CFR 1239.5, which permits the boards to appoint board committees to carry out much of the board's responsibilities. The Bank stated that under the RMBCA, the full board must consider only those activities that ''so substantially affect the rights of the shareholders or are so fundamental to the governance of the corporation.'' The Bank further stated that delegation is a fundamental concept of efficient and competent corporate governance.

Numerous commenters opposed requiring a Bank's full board, rather than a committee of the board, to meet with the Bank's Advisory Council each quarter. The Banks focused on the challenges and inconveniences of requiring quarterly meetings of the full boards and Bank Advisory Councils. Some commenters stated that quarterly meetings with the full boards would be inefficient and unnecessarily costly, requiring Bank Advisory Council members to spend additional time away from their primary jobs in affordable housing and economic development.

Commenters also expressed concern that the proposal would reduce the influence and expertise of the Bank Advisory Councils. They pointed out that the board members who are not on the board housing committees possess different areas of expertise and, as a result, may not have the backgrounds necessary to engage fully in housing policy discussions with the Bank Advisory Councils. Commenters noted that some Banks hold annual meetings of the full board and Bank Advisory Council members, and their board housing committees meet quarterly with the Bank Advisory Councils and provide reports on the meetings to the full board. Commenters also stated that the proposed approach would be more restrictive than the governing statutory provision, which requires each Bank's Advisory Council to meet quarterly with ''representatives of'' the board of directors.

Decisions in the final rule. After considering the comments, FHFA has decided to retain in the final rule the current authority for the Bank's board to delegate to a board committee the responsibility to meet quarterly with the Bank's Advisory Council. FHFA is persuaded by the comments about the costs, inconveniences, and inefficiencies of holding the quarterly meetings with the full board, the value of quarterly off-site meetings with board committees, and the language in the statute referencing ''representatives of'' the board. The final rule also retains the authority for the Bank's board to delegate to a board committee the responsibility to approve or disapprove applications for AHP subsidies and alternates. Approval or disapproval of AHP applications is based on scoring rankings under the Bank's scoring system and not on strategic policy decisions.

However, the Banks' full boards should be responsible for approving all strategic AHP policy decisions. Consistent with 12 CFR 1239.5, the board may rely on reports from board committees, but under the final rule, the authority to approve strategic policy decisions resides with the full board. As noted by commenters, the board committees, whose members have special housing expertise, perform an important role in the AHP strategic policymaking process by evaluating and developing policy recommendations, and FHFA expects their involvement in this process to continue. However, instead of the board committees approving strategic policy decisions on behalf of the full board, the board committees will need to report their policy recommendations to the full board for its approval or disapproval. The specific AHP strategic policy decisions that will need to be approved by the full board are approval of General Fund, Targeted Fund and Homeownership Set-Aside Program policies, and approval and amendment of the AHP Implementation Plan and the TCLP.

[9] *See* 12 U.S.C. 1430(j)(11).

IV. Section-by-Section Analysis

Community Support Requirements Regulation

This section discusses the final rule's changes to the current Community Support Requirements regulation.

§ 1290.6 Bank Community Support Programs

Final rule. The final rule requires the Banks to identify in their TCLPs the housing needs the Banks plan to address in their AHPs, including the particular housing needs they plan to address through any Targeted Funds. The Banks must publish their TCLPs at least 90 days before the initial date for submission of applications for the application funding round for the specific Targeted Fund. Targeted Funds addressing federal- or state-declared disasters are exempt from the 90-day requirement.

Current regulation. FHFA's current Community Support Requirements regulation requires the Banks to adopt annual TCLPs in conjunction with their responsibility to establish and maintain community support programs.[10] The Banks' TCLPs must describe how each Bank plans to address identified credit needs and market opportunities in its district. The Banks are required to consult with their Bank Advisory Councils, members, housing associates, and public and private economic development organizations when developing and implementing their TCLPs. Although the Banks are required to provide an annual notice to their members about their community support programs, they are not required to make their TCLPs available to their members or to the public.

Proposed rule. The proposed rule would amend § 1290.6(a)(5) to enhance the function and usefulness of the TCLPs, as well as improve the TCLPs' connection to the Banks' strategies for implementing their AHPs. The proposal would require the Banks to identify and assess in their TCLPs the significant affordable housing needs in their districts, reflecting market research and supported by empirical data, and would have required the Banks to specify, from among those housing needs, the specific housing needs the Banks would address through their funding allocations and scoring criteria under their General Funds and any Targeted Funds and Homeownership Set-Aside Programs, as set forth in their AHP Implementation Plans. The Banks would continue to be required to develop their TCLPs in conjunction with the stakeholders referenced above. The Banks would also be required to publish their TCLPs on their public websites within 30 days of approval by the Bank's board of directors, and at least six months before the beginning of the Plan year. Proposed § 1291.20(b)(1) would have prohibited a Bank from establishing or administering a Targeted Fund unless at least 12 months had passed since publication of its TCLP. The purpose of the 12-month notice requirement was to provide potential project sponsor applicants with ample notice of the Banks' plans to target AHP awards to a narrower pool of potential applicants so that the project sponsors could prepare applications for submission to the Targeted Fund, with the goal being to generate sufficient numbers of applications for the Bank to be able to conduct a robust competitive scoring process for the Targeted Fund. The proposed rule would also prohibit a Bank's board of directors from delegating the responsibility for adopting or amending the TCLP to a committee of the board.

Comments. FHFA specifically requested comments on the benefits of the proposed expansion of the contents of the TCLPs and their linkage to the AHP Implementation Plans. FHFA also requested comments on whether the proposed expansion would impede the Banks' ability to respond to disasters through the AHP. The commenters who responded to the proposal generally opposed it, stating that the proposed requirements would be overly prescriptive and burdensome. The Banks, a state government entity, and a nonprofit developer particularly criticized the seeming disconnect between the timing requirements for the TCLP and those of other sources of funding, such as housing finance agencies. Several commenters advised that the proposed 12-month and 6-month notice periods would conflict with the Banks' need for flexibility in responding to disasters. One Bank calculated that it would take approximately one to two years of advance work to meet the required lead time in the proposed rule when factoring in time for conducting research, obtaining the necessary internal Bank approvals, and publishing the TCLP.

The Banks commented that FHFA's proposed outcomes requirements for project selection would effectively establish each Bank's housing needs priorities, obviating any need to conduct market research, obtain empirical data, and expand the content of the TCLPs. Several Banks and a Bank Advisory Council expressed concern that the proposal could diminish the role of the Bank Advisory Councils, but indicated that it may add value to the process if FHFA abandoned the proposed outcomes requirements for project selection. The Banks and the Bank Advisory Councils also expressed concerns about the proposed requirement to obtain empirical data about the housing needs in the districts, which they viewed as diminishing the Bank Advisory Councils role in advising the Banks' boards of directors. Two Banks opposed the proposed notification requirement to obtain empirical data because gathering and assessing the data would prevent the Bank from responding quickly to use the AHP for disaster relief. A nonprofit affordable housing intermediary opposed the proposed requirement to obtain empirical data on the grounds that the requirement would add a burden to the Banks and would not prove useful in making decisions about how to direct AHP funding because of the extent of housing needs throughout districts. A national affordable housing policy and advocacy organization recommended that the Banks be required to consult with state housing finance agencies in developing their TCLPs.

Decisions in the final rule. FHFA has considered the comments and remains of the opinion that the Banks's TCLPs should identify and assess the significant affordable housing needs in their districts. The changes to the current requirements for developing the TCLPs will help to ensure that the Banks identify such housing needs and guide the Banks in deciding how to design their AHPs.

The final rule requires the Banks to identify, from among the affordable housing needs addressed in their TCLPs, the housing needs they plan to address through the Banks' AHP, and including the specific needs to be addressed by any Targeted Funds. This differs from the proposed rule, which would have required each Bank to identify in its TCLP the specific housing needs it planned to address through the Bank's funding allocations and scoring criteria under its General Fund and any Targeted Funds and Homeownership Set-Aside Programs in its AHP Implementation Plan. FHFA had proposed that the Banks expand the scope and specificity of their TCLPs in conjunction with the outcome-based approach for project selection. Because the final rule does not adopt the outcome-based approach, there is no longer a need to require the Banks to include detailed information about their General Funds and Homeownership Set-Aside Programs in their TCLPs.

[10] 12 CFR 1290.6(b).

In addition, the final rule removes the proposed requirement that the Banks support the identification and assessment of significant affordable housing needs with empirical data, in response to commenters' concerns that this would be burdensome for Banks to implement. Many of the Banks were concerned that the word ''empirical'' implied that the Banks would be required to commission third-party studies to determine district affordable housing needs. However, the final rule continues to require that the Banks assess market research they conduct or obtain in order to identify significant affordable housing needs in their districts. Banks can also obtain information from their Advisory Councils to support their market research.

The final rule continues to require the Banks to consult with their Bank Advisory Councils, members, housing associates, and public and private economic development organizations in developing their TCLPs, which should ensure a robust process for obtaining input on the TCLPs. In response to the comment that the Banks should also consult with state housing finance agencies in developing their TCLPs, those entities likely are housing associates, as defined under FHFA's General Definitions regulation,[11] so the final rule makes no change to this language in the Community Support Requirements regulation. A Bank may also choose to consult with other parties not referenced in the regulation as appropriate.

However, FHFA agrees with commenters' concerns about the proposed six-month requirement for publishing the TCLPs. The commenters stated that the proposed six-month requirement would inhibit the Banks' abilities to respond to district affordable housing needs, including disasters, in a timely manner. The six-month requirement was proposed in conjunction with the Agency's proposal for an outcome-based framework for project selection. Under the proposed outcome-based approach, a Bank would have been required to identify in its TCLP the specific housing needs the Bank intended to address through its funding allocations and scoring criteria under its General Fund and any Targeted Funds and Homeownership Set-Aside Programs, as set forth in its AHP Implementation Plan. FHFA presumed that the Banks and other stakeholders would need additional time between the publication of the TCLPs and the beginning of the AHP application funding round to develop or revise AHP policies and procedures for inclusion in their AHP Implementation Plans, and conduct outreach to educate members, potential project sponsor applicants, and other AHP stakeholders about the Bank's revised scoring system. However, as discussed under Section III.A. above, the final rule does not adopt the proposed outcome-based approach. Therefore, there is no need to require the Banks to publish their TCLPs 12 months before the beginning of the TCLP year. Instead, the final rule requires the Banks to publish their TCLPs no later than the publication date of their AHP Implementation Plans. This should provide the Banks sufficient time to develop and publish their TCLPs, while underscoring the linkage between the TCLPs and the AHP Implementation Plans.

As noted above, the proposed rule would have required a Bank planning to establish a Targeted Fund to publish its TCLP at least 12 months before establishing and administering the Targeted Fund. FHFA finds commenters' concerns persuasive that this proposed timeframe would impede the Banks' ability to address pressing affordable housing needs, including natural disasters. Accordingly, the final rule sets the time period for publishing a TCLP that addresses the use of Targeted Funds as 90 days before the opening of the AHP application funding round, with an exemption for Targeted Funds addressing federal- or state-declared disasters, as they require expedited assistance. Because most Banks' TCLP years typically begin on January 1, the final rule does not tie the 90-day timeframe to January 1, which would result in the Banks having to publish their TCLPs by September 30 each year. Instead, the final rule ties the 90-day timeframe to the first day AHP applications can be submitted for the funding rounds for the Targeted Funds, which may be different dates throughout the year and be open for different lengths of time. This will provide the Banks more flexibility in administering their Targeted Funds. While significantly shorter than 12 months, the 90-day timeframe should still provide potential applicants with sufficient notice of the Banks' plans for their Targeted Funds so that applicants can prepare applications for submission to the Targeted Funds, with the goal being to produce sufficient numbers of applications for the Banks to be able to conduct robust competitive scoring processes for their Targeted Funds.

As discussed under Section III.F. above, the final rule adopts the proposal prohibiting a Bank's board of directors from delegating the responsibility for adopting or amending the TCLP to a committee of the board.

§ 1290.8 Compliance Dates

The dates by which the Banks must comply with these revised provisions are discussed above in Section I.

Affordable Housing Program Regulation

Reorganization of the Current AHP Regulation

The final rule adopts the proposed reorganization of the current AHP regulation, with some modifications to take into account certain changes from provisions in the proposed rule. The reorganization is intended to provide greater clarity for users of the AHP regulation. Current and new regulatory sections are grouped under new Subpart headings according to similar subject matter, resulting in renumbering of most sections of the current regulation. The numbering of the sections is not consecutive from Subpart to Subpart in order to reserve room within Subparts for the addition of new sections in the future, as necessary. FHFA received no comments on the proposed reorganization of the regulation.

The following discusses each section of the final rule amending the current AHP regulation in the order the sections appear in the final rule.

Subpart A—General

§ 1291.1 Definitions

As proposed, the final rule retains most of the definitions currently in § 1291.1. The final rule revises some of the current definitions and adds definitions, which are discussed below in the context of the related regulatory amendments.

In addition, as proposed, the final rule makes the following technical changes to certain definitions, which did not receive any comments:

- A definition of ''AHP'' is added, which means the Affordable Housing Program required to be established by the Banks pursuant to 12 U.S.C. 1430(j) and this part 1291.
- The definition of ''Homeownership Set-Aside Program'' indicates that establishment of such a program is in the Bank's discretion and is a noncompetitive program.
- The definition of ''net earnings of a Bank'' is revised by removing the requirement to deduct the Bank's annual contribution to the Resolution Funding Corporation, as the Banks are no longer required to make annual contributions to the Resolution Funding Corporation.
- In the definition of ''rental project,'' the term ''manufactured housing'' is

[11] 12 CFR part 1201.

changed to ''manufactured housing communities,'' which more accurately describes this type of housing in the context of rental projects.

• References to the ''competitive application program'' are changed to the General Fund and any Targeted Funds. References to ''homeownership set-aside programs'' are capitalized.

The final rule also makes the following technical revisions and an addition to the definitions for greater clarity, which were not included in the proposed rule:

• Changes ''funding period'' to ''funding round'' to reflect the terminology commonly used by the Banks and AHP stakeholders. Adds a definition of ''LIHTC'' to mean Low-Income Housing Tax Credits under section 42 of the Internal Revenue Code (26 U.S.C. 42).

• In the definition of ''visitable,'' the reference to ''2 feet, 10 inches'' is changed to the equivalent ''34 inches,'' consistent with the use of ''inches'' later in the definition.

§ 1291.2 Compliance Dates

The dates by which the Banks must comply with the revised AHP regulatory provisions are discussed above in Section I.

Subpart B—Program Administration and Governance

§ 1291.10 Required Annual AHP Contribution

Consistent with the proposed rule, the final rule relocates current § 1291.2(a) to § 1291.10. Section 1291.10 contains the Bank Act requirement stating that each Bank shall contribute annually to its AHP 10 percent of its net income for the preceding year, subject to a minimum annual combined contribution by all of the Banks of $100 million.[12]

§ 1291.11 Temporary Suspension of AHP Contributions

Consistent with the proposed rule, the final rule retains current § 1291.11 on the temporary suspension of AHP contributions without change. FHFA did not receive any comments on this provision.

§ 1291.12 Allocation of Required Annual AHP Contribution

Allocation of AHP funds. Consistent with the proposed rule, § 1291.12(a) of the final rule requires each Bank to allocate annually at least 50 percent of its required annual AHP contribution to its General Fund, and § 1291.12(c) permits each Bank to allocate up to 40 percent, in the aggregate, of its required annual AHP contribution to up to three Targeted Funds. The current regulation requires that at least 65 percent of each Bank's required annual AHP contribution be allocated to its Competitive Application Program. As noted in Section III.B. above, the current regulation does not authorize the establishment of Targeted Funds.

For the reasons identified above in Section III.C., § 1291.12(b) of the final rule retains the current limit that a Bank may allocate to its Homeownership Set-Aside Programs up to the greater of $4.5 million or 35 percent of its annual required AHP contribution. The proposed rule would have increased the 35 percent limit to 40 percent.

As discussed in the NPRM, the proposed rule would reduce the current annual required allocation to a Bank's General Fund (*i.e.,* Competitive Application Program) from 65 percent to 50 percent, but noted that the 50 percent threshold would still ensure that the Banks make at least half of their AHP funds available to address a broad spectrum of affordable housing needs within their districts through their General Funds. FHFA also stated in the NPRM that it is extremely important that a substantial portion of AHP funds continue to assist in the development of rental housing for lower income households given the need for more affordable rental housing throughout the Nation. The vast majority of awards under the Competitive Application Program serve rental housing. In 2017, the Banks awarded 90 percent of competitive funds to rental housing. The proposal would enable the Banks to target simultaneously additional specific affordable housing needs in their districts through the allocation of the remaining total AHP funds to Targeted Funds, as well as the optional Homeownership Set-Aside Programs.

Two nonprofit organizations that advocate for the development of affordable multifamily housing opposed any reduction in the minimum funding allocation to the General Fund because it would result in less funding for affordable rental projects. One of those commenters supported this position by referencing the NPRM discussion about the Banks' requests for additional funding allocation authority for Homeownership Set-Aside Programs, which the Banks find easier to administer than the General Funds.

After considering the comments, FHFA has decided to adopt the proposed minimum 50 percent funding allocation requirement for the General Fund in the final rule. FHFA's decision not to increase the maximum percentage allocation for the optional Homeownership Set-Aside Programs from 35 to 40 percent will continue to ensure that each Bank generally allocates a minimum of 65 percent of its total AHP funds to competitive application programs via the mandatory General Fund and any optional Targeted Funds.[13] Overall, FHFA intends the final rule to provide the Banks greater flexibility to allocate their total annual AHP funds to address the affordable rental and homeownership needs within their districts.

Homeownership Set-Aside Programs

One-third funding allocation requirement for first-time homebuyers or owner-occupied rehabilitation, or a combination of both.

Consistent with the proposed rule, § 1291.12(b) of the final rule requires that at least one-third of a Bank's aggregate annual funding allocation to its Homeownership Set-Aside Programs be allocated to assist first-time homebuyers or households for owner-occupied rehabilitation, or a combination of both. The current regulation applies the one-third funding allocation requirement only to first-time homebuyers. In support of the proposal, FHFA noted in the NPRM that a substantial need for owner-occupied rehabilitation funds exists in many Bank districts, and the demand for such funds is likely to increase as the country's population ages.[14] FHFA reasoned that expanding the scope of the one-third funding allocation requirement to include owner-occupied rehabilitation could facilitate additional funding for home repairs and accessibility modifications for households including the elderly, persons with disabilities, and military veterans.

The Banks, Bank Advisory Councils, and an advocacy organization supported the proposal, stating that it would encourage the use of more Homeownership Set-Aside Program funds for owner-occupied rehabilitation at a time when the Banks have identified a substantial need for these funds.

Two nonprofit organizations opposed the proposal, emphasizing the scarcity of resources for low- and moderate-income first-time homebuyers and noting that alternatives to AHP funding

[12] *See* 12 U.S.C. 1430(j)(5)(C).

[13] When a Bank allocates the alternate maximum amount of $4.5 million to its Homeownership Set-Aside Programs, the Bank may allocate, in the aggregate, less than 65 percent of its total AHP funds to its General Fund and any Targeted Funds.

[14] 83 FR at 11348, citing Harvard Joint Center for Housing Studies, *Housing America's Older Adults* (Sept. 2, 2014), *available at http://www.jchs.harvard.edu/sites/jchs.harvard.edu/files/jchs-housing_americas_older_adults_2014-ch4.pdf* (last accessed on 11/15/2018).

exist for rehabilitation. One of these commenters recommended that FHFA establish a separate funding allocation requirement for owner-occupied rehabilitation to ensure that a portion of Homeownership Set-Aside Program funds are provided for this purpose, while allowing the Banks to continue to fulfill the one-third allocation requirement by providing set-aside funds to first-time homebuyers.

Assisting first-time homebuyers is an important priority for the AHP, and the Banks' support for such homebuyers has greatly exceeded the required one-third funding allocation requirement. Since the inception of Homeownership Set-Aside Programs in 1995, over 80 percent of set-aside households have been first-time homebuyers. At the same time, a substantial need for owner-occupied rehabilitation funds exists in many Bank districts and the demand will likely increase over time. Expanding the scope of the one-third funding allocation requirement in the final rule to permit owner-occupied rehabilitation may help address this need by encouraging the Banks to increase their set-aside funding allocations for this purpose, while continuing to support the needs of first-time homebuyers. FHFA is not adopting the commenter's recommendation to establish a separate funding allocation requirement for owner-occupied rehabilitation, as this could limit the Banks' flexibility to determine how best to use their set-aside funds to meet the first-time homebuyer and owner-occupied rehabilitation needs within their districts.

The final rule also adopts a proposed technical revision to clarify that the one-third funding allocation requirement applies to the amount of set-aside funds ''allocated'' by the Bank to such households, not to the amount of set-aside funds actually used by them, because the Bank cannot control whether sufficient numbers of such households ultimately request set-aside funds in a given year. If an insufficient number of such households request set-aside subsidies, any unused funds would be provided to non-first-time homebuyers, and a Bank will not be considered in violation of the funding allocation requirement as long as it allocated the required amount. FHFA received no comments on this proposed technical change.

Phase-in funding allocation requirements for Targeted Funds. As proposed, § 1291.12(c) of the final rule adopts a phase-in process for the allocation of funds to Targeted Funds in order to address the risks of Targeted Funds given their targeted nature. A Bank initially will be permitted to allocate up to 20 percent of its required annual AHP contribution to one Targeted Fund. This percentage limit increases to 30 and 40 percent in subsequent years, depending on the number of additional Targeted Funds established, up to a maximum of three Targeted Funds. The final rule makes a technical change to the references to the Targeted Funds being administered concurrently to refer to their administration in the same year instead. This change recognizes that the Banks may choose to administer their Targeted Funds at different times during the year. FHFA did not receive any comments on the proposed phase-in requirements for funding Targeted Funds. The phase-in requirements governing the number of Targeted Funds that a Bank may establish in any given year are discussed below under § 1291.20.

Transfer of uncommitted Targeted Funds amounts. Proposed § 1291.12(c)(2) would have required a Bank to transfer any uncommitted Targeted Fund amounts to its General Fund for awards to alternates in the same calendar year. Section 1291.28(b) of the final rule makes approval of alternates under the General Fund and any Targeted Funds optional for a Bank pursuant to adoption of a Bank policy on approving alternates, and requires funding of the alternates if the Bank has such a policy and sufficient previously committed AHP subsidies become available within one year of application approval. Section 1291.70(b) of the final rule provides flexibility for the Banks to determine how to commit any uncommitted Targeted Fund amounts where the Bank does not have a policy to approve alternates under its General Fund or Targeted Funds.

Acceleration of funding. Consistent with the proposed rule, the final rule relocates current § 1291.2(b)(3), which contains the discretionary authority for a Bank to accelerate future required annual AHP contributions to its current year's Program, to § 1291.12(d), with certain clarifying technical edits. FHFA did not receive any comments on the technical revisions.

No delegation. As discussed in Section III.F. above and consistent with the proposed rule, § 1291.12(e) of the final rule prohibits a Bank's board of directors from delegating to a committee of the board, Bank officers, or other Bank employees the responsibility for adopting the policies for its General Fund and any Targeted Funds and Homeownership Set-Aside Programs. The prohibition on delegating to a committee of the board is an expansion of the current prohibition on delegating to Bank officers or other Bank employees.

§ 1291.13 Targeted Community Lending Plan; AHP Implementation Plan

Targeted Community Lending Plan. As discussed in § 1290.6 above and as proposed, the final rule amends § 1290.6(a)(5) of the current Community Support Requirements regulation to require each Bank to identify and assess in its annual TCLP the significant affordable housing needs in its district that it plans to address through its AHP, as well as any specific affordable housing needs it plans to address through any Targeted Funds. In a change from the proposed rule, §§ 1290.6(c) and 1291.13(a)(2) of the final rule require that if a Bank plans to establish a Targeted Fund, it must publish its TCLP at least 90 days prior to the opening of the application funding round for the Targeted Fund, unless the Targeted Fund addresses federal- or state-declared disasters. The final rule also provides that a Bank's TCLP must be published on or before the date of publication of its annual AHP Implementation Plan. A Bank is required to notify FHFA of any amendments to its TCLP within 30 days after their adoption by the Bank's board.

AHP Implementation Plan. As proposed, the final rule relocates current § 1291.3, which contains the requirements for the Banks' AHP Implementation Plans, to § 1291.13(b), with changes to reflect the inclusion of new policies required under the final rule. The prohibition on delegating certain strategic responsibilities to a committee of the board is discussed below, as are certain requirements for the Plan meriting particular discussion.

No delegation. As discussed in Section III.F. above and consistent with the proposed rule, § 1291.13(b) of the final rule prohibits a Bank's board of directors from delegating to a committee of the board, Bank officers, or other Bank employees, the responsibility to adopt, and make any amendments to, its AHP Implementation Plan. This is an expansion of the current prohibition on delegating such strategic responsibilities to Bank officers or other Bank employees.

Requirements for each Fund (§ 1291.13(b)(2), (b)(3), (b)(5)). In the current regulation, each Bank must include in its AHP Implementation Plan its requirements for its Competitive Application Program, including its scoring guidelines, and any Homeownership Set-Aside Programs. Consistent with the proposed rule, the final rule requires a Bank to include

those requirements in its AHP Implementation Plan for its General Fund and any Targeted Funds and Homeownership Set-Aside Programs. The final rule also requires a Bank to include in its AHP Implementation Plan, the Bank's application scoring tie-breaker policy, and any policies adopted by the Bank, in its discretion, for approving AHP application alternates for funding under its General Fund and any Targeted Funds.

For any Targeted Funds, a Bank is required to include specific parameters that ensure that the Targeted Fund is designed to receive sufficient numbers of applicants for the amount of AHP funds allocated to the Fund to facilitate a robust competitive scoring process, as required in § 1291.20(b)(2)(i). In a change from the proposed rule, the final rule does not require a Bank to include in its AHP Implementation Plan the specific funding allocation amounts for its General Fund and any Targeted Funds and Homeownership Set-Aside Programs, including how the Bank will apportion the one-third funding allocation under its Homeownership Set-Aside Programs. This will accommodate any potential timing issues a Bank may encounter that could delay its ability to identify the specific amounts of its funding allocations.

Applications to multiple Funds (§ 1291.13(b)(4)). Consistent with the proposed rule, the final rule requires a Bank to include in its AHP Implementation Plan the Bank's policy on how it will determine under which Fund to approve a project that applies to more than one Fund and scores high enough to be approved under each of the Funds.

Retention agreements (§ 1291.13(b)(6)). The final rule retains the current requirement that a Bank include its rental retention agreement requirements in its AHP Implementation Plan, and requires inclusion of the Bank's owner-occupied retention agreement requirements for households who use the AHP subsidy for purchase, or for purchase in conjunction with rehabilitation. Because the final rule eliminates the requirement for an owner-occupied retention agreement where the household uses the AHP subsidy solely for rehabilitation, nothing is required to be included in the AHP Implementation Plan regarding such agreements. This is a change from the proposed rule, which would have eliminated all owner-occupied retention agreements and, therefore, the requirement to address the agreements in the AHP Implementation Plan.

Relocation plans for current occupants of rental projects (§ 1291.13(b)(7)). The final rule includes a requirement that a Bank include in its AHP Implementation Plan the Bank's standards for approving a relocation plan for current occupants of rental projects pursuant to § 1291.23(a)(2)(ii)(B).

Optional Bank district eligibility requirements (§ 1291.13(b)(8)). Consistent with the current requirement in § 1291.5(c)(15) and the proposed rule, the final rule requires a Bank to include in its AHP Implementation Plan any optional Bank district eligibility requirements adopted by the Bank pursuant to § 1291.24(c).

Re-use of repaid AHP direct subsidy in same project (§ 1291.13(b)(12)). In a change from the proposed rule, the final rule retains current § 1291.3(a)(7), which requires a Bank to include its requirements for re-use of repaid AHP direct subsidy in its AHP Implementation Plan, if the requirements are adopted by the Bank pursuant to current § 1291.8(f)(2), which is now § 1291.64(b). The proposed rule would have deleted § 1291.3(a)(7) because the requirements for owner-occupied retention agreements would have been eliminated in all cases, meaning there would be no repayments of AHP subsidy by households that could then be re-used under § 1291.8(f)(2). The final rule retains the current requirement for owner-occupied retention agreements where the household uses the AHP subsidy for purchase, or purchase in conjunction with rehabilitation, but not where the household uses the subsidy solely for rehabilitation. A household that uses the subsidy for purchase, or purchase in conjunction with rehabilitation, may be required to repay subsidy if the household sells or refinances the home within the AHP five-year retention period and none of the regulatory exceptions to subsidy repayment applies. Since the possibility of such subsidy repayments remains under the final rule, a Bank could adopt a subsidy re-use program under § 1291.64(b). Accordingly, the Bank's requirements for re-use of repaid AHP subsidy under any Bank subsidy re-use program adopted pursuant to § 1291.64(b) must be included in its AHP Implementation Plan.

§ 1291.14 Advisory Councils

Consistent with the proposed rule, the final rule relocates current § 1291.4, which addresses the membership requirements and duties of the Banks' Advisory Councils, to § 1291.14, with the clarifications and change discussed below.

Representatives of for-profit organizations. The Bank Act requires that each Bank appoint a Bank Advisory Council of persons drawn from ''community and not-for-profit organizations'' actively involved in providing or promoting low- and moderate-income housing in its district.[15] As proposed, § 1291.14(a)(1) of the final rule clarifies that ''community organizations'' include for-profit organizations, which is consistent with existing Agency guidance.

An organization that advocates on behalf of multifamily housing providers strongly endorsed including representatives of for-profit organizations on the Bank Advisory Councils, noting that such representation adds the voices of developers and owners with experience in affordable multifamily housing and increases the pool of applicants for the AHP.

In contrast, several nonprofit organizations expressed concern that for-profit organization representation on the Bank Advisory Councils could dilute the representation and importance of nonprofit or mission-driven organizations on the Bank Advisory Councils. The commenters urged FHFA to ensure that the Bank Advisory Councils are populated predominantly by nonprofit and public sector representatives, who have mission-driven commitments to serving the community.

FHFA acknowledges the important role that nonprofit organizations play in addressing the housing needs of low- and moderate-income households throughout the country. Nonprofit, as well as for-profit and public sector, organizations all bring important affordable housing perspectives to the Bank Advisory Councils. In 2018, 56 percent of the total membership of all eleven Bank Advisory Councils represented nonprofit organizations, and 15 percent represented for-profit organizations. The rest of the membership represented consulting firms and government entities. For-profit organization representation is consistent with § 1291.14(a)(3) of the final rule, which retains the current requirement in § 1291.4(a)(3) for a diverse range of membership on the Bank Advisory Council such that representatives of no one group constitute an undue proportion of the membership, giving consideration to the size of the Bank's district and the diversity of low- and moderate-income housing and community lending needs and activities within the district.

[15] *See* 12 U.S.C. 1430(j)(11).

Recommendations on Bank Targeted Community Lending Plans. FHFA's Community Support Requirements regulation[16] requires the Banks to consult with their Bank Advisory Councils and other groups in developing and implementing their TCLPs. As proposed, § 1291.14(d)(1)(ii)(A) of the final rule includes the parallel requirement for the Bank Advisory Councils to provide recommendations to the Banks on their TCLPs, and any amendments thereto.

No delegation. For the reasons discussed in Section III.F. above, the final rule does not adopt the proposed amendment requiring a Bank's full board of directors to meet quarterly with its Bank Advisory Council.

§ 1291.15 Agreements

As proposed, the final rule relocates current § 1291.9, which governs the AHP contractual agreements that must be in place between the Banks and members, and between the members and project sponsors or owners, to § 1291.15. The final rule makes a number of changes and clarifications to the provisions in this section from those in the proposed rule, as discussed below.

Notice to Bank of LIHTC project noncompliance (§ 1291.15(a)(5)(ii)). Consistent with the proposed rule, § 1291.15(a)(5)(ii) of the final rule adds a monitoring agreement requirement for notices of LIHTC project noncompliance that is not contained in the current regulation. The Banks' AHP agreements with their members must require the members' monitoring agreements with project owners to include a provision requiring the latter to agree to provide prompt written notice to the Bank if an LIHTC project is in noncompliance with the LIHTC income targeting or rent requirements during the AHP 15-year retention period. However, in a change from the proposed rule, the final rule only requires that such notice be provided where the LIHTC noncompliance is material and unresolved, which may trigger a tax benefit recapture event and repayment of some of the AHP subsidy. If tax benefits are recaptured from a project, it may impact the project's financial viability. A corresponding monitoring requirement that the Banks review the LIHTC noncompliance notices received from project owners during the AHP retention period is included in § 1291.50(c)(1)(ii) of the final rule, as proposed.

Consistent with the current regulation and proposed rule, the final rule does not require the Banks to conduct long-term monitoring of AHP projects that received LIHTCs during the AHP 15-year retention period. Noncompliance with LIHTC income-targeting and rent requirements has been the same as or substantially equivalent to noncompliance with AHP income-targeting and rent requirements. Although LIHTC project noncompliance is rare, instances of noncompliance with LIHTC income targeting or rent requirements can occur during the AHP retention period, which would mean that the projects' incomes or rents likely are also in noncompliance with similar AHP requirements. However, the noncompliance generally would not come to the attention of a Bank during the AHP retention period because the Banks do not monitor LIHTC projects.

FHFA specifically requested comments on the practicality of the proposed notice requirement, and whether it should also be required in the event of noncompliance by projects with the income-targeting or rent requirements of the government housing programs discussed under § 1291.50(c)(1)(ii) below.

Several nonprofit intermediaries and an advocacy organization supported the proposed notice requirement as reasonable. A number of other commenters, including developers, a nonprofit affordable rental housing trade association, and an affordable housing developer, recommended that notice to the Banks only be required where the noncompliance is ''unresolved.'' The commenters noted that the Internal Revenue Service (IRS) requirements for notification of noncompliance result in the issuance of many notices for small, easily resolved operating issues, and only a small fraction of those notices remain unresolved for a substantial period of time. The notices that remain unresolved may involve projects with material noncompliance issues that could have an impact on the projects' financial viability. Commenters stated that the Banks should only be made aware of such material and unresolved problems.

In contrast, the Banks opposed the proposal. One Bank stated that implementation of the proposal would be impracticable because the Banks must defer to the state housing finance agency or the IRS in cases of noncompliance. A trade association and a developer of housing with supportive services suggested that the proposal would have limited effect because LIHTC projects rarely become noncompliant due to the nature of the private equity investments. Another Bank and a nonprofit developer stated that project owners may not remember their obligation to report LIHTC noncompliance to the Bank under their AHP monitoring agreements. Finally, several commenters stated that the proposal would place an additional 15-year regulatory burden to monitor the projects on members and the original project sponsors even if they had transferred ownership of the project after project development.

FHFA finds the comments about the infrequent instances of LIHTC project noncompliance and the minor nature of some of the noncompliance persuasive. The Banks do not need to receive notices of LIHTC noncompliance that will be easily resolved because these types of noncompliance will be cured within a reasonable period of time and do not jeopardize the long-term financial viability of the project. However, the Banks should be notified in the event of any material and unresolved noncompliance during the AHP 15-year retention period, which may trigger a tax benefit recapture event, so that the Bank can monitor the project's status and take remedial action as required by the AHP regulation. As noted above, the Banks likely would not become aware of material and unresolved noncompliance without notification because they do not monitor LIHTC projects during the retention period.

Concerning the comments asserting that the proposal would impose an additional 15-year regulatory monitoring burden on members, FHFA notes that only project owners would be required to report noncompliance to the Bank.

The final rule does not include a requirement that project sponsors or owners send notices to the Banks of noncompliance by projects with the requirements of the other specified government housing programs because a separate monitoring provision in the final rule addresses such noncompliance. Specifically, § 1291.50(c)(1)(i) and (ii) requires the Banks to obtain information annually from project sponsors or owners on their projects' compliance with other government funding sources, as well as the projects' on-going financial viability, as part of ''enhanced certifications'' to the Banks.

Owner-occupied retention agreements for purchase, or for purchase in conjunction with rehabilitation (§ 1291.15(a)(7)). For the reasons discussed in Section III.D. above, § 1291.15(a)(7) of the final rule retains the current requirement for an owner-occupied retention agreement where the

[16] 12 CFR 1290.6(a)(5)(iii).

household uses the AHP subsidy for purchase of a home, or for purchase of a home in conjunction with its rehabilitation, but eliminates the current requirement for an owner-occupied retention agreement where the household uses the AHP subsidy solely for rehabilitation of a home. The final rule makes accompanying conforming changes to various references to owner-occupied retention agreements throughout the final rule.

Notice to Bank or Bank designee. Section 1291.15(a)(7)(i) of the final rule provides that the Bank, and in its discretion any designee of the Bank, shall be given notice of any sale, transfer, assignment of title or deed, or refinancing of an AHP-assisted unit during the AHP five-year retention period. This is a change from the current regulation, which requires notice to the Bank or its designee.

FHFA requested comments in the proposed rule on whether owner-occupied retention agreements, if retained in the final rule, should require that such notice be provided to both the Bank and its designee (typically the member), rather than to one or the other. FHFA indicated that such a requirement would facilitate Program operations by giving the Bank simultaneous notice with the Bank's designee (if the Bank has one), and could facilitate repayment of AHP subsidy to the Bank in cases where a member subsequently fails and is subject to receivership actions by other federal agencies.

One Bank favored requiring notice to both parties, noting that it includes this requirement in its standard retention agreements as it is beneficial to the Bank to know that a sale or refinancing of the property has occurred. A nonprofit organization also favored requiring notice to both parties, stating that the minimal cost of the extra notice is worth the additional layer of oversight. Another Bank indicated that it includes a requirement for notice to the Bank in its retention agreements, but opposed requiring notice to a Bank designee, stating that this requirement might cause confusion as to who is responsible for calculating and providing a payoff in the event of a sale of the property.

As the comments indicate, requiring notice to the Bank is sound practice to ensure that the Bank is aware of events that might trigger an obligation to recover AHP subsidy. Therefore, the final rule requires that the Banks receive such notice. However, FHFA is persuaded by the comments that requiring notice to both the Bank and a Bank designee could be disruptive to the Bank's established processes. Each Bank should have the discretion to determine whether to require notice to a designee as may be appropriate for that Bank's operations. Accordingly, the final rule allows a Bank to determine, in its discretion, whether to require notice to a designee of the Bank.

Sale, transfer, or assignment. The final rule provides that the retention agreement applies not only to a sale of an owner-occupied unit, but also to a transfer or assignment of title or deed, during the retention period, as these forms of conveyance are the functional equivalent of sales.

Calculation of AHP subsidy repayment based on net proceeds and household's investment. Consistent with § 1291.9(a)(7) of the current regulation, § 1291.15(a)(7) of the final rule requires an AHP-assisted household to repay a pro rata portion of the AHP subsidy if the unit is sold or refinanced during the five-year retention period, subject to certain exceptions. However, the final rule prescribes a ''net proceeds'' calculation for determining the amount of subsidy subject to recovery. This is a change from the current regulation, which requires repayment of a portion of AHP subsidy from any *net gain* realized upon sale or refinancing. The subsidy repayment calculation in the final rule also prioritizes return of the AHP-assisted household's investment in the home to the household. The pro rata subsidy amount subject to repayment cannot exceed what is available from the net proceeds of the sale or refinancing.

Although the current regulation does not define ''net gain,'' as FHFA noted in the proposed rule, a majority of the Banks calculate the net gain as the sales price minus the original purchase price, purchaser and seller paid closing costs, and capital improvement costs, and then apply the pro rata repayment requirement. Some of these Banks have also deducted the AHP subsidy amount from the original purchase price. Other Banks have calculated the subsidy repayment amount using net proceeds identified on the Closing Disclosure, by deducting the senior mortgage debt from the sales price and, depending on the Bank, crediting or not crediting the household with its investments in the home. Some of these Banks have also added the AHP subsidy amount to the total proceeds.

Because the proposed rule would have eliminated the requirement for owner-occupied retention agreements in all cases, it did not propose a specific method in the rule text for calculating the repayment of AHP subsidy. However, the NPRM noted that FHFA reviewed the subsidy repayment requirements of other government housing programs, and in particular, HUD's HOME Program. The NPRM discussed the Owner Investment Returned First approach under the HOME Program which, if applicable to the AHP, would calculate net proceeds available for recapture as the sales price minus outstanding superior debt and seller paid costs, with the seller recovering its entire investment first from the net proceeds, the Bank then recovering the AHP subsidy on a pro rata basis, and any remaining net proceeds returned to the seller. FHFA requested comments on the merits and disadvantages of this approach and the net gain approach from the standpoint of the AHP-assisted households and the Banks, and whether there are other subsidy repayment approaches FHFA should consider if a retention agreement requirement were retained in the final rule.

FHFA received a number of comments on whether it should require a net gain or net proceeds calculation for determining the AHP subsidy repayment amount. One Bank supported the use of the net gain calculation discussed in the NPRM as the appropriate basis for calculating a pro rata repayment. In support of this recommendation, however, the Bank cited the benefits of coordinating the AHP calculation methodology with those in other government programs, such as those used by HUD, without specifying these HUD programs. Because the NPRM specifically described only one HUD program—the HOME Program—in the context of the owner-occupied retention agreement repayment calculation, and the version of the HOME Program calculation described in the NPRM is more similar to the net proceeds approach than the net gain approach, this commenter appears to have mistaken the net proceeds and net gain calculations. Another Bank stated that the net gain calculation has been effective for AHP-assisted home sales, but noted that the calculation does not work effectively for AHP rehabilitation grants because the AHP-assisted homeowners are frequently elderly or disabled, have lived in their houses for decades, and generally are unable to recall or do not have documentation of the original purchase price of their homes, a necessary component of the net gain calculation. Several Banks indicated support for an approach that would minimize the need to obtain information from the AHP-assisted households or third parties, noting that they have experienced frequent difficulty

obtaining original purchase prices of the homes.

A nonprofit organization expressed support for using the net proceeds recapture approaches as prescribed under the HOME Program. The commenter characterized the HOME Program approach as fair, and emphasized the value of promoting alignment between multiple government subsidy sources often used together in projects. A nonprofit economic research organization supported using a net proceeds approach, with AHP-assisted households able to recover their capital improvement costs, noting that this could help incentivize such households to maintain their properties. A Bank similarly commented that a repayment calculation that allows for recovery by households of their capital improvement costs would incentivize households in distressed areas to invest in such improvements.

The final rule eliminates the requirement for retention agreements for AHP subsidies used solely for rehabilitation. This change will eliminate the administrative burden on Banks and members of attempting to obtain subsidy repayments from households and also relieve a financial burden on those households. For owner-occupied retention agreements where the household used the AHP subsidy for purchase, or for purchase in conjunction with rehabilitation, the final rule establishes a net proceeds calculation that addresses the above-described concerns with the net gain approach.

The subsidy repayment calculation in the final rule also prioritizes return of the AHP-assisted household's investment in the home to the household. Specifically, § 1291.15(a)(7)(v) provides that the household shall repay the Bank the lesser of: (i) The AHP subsidy, reduced on a pro rata basis per month until the unit is sold, transferred, or its title or deed transferred, or is refinanced, during the AHP five-year retention period; or (ii) any net proceeds from the sale, transfer, or assignment of title or deed of the unit, or the refinancing, as applicable, minus the AHP-assisted household's investment. Section 1291.1 of the final rule defines ''net proceeds'' as the sales price minus reasonable and customary costs paid by the household and outstanding superior debt, or, in the case of a refinancing, the principal amount of the new mortgage minus reasonable and customary costs paid by the household and the principal amount of the refinanced mortgage. This calculation uses only information that is available from the settlement documents. The calculation also does not incorporate the subsidy originally provided to the AHP-assisted household, *i.e.,* the subsidy is not added to the net proceeds or subtracted from any of the components of the net proceeds calculation. No AHP subsidy may be recovered by the Bank unless the net proceeds exceed the AHP-assisted household's investment.

FHFA is persuaded by the commenters that the subsidy recovery calculation should account for the AHP-assisted household's investment in the home. Households invest resources in their homes in the form of down payments, transaction costs (such as broker's commission and title search fees), capital improvement costs, and repayment of senior mortgage principal. The household's investment should be retained and prioritized in light of the purpose of AHP subsidies to provide households with the benefits of homeownership. The ''household's investment'' is defined in § 1291.1 to mean reasonable and customary transaction costs paid in connection with the purchase of the unit, down payment, cost of capital improvements made, and any mortgage principal repaid since the purchase of the unit until the time of sale or refinancing during the AHP five-year retention period where the household documents these costs to the Bank or its designee. For example, a household could produce documentation of its expenditures associated with the installation of a new roof.

Consistent with § 1291.9(a)(7)(ii) of the current regulation, the final rule requires that the AHP subsidy be reduced on a pro rata basis for the time that the household owned the unit until its sale or refinancing. However, whereas the current regulation provides generally for this reduction each year, the final rule requires a reduction each month, consistent with current Bank practice, as provided below:

$$\left(1 - \frac{\#\ of\ months\ homeowner\ occupied\ home}{Retention\ Period\ (60\ months)}\right) X\ Original\ AHP\ Subsidy$$

$$= Pro\ Rata\ Subsidy\ Amount$$

The final rule provides that the Bank shall recover the lesser of: (i) The pro rata subsidy amount; or (ii) the net proceeds minus the household's investment.

Exception where the subsequent purchaser is low- or moderate-income. Consistent with § 1291.9(a)(7)(ii) of the current regulation, § 1291.15(a)(7)(ii)(B) of the final rule provides an exception to the AHP subsidy repayment requirement if the AHP-assisted unit is sold to a low- or moderate-income household. However, in contrast to the current regulation, the final rule provides methods of evaluating the subsequent purchaser's income in the absence of actual documentation. In such cases, the Bank or its designee shall determine the subsequent purchaser's income using one or more proxies that are reliable indicators of the subsequent purchaser's income, which may be selected by the Bank pursuant to guidance that FHFA will issue on proxies and which must be included in the Bank's AHP Implementation Plan. The requirement will become effective upon issuance of the guidance.

Neither the Bank nor its designee is required to request or obtain the subsequent purchaser's income, but must evaluate any income documentation if made available. As noted in the proposed rule, the subsequent purchaser of an AHP-assisted unit is under no obligation to provide income documentation to the Bank or member. This has made it difficult for the Banks and their members to determine subsequent purchasers' incomes in order to determine whether the subsidy repayment exception applies. The current regulation is silent on the use of proxies in evaluating a subsequent purchaser's income. At least one Bank, however, has applied a proxy, under limited circumstances, to evaluate subsequent purchasers' incomes, in light of these operational constraints.

FHFA requested comments on what approaches should be specified in the retention agreement, if retained in the final rule, that would provide a reasonable basis to assume that the subsequent purchaser of an AHP-assisted unit is likely to be low- or moderate-income, including proxies that could serve this purpose such as

the following: Certification from the subsequent purchaser or a third party that the subsequent purchaser's income is at or below the low- or moderate-income limit; evidence that the subsequent purchaser is receiving direct homebuyer assistance from another government program with household income targeting requirements substantially equivalent to those of the AHP; purchase price of the AHP-assisted unit is less than the median home price in the area; the AHP-assisted unit is located in a census tract or block group where at least 51 percent of the households are low- or moderate-income; or Federal Housing Administration (FHA) or other underwriting standards indicate that the income required to purchase the AHP-assisted unit at the purchase price is low- or moderate-income.

Commenters generally offered mixed opinions on the use of proxies, providing a variety of responses addressing which proxies would serve as acceptable methods for likely determining the income of the subsequent purchaser. A Bank supported the use of two proxies: Third-party certifications; and evidence that the subsequent purchaser was receiving direct homebuyer assistance from another government program. The Bank noted that using median home price and census tract income data may not be reasonable approaches as these data points would not adequately recognize or track areas affected by gentrification. The Bank asserted that gentrification occurs gradually and that median sales price and census tract data would not reflect investor purchases and sales to new or higher-income populations.

Another Bank supported the use of third-party certifications, evidence that the subsequent purchaser was receiving direct homebuyer assistance from another government program, and FHA or other underwriting standards. A nonprofit organization supported use of the latter two proxies.

The nonprofit organization objected to the use of geographically-based proxies, such as the purchase price of the AHP-assisted unit relative to area median home price, or location of the unit in a census tract or block group where at least 51 percent of the households are low- or moderate-income, because higher income homebuyers could purchase homes in low-income neighborhoods or census tracts. Another nonprofit organization stated that certain portions of distressed neighborhoods may be more upscale than nearby sections due to the presence of certain amenities, such as water features and golf courses. The commenter also opposed the use of third-party certifications, stating that it had witnessed significant unintended consequences of certification requirements in the context of FHA insurance and the foreclosure process.

A nonprofit organization encouraged the use of person-based proxies, such as evidence that the homebuyer received down payment assistance or participated in first-time homebuyer programs or family self-sufficiency programs, rather than geographically-based proxies, stating that geographically-based proxies fail to account for gentrification. The commenter stated, however, that self-certification or certain types of third-party certification (by the loan originator, for example) would be adequate.

One Bank expressed concern generally about the exception to the subsidy repayment requirement for sale to a low- or moderate-income purchaser, noting that the subsequent purchaser's income is not correlated to the AHP-assisted household's income. The Bank asserted that the subsidy repayment exception results in different treatment of similarly situated AHP-assisted households based on the subsequent purchaser's income. Another Bank objected to any requirement for a Bank or member to obtain sensitive income information from a subsequent purchaser with which neither institution has a contractual relationship.

FHFA has considered the comments regarding the use of proxies in the AHP and determined that the use of certain proxies will help ensure that Banks and members are not requiring repayment of subsidy by AHP-assisted households in cases where the subsequent purchaser is low- or moderate-income. Therefore, FHFA will require that Banks use one or more proxies that are reasonable indicators that the subsequent purchaser is likely a low- or moderate-income household, pursuant to Agency guidance. FHFA acknowledges commenters' discussions of the limitations of the proxies included in the NPRM. The Agency notes that as approximations, no proxy will be able to definitively determine the income of the subsequent purchaser.

AHP subsidy repayment exception for de minimis subsidy amount. Section 1291.15(a)(7)(ii)(C) of the final rule provides for an exception to the AHP subsidy repayment requirement for AHP-assisted households where the amount of AHP subsidy subject to repayment pursuant to the calculation in § 1291.15(a)(7)(v) is $2,500 or less. Under that provision, if the pro rata subsidy amount is $2,500 or less, calculation of net proceeds is unnecessary. The current regulation does not provide for an exception to the AHP subsidy repayment requirement for ''*de minimis*'' amounts of AHP subsidy subject to repayment.

FHFA requested comments in the proposed rule on whether, if the owner-occupied retention agreement requirement were retained in the final rule, there should be an exception to AHP subsidy repayment where the amount of subsidy subject to repayment, after calculating the net proceeds or net gain, is $1,000 or less. A number of commenters specifically supported a $1,000 *de minimis* threshold. For example, a state government housing authority, an individual commenter, and a Bank stated that at a net gain of $1,000, the administrative cost of ensuring repayment generally exceeds the value of any recaptured AHP subsidy. A national nonprofit intermediary recommended a *de minimis* threshold of greater than $2,000, stating that this amount constitutes a reasonable balance between the need for sound Program stewardship and asset building for low- or moderate-income families. An affordable housing policy organization and a national trade organization recommended a *de minimis* threshold of at least $5,000. A nonprofit consumer organization supported FHFA establishing the *de minimis* threshold amount for the Banks, and suggested that it be adjusted using an inflator based on the Agency's house price index so that it remains reasonable as home prices escalate.

The affordable housing policy organization stated that if the original AHP subsidy amount was $5,000 or less, there should be no subsidy repayment requirement, as such a small amount of subsidy would be unlikely to trigger flipping, and the transaction costs would nullify the value of the AHP subsidy. A community-based affordable housing financing organization and a community bank made a similar recommendation where the original AHP subsidy was $7,500 or less, or $10,000 or less, respectively, on the basis that the administrative expense was likely to exceed the value of the investment, and households should be entitled at a minimum to recover their required investment at the time of sale, net of AHP repayment so as not to impose financial injury.

The Banks supported a ''*de minimis*'' threshold exception to the AHP subsidy repayment requirement, but recommended that the amount of the threshold be determined by each Bank

based on the specific facts and circumstances of its district, rather than set by FHFA in the regulation. One Bank stated that the Banks should be authorized to adjust the *de minimis* threshold over time to account for housing market fluctuations and inflation. Another Bank suggested that the Banks be permitted to establish a *de minimis* amount based on a percentage of the original AHP subsidy amount, rather than a fixed dollar amount, because of the variations in the size of AHP subsidy amounts provided by the different Banks. A nonprofit organization recommended requiring each Bank to establish a *de minimis* threshold based on the Bank's and its members' actual administrative costs for assigning a lien on a property and calculating repayments of subsidy. The commenter stated that applying a *de minimis* threshold would avoid economic waste, but that support of a prescribed amount was impossible without further data.

FHFA has considered the comments and has decided to establish a *de minimis* threshold of $2,500 in the final rule. As discussed in the NPRM and underscored by the comments, establishing a *de minimis* threshold of $2,500 may deter flipping of AHP-assisted units, while at the same time minimize the financial burden on low- or moderate-income households of having to repay AHP subsidy if they sell their homes during the AHP retention period. The underlying policy of the AHP has always been that the purpose of the AHP subsidy is to enable low- or moderate-income households to receive the benefits of homeownership including appreciation in the value of their homes and, thus, to minimize any AHP subsidy repayments. A $2,500 threshold will also reduce the administrative obligations of the Banks and members associated with recovering AHP subsidies.

In response to the comments to adopt a *de minimis* threshold greater than $1,000, FHFA analyzed Bank data for set-aside grants awarded to households in 2012 and subsequently repaid during the five-year retention period ending in 2017. The data indicate that 1,080 grants of a total 10,203 set-aside grants awarded in 2012 were repaid during that time period. FHFA queried the data to determine how many of those grants would have been subject to *de minimis* thresholds of $2,000 or $2,500. The Agency's analysis revealed that at a $2,000 *de minimis* threshold, 683 of the 1,080 repaid grants, which is approximately 2 out of every 3 repaid grants, or 65 percent, would have been exempted from repayment. At a $2,500 *de minimis* threshold, 783 of the 1,080 repaid grants, which is approximately 3 out of every 4 repaid grants, or approximately 73 percent, would have been exempted from repayment.

Based on this data, FHFA has decided to set the *de minimis* threshold exception for AHP subsidy repayment at $2,500. This will result in fewer households subject to subsidy recapture, thereby enabling households to benefit more from appreciation in the value of their homes, and reduce the Banks' operational expenses associated with the subsidy repayment process. FHFA set the *de minimis* threshold at a fixed dollar amount, rather than a percentage that varies based upon the grant amount, for ease of implementation by the Banks, members, and households. FHFA considered requiring each Bank to establish a *de minimis* threshold based on the actual administrative costs incurred by the Bank and its members for assigning liens on properties and calculating subsidy repayments, but did not receive any comments or other information quantifying the actual administrative costs that FHFA could evaluate. FHFA also opted not to index the *de minimis* threshold to an inflator based upon the Agency's house price index, in order to provide a definitive *de minimis* threshold for AHP stakeholders. However, FHFA may consider adjusting the *de minimis* threshold in the future to account for house price fluctuations and Bank use of the new authority to establish higher set-aside grant amounts per household.

Other exceptions to subsidy repayment. Consistent with § 1291.9(a)(7)(ii) of the current regulation, § 1291.9(a)(7)(ii) of the final rule provides that the obligation to repay a pro rata portion of the AHP subsidy amount upon sale or refinancing does not apply if the unit was assisted with a permanent mortgage loan funded by an AHP subsidized advance. Also consistent with the current regulation, the final rule provides an exception to repayment obligation if, following a refinancing, the unit continues to be subject to a deed restriction or other legally enforceable retention agreement or mechanism.

Termination of AHP subsidy repayment obligation. Section 1291.15(a)(7)(iv) of the final rule clarifies that the obligation to repay AHP subsidy to a Bank terminates not only after any event of foreclosure, but also after transfer by deed in lieu of foreclosure, assignment of an FHA mortgage to HUD, or death of the owner(s) of the unit. This is consistent with guidance FHFA has provided to the Banks clarifying that transfer by deed in lieu of foreclosure is the functional equivalent of foreclosure, facilitating coordination of the AHP with FHA requirements, and clarifying that the heirs of the AHP-assisted homeowner are not subject to any AHP subsidy repayment obligation upon the death of such homeowner.

The proposed rule requested comments on whether this clarification should be made in the final rule if FHFA retained the current requirement for owner-occupied retention agreements in the final rule. The Banks and a trade organization favored including the clarifying language in the final rule. One Bank stated that the clarification would be useful for members and project sponsors using the AHP Bank in that it would help the Banks resolve ongoing issues with homebuyers using FHA loans as the underwriters flag the loans if this language is missing from the AHP retention agreements. The Bank also indicated that elderly owners are sometimes reluctant to sign the AHP retention agreement for fear that the potential AHP subsidy repayment obligation will fall on their beneficiaries upon their death(s).

Retention agreements for rental projects. The final rule retains § 1291.9(a)(8) of the current regulation, which contains the requirement for AHP 15-year retention agreements for rental projects, with several changes that are discussed below. Current § 1291.9(a)(8) provides that if a rental project is sold or refinanced during the 15-year retention period, the full amount of the AHP subsidy must be repaid to the Bank, unless certain exceptions apply.

Notice to the Bank or Bank designee. In a change from the current regulation and proposed rule, the final rule provides that the retention agreement for rental projects shall include a requirement that notice of a sale or refinancing of the rental project during the AHP 15-year retention period be provided to the Bank and, in its discretion, to a designee of the Bank. This is consistent with the change made for owner-occupied retention agreements discussed above. The current regulation requires that such notice be provided to the Bank or its designee. The proposed rule would have provided that the notice be provided to both the Bank and its designee. The NPRM stated that requiring notice to both the Bank and its designee (typically a member) would facilitate Program operations by giving the Bank simultaneous notice with the Bank's designee (if the Bank has one), and could facilitate repayment of AHP

subsidy to the Bank in cases where a member subsequently fails and is subject to receivership actions by other federal agencies.

A Bank and a nonprofit intermediary supported the proposal. The Bank stated that owners of multifamily properties often do not have other incentives to provide the Bank or its member with notice, and without notice to the Bank, the Bank might find it difficult to know the identity of the acquiring owner in the case of a sale, or whether the subsidy should remain with the property or the Bank should request repayment. A nonprofit lender recommended providing the Banks discretion regarding whether to require that project owners provide the notice to the Banks or designees. Two Banks opposed any change in the notice requirement because they address issues directly with the project sponsor. One Bank also stated that providing notice to the member may be viewed as imposing additional obligations on the member, which could discourage members' use of the AHP.

For the same reasons discussed above under the owner-occupied retention agreements, the final rule requires that notice be provided to the Bank and, in its discretion, to a designee of the Bank.

Sale, transfer, or assignment. Consistent with proposed § 1291.15(a)(7), § 1291.15(a)(8) of the final rule clarifies that the retention agreement applies not only to a sale of the rental project, but also to a transfer or assignment of title or deed, during the AHP 15-year retention period, as these forms of conveyance are the functional equivalent of sales. FHFA received no comments on this provision.

Project sponsor qualifications. The final rule relocates current § 1291.5(c)(10) on project sponsor qualifications to § 1291.15(b)(2), and makes a number of changes from the proposed rule. Specifically, the final rule requires the Banks to evaluate the qualifications of, and any covered misconduct by, the project sponsor at AHP application, and prior to each AHP subsidy disbursement. The Bank's AHP subsidy application form and AHP subsidy disbursement form (or other related documents) must include a requirement for the project sponsor to certify to this effect. The Banks will not be required to evaluate the qualifications and any misconduct of the project sponsor's affiliates and team members, including general contractors, as proposed. The final rule does not include the proposed rule's references to the project sponsor's affiliates and team members, including general contractors, in the sponsor qualifications and Agreements sections, as proposed, because the definition of ''sponsor'' is not being expanded to include such parties.

Section 1291.1 of the current regulation defines the ''sponsor'' of a project as a nonprofit, for-profit, or public entity meeting one of four specific criteria. Section 1291.5(c)(10) provides that for a project to be eligible to receive AHP subsidy, the project sponsor must be qualified and able to perform its responsibilities as committed to in its AHP application. Paragraphs (b)(4) and (g)(3) of § 1291.5 require a Bank to verify that the project meets its AHP application commitments at AHP application, and prior to each disbursement of AHP subsidy to the project, respectively.

The proposed rule would retain the definition of ''sponsor'' in current § 1291.1, but would have revised § 1291.5(c)(10) by extending the qualifications requirement to the project sponsor's affiliates and team members, including the general contractor. Thus, at AHP application, and prior to each AHP subsidy disbursement to a project, a Bank would have been required to determine whether the project sponsor, as well as all of its affiliates and team members, are qualified to perform the AHP project application commitments. The proposed rule would have added a requirement in the Agreements section of the regulation that, at AHP application, and prior to each disbursement of AHP subsidy to the project, the project sponsor must certify, or respond to specific questions about, whether it and its affiliates and team members have engaged in any misconduct as defined in FHFA's Suspended Counterparty Program regulation or by the Bank. The Bank's AHP subsidy application form and subsidy disbursement forms, or other related forms, would have been be required to include the qualifications criteria and certification or questions about any misconduct to be completed by the project sponsor.

Commenters who responded to this issue overwhelmingly opposed the proposal. A nonprofit intermediary commented that evaluating the qualifications of the general contractor and its team members at AHP application would be problematic because the project sponsor has yet to identify them at the AHP application stage. The nonprofit intermediary and a wide diversity of other commenters noted that project sponsors often select the general contractors after all funding sources are committed to the project and the project is ready to move forward to loan closings and construction. The nonprofit intermediary also stated that other financing sources frequently require that project sponsors conduct rigorous bidding processes in selecting general contractors, making a parallel evaluation by the Banks of the general contractors' qualifications unnecessary and overly burdensome.

The Bank Advisory Councils urged FHFA to maintain the current regulatory requirement for project sponsor qualifications and require that project sponsors certify compliance with the FHFA's Suspended Counterparty Program regulation only prior to AHP subsidy disbursement. The Bank Advisory Councils stated their preference for the Banks to be able to rely on the due diligence and capacity review by other funders of project sponsors and their affiliates and team members. The Bank Advisory Councils noted that the Banks currently have processes in place to monitor project progress and the project sponsor's performance.

The Banks asserted that requiring that the Banks' assessment of project sponsor capacity include compliance with FHFA's Suspended Counterparty Program regulation by all parties is unnecessary. They stated that the Banks lack privity of contract with general contractors and other parties and, therefore, cannot compel them to disclose such information. The Banks emphasized this point in particular with respect to owner-occupied rehabilitation grants that involve multiple contractors. They also commented that other funding sources perform due diligence reviews of the general contractor.

A Bank pointed out that while the term ''sponsor'' is defined in the current regulation and proposed rule as a nonprofit, for-profit, or public entity meeting one of four specified criteria, the proposal states in § 1291.15(b)(2) that ''a project sponsor includes all affiliates and team members such as the general contractor.'' The Bank stated that if the term ''sponsor'' is intended to include affiliates and team members, the Bank would need to consider whether its AHP subsidy collection efforts and settlements in the event of project noncompliance could extend beyond the assets of the project sponsor to include those of the project sponsor's affiliates and team members. A nonprofit intermediary noted that the proposed rule did not provide guidance on the definitions of ''affiliate'' and ''team member.''

A nonprofit developer commented that the proposal would ''cut out'' team members that have yet to establish a track record in the industry from AHP

participation. Likewise, a housing authority stated that the proposal has the potential to unreasonably exclude, or discriminate against, AHP applicants with new or less tested team members, but who possess sufficient overall strength as a team to be successful.

FHFA's intent for the proposal was to ensure that, in addition to the project sponsor, the project sponsor's affiliates and team members have the necessary qualifications to perform the AHP application commitments. The proposal was also intended to enable a Bank to identify any misconduct by the project sponsor and any affiliates or team members so that the Bank could determine whether it should accept the project sponsor's AHP application or approve requests from the project sponsor for AHP subsidy disbursement. Banks would have the latitude to define ''misconduct'' to include types of misconduct beyond those specifically addressed by FHFA in the Suspended Counterparty Program regulation. Therefore, if a Bank subsequently determined that a project sponsor's certification was false and that the project sponsor or its affiliates and team members were not qualified to perform the AHP application commitments, the Bank would have a contractual basis to cancel the project sponsor's AHP application and deny its requests for disbursement of AHP subsidy. The Bank would also have a basis to reject future AHP applications from the project sponsor, or to reject AHP applications that include the project sponsor's affiliates or team members, on the basis that the project sponsor is not qualified to carry out its AHP responsibilities.

As noted by the commenters, however, project sponsors generally have not selected their general contractors at the time of AHP application. Thus, it would be impossible for project sponsors to evaluate and certify as to the qualifications and any misconduct of their general contractors and the general contractors' subcontractors at the time of AHP application. Concerning the comments on the Banks' lack of privity with the general contractors and that an evaluation by the Banks of the general contractors' qualifications parallel to that of other funders is unnecessary, FHFA notes that it did not propose that the Banks evaluate or underwrite directly the general contractors' qualifications, but rather that the Banks obtain certifications from the project sponsors on their general contractors' qualifications. The Agency's decision not to adopt the proposed requirement for evaluation of the general contractor's qualifications should alleviate commenters' concerns that projects with less experienced team members would be excluded where the project team as a whole possesses the capacity to successfully develop the project.

Accordingly, the final rule requires the Banks to obtain a certification from the project sponsor of only its own qualifications and lack of misconduct at the time of AHP application and at AHP subsidy disbursement.

The final rule makes two clarifications to the proposed rule language. First, it changes the reference to ''misconduct'' to ''covered misconduct'' to reflect the terminology in the Suspended Counterparty Program regulation. Second, it states that if a Bank adopts its own definition of ''covered misconduct,'' that definition must incorporate the definition of ''covered misconduct'' in the Suspended Counterparty Program regulation at a minimum.

Application to existing AHP agreements. The final rule relocates § 1291.9(c) of the current regulation to § 1291.15(c), and revises the provision to make it applicable only to existing AHP agreements where the Bank is a party. The provisions of the AHP regulation, as amended from time to time, are deemed incorporated into all such agreements. This amendment recognizes that FHFA regulates the Banks and not third parties. FHFA will provide guidance, as necessary, for specific situations where a Bank is not a party to existing AHP agreements and questions arise as to applicability of AHP amendments to those agreements.

§ 1291.16 Conflicts of Interest

Consistent with the proposed rule, the final rule relocates current § 1291.10, which addresses conflicts of interest regarding financial interests of Bank directors, Bank employees, Bank Advisory Council members, and their family members, unchanged to § 1291.16. FHFA did not propose any changes to this section.

A Bank commented that the terms ''financial interest'' and ''family member'' were overly broad and should be defined in accordance with comparable terms in FHFA's regulation governing conflict of interest policies for Bank directors.[17] The Bank identified several ordinary course financial transactions that it said should not be considered ''financial interests'' for AHP conflict of interest purposes because they would not be expected to motivate Bank directors, Bank employees, or Bank Advisory Council members to influence decisions by the Bank regarding the evaluation, approval, funding, monitoring, or any remedial process for an AHP project. Examples cited included the purchase of an insurance product, an investment in a 401(k) account, and a retirement pension plan. FHFA notes that the scope of the AHP conflict of interest policy provision in § 1291.16 is limited to financial interests ''in projects'' that are the subject of a pending or approved AHP application and, thus, does not apply to the types of routine transactions cited by the Bank.

Subpart C—General Fund and Targeted Funds

§ 1291.20 Establishment of Programs

General Fund. Consistent with the proposed rule, § 1291.20(a)(1) of the final rule replaces current § 1291.5(a) by requiring each Bank to establish a General Fund pursuant to the requirements of this part. ''General Fund'' is the new term for the current ''Competitive Application Program.''

Eligibility requirements. Consistent with the current regulation, § 1291.20(a)(2) of the final rule provides that a Bank may not adopt eligibility requirements for its General Fund except as specifically authorized in the regulation.

FHFA did not receive comments on these provisions.

Targeted Funds. As proposed, § 1291.20(b)(1) of the final rule provides that a Bank may establish, in its discretion, a maximum of three Targeted Funds, on a phased-in basis, to address specified affordable housing needs in its district. Targeted Funds are further discussed above under Section III.B. and § 1291.12(c)(1) (phase-in of funding allocations).

Proposed § 1291.20(b) would have prohibited a Bank from establishing a Targeted Fund unless at least 12 months had passed since the publication of the Bank's TCLP. The final rule addresses the timing of the establishment of Targeted Funds in § 1291.13(d) and (e), and in § 1290.6(c) of the Community Support Requirements regulation. Comments received on the proposed timing requirements are addressed under § 1290.6 above.

The final rule establishes the phase-in requirements for a Bank's establishment of Targeted Funds. A Bank may establish one Targeted Fund in the first year that it establishes a Targeted Fund. If a Bank has previously administered at least one Targeted Fund in any preceding year, a Bank may establish two Targeted Funds. If a Bank has previously administered two Targeted Funds in any preceding year, it may

[17] 12 CFR 1261.11(f)(1), (2).

establish three Targeted Funds. The phase-in requirements help ensure that a Bank has demonstrated its ability to manage the risks associated with administering more than one competitive program in a year.

Eligibility requirements. As discussed above under Section III.B., § 1291.20(b)(2) of the final rule adopts the proposed requirement that the Banks adopt and implement parameters (referred to as ''controls'' in the proposed rule), as specified in their AHP Implementation Plans, for ensuring that each Targeted Fund is designed to receive sufficient numbers of applicants for the amount of AHP funds allocated to the Targeted Fund to facilitate a robust (referred to as ''genuinely'' in the proposed rule) competitive scoring process. In addition, as with General Funds, the final rule provides that the Banks may not adopt eligibility requirements for their Targeted Funds except as specifically authorized in the regulation.

The Banks questioned whether this proposed requirement was designed to measure sufficiency in terms of a Bank's approach in soliciting applications, or based on the number of applications actually received. Two of those Banks suggested that the measurement be based on the structure of the Targeted Fund and not on the actual number of applications received. FHFA notes that the language stating that the Targeted Fund is ''*designed* to receive sufficient number of applicants'' indicates that the requirement pertains to the scope and scoring methodology of the Targeted Fund, and is not a guarantee of the actual number of applications received. Therefore, no change to this language is made in the final rule.

§ 1291.21 Eligible Applicants

Member applicants. As proposed, the final rule relocates the eligibility requirement for member applicants in § 1291.5(b)(2) of the current regulation to § 1291.21(a), without changes except that the reference to the ''competitive application program'' is replaced with references to the General Fund and any Targeted Funds established by the Bank. FHFA did not receive any comments on this provision.

Project sponsor qualifications. As proposed, the final rule relocates the eligibility requirements in § 1291.5(c)(10) of the current regulation for project sponsors applying for AHP funds in conjunction with members to § 1291.21(b). The final rule retains the current requirement that a project sponsor must be qualified and able to perform its responsibilities. As further discussed under § 1291.15(b)(2) above, the final rule does not include the proposal to extend the qualifications requirement to include the project sponsor's affiliates and team members, including general contractors.

§ 1291.22 Funding Rounds; Application Process

As proposed, the final rule relocates the funding round and application process requirements in § 1291.5(b)(1), (b)(3), and (b)(4) of the current regulation to § 1291.22. The final rule substitutes the term ''rounds'' for ''periods'' to reflect common usage among the Banks and AHP stakeholders. FHFA did not receive any comments on this section.

§ 1291.23 Eligible Projects

Eligibility requirements. Consistent with the proposed rule, new § 1291.23 of the final rule sets forth the eligibility requirements for AHP projects, and comprises a number of provisions related to what constitutes an eligible project in § 1291.5(c) of the current regulation. This section includes the eligibility requirements for owner-occupied and rental housing projects, projects that are or are not occupied, project feasibility, timing of AHP subsidy use, retention agreements for owner-occupied and rental projects, and compliance with fair housing laws. In a change from the proposed rule, the current eligibility requirement for a five-year retention agreement for owner-occupied projects in § 1291.5(c)(9)(i) where the AHP subsidy is used for purchase, or purchase in conjunction with rehabilitation, is retained in § 1291.23(d)(1) of the final rule, as discussed in Section III.D. above.

Tenant income qualification in rental projects. Section 1291.23(a)(2)(ii) of the final rule provides that, in order for an occupied rental project to satisfy the income targeting commitments in the AHP application at initial occupancy after completion of the purchase or rehabilitation, the project must have a relocation plan for current occupants that is approved by one of the project's federal, state, or local government funders, or a reasonable relocation plan that is otherwise approved by the Bank according to standards included in its AHP Implementation Plan. The proposed rule would have required a relocation plan approved by one of the project's primary funders.

Under the current regulation, for rental projects that are not occupied at the time of application and are approved for AHP subsidy, the households must have incomes meeting the income targeting commitments in the approved AHP application upon initial occupancy of the rental units. For projects involving the purchase or rehabilitation of rental housing that are occupied at the time of AHP application, the households must have incomes meeting the income targeting commitments in the approved AHP application at the time of the AHP application. The purpose of qualifying current occupants' incomes at the time of AHP application is to discourage displacement of occupants whose incomes are higher than the income commitments in the approved AHP application.

FHFA specifically requested comments on how to encourage preservation of rental projects through the AHP while discouraging displacement of current occupants with incomes higher than those targeted in the AHP application, including whether the proposed requirement for a relocation plan approved by the primary funder of the project is reasonable. A state agency and a bank supported the proposed requirement for submission of a relocation plan, stating that it would provide adequate protection of tenants from displacement. A trade organization recommended that the Banks have discretion to either establish such a policy or to defer to policies established for other subsidy programs assisting the project.

Several other commenters and a Bank noted that there may be cases where review by the Bank may be necessary to determine whether a relocation plan provides adequate tenant protections and assistance. A nonprofit intermediary recommended that the Banks have discretion to evaluate the appropriateness of tenant protections in the context of the local market. Another Bank, a CDFI, and a nonprofit developer stated that for multifamily preservation projects that have no relocation plans because they lack government funding or their primary funders are commercial banks, the Bank should have authority to approve a relocation plan. The Bank reported that in 15 percent of its rental rehabilitation projects, AHP funds and the projects' replacement reserves were the only sources of funds and, thus, the projects were not subject to relocation plans approved under a government program.

The majority of commenters that addressed this issue, including nonprofit intermediaries, trade associations, a lender, and nonprofit developers, recommended that FHFA require the Banks to apply either a ''next tenant'' policy or a ''grandfather'' policy to existing tenants who exceed the AHP income commitments in order to avoid displacement of those tenants from the

project. Under a ''next tenant'' policy, the project's current tenant income mix would not be evaluated at the time of AHP application, but the project owner would be required to rent the unit, when it becomes vacant, of a tenant not meeting the AHP income commitments to a tenant who meets those commitments. In contrast, a ''grandfather'' policy would deem tenants in previously or currently-income restricted units who were income-eligible at the time they moved in but whose incomes subsequently exceed the income-eligibility thresholds, as income-eligible under the AHP. Two commenters stated that a ''grandfather'' policy would be consistent with HUD requirements, which prohibit the permanent relocation of existing residents in many preservation transactions, as well as with proposed legislative changes to LIHTC policy and the California Tax Credit Allocation Committee's regulations. One commenter stated that without use of a ''grandfather'' policy, preservation projects financed through HUD Sections 202 and 236, and the Rental Assistance Demonstration program, would be disadvantaged in the AHP application process. Another commenter recommended that the relocation requirement for currently assisted properties be consistent with other federal program requirements.

After considering the comments, FHFA is adopting in the final rule the proposal to allow income qualification of current occupants at initial occupancy after completion of the purchase or rehabilitation, at the Bank's discretion provided there is a relocation plan for current occupants that is approved by one of the project's federal, state, or local government funders, or a reasonable relocation plan for current occupants that is otherwise approved by the Bank. By requiring that the relocation plan be government-approved, or otherwise approved by the Bank subject to a reasonableness standard, as opposed to any relocation plan approved by one of the project's primary funders, the final rule helps ensure that the relocation plan meets standards for adequate relocation protections and assistance to tenants. Allowing a Bank to approve a reasonable relocation plan also responds to the commenters' concerns about projects where there is no government-approved relocation plan, or where the Bank has determined that some types of relocation plans typically approved in its district may not provide adequate tenant relocation protections.

FHFA acknowledges the value in the commenters' recommendations that the Banks be allowed to ''grandfather'' existing tenants based on their incomes when they moved into the project. However, FHFA has not included this recommendation in the final rule because the income targeting requirements for other federal and state programs could differ substantially from the AHP income targeting requirements (*e.g.,* targeting units at 60 percent, 65 percent, or 80 percent AMI, as opposed to the AHP income targeting requirement of 50 percent AMI for at least 20 percent of the units in the rental project).

FHFA is also not adopting commenters' recommendations for a ''next-tenant'' policy in the final rule. While the approach would avoid displacement of current tenants not meeting the AHP income targeting commitments, it could be a number of years before these tenants move out of the building and AHP income-eligible tenants replace them, meaning the project would not be serving AHP-income eligible households for some period of time. In addition, the practice could increase the income-targeting monitoring burden on the Banks and project sponsors.

§ 1291.24 Eligible Uses

Eligible uses of AHP subsidy. Consistent with the proposed rule, § 1291.24(a) of the final rule groups together a number of provisions in § 1291.5(c) of the current regulation related to eligible uses of AHP subsidy. These include: use of the AHP subsidy for purchase, construction, or rehabilitation of owner-occupied or rental housing; determinations of the need for the AHP subsidy, including sponsor-provided permanent financing; reasonable project costs determinations; reasonable financing costs determinations; eligible counseling costs; eligible refinancing; optional Bank district eligibility requirements; and calculation of the AHP subsidy. The provisions and any changes are discussed below.

Need for AHP subsidy. The final rule relocates the need for AHP subsidy eligibility requirement in § 1291.5(c)(2) of the current regulation to § 1291.24(a)(3), but does not adopt the proposed changes. FHFA plans instead to separately address the need for subsidy determination.

The current regulation requires that rental projects establish their eligibility for AHP subsidy by demonstrating: (1) A need for the AHP subsidy; (2) developmental and operational feasibility; and (3) project cost reasonableness. The regulation states that the estimated sources of funds for a project must equal its estimated uses of funds, as reflected in the project's development budget. Where the project's uses of funds exceed its sources of funds (excluding the AHP subsidy), the difference is the project's need for AHP subsidy, which is the maximum amount the project may receive.

As discussed in the NPRM, Banks and various stakeholders have asserted that the current regulatory language, as well as preamble language from an earlier AHP rulemaking, indicate that, for rental projects, the Banks are only required to review the project's development budget and not its operating *pro forma* in determining its need for AHP subsidy. The NPRM noted that FHFA's long-standing policy has been that the Banks review both the project development budget and the operating *pro forma* in making this determination.

In an effort to address any misunderstandings or differences in views about the process and requirements for determining a rental project's need for AHP subsidy, the proposed rule would have required the Banks to review the project's operating *pro forma,* in addition to the development budget, consistent with FHFA's long-standing policy. As discussed in the NPRM, a Bank must review a rental project's development budget to determine whether a funding gap exists between the sources and uses of funds. Review of the project's operating *pro forma* enables the Bank to assess the reasonableness of the project's projected cash flow, which could have an impact on the Bank's assessment of the need for AHP subsidy. For example, a debt coverage ratio or cash flow amount that exceeds the Bank's feasibility standards could indicate that the project does not need the full amount of AHP subsidy requested because it will have sufficient funds from ongoing operations to repay the debt associated with developing the rental project. If so, the project may be able to supplant part, or all, of the AHP subsidy through other means.

The NPRM included proposed guidance for evaluating that a project's cash flow and costs are reasonable, and how the Banks should perform the need for subsidy analysis in cases where: (1) Capitalized reserves exceed the Bank's project cost guidelines; (2) the project provides supportive services; and (3) the cash flow or debt coverage ratio exceeds the Bank's project cost guidelines.

Numerous commenters, including the Banks, nonprofit advocacy organizations and intermediaries, trade associations, and nonprofit and for-profit developers,

expressed views about the proposed regulatory change and guidance for determining the need for subsidy. A majority of the commenters opposed requiring the Banks to review a project's operating *pro forma* in addition to its development budget. A common concern raised was that the proposal could lead to cancellation of AHP subsidy awards due to a lack of need for the subsidy, negatively impacting individual projects and the overall Program. The commenters acknowledged the value of the operating *pro forma* in assessing the financial viability of a rental project, but not in determining the project's need for subsidy. The commenters emphasized that having a strong cash flow at some point during a project's lifecycle does not indicate that the project can borrow more funds or attract additional grant funding. One nonprofit affordable housing intermediary stressed that because AHP funds play a subordinate role in the production and financing of affordable housing, FHFA should not require the Banks to assess independently the reasonableness of a rental project's cash flow. The commenter stated that the Banks should be permitted to rely on cash flow and debt service parameters established by first position lenders and equity sources. The commenter and a nonprofit housing developer recommended that FHFA issue guidance encouraging the Banks to leverage the underwriting processes of other funding sources when making a need for subsidy determinations at application or at initial monitoring. One of the commenters also suggested that FHFA allow the Banks to rely on certifications by the project owner that the AHP funds were needed, or to structure AHP awards as loans or repayable grants that the project could repay from cash flow if funds remained.

For rental projects providing supportive services, the proposed guidance in the NPRM recognized the challenges associated with the analysis of these projects since, under the Bank Act and the AHP regulation, AHP subsidy may not be used to fund supportive services expenses. The NPRM stated that the Banks should require a separate supportive services budget that captures income and expenses for all supportive services activities to ensure that the project can reasonably offer them. The NPRM indicated that for projects where a government entity provides operating subsidies that fund both housing operating costs and supportive services and the operating subsidies cannot be readily bifurcated, the operating *pro forma* should capture the supportive services income and expenses. The Banks and many other commenters stated that requiring creation of an operating *pro forma* for housing and a separate one for supportive services could result in an inaccurate accounting of costs. They recommended that supportive services expenses be treated as standard operating expenses and, therefore, included in the operating *pro forma.*

The comments received in response to the proposed regulatory change and guidance reflect significant differences between the commenters' understanding of, and experience implementing, the requirement for determining need for subsidy and the Agency's rationale for addressing and clarifying the requirement. In light of these differences, the final rule does not adopt the proposed regulatory requirement for the Banks to review the operating *pro forma* in determining the need for AHP subsidy, and the proposed guidance is not included in the final rule preamble. Instead, FHFA plans to separately address the need for subsidy determination.

Sponsor-provided permanent financing to homeowners. As proposed, the final rule relocates the requirements in § 1291.5(c)(2)(ii) of the current regulation for sponsor-provided permanent financing to § 1291.24(a)(3)(ii) with no changes from the current regulation. FHFA expects to initiate a rulemaking on this subject in the near future.

The current regulation provides that when a Bank determines the need for AHP subsidy in homeownership projects where the sponsor extends permanent financing to the homebuyer, the sponsor's cash contribution (which is included in the project's cash sources of funds) shall include the present value of any payments the sponsor is to receive from the buyer, including any cash down payment from the buyer, plus the present value of any purchase note the sponsor holds on the unit. If the note carries a market interest rate commensurate with the credit quality of the buyer, the present value of the note equals the face value of the note. If the note carries an interest rate below the market rate, the present value of the note shall be determined using the market rate to discount the cash flows.

Prior to the issuance of the proposed rule, some Banks and AHP stakeholders requested that FHFA eliminate this provision, citing the complexity of the calculation. Others suggested that the regulation should treat sponsors like revolving loan funds, on the basis that their financing model operates essentially as a revolving loan fund. FHFA specifically requested comments in the proposed rule on whether the current AHP requirements for sponsor-provided permanent financing are reasonable, including whether the sponsors have a need for AHP subsidy in light of their particular financing model, and whether the current method in the regulation for determining their need for AHP subsidy understates or overstates the amount of AHP subsidy needed. FHFA also requested comments on whether the regulation should consider sponsors using this financing model to be revolving loan funds and, if so, whether they should be subject to current or different AHP revolving loan fund requirements.

A national intermediary and a number of its affiliates opposed the current AHP regulatory requirements for sponsor-provided permanent financing. They stated that the AHP regulation does not require any other lender to disclose how it obtains funds to lend to a homebuyer and that this is an unfair burden placed solely on sponsor-provided permanent mortgage lenders. Commenters stated that, from a practical and examination standpoint, the AHP subsidy must be disclosed on the Closing Disclosure, which shows the face value of the mortgage loan and demonstrates the pass through of the AHP grant to the homebuyer. The national intermediary further stated that the regulatory requirement was intended to show that due to lending money at a below market interest rate, the AHP subsidy is needed as a source for the discounted loan (present value of the loan). The commenter asserted, however, that since the ''present value loan amount'' is not on the Closing Disclosure, this creates an additional document for these organizations to create that is burdensome and provides no additional value to the Banks in evaluating the need for AHP subsidy.

In view of the comments and the value of receiving further input on these issues, FHFA has not adopted any changes to these requirements in the final rule and intends to conduct rulemaking in the near future on sponsor-provided permanent financing.

Prohibited uses of AHP subsidy. As in the proposed rule, § 1291.24(b) of the final rule includes the prohibited uses of AHP subsidy set forth in § 1291.5(c)(16) of the current regulation. These prohibited uses are: certain prepayment fees imposed by a Bank; fees imposed by a Bank for cancellation of a subsidized advance commitment; and processing fees charged by members

for providing AHP direct subsidies to a project.

As proposed, § 1291.24(b)(4) of the final rule adds that, consistent with current practice, capitalized reserves, periodic deposits to reserve accounts, operating expenses, and supportive services expenses are not eligible uses of AHP subsidy. The Banks concurred that supportive services expenses are not an eligible use of AHP subsidy. No comments were received on the other prohibited uses of AHP subsidy.

Optional Bank district eligibility requirements—maximum subsidy limits. As proposed, § 1291.24(c) of the final rule retains § 1291.5(c)(15) of the current regulation, which authorizes a Bank to establish limits on the maximum amount of AHP subsidy available per member, per project, or per project unit in a single AHP funding round, and adds that a Bank may establish a maximum subsidy limit per project sponsor. This change and other changes are discussed below.

Maximum subsidy limit per member each year. As proposed, the final rule removes the reference in the current regulation to ''per member each year'' as unnecessary because it can be factored into the subsidy limit per member in a single AHP funding round, especially as no Bank currently conducts more than one AHP funding round per year.

Maximum subsidy limit per project sponsor. As proposed, the final rule revises the current regulation to allow a Bank to adopt a maximum subsidy limit per project sponsor in a single AHP funding round. A Bank might choose to establish such a limit in order to provide opportunities for smaller or less experienced project sponsors to compete successfully for AHP subsidies. On the other hand, a project sponsor limit could prevent worthy projects developed by larger, more experienced project sponsors from receiving AHP subsidy. FHFA specifically requested comments in the NPRM on the potential advantages and disadvantages of allowing the Banks to impose a maximum subsidy limit per project sponsor.

One Bank supported the proposal on the basis that it would reduce the concentration of AHP awards in a small number of project sponsors. Several other commenters provided mixed or qualified views on the proposal. A Bank stated that a project sponsor subsidy limit could provide an opportunity for other types of project sponsors to participate, but it could also restrict project sponsors with otherwise competitive applications from receiving AHP awards. A trade association stated that a project sponsor subsidy limit could limit Bank exposure to risk associated with a single project sponsor and encourage diversification of project sponsors, but because project sponsors differ substantially in size, scale, geographic scope, capacity, and internal controls, individual AHP applications should be evaluated based on their merits without an arbitrary project sponsor subsidy limit. The commenter recommended that the Banks establish any project sponsor subsidy limit as a percentage of total AHP awards, so that it is high enough to allow a project sponsor to receive multiple awards in a single AHP funding round. A nonprofit affordable housing intermediary likewise supported awarding AHP subsidy based on the merits of individual applications, but acknowledged that having a project sponsor subsidy limit would make the AHP subsidy available to more project sponsors.

Other commenters opposed providing the Banks discretion to adopt project sponsor subsidy limits. A nonprofit affordable housing intermediary commented that the Banks can have a much greater impact if they award AHP subsidy based on the merits of individual applications rather than setting an arbitrary maximum subsidy limit per project sponsor. Two nonprofit developers stated that the proposed project sponsor subsidy limit would penalize project sponsors that have multiple projects that score well and are eligible for subsidy awards. A trade organization stated that the proposed project sponsor subsidy limit would allow less qualified projects and project sponsors to benefit at the expense of better qualified projects and project sponsors whose applications exceed the subsidy limit, thereby eroding the transparency of the application approval process.

After consideration of the comments, FHFA has decided to adopt the proposal in the final rule. Each Bank should have discretion to determine whether the benefits of establishing a project sponsor subsidy limit in its district outweigh its potential disadvantages, based on factors such as the characteristics of their project sponsor applicant pools, the record of accomplishment of experienced and less experienced project sponsors in receiving AHP subsidy awards, and the housing needs of the district.

Number of maximum subsidy limits per Fund. Consistent with Agency guidance for the current Competitive Application Program and with the proposed rule, the final rule provides that a Bank may establish only one maximum AHP subsidy limit per member, per project, or per project unit for the General Fund and for each Targeted Fund, which shall apply to all applicants to the specific Fund. This requirement also applies to the newly authorized maximum subsidy limit per project sponsor. The purpose of this requirement is to ensure consistency, clarity, and a level playing field for all applicants to a specific Fund, and avoid administrative burdens for the Banks if they were permitted to determine different subsidy limits for different regions or types of projects.

As proposed, the final rule further provides that the maximum AHP subsidy limit per project or per project unit may differ for each Fund. FHFA's intent in providing this flexibility is to allow the Banks to establish maximum subsidy limits for each Fund that addresses the specific characteristics of project applicants for that Fund. For instance, a Bank may want to establish a higher maximum subsidy limit per project for a Targeted Fund focused on certain geographies or development types in light of differences in housing development costs, such as high-cost areas or projects where most units contain three or more bedrooms to accommodate larger households. FHFA did not receive any comments on this proposal.

Applications to multiple Funds—subsidy amount. Consistent with the proposed rule, § 1291.24(d) of the final rule provides that if an AHP application for a project is submitted to more than one Fund at the same time, the application for each Fund must be for the same amount of AHP subsidy. This will ensure that the project demonstrates the same need for AHP subsidy in each application. If a project sponsor applies for a different amount of AHP subsidy in each application, the Bank would communicate with the sponsor to determine which subsidy amount the Bank should evaluate for both applications. Otherwise, it would raise questions about whether the project would be over-subsidized if awarded the higher amount of subsidy. FHFA did not receive any comments on this proposal.

§ 1291.25 Scoring Methodologies

As discussed in Section III.A. above, the final rule does not adopt the proposed outcome-based framework and instead revises the scoring-based project selection framework in the current regulation for the General Fund. New § 1291.25 addresses scoring methodologies for evaluating applications under the General Fund and Targeted Funds. Section 1291.25 retains much of the content in current

§ 1291.5(d)(1) through (4), with certain modifications discussed below. The requirements for the scoring criteria for the General Fund and Targeted Funds are included in new §§ 1291.26 and 1291.27, respectively.

Written scoring methodologies. Section 1291.25(a)(1) of the final rule establishes requirements for the Banks' scoring methodologies that are generally comparable to current § 1291.5(d)(1) with changes to reflect the Banks' new authority to administer Targeted Funds. Consistent with the current regulation, a Bank's scoring methodologies must be written, and a Bank may not adopt additional scoring criteria or scoring points allocations except as specifically authorized by the regulation. Consistent with proposed § 1291.25(a), the final rule provides that the scoring methodology for each Fund may be different.

Scoring points allocations. Section 1291.25(a)(2)(i) of the final rule establishes scoring points allocation requirements for the General Fund. Consistent with current § 1291.5(d)(2) and proposed § 1291.25(b), the final rule requires that a Bank allocate 100 points among the relevant scoring criteria. However, as discussed in Section III.A. above, the final rule revises the current minimum scoring points allocation requirements. Specifically, while the income targeting scoring criterion must still be allocated at least 20 points, and the remaining scoring criteria must still be allocated at least 5 points each, if a Bank adopts a scoring criterion for home purchase by low- or moderate-income households as an optional scoring criterion, the Bank may allocate fewer than the full 5 points to it, with the remainder of such points allocated to one or a combination of the other scoring criteria other than to the Bank district priorities scoring criterion. The scoring points allocation requirements are further discussed in connection with specific scoring criteria under § 1291.26 below.

In addition, as proposed, the final rule provides that if a Bank adopts a scoring criterion under its Bank district priority for housing located in the Bank's district, the Bank may not allocate points to the scoring criterion in a way that excludes all out-of-district projects from its General Fund. This provision strengthens the statement in the preamble to the 2006 AHP final rule that a Bank should not use the scoring criterion in this way by explicitly prohibiting the allocation of points in such way. FHFA did not receive comments on this provision.

For Targeted Funds, as proposed, § 1291.25(a)(2)(ii) of the final rule requires a Bank to allocate 100 points among all of the scoring criteria adopted by the Bank for the Targeted Fund. The final rule adds a requirement that a Bank may not allocate more than 50 points to any one scoring criterion for a Targeted Fund in order to ensure that applications are evaluated in a competitive process, taking all of the scoring criteria into account.

Scoring tied applications. Section 1291.25(c) of the final rule adopts, as proposed, a requirement that each Bank establish and implement, as necessary, a scoring tie-breaker policy to address the case of two or more applications to its General Fund or any Targeted Fund receiving identical scores in the same AHP funding round and there is insufficient AHP subsidy to approve all of the tied applications but sufficient subsidy to approve at least one of them. The specific requirements in the final rule for the scoring tie-breaker policy are consistent with guidance FHFA has provided to the Banks and with the proposed rule, except that the final rule provides that the approval of tied applications as alternates is only applicable if the Bank has adopted a written policy to approve alternates for funding under the applicable Fund. Approval of alternates is discussed further under § 1291.28(b) below. FHFA did not receive comments on this provision.

§ 1291.26 Scoring Criteria for the General Fund

Final rule. In a significant change from the proposed rule, and as discussed in Section III.A. above, the final rule does not adopt the proposed outcome-based framework for project selection, and instead revises the scoring-based project selection framework in the current regulation. The scoring-based framework in the final rule incorporates housing needs priorities from the current regulation and the proposed rule, and provides the Banks with additional discretion in the selection of Bank district housing needs than is provided in the current regulation.

Current regulation. The current regulation prescribes a scoring-based project selection system based on a 100-point scale. Under the current system, each Bank must allocate at least five points to each of two scoring criteria reflecting priorities in the Bank Act—use of donated or conveyed government-owned or other properties, and sponsorship by a nonprofit organization or government entity. Each Bank must allocate at least 40 points collectively to five scoring criteria reflecting FHFA regulatory priorities—20 points to income targeting, and five points each to housing for homeless households, promotion of empowerment, AHP subsidy per unit, and community stability. Of the remaining 50 points, a minimum of 5 points must be allocated to each of two Bank district priority categories: The first Bank district priority, for which a Bank selects one or more housing needs from 12 eligible housing needs specified in the regulation; and the second Bank district priority addressing one or more housing needs in the Bank's district, as defined by the Bank, with the Bank permitted to select an eligible housing need from the first Bank district priority provided it is different from the housing needs selected by the Bank under the second Bank district priority. The current regulation, thus, establishes a 50–50 distribution of points that must be allocated to: (i) The combination of statutory and regulatory priorities; and (ii) the combination of first and second Bank district priorities.

Current Regulatory Scoring Framework

Scoring Priorities	MINIMUM POINT ALLOCATIONS
Priorities: Statutory – Mandatory	
Federal government/donated or conveyed properties	5
Sponsorship – Nonprofit or government	5
Priorities: Regulatory – Mandatory	
Targeting to lower income households	20
Housing for homeless households	5
Promotion of empowerment	5
Community stability	5
Amount of AHP subsidy per unit	5
Priorities: Banks – Mandatory	
First Bank District Priorities (eligible housing needs identified in regulation)	5
Second Bank District Priorities (housing needs identified by Banks)	5

50 point minimum total for mandatory statutory and regulatory priorities.

Proposed rule. As discussed in in Section III.A. above, the proposed rule would have replaced the current scoring-based framework with an outcome-based approach which would have included four regulatory priorities for: (1) Very low-income targeting for rental units; (2) underserved communities and populations; (3) creating economic opportunity; and (4) affordable housing preservation, with examples of eligible housing needs specified under the latter three regulatory priorities.

Comments. The Banks jointly submitted an alternative proposal for project selection that retains the current scoring-based system, with certain changes to the regulatory priorities and required minimum scoring allocations, as described below.

Banks' Proposed Scoring Framework

Scoring Priorities	MINIMUM POINT ALLOCATIONS
Priorities: Statutory – Mandatory	
Federal government/donated or conveyed properties	5
Sponsorship – Nonprofit or government	5
Home Purchase (required under certain circumstances)	5
Priorities: Regulatory – Mandatory	
Targeting to lower income households	15
Underserved communities and populations	5
Creating economic opportunity	5
Affordable housing preservation	5
Community stability	5
Priorities: Banks – Optional	
Bank District Priorities (housing needs identified by Banks)	0

50 point minimum total for mandatory statutory and regulatory priorities.

Statutory priorities. The Banks' proposal retains the following statutory priorities as mandatory scoring priorities, consistent with the current regulation and proposed rule: (1) Projects sponsored by a government or nonprofit entity; and (2) projects using donated or conveyed government property. The Banks' proposal adds a scoring criterion for the Bank Act priority for the purchase of homes by low- or moderate-income households,[18] which a Bank would be required to implement if it does not allocate at least 10 percent of its total annual required AHP contribution to Homeownership Set-Aside Programs. Each of the statutory priorities is allocated a minimum of 5 points.

Regulatory priorities. The Banks' proposal also includes five regulatory priorities, each of which must be allocated a minimum of 5 points, except that income targeting must be allocated at least 15 points, resulting in a combined minimum allocation of 35 points. These priorities generally include the four regulatory priorities in the proposed rule, but with some modifications to the specific eligible housing needs included under those regulatory priorities. The fifth regulatory priority is community stability, which the Banks' proposal retains, with limited revisions, from the current regulation. The Banks' proposal does not retain the current scoring criterion for AHP subsidy per unit. The Banks' proposed minimum allocation of 35 points for the regulatory priorities is a reduction from the 40 points the current regulation requires the Banks to allocate to the regulatory priorities therein. In FHFA's view, this proposed five-point reduction in the number of points allocated to regulatory priorities would not significantly impact whether FHFA has met its statutory requirement to establish priorities for the use of the AHP subsidies.[19] The Banks' proposal further supports this conclusion because it maintains the current 50–50 point allocation between statutory/regulatory priorities and Bank district priorities, as further discussed below.

In addition, the Banks' proposal retains certain standards in the current scoring criteria. The proposal retains the current 60 percent maximum scoring standard for targeting very low-income households as part of the income targeting priority. The Bank's proposal also retains the current minimum threshold of 20 percent for the number of units in a project that must target homeless or special needs households in order to receive points, and includes a minimum 20 percent threshold for projects serving other targeted populations, in contrast to the 50 percent minimum threshold for these populations in the proposed rule. In addition, the Banks' proposal makes slight changes to the types of populations included under the special needs and other targeted populations categories, discussed further below. Finally, the Banks' proposal provides for the Banks to define the terms ''rural area'' and ''affordable housing preservation,'' as currently allowed, and to define ''residential economic diversity,'' rather than use the current regulatory definition. The proposed rule would have required the Banks to use FHFA's Duty to Serve definitions of those terms.

Bank district priorities. The Banks' proposal permits the Banks to allocate the remaining maximum of 50 points to priorities that address affordable housing needs in the Bank's district that the Bank has not otherwise adopted in its scoring framework.

Additional comments received from the Banks and other commenters on specific scoring criteria proposed by FHFA are discussed below.

Decision in final rule. FHFA finds the Banks' proposal to be a reasonable approach for project selection, subject to certain changes in response to various comments received and to achieve specific policy objectives. Accordingly, the final rule adopts a scoring-based framework based on the current regulation that incorporates many features from the Banks' proposal—significantly, the statutory priorities in the current regulation, an additional statutory priority for home purchases by low- or moderate-income households, the proposed regulatory priorities for income targeting, underserved communities and populations, creating economic opportunity, and affordable housing preservation (in conjunction with community stability), and a Bank district priority as in the current regulation. The regulatory priorities incorporate the regulatory priorities in the current regulation but are broader in scope. The statutory and regulatory priorities, and related comments received, are discussed further below.

[18] 12 U.S.C. 1430(j)(3)(A).

[19] *See* 12 U.S.C. 1430(j)(9)(B).

Final Rule Scoring Framework

Scoring Priorities	MINIMUM POINT ALLOCATIONS
Priorities: Statutory – Mandatory	
Federal government/donated or conveyed properties	**5**
Sponsorship – Nonprofit or government	**5**
Home Purchase (required under certain circumstances)	**5**
Priorities: Regulatory – Mandatory	
Targeting to lower income households	**20**
Underserved communities and populations	**5**
Creating economic opportunity	**5**
Community stability, including affordable housing preservation	**5**
Priorities: Banks – Optional	
Bank District Priorities (housing needs identified by Banks)	**0**

50 point minimum total for mandatory statutory and regulatory priorities.

Statutory priorities for government properties and project sponsorship (§ 1291.26(a), (b)). The scoring framework in the final rule retains the statutory priorities for the use of donated or conveyed government properties and for projects sponsored by a nonprofit organization or government entity. A for-profit developer commented that retention of these scoring criteria would greatly limit participation in the program by affordable housing providers. A CDFI opposed land donation as a scoring criterion, questioning its utility in the current affordable housing environment. A nonprofit developer stated that donated land is available to it on very few occasions. A Bank Advisory Council stated that at the time Congress enacted the Bank Act amendments authorizing the AHP, there were significant government-held, real estate-owned inventories and proposed military base closures, but that government properties are now rarely a factor in the funding of affordable housing projects, illustrating the need for regulatory flexibility. Several CDFIs commented that revolving loan fund programs typically do not score well under this criterion.

FHFA acknowledges, as it did in the NPRM, that in the Program's experience, a relatively limited number of projects have satisfied the government properties priority, and the Agency expects that to continue. However, because the use of government-owned properties is a priority specified in the Bank Act, FHFA is retaining it as a scoring criterion in the project selection framework in the final rule.

Similarly, sponsorship of a project by a nonprofit organization or government entity is a priority specified in the Bank Act and, therefore, is also retained as a scoring criterion in the project selection framework in the final rule. The Banks award a majority of AHP awards through their Competitive Application Programs to projects with nonprofit or government entity sponsors. Continued support of these types of project sponsors is important because they have a long record of using AHP subsidies to support affordable housing.

Statutory priority for purchase of homes by low- or moderate-income households (§ 1291.26(c)). The project selection framework in the final rule adds a statutory priority for the purchase of homes by low- or moderate-income households that a Bank must adopt if it does not allocate at least 10 percent of its total required annual AHP contribution to Homeownership Set-Aside Programs. This requirement is consistent with the Banks' proposal for project selection.

Proposed § 1291.48(b) would have required that, each year, each Bank award at least 10 percent of its annual required AHP contribution to low- or moderate-income households, or to projects targeting such households, for the purchase by such households of homes under any or some combination of the Bank's General Fund, any Targeted Funds, and any Homeownership Set-Aside Programs. As discussed in the NPRM, this priority is consistent with the priority in the Bank Act for the purchase of homes by low- or moderate-income families. FHFA specifically requested comments on whether 10 percent of a Bank's total annual required AHP contribution constitutes sufficient prioritization for this home purchase priority, or whether the percentage should be higher or lower. A number of commenters expressed differing views over the proposed 10 percent figure. A Bank stated that it would establish an appropriate prioritization, while the Banks opposed it as overly prescriptive and difficult to meet in high cost areas.

The scoring criterion in the final rule responds to commenters' concerns that the proposed 10 percent allocation to a Bank's Homeownership Set-Aside Programs would be too restrictive. In areas of Bank districts where the cost of homeownership is very high, comparatively fewer low- or moderate-income households would be able to afford to purchase homes, even if funds for down payment and closing costs were available to them from a Homeownership Set-Aside Program. A Bank with such high cost areas in its district, thus, may prefer not to allocate funds to Homeownership Set-Aside Programs and to support instead the development of rental units as the most impactful use of its AHP subsidies. The final rule enables the Banks to address such situations by providing them the option to adopt the scoring criterion for home purchase by low- or moderate-income households in lieu of allocating at least 10 percent of their AHP funds

to Homeownership Set-Aside Programs. FHFA expects that such a scoring criterion will have an impact, even in the absence of a set-aside program.

Regulatory priority for income targeting (§ 1291.26(d)). The scoring framework in the final rule retains the current regulatory priority for targeting very low- and low- or moderate-income households, including the specific scoring methodology for targeting these households. The final rule continues the current required allocation of at least 20 points for this priority, in contrast to the Banks' proposal to reduce the minimum point allocation to 15 points.

Proposed § 1291.48(c) would have established an outcome requirement for a regulatory priority for very low-income targeting for rental units. Each Bank would have been required to ensure that each year, at least 55 percent of all rental units in rental projects receiving AHP awards under the Bank's General Fund and any Targeted Funds are reserved for very low-income households (households with incomes at or below 50 percent AMI). FHFA specifically requested comments on this proposed requirement, including whether the proposed 55 percent threshold, the applicability solely to rental units, and income-targeting at 50 percent AMI were appropriate.

Commenters generally opposed the proposal. The Banks, a Bank Advisory Council, and two trade and policy organizations expressed concern that this requirement would fail to recognize the benefits of mixed-income occupancy projects, which allow developers to cross-subsidize units. A nonprofit intermediary stated that the income targeting standards should align with LIHTC income targeting standards. The Banks' project selection proposal retains the standard for targeting very low- and low- or moderate-income households set forth in the current regulation, which, for rental projects, requires the Banks to award the maximum income targeting score to projects that reserve 60 percent of the units for households with incomes at or below 50 percent AMI.

As discussed under Section III.A. above, the final rule does not adopt the proposed outcome-based scoring framework, including this proposed very low-income targeting regulatory priority. Instead, consistent with the Banks' project selection proposal, the final rule retains the current scoring criterion for income targeting in order to continue the AHP's important role in addressing the housing needs of very low- as well as low- or moderate-income households. Retaining the existing 20-point minimum allocation for income targeting also emphasizes the AHP's role in this regard. At the same time, the final rule retains the current 60 percent of units standard, which is intended to encourage the awarding of more points to mixed-income housing. The income targeting standards in the regulation cannot be changed to align completely with the LIHTC income targeting standards because the Bank Act's standards are different.

Regulatory priorities for underserved communities and populations, creating economic opportunities, and community stability including affordable housing preservation.

The final rule adopts three regulatory priorities, each of which comprises a number of specified eligible housing needs, some of which are scoring criteria in the current regulation. The specified eligible housing needs are examples of the kinds of housing needs a Bank may choose to adopt under each regulatory priority and are not exclusionary. A Bank may choose to adopt other housing needs under the regulatory priority that are similar in nature to those specified under the regulatory priority. FHFA may also specify additional eligible housing needs under the regulatory priorities by separate guidance, as new housing needs arise. A Bank must adopt at least one housing need as a scoring criterion under each of the three regulatory priorities.

FHFA's research to develop the housing priorities in the proposed rule leads it to believe that these three regulatory priorities represent the most pressing housing needs currently facing the Nation, while providing the Banks sufficient flexibility to meet future housing needs. The three regulatory priorities and examples of their eligible housing needs are discussed below.

Regulatory Priority for Underserved Communities and Populations (§ 1291.26(e))

Consistent with the proposed rule, the final rule adopts a regulatory priority for underserved communities and populations, including the following eligible housing needs described in further detail below: Housing for homeless households; housing for special needs populations; housing for other targeted populations; housing in rural areas; and rental housing for extremely low-income households. FHFA may also identify other specific housing needs as eligible under this regulatory priority by separate guidance, as new housing needs arise.

Housing for homeless households (§ 1291.26(e)(1)). As proposed, the final rule includes housing for homeless households as an eligible housing need under the underserved communities and populations regulatory priority. In contrast to the current regulation, the final rule makes adoption of a housing for homeless households scoring criterion optional rather than mandatory. In a change from the proposed rule, the final rule retains the current minimum threshold for the number of units that must be reserved for homeless households at 20 percent in order for a project to receive points. The proposed rule would have increased the minimum threshold to 50 percent to encourage projects dedicated to serving the needs of those households. FHFA specifically requested comments on whether this proposed increase would be appropriate.

Commenters overwhelmingly opposed the proposed increase in the minimum threshold. A number of commenters raised project development concerns with the proposal, such as difficulties in securing a project site or project financing. A Bank Advisory Council stated that a minimum 50 percent threshold would be very challenging for project sponsors to meet given the lack of operating subsidies available for homeless housing and special needs housing. A Bank and its Bank Advisory Council emphasized that a minimum 50 percent threshold would not align with current housing models or the requirements of other funders that also fund AHP projects, especially since many housing finance agencies require that a maximum of 25 or 30 percent of the units in a project target homeless households. A number of representatives of a nonprofit developer stated that a specific project would not have been able to overcome community opposition if it had been required to reserve 50 percent of its units for homeless households. A number of nonprofit housing developers asserted that many homeownership projects, even those serving specified populations, would find it difficult to meet a 50 percent threshold as these populations often find it difficult to qualify for homeownership opportunities.

FHFA is persuaded by the commenters that increasing the current minimum 20 percent threshold for homeless households to 50 percent could create difficulties for the financing of such projects, particularly in states or localities with limited designated funding sources for such households. The Agency also recognizes that the development of such projects at a 50 percent threshold level may face community opposition. Therefore, the final rule retains the current minimum

threshold of 20 percent for homeless households.

Housing for special needs (§ 1291.26(e)(2)). As proposed, the final rule includes housing for special needs populations as an eligible housing need under the underserved communities and populations regulatory priority. The current regulation includes housing for special needs populations as an optional eligible housing need under the first Bank district priority. As in the current regulation and proposed rule, the final rule includes the following as eligible special needs populations under this scoring criterion: The elderly; persons recovering from physical abuse or alcohol or drug abuse; persons with HIV/AIDS; persons with disabilities; and housing that is visitable by persons with physical disabilities who are not occupants of such housing. In addition, as proposed, the final rule expands the eligible special needs populations from those in the current regulation to include: Formerly incarcerated persons; victims of domestic violence, dating violence, sexual assault or stalking; and unaccompanied youth.

However, in a change from the proposed rule, the final rule retains the current minimum threshold of 20 percent for the number of units that must be reserved for special needs populations in order for a project to receive scoring points. FHFA specifically requested comments on whether this proposed increase, which was intended to encourage projects dedicated to serving special needs populations, would be appropriate. In addition, in contrast to the proposed rule, which would have required projects with units serving special needs populations to provide supportive services or access to supportive services for the specific special needs population served, the final rule does not require projects to provide such services or access to such services in order to receive points under this scoring criterion.

One commenter supported the proposed increase in the minimum threshold from 20 to 50 percent, stating that significant evidence documents that people with disabilities prefer to live in housing designed to address their specific needs, rather than being dispersed through a mixed-occupancy project. Commenters otherwise overwhelmingly opposed the proposed increase in the minimum threshold. A Bank Advisory Council stated that a minimum 50 percent threshold would be very challenging for project sponsors to meet given the lack of operating subsidies available for special needs. A Bank and its Advisory Council emphasized that a minimum 50 percent threshold would not align with current housing models or the requirements of other funders that also fund AHP projects, especially since, according to these commenters, many housing finance agencies require that a maximum of 25 or 30 percent of the units in a project target special needs. Numerous commenters also questioned whether the proposed increase in the threshold would be consistent with other applicable federal law governing the housing integration of persons with disabilities.[20] A nonprofit intermediary indicated that, since 2015, one-third of its AHP-funded supportive housing projects targeted less than 50 percent of their units to supportive housing. The commenter indicated that this portion of its portfolio provided needed housing units for households who benefited from the provision of supportive housing units. The commenter stated that increasing the threshold to 50 percent could diminish the flexibility developers need, impeding supportive housing development in some communities. A number of nonprofit housing developers asserted that many homeownership projects, even those serving specified populations, would find it difficult to meet a 50 percent threshold as special populations often find it difficult to qualify for homeownership opportunities. An advocacy organization that focuses on the housing needs of people with disabilities opposed the proposed 50 percent threshold for housing for people with disabilities, stating that it would result in isolation of such individuals from other populations. The commenter recommended that FHFA consider adopting a maximum limit of 25 percent of the number of units within a project that could be reserved for occupancy by the applicable targeted population, citing HUD's Section 811 Project Rental Assistance program as a federal program reflecting this approach.

For the same reasons discussed under the homeless households scoring criterion above, the final rule retains the current minimum threshold of 20 percent for special needs households. The final rule does not adopt the commenter's recommendation to establish a maximum 25 percent limit on the number of units in a project that could be reserved for occupancy by persons with disabilities because it would unnecessarily constrain Banks in districts that can accommodate projects with a higher threshold.

Several commenters objected to the proposed requirement that projects provide supportive services, or access to supportive services, for special needs populations in order to receive points under this scoring criterion. As discussed in the NPRM, this requirement was proposed because these populations have special needs associated with their particular life circumstances that could be addressed by targeted supportive services. An advocacy organization focused on addressing the needs of persons with disabilities urged that the final rule provide project sponsors with discretion to offer supportive services and provide residents with disabilities individual choice in how and from whom they access services. The Banks' project selection proposal does not require provision of, or access to, supportive services for special needs populations. One Bank, in support of the Banks' project selection proposal, stated that many housing providers do not provide on-site supportive services, and another Bank stated that, among those providers who do provide supportive services, many may not continue to do so in the future. Several Banks recommended that the final rule leave the decision on whether supportive services are appropriate for particular projects to the discretion of affordable housing developers.

FHFA notes that the proposed rule would not have required the provision of supportive services but merely ''access to'' those services. Nevertheless, FHFA finds the comments on supportive services persuasive and has not included a supportive services requirement in the final rule. The final rule, instead, authorizes the Banks, in their discretion, to adopt a supportive services requirement for specific special needs populations identified by the Bank.

Other commenters provided input on the specific special needs populations proposed for inclusion under this scoring criterion. An advocacy organization that focuses on addressing the needs of people with disabilities supported including people with disabilities as an underserved population under the special needs scoring criterion. An intermediary that focuses on supportive housing supported the inclusion of: Formerly incarcerated persons; victims of domestic violence, dating violence, sexual assault, or stalking; and unaccompanied youth. No commenter objected to the inclusion of any of the populations specified in the proposed rule.

Accordingly, the final rule includes the eligible special needs populations specified in the proposed rule. As

[20] *See* 28 CFR 35.130(d).

discussed in the NPRM, the reference to ''persons with AIDS'' in the current regulation is updated to ''persons with HIV/AIDS'' to more closely align it with common nomenclature and in recognition of the fact that persons with HIV experience comparable housing needs to persons with AIDS. The term ''mentally or physically disabled persons'' in the current regulation similarly is updated to ''persons with disabilities'' to reflect more commonly acceptable terminology. As discussed in the NPRM, persons with disabilities are included under this scoring criterion because they benefit from housing features such as wheelchair-accessibility or enhancements for visual or hearing impairments.

Housing for other targeted populations (§ 1291.26(e)(3)). As proposed, the final rule includes housing for other targeted populations as an eligible housing need under the underserved communities and populations regulatory priority. Generally consistent with the proposed rule, the final rule includes the following as eligible ''other targeted populations:'' Agricultural workers; military veterans; Native Americans; households requiring large units; and kinship care households, because of the significant housing needs these populations face, as discussed in the NPRM. In a technical change from the proposed rule, as discussed further below, the final rule replaces the term ''multigenerational households'' with ''kinship care households,'' and removes the category of persons with disabilities, which are covered under the special needs scoring criterion. In addition, for the same reasons discussed under the homeless households and special needs scoring criteria above, the final rule does not adopt the proposed increase in the number of units reserved for occupancy by the relevant targeted population from 20 to 50 percent. FHFA specifically requested comments on whether this proposed increase, which was intended to encourage projects dedicated to serving other targeted populations, would be appropriate. The final rule also does not include the qualifying phrase ''not necessarily with supportive services'' that was in the proposed rule because, as discussed under the special needs scoring criterion above, the final rule does not adopt a supportive services requirement for that scoring criterion.

FHFA received several comments on this proposed scoring category, including comments on the types of targeted populations that should be included. A nonprofit affordable housing intermediary strongly supported the inclusion of the specified other targeted populations as a regulatory priority, noting that many of the specified populations reside in rural communities. The commenter also recommended that FHFA narrow the targeting of housing for Native Americans to housing for Native Americans on or near federally recognized tribal lands, stating that this is where housing needs are most acute for this population. The Banks' proposal for project selection replaces the term ''Native Americans'' with ''Native Peoples,'' to ensure that the category includes Native Alaskan and Hawaiian populations. The Banks' proposal eliminates the multigenerational household category. Multiple Banks characterized the term ''multigenerational'' as ambiguous, expressing concern that the proposed rule would prioritize housing that accommodates only parents and children.

As proposed, the final rule includes Native Americans as a specific eligible targeted population under this scoring category, in view of their significant housing needs, as discussed in the NPRM. The final rule continues to use the term ''Native Americans'' because it is commonly used in other programs. Under this scoring category, a Bank may also include Native Alaskan and Native Hawaiian populations, at its discretion. The Agency acknowledges the acute housing needs of Native Americans on or near federally recognized tribal lands, but also recognizes that Bank districts vary in the degree to which they contain federally recognized tribal lands. The broader definition in the final rule gives the Banks discretion to best target AHP subsidies to meet the housing needs of Native American populations in their districts.

Regarding multigenerational households, such as grandparents raising grandchildren, the NPRM explained that such households may have a need for special housing that includes, for example, features of elderly projects (*e.g.,* handrails in bathrooms and hallways), as well as features of family housing (*e.g.,* outdoor play spaces). To better describe the intended population in response to the comments, the final rule replaces the term ''multigenerational household'' with the term ''kinship care.'' Kinship care households are defined as households in which children are in the care of cohabitating relatives, such as grandparents, aunts, or uncles, or cohabitating close family friends.

Housing in rural areas (§ 1291.26(e)(4)). Consistent with the proposed rule, the final rule includes housing in rural areas as an eligible housing need under the underserved communities and populations regulatory priority, in light of the significant and particularized housing needs experienced by rural households, as discussed in the NPRM. However, unlike the proposed rule, which would have defined ''rural area'' according to the definition in FHFA's Duty to Serve regulation, the final rule follows the approach of the current regulation and allows each Bank to adopt its own definition of ''rural area.'' That definition, like the Bank's Program in general, would have to be reasonable, and would be subject to FHFA examination.

A trade association and two nonprofit affordable housing intermediaries specifically supported the proposed inclusion of rural housing as a specified need in the Program. One of the intermediaries commented that its partners, largely comprising rural community-based housing providers, found that their applications for AHP funds are less competitive than in the past. The commenter suggested that rural applicants do not score as well as urban or suburban applicants, whose projects are of a larger scale and whose borrowers may have higher incomes and greater access to financial services. Several commenters provided input on the proposed definition of ''rural area.'' The nonprofit intermediary stated that, though it regards local government entities and communities as best equipped to define rural areas, it supported the proposed definition as a comprehensive and structured classification for rural areas under the AHP. It characterized the proposed definition as an enhancement that relies on a more accurate definition of rural territory and that minimizes misclassification of projects in suburban or exurban areas.

In contrast, a Bank and its Bank Advisory Council asserted that the proposed definition is overly restrictive within metropolitan areas because it excludes small towns that are truly rural in character. These commenters also stated that the AHP would not be able to maximally coordinate with USDA programs, as there are areas eligible for USDA assistance under USDA's definition of ''rural area'' that would be excluded under the proposed definition. In their proposal for project selection, the Banks recommended that each Bank have the authority to define ''rural area.'' One Bank commented that the proposed definition would be overly complicated for purposes of the AHP. The Bank indicated that the Banks designed their project selection proposal

to provide each Bank with flexibility to adopt its own definition so that each Bank could align its standards with those used by other state and local affordable housing financing sources that fund AHP projects.

FHFA is persuaded by commenters' concerns about the definition of ''rural area'' in the proposed rule. The Agency's aim of aligning, where appropriate, AHP definitions with those in other FHFA programs such as the Duty to Serve Program was not intended to constrain each Bank's flexibility to coordinate with other funding sources in responding to housing needs within its district. Continuing to give the Banks discretion to define ''rural area'' will allow them to align their Programs with other local and state funding programs for affordable housing. Accordingly, and consistent with the current regulation, the final rule authorizes each Bank to establish its own definition of ''rural area.''

Rental housing for extremely low-income households (§ 1291.26(e)(5)). As proposed, the final rule includes housing for extremely low-income households as an eligible housing need under the underserved communities and populations regulatory priority, in light of the severe affordable housing challenges faced by such households, as discussed in the NPRM. Consistent with the proposed rule, the final rule adds a definition of ''extremely low-income household'' in § 1291.1 to mean a household with an income at or below 30 percent AMI. In a change from the proposed rule, the final rule authorizes each Bank to define its own minimum threshold for the percentage of units reserved for extremely low-income households that a project must meet in order to qualify for points under this scoring criterion. The proposed rule would have set this minimum threshold at 20 percent. FHFA specifically requested comments on whether the proposed 20 percent minimum threshold is appropriate.

Several housing policy organizations, a CDFI, and two nonprofit developers generally supported this proposed scoring criterion. A nonprofit developer supported the scoring criterion but encouraged FHFA to allow AHP-funded projects targeting extremely low-income occupants to adjust their income targeting and rent restrictions in the event the project sponsor, through no fault of its own, loses its project-based operating subsidy. One of the housing policy organizations acknowledged the benefits of targeting extremely low-income households, but asserted that a minimum 20 percent threshold could be difficult to meet in states that do not have local or state rental housing development resources and access to federal project-based rental assistance programs. The commenter suggested use of a sliding points scale to encourage projects that target more units to extremely low-income people, up to a maximum of 20 or 25 percent of the units in a project, rather than establishing a minimum of 20 percent of the units. A nonprofit intermediary recommended a sliding points scale of up to 100 percent of the units in a project.

Other commenters opposed the proposed minimum 20 percent threshold. A Bank commented that it may render smaller projects financially infeasible. A CDFI trade organization stated that while targeting units for extremely low-income households is important, a minimum 20 percent threshold would create incentives for concentrations of populations of extremely low-income households, which would decrease residential economic diversity. A CDFI opposed a minimum 20 percent threshold on the grounds that projects that overestimate the number of extremely low-income units they can support may face financial instability. A trade organization supported the goal of targeting extremely low-income households, but stated that a minimum 20 percent threshold would not be feasible because the amount of AHP subsidy would generally be insufficient to offset the reduction in rents required to serve such households. The Banks stated that some projects may not be able to secure rent subsidies to support a minimum 20 percent threshold, making the projects financially infeasible.

The Banks' proposal on project selection does not include a scoring priority for housing for extremely low-income households. One Bank stated that the Banks could address this housing need under their Bank district priority scoring criterion, and that including a scoring criterion for housing for extremely low-income households would overlap with the scoring criterion for housing for other targeted populations. Another Bank stated that a scoring criterion for housing for extremely low-income households would be redundant with the income targeting scoring criterion. Multiple Banks expressed doubt that a project meeting a 20 percent threshold for extremely low-income households could demonstrate financial feasibility.

In summary, most commenters acknowledged the importance of targeting extremely low-income households, but objected to the proposed minimum 20 percent threshold. After consideration of the comments on the proposed threshold, including the recommendation for a sliding scale that would allow projects with some extremely low-income units but less than 20 percent to receive points, FHFA is persuaded that a 20 percent threshold may be too high in most circumstances. FHFA notes that the differing comments on the proposed threshold may stem from the differences in the financial viability of projects with extremely low-income units in different local housing markets. Therefore, in order to encourage targeting of extremely low-income households while providing adequate discretion to the Banks to take into account differences in housing markets among the Banks, the final rule includes a scoring criterion for projects targeting such households but also authorizes the Banks to establish their own minimum thresholds for the number of units a project is required to reserve for such households in order for the project to receive scoring points.

FHFA notes that most Banks have not allocated scoring points for projects specifically targeting extremely low-income households, which suggests that including this housing need under the underserved communities and populations regulatory priority would not be redundant. FHFA also notes that housing for extremely low-income households is an optional scoring category in the final rule, which Banks may choose to adopt in addition to the mandatory regulatory priority for income targeting for very low-income households.

Regulatory Priority for Creating Economic Opportunity (§ 1291.26(f))

As proposed, the final rule adopts a regulatory priority for creating economic opportunity, including the following eligible housing needs as scoring criteria: promotion of empowerment and residential economic diversity. FHFA may also identify other specific housing needs that facilitate economic opportunity as eligible under this regulatory priority by separate guidance, as new housing needs arise. The eligible housing needs are discussed further below.

Promotion of empowerment (§ 1291.26(f)(1)). Consistent with the proposed rule, the final rule includes promotion of empowerment as an eligible housing need under the creating economic opportunity regulatory priority. In contrast to the current regulation, promotion of empowerment would be an optional rather than a mandatory scoring criterion. As

proposed, the final rule retains the eligible empowerment services included in § 1291.5(d)(5)(v) of the current regulation. For the reasons discussed in the NPRM and comments discussed below, the final rule adds the following empowerment services not included in the current regulation: Childcare; adult daycare services; afterschool care; tutoring; health services, including mental health and behavioral health services; and workforce preparation and integration.

A nonprofit intermediary that focuses on supportive housing strongly supported the addition of health services as an eligible empowerment activity. The commenter urged that the final rule include an explicit reference to mental and behavioral health services, which are mentioned in the case study cited in the NPRM. FHFA concurs in the importance of mental and behavioral health services and has added a reference to these services in connection with health services in the final rule. Consistent with the proposed rule, the reference to ''welfare to work'' in the current regulation is updated to ''workforce preparation and integration'' to broaden the scope beyond households receiving public assistance to include initiatives providing skills to those entering or re-entering the workforce. FHFA received no comments addressing any of the other proposed additions to the promotion of empowerment scoring criterion.

Residential economic diversity (§ 1291.26(f)(2)). As proposed, the final rule includes residential economic diversity as an eligible housing need under the regulatory priority for creating economic opportunity. The current regulation includes residential economic diversity as an optional scoring criterion under the first Bank district priority. The proposed rule would have revised the current definition of residential economic diversity to reflect the definition in FHFA's Duty to Serve regulation. The final rule adopts a modified version of the Duty to Serve definition that provides discretion to the Banks in defining certain component terms thereof, as further discussed below.

The proposed rule would have defined ''residential economic diversity'' as the financing of either affordable housing in a high opportunity area, or mixed-income housing in an area of concentrated poverty, with those terms defined in accordance with the Duty to Serve regulation and Evaluation Guidance. FHFA received a number of comments opposing adoption of the Duty to Serve definition. Two Banks and a Bank Advisory Council preferred to have discretion to adopt their own definitions in order to be able to align their Programs with the economic characteristics of their districts. One Bank recommended that FHFA expand the definition to explicitly include the development of mixed-income housing in middle- and high-income neighborhoods, in addition to low- and moderate-income neighborhoods, in order to provide the Banks flexibility to respond to the best evidence on the impact of living in high opportunity areas for low-income families. The Banks' proposal on project selection allows each Bank to define ''high opportunity area,'' and allows mixed-income housing in any area that the Bank designates. The Banks indicated that they prefer flexibility to align the residential economic diversity standards with those of state and local funders.

FHFA agrees with the comments that requiring use of the Duty to Serve definition for residential economic diversity under the AHP, especially the component definition of ''high opportunity area,'' could limit the extent to which the Bank are able to align their Programs, where appropriate, with residential economic diversity standards of state and local funders. The final rule, therefore, allows each Bank to define ''high opportunity area.'' In addition, FHFA is persuaded that mixed-income housing may, in certain Bank districts and under some circumstances, be beneficial in middle- and high-income neighborhoods. Accordingly, the final rule does not adopt the proposed requirement that the mixed-income housing be located in an area of concentrated poverty, and instead provides discretion to the Banks to designate the areas in which the mixed-income housing must be located.

Regulatory Priority for Community Stability Including Affordable Housing Preservation (§ 1291.26(g))

In a change from the proposed rule, the final rule adopts community stability, including affordable housing preservation, as a regulatory priority. Community stability is a mandatory scoring criterion in the current regulation, but was not included as a regulatory priority in the proposed rule. Section 1291.5(d)(5)(ix) of the current regulation provides that a project may receive points under this scoring criterion if it promotes community stability, such as by rehabilitating vacant or abandoned properties, being an integral part of a neighborhood stabilization plan approved by a unit of state or local government, and not displacing low- or moderate-income households, or if such displacement will occur, assuring that such households will be assisted to minimize the impact of such displacement. The final rule adds, as an example of the types of projects that promote community stability, projects that preserve affordable housing. The final rule further modifies the current community stability scoring criterion by replacing the term ''neighborhood stabilization plan'' with ''community development or economic development strategy,'' and providing that such a strategy may be approved by an instrumentality of government. The final rule also retains the above-described non-displacement provision from the current regulation. In a change from the proposed rule, the final rule does not provide examples illustrating the types of projects that may be considered affordable housing preservation.

The proposed rule would have specified two eligible housing needs under the proposed affordable housing preservation regulatory priority: Affordable rental housing preservation and affordable homeownership preservation. Affordable rental housing preservation would have included housing needs such as: Existing affordable housing in need of rehabilitation as indicated by deteriorating physical condition, high vacancy rates, or poor financial performance; affordable rental housing with energy or water efficiency improvements (meeting the requirements in the Duty to Serve regulation); projects that received funding from certain government affordable rental housing programs specified under the Duty to Serve regulation, *i.e.,* HUD Section 8, Section 236, Section 221(d)(4), Section 202, and Section 811 programs; McKinney-Vento Homeless Assistance; USDA Section 515; LIHTC; or other state or local affordable housing programs comparable to the foregoing housing programs. Affordable homeownership preservation would have included owner-occupied rehabilitation, shared equity programs, owner-occupied housing with energy or water efficiency improvements (meeting the requirements in the Duty to Serve regulation), or other housing finance strategies to preserve homeownership. A Bank has discretion under the final rule to include any of these types of housing needs under its community stability scoring criterion.

In addition, the final rule provides that FHFA may also identify other mechanisms for affordable rental housing preservation or affordable homeownership preservation as eligible

under this regulatory priority by separate guidance, as new housing needs arise.

A Bank commented that including affordable housing preservation as a regulatory priority would provide substantial encouragement to address this pressing need effectively. Other commenters indicated that the proposed affordable housing preservation definition is too narrow. A number of nonprofit developers stated that the proposed regulatory priority would apply only in very limited circumstances to affordable homeownership projects such as those where the AHP sponsor is engaged in owner-occupied rehabilitation or permanent affordability strategies. The commenters asserted that, although the types of affordable homeownership preservation identified in the proposed rule are viable and important strategies in many areas of the country, they may not be the most impactful or appropriate for many communities in each of the Banks' districts. The Bank Advisory Councils and a Bank noted that the proposed affordable housing preservation regulatory priority would not include projects that repurpose or adapt non-housing properties, such as former schools, industrial properties, or commercial properties, which would be covered under the current community stability scoring criterion. The Banks' proposal for project selection includes separate regulatory priorities for affordable housing preservation and community stability.

FHFA notes that the proposed regulatory priority for affordable housing preservation would have allowed the Banks to adopt other types of affordable housing preservation needs similar to those specified in the regulatory priority. However, FHFA acknowledges that replacing the current community stability scoring criterion with affordable housing preservation would have omitted strategies outside of affordable housing preservation that are important for addressing community stability, such as adaptive re-use and the development of infill housing that are included under the current community stability scoring criterion. Because affordable housing preservation is an important strategy for achieving community stability, the final rule adopts a regulatory priority for community stability that specifically includes affordable housing preservation. FHFA is not retaining the proposed definition of affordable housing preservation, which referenced specific programs and strategies included in the Duty to Serve regulation, in order to provide the Banks flexibility to include those or other housing needs under affordable housing preservation to meet the specific housing needs of their districts.

Current Regulatory Priority for Subsidy per Unit

As proposed, the final rule eliminates the current mandatory scoring criterion for AHP subsidy per unit. This criterion favors more highly leveraged projects, such as LITHC projects and other large rental projects, where the AHP award is a smaller percentage of the total project development budget. A Bank may want to encourage AHP awards to projects that may not be able to leverage as much funding from other sources and, therefore, need deeper subsidy from the AHP. Eliminating this scoring criterion provides the Banks with more discretion to target the types of projects that best meet the housing needs in their districts. The Banks' proposal for project selection also eliminates this scoring criterion. Under the final rule, a Bank, in its discretion, could choose to include AHP subsidy per unit as a scoring criterion under its Bank district priorities category.

Bank District Priorities (§ 1291.26(h))

The final rule adopts a cumulative minimum points allocation of 50 points for the statutory and regulatory priorities, consistent with the cumulative minimum points allocation required for the statutory and regulatory priorities in the current regulation. The final rule permits the Banks to allocate the remaining maximum 50 points to affordable housing needs in the Banks' districts selected by the Banks. This is a modified version of the current regulation, which has two scoring categories of Bank district priorities. Under the first Bank district priority, a Bank must choose one or more housing needs from 12 specified eligible housing needs. Under the second Bank district priority, a Bank adopts one or more housing needs in the Bank's district identified by the Bank, which must be different from those chosen by the Bank under its first Bank district priority. The final rule essentially combines the current first and second Bank district priorities into one category under which a Bank may adopt specific district housing needs, for a maximum of 50 points. This will provide the Banks with additional flexibility to tailor their General Funds to meet specific housing needs in their districts.

§ 1291.27 Scoring Criteria for Targeted Funds

Section 1291.27 of the final rule sets forth general requirements for scoring criteria for Targeted Funds. For each Targeted Fund established by a Bank, the Bank must include a minimum of three different scoring criteria, as established by the Bank, that allow the Bank to select applications that meet the specific affordable housing need or needs being addressed by the Targeted Fund. This requirement for at least three scoring criteria is consistent with the Banks' comment on the scoring criteria for Targeted Funds and is a change from the proposed rule, which did not include this requirement. As discussed under § 1291.25 above, the maximum points allocation for a single scoring criterion under a Targeted Fund is 50 points. These requirements should promote a robust competitive scoring process under the Targeted Fund.

§ 1291.28 Approval of AHP Applications Under the General Fund and Targeted Funds

AHP application approvals generally. Consistent with the application approval requirements in the current regulation, the final rule provides generally that a Bank's board of directors shall approve (*i.e.,* award) applications for AHP subsidy under the General Fund and any Targeted Funds that meet all of the applicable AHP eligibility requirements in descending order, starting with the highest scoring application until the total funding amount for the particular AHP funding round, except for any amount insufficient to fund the next highest scoring application, has been approved. Exceptions to this process, as proposed, are discussed below.

AHP application alternates. Section 1291.28(b) of the final rule provides the Banks with discretion to approve a specified number, as determined by the Bank in its discretion, of the next highest scoring applications as alternates eligible for funding, and may approve any tied applications as alternates eligible for funding pursuant to § 1291.28(c)(2), when any previously committed AHP subsidies become available, pursuant to a written policy established by the Bank. If a Bank has established such a policy for approving alternates for funding and sufficient previously committed AHP subsidies become available within one year of application approval, the Bank is required to approve the designated alternates for funding within that one-year period. This is a change from the current regulation, which requires a Bank to approve at least the next four highest scoring applications in the General Fund as alternates, but gives the Bank the option whether to approve the designated alternates for funding if

previously committed AHP subsidies become available within one year of application approval. The final rule is consistent with the proposed requirement that the Banks fund the General Fund alternates within one year of approval if any previously committed AHP subsidies become available, but requires this only where the Bank has adopted a policy to approve alternates for funding. The final rule also links approval of tied applications as alternates, pursuant to § 1291.28(c)(2), to establishment by a Bank of a written policy for approval of alternates for funding. In addition, the final rule applies the above requirements applicable to the approval of General Fund alternates to the approval of Targeted Fund alternates. The proposed rule would have given the Banks discretion regarding the approval and funding of Targeted Fund alternates.

The purpose of FHFA's proposal to require funding of alternates under the General Fund within one year of approval if previously committed AHP funds become available was to ensure that the Banks award the AHP funds to alternates in the General Fund rather than selecting General Fund alternates but transferring AHP funds from the General Fund to the Bank's Homeownership Set-Aside Programs or Targeted Funds instead. The Banks and a trade association opposed the proposal, noting that projects approved as alternates typically seek additional funding sources or change the scope of the development if approved as alternates, which may significantly change the structure of the projects. They pointed out that a mandatory funding requirement for such projects would require the Banks to first re-underwrite the projects to determine their satisfaction with the AHP eligibility requirements, including the need for AHP subsidy, which would increase the burden and costs to the Banks and the project sponsors. The Banks further stated that the proposal could require the Banks to fund alternates that do not serve the housing needs prioritized in the Banks' TCLPs or the proposed outcome requirements. The Banks and their Bank Advisory Councils urged FHFA to continue allowing the Banks the discretion to approve alternates for the General Fund, and to provide similar discretion to approve alternates for any Targeted Funds established by the Banks.

FHFA finds relevant the comments that previously committed AHP subsidies often do not become available until well after the conclusion of the AHP funding round, by which time alternates' applications may no longer reflect the current structure of the projects or their funding needs. Projects may also have received funding from other sources in the meantime to substitute for the AHP funding requested. The projects, thus, may no longer meet the AHP eligibility requirements, including the need for AHP subsidy, or may need to be re-scored due to the changes in the projects' structures and funding. Requiring re-underwriting, as well as possible re-scoring, of these projects may be unnecessary and burdensome in such circumstances. In addition, the Banks should not have to select alternates if they do not intend to fund these projects. Accordingly, the final rule revises the current regulation to make the approval of alternates discretionary rather than mandatory for the Banks, pursuant to a written policy established by the Bank, and to require the Bank to approve such alternates for funding within one year of approval if any previously committed AHP subsidies become available but only if the Bank has a policy to approve alternates for funding.

Where a Bank does not adopt a policy to approve alternates for its General Fund or any Targeted Funds, the Bank may use previously committed AHP subsidies that become available under the applicable Fund to address other district affordable housing needs through the Banks' Homeownership Set-Aside Programs or project modifications, as currently permitted, or through any Bank Targeted Funds. This may benefit Banks, for example, that wish to establish a Targeted Fund to address a federal- or state-declared disaster. It may also benefit Banks receiving requests for subsidy to assist households under their Homeownership Set-Aside Programs that exceed the current maximum annual allowable funding allocation of 35 percent, which is retained in the final rule.

Tied applications. As discussed above under the scoring tie-breaker policies in §§ 1291.25(c) and 1291.28(c)(2) of the final rule, where there is insufficient AHP subsidy to approve all tied applications for the General Fund or a Targeted Fund, and the Bank has a written policy to approve alternates for funding under the applicable Fund, the Bank must approve a tied application as an alternate if it does not prevail under the Bank's scoring tie-breaker methodology, or is tied with another application but requested more subsidy than the amount of AHP funds that remain to be awarded under the Fund. This is consistent with current FHFA guidance to the Banks for their General Funds except that it is only required, under the final rule, where the Bank has a written policy to approve alternates.

Applications to multiple Funds—approval under one Fund. Section 1291.28(d) of the final rule provides that if an application for the same project is submitted to more than one Fund at a Bank in a calendar year and the application scores high enough to be approved under each Fund, the Bank shall approve the application under only one of the Funds pursuant to the Bank's policy established in its AHP Implementation Plan. For example, a Bank's policy could provide that any project that is competitive under multiple Funds will be approved under the General Fund. The proposed rule referred to submission of an application for the same project in an AHP funding round. The final rule changes this to a calendar year to take into account that Banks may hold separate funding rounds for their General Fund and Targeted Funds at different times in a calendar year. No comments were received on this proposal.

No re-ranking of scored applications and alternates. As discussed in Section III.A. above, the final rule does not adopt the proposal to allow the Banks, in their discretion, to re-rank scored applications and alternates, in light of FHFA's determination not to adopt the proposed outcomes framework in the final rule.

No delegation. The final rule retains the provision in the current regulation prohibiting a Bank's board of directors from delegating to Bank officers or other Bank employees the responsibility to approve or disapprove the AHP subsidy applications, as well as alternates. Since the final rule provides that the Banks are no longer required to approve alternates, the final rule states that the delegation prohibition is applicable to the approval of alternates only if a Bank has a written policy to approve alternates for funding under its General Fund or any Targeted Fund. The final rule does not adopt the proposed prohibition on delegation by the Bank's board to a committee of the board because the approval of AHP applications is not a strategic policy decision. Comments received on delegation are covered in the previous discussion of comments on the other proposed prohibited delegations in Section III.F. above.

§ 1291.29 Modifications of Approved AHP Applications

The final rule relocates the provisions on modifications of approved AHP applications from current § 1291.5(f) to § 1291.29, with a number of clarifying and other changes.

Approval of modifications. Consistent with the proposed rule, the final rule provides that if the requirements for a modification are satisfied, the Bank must approve the modification request, unless the request is for an increase in AHP subsidy, which a Bank may approve in its discretion. The final rule is a change from the current regulation, which allows for Bank discretion in approving all modification requests. If a project re-scores successfully in its original funding round and all of the other modification requirements are satisfied, there should be no reason for the Bank not to approve the modification. FHFA did not receive any comments on removing discretionary approvals.

Cure of noncompliance. The final rule provides that before a Bank may approve a modification request, it must first request that the project sponsor or owner make a reasonable effort to cure any AHP noncompliance within a reasonable period of time. This provision includes clarifying language in response to comments on the proposed language, and is consistent with similar clarifying language made in the ''waterfall'' provisions for remedying project noncompliance discussed under § 1291.60 below. Comments on the cure of noncompliance language are discussed under § 1291.60 below.

Re-scoring of application. Consistent with the current regulation, § 1291.29(a)(3) of the final rule provides that in order to be approved for a modification, the application, as reflective of the changes requested, must continue to score high enough to have been approved in the AHP funding round in which it was originally scored and approved by the Bank. In response to questions that have arisen as to what it means to score high enough where a Bank also approved applications as alternates during the original AHP funding round, the proposed rule would have clarified that the application must continue to score as high as the lowest ranking alternate that was not simply designated as an alternate but approved for funding by the Bank in the application's original AHP funding round. Because the final rule allows a Bank to approve alternates for funding in its discretion pursuant to a written policy adopted by the Bank, the final rule states that the lowest ranking alternate approved for funding by the Bank is the applicable standard where the Bank has a written policy to approve alternates for funding. FHFA did not receive any comments on this proposed standard.

Good cause. Consistent with the current regulation and proposed rule, the final rule continues to require that there be good cause for a modification, with the Bank's analysis and justification for the modification documented in writing. As proposed, the final rule clarifies that remediation of project noncompliance is not, in and of itself, good cause for a modification. As discussed below under § 1291.60 (Remedial Actions for Project Noncompliance), the final rule adds that the written analysis and justification for good cause must include why a cure of noncompliance was not successful or attempted.

A Bank provided comments on the good cause determination for modifying a project. The Bank noted that it considered remediation of project noncompliance, by itself, to be good cause for modification. The Bank stressed that a project that remains eligible for an award in its original AHP funding round after the modification should be eligible for a modification without having to cure noncompliance first, notwithstanding the changes made after application approval. The Bank emphasized the need to preserve the AHP's ability to accept and adapt to a project's needs. The Bank cited potential changes to green initiatives or the number of units reserved for homeless households that may or may not impact the project's budget or financing commitments, as examples of the types of changes justifying good cause for a modification. The Bank contended that a cure-first requirement would add unnecessary administrative costs for the Banks, the project sponsors, and the members when the projects are eligible for project modifications in any case based on their scoring, feasibility, and need for subsidy.

FHFA is not persuaded by the Bank's comments. Remediation of project noncompliance is not, in and of itself, good cause for a modification. There must be other reasonable justification for the modification, such as a change in market conditions, loss of committed funding to subsidize project rents, or loss of a major employer in the community that makes it difficult to find households at the incomes committed to in the project's AHP application to occupy the targeted units in the project. Otherwise, there would be less of an incentive to cure noncompliance if project sponsors knew they could simply request a modification of the project terms to no longer be in noncompliance. The final rule adds that the written analysis and justification for good cause must include why a cure of noncompliance was not successful or attempted.

Consistent with the proposed rule, the final rule also makes technical changes to the language in § 1291.29(b)(1) to clarify any ambiguity about the requirement that requests for subsidy increase modifications must also meet the requirements for approval applicable to other modifications in § 1291.29(a).

§ 1291.30 Procedures for Funding

Consistent with the proposed rule, the final rule relocates the procedures for AHP funding from § 1291.5(g) of the current regulation to § 1291.30, with several changes.

Cancellation of AHP application approvals. The final rule clarifies in § 1291.30(b) and (c) that if a Bank cancels any AHP application approvals due to lack of progress towards draw-down and use of the AHP subsidies or noncompliance with AHP eligibility requirements, the requirement to make the AHP subsidies available to other AHP-eligible projects also includes the option to make the subsidies available to other AHP-eligible households.

Compliance upon disbursement of AHP subsidies. The final rule removes the reference to a change in the need for AHP subsidy in § 1291.30(c). This language is superfluous because as the rule states, at each disbursement of AHP subsidy, a project must meet all eligibility requirements, which include the need for AHP subsidy.

Notification under subsidy re-use programs. As discussed under §§ 1291.13 above and 1291.64(b) below, in a change from the proposed rule, the final rule retains the current regulatory provision enabling a Bank to adopt, in its discretion, a program allowing re-use of AHP subsidy repayments in the same project. Accordingly, § 1291.30(f) of the final rule also retains current § 1291.5(g)(6), which requires project sponsor notification to the Bank and the member of the re-use of repaid AHP direct subsidy where the Bank has authorized such re-use.

Bank board duties and delegation. As proposed, the final rule eliminates current § 1291.5(h), which addresses Bank board duties and delegations, as these duties and delegations are addressed elsewhere in the final rule.

§ 1291.31 Lending and Re-Lending of AHP Direct Subsidy by Revolving Loan Funds

The final rule relocates § 1291.5(c)(13) of the current regulation, which addresses the requirements for lending and re-lending of AHP direct subsidies by revolving loan funds to § 1291.31,

without change except as related to the elimination of the requirement for a retention agreement for owner-occupied rehabilitation in the final rule. The revolving loan fund provisions were designed for lending and re-lending of the AHP subsidy by distinct projects in specific locations, or for pipelines of expected projects meeting specific criteria that the revolving loan fund anticipates funding and that would be specified in its AHP application. Under the regulation, the revolving loan fund may be scored on the specific criteria it establishes in its AHP application for its pipeline of projects, without having to actually identify specific projects in the AHP application.

To assist in anticipated future rulemaking on revolving loan funds under the AHP, FHFA specifically requested comments in the NPRM on why certain AHP scoring criteria have been difficult to meet, how the AHP retention periods could be satisfied, how AHP subsidy would be repaid in the event of project noncompliance, how the revolving loan fund can demonstrate a need for AHP subsidy, and the potential positive or negative impacts of eliminating the owner-occupied retention agreement requirement for revolving loan funds.

A nonprofit affordable housing intermediary expressed general support for increased use of AHP funds by revolving loan funds. A trade association for CDFIs stated that it would be particularly interested in working with FHFA and the Banks on expanding the use and impact of revolving loan funds. A Bank indicated that revolving loan funds can help meet the rehabilitation needs of owner-occupied units.

Several CDFIs and Banks commented that identifying specific project locations or addresses in AHP applications is problematic for revolving loan funds. One of the Banks stated that revolving loan fund applications cannot score sufficient points in categories tied to geography, inclusion of donated properties, economic diversity, or income targeting because the revolving loan funds cannot commit with certainty to the characteristics of a project or household as specific addresses or households are often unknown by the revolving loan fund at the time of AHP application.

A CDFI and a Bank suggested that applications for revolving loan funds should describe a pipeline of potential projects rather than discrete projects. Another CDFI suggested developing a scoring system based on a commitment to impact and homebuyer benefit, rather than on specific property addresses. The commenter also recommended establishing separate scoring criteria within the AHP scoring framework for revolving loan funds.

Two Banks reported not having received revolving loan fund applications for the AHP and encouraged FHFA to engage in a separate rulemaking for revolving loan funds. One of the Banks indicated that it was not aware of any revolving loan funds in the market that meet the current AHP regulatory requirements, and that it did not know how to make the AHP more amenable to revolving loan funds. The other Bank stated that the proposed outcome requirements would not necessarily facilitate the use of revolving loan funds.

In response to FHFA's request for comment, FHFA received several comments on whether organizations using sponsor-provided permanent financing models should be considered to be revolving loan funds. A national nonprofit opposed this, stating that it uses this model and would likely be excluded from competitive AHP Funds if it were treated exclusively as a revolving loan fund under any future AHP regulation. A Bank stated that, by definition, there are similarities between revolving loan funds and sponsor-provided permanent financing models since the funds of each are recycled on an ongoing basis. The Bank stated, however, that unlike a revolving loan fund, sponsor-provided permanent financing models are project specific and have readily available information that can be vetted during the application process.

FHFA is unclear on how to interpret the comments on identifying specific property locations in AHP applications. As discussed in the NPRM and above, the current regulation allows a Bank to score a revolving loan fund based on the specific criteria it establishes in its AHP application for its pipeline of projects, without having to actually identify specific projects in the AHP application. FHFA will consider the comments received on this issue, as well as comments received in response to its anticipated future rulemaking, in determining the treatment of revolving loan funds under the AHP regulation.

§ 1291.32 Use of AHP Subsidy in Loan Pools

The final rule relocates § 1291.5(c)(14) of the current regulation, which addresses the requirements for use of AHP subsidies in loan pools, to § 1291.32, with a change to remove the requirement for retention agreements for owner-occupied rehabilitation in current § 1291.5(c)(14)(iii).

The current regulation establishes specific conditions under which a Bank may provide AHP subsidies under its Competitive Application Program for the origination of first mortgage loans or rehabilitation loans with subsidized interest rates to AHP-eligible household through a purchase commitment by an entity that will purchase and pool the loans. As stated in the NPRM, FHFA is not aware that any loan pools meeting these conditions have applied for AHP subsidy since adding the regulatory authority in 2006. FHFA is also not aware of any loan pools of this type currently existing in the housing market. FHFA specifically requested comments in the NPRM on whether there are loan pools currently operating in the market that meet the conditions in the regulation, how the loan pools are addressing current housing market needs, and the potential positive or negative impacts of eliminating the owner-occupied retention agreement requirement for loan pools. FHFA received only one comment on this section, from a Bank, which stated that it had no experience with loan pools meeting the AHP requirements.

FHFA anticipates engaging in a future rulemaking on loan pools with respect to the AHP, and will consider comments received in response to such rulemaking in determining the treatment of loan pools under the AHP regulation.

Subpart D—Homeownership Set-Aside Programs

§ 1291.40 Establishment of Programs

The final rule relocates § 1291.6(a) of the current regulation on the Bank establishment of Homeownership Set-Aside Programs to § 1291.40. As proposed, the final rule states that these programs are optional by adding that a Bank may establish such programs ''in its discretion.'' The final rule does not include the proposed requirement that a Bank's analyses for establishing such programs be included in its TCLP, as previously discussed under § 1290.6 (Bank Community Support Programs).

§ 1291.41 Eligible Applicants

The final rule relocates § 1291.6(b) of the current regulation on eligible member applicants to § 1291.41, without change. No comments were received on this provision.

§ 1291.42 Eligibility Requirements

The final rule relocates § 1291.6(c) of the current regulation on the eligibility requirements for Homeownership Set-Aside Programs to § 1291.42, with several changes, as proposed.

Adoption of additional eligibility requirements. Consistent with informal

guidance provided by FHFA to the Banks and the proposed rule, the final rule clarifies that the Banks may not adopt eligibility requirements under their Homeownership Set-Aside Programs beyond those set forth in this section, except those related to household eligibility pursuant to § 1291.42(b)(3). No comments were received on this proposed clarification.

One-third funding allocation requirement—first-time homebuyers or owner-occupied rehabilitation—conforming change. As discussed above under § 1291.12(b) (funding allocation for Homeownership Set-Aside Programs), the final rule requires that at least one-third of a Bank's annual Homeownership Set-Aside Program funding allocation be for first-time homebuyers or households receiving set-aside funds for owner-occupied rehabilitation, or a combination of both. The final rule adds conforming language in § 1291.42(b)(3) for households receiving set-aside funds for owner-occupied rehabilitation.

Maximum grant limit. Consistent with the proposed rule, the final rule authorizes the Banks to provide, through their members, set-aside grants of up to $22,000 per household, subject to annual upward adjustment in accordance with FHFA's House Price Index (HPI). This is a change from the current regulation, which authorizes set-aside grants of up to $15,000 per household and does not provide for annual HPI adjustments. The purpose of the increase in the subsidy limit is to respond to increases in the costs associated with buying or rehabilitating homes in high cost areas, as well as the high costs of certain types of rehabilitation. It will also bring the subsidy limit in line with changes in the HPI since 2002, when the regulation established the $15,000 subsidy limit. The HPI upward adjustments will account for future house price increases, negating any need for periodic revisions of the subsidy limit by regulation. FHFA will notify the Banks annually of the maximum subsidy amount based on the HPI.

A number of commenters generally supported raising the subsidy limit per household from $15,000 to $22,000. Some of the commenters provided reasons for their support that were cited by FHFA in the NPRM, specifically, that the proposed increase would provide additional flexibility, benefit homeowners in high-cost areas, and support owner-occupied rehabilitation and aging in place. The Banks, nonprofit organizations, and a CDFI supported the proposed annual upward HPI adjustments. The Banks stated that because the adjustment would measure average price fluctuations in the single-family housing market, it would provide insight to the Banks about whether they should increase their individual subsidy limit in housing markets that are becoming less affordable.

A state agency cautioned that the proposed increase in the subsidy limit could augment purchasers' ability to buy bigger houses, resulting in fewer grant recipients overall. A trade association stated that raising the raising the subsidy limit while also removing the requirement for owner-occupied retention agreements, as proposed, could increase the likelihood of the AHP subsidy being misused.

As discussed in the NPRM and above, the purpose of the increase in the subsidy limit is to respond to increases in the costs associated with buying or rehabilitating homes in high cost areas, as well as the high costs of certain types of rehabilitation generally. The increase also brings the subsidy limit in line with changes in the HPI since 2002. The HPI shows that $15,000 in January 2002 has approximately the same buying power as $21,500 today. FHFA acknowledges commenters' concern that Bank adoption of the proposed higher subsidy limit could result in fewer households receiving set-aside subsidies. However, because most Banks have established subsidy limits below the current $15,000 limit, FHFA believes that an increase in the subsidy limit to $22,000 is not likely to result in a significant overall reduction in the number of households assisted by the Banks under their set-aside programs.

Owner-occupied retention agreements. As discussed under Section III.D. above, the proposed rule would have eliminated the requirement for all owner-occupied retention agreements. The owner-occupied retention agreement requirement for households assisted with set-aside funds in current § 1291.6(c)(5), thus, would have been eliminated. Because the final rule retains the requirement for owner-occupied retention agreements where the AHP subsidy is used for purchase, or for purchase in conjunction with rehabilitation, the retention agreement requirement for such uses of AHP subsidy is retained in § 1291.42(e) of the final rule.

§ 1291.43 Approval of AHP Applications

The final rule relocates § 1291.6(d) of the current regulation, which addresses the approval of set-aside applications in accordance with the Banks' criteria governing the allocation of funds, to § 1291.43, without substantive change.

§ 1291.44 Procedures for Funding

The final rule relocates § 1291.6(e) of the current regulation, which addresses the procedures for set-aside funding, to § 1291.44, without substantive change.

Subpart E—Outcome Requirements for Statutory and Regulatory Priorities

FHFA proposed a number of benchmarks for demonstrating compliance with the proposed outcome-based approach for project selections. As discussed in Section III.A. above, FHFA has decided not to adopt the proposed outcome-based approach t project selection in the final rule. Accordingly, the provisions in proposed Subpart E are not adopted in the final rule.

Subpart E—Monitoring

§ 1291.50 Monitoring Under the General Fund and Targeted Funds

Initial monitoring of AHP projects receiving LIHTC. Consistent with the proposed rule, § 1291.50(a)(3)(i) of the final rule streamlines the initial monitoring requirements for LIHTC projects that also receive AHP subsidy. The final rule retains the current initial monitoring requirement that the Banks review certifications from LIHTC project sponsors that the residents' incomes and the rents comply with the income-targeting and rent commitments in the approved AHP application. It also includes a requirement, consistent with Bank practice, that the Banks review the LIHTC project's rent rolls, which include each household's income and rent. However, the final rule removes the current requirement that the Banks review other back-up documentation on household incomes and rents at initial monitoring for LIHTC projects. The final rule also streamlines the language of the LIHTC monitoring provisions as proposed.

The proposed rule requested comments on whether this proposed streamlining of the Banks' initial monitoring requirements for LIHTC projects is reasonable, taking into consideration the risks of noncompliance and the costs of project monitoring. Commenters who commented on this proposal overwhelmingly supported it. A nonprofit affordable housing intermediary, a trade group, and the Banks stated generally that the proposal is reasonable and would not add any operational risks.

In 2017, 51 percent of AHP projects received LIHTC, similar to the percentage of AHP projects that received LIHTC in the previous several years. Thus, any amendments to the LIHTC

monitoring requirements will impact the Banks and many project sponsors and members that participate in the AHP. As discussed further in the NPRM, it is reasonable to allow the Banks to rely on the monitoring by the state-designated tax credit allocation agencies of AHP-assisted LIHTC projects because the LIHTC income, rent, and long-term retention period requirements have been substantially equivalent to those of the AHP, the tax credit allocation agencies monitor the projects, and LIHTC projects rarely go out of compliance with the income and rent requirements. Further, multiple parties retain a strong incentive to monitor LIHTC projects for income and rent compliance. LIHTC project owners bear responsibility for ensuring that their projects comply with the program's income, rent, and retention period requirements. The owners face severe consequences for noncompliance, which serve as a substantial deterrent to noncompliance. Because LIHTC investors cannot receive the benefits of the tax credits for units that are not in compliance, LIHTC project owners guarantee to their investors that their projects will remain in compliance, or the project owners must repay investors the amount of tax credits lost plus any penalties or interest levied by the IRS.

The Banks currently are permitted to review LIHTC back-up documentation at initial monitoring on a risk basis. Given the low risks of noncompliance by LIHTC projects, the Banks can establish review schedules for the back-up documentation that are not especially burdensome. Although the administrative burdens on the project sponsors to provide, and the Banks to review, LIHTC back-up documentation (other than rent rolls) at initial monitoring may not be significant, eliminating this requirement will benefit the Banks and project sponsors by reducing their administrative costs.

Initial and long-term monitoring of AHP projects funded by certain other government programs specified in FHFA guidance. As proposed, § 1291.50(a)(3)(i) of the final rule provides that, for AHP projects funded by certain other government programs specified in separate FHFA guidance, the Banks will only be required to review project sponsor certifications and rent rolls, and not any other back-up documentation, at initial monitoring. For long-term monitoring, § 1291.50(c)(1)(ii) of the final rule provides that the Banks will only be required to review annual project sponsor certifications on incomes and rents for such projects, and will not be required to review any back-up documentation for incomes and rents, including rent rolls. FHFA guidance will include government programs that have the same or substantially equivalent rent, income, and retention period requirements as the AHP, very low occurrences of noncompliance with those requirements, and monitoring entities that have demonstrated and continue to demonstrate their ability to monitor the programs. FHFA will update the guidance as appropriate to remain current with federal program developments.

The FHFA guidance initially will specify the following federal government programs, which meet the standards outlined above, as eligible for the streamlined monitoring:

- HUD Section 202 Program for the Elderly;
- HUD Section 811 Program for Housing the Disabled;
- USDA Section 515 Rural Multifamily Program; and
- USDA Section 514 Farmworker Multifamily Program.

In 2017, approximately two-thirds of AHP projects received funding from other federal programs. As further discussed in the NPRM, FHFA reviewed the extent to which AHP projects also receive subsidies from HUD and USDA programs to assess the extent to which the Banks could reasonably rely on HUD and USDA monitoring for these projects. In 2017, 24 percent of AHP projects received HOME Program financing, 8 percent received Community Development Block Grant (CDBG) funds, and 9 percent received other federal financing, including from USDA. FHFA then analyzed the HUD and USDA programs to determine which programs have substantially equivalent rent, income, and retention requirements to the AHP, very low noncompliance rates, and where the monitoring entity has demonstrated and continues to demonstrate effective monitoring of a respective program. The Agency determined that the four programs noted above meet these standards. FHFA has not identified other programs that meet these standards at this time. The proposed rule requested comments on whether this proposed reduction of the Banks' initial and long-term monitoring requirements for AHP projects funded by certain other government programs is reasonable, taking into consideration the risks of noncompliance and the costs of project monitoring. Many commenters, including trade groups, intermediaries, and nonprofit developers supported reliance on the monitoring of other federal funders of AHP projects. The Banks similarly supported the proposed changes to the initial and long-term monitoring requirements that would align them with the monitoring requirements of other federal programs, stating that they present very little risk. An intermediary supported reduced monitoring for projects involving USDA Section 514 and Section 515 properties because it would decrease regulatory and reporting burden. A CDFI supported reduced monitoring because it decreases the final burden on project sponsors, members, and the Banks.

A nonprofit organization opposed reduction to the monitoring requirements for income and rental validation at initial monitoring. The commenter stated that projects are most likely to go out of compliance during the initial lease-up phase, and that Bank review at initial monitoring would likely ensure that the project remained compliant in the long term. The commenter did not identify any specific information to justify its position. Two policy organizations encouraged FHFA to continue to evaluate other federal programs such as HOME, CDBG, Rental Assistance Demonstration, and Section 8 Project-Based Rental Assistance, to determine whether the programs could be included in the guidance.

It is reasonable to allow the Banks to conduct less monitoring of AHP projects funded by any of the four programs to be included in the FHFA guidance, given the low noncompliance risk to the AHP due to the overlap of the AHP monitoring requirements with USDA and HUD's monitoring practices, the substantially equivalent income, rent and retention requirements, and the programs' very low noncompliance rates. Eliminating the requirement to provide and review back-up documentation (other than rent rolls) for such projects at initial monitoring, and eliminating the requirement to provide and review any back-up documentation (including rent rolls) for such projects during long-term monitoring, will also benefit project sponsors and the Banks by reducing their administrative costs, albeit modestly for the Banks.[21] In addition, aligning the AHP monitoring requirements for such projects with USDA's monitoring may encourage more USDA-funded projects to apply for AHP funds, thus increasing the proportion of rural families served by the AHP.

FHFA will continue to assess the programs recommended by the commenters, as well as other possible

[21] The Banks have an average of 260 AHP rental projects per Bank in long-term monitoring, where monitoring reasonably be reduced through a risk-based monitoring plan.

programs, and may add programs in the guidance as appropriate. Programs will be removed from the guidance when they no longer meet the standards for inclusion in the guidance.

Enhanced long-term monitoring certifications. Consistent with the proposed rule, § 1291.50(c)(1)(i) of the final rule codifies existing Bank best practices that require submission by project sponsors of annual project certifications during the AHP 15-year retention period to include not only the household income and rent information, but also information addressing the on-going financial viability of the project, such as whether the project is current on property taxes and loan payments, its vacancy rate, and whether it is in compliance with its commitments to other funding sources.

As discussed in the NPRM, during long-term monitoring, the Banks are required to monitor projects for compliance with the household income targeting and rent commitments in their AHP applications. This information may not reveal operational and viability challenges the projects are experiencing. By obtaining additional information from project sponsors about the project, the Banks may be able to work with other funders to address project concerns and any noncompliance, including attempting remediation through workout strategies or recovery of AHP subsidies for noncompliance. The requirement for enhanced certifications modestly increases the reporting requirements for project sponsors and Banks that are not currently requiring such enhanced certifications. FHFA did not receive any comments on the proposed enhanced certifications.

Notice requirement for LIHTC project noncompliance during AHP long-term retention period. As discussed under § 1291.15(a)(5)(ii) above, the final rule requires the Banks to include in their AHP monitoring agreements with members, and for members to include in their agreements with project owners, a requirement that project owners provide prompt written notice to the Bank if an AHP-assisted LIHTC project is in material and unresolved noncompliance with LIHTC household income targeting or rent requirements at any time during the AHP 15-year retention period. Section 1291.50(c)(1)(ii) of the final rule includes a corresponding monitoring requirement that the Banks must review LIHTC noncompliance notices received from project owners during the 15-year retention period, which will make the Banks aware of any material and unresolved noncompliance so that they can take remedial or other actions regarding the project as appropriate.

Risk factors and other monitoring. Consistent with the current regulation and proposed rule, § 1291.50(c)(2)(i) of the final rule requires that a Bank's written monitoring policies take risk factors into account. The final rule adds project sponsor performance as one of the risk factors that Banks may take into account because previous compliance history may be a useful criterion for Banks to consider in developing their monitoring policies.

§ 1291.51 Monitoring Under Homeownership Set-Aside Programs

The final rule relocates the monitoring provisions for the Homeownership Set-Aside Program from current § 1291.7(b) to § 1291.51. The proposed rule would have removed the requirement in current § 1291.7(b)(ii) for verifying that AHP-assisted owner-occupied units are subject to retention agreements because it would have eliminated the requirement for owner-occupied retention agreements. However, as discussed in Section III.D. above, the final rule eliminates the requirement for owner-occupied retention agreements only where the household uses the AHP subsidy solely for owner-occupied rehabilitation. Accordingly, the final rule retains the current verification requirement for owner-occupied retention agreements where the households uses the AHP subsidy for purchase of the unit, or for purchase of the unit in conjunction with rehabilitation.

Subpart F—Remedial Actions for Noncompliance

The final rule relocates the provisions on remedial actions for AHP noncompliance from § 1291.8 of the current regulation to Subpart F. As proposed, the final rule addresses each type of noncompliance—project sponsor or owner, member, or Bank—in a separate section so that the responsibilities and potential liabilities of each party are clear. As proposed, the final rule also makes substantive changes to the order in which certain remedial actions must be taken, with certain clarifications to the provision on curing noncompliance. The changes are further discussed below.

§ 1291.60 Remedial Actions for Project Noncompliance

Consistent with the proposed rule, § 1291.60 of the final rule addresses remedial actions for AHP project noncompliance. The language is revised and streamlined to provide greater clarity on the scope of the section and the responsibilities of the parties. As discussed extensively in Section III.E. above, the final rule adopts certain substantive changes by establishing a sequence of remedial steps for a Bank to follow before recovering AHP subsidy. The final rule also clarifies factors for Bank consideration in determining whether to accept less than the full amount of AHP subsidy due. Because the final rule is not adopting the proposed outcome-based requirements, the final rule does not adopt proposed § 1291.65, which would have provided for a number of remedial actions that FHFA could take to address Bank noncompliance with the outcome requirements, including housing plans and reimbursement of the AHP Fund.

The changes in the final rule that are not discussed in Section III.E. above, are discussed below.

Scope. Consistent with the proposed rule, § 1291.60 of the final rule sets forth the requirements applicable to the Banks in the event of noncompliance by an AHP-assisted project with its AHP application commitments and the requirements of the AHP regulation, including any use of AHP subsidy by the project sponsor or owner for purposes other than those committed to in the AHP application. As proposed, the final rule clarifies that this section does not apply to individual AHP-assisted households, or to the sale or refinancing by such households of their homes, as there is no ongoing Bank monitoring of households once they purchase their homes, and sale or refinancing during the AHP five-year retention period is not considered noncompliance.

Elimination of project noncompliance. Section 1291.60(b) of the final rule establishes a sequence of remedial steps for a Bank to follow before recovering AHP subsidy, as discussed below.

Cure of noncompliance (§ 1291.60(b)(1)). To address concerns that the proposed cure-first requirement might compel project sponsors or owners to continue to attempt curative efforts when project noncompliance cannot be cured, the final rule includes clarifying language applying a reasonableness standard for the level of these efforts. This clarification in the final rule codifies practices Banks generally follow now.

Project modification (§ 1291.60(b)(2)). As proposed, the final rule further provides that if the project noncompliance cannot be cured within a reasonable period of time, the Bank shall determine whether the circumstances of the noncompliance

can be eliminated through a project modification under § 1291.29, and if so, the Bank must approve the modification request (except for modifications requests for AHP subsidy increases, whose approval remains discretionary for the Banks).

Reasonable collection efforts, including settlement (§ 1291.60(c)). Consistent with the proposed rule, § 1291.60(c)(1) of the final rule provides that if the circumstances of a project's noncompliance cannot be eliminated through a cure or modification, the Bank, or the member if delegated the responsibility, must first make a demand on the project sponsor or owner for repayment of the full amount of the AHP subsidy not used in compliance with the commitments in the AHP application or the AHP regulation. This is intended to ensure that the Banks attempt to recover all of the subsidy due before considering settlements. This provision also clarifies that if the noncompliance is occupancy by over-income households, the amount of AHP subsidy due is calculated based on the number of units in noncompliance, the length of the noncompliance, and the portion of the AHP subsidy attributable to the noncompliant units.

Section 1291.60(c)(2) of the final rule specifies that if the demand for repayment of the full amount of subsidy due is unsuccessful, then the Bank, or the member if delegated the responsibility and in consultation with the Bank, is required to make reasonable efforts to collect the subsidy from the project sponsor or owner, which may include settlement for less than the full amount of subsidy due. As proposed, the final rule clarifies that members would carry out these efforts in consultation with the Bank, consistent with current practice.

The final rule also retains the proposal to clarify that the facts and circumstances to consider in determining whether to settle include not only the degree of culpability of the noncomplying parties and the extent of the Bank's or member's collection efforts, as provided in the current regulation, but also the financial capacity of the project sponsor or owner, assets securing the AHP subsidy, and other assets of the project sponsor or owner. FHFA specifically requested comments on whether the facts and circumstances included in the proposed rule are appropriate for consideration during reasonable collection efforts, and whether there are other factors that should be considered.

The Banks, a Bank Advisory Council, a trade association, and a nonprofit organization opposed the proposal on several different bases. The Banks stated that the facts and circumstances in the proposed rule were worthy but represented just a few of the considerations used in the subsidy recapture process. The Banks requested, therefore, that FHFA not codify the factors in the regulation, but rather allow each Bank to evaluate the fact-specific scenarios of a subsidy recapture and settlement process based on its own guidelines.

A Bank Advisory Council and a nonprofit organization stated that expanding the requirements of reasonable collection efforts to include the Bank's review of the financial capacity and assets of both the project sponsor and project owner would increase the Bank's administrative burden. The commenters stated that the proposal could decrease the number of project sponsors, project owners, and members willing to submit applications for AHP subsidy. Several commenters warned that the proposed requirements regarding the repayment of AHP subsidy would require project sponsors to act as guarantors, responsible for repaying all or a portion of the AHP subsidy due to noncompliance. A Bank and a trade association opposed the proposal, stating that it would effectively make AHP funds recourse obligations of the project sponsor and project owner, although affordable rental housing financing, particularly for LIHTC projects, is normally nonrecourse, and was not appropriate.

Settlement represents the last resort in a series of steps that a Bank initiates to remedy a project's noncompliance, in cases where the noncompliance cannot be eliminated through a cure or modification and the demand for full repayment of the AHP subsidy is unsuccessful. It is reasonable, in these rare instances, for a Bank to take into account the financial capacity and assets of both the project sponsor and owner to determine whether they have the ability to repay a portion of the AHP subsidy. The Bank would not require repayment of subsidy if they do not have resources to do so. The requirement for the project sponsor or owner to repay all or a portion of the AHP subsidy in the case of noncompliance that cannot be resolved through a cure or modification is a longstanding requirement of the AHP and, therefore, is unlikely to decrease the number of applications for AHP subsidy. For these reasons, the final rule retains the proposed clarifications described above.

As proposed, the final rule also eliminates current § 1291.8(d)(2), which provided the Banks the option of seeking FHFA's prior approval for a proposed subsidy settlement. As discussed in the NPRM, only one Bank has used this option and it was for two similar cases. The Banks may enter into subsidy settlements, in their discretion, provided the settlements are supported by reasonable justifications. The Banks have made these types of business decisions for many years without seeking prior FHFA approval. Moreover, the final rule further clarifies the factors the Banks should consider in deciding whether to settle with a project sponsor or project owner. FHFA did not receive any comments on this provision.

§ 1291.61 Recovery of Subsidy for Member Noncompliance

Section 1291.61 of the final rule addresses member noncompliance, which is addressed in § 1291.8(b)(1) of the current regulation. The final rule clarifies the language to focus on noncompliance with a member's AHP application or the AHP regulation as a result of the member's actions or omissions, consistent with similar language applicable to the Banks and project sponsors in the current regulation and Subpart F, rather than on impermissible use of the subsidy by the member. FHFA did not receive any comments on this section.

§ 1291.62 Bank Reimbursement of AHP Fund

As proposed, the final rule relocates § 1291.8(e) of the current regulation, which addresses circumstances where a Bank is required to reimburse its AHP fund, to § 1291.62, with no substantive changes. FHFA did not receive any comments on this section.

§ 1291.63 Suspension and Debarment

Consistent with the proposed rule, the final rule relocates § 1291.8(g) of the current regulation, which addresses suspension or debarment of members, project sponsors, or project owners, to § 1291.63, without change. FHFA did not receive any comments on this section.

§ 1291.64 Use of Repaid AHP Subsidies

Use of repaid AHP subsidies for other AHP-eligible projects or households. Consistent with the proposed rule, § 1291.64 of the final rule includes § 1291.8(f)(1) of the current regulation, which provides that AHP subsidy repaid to a Bank under the AHP regulation must be made available by the Bank for other AHP-eligible projects. As proposed, the final rule also clarifies that the repaid subsidy may also be

made available by the Bank for AHP-eligible households.

Re-use of repaid AHP direct subsidies in the same project. The final rule retains § 1291.8(f)(2) of the current regulation, which provides for re-use of repaid AHP direct subsidies in the same project, in the Bank's discretion. The proposed rule would have eliminated the requirement for owner-occupied retention agreements in all cases, meaning no AHP subsidy would be repaid by households if they sold their homes during the five-year AHP retention period, rendering the ability to re-use repaid subsidy in the project moot. The final rule retains the owner-occupied retention agreement requirement where the household uses the subsidy for purchase of the unit, or purchase of the unit in conjunction with rehabilitation, but not where the household uses the subsidy solely for rehabilitation. Thus, there remains the possibility for repayments of subsidy by households if they sell their homes during the five-year retention period and none of the regulatory exceptions to subsidy repayment applies. FHFA did not receive any comments on this re-use of repaid subsidies provision.

§ 1291.65 Transfer of Program Administration

The final rule relocates § 1291.8(h) of the current regulation, which addresses transfer of a Bank's Program to another Bank in the event of mismanagement of its Program, to § 1291.65, with no changes. The proposed rule did not propose any changes to this provision, and no comments were received on it.

Removal of Obsolete Provision

As proposed, the final rule rescinds current § 1291.8(i) because the provision refers to a now-repealed Finance Board regulatory provision that was intended to establish a formal process for review by the Board of Directors of the Finance Board of certain types of supervisory decisions, which FHFA opted not to adopt.[22] Though it is not directly comparable to the repealed Finance Board provision, FHFA's Ombudsman regulation provides an avenue for the Banks to present complaints and appeals to the Agency about their regulation or supervision.[23] FHFA did not receive any comments on this proposed rescission.

Subpart G—Affordable Housing Reserve Fund

§ 1291.70 Affordable Housing Reserve Fund

Consistent with the proposed rule, the final rule relocates § 1291.12 of the current regulation, which addresses the requirements for an Affordable Housing Reserve Fund, to § 1291.70. The final rule revises the current provision by requiring that amounts remaining unused or uncommitted at year-end are deemed to be used or committed if, in combination with AHP funds that have been returned to the Bank or de-committed from canceled projects, they are insufficient to fund: (1) AHP application alternates in the Bank's final funding round of the year for its General Fund or any Targeted Funds, if the Bank has a policy to approve alternates for funding under such Funds; (2) pending applications for funds under any Bank Homeownership Set-Aside Programs; and (3) project modifications for AHP subsidy increases approved by the Bank. The proposed rule would have prioritized the General Fund and then any Targeted Funds. The final rule does not adopt this proposed change in order to provide the Banks with flexibility on how to use such funds. FHFA did not receive any comments on this proposed revision. FHFA notes that in the history of the Program, there has never been a need to establish an Affordable Housing Reserve Fund.

V. Consideration of Differences Between the Banks and the Enterprises

Section 1313(f) of the Federal Housing Enterprises Financial Safety and Soundness Act of 1992 requires the Director of FHFA, when promulgating regulations relating to the Banks, to consider the differences between the Banks and the Enterprises (Fannie Mae and Freddie Mac) as they relate to the Banks' cooperative ownership structure, mission of providing liquidity to members, affordable housing and community development mission, capital structure, and joint and several liability. The final rule applies only to the Banks. It amends the current AHP regulation to revise the scoring criteria governing the selection of AHP award recipients; provide additional authority to the Banks regarding certain Program operations, streamline project monitoring requirements, clarify various parties' responsibilities regarding AHP noncompliance, eliminate the requirement for retention agreements for AHP subsidy used to rehabilitate owner-occupied units without an accompanying purchase, and clarify certain operational requirements. In preparing this final rule, the Director considered the differences between the Banks and the Enterprises as they relate to the above factors, and determined that the amendments in the final rule are positive for the affordable housing mission of the Banks and neutral regarding the other statutory factors. FHFA requested comments in the NPRM regarding whether differences related to those factors should result in any revisions to the proposed rule. No significant relevant comments were received.

VI. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (PRA)[24] requires that Federal agencies, including FHFA, consider the impact of paperwork and other information collection burdens imposed on the public. Under the PRA and the implementing regulations of the Office of Management and Budget (OMB), no agency may conduct or sponsor, and no person is required to respond to, an information collection unless it displays a currently valid OMB control number. Part 1291 contains six information collections (ICs) relating to the Banks' AHPs, which have been approved by OMB under the PRA and assigned control number 2590–0007 (entitled ''Affordable Housing Program''; expires Mar. 31, 2020). The final rule modifies some of the information collection requirements in part 1291 and makes other changes to the regulation that affect the reporting and recordkeeping burdens imposed by the regulation. FHFA has submitted the proposed and final rules and an analysis of the revised ICs to OMB for review and has requested approval of a three-year extension of control number 2590–0007.

A. Background

As revised by the final rule, part 1291 contains six ICs: (1) Competitive applications for AHP subsidy under General Funds and Targeted Funds; (2) compliance submissions for approved General Fund and Targeted Fund projects at AHP subsidy disbursement; (3) modification requests for approved General Fund and Targeted Fund projects; (4) initial monitoring submissions for approved General Fund and Targeted Fund projects; (5) long-term monitoring submissions for approved General Fund and Targeted Fund projects; and (6) Homeownership Set-Aside Program applications and certifications. These ICs are substantially the same as the six currently-approved ICs in existing part 1291, although ICs #1 through #5 have

[22] 12 CFR 907.9.

[23] *See* 12 CFR part 1213.

[24] 44 U.S.C. 3501 *et seq.*

been re-titled to refer to the Banks' ''General Fund and Targeted Fund projects'' instead of their ''Competitive Application Program projects.'' Under the final rule (as under the proposed rule), projects funded under the Banks' General Funds and Targeted Funds will be subject to a competitive application process and to requirements regarding subsidy disbursements, modification requests, and initial and long-term monitoring that are similar to those that apply to the Banks' Competitive Application Programs.

As required by 5 CFR 1320.8(d)(3), the **SUPPLEMENTARY INFORMATION** to the proposed rule included a PRA statement setting forth FHFA's burden estimates for the six ICs, as revised by the proposed rule, and requested public comments on those estimates and on the reporting and recordkeeping burdens that would be imposed by the rule.[25] The PRA statement also detailed, for each IC, how FHFA arrived at its burden estimate, the effect of the proposed rule on the scope of the IC and the burden estimate, and how the collected information would be used.

In compliance with 5 CFR 1320.11(b), FHFA submitted the proposed rule and an analysis of the revised ICs to OMB for review simultaneously with the publication of the proposed rule. On June 6, 2018, OMB issued a Notice of Action (NOA) to FHFA, pursuant to 5 CFR 1320.11(c), stating that OMB had not yet approved the revised ICs and that the terms of the prior renewal of the control number remained in effect. The NOA instructed FHFA to address all comments received in response to the proposed rule's PRA statement. Under 5 CFR 1320.11(f), FHFA must explain how any IC contained in the final rule responds to any comments received from OMB or the public and must identify and explain any modifications made in the final rule, or explain why it rejected the comments. Aside from the NOA filed by OMB, FHFA received no comments in response to the PRA statement in the proposed rule.

Although not generated by PRA comments or concerns, there are a number of substantive differences between the proposed and final rules, as detailed above. While some of these differences touch upon information collection requirements, FHFA has concluded that the only difference that will have a material effect on the paperwork burden imposed by the final rule is the decision not to adopt the proposed increase, from 35 to 40 percent, in the maximum percentage of AHP funds Banks may allocate to their Homeownership Set-Aside programs. In estimating the paperwork burden that IC #6 would have imposed under the proposed rule, FHFA anticipated that the increase in the maximum allocation percentage, in combination with generally higher Bank incomes, would lead the average annual number of Homeownership Set-Aside Program applications and certifications to increase significantly, to 15,000 from the 13,000 that FHFA had estimated in connection with the prior renewal of the control number. This led FHFA to estimate that the average annual burden imposed by IC #6 would increase from 65,000 to 75,000 hours under the proposed rule. Because the final rule does not implement the proposed maximum allocation percentage increase, however, FHFA now anticipates that the Banks will receive an average of only 13,260 Homeownership Set-Aside Program applications and certifications annually. This figure represents a two percent increase from the most recent estimate of 13,000, to reflect a slightly higher level of Homeownership Set-Aside Program activity arising from anticipated higher Bank incomes over the next three years. As a result of this change, FHFA has modified its burden estimate for revised IC #6 downward to 66,300 hours from the 75,000 hours reflected in the proposed rule's PRA statement (a decrease of 8,700 hours).

Aside from the modification of the burden estimate for IC #6 discussed above, the burden estimates for, and material details regarding, each revised IC remain as described in the PRA statement for the proposed rule. The final burden estimates for revised part 1291 appear below.

B. Burden Estimates for Respondents

FHFA estimates that the average total burden that will be imposed upon Bank members and AHP project sponsors and owners annually over the next three years by the six ICs in revised part 1291 will be 118,905 hours. This represents an increase of 3,155 total hours over the estimate of 115,750 hours made in connection with the most recent renewal of the OMB control number. The burden estimate for each IC and the manner in which the estimate was calculated are set forth below.

1. Competitive Applications for AHP Subsidy Under General Funds and Targeted Funds

FHFA estimates that Banks will receive an annual average of 1,485 competitive applications for subsidy from Bank members on behalf of project sponsors and owners under their General Funds and Targeted Funds over the next three years and that it will take an average of 24 hours to prepare and submit each application, resulting in an estimated annual average burden of 35,640 hours for IC #1.

2. Compliance Submissions for Approved General Fund and Targeted Fund Projects at AHP Subsidy Disbursement

FHFA estimates that the Banks will receive an annual average of 715 submissions over the next three years from Bank members and project sponsors verifying that projects approved under the Banks' General Funds and Targeted Funds continue to comply with the regulatory eligibility requirements and all commitments made in the approved AHP applications at the time of subsidy disbursement and that it will take an average of one hour to prepare each submission, resulting in an estimated annual average burden of 715 hours for IC #2.

3. Modification Requests for Approved General Fund and Targeted Fund Projects

FHFA estimates that Banks will receive an annual average of 290 requests from Bank members and project sponsors for modifications to projects that have been approved under the Banks' AHP competitive application programs over the next three years and that it will take an average of 2.5 hours to prepare each request, resulting in an estimated annual average burden of 725 hours for IC #3.

4. Initial Monitoring Submissions for Approved General Fund and Targeted Fund Projects

FHFA estimates that Banks will receive an annual average of 510 submissions from Bank members and project sponsors of documentation required by the Banks as part of their initial monitoring of in-progress and recently completed projects approved under their General Funds and Targeted Funds over the next three years and that it will take an average of 4.5 hours to prepare each submission, resulting in an estimated annual average burden of 2,295 hours for IC #4.

5. Long-Term Monitoring Submissions for Approved General Fund and Targeted Fund Projects

FHFA estimates that Banks will receive an annual average of 4,900 submissions from Bank members and project sponsors of documentation required by the Banks as part of their long-term monitoring of completed projects approved under their General

[25] *See* 83 FR at 11370–74.

Funds and Targeted Funds over the next three years and that it will take an average of 2.7 hours to prepare each submission, resulting in an estimated annual average burden of 13,230 hours for IC #5.

6. Homeownership Set-Aside Program Applications and Certifications

FHFA estimates that Banks will receive from Bank members an annual average of 13,260 applications and required certifications for AHP direct subsidies under their Homeownership Set-Aside Programs and that it will take an average of 5 hours to prepare each submission, resulting in an estimated annual average burden of 66,300 hours for IC #6.

VII. Regulatory Flexibility Act

The Regulatory Flexibility Act [26] requires that a regulation that has a significant economic impact on a substantial number of small entities, small businesses, or small organizations must include an initial regulatory flexibility analysis describing the regulation's impact on small entities. Such an analysis need not be undertaken if the agency has certified that the regulation will not have a significant economic impact on a substantial number of small entities.[27] FHFA has considered the impact of the final rule under the Regulatory Flexibility Act. The General Counsel of FHFA certifies that the final rule is not likely to have a significant economic impact on a substantial number of small entities because the regulation applies to the Banks, which are not small entities for purposes of the Regulatory Flexibility Act.

VIII. Congressional Review Act

In accordance with the Congressional Review Act,[28] FHFA has determined that this final rule is not a major rule and has verified this determination with the Office of Information and Regulatory Affairs of the Office of Management and Budget (OMB).

List of Subjects

12 CFR Part 1290

Banks and banking, Credit, Federal home loan banks, Housing, Mortgages, Reporting and recordkeeping requirements.

12 CFR Part 1291

Community development, Credit, Federal home loan banks, Housing, Low- and moderate-income housing, Mortgages, Reporting and recordkeeping requirements.

For the reasons stated in the Preamble, FHFA amends parts 1290 and 1291 of Title 12 of the Code of Federal Regulations as follows:

PART 1290—COMMUNITY SUPPORT REQUIREMENTS

■ 1. The authority citation for part 1290 continues to read as follows:

Authority: 12 U.S.C. 1430(g).

■ 2. Amend § 1290.6 by revising paragraph (a)(5) and adding paragraph (c) to read as follows:

§ 1290.6 Bank community support programs.

(a) * * *

(5) Include an annual Targeted Community Lending Plan approved by the Bank's board of directors and subject to modification. The Bank's board of directors shall not delegate to a committee of the board, Bank officers, or other Bank employees the responsibility to adopt or amend the Targeted Community Lending Plan. The Targeted Community Lending Plan shall:

(i) Reflect market research conducted in the Bank's district;

(ii) Describe how the Bank will address identified credit needs and market opportunities in the Bank's district for targeted community lending;

(iii) Be developed in consultation with (and may only be amended after consultation with) its Advisory Council and with members, housing associates, and public and private economic development organizations in the Bank's district;

(iv) Establish quantitative targeted community lending performance goals;

(v) Identify and assess significant affordable housing needs in its district that will be addressed through its Affordable Housing Program under 12 CFR part 1291, reflecting market research conducted or obtained by the Bank; and

(vi) For any Targeted Funds established by the Bank under its Affordable Housing Program, specify, from among the identified affordable housing needs, the particular affordable housing needs the Bank plans to address through such Targeted Funds.

* * * * *

(c) *Public access.* A Bank shall publish its current Targeted Community Lending Plan on its publicly available website, and shall publish any amendments to its Targeted Community Lending Plan on the website within 30 days after the date of their adoption by the Bank's board of directors. If a Bank plans to establish any Targeted Funds under its Affordable Housing Program, the Bank must publish its Targeted Community Lending Plan (as amended) on the website on or before the date of publication of its annual Affordable Housing Program Implementation Plan, and at least 90 days before the first day that applications may be submitted to the Targeted Fund, unless the Targeted Fund is specifically targeted to address a federal- or state-declared disaster.

■ 3. Add § 1290.8 to read as follows:

§ 1290.8 Compliance dates.

From December 28, 2018 to December 31, 2020, a Bank shall comply with either prior part 1290 (in 12 CFR part 1290 (January 1, 2018 edition)) or this part 1290. On and after January 1, 2021, a Bank shall comply with this part 1290.

PART 1291—FEDERAL HOME LOAN BANKS' AFFORDABLE HOUSING PROGRAM

■ 4. Revise part 1291 to read as follows:

PART 1291—FEDERAL HOME LOAN BANKS' AFFORDABLE HOUSING PROGRAM

Subpart A—General

Sec.
1291.1 Definitions.
1291.2 Compliance dates.

Subpart B—Program Administration and Governance

1291.10 Required annual AHP contribution.
1291.11 Temporary suspension of AHP contributions.
1291.12 Allocation of required annual AHP contribution.
1291.13 Targeted Community Lending Plan; AHP Implementation Plan.
1291.14 Advisory Councils.
1291.15 Agreements.
1291.16 Conflicts of interest.

Subpart C—General Fund and Targeted Funds

1291.20 Establishment of programs.
1291.21 Eligible applicants.
1291.22 Funding rounds; application process.
1291.23 Eligible projects.
1291.24 Eligible uses.
1291.25 Scoring methodologies.
1291.26 Scoring criteria for the General Fund.
1291.27 Scoring criteria for Targeted Funds.
1291.28 Approval of AHP applications under the General Fund and Targeted Funds.
1291.29 Modifications of approved AHP applications.
1291.30 Procedures for funding.
1291.31 Lending and re-lending of AHP direct subsidy by revolving loan funds.
1291.32 Use of AHP subsidy in loan pools.

[26] 5 U.S.C. 601 *et seq.*

[27] 5 U.S.C. 605(b).

[28] *See* 5 U.S.C. 804(2).

Subpart D—Homeownership Set-Aside Programs

1291.40 Establishment of programs.
1291.41 Eligible applicants.
1291.42 Eligibility requirements.
1291.43 Approval of AHP applications.
1291.44 Procedures for funding.

Subpart E—Monitoring

1291.50 Monitoring under General Fund and Targeted Funds.
1291.51 Monitoring under Homeownership Set-Aside Programs.

Subpart F—Remedial Actions for Noncompliance

1291.60 Remedial actions for project noncompliance.
1291.61 Recovery of subsidy for member noncompliance.
1291.62 Bank reimbursement of AHP fund.
1291.63 Suspension and debarment.
1291.64 Use of repaid AHP subsidies.
1291.65 Transfer of Program administration.

Subpart G—Affordable Housing Reserve Fund

1291.70 Affordable Housing Reserve Fund.

Authority: 12 U.S.C. 1430(j).

Subpart A—General

§ 1291.1 Definitions.

As used in this part:

Affordable means that:

(1) The rent charged to a household for a unit that is to be reserved for occupancy by a household with an income at or below 80 percent of the median income for the area, does not exceed 30 percent of the income of a household of the maximum income and size expected, under the commitment made in the AHP application, to occupy the unit (assuming occupancy of 1.5 persons per bedroom or 1.0 persons per unit without a separate bedroom); or

(2) The rent charged to a household, for rental units subsidized with Section 8 assistance under 42 U.S.C. 1437f or subsidized under another assistance program where the rents are charged in the same way as under the Section 8 program, if the rent complied with this definition at the time of the household's initial occupancy and the household continues to be assisted through the Section 8 or another assistance program, respectively.

AHP means the Affordable Housing Program required to be established by the Banks pursuant to 12 U.S.C. 1430(j) and this part.

AHP project means a single-family or multifamily housing project for owner-occupied or rental housing that has been awarded or has received AHP subsidy under a Bank's General Fund and any Targeted Funds.

Cost of funds means, for purposes of a subsidized advance, the estimated cost of issuing Bank System consolidated obligations with maturities comparable to that of the subsidized advance.

Direct subsidy means an AHP subsidy in the form of a direct cash payment.

Eligible household means a household that meets the income limits and other requirements specified by a Bank for its General Fund and any Targeted Funds and Homeownership Set-Aside Programs, provided that:

(1) In the case of owner-occupied housing, the household's income may not exceed 80 percent of the median income for the area; and

(2) In the case of rental housing, the household's income in at least 20 percent of the units may not exceed 50 percent of the median income for the area.

Eligible project means a project eligible to receive AHP subsidy pursuant to the requirements of this part.

Extremely low-income household means a household that has an income at or below 30 percent of the median income for the area, with the income limit adjusted for household size in accordance with the methodology of the applicable median income standard selected from those enumerated in the definition of ''median income for the area,'' unless such median income standard has no household size adjustment methodology.

Family member means any individual related to a person by blood, marriage, or adoption.

Funding round means a time period, as determined by a Bank, during which the Bank accepts AHP applications for subsidy under its General Fund and any Targeted Funds.

General Fund means a program that each Bank is required to establish and under which the Bank approves *(i.e.,* awards) applications for AHP subsidy through a competitive application scoring process and disburses the subsidy, pursuant to the requirements of this part.

Homeownership Set-Aside Program means a program established by a Bank, in its discretion, under which the Bank approves (*i.e.,* awards) applications for AHP direct subsidy through a noncompetitive process developed by the Bank and disburses the subsidy, pursuant to the requirements of this part.

Household's investment means the following, to the extent paid by the household and documented (in the Closing Disclosure or other settlement statement, if applicable, or elsewhere) to the Bank or its designee:

(1) Reasonable and customary costs paid by the household in connection with the purchase of the unit (including real estate broker's commission, attorney's fees, and title search fees);

(2) Any down payment paid in connection with the household's purchase of the unit;

(3) The cost of any capital improvements made after the household's purchase of the unit until the time of the subsequent sale, transfer, assignment of title or deed, or refinancing; and

(4) The amount of principal on any mortgage senior to the AHP subsidy lien or other legally enforceable AHP subsidy repayment obligation repaid by the household.

LIHTC means Low-Income Housing Tax Credits under section 42 of the Internal Revenue Code (26 U.S.C. 42).

Loan pool means a group of mortgage or other loans meeting the requirements of this part that are purchased, pooled, and held in trust.

Low- or moderate-income household means a household that has an income of 80 percent or less of the median income for the area, with the income limit adjusted for household size in accordance with the methodology of the applicable median income standard selected from those enumerated in the definition of ''median income for the area,'' unless such median income standard has no household size adjustment methodology.

Median income for the area means one or more of the following median income standards as determined by a Bank, after consultation with its Advisory Council, in its AHP Implementation Plan:

(1) The median income for the area, as published annually by HUD;

(2) The median income for the area obtained from the Federal Financial Institutions Examination Council;

(3) The applicable median family income, as determined under 26 U.S.C. 143(f) (Mortgage Revenue Bonds) and published by a state agency or instrumentality;

(4) The median income for the area, as published by the United States Department of Agriculture; or

(5) The median income for an applicable definable geographic area, as published by a federal, state, or local government entity, and approved by FHFA, at the request of a Bank, for use under the AHP.

Multifamily building means a structure with five or more dwelling units.

Net earnings of a Bank means the net earnings of a Bank for a calendar year before declaring or paying any dividend under section 16 of the Bank Act (12 U.S.C. 1436). For purposes of this part,

''dividend'' includes any dividends on capital stock subject to a redemption request even if under GAAP those dividends are treated as an ''interest expense.''

Net proceeds means:

(1) In the case of a sale, transfer, or assignment of title or deed of an AHP-assisted unit by a household during the AHP five-year retention period, the sales price minus reasonable and customary costs paid by the household in connection with the transaction (including real estate broker's commission, attorney's fees, and title search fees) and outstanding debt superior to the AHP subsidy lien or other legally enforceable AHP subsidy repayment obligation;

(2) In the case of a refinancing of an AHP-assisted unit by a household during the AHP five-year retention period, the principal amount of the new mortgage minus reasonable and customary costs paid by the household in connection with the transaction (including attorney's fees and title search fees) and the principal amount of the refinanced mortgage.

Owner-occupied project means, for purposes of a Bank's General Fund and any Targeted Funds, one or more owner-occupied units in a single-family or multifamily building, including condominiums, cooperative housing, and manufactured housing.

Owner-occupied unit means a dwelling unit occupied by the owner of the unit. Housing with two to four dwelling units consisting of one owner-occupied unit and one or more rental units is considered a single owner-occupied unit.

Program means the Affordable Housing Program established pursuant to this part.

Rental project means, for purposes of a Bank's General Fund and any Targeted Funds, one or more dwelling units for occupancy by households that are not owner-occupants, including overnight and emergency shelters, transitional housing for homeless households, mutual housing, single-room occupancy housing, and manufactured housing communities.

Retention period means:

(1) Five years from closing for an AHP-assisted owner-occupied unit where the AHP subsidy is used for purchase of the unit or for purchase in conjunction with rehabilitation of the unit; and

(2) Fifteen years from the date of completion for a rental project.

Revolving loan fund means a capital fund established to make mortgage or other loans whereby loan principal is repaid into the fund and re-lent to other borrowers.

Single-family building means a structure with one to four dwelling units.

Sponsor means a not-for-profit or for-profit organization or public entity that:

(1) Has an ownership interest (including any partnership interest), as defined by the Bank in its AHP Implementation Plan, in a rental project;

(2) Is integrally involved, as defined by the Bank in its AHP Implementation Plan, in an owner-occupied project, such as by exercising control over the planning, development, or management of the project, or by qualifying borrowers and providing or arranging financing for the owners of the units;

(3) Operates a loan pool; or

(4) Is a revolving loan fund.

Subsidized advance means an advance to a member at an interest rate reduced below the Bank's cost of funds by use of a subsidy.

Subsidy means:

(1) A direct subsidy, provided that if a direct subsidy is used to write down the interest rate on a loan extended by a member, sponsor, or other party to a project, the subsidy must equal the net present value of the interest foregone from making the loan below the lender's market interest rate; or

(2) The net present value of the interest revenue foregone from making a subsidized advance at a rate below the Bank's cost of funds.

Targeted Fund means a program established by a Bank, in its discretion, to address specific affordable housing needs within its district that are unmet, have proven difficult to address through its General Fund, or align with objectives identified in its strategic plan, under which the Bank approves (*i.e.,* awards) applications for AHP subsidy through a competitive application scoring process developed by the Bank and disburses the subsidy, pursuant to the requirements of this part.

Very low-income household means a household that has an income at or below 50 percent of the median income for the area, with the income limit adjusted for household size in accordance with the methodology of the applicable median income standard selected from those enumerated in the definition of ''median income for the area,'' unless such median income standard has no household size adjustment methodology.

Visitable means, in either owner-occupied or rental housing, at least one entrance is at-grade (no steps) and approached by an accessible route such as a sidewalk, and the entrance door and all interior passage doors are at least 34 inches wide, offering 32 inches of clear passage space.

§ 1291.2 Compliance dates.

(a) *General January 1, 2021 compliance date.* Except as provided in paragraph (b) of this section, from December 28, 2018 to December 31, 2020, a Bank shall comply with either prior part 1291 (in 12 CFR part 1291 (January 1, 2018 edition)) or this part 1291, and on and after January 1, 2021, a Bank shall comply with this part 1291.

(b) *January 1, 2020 compliance date for owner-occupied retention agreements; exception for adoption of proxies.* From December 28, 2018 to December 31, 2019, a Bank shall comply with either prior § 1291.9(a)(7) (in 12 CFR part 1291 (January 1, 2018 edition)) or § 1291.15(a)(7), and on and after January 1, 2020, a Bank shall comply with § 1291.15(a)(7), except that a Bank shall comply with § 1291.15(a)(7)(ii)(B) on the date set forth in the FHFA guidance on proxies referenced therein.

Subpart B—Program Administration and Governance

§ 1291.10 Required annual AHP contribution.

Each Bank shall contribute annually to its Program the greater of:

(a) 10 percent of the Bank's net earnings for the previous year; or

(b) That Bank's pro rata share of an aggregate of $100 million to be contributed in total by the Banks, such proration being made on the basis of the net earnings of the Banks for the previous year, except that the required annual AHP contribution for a Bank shall not exceed its net earnings in the previous year.

§ 1291.11 Temporary suspension of AHP contributions.

(a) *Request to FHFA.* If a Bank finds that the contributions required pursuant to § 1291.10 are contributing to the financial instability of the Bank, the Bank may apply in writing to FHFA for a temporary suspension of such contributions.

(b) *Director review*—(1) *Financial instability.* In determining the financial instability of a Bank, the Director shall consider such factors as:

(i) Severely depressed Bank earnings;

(ii) A substantial decline in Bank membership capital; and

(iii) A substantial reduction in Bank advances outstanding.

(2) *Limitations on grounds for suspension.* The Director shall not suspend a Bank's annual AHP contributions if it determines that the Bank's reduction in earnings is due to:

(i) A change in the terms of advances to members that is not justified by market conditions;

(ii) Inordinate operating and administrative expenses; or

(iii) Mismanagement.

§ 1291.12 Allocation of required annual AHP contribution.

Each Bank, after consultation with its Advisory Council and pursuant to written policies adopted by the Bank's board of directors, shall meet the following requirements for allocation of its required annual AHP contribution.

(a) *General Fund.* Each Bank shall allocate annually at least 50 percent of its required annual AHP contribution to provide funds to members through a General Fund established and administered by the Bank pursuant to the requirements of this part.

(b) *Homeownership Set-Aside Programs.* A Bank may, in its discretion, allocate annually, in the aggregate, up to the greater of $4.5 million or 35 percent of its required annual AHP contribution to provide funds to members participating in Homeownership Set-Aside Programs established and administered by the Bank pursuant to the requirements of this part, provided that at least one-third of the Bank's aggregate annual set-aside allocation to such programs is allocated to assist first-time homebuyers or households for owner-occupied rehabilitation, or a combination of both.

(c) *Targeted Funds—phase-in requirements for funding allocations.* Unless otherwise directed by FHFA and subject to the phase-in requirements for the number of Targeted Funds in § 1291.20(b), a Bank may, in its discretion, allocate annually, up to:

(1) 20 percent, in the aggregate, of its required annual AHP contribution to any Targeted Funds;

(2) 30 percent, in the aggregate, of its required annual AHP contribution to any Targeted Funds, provided that it allocated at least 20 percent, in the aggregate, of its required annual AHP contribution to one or more Targeted Funds in any preceding year; or

(3) 40 percent, in the aggregate, of its required annual AHP contribution to any Targeted Funds, provided that it allocated at least 30 percent, in the aggregate, of its required annual AHP contribution to one or more Targeted Funds in any preceding year.

(d) *Acceleration of funding.* A Bank may, in its discretion, accelerate to its current year's Program from future required annual AHP contributions an amount up to the greater of $5 million or 20 percent of its required annual AHP contribution for the current year. The Bank may credit the amount of the accelerated contribution against required AHP contributions under this part 1291 over one or more of the subsequent five years.

(e) *No delegation.* A Bank's board of directors shall not delegate to a committee of the board, Bank officers, or other Bank employees the responsibility for adopting the Bank's policies for its General Fund and any Targeted Funds and Homeownership Set-Aside Programs.

§ 1291.13 Targeted Community Lending Plan; AHP Implementation Plan.

(a) *Targeted Community Lending Plan*—(1) *Identification of housing needs.* Pursuant to the requirements of 12 CFR 1290.6(a)(5)(v) and (vi), a Bank's annual Targeted Community Lending Plan adopted under its community support program shall, among other things, identify the significant affordable housing needs in its district that will be addressed through its AHP, as well as any specific affordable housing needs it plans to address through any Targeted Funds as set forth in its AHP Implementation Plan.

(2) *Public access.* A Bank shall publish its current Targeted Community Lending Plan on its publicly available website, and shall publish any amendments to its Targeted Community Lending Plan on the website within 30 days after the date of their adoption by the Bank's board of directors. If a Bank plans to establish any Targeted Funds under its AHP, the Bank must publish its Targeted Community Lending Plan (as amended) on the website on or before the date of publication of its annual AHP Implementation Plan, and at least 90 days before the first day that applications may be submitted to the Targeted Fund, unless the Targeted Fund is specifically targeted to address a federal- or state-declared disaster.

(3) *Notification of Plan amendments to FHFA.* A Bank shall notify FHFA of any amendments to its Targeted Community Lending Plan within 30 days after the date of their adoption by the Bank's board of directors.

(b) *AHP Implementation Plan.* Each Bank's board of directors, after consultation with its Advisory Council, shall adopt a written AHP Implementation Plan, and shall not amend the AHP Implementation Plan without first consulting its Advisory Council. The Bank's board of directors shall not delegate to Bank officers or other Bank employees the responsibility for such prior consultations with the Advisory Council, and shall not delegate to a committee of the board, Bank officers, or other Bank employees the responsibility for adopting or amending the AHP Implementation Plan. The AHP Implementation Plan shall set forth, at a minimum:

(1) The applicable median income standard or standards adopted by the Bank consistent with the definition of ''median income for the area'' in § 1291.1.

(2) For the General Fund established by the Bank pursuant to § 1291.20(a), the Bank's requirements for the General Fund, including the Bank's scoring methodology, including its scoring tie-breaker policy adopted pursuant to §§ 1291.25(c) and 1291.28(c), and any policy on approving AHP application alternates for funding pursuant to §§ 1291.25(c)(6) and 1291.28(b).

(3) For each Targeted Fund established by the Bank, if any, pursuant to § 1291.20(b), the Bank's requirements for the Targeted Fund, including the Bank's scoring methodology for each Fund, including its scoring tie-breaker policy adopted pursuant to §§ 1291.25(c) and 1291.28(c), and any policy on approving AHP application alternates for funding pursuant to §§ 1291.25(c)(6) and 1291.28(b), and the parameters adopted pursuant to § 1291.20(b)(2).

(4) The Bank's policy on how it will determine under which Fund to approve an application for the same project that is submitted to more than one Fund at a Bank in a calendar year and scores high enough to be approved under each Fund, pursuant to § 1291.28(d).

(5) For each Homeownership Set-Aside Program established by the Bank, if any, pursuant to § 1291.40, the Bank's requirements for the program, including the Bank's application and subsidy disbursement methodology.

(6) The Bank's retention agreement requirements for projects and households under its General Fund, any Targeted Funds, and any Homeownership Set-Aside Programs, pursuant to § 1291.15(a)(7) and (8), including the proxy or proxies selected by the Bank for determining a subsequent purchaser's income pursuant to FHFA guidance under § 1291.15(a)(7)(ii)(B).

(7) The Bank's standards for approving a relocation plan for current occupants of rental projects pursuant to § 1291.23(a)(2)(ii)(B).

(8) Any optional Bank district eligibility requirements adopted by the Bank pursuant to § 1291.24(c).

(9) The Bank's requirements for funding revolving loan funds, if adopted by the Bank pursuant to § 1291.31;

(10) The Bank's requirements for funding loan pools, if adopted by the Bank pursuant to § 1291.32;

(11) The Bank's requirements for monitoring under its General Fund and any Targeted Funds and Homeownership Set-Aside Programs pursuant to §§ 1291.50 and 1291.51.

(12) The Bank's requirements, including time limits, for re-use of repaid AHP direct subsidy in the same project, if adopted by the Bank pursuant to § 1291.64(b).

(c) *Advisory Council review.* Prior to the amendment of a Bank's AHP Implementation Plan, the Bank shall provide its Advisory Council an opportunity to review the document, and the Advisory Council shall provide its recommendations to the Bank's board of directors for its consideration.

(d) *Notification of Plan amendments to FHFA.* A Bank shall notify FHFA of any amendments made to its AHP Implementation Plan within 30 days after the date of their adoption by the Bank's board of directors.

(e) *Public access.* A Bank shall publish its current AHP Implementation Plan on its publicly available website, and shall publish any amendments to the AHP Implementation Plan on the website within 30 days after the date of their adoption by the Bank's board of directors.

§ 1291.14 Advisory Councils.

(a) *Appointment.* (1) Each Bank's board of directors shall appoint an Advisory Council of 7 to 15 persons who reside in the Bank's district and are drawn from community and not-for-profit organizations that are actively involved in providing or promoting low- and moderate-income housing, and community and not-for-profit organizations that are actively involved in providing or promoting community lending, in the district. Community organizations include for-profit organizations.

(2) Each Bank shall solicit nominations for membership on the Advisory Council from community and not-for-profit organizations pursuant to a nomination process that is as broad and as participatory as possible, allowing sufficient time for responses.

(3) The Bank's board of directors shall appoint Advisory Council members from a diverse range of organizations so that representatives of no one group constitute an undue proportion of the membership of the Advisory Council, giving consideration to the size of the Bank's district and the diversity of low- and moderate-income housing and community lending needs and activities within the district.

(b) *Terms of Advisory Council members.* Pursuant to policies adopted by the Bank's board of directors, Advisory Council members shall be appointed by the Bank's board of directors to serve for terms of three years, which shall be staggered to provide continuity in experience and service to the Advisory Council, except that Advisory Council members may be appointed to serve for terms of one or two years solely for purposes of reconfiguring the staggering of the three-year terms. No Advisory Council member may be appointed to serve for more than three full consecutive terms. An Advisory Council member appointed to fill a vacancy shall be appointed for the unexpired term of his or her predecessor in office.

(c) *Election of officers.* Each Advisory Council shall elect from among its members a chairperson, a vice chairperson, and any other officers the Advisory Council deems appropriate.

(d) *Duties*—(1) *Meetings with the Banks.* (i) The Advisory Council shall meet with representatives of the Bank's board of directors at least quarterly to provide advice on ways in which the Bank can better carry out its housing finance and community lending mission, including, but not limited to, advice on the low- and moderate-income housing and community lending programs and needs in the Bank's district, and on the use of AHP subsidies, Bank advances, and other Bank credit products for these purposes.

(ii) The Advisory Council's advice shall include recommendations on:

(A) The Bank's Targeted Community Lending Plan, and any amendments thereto, pursuant to 12 CFR 1290.6(a)(5)(iii);

(B) The amount of AHP funds to be allocated to the Bank's General Fund and any Targeted Funds and Homeownership Set-Aside Programs, including how the set-aside funds should be apportioned under the one-third funding allocation requirement in § 1291.12(b);

(C) The AHP Implementation Plan and any subsequent amendments thereto;

(D) The Bank's scoring methodologies, related definitions, and any additional optional district eligibility requirements for the General Fund and any Targeted Funds; and

(E) The eligibility requirements and any priority criteria for any Homeownership Set-Aside Programs.

(2) *Summary of AHP applications.* The Bank shall comply with requests from the Advisory Council for summary information regarding AHP applications from prior funding rounds.

(3) *Annual analysis; public access.* (i) Each Advisory Council annually shall submit to FHFA by May 1 its analysis of the low- and moderate-income housing and community lending activity of the Bank by which it is appointed.

(ii) Within 30 days after the date the Advisory Council's annual analysis is submitted to FHFA, the Bank shall publish the analysis on its publicly available website.

(e) *Expenses.* The Bank shall pay Advisory Council members' travel expenses, including transportation and subsistence, for each day devoted to attending meetings with representatives of the board of directors of the Bank and meetings requested by FHFA.

(f) *No delegation.* A Bank's board of directors shall not delegate to Bank officers or other Bank employees the responsibility to appoint persons as members of the Advisory Council or to meet with the Advisory Council at the quarterly meetings required by the Bank Act (12 U.S.C. 1430(j)(11)).

§ 1291.15 Agreements.

(a) *Agreements between Banks and members.* A Bank shall have in place with each member receiving an AHP subsidized advance or AHP direct subsidy an agreement or agreements containing, at a minimum, the following provisions, where applicable:

(1) *Notification of member.* The member has been notified of the requirements of this part as they may be amended from time to time, and all Bank policies relevant to the member's approved application for AHP subsidy.

(2) *AHP subsidy pass-through.* The member shall pass on the full amount of the AHP subsidy to the project or household, as applicable, for which the subsidy was approved.

(3) *Use of AHP subsidy*—(i) *Use of AHP subsidy by the member.* The member shall use the AHP subsidy in accordance with the terms of the member's approved application for the subsidy and the requirements of this part.

(ii) *Use of AHP subsidy by the project sponsor or owner.* The member shall have in place an agreement with each project sponsor or owner in which the project sponsor or owner agrees to use the AHP subsidy in accordance with the terms of the member's approved application for the subsidy and the requirements of this part.

(4) *Repayment of AHP subsidies in case of noncompliance*—(i) *Noncompliance by the member.* The member shall repay AHP subsidies to the Bank in accordance with the requirements of § 1291.61.

(ii) *Noncompliance by a project sponsor or owner*—(A) *Agreement.* The member shall have in place an agreement with each project sponsor or owner in which the project sponsor or owner agrees to repay AHP subsidies to the member or the Bank in accordance with the requirements of § 1291.60.

(B) *Recovery of AHP subsidies.* The member shall recover from the project sponsor or owner and repay to the Bank AHP subsidies in accordance with the requirements of § 1291.60 (if applicable).

(5) *Project monitoring*—(i) *Monitoring by the member.* The member shall comply with the monitoring requirements applicable to it, as established by the Bank in its monitoring policies pursuant to §§ 1291.50 and 1291.51.

(ii) *Agreement; LIHTC noncompliance notice.* The member shall have in place an agreement with each project sponsor and owner, in which the project sponsor and owner agree to comply with the monitoring requirements applicable to such parties, as established by the Bank in its monitoring policies pursuant to § 1291.50. The member's agreement shall also include an agreement by the project owner to provide prompt written notice to the Bank if the project also received LIHTC and the project is in material and unresolved noncompliance with the LIHTC income targeting or rent requirements at any time during the AHP 15-year retention period.

(6) *Transfer of AHP obligations*—(i) *To another member.* The member shall make best efforts to transfer its obligations under the approved application for AHP subsidy to another member in the event of its loss of membership in the Bank prior to the Bank's final disbursement of AHP subsidies.

(ii) *To a nonmember.* If, after final disbursement of AHP subsidies to the member, the member undergoes an acquisition or a consolidation resulting in a successor organization that is not a member of the Bank, the nonmember successor organization assumes the member's obligations under its approved application for AHP subsidy, and where the member received an AHP subsidized advance, the nonmember assumes such obligations until prepayment or orderly liquidation by the nonmember of the subsidized advance.

(7) *Owner-occupied units—required provisions for retention agreements.* The member shall ensure that where a household receives AHP subsidy for purchase, or purchase in conjunction with rehabilitation, of an owner-occupied unit, the unit is subject to a deed restriction or other legally enforceable retention agreement or mechanism requiring that:

(i) *Notice.* The Bank, and in its discretion any designee of the Bank, shall be given notice of any sale, transfer, assignment of title or deed, or refinancing of the unit by the household occurring during the AHP five-year retention period;

(ii) *Repayment of subsidy; exceptions.* In the case of a sale, transfer, assignment of title or deed, or refinancing of the unit by the household during the retention period, the amount of AHP subsidy calculated in accordance with paragraph (a)(7)(v) of this section shall be repaid to the Bank, unless one of the following exceptions applies:

(A) The unit was assisted with a permanent mortgage loan funded by an AHP subsidized advance;

(B) The subsequent purchaser, transferee, or assignee is a low- or moderate-income household, as determined by the Bank. For any sale, transfer, or assignment that occurs after the date established by FHFA in guidance on the use of proxies, the Bank or its designee shall determine the household's income using one or more proxies that are reliable indicators of the subsequent purchaser's income, which may be selected by the Bank pursuant to the FHFA guidance and shall be included in the Bank's AHP Implementation Plan, unless documentation demonstrating that household's actual income is available. The Bank or its designee is not required to request or obtain such documentation, but must use it in lieu of a proxy if available;

(C) The amount of the AHP subsidy that would be required to be repaid in accordance with the calculation in paragraph (a)(7)(v) of this section is $2,500 or less; or

(D) Following a refinancing, the unit continues to be subject to a deed restriction or other legally enforceable retention agreement or mechanism described in this paragraph (a)(7);

(iii) *Subsidy repayments to Bank, member, or project sponsor.* In the case of a direct subsidy, such repayment of AHP subsidy shall be made:

(A) To the Bank. If the Bank has not authorized re-use of the repaid AHP subsidy or has authorized re-use of the repaid subsidy but not retention of such repaid subsidy by the member or project sponsor pursuant to § 1291.64(b) of this part, or has authorized retention and re-use of such repaid subsidy by the member or project sponsor pursuant to such section and the repaid subsidy is not re-used in accordance with the requirements of the Bank and such section; or

(B) To the member or project sponsor. To the member or project sponsor for re-use by such member or project sponsor, if the Bank has authorized retention and re-use of such subsidy by the member or project sponsor pursuant to § 1291.64(b);

(iv) *Termination of subsidy repayment obligation.* The obligation to repay AHP subsidy to the Bank shall terminate after any event of foreclosure, transfer by deed-in-lieu of foreclosure, an assignment of a Federal Housing Administration first mortgage to HUD, or death of the AHP-assisted homeowner; and

(v) *Calculation of AHP subsidy repayment based on net proceeds and household's investment.* The Bank shall be repaid the lesser of:

(A) The AHP subsidy, reduced on a pro rata basis per month until the unit is sold, transferred, or its title or deed transferred, or is refinanced, during the AHP five-year retention period; or

(B) Any net proceeds from the sale, transfer, or assignment of title or deed of the unit, or the refinancing, as applicable, minus the AHP-assisted household's investment.

(8) *Rental projects—required provisions for retention agreements.* The member shall ensure that an AHP-assisted rental project is subject to a deed restriction or other legally enforceable retention agreement or mechanism requiring that:

(i) *Income and rent commitments.* The project's rental units, or applicable portion thereof, must remain occupied by and affordable for households with incomes at or below the levels committed to be served in the approved AHP application for the duration of the AHP 15-year retention period;

(ii) *Notice.* The Bank, and in its discretion any designee of the Bank, shall be given notice of any sale, transfer, assignment of title or deed, or refinancing of the project by the project owner occurring during the retention period;

(iii) *Repayment of subsidy; exceptions.* In the case of a sale, transfer, assignment of title or deed, or refinancing of the project by the project owner during the retention period, the full amount of the AHP subsidy received by the project owner shall be repaid to the Bank, unless one of the following exceptions applies:

(A) The project continues to be subject to a deed restriction or other legally enforceable retention agreement or mechanism incorporating the income-eligibility and affordability restrictions committed to in the

approved AHP application for the duration of the AHP 15-year retention period; or

(B) If authorized by the Bank, in its discretion, the households are relocated, due to the exercise of eminent domain, or for expansion of housing or services, to another property that is made subject to a deed restriction or other legally enforceable retention agreement or mechanism incorporating the income-eligibility and affordability restrictions committed to in the approved AHP application for the remainder of the AHP 15-year retention period; and

(iv) *Termination of income and rent restrictions.* The income-eligibility and affordability restrictions applicable to the project shall terminate after any foreclosure.

(9) *Lending of AHP direct subsidies.* If a member or a project sponsor lends AHP direct subsidy to a project, any repayments of principal and payments of interest received by the member or the project sponsor must be paid forthwith to the Bank, unless the direct subsidy is being both lent and re-lent by a revolving loan fund pursuant to § 1291.31(d).

(10) *Special provisions where members obtain AHP subsidized advances*—(i) *Repayment schedule.* The term of an AHP subsidized advance shall be no longer than the term of the member's loan to the project funded by the advance, and at least once in every 12-month period, the member shall be scheduled to make a principal repayment to the Bank equal to the amount scheduled to be repaid to the member on its loan to the project in that period.

(ii) *Prepayment fees.* Upon a prepayment of an AHP subsidized advance, the Bank shall charge a prepayment fee only to the extent the Bank suffers an economic loss from the prepayment.

(iii) *Treatment of loan prepayment by project.* If all or a portion of the loan or loans financed by an AHP subsidized advance are prepaid by the project to the member, the member may, at its option, either:

(A) Repay to the Bank that portion of the advance used to make the loan or loans to the project, and be subject to a fee imposed by the Bank sufficient to compensate the Bank for any economic loss the Bank experiences in reinvesting the repaid amount at a rate of return below the cost of funds originally used by the Bank to calculate the interest rate subsidy incorporated in the advance; or

(B) Continue to maintain the advance outstanding, subject to the Bank resetting the interest rate on that portion of the advance used to make the loan or loans to the project to a rate equal to the cost of funds originally used by the Bank to calculate the interest rate subsidy incorporated in the advance.

(b) *Agreements between Banks and project sponsors or owners*—(1) *Repayment of subsidies.* A Bank may have in place an agreement with each project sponsor or owner, in which the project sponsor or owner agrees to repay AHP subsidies directly to the Bank in accordance with the requirements of § 1291.60.

(2) *Project sponsor qualifications.* A Bank's AHP subsidy application form and AHP subsidy disbursement form for each subsidy disbursement (or other related documents) must include a requirement for the project sponsor to provide a certification that it meets the project sponsor qualifications criteria established by the Bank and that it has not engaged in, and is not engaging in, covered misconduct as defined in FHFA's Suspended Counterparty Program regulation (12 CFR part 1227), or as defined by the Bank, provided the Bank's definition incorporates the definition in 12 CFR part 1227 at a minimum.

(c) *Application to existing AHP agreements.* The requirements of section 10(j) of the Bank Act (12 U.S.C. 1430(j)) and the provisions of this part, as amended, are incorporated into all AHP agreements between a Bank and any member, project sponsor, or project owner receiving AHP subsidies under the General Fund and any Targeted Funds, and between a Bank and any member or unit owner under any Homeownership Set-Aside Programs. To the extent the requirements of this part are amended from time to time, such agreements are deemed to incorporate the amendments to conform to any new requirements of this part. No amendment to this part shall affect the legality of actions taken prior to the effective date of such amendment.

§ 1291.16 Conflicts of interest.

(a) *Bank directors and employees.* (1) Each Bank's board of directors shall adopt a written policy providing that if a Bank director or employee, or such person's family member, has a financial interest in, or is a director, officer, or employee of an organization involved in, a project that is the subject of a pending or approved AHP application, the Bank director or employee shall not participate in or attempt to influence decisions by the Bank regarding the evaluation, approval, funding, monitoring, or any remedial process for such project.

(2) If a Bank director or employee, or such person's family member, has a financial interest in, or is a director, officer, or employee of an organization involved in, an AHP project such that he or she is subject to the requirements in paragraph (a)(1) of this section, such person shall not participate in or attempt to influence decisions by the Bank regarding the evaluation, approval, funding, monitoring, or any remedial process for such project.

(b) *Advisory Council members.* (1) Each Bank's board of directors shall adopt a written policy providing that if an Advisory Council member, or such person's family member, has a financial interest in, or is a director, officer, or employee of an organization involved in, a project that is the subject of a pending or approved AHP application, the Advisory Council member shall not participate in or attempt to influence decisions by the Bank regarding the approval for such project.

(2) If an Advisory Council member, or such person's family member, has a financial interest in, or is a director, officer, or employee of an organization involved in, an AHP project such that he or she is subject to the requirements in paragraph (b)(1) of this section, such person shall not participate in or attempt to influence decisions by the Bank regarding the approval for such project.

(c) *No delegation.* A Bank's board of directors shall not delegate to Bank officers or other Bank employees the responsibility to adopt the conflict of interest policies required by this section.

Subpart C—General Fund and Targeted Funds

§ 1291.20 Establishment of programs.

(a) *General Fund*—(1) *Establishment.* A Bank shall establish a General Fund pursuant to the requirements of this part.

(2) *Eligibility requirements.* A Bank may not adopt eligibility requirements for its General Fund except as specifically authorized in this part.

(b) *Targeted Funds*—(1) *Establishment; number of Targeted Funds and funding allocation amounts.* A Bank may establish, in its discretion, up to three Targeted Funds to address specified affordable housing needs in its district pursuant to the phase-in funding allocation requirements in § 1291.12(c)(1), the following phase-in requirements for the number of Targeted Funds unless otherwise directed by FHFA, and any other applicable requirements of this part:

(i) One Targeted Fund;

(ii) Two Targeted Funds to be administered in the same calendar year,

provided that the Bank administered at least one Targeted Fund in any preceding year; or

(iii) Three Targeted Funds to be administered in the same calendar year, provided that the Bank administered at least two Targeted Funds in any preceding year.

(2) *Eligibility requirements.* (i) A Bank shall adopt and implement parameters, which shall be included in its AHP Implementation Plan, for ensuring that each Targeted Fund is designed to receive sufficient numbers of applicants for the amount of AHP funds allocated to the Targeted Fund to enable the Bank to facilitate a robust competitive scoring process.

(ii) A Bank may not adopt eligibility requirements for its Targeted Funds except as specifically authorized in this part.

§ 1291.21 Eligible applicants.

(a) *Member applicants.* A Bank shall accept applications for AHP subsidy under its General Fund and any Targeted Funds only from institutions that are members of the Bank at the time the application is submitted to the Bank.

(b) *Project sponsor qualifications*—(1) *In general.* A project sponsor must be qualified and able to perform its responsibilities as committed to in the application for AHP subsidy funding the project.

(2) *Revolving loan fund.* Pursuant to written policies adopted by a Bank's board of directors, a revolving loan fund sponsor that intends to use AHP direct subsidy in accordance with § 1291.31 shall:

(i) Provide audited financial statements that its operations are consistent with sound business practices; and

(ii) Demonstrate the ability to re-lend AHP subsidy repayments on a timely basis and track the use of the AHP subsidy.

(3) *Loan pool.* Pursuant to written policies adopted by a Bank's board of directors, a loan pool sponsor that intends to use AHP subsidy in accordance with § 1291.32 shall:

(i) Provide evidence of sound asset/liability management practices;

(ii) Provide audited financial statements that its operations are consistent with sound business practices; and

(iii) Demonstrate the ability to track the use of the AHP subsidy.

§ 1291.22 Funding rounds; application process.

(a) *Funding rounds.* A Bank may accept applications from proposed projects for AHP subsidy under its General Fund and any Targeted Funds during a specified number of funding rounds each year, as determined by the Bank.

(b) *Submission of applications.* Except as provided in § 1291.29(a), a Bank shall require applications for AHP subsidy to contain information sufficient for the Bank to:

(1) Determine that the proposed AHP project meets the eligibility requirements of this part; and

(2) Evaluate the application pursuant to the scoring methodology adopted by the Bank pursuant to §§ 1291.25, 1291.26, and 1291.27, as applicable.

(c) *Review of applications submitted.* Except as provided in § 1291.29(b), a Bank shall review the applications for AHP subsidy to determine that the proposed AHP project meets the eligibility requirements of this part, and shall evaluate the applications pursuant to the Bank's scoring methodology adopted pursuant to §§ 1291.25, 1291.26, and 1291.27, as applicable.

§ 1291.23 Eligible projects.

Projects receiving AHP subsidies pursuant to a Bank's General Fund and any Targeted Funds must meet the following eligibility requirements:

(a) *Owner-occupied or rental housing.* The AHP subsidy shall be used exclusively for:

(1) *Owner-occupied housing.* The purchase, construction, or rehabilitation of an owner-occupied project for very low-income or low- or moderate-income households, where the housing is to be used as the household's primary residence. A household must have an income meeting the income targeting commitments in the approved AHP application at the time it is qualified by the project sponsor for participation in the project;

(2) *Rental housing.* The purchase, construction, or rehabilitation of a rental project, where at least 20 percent of the units in the project are occupied by and affordable for very low-income households.

(i) *Projects that are not occupied.* For a rental project that is not occupied at the time the AHP application is submitted to the Bank for approval, a household must have an income meeting the income targeting commitments in the approved AHP application upon initial occupancy of the rental unit.

(ii) *Projects that are occupied.* (A) Except as provided in paragraph (a)(2)(ii)(B) of this section, for a rental project involving purchase or rehabilitation that is occupied at the time the AHP application is submitted to the Bank for approval, a household must have an income meeting the income targeting commitments in the approved AHP application at the time of such submission.

(B) If the project has a relocation plan for current occupants that is approved by one of its federal, state, or local government funders, or a reasonable relocation plan for current occupants that is otherwise approved by the Bank according to standards included in the Bank's AHP Implementation Plan, a household may have an income meeting the income targeting commitments upon initial occupancy of the rental unit after completion of the purchase or rehabilitation.

(b) *Project feasibility*—(1) *Developmental feasibility.* The project must be likely to be completed and occupied, based on relevant factors contained in the Bank's project feasibility guidelines, including, but not limited to, the development budget, market analysis, and project sponsor's experience in providing the requested assistance to households.

(2) *Operational feasibility of rental projects.* A rental project must be able to operate in a financially sound manner, in accordance with the Bank's project feasibility guidelines, as projected in the project's operating pro forma.

(c) *Timing of AHP subsidy use.* Some or all of the AHP subsidy must be likely to be drawn down by the project or used by the project to procure other financing commitments within 12 months of the date of approval of the application for AHP subsidy funding the project.

(d) *Retention agreements*—(1) *Owner-occupied projects.* Each AHP-assisted unit in an owner-occupied project for which the AHP subsidy was used for purchase, or for purchase in conjunction with rehabilitation, of the unit by the AHP-assisted household, is, or is committed to be, subject to a five-year retention agreement described in § 1291.15(a)(7).

(2) *Rental projects.* AHP-assisted rental projects are, or are committed to be, subject to a 15-year retention agreement as described in § 1291.15(a)(8).

(e) *Fair housing.* The project, as proposed, must comply with applicable federal and state laws on fair housing and housing accessibility, including, but not limited to, the Fair Housing Act, the Rehabilitation Act of 1973, the Americans with Disabilities Act of 1990, and the Architectural Barriers Act of 1969, and must demonstrate how the project will be affirmatively marketed.

§ 1291.24 Eligible uses.

(a) *Eligible uses of AHP subsidy.* AHP subsidies shall be used only for:

(1) *Owner-occupied housing.* The purchase, construction, or rehabilitation of owner-occupied housing.

(2) *Rental housing.* The purchase, construction, or rehabilitation of rental housing.

(3) *Need for AHP subsidy*—(i) *Review of project development budget.* The project's estimated sources of funds shall equal its estimated uses of funds, as reflected in the project's development budget. The difference between the project's sources of funds (excluding AHP subsidy) and uses of funds is the project's need for AHP subsidy, which is the maximum amount of AHP subsidy the project may receive. A Bank, in its discretion, may permit a project's sources of funds to include or exclude the estimated market value of in-kind donations and voluntary professional labor or services (excluding the value of sweat equity), provided that the project's uses of funds also include or exclude, respectively, the value of such estimates.

(ii) *Cash sources of funds.* A project's cash sources of funds shall include any cash contributions by the sponsor, any cash from sources other than the sponsor, and estimates of funds the project sponsor intends to obtain from other sources but which have not yet been committed to the project. In the case of homeownership projects where the sponsor extends permanent financing to the homebuyer, the sponsor's cash contribution shall include the present value of any payments the sponsor is to receive from the buyer, which shall include any cash down payment from the buyer, plus the present value of any purchase note the sponsor holds on the unit. If the note carries a market interest rate commensurate with the credit quality of the buyer, the present value of the note equals the face value of the note. If the note carries an interest rate below the market rate, the present value of the note shall be determined using the market rate to discount the cash flows.

(iii) *Cash uses.* A project's cash uses are the actual outlay of cash needed to pay for materials, labor, and acquisition or other costs of completing the project. Cash costs do not include in-kind donations, voluntary professional labor or services, or sweat equity.

(4) *Project costs*—(i) *In general.* (A) Taking into consideration the geographic location of the project, development conditions, and other non-financial household or project characteristics, a Bank shall determine that a project's costs, as reflected in the project's development budget, are reasonable, in accordance with the Bank's project cost guidelines.

(B) For purposes of determining the reasonableness of a developer's fee for a project as a percentage of total development costs, a Bank may, in its discretion, include estimates of the market value of in-kind donations and volunteer professional labor or services (excluding the value of sweat equity) committed to the project as part of the total development costs.

(ii) *Cost of property and services provided by a member.* The purchase price of property or services, as reflected in the project's development budget, sold to the project by a member providing AHP subsidy to the project, or, in the case of property, upon which such member holds a mortgage or lien, may not exceed the market value of such property or services as of the date the purchase price was agreed upon. In the case of real estate owned property sold to a project by a member providing AHP subsidy to the project, or property sold to the project upon which the member holds a mortgage or lien, the market value of such property is deemed to be the ''as-is'' or ''as-rehabilitated'' value of the property, whichever is appropriate. That value shall be reflected in an independent appraisal of the property performed by a state certified or licensed appraiser, as defined in 12 CFR 564.2(j) and (k), within 6 months prior to the date the Bank disburses AHP subsidy to the project.

(5) *Financing costs.* The rate of interest, points, fees, and any other charges for all loans that are made for the project in conjunction with the AHP subsidy shall not exceed a reasonable market rate of interest, points, fees, and other charges for loans of similar maturity, terms, and risk.

(6) *Counseling costs.* Counseling costs, provided:

(i) Such costs are incurred in connection with counseling of homebuyers who actually purchase an AHP-assisted unit; and

(ii) The cost of the counseling has not been covered by another funding source, including the member.

(7) *Refinancing.* Refinancing of an existing single-family or multifamily mortgage loan, provided that the refinancing produces equity proceeds and such equity proceeds up to the amount of the AHP subsidy in the project shall be used only for the purchase, construction, or rehabilitation of housing units meeting the eligibility requirements of this part.

(8) *Calculation of AHP subsidy.* (i) Where an AHP direct subsidy is provided to a project to write down the interest rate on a loan extended by a member, sponsor, or other party to a project, the net present value of the interest foregone from making the loan below the lender's market interest rate shall be calculated as of the date the application for AHP subsidy is submitted to the Bank, and subject to adjustment under § 1291.30(d).

(ii) Where an AHP subsidized advance is provided to a project, the net present value of the interest revenue foregone from making a subsidized advance at a rate below the Bank's cost of funds shall be determined as of the earlier of the date of disbursement of the subsidized advance or the date prior to disbursement on which the Bank first manages the funding to support the subsidized advance through its asset/liability management system, or otherwise.

(b) *Prohibited uses of AHP subsidy.* AHP subsidy may not be used to pay for:

(1) *Certain prepayment fees.* Prepayment fees imposed by a Bank on a member for a subsidized advance that is prepaid, unless:

(i) The project is in financial distress that cannot be remedied through a project modification pursuant to § 1291.29;

(ii) The prepayment of the subsidized advance is necessary to retain the project's affordability and income targeting commitments;

(iii) Subsequent to such prepayment, the project will continue to comply with the terms of the approved AHP application and the requirements of this part for the duration of the original retention period;

(iv) Any unused AHP subsidy is returned to the Bank and made available for other AHP projects or households; and

(v) The amount of AHP subsidy used for the prepayment fee may not exceed the amount of the member's prepayment fee to the Bank;

(2) *Cancellation fees.* Cancellation fees and penalties imposed by a Bank on a member for a subsidized advance commitment that is canceled;

(3) *Processing fees.* Processing fees charged by members for providing AHP direct subsidies to a project; or

(4) *Reserves and certain expenses.* Capitalized reserves, periodic deposits to reserve accounts, operating expenses, or supportive services expenses.

(c) *Optional Bank district eligibility requirements.* A Bank may require a project receiving AHP subsidies to meet one or more of the following additional eligibility requirements adopted by the Bank's board of directors and included

in its AHP Implementation Plan after consultation with its Advisory Council:

(1) *AHP subsidy limits.* A requirement that the amount of AHP subsidy requested for the project does not exceed limits established by the Bank as to the maximum amount of AHP subsidy available per member, per project sponsor, per project, or per project unit in a single AHP funding round. A Bank may establish only one maximum subsidy limit per member, per sponsor, per project, or per project unit for the General Fund and for each Targeted Fund, which shall apply to all applicants to the specific Fund, but the maximum subsidy limit per project or per project unit may differ among the Funds; or

(2) *Homebuyer or homeowner counseling.* A requirement that a household must complete a homebuyer or homeowner counseling program provided by, or based on one provided by, an organization recognized as experienced in homebuyer or homeowner counseling, respectively.

(d) *Applications to multiple Funds—subsidy amount.* If an application for a project is submitted to more than one Fund at the same time, the application for each Fund must be for the same amount of AHP subsidy.

§ 1291.25 Scoring methodologies.

(a)(1) *Written scoring methodologies.* A Bank shall establish a written scoring methodology for its General Fund and for any Targeted Fund setting forth the Bank's scoring point allocations as required in paragraph (a)(2) of this section, scoring criteria adopted pursuant to the requirements of §§ 1291.26 and 1291.27, as applicable, and related definitions. The scoring methodology for each Fund may be different. A Bank shall not adopt scoring points allocations or scoring criteria for its General Fund and any Targeted Funds except as specifically authorized under this paragraph (a)(1) and §§ 1291.26 and 1291.27, respectively.

(2) *Scoring points allocations*—(i) *General Fund.* A Bank shall allocate 100 points among all of the scoring criteria adopted by the Bank for its General Fund pursuant to § 1291.26. The scoring criterion for targeting in § 1291.26(d) shall be allocated at least 20 points. The remaining scoring criteria shall be allocated at least 5 points each, except that if a Bank adopts the scoring criterion for home purchase by low- or moderate-income households in § 1291.26(c) as an optional scoring criterion, the Bank may allocate fewer than the full 5 points to it, with the remainder of such points allocated to one or a combination of the other scoring criteria in § 1291.26 other than to the scoring criterion for Bank district priorities in § 1291.26(h). If a Bank adopts a scoring criterion under its Bank district priorities for housing located in the Bank's district, the Bank may not allocate points to the scoring criterion in a way that excludes all out-of-district projects from its General Fund.

(ii) *Targeted Funds.* A Bank shall allocate 100 points among all of the scoring criteria adopted by the Bank for each Targeted Fund pursuant to § 1291.27. A Bank may not allocate more than 50 points to any one scoring criterion for a Targeted Fund.

(3) *Fixed-point and variable-point scoring criteria.* A Bank shall designate each scoring criterion as either a fixed-point or a variable-point criterion, defined as follows:

(i) Fixed-point scoring criteria are those that cannot be satisfied in varying degrees and are either satisfied or not, with the total number of points allocated to the criterion awarded by the Bank to an application meeting the criterion; and

(ii) Variable-point criteria are those where there are varying degrees to which an application can satisfy the criteria, with the number of points that may be awarded to an application for meeting the criterion varying, depending on the extent to which the application satisfies the criterion, based on a fixed scale or on a scale relative to the other applications being scored. A Bank shall designate the targeting scoring criterion in § 1291.26(d) as a variable-point criterion.

(b) *Satisfaction of scoring criteria.* A Bank shall award scoring points to applications to a particular Fund based on satisfaction of the scoring criteria in the Bank's scoring methodology for that Fund.

(c) *Scoring tied applications.* A Bank shall establish and implement, as necessary, a scoring tie-breaker policy to address the case of two or more applications to its General Fund or any Targeted Fund receiving identical scores in the same AHP funding round and there is insufficient AHP subsidy to approve all of the tied applications but sufficient subsidy to approve one of them. A Bank shall meet the following requirements in establishing its scoring tie-breaker policy:

(1) The Bank shall consult with its Advisory Council prior to adoption of its policy;

(2) The Bank shall adopt the policy in advance of an AHP funding round and include it in its AHP Implementation Plan;

(3) The policy shall include the methodology used to break a scoring tie, which may differ for each Fund, and which shall be drawn from the particular Fund's scoring criteria adopted in the Bank's AHP Implementation Plan;

(4) The scoring tie-breaker methodology shall be reasonable, transparent, verifiable, and impartial;

(5) The scoring tie-breaker methodology shall be used solely to break a scoring tie and may not affect the eligibility of the applications, including financial feasibility, or their scores and resultant rankings;

(6) The Bank shall approve a tied application as an alternate pursuant to § 1291.28(b) if the application does not prevail under the scoring tie-breaker methodology, or if the application is tied with another application but requested more subsidy than the amount of AHP funds that remain to be awarded, if the Bank has a written policy to approve alternates for funding under the applicable Fund; and

(7) The Bank shall document in writing its analysis and results for each use of the scoring tie-breaker methodology.

§ 1291.26 Scoring criteria for the General Fund.

A Bank shall adopt in its scoring methodology for its General Fund all of the following categories of scoring criteria, including at least one housing need under each of paragraphs (e), (f), and (g) of this section, except that a Bank is not required to adopt the scoring criterion for homeownership by low- or moderate-income households in paragraph (c) of this section if the Bank allocates at least 10 percent of its required annual AHP contribution to any Homeownership Set-Aside Programs, and a Bank is not required to adopt the scoring criterion for Bank district priorities in paragraph (h) of this section:

(a) *Use of donated or conveyed government-owned or other properties.* The financing of housing using a significant proportion, as defined by the Bank in its AHP Implementation Plan, of:

(1) Land or units donated or conveyed by the federal government or any agency or instrumentality thereof; or

(2) Land or units donated or conveyed by any other party for an amount significantly below the fair market value of the property, as defined by the Bank in its AHP Implementation Plan.

(b) *Sponsorship by a not-for-profit organization or government entity.* Project sponsorship by a not-for-profit organization, a state or political subdivision of a state, a state housing agency, a local housing authority, a

Native American Tribe, an Alaskan Native Village, or the government entity for Native Hawaiian Home Lands.

(c) *Home purchase by low- or moderate-income households.* The financing of home purchases by low- or moderate-income households.

(d) *Income targeting.* The extent to which a project provides housing for very low- and low- or moderate-income households, as follows:

(1) *Rental projects.* An application for a rental project shall be awarded the maximum number of points available under this scoring criterion if 60 percent or more of the units in the project are reserved for occupancy by households with incomes at or below 50 percent of the median income for the area. Applications for projects with less than 60 percent of the units reserved for occupancy by households with incomes at or below 50 percent of the median income for the area shall be awarded points on a declining scale based on the percentage of units in a project that are reserved for households with incomes at or below 50 percent of the median income for the area, and on the percentage of the remaining units reserved for households with incomes at or below 80 percent of the median income for the area.

(2) *Owner-occupied projects.* Applications for owner-occupied projects shall be awarded points based on a declining scale to be determined by the Bank in its AHP Implementation Plan, taking into consideration percentages of units and targeted income levels.

(3) *Separate scoring.* For purposes of this scoring criterion, applications for owner-occupied projects and rental projects may be scored separately.

(e) *Underserved communities and populations.* The financing of housing for underserved communities or populations, by addressing one or more of the following specific housing needs:

(1) *Housing for homeless households.* The financing of rental housing, excluding overnight shelters, reserving at least 20 percent of the units for homeless households, the creation of transitional housing for homeless households permitting a minimum of 6 months occupancy, or the creation of permanent owner-occupied housing reserving at least 20 percent of the units for homeless households, with the term ''homeless households'' defined by the Bank in its AHP Implementation Plan.

(2) *Housing for special needs populations.* The financing of housing in which at least 20 percent of the units are reserved for households with specific special needs, such as: The elderly; persons with disabilities; formerly incarcerated persons; persons recovering from physical abuse or alcohol or drug abuse; victims of domestic violence, dating violence, sexual assault or stalking; persons with HIV/AIDS; or unaccompanied youth; or the financing of housing that is visitable by persons with physical disabilities who are not occupants of such housing. A Bank may, in its discretion, adopt a requirement that projects provide supportive services, or access to supportive services, for specific special needs populations identified by the Bank in order for the project to receive scoring points under this paragraph (e)(2).

(3) *Housing for other targeted populations.* The financing of housing in which at least 20 percent of the units are reserved for households specifically in need of housing, such as agricultural workers, military veterans, Native Americans, households requiring large units, or kinship care households in which children are in the care of cohabitating relatives, such as grandparents, aunts or uncles, or cohabitating close family friends.

(4) *Housing in rural areas.* The financing of housing located in a rural area, as defined by the Bank in its AHP Implementation Plan.

(5) *Rental housing for extremely low-income households.* The financing of rental housing in which a minimum percentage of the units, as defined by the Bank in its AHP Implementation Plan, are reserved for extremely low-income households. Points awarded under this criterion shall be awarded in addition to any points awarded for income targeting under paragraph (d)(1) of this section, such that the points awarded to a project under this criterion and the income targeting criterion, combined, may exceed the maximum number of possible points awarded under the income targeting criterion.

(6) *Other.* The financing of other housing addressing specific housing needs of underserved communities or populations as FHFA may provide by guidance.

(f) *Creating economic opportunity.* The financing of housing that facilitates economic opportunity for the residents by addressing one or more of the following specific housing needs:

(1) *Promotion of empowerment.* The provision of housing in combination with a program offering services that assist residents in attaining life skills or moving toward better economic opportunities, such as: Employment; education; training; homebuyer, homeownership or tenant counseling; child care; adult daycare services; afterschool care; tutoring; health services, including mental health and behavioral health services; resident involvement in decision making affecting the creation or operation of the project; or workforce preparation and integration.

(2) *Residential economic diversity.* The financing of either affordable housing in a high opportunity area, or mixed-income housing in an area designated by the Bank, with those terms defined and area designated by the Bank in its AHP Implementation Plan.

(3) *Other.* The financing of other housing that facilitates economic opportunity as FHFA may provide by guidance.

(g) *Community stability, including affordable housing preservation.* The promotion of community stability, such as by preserving affordable housing, rehabilitating vacant or abandoned properties, or being an integral part of a community revitalization or economic development strategy approved by a unit of state or local government or instrumentality thereof, and not displacing low- or moderate-income households, or if such displacement will occur, assuring that such households will be assisted to minimize the impact of such displacement.

(h) *Bank district priorities.* The satisfaction of one or more housing needs in the Bank's district, as defined by the Bank in its AHP Implementation Plan, that the Bank has not otherwise adopted under this section.

§ 1291.27 Scoring criteria for Targeted Funds.

A Bank shall adopt in its scoring methodology for each Targeted Fund established by the Bank at least three different scoring criteria, as determined by the Bank in its discretion, that allow the Bank to select applications that meet the specific affordable housing need or needs being addressed by the Targeted Fund.

§ 1291.28 Approval of AHP applications under the General Fund and Targeted Funds.

(a) *Approval of AHP applications.* Subject to the requirements in paragraphs (c) and (d) of this section, a Bank shall approve applications for AHP subsidy under its General Fund and any Targeted Funds that meet all of the applicable AHP eligibility requirements in this part in descending order, starting with the highest scoring application until the total funding amount for the particular AHP funding round, except for any amount insufficient to fund the next highest scoring application, has been approved.

(b) *AHP application alternates.* For the General Fund and any Targeted Funds, the Bank also may, in its discretion, approve a specified number, as determined by the Bank, of the next highest scoring applications as alternates eligible for funding, and may approve any tied applications as alternates eligible for funding pursuant to paragraph (c)(2) of this section, if any previously committed AHP subsidies become available, pursuant to a written policy on approving alternates for funding established by the Bank and included in the Bank's AHP Implementation Plan. If a Bank has established such a policy for approving alternates for funding and sufficient previously committed AHP subsidies become available within one year of application approval, the Bank shall approve the designated alternates for funding within that one-year period.

(c) *Tied applications.* (1) Where two or more applications to a General Fund or Targeted Fund have identical scores in the same AHP funding round and there is insufficient AHP subsidy to approve all of the tied applications but sufficient subsidy to approve one of them, a Bank shall approve the tied application that prevails under the Bank's scoring tie-breaker methodology in its policy adopted pursuant to § 1291.25(c).

(2) A tied application that does not prevail under the Bank's scoring tie-breaker methodology, or is tied with another application but requested more subsidy than the amount of AHP funds that remain to be awarded under the Fund, shall be approved as an alternate for funding if the Bank has a written policy to approve alternates for funding under the Fund.

(d) *Applications to multiple Funds—approval under one Fund.* If an application for the same project is submitted to more than one Fund at a Bank in a calendar year and the application scores high enough to be approved under each Fund, the Bank shall approve the application under only one of the Funds pursuant to the Bank's policy established in its AHP Implementation Plan.

(e) *No delegation.* A Bank's board of directors may not delegate to Bank officers or other Bank employees the responsibility to approve or disapprove the AHP subsidy applications, as well as any alternates under the Bank's General Fund and any Targeted Fund if the Bank has a written policy to approve alternates for funding under such Fund.

§ 1291.29 Modifications of approved AHP applications.

(a) *Modification procedure.* If, prior to or after final disbursement of funds to a project from all funding sources, in order to remedy noncompliance or receive additional subsidy, there is or will be a change in the project that would change the score that the project application received in the AHP funding round in which it was originally scored and approved, had the changed facts been operative at that time, a Bank shall approve in writing a request for a modification to the terms of the approved application, provided that:

(1) The Bank first requests that the project sponsor or owner make a reasonable effort to cure any noncompliance within a reasonable period of time, and the noncompliance could not be cured within a reasonable period of time;

(2) The project, incorporating any such changes, would meet the eligibility requirements of this part;

(3) The application, as reflective of such changes, continues to score high enough to have been approved in the AHP funding round in which the application was originally scored and approved by the Bank, which is as high as the lowest ranking alternate approved for funding by the Bank if the Bank has a written policy to approve alternates for funding; and

(4) There is good cause for the modification, which may not be solely remediation of noncompliance, and the analysis and justification for the modification, including why a cure of noncompliance was not successful or attempted, are documented by the Bank in writing.

(b) *AHP subsidy increases; no delegation*—(1) *AHP subsidy increases.* A Bank's board of directors may, in its discretion, approve or disapprove requests for modifications involving an increase in AHP subsidy in accordance with the requirements of paragraph (a) of this section.

(2) *No delegation.* The authority to approve or disapprove requests for modifications involving an increase in AHP subsidy shall not be delegated by the Bank's board of directors to Bank officers or other Bank employees.

§ 1291.30 Procedures for funding.

(a) *Disbursement of AHP subsidies to members.* (1) A Bank may disburse AHP subsidies only to institutions that are members of the Bank at the time they request a draw-down of the subsidies.

(2) If an institution with an approved application for AHP subsidy loses its membership in a Bank, the Bank may disburse AHP subsidies to a member of such Bank to which the institution has transferred its obligations under the approved AHP application, or the Bank may disburse AHP subsidies through another Bank to a member of that Bank that has assumed the institution's obligations under the approved AHP application.

(b) *Progress towards use of AHP subsidy.* A Bank shall establish and implement policies, including time limits, for determining whether progress is being made towards draw-down and use of AHP subsidies by approved projects, and whether to cancel AHP application approvals for lack of such progress. If a Bank cancels any AHP application approvals due to lack of such progress, the Bank shall make the AHP subsidies available for other AHP-eligible projects or households.

(c) *Compliance upon disbursement of AHP subsidies.* A Bank shall establish and implement policies for determining, prior to its initial disbursement of AHP subsidy for an approved project, and prior to each subsequent disbursement, that the project meets the eligibility requirements of this part and all obligations committed to in the approved AHP application. If a Bank cancels any AHP application approvals due to noncompliance with eligibility requirements of this part, the Bank shall make the AHP subsidies available for other AHP-eligible projects or households.

(d) *Changes in approved AHP subsidy amount where a direct subsidy is used to write down prior to closing the principal amount or interest rate on a loan.* If a member is approved to receive AHP direct subsidy to write down prior to closing the principal amount or the interest rate on a loan to a project, and the amount of AHP subsidy required to maintain the debt service cost for the loan decreases from the amount of AHP subsidy initially approved by the Bank due to a decrease in market interest rates between the time of approval and the time the lender commits to the interest rate to finance the project, the Bank shall reduce the AHP subsidy amount accordingly. If market interest rates rise between the time of approval and the time the lender commits to the interest rate to finance the project, the Bank, in its discretion, may increase the AHP subsidy amount accordingly.

(e) *AHP outlay adjustment.* If a Bank reduces the amount of AHP subsidy approved for a project, the amount of such reduction shall be returned to the Bank's AHP fund. If a Bank increases the amount of AHP subsidy approved for a project, the amount of such increase shall be drawn first from any currently uncommitted or repaid AHP

subsidies and then from the Bank's required AHP contribution for the next year.

(f) *Project sponsor notification of re-use of repaid AHP direct subsidy.* Prior to disbursement by a project sponsor of AHP direct subsidy repaid to and retained by such project sponsor pursuant to a subsidy re-use program authorized by the Bank under § 1291.64(b), the project sponsor shall provide written notice to the member and the Bank of its intent to disburse the repaid AHP subsidy to a household satisfying the requirements of this part and the commitments made in the approved AHP application.

§ 1291.31 Lending and re-lending of AHP direct subsidy by revolving loan funds.

Pursuant to written policies established by a Bank's board of directors after consultation with its Advisory Council, a Bank, in its discretion, may provide AHP direct subsidy under its General Fund or any Targeted Funds for eligible projects and households involving both the lending of the subsidy and subsequent lending of subsidy principal and interest repayments by a revolving loan fund, provided the following requirements are met:

(a) *Submission of application.* (1) An application for AHP subsidy under this section shall include the revolving loan fund's criteria for the initial lending of the subsidy, identification of and information on a specific proposed AHP project if required in the Bank's discretion, the revolving loan fund's criteria for subsequent lending of subsidy principal and interest repayments, and any other information required by the Bank.

(2) The information in the application shall be sufficient for the Bank to:

(*i*) Determine that the criteria for the initial lending of the subsidy, the specific proposed project if applicable, and the criteria for subsequent lending of subsidy principal and interest repayments, meet the eligibility requirements of § 1291.23; and

(ii) Evaluate the criteria for the initial lending of the subsidy, and the specific proposed project if applicable, pursuant to the scoring methodology established by the Bank pursuant to §§ 1291.25, 1291.26, and 1291.27, as applicable.

(b) *Review of application.* A Bank shall review the application for AHP subsidy to determine that the criteria for the initial lending of the subsidy, the specific proposed project if applicable, and the criteria for subsequent lending of subsidy principal and interest repayments, meet the eligibility requirements of § 1291.23, and shall evaluate the criteria for the initial lending of the subsidy and the specific proposed project, if applicable, pursuant to the scoring methodology established by the Bank pursuant to §§ 1291.25, 1291.26, and 1291.27, as applicable.

(c) *Initial lending of subsidy.* (1) The revolving loan fund's initial lending of the AHP subsidy shall meet the eligibility requirements of paragraph (a) of this section, shall be to projects or households meeting the commitments in the approved application for AHP subsidy, and shall be subject to the requirements in §§ 1291.15 and 1291.50, respectively.

(2) If an owner-occupied unit or project funded under this paragraph (c) is in noncompliance with the commitments in the approved AHP application, or is sold or refinanced prior to the end of the applicable AHP retention period, the required amount of AHP subsidy shall be repaid to the revolving loan fund in accordance with §§ 1291.15(a)(7), 1291.15(a)(8), and 1291.60, and the revolving loan fund shall re-lend such repaid subsidy, excluding the amounts of AHP subsidy principal already repaid to the revolving loan fund, to another owner-occupied unit or project meeting the initial lending requirements of this paragraph (c) for the remainder of the retention period.

(d) *Subsequent lending of AHP subsidy principal and interest repayments.* (1) AHP subsidy principal and interest repayments received by the revolving loan fund from the initial lending of the AHP direct subsidy shall be re-lent by the revolving loan fund in accordance with the requirements of this paragraph (d), except that the revolving loan fund, in its discretion, may provide part or all of such repayments as nonrepayable grants to eligible projects in accordance with the requirements of this paragraph (d).

(2) The revolving loan fund's subsequent lending of AHP subsidy principal and interest repayments shall be for the purchase, construction, or rehabilitation of owner-occupied projects for households with incomes at or below 80 percent of the median income for the area, or of rental projects where at least 20 percent of the units are occupied by and affordable for households with incomes at or below 50 percent of the median income for the area, and shall meet all other eligibility requirements of this paragraph (d).

(3) A Bank may, in its discretion, require the revolving loan fund's subsequent lending of subsidy principal and interest repayments to be subject to retention period, monitoring, and recapture requirements, as defined by the Bank in its AHP Implementation Plan.

(e) *Return of unused AHP subsidy.* The revolving loan fund shall return to the Bank any AHP subsidy that will not be used according to the requirements in this section.

§ 1291.32 Use of AHP subsidy in loan pools.

Pursuant to written policies established by a Bank's board of directors after consultation with its Advisory Council, a Bank, in its discretion, may provide AHP subsidy under its General Fund or any Targeted Funds for the origination of first mortgage or rehabilitation loans with subsidized interest rates to AHP-eligible households through a purchase commitment by an entity that will purchase and pool the loans, provided the following requirements are met:

(a) *Eligibility requirements.* The loan pool sponsor's use of the AHP subsidies shall meet the requirements under this section, and shall not be used for the purpose of providing liquidity to the originator or holder of the loans, or paying the loan pool's operating or secondary market transaction costs.

(b) *Forward commitment.* (1) The loan pool sponsor shall purchase the loans pursuant to a forward commitment that identifies the loans to be originated with interest-rate reductions as specified in the approved application for AHP subsidy to households with incomes at or below 80 percent of the median income for the area. Both initial purchases of loans for the AHP loan pool and subsequent purchases of loans to substitute for repaid loans in the pool shall be made pursuant to the terms of such forward commitment and subject to time limits on the use of the AHP subsidy as specified by the Bank in its AHP Implementation Plan and the Bank's agreement with the loan pool sponsor, which shall not exceed one year from the date of approval of the AHP application.

(2) As an alternative to using a forward commitment, the loan pool sponsor may purchase an initial round of loans that were not originated pursuant to an AHP-specific forward commitment, provided that the entities from which the loans were purchased are required to use the proceeds from the initial loan purchases within time limits on the use of the AHP subsidy as specified by the Bank in its AHP Implementation Plan and the Bank's agreement with the loan pool sponsor, which shall not exceed one year from the date of approval of the AHP application. The proceeds shall be used by such entities to assist households

that are income-eligible under the approved AHP application during subsequent rounds of lending, and such assistance shall be provided in the form of a below-market AHP-subsidized interest rate as specified in the approved AHP application.

(c) Each AHP-assisted owner-occupied unit and rental project receiving AHP direct subsidy or a subsidized advance shall be subject to the requirements of §§ 1291.15, 1291.50, and 1291.60, respectively.

(d) Where AHP direct subsidy is being used to buy down the interest rate of a loan or loans from a member or other party, the loan pool sponsor shall use the full amount of the AHP direct subsidy to buy down the interest rate on a permanent basis at the time of closing on such loan or loans.

Subpart D—Homeownership Set-Aside Programs

§ 1291.40 Establishment of programs.

A Bank may establish, in its discretion, one or more Homeownership Set-Aside Programs pursuant to the requirements of this part.

§ 1291.41 Eligible applicants.

A Bank shall accept applications for AHP direct subsidy under its Homeownership Set-Aside Programs only from institutions that are members of the Bank at the time the application is submitted to the Bank.

§ 1291.42 Eligibility requirements.

A Bank's Homeownership Set-Aside Programs shall meet the eligibility requirements set forth in this section. A Bank may not adopt additional eligibility requirements for its Homeownership Set-Aside Programs except for eligible households pursuant to paragraph (b) of this section.

(a) *Member allocation criteria.* AHP direct subsidies shall be provided to members pursuant to allocation criteria established by the Bank in its AHP Implementation Plan.

(b) *Eligible households.* Members shall provide AHP direct subsidies only to households that:

(1) Have incomes at or below 80 percent of the median income for the area at the time the household is accepted for enrollment by the member in the Bank's Homeownership Set-Aside Programs, with such time of enrollment by the member defined by the Bank in its AHP Implementation Plan;

(2) Complete a homebuyer or homeowner counseling program provided by, or based on one provided by, an organization experienced in homebuyer or homeowner counseling, in the case of households that are first-time homebuyers; and

(3) Are first-time homebuyers or households receiving AHP subsidy for owner-occupied rehabilitation, in the case of households receiving subsidy pursuant to the one-third set-aside funding allocation requirement in § 1291.12(b), and meet such other eligibility criteria that may be established by the Bank in its AHP Implementation Plan, such as a matching funds requirement, homebuyer or homeowner counseling requirement for households that are not first-time homebuyers, or criteria that give priority for the purchase or rehabilitation of housing in particular areas or as part of a disaster relief effort.

(c) *Maximum grant limit.* Members shall provide AHP direct subsidies to households as a grant, in an amount up to a maximum established by the Bank, not to exceed $22,000 per household, which limit shall adjust upward on an annual basis in accordance with increases in FHFA's House Price Index (HPI). In the event of a decrease in the HPI, the subsidy limit shall remain at its then-current amount until the HPI increases above the subsidy limit, at which point the subsidy limit shall adjust to that higher amount. FHFA will notify the Banks annually of the maximum subsidy limit, based on the HPI. A Bank may establish a different maximum grant limit, up to the maximum grant limit, for each Homeownership Set-Aside Program it establishes. A Bank's maximum grant limit for each such program shall be included in its AHP Implementation Plan, which limit shall apply to all households in the specific program for which it is established.

(d) *Eligible uses of AHP direct subsidy.* Households shall use the AHP direct subsidies to pay for down payment, closing cost, counseling, or rehabilitation assistance in connection with the household's purchase or rehabilitation of an owner-occupied unit, including a condominium or cooperative housing unit or manufactured housing, to be used as the household's primary residence.

(e) *Retention agreement.* An owner-occupied unit purchased, or purchased in conjunction with rehabilitation, using AHP direct subsidy, shall be subject to a five-year retention agreement described in § 1291.15(a)(7).

(f) *Financial or other concessions.* The Bank may, in its discretion, require members and other lenders to provide financial or other concessions, as defined by the Bank in its AHP Implementation Plan, to households in connection with providing the AHP direct subsidy or financing to the household.

(g) *Financing costs.* The rate of interest, points, fees, and any other charges for all loans made in conjunction with the AHP direct subsidy shall not exceed a reasonable market rate of interest, points, fees, and other charges for loans of similar maturity, terms, and risk.

(h) *Counseling costs.* The AHP direct subsidies may be used to pay for counseling costs only where:

(1) Such costs are incurred in connection with counseling of homebuyers who actually purchase an AHP-assisted unit; and

(2) The cost of the counseling has not been covered by another funding source, including the member.

(i) *Cash back to household.* A member may provide cash back to a household at closing on the mortgage loan in an amount not exceeding $250, as determined by the Bank in its AHP Implementation Plan, and a member shall use any AHP direct subsidy exceeding such amount that is beyond what is needed at closing for closing costs and the approved mortgage amount as a credit to reduce the principal of the mortgage loan or as a credit toward the household's monthly payments on the mortgage loan.

§ 1291.43 Approval of AHP applications.

A Bank shall approve applications for AHP direct subsidy under its Homeownership Set-Aside Programs in accordance with the Bank's criteria governing the allocation of funds.

§ 1291.44 Procedures for funding.

(a) *Disbursement of AHP direct subsidies to members.* (1) A Bank may disburse AHP direct subsidies under its Homeownership Set-Aside Programs only to institutions that are members of the Bank at the time they request a draw-down of the subsidies.

(2) If an institution with an approved application for AHP direct subsidy loses its membership in a Bank, the Bank may disburse AHP direct subsidies to a member of such Bank to which the institution has transferred its obligations under the approved AHP application, or the Bank may disburse AHP direct subsidies through another Bank to a member of that Bank that has assumed the institution's obligations under the approved AHP application.

(b) *Reservation of Homeownership Set-Aside Program subsidies.* A Bank shall establish and implement policies for reservation of set-aside subsidies for households enrolled in the Bank's Homeownership Set-Aside Programs. The policies shall provide that set-aside

subsidies be reserved no more than two years in advance of the Bank's time limit in its AHP Implementation Plan for draw-down and use of the subsidies by the household and the reservation of subsidies be made from the allocation for the Homeownership Set-Aside Programs for the year in which the Bank makes the reservation.

(c) *Progress towards use of AHP direct subsidy.* A Bank shall establish and implement policies, including time limits, for determining whether progress is being made towards draw-down and use of the AHP direct subsidies by eligible households, and whether to cancel AHP application approvals for lack of such progress. If a Bank cancels any AHP application approvals due to lack of such progress, it shall make the AHP direct subsidies available for other applicants for AHP direct subsidies under the Homeownership Set-Aside Programs or for other AHP-eligible projects.

Subpart E—Monitoring

§ 1291.50 Monitoring under the General Fund and Targeted Funds.

(a) *Initial monitoring policies for owner-occupied and rental projects.* A Bank shall adopt written policies pursuant to which the Bank shall monitor each AHP owner-occupied project and rental project approved under its General Fund and any Targeted Funds prior to, and within a reasonable period of time after, project completion to verify, at a minimum, satisfaction of the requirements in this section.

(1) *Satisfactory progress.* The Bank shall determine that:

(i) The project is making satisfactory progress towards completion, in compliance with the commitments made in the approved AHP application, Bank policies, and the requirements of this part; and

(ii) Following completion of the project, satisfactory progress is being made towards occupancy of the project by eligible households.

(2) *Project sponsor or owner certification, rent roll and other documentation; backup and other project documentation.* Within a reasonable period of time after project completion, the Bank shall review a certification from the project sponsor or owner, the project rent roll (which includes household incomes and rents), and any other documentation to verify that the project meets the following requirements, at a minimum:

(*i*) The AHP subsidies were used for eligible purposes according to the commitments made in the approved AHP application;

(ii) The household incomes and rents comply with the income targeting and rent commitments made in the approved AHP application;

(iii) The project's costs were reasonable in accordance with the Bank's project cost guidelines, and the AHP subsidies were necessary for the completion of the project as currently structured, as determined pursuant to § 1291.24(a)(4);

(iv) Each AHP-assisted unit of an owner-occupied project and rental project is subject to an AHP retention agreement that meets the requirements of § 1291.15(a)(7) and (8), respectively; and

(v) The services and activities committed in the approved AHP application have been provided.

(3) *Back-up and other project documentation.* The Bank's written monitoring policies shall include requirements for:

(i) Bank review within a reasonable period of time after project completion of back-up project documentation regarding household incomes and rents (not including the rent roll) maintained by the project sponsor or owner, except for projects that received funds from other federal, state or local government entities whose programs meet the requirements in paragraphs (b)(1) and (2) of this section as specified in separate FHFA guidance, or projects that have also been allocated LIHTC; and

(ii) Maintenance and Bank review of other project documentation in the Bank's discretion.

(4) *Sampling plan.* The Bank shall not use a sampling plan to select the projects to be monitored under this paragraph (a), but may use a reasonable risk-based sampling plan to review the back-up project documentation.

(b) *Long-term monitoring—reliance on other governmental monitoring for certain rental projects.* For completed AHP rental projects that also received funds from federal, state, or local government entities other than LIHTC, a Bank may, in its discretion, for purposes of long-term AHP monitoring under its General Fund and any Targeted Funds, rely on the monitoring by such entities of the income targeting and rent requirements applicable under their programs, provided that the Bank can show that:

(1) The compliance profiles regarding income targeting, rent, and retention period requirements of the AHP and the other programs are substantively equivalent;

(2) The entity has demonstrated and continues to demonstrate its ability to monitor the project;

(3) The entity agrees to provide reports to the Bank on the project's incomes and rents for the full 15-year AHP retention period; and

(4) The Bank reviews the reports from the monitoring entity to confirm that they comply with the Bank's monitoring policies.

(c) *Long-term monitoring policies for rental projects.* In cases where a Bank does not rely on monitoring by a federal, state, or local government entity pursuant to paragraph (b) of this section, pursuant to written policies established by the Bank, the Bank shall monitor completed AHP rental projects approved under its General Fund and any Targeted Funds, commencing in the second year after project completion through the AHP 15-year retention period, to verify, at a minimum, satisfaction of the requirements in this section.

(1) *Annual project sponsor or owner certifications; backup and other project documentation.* A Bank's written monitoring policies shall include requirements for:

(i) Bank review of annual certifications by project sponsors or owners to the Bank that household incomes and rents are in compliance with the commitments made in the approved AHP application during the AHP 15-year retention period, along with information on the ongoing financial viability of the project, including whether the project is current on its property taxes and loan payments, its vacancy rate, and whether it is in compliance with its commitments to other funding sources;

(ii) Bank review of back-up project documentation regarding household incomes and rents, including the rent rolls, maintained by the project sponsor or owner, except for projects that also received funds from other federal, state or local government entities whose programs meet the requirements in paragraphs (b)(1) and (2) of this section as specified in separate FHFA guidance, or projects that have been allocated LIHTC, provided that the Bank shall review any LIHTC noncompliance notices received from project owners pursuant to § 1291.15(a)(5)(ii) during the AHP 15-year retention period; and

(iii) Maintenance and Bank review of other project documentation in the Banks' discretion.

(2) *Risk factors and other monitoring*—(i) *Risk factors; other monitoring.* A Bank's written monitoring policies shall take into account risk factors such as the amount

of AHP subsidy in the project, type of project, size of project, location of project, sponsor experience and performance, and any monitoring of the project provided by a federal, state, or local government entity.

(ii) *Risk-based sampling plan.* A Bank may use a reasonable, risk-based sampling plan to select the rental projects to be monitored under this paragraph (c), and to review the back-up and any other project documentation. The risk-based sampling plan and its basis shall be in writing.

(d) *Annual adjustment of targeting commitments.* For purposes of determining compliance with the targeting commitments in an approved AHP application for both initial and long-term AHP monitoring purposes under a Bank's General Fund and any Targeted Funds, such commitments shall be considered to adjust annually according to the current applicable median income data. A rental unit may continue to count toward meeting the targeting commitment of an approved AHP application as long as the rent charged to a household remains affordable, as defined in § 1291.1, for the household occupying the unit.

§ 1291.51 Monitoring under Homeownership Set-Aside Programs.

(a) *Adoption and implementation.* Pursuant to written policies adopted by a Bank, the Bank shall monitor compliance with the requirements of its Homeownership Set-Aside Programs, including monitoring to determine, at a minimum, whether:

(1) The AHP subsidy was provided to households meeting all applicable eligibility requirements in § 1291.42(b) and the Bank's Homeownership Set-Aside Program policies; and

(2) All other applicable eligibility requirements in § 1291.42 and the Bank's Homeownership Set-Aside Program policies are met, including that the AHP-assisted units are subject to retention agreements, as required under § 1291.15(a)(7), where the AHP subsidy was used for purchase of the unit, or for purchase of the unit in conjunction with rehabilitation.

(b) *Member certifications; back-up and other documentation.* The Bank's written monitoring policies shall include requirements for:

(1) Bank review of certifications by members to the Bank, prior to disbursement of the AHP subsidy, that the subsidy will be provided in compliance with all applicable eligibility requirements in § 1291.42;

(2) Bank review of back-up documentation regarding household incomes maintained by the member; and

(3) Maintenance and Bank review of other documentation in the Bank's discretion.

(c) *Sampling plan.* The Bank may use a reasonable sampling plan to select the households to be monitored, and to review the back-up and any other documentation received by the Bank, but not the member certifications required in paragraph (b) of this section. The sampling plan and its basis shall be in writing.

Subpart F—Remedial Actions for Noncompliance

§ 1291.60 Remedial actions for project noncompliance.

(a) *Scope.* This section sets forth the requirements applicable to the Banks in the event of noncompliance by an AHP-assisted project with the commitments made in its application for AHP subsidies and the requirements of this part, including any use of AHP subsidy by the project sponsor or owner for purposes other than those committed to in the AHP application. This section does not apply to individual AHP-assisted households or to the sale or refinancing by such households of their homes.

(b) *Elimination of project noncompliance*—(1) *Cure.* In the event of project noncompliance, the Bank shall request that the project sponsor or owner make a reasonable effort to cure the noncompliance within a reasonable period of time. If the noncompliance cannot be cured within a reasonable period of time, the requirements for project modification in paragraph (b)(2) of this section shall apply. If the noncompliance is cured within a reasonable period of time, the Bank shall not require the project sponsor or owner to repay AHP subsidy to the Bank.

(2) *Project modification.* If the project sponsor or owner cannot cure the noncompliance within a reasonable period of time, the Bank shall determine whether the circumstances of the noncompliance can be eliminated through a modification of the terms of the AHP application pursuant to § 1291.29. When the circumstances of the noncompliance can be eliminated through a modification, the Bank shall approve the modification and shall not require the project sponsor or owner to repay AHP subsidy to the Bank.

(c) *Reasonable collection efforts*—(1) *Demand for repayment.* If the circumstances of a project's noncompliance cannot be eliminated through a cure or modification, the Bank, or the member if delegated the responsibility, shall make a demand on the project sponsor or owner for repayment of the full amount of the AHP subsidy not used in compliance with the commitments in the AHP application or the requirements of this part (plus interest, if appropriate). If the noncompliance is occupancy by households with incomes exceeding the income-targeting commitments in the AHP application, the amount of AHP subsidy due is calculated based on the number of units in noncompliance, the length of the noncompliance, and the portion of the AHP subsidy attributable to the noncompliant units.

(2) *Settlement.* (i) If the demand for repayment of the full amount due is unsuccessful, the Bank, or the member if delegated the responsibility and in consultation with the Bank, shall make reasonable efforts to collect the subsidy from the project sponsor or owner, which may include settlement for less than the full amount due, taking into account factors such as the financial capacity of the project sponsor or owner, assets securing the AHP subsidy, other assets of the project sponsor or owner, the degree of culpability of the project sponsor or owner, and the extent of the Bank's or member's collection efforts.

(ii) The settlement with the project sponsor or owner must be supported by sufficient documentation showing that the sum agreed to be repaid under the settlement is reasonably justified, based on the facts and circumstances of the noncompliance, including any factors in paragraph (c)(2)(i) of this section that were considered in reaching the settlement.

§ 1291.61 Recovery of subsidy for member noncompliance.

A Bank shall recover from a member the amount of any AHP subsidy (plus interest, if appropriate) not used in compliance with the commitments in the member's AHP application or the requirements of this part as a result of the actions or omissions of the member.

§ 1291.62 Bank reimbursement of AHP fund.

(a) *By the Bank.* A Bank shall reimburse its AHP fund in the amount of any AHP subsidies (plus interest, if appropriate) not used in compliance with the commitments in an AHP application or the requirements of this part as a result of the actions or omissions of the Bank.

(b) *By FHFA order.* FHFA may order a Bank to reimburse its AHP fund in an appropriate amount upon determining that:

(1) The Bank has failed to reimburse its AHP fund as required under paragraph (a) of this section; or

(2) The Bank has failed to recover the full amount of AHP subsidy due from a project sponsor, project owner, or member pursuant to the requirements of §§ 1291.60 and 1291.61, and has not shown that such failure is reasonably justified, considering factors such as those in § 1291.60(c)(2)(i).

§ 1291.63 Suspension and debarment.

(a) *At a Bank's initiative.* A Bank may suspend or debar a member, project sponsor, or project owner from participation in the Program if such party shows a pattern of noncompliance, or engages in a single instance of flagrant noncompliance, with the terms of an approved application for AHP subsidy or the requirements of this part.

(b) *At FHFA's initiative.* FHFA may order a Bank to suspend or debar a member, project sponsor, or project owner from participation in the Program if such party shows a pattern of noncompliance, or engages in a single instance of flagrant noncompliance, with the terms of an approved application for AHP subsidy or the requirements of this part.

§ 1291.64 Use of repaid AHP subsidies.

(a) *Use of repaid AHP subsidies for other AHP-eligible projects or households.* Except as provided in paragraph (b) of this section, amounts of AHP subsidy, including any interest, repaid to a Bank pursuant to this part shall be made available by the Bank for other AHP-eligible projects or households.

(b) *Re-use of repaid AHP direct subsidies in same project*—(1) *Requirements.* AHP direct subsidy, including any interest, repaid to a member or project sponsor, as applicable, under a Bank's General Fund and any Targeted Funds may be repaid by such parties to the Bank for subsequent disbursement to and re-use by such parties, or retained by such parties for subsequent re-use, as authorized by the Bank, in its discretion, after consultation with its Advisory Council, in its AHP Implementation Plan, provided all of the following requirements are satisfied:

(i) The member or the project sponsor originally provided the AHP direct subsidy as down payment, closing cost, rehabilitation, or interest rate buy down assistance to an eligible household for purchase, or for purchase in conjunction with rehabilitation, of an owner-occupied unit pursuant to an approved AHP application;

(ii) The AHP direct subsidy, including any interest, was repaid to the member or project sponsor as a result of a sale, transfer, or assignment of title or deed of the unit prior to the end of the retention period to a subsequent purchaser that is not a low- or moderate-income household; and

(iii) The repaid AHP direct subsidy is made available by the member or project sponsor, within the period of time specified by the Bank in its AHP Implementation Plan, to another AHP-eligible household for purchase, or for purchase in conjunction with rehabilitation, of an owner-occupied unit in the same project in accordance with the terms of the approved AHP application.

(2) *No delegation.* A Bank's board of directors shall not delegate to Bank officers or other Bank employees the responsibility to adopt any Bank policies on re-use of repaid AHP direct subsidies in the same project pursuant to paragraph (b) of this section.

§ 1291.65 Transfer of Program administration.

Without limitation on other remedies, FHFA, upon determining that a Bank has engaged in mismanagement of its Program, may designate another Bank to administer all or a portion of the first Bank's annual AHP contribution, for the benefit of the first Bank's members, under such terms and conditions as FHFA may prescribe.

Subpart G—Affordable Housing Reserve Fund

§ 1291.70 Affordable Housing Reserve Fund.

(a) *Deposits.* If a Bank fails to use or commit the full amount it is required to contribute to the Program in any year pursuant to § 1291.10(a), 90 percent of the unused or uncommitted amount shall be deposited by the Bank in an Affordable Housing Reserve Fund established and administered by FHFA. The remaining 10 percent of the unused and uncommitted amount retained by the Bank should be fully used or committed by the Bank during the following year, and any remaining portion shall be deposited in the Affordable Housing Reserve Fund.

(b) *Use or commitment of AHP funds.* Approval of applications for AHP funds from members sufficient to exhaust the amount a Bank is required to contribute pursuant to § 1291.10(a) shall constitute use or commitment of funds. Amounts remaining unused or uncommitted at year-end are deemed to be used or committed if, in combination with AHP funds that have been returned to the Bank or de-committed from canceled projects, they are insufficient to fund:

(1) AHP application alternates in the Bank's final funding round of the year for its General Fund or any Targeted Funds, if the Bank has a policy to approve alternates for funding under such Funds;

(2) Pending applications for funds under the Bank's Homeownership Set-Aside Programs, if any; and

(3) Project modifications for AHP subsidy increases approved by the Bank pursuant to the requirements of this part.

(c) *Carryover of insufficient amounts.* Such insufficient amounts as described in paragraph (b) of this section shall be carried over by the Bank for use or commitment in the following year in its General Fund, any Targeted Funds, or any Homeownership Set-Aside Programs.

Dated: November 16, 2018.

Melvin L. Watt,

Director, Federal Housing Finance Agency.

[FR Doc. 2018–25635 Filed 11–27–18; 8:45 am]

BILLING CODE 8070–01–P

FEDERAL REGISTER

Vol. 83 Wednesday,

No. 229 November 28, 2018

Part III

Department of Veterans Affairs

38 CFR Parts 17, 51, and 52

Per Diem Paid to States for Care of Eligible Veterans in State Homes; Final Rule

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Parts 17, 51, and 52

RIN 2900–AO88

Per Diem Paid to States for Care of Eligible Veterans in State Homes

AGENCY: Department of Veterans Affairs.

ACTION: Final rule.

SUMMARY: This rulemaking adopts as final, with changes, proposed amendments to VA's regulations governing payment of per diem to States for nursing home care, domiciliary care, and adult day health care for eligible veterans in State homes. This rulemaking reorganizes, updates, and clarifies State home regulations, authorizes greater flexibility in adult day health care programs, and establishes regulations regarding domiciliary care, with clarifications regarding the care that State homes must provide to veterans in domiciliaries.

DATES: This rule is effective on December 28, 2018.

FOR FURTHER INFORMATION CONTACT: Dr. George F. Fuller, Chief Consultant, Geriatrics and Extended Care Services (10NC4), Veterans Health Administration, 810 Vermont Avenue NW, Washington, DC 20420, (202) 461–6750. (This is not a toll-free number.)

SUPPLEMENTARY INFORMATION: On June 17, 2015, VA proposed changes to parts 17, 51, and 52 of title 38 Code of Federal Regulations. 80 FR 34794. VA published technical corrections to the proposed rulemaking on June 24, 2015, 80 FR 36305. This final rule amends part 17 by deleting provisions that applied to State home hospitals, because there no longer are any, and moving to part 51 the other provisions that apply to State homes, including State home domiciliary care programs. It revises part 51 subparts A, B, and C to eliminate redundancy in the regulations governing the payment of per diem to State home nursing home, domiciliary, and adult day health care programs by combining similar regulations from part 17 and part 52. It amends several sections of the nursing home regulations in part 51 subpart D, and adds subparts E and F on domiciliary care and adult day health care, respectively, to part 51. Because of that, this rule eliminates the State home regulations from part 17 and part 52, and combines in part 51 all the regulations for a State home to establish and maintain qualification for receipt of VA per diem payments.

We invited interested parties to submit written comments on the proposed rule on or before August 17, 2015, and we received 32 public comments. Several commenters commended and supported revisions that reorganize, update, and clarify the regulations, particularly those that increase the State homes' ability to emphasize the independence of adult day health care participants. VA thanks these commenters for their support of the rule. We have responded to the rest of the comments recommending changes to the proposed rule under the heading of the sections with which the commenters expressed concern.

Technical Correction

The notice of proposed rulemaking proposed to amend 38 CFR part 51 under the part heading, ''PART 51—PER DIEM FOR NURSING HOME, DOMICILIARY, OR ADULT DAY HEALTH CARE OF VETERANS IN STATE HOMES.'' The correct heading of part 51 until this rulemaking becomes final is, ''PER DIEM FOR NURSING HOME CARE OF VETERANS IN STATE HOMES.'' The notice of proposed rulemaking neglected to include amendatory language proposing to change the heading of part 51. We are correcting this omission by adding that amendatory language and the revised heading of part 51 below as amendatory action 3. We have renumbered all subsequent amendatory instructions accordingly.

Subpart A—General

51.1 Purpose and Scope of Part 51

We have changed ''rules'' to ''requirements'' in the sentence of § 51.1 beginning, ''Subpart C sets forth requirements governing . . . .'' The term ''rule'' is commonly used as a synonym for ''regulation'' in federal rulemaking, as in the ACTION heading of this rulemaking. Avoiding its use in the text of a regulation eliminates a possible point of confusion. The term ''requirements'' better describes the function and scope of the regulations in subpart C of part 51.

51.2 Definitions

VA received comments related to the definition of domiciliary care, and concerns that the proposed definition, in addition to the standards in subpart E of the proposed regulations imposing the entire nursing home program regulations on the domiciliary care program, would impose unnecessary and costly burdens on domiciliary programs that are inconsistent with their purpose and that would replicate nursing home care. Several commenters stated some States may have to close their domiciliary programs because of these costs. A commenter said that VA's proposed definition of ''domiciliary care'' needs to be clearer for the State homes to tell whether their programs fit the definition. Similarly, others said that States need a clearer definition of what domiciliary care is to know whether the per diem rate for that care will sustain their programs.

VA agrees that the application of whole regulations governing the nursing home care program to the domiciliary care program, as proposed §§ 51.300 and 51.350 would have done, would be excessively burdensome. We have revised those sections to eliminate the application of multiple nursing home provisions to the domiciliary care program. We discuss each change from the proposed rule in the discussion of §§ 51.300 and 51.350 below.

VA agrees that the definition of domiciliary care in proposed § 51.2 requires clarification. We have, therefore, added to it a description of what constitutes ''necessary medical services'' for purposes of State home domiciliary care, which are the services described in subpart E of this rulemaking. This updated definition, along with the revisions to the proposed domiciliary care requirements under subpart E of this rule, described in detail below, allows a user to tell whether a State home program fits the definition of domiciliary care.

A commenter said VA may need to clarify the definition of domiciliary care regarding whether domiciliary care is a temporary or permanent living arrangement so State homes could assess whether their programs meet the definition. The commenter said that State home domiciliaries offer different types of programs, including retirement, independent living, transitional care, or permanent care programs. VA received other comments raising similar concerns about State homes' abilities to provide transitional care in domiciliaries under the proposed rules.

VA declines to change the definition of domiciliary care to differentiate between temporary and permanent services. We believe the revised definition provides necessary guidance, and also provides flexibility so that State homes can operate many variations of domiciliary care within the definition, including transitional services, as long as the State home meets VA's standards for per diem payment while the resident resides in the home. The changes to the definition of domiciliary care in § 51.2 and to the domiciliary requirements in subpart E of this rulemaking should resolve the issues raised by this comment. We

therefore make no changes based on these comments.

Although not defined in this section, we noticed the terms ''treatment plan,'' ''care plan,'' and ''plan of care'' are used inconsistently throughout the proposed regulations to refer to the same thing: The regimen of care based on a comprehensive assessment that is offered in all State home programs of care. We changed all instances of these terms to ''comprehensive care plan,'' which is also consistent with the regulations in part 51 that are not changed by this final rule.

We are also removing ''primary physician'' from the definition proposed as ''primary physician or primary care physician,'' and changing all references to ''primary physician'' to ''primary care physician'' throughout part 51. Proposed part 51 had used each about the same number of times. Though they mean the same thing, we think this part would be clearer if the definition defines a single term and uses that term consistently.

Subpart B—Obtaining Recognition and Certification for per Diem Payments

51.20 Recognition of a State Home

In §§ 51.20 and 51.30 of the proposed rule, we used some terms that make sense applied to residential programs—nursing home and domiciliary—that do not make sense applied to adult day health care programs. For example, ''beds'' is a useful term when referring to the number of residents in a nursing home care program or a domiciliary care program, but not when referring to the number of participants in an adult day health care program, which has no overnight operations. We have, therefore revised §§ 51.20 and 51.30 to speak of ''capacity'' of a program or facility, rather than of ''beds.''

We are changing proposed § 51.20(b) to explicitly include applicable requirements in subpart C in the list of requirements and standards that VA may evaluate in a survey of the State home. Subpart C contains requirements regarding eligibility, payment rates, and payment procedures that apply to State home programs of care. We do not consider this a substantive change, because State homes would clearly need to comply with subpart C under the proposed rule. This change makes § 51.20(b) complete regarding the scope of surveys.

We are clarifying proposed § 51.20(b)(3)(ii). As proposed, the paragraph provided for the State home to respond to a medical center director's recommendation to the Under Secretary for Health to not recognize a state home and to submit additional evidence with that response. The paragraph neglected to identify to whom the State home is to submit the response or additional evidence. We are adding language to the end of § 51.20(b)(3)(ii) providing that the State's submission of a response to a recommendation to not recognize a State home is to the Under Secretary for Health. This is consistent with current § 51.30(d), which provides for appeal from a recommendation against recognition, and inclusion of additional material with that appeal. This is not a change from the current regulation; it merely fills a gap in the proposed regulation.

We are further clarifying paragraph (b)(3)(ii) and multiple other proposed provisions of part 51 that measure time by qualifying the 30 days as ''calendar'' days. As proposed, part 51 inconsistently qualified the measure of time. We believe this inconsistency invites confusion. Qualifying time in calendar days generally provides certainty to the time allowed in provisions that prescribe deadlines. There are three exceptions in part 51 that measure time in ''working'' days. These codify long-standing practice with which VA and the State homes are accustomed. These are §§ 51.30(d)(1)(iii), time to provide a corrective action plan; 51.320(a)(4), time for a domiciliary care program to report a sentinel event; and 51.430(a)(3), time for an adult day health care program to report a sentinel event.

We are clarifying proposed § 51.20(c). As proposed, the paragraph provided, ''After receipt of a recommendation from the Director, the Undersecretary for Health will award or deny recognition based on all available evidence.'' Though it seems implicit, the proposed regulation does not explicitly say that ''all available evidence'' included any evidence the State home submits during the 30 calendar days the preceding paragraph allows for submission of a response or additional evidence. To make the regulation explicit, we are adding to paragraph (c), following ''Director,'' the following: ''and allowing 30 calendar days for the state to respond to the recommendation and to submit evidence . . .'' As revised, the sentence reads, ''After receipt of a recommendation from the Director, and allowing 30 calendar days for the state to respond to the recommendation and to submit evidence, the Under Secretary for Health will award or deny recognition based on all available evidence.'' We are also adding ''in writing'' at the end of the second sentence of paragraph (c) because the current regulation, § 51.30(e), requires the Under Secretary's decision to be written. We omitted this requirement from the proposed regulation.

We are removing the second sentence of proposed § 51.20(d)(2), which provided that changes in the use of particular beds between recognized programs of care and increases in capacity that are not the result of the expansion of the size of a home or relocation to a new facility will not require recognition. Those changes are the subject of § 51.30. We are adding ''or capacity'' following ''size'' in the remaining sentence of this paragraph to be clear that a recognized state home only needs a new recognition if there is an expansion in the physical size of the home, increased in the number of persons served, or relocation to a new facility. So, we do not need to explain in § 51.20 that the section on certification, § 51.30, addresses any changes that do not involve such an expansion or relocation. This is not a substantive change.

51.30 Certification of a State Home

In § 51.30(a) and throughout part 51 wherever proposed, we are changing ''within'' as it pertains to numbers of days to ''no later than.'' We believe one can be unsure whether ''within'' includes or excludes the last day of the period. ''No later than'' more clearly includes the last day of the period. If the regulation provides, as in § 51.30(a) for example, that something be done no later than 450 days after an event one can be sure on day 451 the deadline has been missed.

VA is eliminating from proposed § 51.30(c) the provisions that would have allowed precertification when State homes switch capacity between programs of care or increase capacity in a program of care. On further consideration, we have determined that the regular surveys described in paragraph (b) of this section are frequent enough, and the provisional certification process holds the State homes accountable enough, that the precertification process adds complexity with little benefit. Deleting it eliminates an administrative burden on the State homes and on VA. We are, therefore, deleting the precertification provisions in proposed § 51.30(c)(1).

One commenter applauded proposed § 51.30(c)(2), which eliminated the requirement that VA perform a new survey of a program upon reduction of the capacity of that program. We have retained this provision, but have redesignated it as § 51.30(c). For administrative convenience, in this final rule we have changed the destination to

which the State home must send its report regarding decreases in capacity to the Office of Geriatrics and Extended Care in VA Central Office, from the Director of the VAMC of jurisdiction, as proposed, which will keep the regulations consistent with longstanding practice.

VA is clarifying the function and purpose of the provisional certification provisions of proposed paragraph (d)(1). The paragraph serves two purposes: (1) To allow the State home to receive per diem payments while correcting deficiencies a survey reveals, and (2) to ensure VA does not pay per diem if a survey reveals a deficiency that is an immediate hazard to health or safety so great, and the need to remediate so urgent, it is unreasonable to continue per diem payments during the time until the next survey.

Specifically, VA is amending proposed § 51.30(d)(1)(ii), which would not allow VA to grant a provisional certification if the State home is deficient in a standard that would jeopardize the health or safety of any resident or participant. Because almost all of the standards in these regulations are aimed at promoting the health and safety of State home residents and participants, the regulation as proposed would prevent VA from issuing most provisional certifications, frustrating the purpose of provisional certifications. Though some commenters favored imposing the strictest possible State home compliance with all regulations, VA believes a provisional certification scheme resulting in frequent denial of provisional certification is not in the best interest of State home residents. Consequently, we clarify that the deficiencies for which VA will grant provisional certification are only those that will not jeopardize the health and safety of Veterans before the State home can remedy them. We are, therefore, adding the word ''immediately'' so that this provision reads, ''None of these deficiencies immediately jeopardize the health or safety of any resident or participant.''

VA is eliminating the provisions that were proposed as § 51.30(d)(3), which detailed how VA would issue additional provisional certifications to a State home that already received a provisional certification. VA has determined that the proposed procedure is inconsistent with VA's practices of working with State homes on corrective action plans to ensure the programs are brought into compliance with these regulations under one provisional certification. The provisional certification procedures in this final rule are complete without that proposed provision.

51.31 Surveys for Recognition and/or Certification

We have changed proposed § 51.31(b)(1). We proposed, as a requirement for VA to conduct a recognition survey, that a State home nursing home care program or domiciliary care program must have at least 21 residents or have a number of residents consisting of at least 50 percent of the resident capacity of the home. We have reduced the residency number requirement from 21 to 20, while keeping the 50 percent alternative. We are making this change to facilitate recognition of homes using the small house model which is based on facilities of 20 beds.

We have removed ''the Assistant Deputy Under Secretary for Health (10N);'' from the list in paragraph (c) of persons the director of the VA medical center of jurisdiction must notify upon finding an immediate threat to safety in a State home. Through reorganization, Veterans Health Administration no longer has an officer with exactly that title. The other listed VA offices are sufficient to accomplish the necessary oversight of State homes. Consequently, we remove the named VA officer without substitution of another.

Subpart C—Requirements Applicable to Eligibility, Rates, and Payments

We are revising the proposed heading of subpart C by inserting ''Requirements Applicable to'' before ''Eligibility, Rates, and Payments'', to read, ''Subpart C—Requirements Applicable to Eligibility, Rates, and Payments''. As revised, the heading describes the function and scope of subpart C better than the proposed heading.

51.40 Basic per Diem Rates

In proposed subpart F, VA proposed changes to requirements for State home adult day health care to reduce the requirements for medical supervision in the programs. VA received comments that VA should establish a two-tier per diem payment system for adult day healthcare programs under § 51.40(a) because of the higher cost of providing medical supervision and the lower cost of programs that do not. The commenters said that failure to provide separate rates for programs that offer medical supervision and for those that do not will negatively affect State homes providing adult day health care services with medical supervision and the veterans these programs serve. They noted the current medical supervision style of programs has a significant track record of keeping veterans out of hospital emergency rooms and hospitalizations; they care for veterans who would otherwise be institutionalized in a nursing home.

We explained in the proposed rule that VA would not pay different rates of per diem to State home adult day health care programs that provide medical supervision than to those that do not. We proposed to expand the definition of adult day health care, which had previously allowed only for the medical model of care, to afford State homes the flexibility to offer a social model of care, and thereby expand availability of adult day health care to more Veterans throughout the country. Though a State home may still choose to provide medical supervision, and must meet the standards in § 51.445 if it does, the method for calculating per diem payments will remain the same regardless of the type of care provided. If the veteran needs more medical care than the adult day health care program can provide, the State home must transfer the veteran to another appropriate care program. Even if VA were to implement, under 38 U.S.C. 1741, different rates for adult day health care programs that provide the medical model of care, the payment would still be subject to the statutory limit of no more than one half of the cost of the veteran's care. 38 U.S.C. 1741(b). We point this out on the assumption that the commenter is seeking a payment tier that provides higher payments for medical model participants than the current per diem payment, and not a lower payment tier for social model adult day health care participants. Because the statute describes the maximum basic per diem payment as a percentage of the cost of care, and because we see no value in tiered payments merely for the sake of tiering, we make no change based on this comment.

We note that since the publication of VA's proposed rule in June 2015, the President signed into law the State Veterans Home Adult Day Health Care Improvement Act of 2017. VA is working to implement this new authority; if any further revisions in these regulations are needed because of this recently enacted legislation, VA will make them through subsequent rulemaking.

Another commenter addressed the cost of providing ''primary care, medical services, and preventative care to domiciliary residents while restricting the payments to 'less than one half of the cost of care' '' as inequitable and unrealistic. The commenter asserted the current reimbursement structure does

not always cover the cost of the required care, and that the proposed new regulations would introduce more bureaucracy and ''paper work'' costs and shift the cost and much of the responsibility for the health care of domiciliary veterans from VA to the State homes.

By law, the basic per diem rate cannot exceed one-half the cost of the veteran's care in the State home. As such, per diem payments are not intended to serve as a reimbursement for all the costs of the care provided to veterans. We make no change based on this comment.

The per diem program does not shift costs of care or the responsibility for providing health care from VA to the State homes. Domiciliary care has long included all ''necessary medical services'' which essentially includes all outpatient care. See § 17.30(b). So, by limiting the care that State home domiciliaries are required to provide, this rule could be seen as shifting the cost and responsibility for most medical services to VA. Regarding additional bureaucratic paper-work costs due to this rulemaking, the commenter did not identify any specific provisions that would have that effect. We refer the commenter to the discussions throughout this supplementary information describing multiple changes from the proposed rules this final rule makes to reduce administrative and other costs. For example, see the discussion of changes from proposed § 51.300. We make no change based on this comment.

The same commenter expressed difficulty keeping track of the services covered by the different per diem payments. The commenter expressed the desire that VA publish a comprehensive list of services covered by the nursing home, domiciliary, and adult day care per diem payments for veterans with service-connected disabilities rated 70 percent or 100 percent disabling.

Per diem under 38 U.S.C. 1741 is paid under a VA grant program. VA makes the payments to the States to support the care of veterans in State homes; it is not ''coverage'' for specific services, like insurance. The States must meet certain standards as a condition of receiving VA per diem to ensure the State home provides for the health, safety, and well-being of veterans in its care. The rate of per diem paid for the nursing home care of veterans with service-connected disabilities rated 70 percent or more is the subject of § 51.41, Contracts and provider agreements for certain veterans with service-connected disabilities. VA published a notice of proposed rule; correction and clarification, 80 FR 36305 (June 24, 2015), acknowledging that VA omitted § 51.41 from the initial notice of proposed rulemaking proposing the rules this rulemaking finalizes. The notice of correction stated VA is not amending § 51.41 in this rulemaking, consequently comments based on it are beyond the scope of this rulemaking. We make no changes based on this comment.

Commenters objected that VA proposed to apply the same rule to payment of per diem for veterans absent from State home domiciliaries as it applies to payment of per diem for veterans absent from State home nursing homes. As proposed, § 51.40(c) would allow VA to pay per diem for a day without an overnight stay if the State home domiciliary had an occupancy of rate of 90 percent or greater on that day. The per diem payments would be limited to the first 10 consecutive days the veteran was admitted to any hospital and the first 12 days in a calendar year for absences other than for the purpose of receiving hospital care. Specifically, the commenters objected to the requirement that the State home domiciliary care program be filled to 90 percent of capacity before VA will pay per diem for a veteran's absence. One comment said the requirement would have a major financial impact on State home domiciliaries, and that the limit for payments of 12 days in a calendar year for absences other than for hospital care would adversely affect the residents' quality of life. One commenter requested VA allow 24 days of leave other than for hospital care, arguing this would be good for the resident and consistent with the capacity for independence of domiciliary residents. Another asserted the regulation was vague as proposed and needed clarification. The commenter noted the proposed regulation omitted the ''original'' requirement that a resident not be absent from a State Home for more than 96 consecutive hours for the Home to receive per diem for that veteran, but the proposed section now states that per diem will be paid only for a veteran who has an overnight stay, or if the State Home has an occupancy rate of 90 percent or greater on that day. This commenter pointed out that domiciliary residents are independent and may choose to spend time away from the State home, which needs to guarantee their accommodations will be available when they return and should be reimbursed for that. These commenters said VA should continue the ''96-hour'' rule for payment of per diem during absences from the domiciliary for reasons other than hospitalization.

VA agrees that domiciliary residents require a different level of care and have more independence than nursing home residents, and imposing the same requirements for absences would impose an unfair burden on domiciliaries. State home domiciliary care programs are typically below 90 percent of capacity, but VA nonetheless believes that it is important to pay per diem during short absences to ensure that veterans who choose to take brief absences do not lose their spaces in State home domiciliaries. We agree that the 12-day cumulative absence rule is impracticable and overly burdensome for domiciliary care programs for the same reasons. In fact, even a 24-day rule, as one commenter requested, would allow less time away per year than the 96-hour rule some commenters recommended. Consequently, we are removing both the 90 percent and the 12-day requirements from the final rule. We are instead codifying the 96-hour rule for absences from domiciliaries in § 51.40(c), as it is currently in VHA Directive 1601SH.01. Under this rule, VA will pay per diem for any absence from the domiciliary of 96 or fewer consecutive hours, unless the absence is for hospital care at VA expense. VA will not pay per diem for any absence that lasts longer than 96 hours.

To effect these changes, we are revising the paragraph into two paragraphs: (c)(1), ''Nursing homes'' and (c)(2), ''Domiciliaries.''

51.41 Contracts and Provider Agreements for Certain Veterans With Service-Connected Disabilities

As published in a notice of correction and clarification, 80 CFR 36305 (June 24, 2015), this rulemaking as proposed inadvertently omitted instructions for § 51.41. VA did not intend to propose any changes to that section, and we make none in this rulemaking. We have provided amendatory language for subpart C to ensure inclusion of § 51.41 in 38 CFR part 51, and have added § 51.41 to the table of contents.

51.42 Payment Procedures

As proposed, § 51.42(a) read as a 147-word sentence. We have revised it to read as three sentences for clarity. We have also revised the proposed note to paragraph (a)(1)(i), redesignated ''Note 1,'' to clarify who must complete the financial disclosure and that adult day health care participants are not to complete the financial disclosure, but they must sign the form to acknowledge financial responsibility. As revised, the note also makes clear that VA will reject

the form as incomplete if submitted without the required signature.

VA had proposed expanding the deadline for VA to receive the forms from the State home identified in this section from 10 days to 12 days. The statute only allows 10 days, and we have no authority to allow a longer time. 38 U.S.C. 1743. VA will therefore maintain the 10-day deadline in this final rule by changing 12 to 10 in paragraph (b)(3) of this section. As discussed above, we are qualifying the time as 10 ''calendar'' days and defining the time limit as ''no later than,'' rather than ''within'' as proposed, and adding ''after care began'', consistent with the statute. We have also made minor technical edits to this section. We have changed the heading of paragraph (b)(2) of this section by deleting ''or precertified,'' because, as described above, § 51.30(c) will not establish a precertification procedure. We have deleted the first sentence of paragraph (b)(2) of this section for the same reason.

51.51 Eligible Veterans—Domiciliary Care

One commenter said that proposed § 51.51(b)(7) is ambiguous in requiring that a veteran must be able to ''[s]hare in some measure, however slight, in the maintenance and operation of the State home'' to be eligible for VA per diem payments, and this provision could violate the protection from involuntary servitude of the thirteenth amendment of the U.S. Constitution.

We disagree with the assertion that paragraph (b)(7) compels involuntary servitude. Residency in the State home domiciliary care program is itself voluntary. Any resident may leave. Paragraph (b)(7) describes an ability that, with the other eligibility criteria, ensures the enrollees on whose behalf VA pays per diem are appropriately in a domiciliary care program, and that VA pays the State home domiciliary care per diem only for such residents. Moreover, under revised § 51.310(c), the veteran is consulted and must agree to the work arrangement described in his or her comprehensive care plan, and § 51.300(b) requires that the resident be paid for work that the State home would need to pay others to perform. Together these provisions protect residents from involuntary servitude and from a State home otherwise taking unfair advantage of the resident through its work program.

Based on this comment, however, we are revising paragraph (b)(7) to read, ''Participate in some measure, however slight, in work assignments that support the maintenance and operation of the State home.'' This makes clear the eligibility criteria include the ability to personally participate in the maintenance and operation of the State home. The addition also harmonizes this eligibility criterion with the role of resident work in the domiciliary care program as prescribed in §§ 51.300 and 51.310. The specific work the resident chooses will be by agreement with the interdisciplinary team that develops the resident's comprehensive care plan, and the resident will be paid a competitive wage if the facility would otherwise pay a non-resident for such work. There is flexibility in how this may be implemented, as reflected in §§ 51.300(b) on residents' rights and behavior and 51.310(c) on comprehensive care plans, respectively.

Multiple commenters commented the State home should pay residents for work. Another objected to application through proposed § 51.300 of the nursing home regulation, § 51.70(h)(1), permitting a resident to refuse to work. This commenter asserted the State home should require each resident to work. In consideration of these comments we are revising proposed § 51.300 to require each resident's comprehensive care plan to specify whether a resident's work for the domiciliary is paid or unpaid.

51.52 Eligible Veterans—Adult Day Health Care

We have made non-substantive technical revisions to paragraph § 51.52(d)(3)(ii). As proposed, this provision may have been interpreted as requiring a minimum of 24 visits, 12 outpatient and 12 emergency, to be considered as a high user of medical services and thereby establish eligibility for adult day health care per diem payments. We intended 12 visits total, whether outpatient, emergency, or some combination, and have changed the provision in this final rulemaking to clarify that.

51.58 Requirements and Standards Applicable for Payment of per Diem

We are changing the heading of § 51.58, as shown, consistent with the changed heading of subpart C, discussed above, and other references to subpart C in this part. Similar to the change described above in § 51.20(b), we are changing proposed § 51.58 to make explicit in the introduction that State homes must meet the requirements of subpart C to receive per diem payments. Subpart C contains the eligibility requirements, payment rates, and payment procedures that apply to all State home programs of care. Although we do not consider this a substantive change, because the provisions of subpart C clearly apply to State homes receiving per diem, § 51.58 would be incomplete without it.

51.140 Dietary Services

This rulemaking makes a technical amendment to § 51.140(a)(2) that was not in the proposed rule. The paragraph refers to the ''American Dietetic Association,'' which changed its name to the ''Academy of Nutrition and Dietetics.'' This rulemaking updates that name.

Subpart E—Standards Applicable to the Payment of per Diem for Domiciliary Care

VA received comments asking VA to collaborate with national associations representing State homes to revise the proposed regulations regarding domiciliary care and to retain the prior domiciliary rules in the interim, rather than implement the proposed rules.

VA is grateful to the State homes, and to all parties who submitted comments on this rulemaking. The rulemaking process we have followed allows all members of the public to have a fair opportunity to participate in the rulemaking process, as the Administrative Procedure Act requires. 5 U.S.C. 553. VA has considered all comments it received, including the comments about the effects of the proposed domiciliary regulations submitted by national associations and individual State homes, and is making substantial changes to the domiciliary regulations in this final rulemaking. We therefore decline to retain the prior rules on per diem payments to domiciliaries while developing new regulations, but we welcome continuing feedback and opportunities to work with the State homes to improve services to veterans.

§ 51.300 Residential Rights and Behavior; State Home Practices; Quality of Life

VA received a number of comments about § 51.300, which, as proposed, would have applied to State home domiciliaries the requirements of §§ 51.70, 51.80, 51.90, and 51.100. These regulations provide standards that apply to State home nursing home resident rights; admission, transfer and discharge rights; resident behavior and facility practices; and quality of life. In response to these comments and for other reasons, we have revised proposed 51.300 so it does not apply to the domiciliary care program all of the nursing home regulations we proposed to apply. We have changed the introduction to § 51.300 to specify which provisions of the nursing home sections will not apply to the

domiciliary care program. Discussion of the specific comments and changes to § 51.300 follow.

Five commenters opined that compliance with §§ 51.70, 51.80, 51.90, and 51.100 may seem reasonable as they pertain to veterans' treatment and rights. They asserted, however, that compliance with these sections also imposes additional, extensive ''nursing home'' standards on the domiciliary programs, creating new requirements that are not feasible under current operation and staffing models. The commenters noted, for example, that § 51.70 contains 14 major sections and multiple subsections of requirements, whereas the existing domiciliary care program regulations have only one standard ''(13 Quality of Life).'' The commenters asserted the other sections to which § 51.300 refers are similarly burdensome, citing as another example the § 51.100 requirement that social workers meet specific qualifications and that the domiciliary meet specific staffing requirements.

We deduce that the commenters' citations of various ''existing regulations,'' *e.g.,* ''13 Quality of Life,'' refer to provisions of the VA Guide for Inspection of State Veterans Homes: Domiciliary Care Standards (Nov. 26, 1986) [hereafter 1986 Guide], because the citations are, verbatim, to headings of standards in the 1986 Guide. We disagree with assertions that the proposed regulations have many more provisions than the 1986 Guide, and with the implicit argument that more provisions means a greater burden of compliance. First, the commenters comparison of § 51.70 with the 1986 Guide, which incidentally does not comprise regulations, misstated the differences. Section 51.70 is one section comprising 14 paragraphs, (a)–(n), which each have multiple provisions. Section 13 of the 1986 Guide, ''Quality of Life,'' comprises one section with six standards, each with one to four indicators of compliance, which in turn each has as many as 13 elements, and each standard one through six has a corresponding guideline paragraph. We further disagree that the number of provisions defines the burden of compliance. The number of provisions, as the commenters identify them, is an organizational device to aid readability. It does not inherently correlate with the burden of compliance.

The commenters also expressed particular concern about the cost of applying these sections to domiciliary care programs that offer primarily transition services. Commenters said the proposed rules would have an adverse financial effect on the domiciliary programs, including potential closures, which would have an especially negative effect on the homeless population that some domiciliary care programs widely serve. Commenters said the proposed rules would treat otherwise homeless residents as patients and would medically institutionalize them, whereas the traditional domiciliary model encourages self-reliance. Some commented that nursing home standards would increase the nursing requirements for assisted-living domiciliaries. Some said that these requirements amounted to an unfunded mandate. Some said VA should either increase the per diem payment for domiciliary care, or eliminate or reduce the requirements.

We disagree that any requirement in this rulemaking is an unfunded mandate, even if compliance with some provisions increases a State's costs to run its program. An unfunded mandate, or a ''Federal intergovernmental mandate'' as defined in the Unfunded Mandates Reform Act of 1995, is, in pertinent part, ''any provision in legislation, statute, or regulation that (i) would impose an enforceable duty upon State, local, or tribal governments—except (I) a condition of Federal assistance; or (II) a duty arising from participation in a voluntary Federal program.'' 2 U.S.C. 658(5). No Federal law imposes an enforceable duty on any the States to have a State home. VA's per diem program is a benefit the United States affords veterans through the States. This rulemaking provides conditions of this VA assistance. Each State participates voluntarily. The cost of qualifying for VA per diem payments to State homes is not an unfunded mandate; it is simply a condition of Federal assistance or a duty arising from participation in a voluntary Federal program. We make no change based on this comment.

VA agrees that certain of the requirements we proposed in § 51.300 should not be applied to State home domiciliaries, and we have made a number of changes to that section in response to the commenters' recommendations. The standards VA will require State home domiciliary care programs to meet under this final rule are those we have determined are essential to the health, safety, and well-being of the residents and that will enable the State homes to continue providing services that foster veterans' independence. To that end, VA will apply some provisions of §§ 51.70, 51.80, 51.90, and 51.100 to domiciliaries, but we are excluding some and establishing more suitable standards in the place of certain paragraphs of each. From § 51.70, we are excluding § 51.70(b)(9), (h)(1), and (m); from § 51.80 we are excluding § 51.80(a)(2), (a)(4), and (b); and from § 51.100 we are excluding § 51.100(g)(2), (h), and (i)(5)–(i)(7). We have added provisions using the same or substantially similar headings as the excluded paragraphs and added provisions in language similar to the excluded provision, adapted and tailored to the needs of the domiciliary care program. For the most part, these changes implement changes commenters recommended or eliminate burdens commenters identified.

Some commenters approved of the proposed application of nursing home regulations to domiciliary care programs. They urged VA to apply all nursing home regulations to domiciliary care programs. Some suggested specific changes to various provisions of §§ 51.70 and 51.100 as we proposed to apply them to domiciliary care programs. The suggested amendments are addressed under the headings for those provisions. One suggested a substantial rewrite of §§ 51.70 and 51.100, which we discuss under the Other Issues heading below.

A description of changes from the proposed regulations follows.

51.300(a) Notice of Rights and Services—Notification of Changes

VA received comments that § 51.70(b)(9), Notification of changes, should not apply to domiciliary care program residents. The comments said that State homes do not currently notify families or legal representatives of changes to the domiciliary residents' medical status or room assignments. They noted that the State home often asks the residents to move from rooms with multiple residents to single rooms based on availability and seniority, and there is no need to inform family members in writing of such a change. One commenter further noted, ''[T]here is no need to notify family members of changes in their medical conditions against their will in violation of their Health Insurance Portability and Accountability Act rights,'' and domiciliary residents are independent enough to oversee their own affairs. We interpret the comment referencing HIPAA to mean, if a State home were to notify family members of changes in the resident's medical condition over the resident's objection, that notice would violate the resident's rights under HIPAA, and therefore the proposed notice requirement violates HIPPA.

We agree that the requirement to notify a resident's legal representative or interested family member of changes to

the resident's medical status or room assignment as § 51.70(b)(9) requires is not necessary for domiciliary care program residents for the reasons the commenters stated. We do not address whether the proposed notice requirement would violate HIPAA because we are eliminating the requirement to notify certain people. Instead, we have added a right to notice provision in § 51.300(a). In consideration of the comments for and against notice of certain outside persons, we are making changes intended to balance these conflicting concerns. Paragraph (a) of this section will provide that the domiciliary resident will have the right to decide whether to have the State home notify other people of changes to the resident's medical status or room assignment.

51.300(b) Work

VA received comments objecting to applying to domiciliaries via proposed § 51.300 the nursing home rule that allows residents to refuse to work in § 51.70(h)(1). A commenter said that work programs allow residents to participate in their independent living communities and provide valuable therapy and skills for residents who will leave the facility. In contrast, VA also received comments that supported the proposed right to refuse to work for domiciliary residents.

We agree that sharing in some portion of the work to maintain the domiciliary is an essential part of domiciliary care programs. By longstanding practice, in the absence of comprehensive State home domiciliary regulations, State home domiciliary care programs have followed the same work requirement that applies to eligibility for VA's domiciliary care program in § 17.46(b). As described above, VA has adopted a requirement in § 51.51(b)(7) that to be eligible for per diem payments for State home domiciliary care the veteran must be able to participate in some measure, however slight, in work assignments that support the maintenance and operation of the State home. We have, therefore, also changed § 51.300 to eliminate the nursing home rule regarding the right to refuse work that VA had proposed to apply to State home domiciliary residents. As revised, § 51.300(b) now states explicitly, in part, ''The resident must participate, based on his or her ability, in some measure, however slight, in work assignments that support the maintenance and operation of the State home.'' To ensure that the work has therapeutic value, § 51.300(b) also requires that the State home have a written policy to implement the work requirement, that each resident's comprehensive care plan describe the work the resident will perform, that the facility consulted with and the resident agrees to the work arrangement described in the comprehensive care plan, and that, if the resident is paid for the work he or she performs, payment will be at wages that meet or exceed the prevailing wages for similar work in the area. We have also included a provision to encourage the resident's participation in vocational and employment services, in addition to performing work.

VA received a comment saying that prevailing wages are not currently paid for participation in work therapy or volunteer programs. It's unclear whether the commenter means that State home domiciliaries should have authority to pay residents some other wage, or whether they should have authority to not pay residents for their work. VA believes a resident may perform volunteer work designed for its therapeutic value, even if the nature of the work is not one that an outside worker would typically be contracted to perform. VA also believes, however, that domiciliary residents are entitled to fair payment for the work they perform for the maintenance and operation of the State home if the home would otherwise hire non-residents to do the work. This distinction protects the residents from being used under the guise of therapy to reduce the State homes' operating costs by substituting residents' labor for labor it would ordinarily hire at the prevailing wage in the local labor market. VA applies similar rules regarding work therapy to its own domiciliary and nursing home residents, and we see no difference between VA and State home programs to suggest residents should be paid different wages when doing work for which the State homes must pay. To make clear that State homes must pay residents the prevailing wage to perform work the State home would have otherwise hired non-residents to perform, we revised paragraph (b)(3) to read as follows: ''Compensation for work for which the facility would pay a prevailing wage if done by non-residents is paid at or above prevailing wages for similar work in the area where the facility is located''.

VA received comments saying the domiciliary residents should be compensated for all work they perform. VA disagrees; the work requirement does not preclude unpaid volunteer work, such as keeping one's room orderly or other housekeeping chores ordinarily to be expected of persons sharing a residence.

One commenter asserted VA's State home per diem regulations amount to a contract between State homes and VA requiring that State homes pay veterans Federal contract wages. The commenter cites an invalid World Wide Web address, *https://www.dol.gov/ofccp/OFCCPRecoveryActPlan.htm,* apparently referring to the Department of Labor Office of Federal Contract Compliance Programs (OFCCP). State home compliance with VA per diem regulations are not subject to the oversight of the Department of Labor OFCCP. VA regulations on State home domiciliary residents' work requirements are not Federal contracts, either between VA and the State homes or between VA and the residents, and they do not subject the States to Federal contract law. We make no change based on this comment.

51.300(c) Married Couples

We received comments objecting to the proposed application to the domiciliaries of the nursing home requirement from § 51.70(m), which provides married couples have the right to share a room if they live in the same facility and both agree. One commenter noted that it operates one of the oldest State homes in the country and lacks the space or proper facilities to provide married living quarters in the domiciliary, and to do so would need renovations and the possible displacement of some unmarried residents. In contrast, one commenter supported the requirement that State home domiciliary care programs receiving VA per diem payments must provide shared living quarters for married veteran residents who wish them and who each meet the eligibility criteria for the program.

We agree that buildings might not always be able to accommodate married living quarters; however, there are ways that the State Home can make accommodations for married couples to have private space, even if temporarily. To accommodate the physical space limitations of certain State homes, but establish responsibility for programs to honor such requests to the extent possible, we have added § 51.300(c). This paragraph restates § 51.70(m), inserting ''if space is available within the existing facility'' after ''has the right'' and adding the following sentence: ''If the State home determines existing space is not available to allow married residents to share rooms, the State home will make accommodations for the privacy of married residents.''

51.300(d) Transfer and Discharge

We received comments that State homes should have a concise procedure for discharge of residents to prevent

arbitrary discharge at the whim of management. One commenter stated there needs to be reasons for discharge and a right to contest the discharge in a speedy way. The commenter was particularly concerned about immediate discharges without any mechanism for immediate review, resulting in the resident having to abandon property and even personal effects. The commenters said a VA representative as well as a resident should be part of the process to ensure that residents' rights are not being violated. This comment pertains to the application of § 51.80, Admissions, transfer and discharge rights, to domiciliary care programs, under proposed § 51.300.

We agree that State home domiciliaries must have a clearly identified process for admissions, transfers, and discharges, and we have amended the introductory paragraph of § 51.300 to require the State home domiciliary have a written policy on the topic. Additionally, we have created § 51.300(a) to require the facility management to immediately inform the resident when there is a decision to transfer or discharge the resident, and a new paragraph (d)(6) to require the notice to include the resident's right to appeal and the contact information for the State long-term care ombudsman. These changes to the final rule give the residents a more defined process for discharge. We understand the commenter's reference to a VA representative to mean a VA employee. Involving a VA employee in this process would impose an unnecessary burden on State homes. We therefore make only the changes described based on that comment.

We received a comment objecting to the application to domiciliary care programs of the transfer and discharge requirements from § 51.80(a)(2)(ii). Section 51.80(a)(2) requires the facility management to permit each resident to remain in the facility, and not transfer or discharge the resident from the facility unless [circumstances meet one or more of a list of conditions]. Among the circumstances permitting transfer or discharge, § 51.80(a)(2)(ii) provides, ''The transfer or discharge is appropriate because the resident's health has improved sufficiently so the resident no longer needs the services provided by the nursing home.''. The commenter distinguished domiciliary residents from nursing home patients, in that it is clear when nursing home patients no longer need nursing home services, but not clear when domiciliary residents no longer need domiciliary care, and domiciliary residents are not discharged just because of improved health. For that reason, it would be inappropriate to apply the nursing home requirements for discharge or transfer of a resident to the circumstances of most domiciliary residents.

We disagree with part of this comment. The structured, residential environment of domiciliary programs can foster personal and financial growth and accountability that allows residents to leave domiciliary care programs because of their improved circumstances. We believe therefore that it is appropriate to retain this provision with respect to discharges due to improved circumstances. The comment revealed a gap in the proposed rule, however. Focusing on transfer or discharge because of improvement revealed the possibility transfer or discharge could be appropriate because the residents may have ceased to meet one or more of the eligibility criteria of § 51.51. For example, the veteran's annual income may have exceeded the maximum annual rate of pension. To fill this gap, we have added paragraph (d)(2)(vii) to the criteria for transfer or discharge in § 51.300 to read, ''The resident ceases to meet any of the eligibility criteria of § 51.51.'' Section 51.51 provides eligibility criteria, but it does not address whether those criteria apply only to the applicant, or also to the resident. It is inconsistent with the function of the eligibility requirements, to ascertain whether someone is suitable for the domiciliary care program, to apply them at entrance and not during residency. A resident who ceases to meet an eligibility criterion would certainly meet a criterion for transfer or discharge.

We agree with the commenter that it is also important to include a requirement for when a resident needs to be moved to a higher level of care. We have, therefore, excluded domiciliaries from complying with § 51.80(a)(2), and instead establish domiciliary transfer and discharge requirements in § 51.300(d)(2), including the requirement in § 51.300(d)(2)(ii) that residents be discharged if they need a higher level of long term or acute care.

VA received comments objecting to the application in proposed § 51.300 of the requirement of § 51.80(a)(4) to notify a legal representative or family member of a transfer or discharge, and of the requirement of § 51.80(a)(5) to provide that notice 30 days in advance of the transfer or discharge. The commenters said these provisions eliminate flexibility necessary for managing an independent living environment and are inconsistent with the independence of the residents.

We have added § 51.300(d) in response to these comments. Regarding the requirement to notify a legal representative or family member, in § 51.300(d)(4) we have changed the regulation by eliminating the State home's requirement to notify and giving the resident the right to decide whether the state home notifies a legal representative or family member. This is similar to the changes we made in § 51.300(a) regarding notifications about medical status and room assignment changes. Regarding the 30-day advance notice of transfer or discharge, we disagree that the requirement is overly burdensome. New paragraph § 51.300(d)(5)(i) provides ample exceptions to the 30-day requirement to afford reasonable flexibility. The 30-day notice requirement, with the exceptions to make it practicable, affords the residents a reasonable safeguard against transfer or discharge without warning.

51.300(e) Notice of Bed-Hold Policy and Readmission—Notice Before Transfer

As proposed, § 51.300 would have applied the nursing home regulation on notice of bed-hold policy and readmission, § 51.80(b), to domiciliary care programs. Based on comments asserting this to be overly burdensome in the domiciliary care context, we have determined there is no need to apply the detailed notice of policy requirements to domiciliary care programs that § 51.80(b) applies to nursing home care programs. Domiciliary residents still need information about the availability of a bed if they return to the home from a period of hospital care. To achieve this, we have added paragraph (e) to proposed § 51.300, which provides, ''The facility management must provide written information to the resident about the State home bed-hold policy upon enrollment, annually thereafter, and before a State home transfers a resident to a hospital.'' Additionally, we have added as the first sentence of the paragraph, ''The State home must have a written bed-hold policy, including criteria for return to the facility.'' While we agree with the commenters that the domiciliary care program bed-hold policy does not need the degree of detail § 51.80(b) applies to the nursing home care program, we believe there must be a policy. This is a logical corollary to the requirement to provide a resident the bed-hold policy. While it may seem obvious that the State home must have a bed-hold policy to notify a resident of it, we believe the paragraph is clearer to explicitly require the State home to have a bed-hold policy. We also added a provision regarding a resident's right to

decide whether to have the State home notify others of the change.

51.300(f) Resident Activities, and (g) Social Services

Several commenters addressed social worker credentialing for domiciliary care programs, which we discuss below. In reviewing those comments, we concluded the commenters' reasoning about social workers' credentials applies as well to credentialing of therapeutic recreation specialists in domiciliary care programs. Unlike the nursing homes, the domiciliaries do not require a credentialed or licensed professional to oversee the residents' activities. We will not apply the credentials provisions of § 51.100(g) to the domiciliary care program as proposed. To effect that change, we have amended the introductory paragraph of § 51.300 to exclude § 51.100(g) and have added § 51.300(f), Resident activities, to adapt § 51.100(g) to the domiciliary care program. As adapted, § 51.300(f)(1) restates § 51.100(g)(1), and § 51.300(f)(2) provides, ''The activities must be directed by a qualified coordinator.'' Section 51.300 applies no other provisions of § 51.100(g) to the domiciliary care programs.

VA received comments objecting to the proposed application of nursing home standards for social services from § 51.100(h), Social services, to domiciliary care programs under proposed § 51.300. One commenter objected only to the requirement of licensed social workers, another objected on the grounds that the proposed regulations mandate specific qualifications and staffing requirements that are not imposed upon domiciliary programs currently. Another noted that the State homes employ licensed and unlicensed social workers, with the latter providing only case management for domiciliary residents that do not require in-depth treatment, in keeping with a transitional model where the social worker's job is to assist the resident with transitioning out of the domiciliary.

We agree the specific credential requirements of § 51.100(h) are not necessary for State home domiciliary care programs. We have added § 51.300(g) to provide more flexibility in social worker staffing for domiciliaries. Paragraph (g) provides that ''[t]he State home must provide social work services to meet the social and emotional needs of residents to attain or maintain the highest practicable mental and psychosocial well-being of each resident;'' that ''[t]he State home must have a sufficient number of social workers to meet the residents' needs''; and that ''[t]he State home must have a written policy on how it determines qualifications of social workers.'' Paragraph (g)(3) provides that ''[i]t is highly recommended, but not required, that a qualified social worker is an individual with'' the same qualifications as those required for nursing home social services providers.

One commenter noted the proposed regulation applying 51.100 to domiciliary care programs ''references the number of required licensed social workers for the state veterans' home,'' and that ''clarity needs to be given as it relates to requirements for Social Workers assigned to the State Home Domiciliary.''

The regulation on the number of social workers, § 51.300(g)(2), provides, ''The State home must have a sufficient number of social workers to meet residents' needs.'' We interpret the comment to be asking how the required number of social workers specified for nursing homes in § 51.100(h), Social services, applies to the domiciliary care program. As the introduction to final § 51.300 states, 51.100(h) is among the nursing home provisions this final rule does not apply to domiciliary care programs. Rather, § 51.300(g)(2) affords State homes flexibility in determining the number of social workers ''sufficient'' to meet the object of paragraph (g)(1). Additionally, though § 51.300(g)(3) strongly suggests the State home use licensed social workers, licensure is not required.

51.300(h) Environment

VA received comments objecting to the application of § 51.100(i), Environment, to the domiciliary care program. These objected to the proposed closet space requirement and to maintaining temperatures at 71–81 degrees Fahrenheit. They commented that environmental requirements of § 51.100(i) that have not previously applied to domiciliary care facilities would pose extraordinary challenges to States operating older facilities that were not designed to meet these requirements. One commenter reported it would face significant and costly upgrades, especially to a 130 year old facility, if VA finalizes the proposed rule. The commenter requested VA ''grandfather in'' older facilities, permitting them not to make upgrades to meet the § 51.300 environment requirements. Another objected it could not provide private closet space without ''massive renovations.''

We agree that the temperature, sound, and lighting requirements VA proposed are unnecessary for the health and well-being of domiciliary residents, and we have eliminated them. We will not, however, remove the closet space requirement, or waive it for older facilities. VA has demonstrated its view of the importance of this requirement by including it among the requirements of its construction grant regulations. 38 CFR 59.140, 59.150. A State may seek a part 59 grant to assist it to bring older facilities into compliance with these essential standards, or to replace facilities that cannot come into compliance, but VA will not ''grandfather in,'' *i.e.,* waive the requirement for, older facilities that currently lack the required closet space. To effect these changes, we have restated the provisions of § 51.100(i)(1)–(4) in § 51.300(h), and omitted the provisions of § 51.100(i)(5)–(7) from § 51.300(h).

51.300 Other Comments

VA received comments saying we should not apply State home nursing home requirements to State home domiciliaries that would require the domiciliary care programs to provide services they do not now provide. The commenters specifically mentioned access to an ombudsman. The commenters distinguished between the needs of nursing home residents, whom they described as an elder, very vulnerable population, and the domiciliary residents, who do not have the same vulnerabilities. They said the domiciliary care program residents are able to tend to their own affairs, and an ombudsman is therefore not necessary.

VA also received comments asking VA to retain the proposed requirement that State home domiciliary residents have access to an ombudsman. The commenters asked VA to appoint or require the State to appoint an ombudsman or patient advocate. One commenter said that decisions would be less ad hoc, more thoughtful, and more considerate of residents' welfare if an ombudsman were available.

We agree with the commenters who asked VA to require domiciliary care program residents to have access to an ombudsman. We disagree with the commenters who argue the relative soundness of the domiciliary residents compared to nursing home residents means the domiciliary residents do not need an ombudsman. VA makes no change to the proposed application of the ombudsman requirement of § 51.70(j) to domiciliary programs. As some commenters pointed out, and VA believes, domiciliary residents face vulnerabilities and are entitled to have an advocate outside the facility who is able to advocate on their behalf or mediate situations between State home

leadership and residents when necessary. State homes are already required to ensure that nursing home residents have access to the State long term care ombudsman. Extending that protection to domiciliary residents does not require the State to create any new position; it need only provide domiciliary residents with access to an existing State long term care ombudsman and information how to contact that ombudsman. Consistent with the application of the § 51.70(j) ombudsman rule to domiciliary residents, we are also adding paragraph 51.300(d)(6)(v) to require any notice of transfer or discharge to include the name, address, and telephone number of the State long term care ombudsman.

One commenter requested that out of sensitivity to the unique needs of veterans, VA add to the quality of life regulations under 51.300 a requirement that State homes recruit and hire veterans for all positions in the State homes, and where veterans are unavailable, require special training of non-veterans in ''veteranology'' [sic], ''or the study of veterans.''

We decline to add the suggested requirement to the quality of life provisions of part 51. Though the commenter's ideas about the value of veteran employees or of special education for non-veteran employees at State homes have merit, the requirement sought would impose a substantial new personnel burden on the state homes, which may conflict with employment laws of these States. Rather than impose this requirement on the States, we would prefer to give the States discretion to hire the best employees for their Veterans. Further, the commenter's suggestion is beyond the scope of this final rulemaking. Consequently, we make no change based on this comment. Nevertheless, we call upon the States to consider the ideas of the commenter.

The same commenter urged VA to require the States, as a condition of receipt of VA per diem payments, to permit residents for whom VA pays per diem to apply for career professional employment at State homes as a ''civil right.'' The commenter requested regulations providing specific employment practices. The commenter further requested VA to establish by regulation ''a rating and employment system whereby residents of US VA Per Diemed [sic] State Veterans Home Domiciliary Programs [sic] who are working professionals living in an SVH Domiciliary Program while seeking employment are registered as members of a new Federally protected class of veteran—'the SVH Domiciliary Veteran-Resident Career Professional.'''

The employment regulation the commenter seeks would conflict with 38 U.S.C. 1742(b), which prohibits VA from having any authority over the management or control of any State home. While a resident is free to apply to any job, it is beyond the scope of this rulemaking to create ''a new Federally protected class of veteran[s].'' Further, as noted above, we would prefer to give the States discretion to hire whom they consider the best qualified employees for their Veterans.

Regarding creation of protected classes under Federal civil rights law, VA lacks authority to create protected classes of citizens under Federal civil rights laws. Creation of the protected class the commenter advocates would require legislation. Current statute prohibits VA authority over ''the management or control of any State home,'' 38 U.S.C. 1742(b), and the establishment of a ''rating and employment system,'' as the commenter described it, seems very likely to amount to management contrary to that statute. Even if VA had the authority to regulate as the commenter seeks, the commenter's suggestions are beyond the scope of this final rulemaking. We make no changes based on this comment.

One commenter noted a State home provides transitional domiciliary care to Veterans who are medically able to live fully independently, but who lack the financial means for subsistence. The commenter said that the proposed application of nursing home requirements for State home domiciliaries would threaten the State home's ability to maintain this practice ''because the Veterans would not meet the new requirements of domiciliary care,'' potentially resulting in some residents being without a housing alternative.

Though we are not making any changes in response to this comment, we should clarify that the new regulations do not change eligibility requirements for residents to require that they be in need of nursing home care, nor will the rule change eligibility requirements for any veterans receiving domiciliary care. Furthermore, as discussed above regarding specific nursing home requirements, we are easing the proposed application of multiple nursing home requirements on State home domiciliaries. This final rule will not require Veterans to be displaced in the manner the commenter described.

Another commenter asserted that VA should have regulations requiring all cash donations to a State home be made known to the residents, and that legacy accounts (accounts of deceased residents) be made known to the residents and to the public.

We disagree with this suggestion. Donations to the State home, and any disclosure, would be the subject of State law. All States have laws governing access to public records like this. If the commenter believes that State laws need to be changed, we recommend that the commenter seek action at the State level. Requiring States to change their laws governing such access is beyond the scope of this rulemaking. Regarding the commenters concern about legacy accounts, current regulations governing residents' funds are sufficient to regulate the State home's handling of those funds. Current regulation, 38 CFR 51.70(c) Protection of resident funds, applies to domiciliary care programs through final § 51.300. It provides for the handling and accounting for a resident's funds on deposit with a State home, including their final accounting and conveyance upon a resident's death. The regulation also provides that each resident is to have personal control of the resident's funds, that the State home cannot require the resident to deposit the funds with the State home, that the State home account for the funds to the resident or to a resident's legal representative, and that the state make a final accounting and conveyance of funds to the individual or probate jurisdiction administering the resident's estate or other appropriate entity. These rules together are consistent with treating the residents' finances as a private matter, even after death. We make no change based on this comment.

51.310 Resident Admission, Assessment, Care Plan, and Discharge

We have made multiple changes to § 51.310. Some are in direct response to comments, and some simply improve organization, clarity, and readability. We have revised the heading to read, ''Resident admission, assessment, care plan, and discharge'', to be more descriptive of the scope of the section. We have rearranged provisions, grouping related provisions together and putting them in the sequence the State homes will generally apply them. This reduces the number of paragraphs in the section from the proposed introduction plus five paragraphs, (a) through (e), to introduction plus four paragraphs, (a) through (d). We have inserted the words ''medical and comprehensive'' before ''assessments'' in the introduction, and inserted ''comprehensive'' before ''assessment'' throughout the section, to indicate they are different. The medical assessment informs the State home of the new resident's medical status and immediate needs on admission. The

comprehensive assessment incorporates the result of the medical assessment and builds on it by bringing together multiple health professionals' assessments of the resident's physical, mental, and social needs. The comprehensive assessment, in turn, informs the comprehensive care plan. We discuss these assessments below. The introductory paragraph of § 51.310 introduces each of these assessments. We have also added a last sentence to the introduction, ''The State home must review comprehensive assessments annually, and promptly after every significant change in the resident's physical, mental, or social condition.'' This sentence adds no new requirement to the proposed admission, assessment, and comprehensive care plan process. Rather it clarifies the ongoing relationship between the comprehensive assessment and the comprehensive care plan.

Three commenters asserted that the unknown cost of having physician's orders for each resident's immediate care and an assessment including medical history and physical examination within 72 hours of admission, as proposed § 51.310(a) required, would be excessive. The commenters compared the proposed requirements with the 1986 Guide, which required that the domiciliary provide and maintain a treatment plan for each domiciliary patient.

We partly agree and partly disagree. We agree that 72 hours is not always enough time to perform the assessment with medical history and examination. We have changed proposed § 51.310(a) to allow 7 calendar days for the medical assessment, which is consistent with VA practice for its domiciliary care program and will provide the State homes with ample time to perform an assessment of the resident. We have clarified that the assessment upon admission is a medical assessment, adding ''and medical assessment'' to the paragraph (a) heading, to read, ''(a) Admission orders and medical assessment.'' This will distinguish this assessment from the comprehensive assessment identified in the introductory paragraph and in paragraph (b). We have also added a last sentence to paragraph (a), ''The medical assessment will be part of the comprehensive assessment.'' This makes clear that a medical assessment is part of the comprehensive assessment, consistent with the inclusion of a physician among the practitioners listed among those to do the comprehensive assessment described in paragraph (b) of this section.

Further, for clarity and certainty, we redesignated paragraph (b) to allow the State home 14 calendar days after admission to complete the comprehensive assessment and redesignated paragraph (c) to allow 21 calendar days after admission to develop the comprehensive care plan. As proposed, § 51.310(d)(2)(i) required a treatment plan be ''Developed within 7 calendar days after completion of the comprehensive assessment,'' but there was no deadline for the comprehensive assessment. Without a deadline for the comprehensive assessment, the proposed rule was uninformative and afforded poor guidance and no certainty about when the treatment plan might be done. Compared to the proposed process from admission to care planning, these changes afford more overall flexibility while also providing more useful guidance to the State homes and more certainty for the State homes and for VA. Also, we have added ''annually, and as required by a change in the resident's condition'' at the end of paragraph (b)(1). Though this restates a phrase of the introduction to § 51.310, we feel it is necessary to avoid any impression that the paragraph (b)(1) requirement to do a comprehensive assessment on admission contradicts the requirement of annual and as needed comprehensive assessments in the introduction. Paragraph (b)(2) describes the purpose of the comprehensive assessment to distinguish it from the medical assessment.

We disagree with the comment that physician orders for immediate treatment should not be required upon admission. Admitting a resident into a residential program with unknown current health needs is an unreasonable risk, both for the patient and for other residents of the domiciliary, although we recognize that this recommendation was made under the assumption that VA would require doctor orders and the complete assessment no later than 72 hours of admission. We have revised the section to distinguish between the medical assessment required shortly before or soon after admission and the subsequent comprehensive assessment, of which the medical assessment is part. As changed, the paragraph allows 7 calendar days after admission to complete the medical assessment. This clarification and other changes to this section provides the State homes with more flexibility in completing the medical assessment and makes the physician orders requirement perfectly reasonable in light of its importance. Consequently, we decline to eliminate the physician orders requirement. We have eliminated the proposed provision that ''physician orders may be submitted when available'' from § 51.310(a), because it is essential to know of immediate medical needs at the time of admission, and it is inconsistent with the changes in this final rule.

VA received comments saying the requirement that the medical assessment be performed by a physician rather than a nurse is overly burdensome and unnecessary because domiciliary residents are generally in better health and have fewer medical needs than nursing home residents. We agree that a physician need not perform the resident's medical assessment upon entering a domiciliary care program. We have therefore changed proposed paragraph (a), Admission orders and medical assessment, to provide that ''a physician, or other health care provider qualified under State law'' must perform the assessment.

We have removed proposed paragraph (b), which provided, ''The State home must use the results of the assessment to develop, review, and revise the resident's treatment plan.'' Initially proposed paragraph (c), ''coordination of assessments,'' is redesignated paragraph (b) and renamed to place this provision in the context of comprehensive assessments. As restructured, the section now flows functionally from (a), admission and medical assessment, through (b), comprehensive assessment, to (c) comprehensive care plan, and finally (d) discharge report.

VA received comments saying that the proposed global nursing home assessment tool is inappropriate for domiciliary care programs. One commenter noted we based proposed § 51.310 on § 51.110, which requires nursing home care programs to use the Centers for Medicare and Medicaid Services Resident Assessment Instrument Minimum Data Set (MDS), Version 3.0. The commenter asserted the MDS 3.0 does not allow for assessing domiciliary residents.

We did not propose using a global nursing home assessment tool. It appears the commenters misread the notice of proposed rulemaking, which specifically explained there is no national tool for assessment of domiciliary residents as there is for nursing homes. Our intent was to provide State homes with reasonable flexibility in conducting the assessment, which is why proposed § 51.310 stated the assessment objectives and process without specifying an assessment tool.

VA received a comment that in a State with a State-established required assessment tool for domiciliary care,

VA's assessment requirements would be duplicative, resulting in additional, unreimbursed costs. The commenter recommended VA allow each State to use its State required assessment tool and for VA to provide a tool for the use of States without a state-required tool.

VA disagrees. Section 51.310(a) does not require duplicative assessments, though it could require the State to augment its assessment procedure. The introduction to this section requires the State home to establish in a written policy how it will complete, implement, review, and revise comprehensive assessments. This allows the State home sufficient flexibility to use its existing assessment tool if it produces an assessment with sufficient information about the resident's emotional, behavioral, social, and physical needs to inform a comprehensive care plan targeted as meeting those needs. We will not change the regulation to explicitly provide that States may use any assessment tool it may have because there would be no assurance that the assessments would be comprehensive enough. Nor is it practicable for VA to review States' assessment tools for sufficiency, and then monitor them for continued sufficiency subsequent to any revision. We do not require the State homes to use an assessment tool specifically designed for nursing homes. We require the assessment to be adequate to inform the comprehensive care plan. We believe this section is flexible enough to enable the State to avoid the cost of duplicative assessments, while providing for the health and wellness of State home domiciliary residents. We make no change based on this comment.

In response to comments on § 51.51 about residents' work in the State home as part of a comprehensive care plan, discussed above, we have added paragraph (c)(1)(ii) to this section, providing that a comprehensive plan must describe: ''The specific work the resident agrees to do to share in the maintenance and operation of the State home upon consultation with the interdisciplinary team, and whether that work is paid or unpaid''. This identifies with whom the resident agrees to perform certain work, and also that the agreement is about which work the resident will do to share in the maintenance and operation of the State home, not whether the veteran agrees to do some work.

We have changed the proposed description of the purpose of the comprehensive care plan. Proposed paragraph (d)(1) provided the comprehensive care plan is ''to address the resident's physical, mental, and psychosocial needs''. In light of comments received and described above about the role of mental health and other specialty care services in domiciliary care, we feel a change in terminology would allow State homes to better understand and implement this provision. As changed, redesignated paragraph (c)(1) says the comprehensive care plan is ''to address a resident's emotional, behavioral, social, and physical needs.'' To allow care providers the flexibility to ensure the comprehensive care plan best reflects each resident's needs, we have also added to the last sentence of paragraph (c)(1) a provision that the comprehensive care plan must describe the items listed, ''as appropriate to the resident's circumstances.''

We have deleted the reference to § 51.350 in proposed paragraph (d)(1)(i), ''as required under § 51.350;''. The reference made sense as proposed, because § 51.350 would have applied all of multiple nursing home regulations to domiciliary care programs. As revised, § 51.350 does not apply most of those nursing home regulations to domiciliary care programs, and removing the reference is consistent with the flexibility we intend final rule § 51.310(c)(1)(i) to allow.

We have also changed the reference to ''the resident's exercise of rights under § 51.300, including the right to refuse treatment'' in proposed paragraph (d)(1)(ii). As revised and redesignated paragraph (c)(1)(iii), the paragraph reads, ''Any services that would otherwise be required under § 51.350 but are not provided due to the resident's exercise of rights under § 51.70, including the right in § 51.70(b)(4) to refuse treatment. This change provides the reader a more direct reference to the substantive provisions concerned. Though the proposed reference to § 51.300 is correct, it is indirect. Reference to § 51.300 requires the reader to ascertain that § 51.300 applies § 51.70, so the reader must then look to § 51.70 for the substantive provisions. This change of cross reference simplifies finding the provisions to which the paragraph refers.

In § 51.310, we changed proposed paragraph (d)(2)(i), which would have required the State home to complete a comprehensive care plan within 7 calendar days of completion of the assessment. As revised, redesignated paragraph (c)(2)(i) requires the State home to develop a comprehensive care plan no later than 21 calendar days after admission. This lets the State home manage time and resources better, potentially allowing more than 7 calendar days to complete the comprehensive care plan if the comprehensive assessment is completed in less than the time allowed. It also affords certainty about when the State home will have a comprehensive care plan for each resident.

Proposed paragraph (d)(2)(iii), redesignated paragraph (c)(2)(iii), provided for periodic review and revision of the comprehensive treatment plan. We determined that final paragraph (c)(2)(iii) would provide clearer guidance if it tied in with the introduction of paragraph (c)(1). Towards that end, we have changed the periodic review and revision to be ''consistent with the most recent comprehensive assessment''. With this change, paragraph (c)(2)(iii) reads, ''Reviewed periodically and revised consistent with the most recent comprehensive assessment by a team of qualified persons no less often than semi-annually''.

We also determined that redesignated paragraph (c)(2) did not complete the logical progression of the paragraph. The point of periodic review is to change the treatment plan if the review reveals it needs to change. We believe it is implicit in the § 51.310 introductory requirement to reassess a resident promptly after every significant change in condition that the comprehensive care plan must also change promptly in response to a significant change in the resident's condition. Consequently, we have added ''; and'' at the end of final paragraph (c)(2)(iii), followed by new paragraph (c)(2)(iv), which reads, ''Revised promptly after a comprehensive assessment reveals a significant change in the resident's condition.''

Proposed paragraph (e)(3) did not state as well as we intended the resident's right to control whether to include a legal representative or interested family member in discharge planning. We have restated that point in redesignated paragraph (d)(2) as an affirmative right.

51.330 Nursing Care

One commenter requested clarification of the statement in the supplemental information of the proposed rule that the nursing care required in domiciliary care programs ''would be similar to what is required in nursing homes, except that we would not require the same level of skilled nursing supervision.'' VA received comments that, as proposed, § 51.330 would require State homes to staff domiciliary care programs with the same amount of nursing staff VA

requires State homes to provide for nursing home care programs. They commented that currently, State home domiciliary care programs require a licensed nurse as needed to meet the nursing care needs of the patient, citing section 5E of the 1986 Guide, whereas the proposed rule would require a licensed nurse for each shift, every day, around the clock. The commenters said that requirement could increase their costs for nursing supervision.

We agree the discussion was not clear about what ''similar to'' and ''level of supervision'' meant. We also agree that the proposed requirement could result in increased costs and that domiciliary care program residents may not require a licensed nurse on each shift, if the nursing care needs of the residents are met. We have, therefore, eliminated the proposed requirement that the director of the nursing service designate a licensed nurse as the supervising nurse for each tour of duty. Otherwise, the staffing requirements in this final rule are similar to the existing nursing care requirements for domiciliary care programs in section 5A of the 1986 Guide, which requires an organized nursing service of personnel qualified to meet the nursing care needs of the domiciliary patient. The final rule, however, clarifies that the residents' individual comprehensive assessments and comprehensive care plans determine their need for nursing services, and that need must be met 24 hours a day, 7 days a week. We continue to believe this is a reasonable and necessary requirement for availability of nursing care.

One commenter said that some states have regulations prescribing staffing levels for State homes. The commenter described the staffing level required by its Residential Care Home Licensing Regulation. The commenter recommended VA permit states with regulatory staffing levels to follow those regulations and that VA provide a regulation for states without a State regulated staffing level.

We decline to make the commenter's recommended change. Section 51.330, as revised, articulates VA's view of the minimum safe staffing for nursing care in State home domiciliary care programs. VA would not be comfortable relying on staffing levels set by the State because they might not meet that minimum. So, to allow the exemption from § 51.330 the commenter seeks, VA would have to review each State's regulation to assure it requires staffing equivalent to the minimum level VA considers acceptable. Such a plan would require a way for VA to know if any State's regulation changed, to again review the regulation, and to maintain a procedure for disallowing states from the exemption if a change permitted an unacceptable level of nurse staffing. This is not a practicable scheme for VA. We believe that if a state's regulations require nurse staffing equivalent to the level VA considers minimally acceptable, the cost cannot be significantly different from the cost of compliance with § 51.330, and the state would not realize any cost savings from the exemption. Consequently, we make no change based on this comment.

One commenter asked whether facilities with ''co-located'' domiciliary care and nursing home care programs on the same property or in the same building must have a director of nursing for each or if they may share a director of nursing. The commenter also asked whether the two programs can share the supervising nurse for each tour of duty, and whether a ''tour of duty'' is the same as a shift.

We intend the State homes to have the flexibility to staff their programs to ensure that all residents get the nursing care each resident's comprehensive assessment indicates each resident needs. The regulation does not preclude sharing a nursing director. A shared nursing director would comply with the regulation only, however, if the State home can ensure it meets the total nursing care needs of all residents in the facility. This final rule eliminates proposed § 51.330(b), which required a licensed supervising nurse for each tour of duty, so the questions about a shared nursing supervisor and whether a tour of duty is the same as a ''shift'' are moot.

51.340 Physician and Other Licensed Medical Practitioner Services

VA received comments about the requirement in proposed § 51.340 that State homes provide necessary primary care to domiciliary residents. Commenters objected to the proposed requirement in this rule, and raised concerns about the definition of ''primary care'' in the VA General Counsel Precedent opinion ruling that State home domiciliary care programs must provide primary care to be entitled to per diem payments. VAOPGCPREC 1–2014 (Mar. 21, 2014). Some commenters objected to the General Counsel's inclusion of surgical services in primary care, and some objected to its inclusion of mental health services in primary care. The commenters said surgical services and mental health services are generally considered specialty care, and VA should define primary care in the same manner as Medicare.

We recognize the confusion about what is included in primary care, which has resulted from the General Counsel opinion and the proposed rule, and therefore clarify that we do not consider primary care as including comprehensive mental health or surgical services. We thus do not consider § 51.340 as requiring a State home to provide domiciliary residents either surgical or comprehensive mental health services—only to assist residents with obtaining these services. See also section 51.2 of this rulemaking, which defines domiciliary care as including ''necessary medical services'' that are described in subpart E. Nothing in subpart E requires State domiciliaries to provide either surgical or comprehensive mental health services. We note, however that under this subpart (§§ 51.300(f)–(g), 51.320(d), 51.340), the State home is required to provide basic mental health screening. We acknowledge that proposed § 51.340 was unclear about what mental health services the State home domiciliaries would be required to provide without many of the clarifications in this final rule. The final rule requires the State home to provide ''its residents the primary care necessary to enable them to attain or maintain the highest practicable . . . mental, and psychosocial well-being.'' Though this could be misread to mean the domiciliary must provide all care necessary to attain or maintain mental health, we believe it is clear that it requires the domiciliary to provide only the necessary primary care. The State home discharges its obligation to enable its residents to attain or maintain mental and psychosocial well-being when it provides primary care. It further requires the State home to assist its residents to obtain other care when a resident needs care other than care the State home must provide. So, if the veteran needs mental health care other than that required by subpart E, the State home must assist the resident to obtain that care.

One commenter objected to the primary care requirement because it would substantially increase state expenses and undermine a resident's ability to obtain care from a physician of his or her choice. The commenter said the primary care requirement would require residents to abandon their existing physicians and mental health specialists, significantly reducing State home admissions and negatively affecting current residents.

One commenter stated medical care should be the veteran's choice when the veteran is capable of making the choice. The commenter did not address the

comment to a specific provision, so it is not clear whether the commenter was addressing a right to choose among health care practitioners or a right to choose to refuse care.

This regulation will not prevent State home domiciliary residents from seeing the private health care providers they choose to see. The § 51.340 requirements do not mean a resident may not see a private physician of his or her choice or must abandon an existing relationship with a private healthcare provider. Further, domiciliary residents retain the right to receive care from their private physicians in the State home domiciliary, provided the physician is credentialed and privileged in the State home. If the commenter means the veteran should have the choice whether to receive medical care, the veteran may refuse treatment under § 51.300, which applies to domiciliary residents the right to refuse treatment as prescribed in § 51.70(b)(4). We make no change based on these comments.

Furthermore, it is unclear why the commenter believes costs would increase; it may be because of the assumption that VA intended to include mental health and surgical services in primary care. The guidelines under which the State home domiciliary care programs have long operated required each resident to have a primary care physician responsible for the resident's medical care, and required that primary care medical services be provided for residents as needed. Section 51.340 imposes no additional primary care burdens or costs. Further, these regulations would not preclude States from charging the veteran's insurance for providing primary care. We make no changes based on this comment.

VA received a comment requesting a ''thorough and explicit definition of what primary care entails.'' The commenter was ''concerned that the proposed rules would transfer all medical costs associated with resident care to the state and nullify existing sharing agreements'' with the local VA facility. Another commenter also raised essentially the same points about the extent of health care the proposed regulations require and about transferring costs and sharing agreements, asserting the burden of shifting primary care costs could make operating domiciliary care unsustainable.

The regulation, as proposed, does not specifically define primary care, and we believe the common dictionary definition VA General Counsel quoted in the precedent opinion cited above is sufficient and widely used. VA declines to define primary care with a list of specific medical services. We disagree that lack of definition of primary care could affect the commenter's primary care sharing agreement with a local VA medical facility. Under the final regulation, this arrangement may continue. The State currently pays for the primary care VA provides through a sharing agreement, so there is no cost to transfer to the State. We make no change based on this comment.

VA received a comment saying that providing additional medical services would be especially burdensome to some State homes that were built in remote locations to care for veterans in underserved communities. Those homes, the commenter stated, currently experience hiring challenges and staffing shortages, and the new requirements would pose challenges and costs associated with hiring additional staff or contracting with outside providers.

We understand that staffing or otherwise obtaining the required services can be more difficult in some areas than others, whether because of remote location and a small labor pool, or because of a central, densely served market with stiff labor competition among employers. The primary care VA requires State homes provide is essential to the health, safety, and well-being of the domiciliary care residents. We will not eliminate or reduce the requirements in response to the vagaries of the local labor market. We make no change based on this comment.

VA received comments that the State home domiciliary care standards in the 1986 Guide, required that a resident be seen annually and as needed by the primary care physician or other licensed medical practitioner. The proposed rule, however, specified that the resident must be seen by the primary care physician or licensed medical practitioner at least every 30 days for the first 90 days after admission, and at least once annually thereafter, or more frequently based on the condition of the resident. The commenter said this requirement would result in a cost burden to the domiciliary, potentially a 100% increase in physician visit costs.

We agree with the commenter that more frequent primary care physician's visits than the State homes have been accustomed to providing will increase the State homes' costs. We also agree a domiciliary resident need not be seen every 30 days for the first 90 days of residency. The typical domiciliary resident's health does not require the frequency of medical monitoring we proposed. We have changed the requirement in § 51.340(d) to require an annual medical assessment, restating the provision in the active voice to read, ''The primary care physician or other licensed medical practitioner must conduct an in-person medical assessment of the resident at least once a calendar year, or more frequently based on the resident's condition.'' Though redundant of the annual medical assessment § 51.310 requires, it is useful also to restate here to consolidate the requirements regarding physicians and other medical practitioner services. This change also eliminates the colloquial expression ''be seen'' in favor of the more precise term ''assessment.''

One commenter interpreted proposed paragraph (e) to mean the domiciliary must provide or arrange for physician or other licensed medical practitioner services 24 hours a day, 7 days a week, in case of an emergency. The commenter also asked for clarification whether the provider must be on site or may be on call.

We did not intend the commenter's interpretation of the provision, which states, ''The State home must assist residents in obtaining emergency care.'' Though a State home certainly may staff its facility at all times, the provision does not require it. It requires only that the facility management be able assist the resident in obtaining emergency care. For example, a telephone call to local 911, if available, could comply with § 51.340(e). We make no change based on this comment.

51.350 Provision of Certain Specialized Services and Environmental Requirements

Proposed § 51.350 would have applied all of the standards applicable to State home nursing homes at §§ 51.140, 51.170, 51.180, 51.190, and 51.200 to State home domiciliary care programs. We are making multiple changes to this section. These correct errors in the proposed rule, respond to comments, and will serve the needs of State home domiciliary care programs and their residents better than would the proposed application of the whole of the sections we proposed to apply.

We are removing the phrase ''nursing home and nursing facility'' from the last sentence of the introduction to proposed § 51.350. Its use was an error. The cited regulations use the term ''the facility,'' but not, ''nursing home'' or ''nursing facility.'' As revised, the sentence reads, ''For purposes of this section, the references to 'facility' in the cited sections also refer to a domiciliary.''

VA received comments opposing the imposition of the whole of these regulations on domiciliary care

programs and recommending the domiciliary program standards be more consistent and commensurate with the stated definition and purpose of domiciliary care. Multiple commenters recommended increasing per diem payments for domiciliary care, as one put it, ''to be compensated for the increased requirements for our domiciliary care facility.'' This commenter specifically reported a $103,000.00 loss in its domiciliary care program in the past year, submitting a financial analysis.

We agree that certain standards that proposed § 51.350 would have applied to domiciliary care programs are impracticable or inappropriate. Consequently, we have revised proposed § 51.350, to exclude § 51.140(f)(2)–(4), § 51.180(c), and § 51.200(a), (b), (d)(1)(ii)–(x), (f), and (h)(3) from application to domiciliary care programs. In addition, we will exclude other provisions as discussed below. Though the mechanism for setting the rate of per diem payment is prescribed by statute, we anticipate these changes will also reduce the costs of compliance.

Section 51.140(f), Frequency of meals, requires nursing home residents to receive and nursing homes to provide three meals per day at regular times comparable to normal meal times in the community. Paragraph (f)(4) of that section allows an interval of 16 hours between dinner and breakfast if a nourishing snack ''is provided'' at bedtime. Consistent with comments about applying § 51.140 to domiciliaries that asserted the generally greater independence of domiciliary residents than nursing home residents, we have added § 51.350(a) to apply to domiciliaries instead of paragraph (f)(2)–(4). Paragraph (a)(1) requires no more than a 14-hour interval between the evening meal and breakfast. Paragraph (a)(2) requires the facility staff to offer snacks at bedtime daily, as does § 51.140(f)(3). Paragraph (a)(3) allows 16 hours between the evening meal and breakfast when the bedtime snack is nourishing. The difference between the domiciliary regulation and the nursing home regulation is the difference between whether the nourishing snack ''is offered'' or ''is provided'' to residents. This difference takes into account the greater independence of domiciliary residents, who can maintain adequate nutrition without the monitoring the nursing home requirement entails. It is, however, the nutritional character of the offered bedtime snack, not the resident's independence in whether to eat it, that affords the State home the additional two hours between the evening meal and breakfast.

Some commenters objected to the proposed monthly drug regimen review required under § 51.180(c)(1), saying that compared to the semiannual drug regimen review required for domiciliary residents in the 1986 Guide, the proposed rule would result in a significant cost increase.

VA agrees with the commenters. The intent of the proposal, to preserve the health and safety of State home domiciliary residents, can be met with a semiannual drug review. We have added § 51.350(b), which requires a drug regimen review at least once every six months and included the requirement in § 51.180(c)(2) requiring a report and action if any irregularities are found.

VA received comments objecting to the burdens of bringing State homes providing domiciliary care into compliance with the requirements of § 51.200, Physical environment. Multiple commenters said that transition-based programs are not currently required or able to meet many of the physical or plant features included in the nursing home standards. The commenters paraphrased or quoted provisions of § 51.200 to illustrate nursing home requirements they asserted domiciliary care facilities could not meet. Among these paraphrases or quotations were ''provide adequate room space in most rooms,'' apparently based on § 51.200(d)(1)(i)–(iv); ''provide sufficient privacy (ceiling suspended curtains extending around beds for total visual privacy) in rooms with more than one resident,'' apparently based on § 51.200(d)(1)(vii)–(viii); ''provide prescribed storage space for residents,'' apparently based on § 51.200(d)(2)(iv); ''have a resident calling system directly to nursing,'' apparently based on § 51.200(f); and ''have corridors equipped with handrails,'' paraphrasing § 51.200(h)(3). We construe these comments as references to these provisions because we do not interpret the commenters to literally oppose providing ''adequate privacy,'' or ''sufficient privacy.''

In response to the comments, we have excluded § 51.200(a), § 51.200(b), § 51.200(d)(1)(ii–x), § 51.200(f), and § 51.200(h)(3) from application to domiciliaries, as noted above. In place of the privacy requirements in § 51.200(d), we have provided for ''visual privacy'' in § 51.350(d), which reads, ''The facility must provide the means for visual privacy for each resident.'' This is based on § 51.200(d)(1)(vii), which requires nursing home bedrooms ''[b]e designed or equipped to ensure full visual privacy for each resident.'' Section 51.200(d)(1)(viii) further specifies that the nursing home bedrooms (other than private rooms) must have ''ceiling-suspended curtains,'' further specifying their placement and specifying other furnishings of the room to ensure ''visual privacy.'' We intend this § 51.350(d) to afford the State homes reasonable flexibility in finding a way to let the domiciliary resident sleep or change clothes or do other ordinarily private things without being watched or in open view of other residents.

While many of these requirements are essential to the health, safety, and well-being of the domiciliary residents, we agree with the commenters that some would pose an excessive burden to State home domiciliaries and are more appropriate for nursing home care than domiciliaries, because domiciliary residents remain more independent. For those reasons, in this final rule, we will not apply to domiciliaries the following environmental requirements: § 51.200(d)(1)(ii–x) regarding resident bedrooms; § 51.200(f) regarding resident call systems; and § 51.200(h)(3) regarding handrails. All of these requirements are more aligned with skilled nursing home care then they are with domiciliaries, and they are not requirements in VA domiciliaries.

VA received a comment that the cost of renovations and upgrades to meet the environmental requirements would total hundreds of millions of dollars nationwide, and the facilities would be forced to compete for funding with the limited resources in VA's State home construction grant program. We agree as discussed above that some of the proposed requirements were too burdensome, and we revised the regulation accordingly. We also agree that applications for grants from VA to meet the cost of complying with a § 51.350 requirement might compete with applications to fund other projects in the construction grant program, but life and safety projects are given priority over all other types of construction when VA determines whether to award construction or acquisition grants. (See 38 CFR part 59 for regulations governing grants to States for construction or acquisition of State homes.) We have revised the final rule to ease the burden of compliance with the specialized services and physical requirements for State home domiciliaries; the rest of the requirements under § 51.350 are essential to the health, safety, or well-being of domiciliary residents and cannot be eased or removed.

One commenter asked VA to ''grandfather in'' (*i.e.,* waive the

requirements for) older facilities that have not needed to comply with environmental requirements of § 51.100 and 51.200 that have traditionally applied only to nursing homes, citing the high costs of making the needed upgrades. Because these provisions are essential to the health, safety, and well-being of domiciliary residents, we will not waive the requirements for older facilities. We make no changes based on this comment.

VA received a comment that imposing the nursing home fire safety standards of § 51.200 would ''drive many homes out of business,'' saying State homes would have to reconsider providing domiciliary care altogether and perhaps provide only nursing home care.

We agree that some of the fire safety rules that apply to nursing home care programs are inappropriate for domiciliary care programs, because of the differences in the services they provide. Specifically, we will not require State home domiciliary care programs to meet NFPA 99, Health Care Facilities Code, as § 51.200(a) requires of State nursing home programs. We are, therefore, changing proposed § 51.350 by adding a new paragraph (c) that only requires State home domiciliaries to meet the ''applicable'' requirements of NFPA 101. We have changed the introduction to § 51.350 to exclude § 51.200(a) from application to domiciliaries.

We have also determined it would be inappropriate to apply the nursing home emergency power requirements of NFPA 99 to domiciliary facilities. NFPA 99 prescribes emergency generator specifications for nursing homes. It is not necessary or appropriate to require State home domiciliaries to have emergency power generating equipment that meets the NFPA 99 specifications of the sort appropriate to nursing homes and specified in § 51.200(b). The applicable provisions of NFPA 101 regarding emergency power will apply instead under § 51.350(c). We have thus changed the introduction to § 51.350 to exclude § 51.200(b) from application to domiciliaries.

General Concerns Regarding Domiciliary Regulations

One commenter, observing the proposed rule appeared to require a level of care for domiciliary residents that mirrors nursing home care, suggested it would have been beneficial to review assisted living regulations across the country because most State home domiciliaries are also licensed by their state's assisted living regulatory licensure and compliance.

We disagree about the benefit of reviewing State assisted living regulations. State assisted living regulations are not pertinent to VA's program of payment of per diem for veterans in State home domiciliary care programs. VA does not pay for assisted living. Veterans residing in a State home must meet the eligibility criteria either for a nursing home care program or for a domiciliary care program. The State home must meet VA's standards for receipt of per diem for those veterans. Moreover, VA must administer a nation-wide program. Consequently, we choose to have regulations of uniform, nation-wide application. These may be like some State assisted living regulations and unlike others, but State assisted living regulations are not an appropriate model for VA per diem regulations. We make no change based on this comment.

VA received a comment reporting grievances about conditions at State home domiciliary programs and asking VA to apply all of the regulations governing per diem payments to State home nursing home care programs to State home domiciliary care programs. The commenter urged VA to afford domiciliary care program residents the same care provided nursing home residents. The commenter requested that VA effect that change by issuing a VA General Counsel opinion. The commenter argued for immediate implementation of this opinion as a ''regulatory instrument'' until VA publishes domiciliary per diem regulations. Specifically, the commenter recommended as the ''holding'' of the opinion, ''[I]n order for a State to receive per diem payments from the VA for a resident in its State home domiciliary, the home must provide domiciliary care to the resident (or residents) in accordance with 38 CFR 51, the current VA regulation outlining long-term care of veterans in state nursing homes.'' The commenter requested specific VA officers implement the suggested General Counsel opinion.

Another commenter reported that a specific State home conducts residents' room inspections, threatens sanctions for [resident] non-compliance with the State home rules, schedules re-inspections, and then fails to follow through. The commenter stated this lack of follow through ''leaves us dangling,'' and demonstrates the ''ad hoc'' management of the State home.

Another commenter expressed grievances about a State's administration of a State home, including concerns that the domiciliary housed veterans unable or unwilling to meet the personal hygiene requirements for residency, allegations of failure to maintain the facility, allegations of failure to spend VA per diem payments on or on behalf of the residents, or of diverting the funds into the State's general fund. The commenter requested VA to regulate specific oversight, staffing, financial accounting, and expenditure requirements. Specifically, the commenter requested a regulation requiring ''all monies that the VA gives to the States for these Homes be placed in a separate account that can only be used for the Home.''

We decline to add a regulation to implement the suggestion regarding dedicated accounts. VA monitors each State home's census and its expenditures on nursing home, domiciliary, and adult day health care services. The State home must report the census of each program and submit a claim for per diem payments monthly on VA Form 10–5588. See § 51.42 of this rulemaking. By statute, VA ''shall have no authority over the management or control of any State home.'' 38 U.S.C. 1742(b). We believe establishing the regulation the commenter seeks would constitute management or control of State homes, contrary to the statute, and would violate that law. We make no change based on this comment.

Regarding the commenters' grievances relating to specific State homes, VA takes reports of grievances from residents of State home domiciliaries seriously; however, VA is unable to adjudicate the grievances in this rulemaking. The commenters are encouraged to voice their grievances directly with the State homes, which are better able to address such grievances. We note that § 51.300 now makes the nursing home standards regarding grievances applicable to State domiciliary care programs and these standards include the resident's right to voice grievances and have the facility implement prompt efforts to resolve these grievances. We further note that State homes must satisfy these standards to receive per diem. Again, specific allegations are best raised directly with the State home. VA therefore makes no changes based on this comment.

Regarding application of all of the State home nursing home program regulations to State home domiciliary care programs, we decline to do so for the reasons previously stated in this preamble. To briefly reiterate, many nursing home regulations would provide little benefit to domiciliary residents, or even be a detrimental burden, while imposing excessive operational constraints and costs on the States. This rulemaking, however, applies to the domiciliary care programs

those nursing care program regulations necessary to the health, safety, and well-being of domiciliary residents. See, for example, the discussion of § 51.300, above. VA therefore makes no changes based on this comment.

We decline to implement the request the commenter submitted in the form of a suggested VA General Counsel opinion the commenter authored seeking to have the Secretary of Veterans Affairs assign certain named VA officers to implement the requested changes. The Secretary's statutory authority includes delegation of certain authority to certain subordinate VA officers, but direct assignment of responsibilities to specific VA officers is beyond the scope of this rulemaking. VA therefore makes no changes based on this comment.

VA received comments recommending that part 51 ''further define the sovereign powers of the Resident Councils.'' The commenter proposed the creation of a National Association of State Veterans Homes Domiciliary Residents' Councils under the auspices of VA Geriatric and Extended Care Services. The commenter provided some details as to how the relationship should be between council members, residents and a VA liaison. The commenter also requested that VA provide whistleblower protections for State home residents who report unethical, illegal, or criminal conduct by a State home or VA employee or office, so that State homes cannot evict residents for speaking up.

Although we decline to make the specific changes this commenter requested, this rulemaking does implement protections for State home domiciliary residents that formerly applied only to nursing home residents. Section 51.300 requires domiciliaries to apply the provisions of §§ 51.70 and 51.100 not otherwise excluded from § 51.300. Among these are § 51.70(b)(6)(ii) requiring the State home to notify residents of the right to file complaints; § 51.70(j)(1)(iv) guaranteeing access to the State long term care ombudsman; § 51.100(c) requiring the State home to document any concerns the resident council submits; and § 51.100(d)(6) requiring the State home to listen to the views of any resident or family group, including the resident council, regarding policy and operations decisions affecting resident care and life in the facility. State home domiciliary residents thus will now have recourse for redress of grievances. We therefore make no change based on this comment.

Subpart F—Standards Applicable to the Payment of Per Diem for Adult Day Health Care

51.410 Transfer and Discharge

We have clarified the language of proposed § 51.410(b), which provides the residents' right to be informed about the possible reasons for a transfer or discharge from the program. We make no substantive changes.

We have changed the proposed heading of paragraph (c) to read, ''Notice before transfer or discharge.'', to be more descriptive of the text of the paragraph.

VA received comments asking to revise paragraph (c)(1), which requires the State home to notify the participant or his or her legal representative prior to a transfer or discharge. The commenters wanted ''or'' in the first sentence to be revised to ''and/or''. VA believes that the intent of this recommendation is to allow the State homes to notify, or ensure the State homes notify, both participants and their legal representatives. In fact, the requirement to notify the participant or the representative does not preclude the State home from notifying both if that is the participant's choice. The ''and'' alternative of ''and/or'' would, however, permit the provision to be read as requiring notice to the participant ''and'' to the representative. We intend to afford the participant control of whether the State home notifies a legal representative, a family member, or both. On further review, we see that as written, ''Notify the participant or the legal representative of the participant,'' could permit the State home to notify someone other than the participant and not notify the participant. To make clear the participant's right to decide who besides the participant the State home notifies of a transfer or discharge, we are revising § 51.410(c)(1) to read as does the revision to the domiciliary notice of transfer or discharge provision, discussed above. As revised, paragraph (c)(1) reads, ''Notify the resident of the transfer or discharge and the reasons for the move in writing and in a language and manner he or she understands. The resident has the right to decide whether to have the State home notify his or her legal representative or interested family member of changes.''.

VA received a comment requesting changes to § 51.410(e)(5), which as proposed read, ''The name, address and telephone number of the State long-term care ombudsman.'' The commenter stated the Older Americans Act Ombudsman program did not apply to adult day health care programs and recommended paragraph (e)(5) be revised as follows: ''The name address and telephone number of the State home's State Department of Health and/or the appropriate State Department of Social Services representative.''

The commenter raised the prospect that a State might not have an ombudsman who advocates for participants in a State home adult day health care program. The proposed requirement derives from § 52.70(h)(1)(iii), which requires State home program management to provide the State long-term care ombudsman with immediate access to participants. The object of proposed § 51.410(e)(5) was to ensure the notice of transfer or discharge includes information how to seek help if the participant objects to the transfer or discharge. We are changing § 51.410(e)(5) to address the possibility that a State does not have a long-term care ombudsman or any ombudsman responsive to State home adult day health care participants. We decline to use the ''and/or'' construction the commenter suggested, because it would permit the State to provide the contact information only for an impersonal state agency possibly difficult to navigate instead of providing the contact information of an ombudsman or other known advocate. We acknowledge, however, that the proposed requirement could be insufficient. We are changing paragraph (e)(5) by adding ''the first listed of the following that exists in the State:'' following ''The name, address and telephone number of''. We are further revising the paragraph by adding after the paragraph (e) introductory language, the following: ''(i) The State long-term care ombudsman, if the long-term care ombudsman serves adult day health care facilities; or (ii) Any State ombudsman or advocate who serves adult day health care participants; or (iii) The State agency responsible for oversight of State adult day care facilities.'' We intend the order of precedence and other changes to afford the participants the intended protection, with little additional burden to the State homes. These changes are a logical outgrowth of the comment. We have removed from proposed paragraph (g)(1) the phrase '', and ensured of timely admission to the hospital''. We have also changed ''and'' to ''or'' in both instances of the phrase ''transfer and discharge.'' The State home will transfer ''or'' discharge a participant, as circumstances require. There is no action called ''transfer and discharge.'' As revised, the paragraph reads, ''Participants will be given a transfer or discharge from the adult day health care program to the hospital when transfer or

discharge is medically appropriate as determined by a physician''. Neither VA nor the State home can ensure timely admission to a hospital; timeliness of admission is beyond VA and the State home's control. In practice, a transfer or discharge to a hospital will result in admission, observation, or other action according to the participant's medical condition and the usual medical and business practice of the hospital.

51.420 Quality of Life

VA received comments objecting to the storage requirement of § 51.420(g)(3), saying that in the State homes' experience, adult day health care participants need lockable storage on a very limited basis because they do not live at the State home. They recommended the participants be made aware that lockable storage is available, and that the homes provide it upon request. They suggested a locked closet with individual storage bins would be sufficient to secure a participant's change of clothes, and that the State home should also provide a coat closet for daily storage of coats, etc.

We agree that the proposed individually lockable storage is not necessary in the adult day health care setting. We proposed that each private storage space be lockable to afford security for wallets, purses, and the like, and we agree the availability of locked storage for those who wish to use it is sufficient. Accordingly, we have changed § 51.420(g)(3) to read, ''Private storage space for each participant sufficient for a change of clothes. Upon request of the participant, the State home must offer storage space that can be secured with a lock.''

51.425 Physician Orders and Participant Medical Assessment

As proposed, this section provided for two types of assessments, and as a result of the comments we received we have changed the names of these assessments in the final rule for clarity and to distinguish the initial medical assessment to determine that the veteran is suitable for and well enough to participate in the program and the subsequent assessment done to inform the comprehensive care plan. The assessment that was proposed in paragraph (a) is now called the ''initial medical assessment'' and the assessment in § 51.425(b) is now called the ''comprehensive assessment'' throughout the paragraph.

VA received comments that the requirement of § 51.425(a) for new adult day health care participants to have tuberculosis (TB) screening no sooner than 30 days before admission to the program would be an undue hardship on the participant or the participant's care giver because screening can take multiple doctor's office visits. The commenters, referencing an unpublished report of the Centers for Disease Control and Prevention, acknowledged that ''elderly nursing home residents are at greater risk for [TB] than elderly persons living in the community.'' They noted current VA practice is to allow TB screening upon admission. The commenters requested VA also allow the TB screening to be performed at the adult day health care program no later than 30 days after admission, which would reduce care-giver burden and facilitate admission by eliminating a potential cause of delay.

We agree that allowing the TB screening to be performed after admission to the adult day healthcare program could reduce the veteran and caregiver's burden and facilitate admission. We disagree, however, that 30 days after admission is an appropriate timeframe to complete screening because of the increased risk of TB among the participant population that the commenter identified. We also believe it is unsafe to have a participant in the program any longer than that with his or her medical history and current condition unknown. To allow more flexibility than the proposed rule allowed, while also requiring the history and physical examination with TB testing be done expeditiously, we have changed § 51.425(a) to allow them to be done no later than 7 calendar days after admission.

VA received comments regarding proposed § 51.425(b), which describes the State home adult day health care program's responsibility to conduct comprehensive assessments for each participant, and lists factors the program should consider in each assessment. The commenters recommended that instead of the assessment guidelines in this regulation, VA should allow each State with an established adult day health care program assessment tool to use it, and that States without assessment tools should work with a select group of members of the National Association of State Veterans Homes to develop an assessment tool to adopt as a national standard and submit to VA as an alternative. The commenters noted that the existing regulation requires each adult day health care program use the MDS–HC assessment tool, even though it is not an ''industry standard'' among adult day healthcare programs, and creating a new tool would solve the existing problem of the lack of a nationally recognized assessment tool and better serve the programs and veterans.

As with the assessments for domiciliary care programs, VA will not change the regulation to explicitly allow State home adult day health care programs to use State-mandated assessment tools, though the homes may do so if those tools meet the requirements in paragraph § 51.425(b). While we appreciate the offer to collaborate on a national tool, we believe that § 51.425(b) provides the States with necessary flexibility to create policies to meet their state's regulatory requirements or their program's needs, while ensuring the health and well-being of participants. We have added an introduction requiring the State home to establish in a written policy how it will complete, implement, review, and revise assessments. In addition to affording the State homes flexibility in devising their methods of assessment, the introduction helps to distinguish between the initial medical assessment and the subsequent comprehensive assessment.

VA received comments recommending that programs should make every effort to coordinate the participant's comprehensive care plan with any existing VA or community provider's comprehensive care plans, as appropriate. The commenters noted many participants seek admission to the State home adult day health care program without prior use of VA services, and often prefer and plan to continue to use their community physician for primary care. Because the State home is ultimately responsible for the care and services provided to each participant, the commenters said they should develop a comprehensive care plan that includes the recommendations of other agencies, including VA.

We agree with these comments. We believe it is consistent with the State home's responsibility to develop the comprehensive care plan that those plans include the recommendations of others providing care to the participant. We believe § 51.425 allows the State home to include the use or adaptation of existing care plans in its assessment and comprehensive care plan policy. We make no change based on this comment.

Based on the comments regarding § 51.425(b) pointing out that some participants enter State home adult day health care programs without a current care plan, we are removing the requirement from proposed § 51.425(b) that the participant have an individualized comprehensive care plan on ''the participant's first visit'' because the requirement is unnecessarily

burdensome. Instead, we are requiring that the State home complete the comprehensive assessment no later than 14 calendar days after admission.

Consistent with the comment that residents might not have a comprehensive care plan upon admission, we are revising proposed paragraph (d) to allow up to 21 calendar days after admission for the State to write a comprehensive care plan for each participant.

We changed certain word choices and phrasing in paragraph (c), but none has substantive effect. We pluralized the word ''assessment'' in the section heading, and rephrased the first sentence of paragraph (c)(1) to clarify that the assessments must be both conducted and coordinated with the appropriate health care professionals. We changed ''the assessment'' to ''an assessment'' in (c)(2) to ensure all assessments are certified. We added (c)(3), ''The results of the assessments must be used to develop, review, and revise the participant's individualized comprehensive care plan.'' This provision makes clear the ongoing relationships among the participant's assessments, changing condition, and comprehensive care plan.

51.430 Quality of Care

We are making technical corrections to proposed paragraph (a)(2) of this section. We are removing '', review, and prevent'' from the paragraph heading to more accurately state the topic of the paragraph. As proposed, the heading ''Duty to report, review, and prevent sentinel events'' commingled the topics of paragraphs (a)(2) and (a)(3). We are also striking from § 51.430(a)(2) the phrase '', review, and prevent'', because § 51.430(a)(2) is solely a notice provision, as is § 51.120(a)(3) from which it derives. We are also removing the reference to § 51.120(a)(4) from proposed § 51.430(a)(2) because § 51.120(a)(4) is the review, analysis, and prevention provision applicable to nursing homes. The mandate to review, analyze and prevent sentinel events in adult day health care programs derives from § 52.120(a)(4) and is restated in proposed § 51.430(a)(3). Additionally, § 51.120(a)(4) has a final sentence we did not intend to apply to § 51.430(a)(3). We referred to § 51.120(a)(4) in proposed § 51.430 erroneously.

51.440 Dietary Services

We have changed the second sentence of proposed § 51.440 so the references in § 51.140 to ''resident'' apply to a participant ''in subpart F.'' This clarifies the scope of the application of § 51.140 to the adult day health care program. Because of the other changes we are making to this section, discussed below, the text proposed as § 51.440 is now the introductory paragraph of the section.

To make the per diem regulations more concise and to eliminate repetition between current parts 51 and 52 of title 38 Code of Federal Regulations, we proposed that § 51.440 would apply the nursing home dietary service provisions of current § 51.140 to the adult day health care program. That was partly a mistake. The proposal inadvertently applied nursing home requirements for frequency of meals under § 51.140(f) that would be inapplicable to adult day health care programs. For example, the nursing home bedtime snack requirements have no application to a daytime only program. To correct this error, we have revised the introduction of § 51.440 to exclude application of § 51.140(f), and added the mealtime requirements of current § 52.140(e)(1) and (2) as paragraphs (a) and (b). These requirements are essential to ensure every adult day health care participant receives at least minimal nourishment during each session. Adding these requirements imposes no new burden on the State homes. They merely continue the current timing and nutritional requirements of the adult day health care program without change.

51.445 Physician Services

We are revising the introduction of § 51.445. The proposed language mistakenly refers to a physician's order for enrollment, but physicians don't write orders to enroll participants in the adult day health care program; they write orders to admit participants. We have corrected this error in terminology. We have also revised the next to last sentence to be more readable. As revised, the sentence reads, ''If a participant's medical needs require that the participant be placed in an adult day health care program that offers medical supervision, the primary care physician must state so in the order for admission.''

VA received comments recommending that VA require all State home adult day health care programs undertake certain practices such as: recording the name of the participant's primary care physician in his or her medical record; requiring that each participant see a primary care physician annually and when there is a change in condition; providing or arranging for acute care when a resident needs it; and ensuring participants are able to obtain emergency care when necessary. The commenters believed these practices should not be restricted only to adult day health care programs that offer medical supervision.

We agree with the first of these recommendations. As proposed, the provision requiring the State home to record the name of each participant's primary care physician is in paragraph (a) of this section, which applies specifically to programs that offer medical supervision. To apply it to all adult day health care program participants, we have moved the requirement from proposed paragraph (a)(2) to the introductory paragraph of this regulation in the final rule, where it applies to the entire section. We redesignated proposed paragraph (a)(3) as (a)(2).

We decline to require that each participant who is in a program that does not offer medical supervision see a primary care physician annually, because such a requirement is unnecessary for all adult day health care programs. We make no change based on this comment.

We decline to require programs that do not offer medical supervision to provide for acute care. State homes may choose to make acute care available, but those services are not by design the intent of social model programs. We make no change based on this comment.

Regarding the final recommendation, proposed paragraph (d), Availability of physicians for emergency care, does require that the management of all adult day health care programs ''must ensure that participants are able to obtain necessary emergency care,'' and the paragraph applies to all adult day health care programs. As with domiciliaries, the State home can meet the requirement by calling 911 emergency services on behalf of the participant. The State home may provide physicians for emergency care, but VA will not require it. We make no change based on this comment.

51.455 Dental Services

For clarity, we have inserted the word ''dental'' into paragraph § 4.455(a)(1) as proposed to read, ''In making dental appointments; and''.

51.470 Physical Environment

We have changed § 51.470(a), Life safety from fire, to read, ''The State home must meet the applicable requirements of National Fire Protection Association's NFPA 101, Life Safety from fire, as incorporated by reference in § 51.200.'' We determined that the proposed language was confusing regarding which NFPA codes applied to State home adult day health care programs. This change is for clarity only.

VA received comments agreeing with the space requirements proposed in § 51.470(b), but only for adult day health care programs with medical supervision. They suggested less space be required for programs that do not provide intensive medical services. Specifically, they suggested at least 70 square feet per participant, including office space for staff, as opposed to the 100 square feet required in the proposed rule; and 40 square feet per participant, excluding office space for staff, as opposed to the 60 square feet required in the proposed rule. They said programs that do not provide intensive medical services do not require the same space as those that do, because they do not provide rehabilitative services or require the same specialized equipment as medical model programs.

The space requirements in proposed § 51.470(b)(3) are the same as the ones in current § 52.200(b)(3). Moreover, they are the same standards VA imposes on VA adult day health care facilities. Likewise, we specify these space allotments in the standards for funding VA construction grants. See 38 CFR part 59. We specify these space allotments because we consider them essential to the health, safety, and well-being of the participants. We make no changes based on this comment.

51.480 Transportation

We received comments requesting that VA provide transportation reimbursement to State homes that provide their residents transportation to a VA medical center for medical care, noting VA reimburses veterans for mileage when traveling to and from a VA medical facility for medical services.

The commenter is correct that VA reimburses veterans for their travel expenses through the Beneficiary Travel program. Veteran residents of a State home may be eligible for Beneficiary Travel depending on the purpose of the travel and other factors. Similarly, VA may make a beneficiary travel payment to a person or organization other than the beneficiary when certain factors are met. 38 CFR 70.2 and 70.20 (defining ''claimant'' for beneficiary travel payments and explaining the application for payment process). This is addressed more fully in 38 CFR part 70. We make no change based on this comment.

Other Issues

One commenter commented on VA's definition of ''State'' in proposed § 51.2. The commenter said that a judicial decision requires the terms ''state'' and ''federal'' be interpreted to encompass any medical care a veteran obtains under the Affordable Care Act anywhere in the world. *King* v. *Burwell,* 576 U.S. ____(2015). By this interpretation, the commenter argued, VA must pay per diem to any veteran wherever in the world the veteran resides. The commenter advised VA to allow Congress to draft the per diem regulations to determine VA's logistical, financial, and fiduciary responsibilities.

VA was not a party to *King* v. *Burwell,* 576 U.S. ____(2015), and nothing it decided is binding on VA's payment of per diem to State homes. By law, VA cannot delegate the task of writing regulations for the State home program to Congress. In fact, Congress has directed VA to prescribe regulations which are necessary and appropriate to carry out laws administered by VA which would include the laws governing the payment of state home per diem and standards for State programs receiving such payments. 38 U.S.C. 501. We make no changes in response to this comment.

VA received a comment suggesting we revise the subject heading of this rulemaking to read, ''Per Diem for Nursing Home, Domiciliary, or Adult Day Health Care of Veterans in State Homes.'' The commenter recommended this rulemaking keep the organization and scope of the proposed rule in several respects. Specifically, that subpart D continues to provide regulations for nursing home care programs and part E for domiciliary care programs.

We decline to change the name of the final rule as the current name adequately describes the content of the rule, and we are keeping the subpart headings and their topics as proposed. We make no change in response to this comment.

The commenter commented that VA should require each State home to employ a regulatory compliance officer who will be a VA employee who resides in the State home to insure the home's compliance with all VA regulations.

VA uses regular surveys of the State homes to ensure compliance with VA regulations governing VA payment of per diem. VA lacks authority to place VA employees on a State home's staff, and adopting this recommendation would blur the line between VA and the State home's independent management. We make no change based on this comment.

In a related comment, another commenter asserted this rulemaking as proposed fails to establish a firm and effective system of legal enforcement by the VA of regulatory compliance and legislative oversight by State Veterans Homes (SVH) of VA Domiciliary Care Standards. A firm and effective VA regulatory enforcement mechanism must be established with respect to State Veterans Homes for the new VA regulation on VA-SVH Domiciliary Care Standards to have maximum positive force and effect.

The commenter recommended enforcing a more visible, professional and proactive role for the State Veterans Home [VISN] Liaison or for the SVH VA Medical Facility Representative as those positions were described in VHA Handbook 1145.01, Survey Procedures for State Veterans Homes (SVH) Providing Nursing Home Care and/or Adult Day Health Care (May 17, 2010). The commenter suggested adding certain duties to those assigned VA officers, including prescribing that VA notify State home residents and resident councils of the existence of these liaison officers, and that those duties be enforced by legislative directives in this rulemaking. The commenter urged that this rulemaking require State Departments of Veterans Affairs to ''a) promulgate state legislation that provides regulatory oversight of State Veterans Homes management, administration and operations; and b) promulgate state legislation that provides for the regulatory compliance by State Veterans Homes of VA Program Regulations.''

VA cannot require States to legislate. We disagree about whether this rulemaking provides effective means to ensure compliance with these regulations. We believe the processes prescribed in this rulemaking provide an effective means of oversight and enforcement of compliance with these regulations. These include the surveys for recognition and subsequent certification, provisional certification if needed, and potentially denial of certification, together with the multiple standards the State home must meet to obtain recognition and certification under part 51. Further, we decline to revise the duties of the VA officers as any such consideration would be beyond the scope of this rulemaking.

The same commenter sought amendments of §§ 51.70 and 51.100, providing specific language. Specifically, the commenter sought amendments of § 51.70(a)(1), (a)(2), (b)(9)(ii), (f), (j)(1)(iv), (j)(3), and (m) (including extensive suggestions for creation and management of married quarters); § 51.100(c), (d), (f), and (i).

This comment is distinguishable from the others that addressed the proposed rule's application of §§ 51.70 and 51.100 to the domiciliary care program because it seeks amendment of §§ 51.70 and 51.100. This rulemaking did not

propose to amend those sections, and VA declines to make any such amendments in this final rulemaking, without providing an adequate period for notice and comment. We will consider these comments for possible future amendment of §§ 51.70 and 51.100. We make no changes here based on these comments.

VA received a comment saying that as a resident of a State home in a remote location, a requirement to provide accommodations for family members to stay on special occasions would be a great benefit to veterans with families, and even to those without, but who would remember the happiness of family life and enjoy the presence of families. Another commenter urged VA to require State homes to provide private family visitation space, reporting that family has not visited during the resident's 13 years of residence in a State home for lack of a private visitation room or space.

We appreciate the commenters' desire for State homes to facilitate family visits this way and certainly encourage State homes to do what they can to facilitate family visits. However, providing accommodations for visiting family could be a significant expense for State homes. We thus make no change based on this comment.

VA received a comment that State politics and corruption take precedence over State home residents' welfare. The commenter proposed creation of an oversight group to take legal action against misuse of Federal funds, lest the funds that States have earmarked for the care of Veterans disappear into other accounts in each state.

While we understand the commenter has concerns, the solution the commenter seeks is beyond the scope of this rulemaking. Consequently, we make no changes based on this comment.

One commenter asked that VA ''coordinate the impact of the semantic differential between terms,'' *i.e.,* define terms the same in Veterans Health Administration (VHA) regulations in 38 CFR part 51 and Veterans Benefits Administration (VBA) regulations in 38 CFR parts 3 and 4. The commenter asserted differences in the use or definition of the same or similar terms could affect how and to whom VBA awards special monthly compensation benefits or aid and attendance benefits under part 3, or temporary total disability evaluations under part 4. The commenter asserts VA regulations are unclear regarding whether a veteran's residency in a State home can qualify for special monthly compensation or pension rates that use nursing home care as a criterion of entitlement. The commenter also urged VA to apply 38 U.S.C. 1151, Benefits for persons disabled by treatment or vocational rehabilitation, to disability incurred in State homes receiving VA per diem payments. The commenter inquired of the significance of residence in a State home to a veteran's VA disability compensation or pension payments. The commenter asserted VA is creating additional burdens for states and confusion through lack of consistency and clarity throughout its regulations, like that resulting from conflict of laws regarding pensioners getting Medicaid-covered nursing home care.

The commenter raises points worthy of legal review and perhaps of rulemaking. It is beyond the scope of this rulemaking to harmonize definitions among parts 3, 4, and 51 of title 38, Code of Federal Regulations. The application of definitions in this rulemaking to claims for monetary benefits the VBA administers, including benefits under 38 U.S.C. 1151, and the effect of residency in a State home on any veteran's monetary benefits, are appropriately addressed in an individual claim to VBA for those benefits. They too are beyond the scope of this rulemaking. Whereas the commenter has raised no issue regarding, or requested any change to, the proposed regulations that are within the scope of this rulemaking, we make no changes based on this comment.

Based on the rationale set forth in the supplementary information to the proposed rule and in the preceding discussion, VA is adopting the provisions of the proposed rule as final, with changes as noted.

Effect of Rulemaking

Title 38 of the Code of Federal Regulations, as revised by this final rule, represents VA's implementation of its legal authority on this subject. Other than future amendments to this regulation or governing statutes, no contrary guidance or procedures are authorized. All existing or subsequent VA guidance must be read to conform with this rulemaking if possible. If not possible, this rulemaking supersedes such guidance.

Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. 3507) requires that VA consider the impact of paperwork and other information collection burdens imposed on the public. Under 44 U.S.C. 3507(a), an agency may not collect or sponsor the collection of information, nor may it impose an information collection requirement, unless it displays a currently valid Office of Management and Budget (OMB) control number. See also 5 CFR 1320.8(b)(3)(vi).

Although this action contains provisions constituting collections of information at 38 CFR 51.20, 51.30, 51.31, 51.42, 51.210, 51.300, 51.310, 51.320, 51.350, 51.390, 51.400, 51.405, 51.410, 51.415, 51.420, 51.425, 51.430, 51.445, 51.460, and 51.475 under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3521), no new or proposed revised collections of information are associated with this final rule. The information collection requirements for §§ 51.20, 51.30, 51.31, 51.42, 51.210, 51.300, 51.310, 51.320, 51.350, 51.390, 51.400, 51.405, 51.410, 51.415, 51.420, 51.425, 51.430, 51.445, 51.460, and 51.475 are currently approved by the Office of Management and Budget (OMB) and have been assigned OMB control number 2900–0160.

Section 51.42 also provides for information collection. The OMB currently approves this information collection under control number 2900–0091.

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 they are defined in the Regulatory Flexibility Act, 5 U.S.C. 601–612. This rule affects veterans, State homes, and pharmacies. The State homes that are subject to this rulemaking are State government entities under the control of State governments. All State homes are owned, operated, and managed by State governments or nonprofit organizations created by the State except for a small number that are operated by entities under contract with State governments. These contractors are not small entities. Also, this rulemaking will not have a consequential effect on any pharmacies that could be considered small entities. Therefore, pursuant to 5 U.S.C. 605(b), this rulemaking is exempt from the final regulatory flexibility analysis requirements of sections 603 and 604.

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 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.''

OMB has examined the economic, interagency, budgetary, legal, and policy implications of this regulatory action and it has been determined not to be a significant regulatory action under Executive Order 12866. VA's regulatory 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 the rulemaking and its regulatory 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 FYTD.'' This rule is not an E.O. 13771 regulatory action because this rule is not significant under E.O. 12866.

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 an 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.

Catalog of Federal Domestic Assistance

The Catalog of Federal Domestic Assistance numbers and titles for the programs affected by this document are 64.005, Grants to States for Construction of State Home Facilities; 64.007, Blind Rehabilitation Centers; 64.008, Veterans Domiciliary Care; 64.009, Veterans Medical Care Benefits; 64.010, Veterans Nursing Home Care; 64.011, Veterans Dental Care; 64.012, Veterans Prescription Service; 64.013, Veterans Prosthetic Appliances; 64.014, Veterans State Domiciliary Care; 64.015, Veterans State Nursing Home Care; 64.016, Veterans State Hospital Care; 64.018, Sharing Specialized Medical Resources; 64.019, Veterans Rehabilitation Alcohol and Drug Dependence; 64.022, Veterans Home Based Primary Care; 64.026, Veterans State Adult Day Health Care; and 64.053, Payments to States for Programs to Promote the Hiring and Retention of Nurses at State Veterans Homes.

List of Subjects in 38 CFR Parts 17, 51, and 52

Administrative practice and procedure, Claims, Day care, Dental health, Government contracts, Grant programs—health, Grant programs—veterans, Health care, Health facilities, Health professions, Health records, Mental health programs, Nursing homes, Reporting and recordkeeping requirements, Travel and transportation expenses, 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 November 9, 2018, for publication.

Dated: November 13, 2018.

Consuela Benjamin,

Regulations Development Coordinator, Office of Regulation Policy & Management, Office of the Secretary, Department of Veterans Affairs.

For the reasons stated in the preamble and under the authority of 38 U.S.C. 1741–1743 and 38 U.S.C. 1745, the Department of Veterans Affairs is amending 38 CFR parts 17, 51, and 52 as follows:

PART 17—MEDICAL

■ 1. The authority citation for part 17 continues to read as follows:

Authority: 38 U.S.C. 501, and as noted in specific sections.

§ § 17.190–17.194 [Removed].

■ 2. Remove the undesignated center heading ''Aid to States for Care of Veterans in State Homes'' and §§ 17.190 through 17.194.

§ § 17.196–17.200 [Removed]

■ 3. Remove §§ 17.196 through 17.200.

PART 51—PER DIEM FOR NURSING HOME, DOMICILIARY, OR ADULT DAY HEALTH CARE OF VETERANS IN STATE HOMES

■ 4. The authority citation for part 51 is amended to read as follows:

Authority: 38 U.S.C. 101, 501, 1710, 1720, 1741–1743, 1745, and as follows.

Section 51.20 and 51.30 also issued under 38 U.S.C. 511, 1742, 7104 and 7105.

Section 51.42 also issued under 38 U.S.C. 510 and 1744.

Section 51.43 also issued under 38 U.S.C. 1712.

Section 51.310 also issued under 38 U.S.C. 1720(f).

■ 5. Revise the part heading as set forth above.

■ 6. Revise subpart A, consisting of §§ 51.1 and 51.2, to read as follows:

Subpart A—General

Sec.
51.1 Purpose and scope of this part.
51.2 Definitions.

Subpart A—General

§ 51.1 Purpose and scope of this part.

The purpose of this part is to establish VA's policies, procedures, and standards applicable to the payment of per diem to State homes that provide nursing home care, domiciliary care, or adult day health care to eligible veterans. Subpart B of this part sets forth the procedures for recognition and certification of a State home. Subpart C sets forth requirements governing the rates of, and procedures applicable to, the payment of per diem; the provision of drugs and medicines; and for which veterans VA will pay per diem. Subparts D, E, and F set forth standards that any State home seeking per diem payments for nursing home care (subpart D), domiciliary care (subpart E), or adult day health care (subpart F) must meet.

§ 51.2 Definitions.

For the purposes of this part:

Activities of daily living (ADLs) means the functions or tasks for self-care usually performed in the normal course of a day, *i.e.,* mobility, bathing, dressing, grooming, toileting, transferring, and eating.

Adult day health care means a therapeutic outpatient care program that includes one or more of the following services, based on patient care needs: Medical services, rehabilitation, therapeutic activities, socialization, and nutrition. Services are provided in a congregate setting.

Clinical nurse specialist means a licensed professional nurse with a master's degree in nursing and a major in a clinical nursing specialty from an academic program accredited by the National League for Nursing.

Director means the Director of the VA medical center of jurisdiction, unless the reference is specifically to another type of director.

Domiciliary care means the furnishing of a home to a veteran, including the furnishing of shelter, food, and other comforts of home, and necessary medical services as defined in this part. For purposes of the definition of ''domiciliary care,'' *necessary medical services* means the medical services subpart E of this part requires the State home to provide.

Eligible veteran means a veteran whose care in a State home may serve as a basis for per diem payments to the State. The requirements that an eligible veteran must meet are set forth in §§ 51.50 (nursing home care), 51.51 (domiciliary care), and 51.52 (adult day health care).

Licensed medical practitioner means a nurse practitioner, physician, physician assistant, or primary care physician.

Nurse practitioner means a licensed professional nurse who is currently licensed to practice in a State; who meets that State's requirements governing the qualifications of nurse practitioners; and who is currently certified as an adult, family, or gerontological nurse practitioner by a nationally recognized body that provides such certification for nurse practitioners, such as the American Nurses Credentialing Center or the American Academy of Nurse Practitioners.

Nursing home care means the accommodation of convalescents or other persons who are not acutely ill and not in need of hospital care, but who require nursing care and related medical services, if such nursing care and medical services are prescribed by, or are performed under the general direction of, persons duly licensed to provide such care. The term includes services furnished in skilled nursing care facilities, in intermediate care facilities, and in combined facilities. It does not include domiciliary care.

Participant means an individual receiving adult day health care.

Physician means a doctor of medicine or osteopathy legally authorized to practice medicine or surgery in the State.

Physician assistant means a person who meets the applicable State requirements for a physician assistant, is currently certified by the National Commission on Certification of Physician Assistants as a physician assistant, and has an individualized written scope of practice that determines the authorization to write medical orders, to prescribe medications, and to accomplish other clinical tasks under appropriate physician supervision.

Primary care physician means a designated generalist physician responsible for providing, directing, and coordinating health care that is indicated for the residents or participants.

Program of care means any or all of the three levels of care for which VA may pay per diem under this part.

Resident means an individual receiving nursing home or domiciliary care.

State means each of the several States, the District of Columbia, the Virgin Islands, the Commonwealth of Puerto Rico, Guam, the Commonwealth of the Northern Mariana Islands, and American Samoa.

State home means a home recognized and, to the extent required by this part, certified pursuant to this part that a State established primarily for veterans disabled by age, disease, or otherwise, who by reason of such disability are incapable of earning a living. A State home must provide at least one program of care (*i.e.,* domiciliary care, nursing home care, or adult day health care).

VA means the U.S. Department of Veterans Affairs.

Veteran means a veteran under 38 U.S.C. 101.

■ 7. Revise subpart B, consisting of §§ 51.20 and 51.30 through 51.32, to read as follows:

Subpart B—Obtaining Recognition and Certification for per Diem Payments

Sec.
51.20 Recognition of a State home.
51.30 Certification of a State home.
51.31 Surveys for recognition and/or certification.
51.32 Terminating recognition.

Subpart B—Obtaining Recognition and Certification for per Diem Payments

§ 51.20 Recognition of a State home.

(a) *How to apply for recognition.* To apply for recognition of a home for purposes of receiving per diem from VA, a State must submit a letter requesting recognition to the Office of Geriatrics and Extended Care in VA Central Office, 810 Vermont Avenue NW, Washington, DC 20420. The letter must be signed by the State official authorized to make the request. The letter will be reviewed by VA, in accordance with this section.

(b) *Survey and recommendation by Director.* (1) After receipt of a letter requesting recognition, VA will survey the home in accordance with § 51.31 to determine whether the facility and program of care meet the applicable requirements of subpart C and the applicable standards in subpart D, E, or F of this part. For purposes of the recognition process including the survey, references to State homes in the standards apply to homes that are being considered by VA for recognition as State homes.

(2) If the Director of the VA Medical Center of jurisdiction determines that the applicable requirements and standards are met, the Director will submit a written recommendation for recognition to the Under Secretary for Health.

(3) If the Director does not recommend recognition, the Director will submit a written recommendation against recognition to the Under Secretary for Health and will notify in writing the State official who signed the letter submitted under paragraph (a) of this section and the State official authorized to oversee operations of the home. The notification will state the following:

(i) The specific standard(s) not met; and

(ii) The State's right to submit a response to the Under Secretary for Health, including any additional evidence, no later than 30 calendar days after the date of the notification to the State.

(c) *Decision by the Under Secretary for Health.* After receipt of a recommendation from the Director, and allowing 30 calendar days for the state to respond to a negative recommendation and to submit evidence, the Under Secretary for Health will award or deny recognition based on all available evidence. The applicant will be notified of the decision in writing. Adverse decisions may be appealed to the Board of Veterans' Appeals (see 38 CFR part 20).

(d) *Effect of recognition.* (1) Recognition of a State home means that, at the time of recognition, the facility and its program of care meet the applicable requirements of this part. The State home must obtain certification after recognition in accordance with § 51.30.

(2) After a State home is recognized, any new annex, new branch, or other expansion in the size or capacity of a home or any relocation of the home to a new facility must be separately recognized.

(The Office of Management and Budget has approved the information collection

requirements in this section under control number 2900–0161.)

§ 51.30 Certification of a State home.

(a) *General certification requirement.* To be certified, the State home must allow VA to survey the home in accordance with § 51.31. A State home must be certified no later than 450 calendar days after the State home is recognized. Certifications expire 600 calendar days after the date of their issuance.

(b) *Periodic certifications required.* The Director of the VA medical center of jurisdiction will certify a State home based on a survey conducted at least once every 270–450 calendar days, at VA's discretion, and will notify the State official authorized to oversee operations of the State home of the decision regarding certification.

(c) *Decreasing capacity for a program of care.* The State must report any decreases in the capacity for a particular program of care to the Office of Geriatrics and Extended Care in VA Central Office, 810 Vermont Avenue NW, Washington, DC 20420 no later than 30 calendar days after such decrease, and must provide an explanation for the decrease.

(d) *Provisional certification*—(1) *When issuance is required.* After a VA survey, the Director must issue a provisional certification for the surveyed State home if the Director determines that all of the following are true:

(i) The State home does not meet one or more of the applicable requirements or standards in this part;

(ii) None of these deficiencies immediately jeopardize the health or safety of any resident or participant;

(iii) No later than 20 working days after receipt by the State home of the survey report, the State submitted to the Director a written plan to remedy each deficiency in a specified amount of time; and

(iv) The plan is reasonable and the Director has sent a written notice to the appropriate person(s) at the State home informing him or her that the Director agrees to the plan.

(2) *Surveys to continue while under provisional certification.* VA will continue to survey the State home while it is under a provisional certification in accordance with this section and § 51.31. After such a survey, the Director will continue the provisional certification if the Director determines that the four criteria listed in paragraphs (c)(1)(i)–(iv) of this section are true.

(e) *Notice and the right to appeal a denial of certification.* A State home has the right to appeal when the Director determines that a State home does not meet the requirements of this part (*i.e.,* denies certification). An appeal is not provided to a State for a State home that receives a provisional certification because, by providing the corrective action plan necessary to receive a provisional certification, a State demonstrates its acceptance of VA's determination that it does not meet the VA standards for which the corrective action plan was submitted.

(1) *Notice of decision denying certification.* The Director will issue in writing a decision denying certification that sets forth the specific standard(s) not met. The Director will send a copy of this decision to the State official authorized to oversee operations of the State home, and notify that official of the State's right to submit a written appeal to the Under Secretary for Health as stated in paragraph (e)(2) of this section. If the State home does not submit a timely written appeal, the Director's decision becomes final and VA will not pay per diem for any care provided on or after the 31st day after the State's receipt of the Director's decision.

(2) *Appeal of denial of certification.* The State must submit a written appeal no later than 30 calendar days after the date of the notice of the denial of certification. The appeal must explain why the denial of certification is inaccurate or incomplete and provide any relevant information not considered by the Director. Any appeal that does not identify a reason for disagreement will be returned to the sender without further consideration. If the State home submits a timely written appeal, the Director's decision will not take effect and VA will continue to pay per diem to the State home pending a decision by the Under Secretary for Health.

(3) *Decision on appeal of a denial of certification.* The Under Secretary for Health will review the matter, including any relevant supporting documentation, and issue a written decision that affirms or reverses the Director's decision. The State will be notified of the decision, which may be appealed to the Board of Veterans' Appeals (see 38 CFR part 20) if it results in a loss of per diem payments to the State. VA will terminate recognition and certification and discontinue per diem payments for care provided on and after the date of the Under Secretary for Health's decision affirming a denial of certification or on a later date that must be specified by the Under Secretary for Health.

(f) *Other appeals.* Appeals of matters not addressed in this section will be governed by 38 CFR part 20.

(The Office of Management and Budget has approved the information collection requirements in this section under control number 2900–0161)

§ 51.31 Surveys for recognition and/or certification.

(a) *General.* Both before and after a home is recognized and certified, VA may survey the home as necessary to determine whether it complies with applicable regulations. VA will provide advance notice before a recognition survey, but advance notice is not required before other surveys. A survey, as necessary, may cover all parts of the home or only certain parts, and may include review, audit, and production of any records that have a bearing on compliance with the requirements of this part (including any reports from state or local entities), as well as the completion and submission to VA of all required forms. The Director will designate the VA officials and/or contractors to survey the home.

(b) *Recognition surveys.* VA will not conduct a recognition survey unless the following minimum requirements are met:

(1) For nursing homes and domiciliaries, the home has at least 20 residents or has a number of residents consisting of at least 50 percent of the resident capacity of the home;

(2) For adult day health care programs of care, the program has at least 10 participants or has a number of participants consisting of at least 50 percent of participant capacity of the program.

(c) *Threats to public, resident, or participant safety.* If VA identifies a condition at the home that poses an immediate threat to public, resident or participant safety, or other information indicating the existence of such a threat, the Director of the VA medical center of jurisdiction will immediately report this to the VA Network Director (10N1–22); the Office of Geriatrics and Extended Care in VA Central Office; and the State official authorized to oversee operations of the home.

(The Office of Management and Budget has approved the information collection requirements in this section under control number 2900–0160.)

§ 51.32 Terminating recognition.

Once a home has achieved recognition, the recognition will be terminated only if the State requests that the recognition be terminated, or if VA makes a final decision that affirms the Director's decision not to certify the State home.

■ 8. Revise the heading for subpart C to read as follows:

Subpart C—Requirements Applicable to Eligibility, Rates, and Payments

* * * * *

■ 9. Revise § 51.40 to read as follows:

§ 51.40 Basic per diem rates.

(a) *Basic rate.* Except as provided in § 51.41, VA will pay per diem for care provided to an eligible veteran at a State home at the lesser of the following rates:

(1) One-half of the daily cost of the care for each day the veteran is in the State home, as calculated under paragraph (b) of this section.

(2) The basic per diem rate for each day the veteran is in the State home. The basic per diem rate is established by VA for each fiscal year in accordance with 38 U.S.C. 1741(a) and (c).

Note to paragraph (a): To determine the number of days that a veteran was in a State home, see paragraph (c) of this section.

(b) *How to calculate the daily cost of a veteran's care.* The daily cost of care consists of those direct and indirect costs attributable to care at the State home, divided by the total number of residents serviced by the program of care. Cost principles are set forth in Office of Management and Budget (OMB) regulations. 2 CFR 200.400–200.475.

(c) *Determining whether a veteran spent a day receiving nursing home or domiciliary care*—(1) *Nursing homes.* VA will pay per diem for each day that the veteran is receiving nursing home care and has an overnight stay at the State home. Per diem also will be paid for a day when there is no overnight stay if the State home nursing home care program has an occupancy rate of 90 percent or greater on that day. However, these payments will be made only for the first 10 consecutive days during which the veteran is admitted as a patient for any stay in a VA or other hospital (a hospital stay could occur more than once in a calendar year once there is an overnight stay in the State home between hospital stays) and only for the first 12 days in a calendar year during which the veteran is absent for purposes other than receiving hospital care. Occupancy rate is calculated by dividing the total number of residents (including nonveterans) in the nursing home on that day by the total recognized nursing home capacity in that State home.

(2) *Domiciliaries.* VA will pay per diem for each day that the veteran is receiving domiciliary care and has an overnight stay at the State home. VA will also pay per diem during any absence of 96 or fewer consecutive hours for purposes other than receiving hospital care at VA expense, but VA will not pay per diem for any part of the absence if it continues for longer than 96 consecutive hours. Absences that are not interrupted by at least 24 hours of continuous residence in the State home are considered one continuous absence.

(d) *Determining whether a Veteran spent a day receiving adult day health care.* Per diem will be paid for a day of adult day health care. For purposes of this section a day of adult day health care means:

(1) Six hours or more in one calendar day in which a veteran receives adult day health care; or

(2) Any two periods of at least 3 hours each but less than 6 hours each in any 2 calendar days in the same calendar month in which the veteran receives adult day health care.

(3) Time during which the State home provides transportation between the veteran's residence and the State home or to a health care visit, or provides staff to accompany a veteran during transportation or a health care visit, will be included as time the veteran receives adult day health care.

■ 10. Revise § 51.42 to read as follows:

§ 51.42 Payment procedures.

(a) *Forms required*—(1) *Forms required at time of admission or enrollment.* As a condition for receiving payment of per diem under this part, the State home must submit the forms identified in paragraphs (a)(1)(i) and (ii) of this section to the VA medical center of jurisdiction for each veteran at the time of the veteran's admission to or enrollment in a State home. If the home is not a recognized State home, the home must, after recognition, submit forms for Veterans who received care on and after the date of the completion of the VA survey that provided the basis for determining that the home met the standards of this part. The State home must also submit the appropriate form with any request for a change in the type of per diem paid on behalf of a veteran as a result of a change in the veteran's program of care or a change in the veteran's service-connected disability rating that makes the veteran's care eligible for payment under § 51.41. Copies of VA Forms can be obtained from any VA Medical Center and are available on our website at *www.va.gov/vaforms.* The required forms are:

(i) A completed VA Form 10–10EZ, Application for Medical Benefits (or VA Form 10–10EZR, Health Benefits Renewal Form, if a completed Form 10–10EZ is already on file at VA).

Note 1 to paragraph (a)(1)(i): Domiciliary applicants and residents must complete the financial disclosure sections of VA Forms 10–10EZ and 10–10EZR, and adult day health care applicants may be required to complete the financial disclosure sections of these forms in order to enroll with VA. Although the nursing home applicants or residents or adult day health care participants do not complete the financial disclosure sections of VA Forms 10–10EZ and 10–10EZR, an unsigned form is incomplete, and VA will not accept the form.

(ii) A completed VA Form 10–10SH, State Home Program Application for Care—Medical Certification.

(2) *Form required for monthly payments.* Except as provided in paragraphs (b)(1) and (2) of this section, VA pays per diem on a monthly basis for care provided during the prior month. To receive payment, the State must submit each month to the VA a completed VA Form 10–5588, State Home Report and Statement of Federal Aid Claimed.

(b) *Commencement of payments*—(1) *Per diem payments for a newly-recognized State home.* No per diem payments will be made until VA recognizes the home and each veteran resident for whom VA pays per diem is verified as being eligible; however, per diem payments will be made retroactively for care that was provided on and after the date of the completion of the VA survey that provided the basis for determining that the home met the standards of this part.

(2) *Per diem payments for capacity certified under § 51.30(c).* Per diem will be paid for the care of veterans in capacity certified in accordance with § 51.30(c) retroactive to the date of the completion of the survey if the Director certifies the capacity as a result of that survey.

(3) *Payments for eligible veterans.* When a State home admits or enrolls an eligible veteran, VA will pay per diem under this part from the date of receipt of the completed forms required by this section, except that VA will pay per diem from the date care began if the Director receives the completed forms no later than 10 calendar days after care began. VA will make retroactive payments of per diem under paragraphs (b)(1) and (2) of this section only if the Director receives the completed forms that must be submitted under this section.

(The Office of Management and Budget has approved the information collection requirements in this section under control numbers 2900–0091 and 2900–0160.)

■ 11. Revise § 51.43 to read as follows:

§ 51.43 Drugs and medicines for certain veterans.

(a) In addition to the per diem payments under § 51.40 of this part, the

Secretary will furnish drugs and medicines to a State home as may be ordered by prescription of a duly licensed physician as specific therapy in the treatment of illness or injury for a veteran receiving nursing home care in a State home if—

(1) The veteran:

(i) Has a singular or combined rating of less than 50 percent based on one or more service-connected disabilities and needs the drugs and medicines for a service-connected disability; and

(ii) Needs nursing home care for reasons that do not include care for a VA adjudicated service-connected disability; or

(2) The veteran:

(i) Has a singular or combined rating of 50 or 60 percent based on one or more service-connected disabilities and needs the drugs and medicines; and

(ii) Needs nursing home care for reasons that do not include care for a VA adjudicated service-connected disability.

(b) VA will also furnish drugs and medicines to a State home for a veteran receiving nursing home, domiciliary, or adult day health care in a State home pursuant to 38 U.S.C. 1712(d), as implemented by § 17.96 of this chapter, subject to the limitation in § 51.41(c)(2).

(c) VA may furnish a drug or medicine under paragraph (a) of this section and under § 17.96 of this chapter only if the drug or medicine is included on VA's National Formulary, unless VA determines a non-Formulary drug or medicine is medically necessary.

(d) VA may furnish a drug or medicine under this section and under § 17.96 of this chapter by having the drug or medicine delivered to the State home in which the veteran resides by mail or other means and packaged in a form that is mutually acceptable to the State home and to VA set forth in a written agreement.

(e) As a condition for receiving drugs or medicine under this section or under § 17.96 of this chapter, the State must submit to the VA medical center of jurisdiction a completed VA Form 10–0460 with the corresponding prescription(s) for each eligible veteran.

(The Office of Management and Budget has approved the information collection requirements in this section under control number 2900–0160.)

■ 12. Revise § 51.50 to read as follows:

§ 51.50 Eligible veterans—nursing home care.

A veteran is an eligible veteran for the purposes of payment of per diem for nursing home care under this part if VA determines that the veteran needs nursing home care; is not barred from receiving care based on his or her service (see 38 U.S.C. 5303, 5303A), is not barred from receiving VA pension, compensation or dependency and indemnity compensation based on the character of a discharge from military service (see 38 CFR 3.12) and is within one of the following categories:

(a) Veterans with service-connected disabilities;

(b) Veterans who are former prisoners of war, who were awarded the Purple Heart, or who were awarded the medal of honor under 10 U.S.C. 3741, 6241, or 8741 or 14 U.S.C. 491;

(c) Veterans who were discharged or released from active military service for a disability incurred or aggravated in the line of duty;

(d) Veterans who receive disability compensation under 38 U.S.C. 1151;

(e) Veterans whose entitlement to disability compensation is suspended because of the receipt of retired pay;

(f) Veterans whose entitlement to disability compensation is suspended pursuant to 38 U.S.C. 1151, but only to the extent that such veterans' continuing eligibility for nursing home care is provided for in the judgment or settlement described in 38 U.S.C. 1151;

(g) Veterans who VA determines are unable to defray the expenses of necessary care as specified under 38 U.S.C. 1722(a);

(h) Veterans solely seeking care for a disorder associated with exposure to a toxic substance or radiation, for a disorder associated with service in the Southwest Asia theater of operations during the Persian Gulf War, as provided in 38 U.S.C. 1710(e), or for any illness associated with service in combat in a war after the Gulf War or during a period of hostility after November 11, 1998, as provided and limited in 38 U.S.C. 1710(e);

(i) Veterans who agree to pay to the United States the applicable co-payment determined under 38 U.S.C. 1710(f) and 1710(g).

Note 1 to paragraph (i): Neither enrollment in the VA healthcare system nor eligibility to enroll is required to be an eligible veteran for the purposes of payment of per diem for nursing home care.

■ 13. Add § 51.51 to read as follows:

§ 51.51 Eligible veterans—domiciliary care.

(a) A veteran is an eligible veteran for the purposes of payment of per diem for domiciliary care in a State home under this part if VA determines that the veteran is not barred from receiving care based on his or her service (see 38 U.S.C. 5303, 5303A), is not barred from receiving VA pension, compensation or dependency and indemnity compensation based on the character of a discharge from military service (see 38 CFR 3.12), and the veteran is:

(1) A veteran whose annual income does not exceed the maximum annual rate of pension payable to a veteran in need of regular aid and attendance; or

(2) A veteran who VA determines has no adequate means of support. The phrase ''no adequate means of support'' refers to an applicant for domiciliary care whose annual income exceeds the rate of pension described in paragraph (a)(1) of this section, but who is able to demonstrate to competent VA medical authority, on the basis of objective evidence, that deficits in health or functional status render the applicant incapable of pursuing substantially gainful employment, as determined by the Chief of Staff of the VA medical center of jurisdiction, and who is otherwise without the means to provide adequately for himself or herself, or be provided for in the community.

(b) For purposes of this section, the eligible veteran must be able to perform the following:

(1) Daily ablutions, such as brushing teeth, bathing, combing hair, and body eliminations, without assistance.

(2) Dress himself or herself with a minimum of assistance.

(3) Proceed to and return from the dining hall without aid.

(4) Feed himself or herself.

(5) Secure medical attention on an ambulatory basis or by use of a personally propelled wheelchair.

(6) Have voluntary control over body eliminations or have control by use of an appropriate prosthesis.

(7) Participate in some measure, however slight, in work assignments that support the maintenance and operation of the State home.

(8) Make rational and competent decisions as to his or her desire to remain in or leave the State home.

■ 14. Add § 51.52 to read as follows:

§ 51.52 Eligible veterans—adult day health care.

A veteran is an eligible veteran for payment of per diem to a State for adult day health care if VA determines that the veteran:

(a) Is not barred from receiving VA pension, compensation or dependency and indemnity compensation based on the character of a discharge from military service (see 38 CFR 3.12);

(b) Is enrolled in the VA health care system;

(c) Would otherwise require nursing home care; and

(d) Needs adult day health care because the veteran meets any one of the following conditions:

(1) The veteran has three or more Activities of Daily Living (ADL) dependencies.

(2) The veteran has significant cognitive impairment.

(3) The veteran has two ADL dependencies and two or more of the following conditions:

(i) Seventy-five years old or older;

(ii) High use of medical services, *i.e.,* three or more hospitalizations per calendar year, or 12 or more visits to an outpatient clinic or to an emergency evaluation unit per calendar year;

(iii) Diagnosis of clinical depression; or

(iv) Living alone in the community.

(4) The veteran does not meet the criteria in paragraph (d)(1), (2), or (3) of this section, but nevertheless a licensed VA medical practitioner determines the veteran needs adult day health care services.

(Authority: 38 U.S.C. 501, 1720(f), 1741–1743)

■ 15. Add § 51.58 to read as follows:

§ 51.58 Requirements and Standards applicable for payment of per diem.

A State home must meet the requirements in subpart C and the standards in the applicable subpart to be recognized, certified, and receive per diem for that program of care:

(a) For nursing home care, subpart D.

(b) For domiciliary care, subpart E.

(c) For adult day health care, subpart F.

■ 16. Revise § 51.59 to read as follows:

§ 51.59 Authority to continue payment of per diem when veterans are relocated due to emergency.

(a) *Definition of emergency.* For the purposes of this section, emergency means an occasion or instance where all of the following are true:

(1) It would be unsafe for veterans receiving care at a State home to remain in that home.

(2) The State is not, or believes that it will not be, able to provide care in the State home on a temporary or long-term basis for any or all of its veteran residents due to a situation involving the State home, and not due to a situation where a particular veteran's medical condition requires that the veteran be transferred to another facility, such as for a period of hospitalization.

(3) The State determines that the veterans must be evacuated to another facility or facilities.

(b) *General authority to pay per diem during a relocation period.* Notwithstanding any other provision of this part, VA will continue to pay per diem for a period not to exceed 30 calendar days for any eligible veteran who resided in a State home, and for whom VA was paying per diem, if such veteran is evacuated during an emergency into a facility other than a VA nursing home, hospital, domiciliary, or other VA site of care if the State is responsible for providing or paying for the care. VA will not pay per diem under this section for more than 30 calendar days of care provided in the evacuation facility, unless the official who approved the emergency response under paragraph (e) of this section determines that it is not reasonably possible to return the veteran to a State home within the 30-calendar-day period, in which case such official will approve additional period(s) of no more than 30 calendar days in accordance with this section. VA will not pay per diem if VA determines that a veteran is or has been placed in a facility that does not meet the standards set forth in paragraph (c)(1) of this section, and VA may recover all per diem paid for the care of the veteran in that facility.

(c) *Selection of evacuation facilities.* The following standards and procedures in paragraphs (c)(1) through (3) apply to the selection of an evacuation facility in order for VA to continue to pay per diem during an emergency. These standards and procedures also apply to evacuation facilities when veterans are evacuated from a nursing home in which care is being provided pursuant to a contract under 38 U.S.C. 1720.

(1) Each veteran who is evacuated must be placed in a facility that, at a minimum, will meet the needs for food, shelter, toileting, and essential medical care of that veteran.

(2) For veterans evacuated from nursing homes, the following types of facilities may meet the standards under paragraph (c)(1) of this section:

(i) VA Community Living Centers;

(ii) VA contract nursing homes;

(iii) Centers for Medicare and Medicaid Services certified facilities; and

(iv) Licensed nursing homes.

Note 1 to paragraph (c)(2): If none of the above options are available, veterans may be evacuated temporarily to other facilities that meet the standards under paragraph (c)(1) of this section.

(3) For veterans evacuated from domiciliaries, the following types of facilities may meet the standards in paragraph (c)(1) of this section:

(i) Emergency evacuation facilities identified by the city or State;

(ii) Assisted living facilities; and

(iii) Hotels.

(d) *Applicability to adult day health care programs of care.* Notwithstanding any other provision of this part, VA will continue to pay per diem for a period not to exceed 30 calendar days for any eligible veteran who was receiving adult day health care, and for whom VA was paying per diem, if the adult day health care facility becomes temporarily unavailable due to an emergency. Approval of a temporary program of care for such veteran is subject to paragraph (e) of this section. If after 30 calendar days the veteran cannot return to the adult day health care program in the State home, VA will discontinue per diem payments unless the official who approved the emergency response under paragraph (e) of this section determines that it is not reasonably possible to provide care in the State home or to relocate an eligible veteran to a different recognized or certified facility, in which case such official will approve additional period(s) of no more than 30 calendar days at the temporary program of care in accordance with this section. VA will not pay per diem if VA determines that a veteran was provided adult day health care in a facility that does not meet the standards set forth in paragraph (c)(1) of this section, and VA may recover all per diem paid for the care of the veteran in that facility.

(e) *Approval of response.* Per diem payments will not be made under this section unless and until the Director of the VA medical center of jurisdiction or the director of the VISN in which the State home is located (if the VAMC Director is not capable of doing so) determines, that an emergency exists and that the evacuation facility meets VA standards set forth in paragraph (c)(1) of this section.

■ 17. Revise the heading of subpart D to read as follows:

Subpart D—Standards applicable to the payment of per diem for nursing home care.

* * * * *

§ 51.120 [Amended]

■ 18. Amend § 51.120 in paragraph (a)(3) by removing ''Chief Consultant, Office of Geriatrics and Extended Care (114)'' and adding in its place ''Office of Geriatrics and Extended Care in VA Central Office''.

§ 51.140 [Amended]

■ 19. Amend § 51.140:

■ a. In paragraph (a)(2), by removing ''American Dietetic Association'' and adding in its place ''Academy of Nutrition and Dietetics''; and

■ b. In paragraph (d)(4), by removing ''who refuse food served''.

■ 20. Amend § 51.210:

■ a. In paragraph (b) introductory text, by removing ''Chief Consultant, Office of Geriatrics and Extended Care (114)'' and adding in its place ''Office of Geriatrics and Extended Care''; and

■ b. Revising paragraph (b)(2), redesignating paragraph (b)(3) as (b)(4) and revising it, and adding new paragraph (b)(3) and paragraph (h)(3).

The revision and additions read as follows:

§ 51.210 Administration.

* * * * *

(b) * * *

(2) The State home administrator;

(3) The director of nursing services (or other individual in charge of nursing services); and

(4) The State employee responsible for oversight of the State home if a contractor operates the State home.

* * * * *

(h) * * *

(3) If a veteran requires health care that the State home is not required to provide under this part, the State home may assist the veteran in obtaining that care from sources outside the State home, including the Veterans Health Administration. If VA is contacted about providing such care, VA will determine the best option for obtaining the needed services and will notify the veteran or the authorized representative of the veteran.

* * * * *

■ 21. Add subpart E, consisting of §§ 51.300 through 51.390, to read as follows:

Subpart E—Standards Applicable to the Payment of Per Diem for Domiciliary Care

Sec.

51.300 Resident rights and behavior; State home practices; quality of life.
51.310 Resident admission, assessment, care plan, and discharge.
51.320 Quality of care.
51.330 Nursing care.
51.340 Physician and other licensed medical practitioner services.
51.350 Provision of certain specialized services and environmental requirements.
51.390 Administration.

Subpart E—Standards Applicable to the Payment of Per Diem for Domiciliary Care

§ 51.300 Resident rights and behavior; State home practices; quality of life.

The State home must protect and promote the rights and quality of life of each resident receiving domiciliary care, and otherwise comply with the requirements in § 51.70, except § 51.70(b)(9), (h)(1), and (m); § 51.80, except § 51.80(a)(2) and (4) and (b); § 51.90; and § 51.100, except § 51.100(g)(2), (h), and (i)(5) through (7). The State Home must have a written procedure for admissions, discharges, and transfers. For purposes of this section, the terms ''nursing home'' and ''nursing facility'' or ''facility'' in the applicable provisions of the cited sections apply to a domiciliary.

(a) *Notice of rights and services—notification of changes.* (1) Facility management must immediately inform the resident and consult with the primary care physician when there is

(i) An accident involving the resident that results in injury and has the potential for requiring physician intervention;

(ii) A significant change in the resident's physical, mental, or psychosocial status (*i.e.,* a deterioration in health, mental, or psychosocial status in either life-threatening conditions or clinical complications);

(iii) A need to alter treatment significantly (*i.e.,* a need to discontinue an existing form of treatment due to adverse consequences, or to commence a new form of treatment); or

(iv) A decision to transfer or discharge the resident from the facility as specified in paragraph (d) of this section.

(2) The facility management must also promptly notify the resident when there is

(i) A change in room or roommate assignment as specified in § 51.100(f)(2); or

(ii) A change in resident rights under Federal or State law or regulations as specified in § 51.70(b)(1).

(3) The facility management must record and periodically update the address and phone number of the resident's legal representative or interested family member, but the resident has the right to decide whether to have the State home notify his or her legal representative or interested family member of changes.

(b) *Work.* The resident must participate, based on his or her ability, in some measure, however slight, in work assignments that support the maintenance and operation of the State home. The State Home management must create a written policy to implement the work requirement. The resident is encouraged to participate in vocational and employment services, which are essential to meeting the psychosocial needs of the resident. The resident must perform work for the facility after the State home has accomplished the following:

(1) The facility has documented the resident's need or desire to work in the comprehensive care plan;

(2) The comprehensive care plan described in § 51.310 specifies the nature of the work performed and whether the work is unpaid or paid;

(3) Compensation for work for which the facility would pay a prevailing wage if done by non-residents is paid at or above prevailing wages for similar work in the area where the facility is located; and

(4) The facility consulted with and the resident agrees to the work arrangement described in the comprehensive care plan.

(c) *Married couples.* The resident has the right, if space is available within the existing facility, to share a room with his or her spouse when married residents live in the same facility and both spouses consent to the arrangement. If the State home determines existing space is not available to allow married residents to share rooms, the State home will make accommodations for the privacy of married residents.

(d) *Transfer and discharge*—(1) *Definition:* Transfer and discharge includes movement of a resident to a bed outside of the facility whether that bed is in the same physical plant or not. Transfer and discharge does not refer to movement of a resident to a bed within the same facility.

(2) *Transfer and discharge requirements.* The facility management must permit each resident to remain in the facility, and not transfer or discharge the resident from the facility unless

(i) The transfer or discharge is necessary for the resident's welfare, including because the domiciliary resident's health has improved sufficiently so the resident no longer needs the services provided by the domiciliary;

(ii) The resident is in need of a higher level of long term or acute care;

(iii) The safety of individuals in the facility is endangered;

(iv) The health of individuals in the facility would otherwise be endangered;

(v) The resident has failed, after reasonable and appropriate notice, to pay for a stay at the facility;

(vi) The domiciliary ceases to operate; or

(vii) The resident ceases to meet any of the eligibility criteria of § 51.51.

(3) *Documentation.* When the facility transfers or discharges a resident under any of the circumstances specified in paragraphs (a)(2)(i) through (vii) of this section, the primary care physician must document the transfer and circumstances in the resident's clinical record.

(4) *Notice before transfer.* Before a facility transfers or discharges a resident, the facility must

(i) Notify the resident of the transfer or discharge and the reasons for the move in writing and in a language and manner he or she understands. The resident has the right to decide whether to have the State home notify his or her legal representative or interested family member of changes.

(ii) Record the reasons in the resident's clinical record; and

(iii) Include in the notice the items described in paragraph (d)(6) of this section.

(5) *Timing of the notice.* (i) The notice of transfer or discharge required by paragraph (d)(4) of this section must be made by the facility at least 30 calendar days before the resident is transferred or discharged, except when specified in paragraph (d)(5)(ii) of this section,

(ii) Notice may be made as soon as practicable before transfer or discharge when

(A) The safety of individuals in the facility would be endangered;

(B) The health of individuals in the facility would be otherwise endangered;

(C) The resident's health improves sufficiently so the resident no longer needs the services provided by the domiciliary; or

(D) The resident's needs cannot be met in the domiciliary.

(6) *Contents of the notice.* The written notice specified in paragraph (d)(4) of this section must include the following:

(i) The reason for transfer or discharge;

(ii) The effective date of transfer or discharge;

(iii) The location to which the resident is transferred or discharged;

(iv) A statement that the resident has the right to appeal the action to the State official designated by the State; and

(v) The name, address and telephone number of the State long term care ombudsman.

(7) *Orientation for transfer or discharge.* The facility management must provide sufficient preparation and orientation to residents to ensure safe and orderly transfer or discharge from the facility.

(e) *Notice of bed-hold policy and readmission—notice before transfer.* The State home must have a written bed-hold policy, including criteria for return to the facility. The facility management must provide written information to the resident about the State home bed-hold policy upon enrollment, annually thereafter, and before a State home transfers a resident to a hospital. A Resident has the right to decide whether to have the State home notify his or her legal representative or interested family member of transfers.

(f) *Resident activities.* (1) The facility management must provide for an ongoing program of activities designed to meet, in accordance with the comprehensive assessment, the interests and the physical, mental, and psychosocial well-being of each resident.

(2) The activities program must be directed by a qualified coordinator.

(g) *Social services.* (1) The State home must provide social work services to meet the social and emotional needs of residents to attain or maintain the highest practicable mental and psychosocial well-being of each resident.

(2) The State home must have a sufficient number of social workers to meet residents' needs.

(3) The State home must have a written policy on how it determines qualifications of social workers. It is highly recommended, but not required, that a qualified social worker is an individual with

(i) A bachelor's degree in social work from a school accredited by the Council of Social Work Education (*Note:* A master's degree social worker with experience in long-term care is preferred), and

(ii) A social work license from the State in which the State home is located, if offered by the State, and

(iii) A minimum of one year of supervised social work experience in a health care setting working directly with individuals.

(4) The facility management must have sufficient support staff to meet patients' social services needs.

(5) Facilities for social services must ensure privacy for interviews.

(h) *Environment.* The facility management must provide

(1) A safe, clean, comfortable, and homelike environment, allowing the resident to use his or her personal belongings to the extent possible;

(2) Housekeeping and maintenance services necessary to maintain a sanitary, orderly, and comfortable interior;

(3) Clean bed and bath linens that are in good condition; and

(4) Private closet space in each resident's room, as specified in § 51.200(d)(2)(iv).

(The Office of Management and Budget has approved the information collection requirements in this section under control number 2900–0160.)

§ 51.310 Resident admission, assessment, care plan, and discharge.

The State home must conduct accurate, written, medical and comprehensive assessments of each resident's medical and functional capacity upon admission, annually, and as required by a change in the resident's condition. The comprehensive assessment will use information from the medical assessment, and both assessments will inform the comprehensive care plan. The State home must have a written policy to determine how to coordinate and complete the comprehensive assessment process, including how it will review, and revise the comprehensive assessment in implementing the comprehensive care plan. The State home must review comprehensive assessments annually, and promptly after every significant change in the resident's physical, mental, or social condition.

(a) *Admission orders and medical assessment.* At the time each resident is admitted, the State home must have physician orders for the resident's immediate care. A medical assessment, including a medical history and physical examination, must be performed by a physician, or other health care provider qualified under State law, and recorded in the medical record no later than 7 calendar days after admission, unless one was performed no earlier than 5 calendar days before admission and the findings were recorded in the medical record. The medical assessment will be part of the comprehensive assessment.

(b) *Comprehensive assessments.* (1) The state home must complete a comprehensive assessment of each resident no later than 14 calendar days after admission, annually, and as required by a change in the resident's condition.

(2) Each comprehensive assessment must be conducted or coordinated by a registered nurse with the participation of appropriate healthcare professionals, including at least one physician, the registered nurse, and one social worker. The registered nurse must sign and certify the assessment. The comprehensive assessment is to determine the care, treatment, and services that will meet the resident's initial and continuing needs. It is an objective evaluation of a resident's health and functional status, describing the resident's capabilities and impairments in performing activities of daily living, strengths, and needs. The assessment gathers information through collection of data, observation, and examination.

(c) *Comprehensive care plans.* (1) The State home must develop a comprehensive care plan for each resident based on the comprehensive assessment, and develop, review, and revise the comprehensive care plan following each comprehensive assessment. The comprehensive care plan must include measurable objectives and timetables to address a resident's emotional, behavioral, social, and physical needs, with emphasis on assisting each patient to achieve and maintain an optimal level of self-care and independence. The comprehensive care plan must describe the following, as appropriate to the resident's circumstances:

(i) The services that are to be furnished to support the resident's highest practicable emotional, behavioral, social rehabilitation, and physical well-being;

(ii) The specific work the resident agrees to do to share in the maintenance and operation of the State home upon consultation with the interdisciplinary team, and whether that work is paid or unpaid; and

(iii) Any services that would otherwise be required under § 51.350 but are not provided due to the resident's exercise of rights under § 51.70, including the right in § 51.70(b)(4) to refuse treatment.

(2) A comprehensive care plan must be:

(i) Developed no later than 21 calendar days after admission; and

(ii) Prepared by an interdisciplinary team of health professionals that may include the primary care physician or a Licensed Independent Practitioner (or designated Physician's Assistant or Nurse Practitioner), a social worker, and a registered nurse who have responsibility for the resident, and other staff in appropriate disciplines as determined by the resident's needs, and, to the extent practicable, the participation of the resident and the resident's family (subject to the consent of the resident) or the resident's legal representative, if appropriate;

(iii) Reviewed periodically and revised consistent with the most recent comprehensive assessment by a team of qualified persons no less often than semi-annually; and

(iv) Revised promptly after a comprehensive assessment reveals a significant change in the resident's condition.

(3) The services provided by the facility must

(i) Meet professional standards of quality; and

(ii) Be provided by qualified persons in accordance with each resident's written comprehensive care plan.

(d) *Discharge summary.* (1) Prior to discharging a resident, the State home must prepare a discharge summary that includes

(i) A summary of the resident's stay, the resident's status at the time of the discharge, and the resident's progress on the comprehensive care plan in paragraph (b)(2) of this section; and

(ii) A post-discharge comprehensive care plan that is developed with the participation of the resident.

(2) A resident has the right to decide if he or she would like to involve his or her legal representative or interested family member in development of a post-discharge plan.

(The Office of Management and Budget has approved the information collection requirements in this section under control number 2900–0160.)

§ 51.320 Quality of care.

The State home must provide each resident with the care described in this subpart in accordance with the assessment and comprehensive care plan.

(a) *Reporting of sentinel events.* (1) A sentinel event is an adverse event that results in the loss of life or limb or permanent loss of function.

(2) Examples of sentinel events are as follows:

(i) Any resident death, paralysis, coma or other major permanent loss of function associated with a medication error;

(ii) Any suicide of a resident;

(iii) Assault, homicide or other crime resulting in resident death or major permanent loss of function; or

(iv) A resident fall that results in death or major permanent loss of function as a direct result of the injuries sustained in the fall.

(3) The State home must report sentinel events to the Director no later than 24 hours after identification. The VA medical center of jurisdiction must report sentinel events by notifying the VA Network Director (10N1–10N22) and the Director, Office of Geriatrics and Extended Care—Operations (10NC4) no later than 24 hours after notification.

(4) The State home must establish a mechanism to review and analyze a sentinel event resulting in a written report to be submitted to the VA Medical Center of jurisdiction no later than 10 working days following the event. The purpose of the review and analysis of a sentinel event is to prevent injuries to residents, visitors, and personnel, and to manage those injuries that do occur and to minimize the negative consequences to the injured individuals and the State home.

(b) *Activities of daily living.* Based on the comprehensive assessment of a resident, the State home must ensure that a resident's abilities in activities of daily living do not diminish unless circumstances of the individual's clinical condition demonstrate that diminution was unavoidable, and the resident is given appropriate treatment and services to maintain or improve his activities of daily living. This includes the resident's ability to:

(1) Bathe, dress, and groom;

(2) Transfer and ambulate;

(3) Toilet;

(4) Eat; and

(5) Talk or otherwise communicate.

(c) *Vision and hearing.* To ensure that residents receive proper treatment and assistive devices to maintain vision and hearing, the State home must, if necessary, assist the resident:

(1) In making appointments; and

(2) By arranging for transportation to and from the office of a practitioner specializing in the treatment of vision or hearing impairment or the office of a professional specializing in the provision of vision or hearing assistive devices.

(d) *Mental and psychosocial functioning.* Based on the comprehensive assessment of a resident, the State home must assist a resident who displays mental or psychosocial adjustment difficulty obtain appropriate treatment and services to correct the assessed problem.

(e) *Accidents.* The State home must ensure that:

(1) The resident environment remains as free of accident hazards as possible; and

(2) Each resident receives adequate supervision and assistive devices to prevent accidents.

(f) *Nutrition.* The State home must follow § 51.120(j) regarding nutrition in providing domiciliary care.

(g) *Special needs.* The State home must provide residents with the following services, if needed:

(1) Injections;

(2) Colostomy, ureterostomy, or ileostomy care;

(3) Respiratory care;

(4) Foot care; and

(5) Non-customized or non-individualized prosthetic devices.

(h) *Unnecessary drugs.* The State home must ensure that the standards set forth in § 51.120(m) regarding unnecessary drugs are followed in providing domiciliary care.

(i) *Medication errors.* The State home must ensure that the standards set forth in § 51.120(n) regarding medication

errors are followed in providing domiciliary care.

(The Office of Management and Budget has approved the information collection requirements in this section under control number 2900–0160.)

§ 51.330 Nursing care.

The State home must provide an organized nursing service with a sufficient number of qualified nursing personnel to meet the total nursing care needs of all residents within the facility, 24 hours a day, 7 days a week, as determined by their comprehensive assessments and their comprehensive care plans. The nursing service must be under the direction of a full-time registered nurse who is currently licensed by the State and has, in writing, administrative authority, responsibility, and accountability for the functions, activities, and training of the nursing service's staff.

§ 51.340 Physician and other licensed medical practitioner services.

The State home must provide its residents the primary care necessary to enable them to attain or maintain the highest practicable physical, mental, and psychosocial well-being. When a resident needs care other than the State home is required to provide under this subpart, the State home is responsible to assist the resident to obtain that care. The State home must ensure that a physician personally approves in writing a recommendation that an individual be admitted to a domiciliary. Each resident must remain at all times under the care of a licensed medical practitioner assigned by the State home. The name of the practitioner will be listed in the resident's medical record. The State home must ensure that all of the following conditions in paragraphs (a) through (e) of this section are met:

(a) *Supervision of medical practitioners.* Any licensed medical practitioner who is not a physician may provide medical care to a resident within the practitioner's scope of practice without physician supervision when permitted by State law.

(b) *Availability of medical practitioners.* If the resident's assigned licensed medical practitioner is unavailable, another licensed medical practitioner must be available to provide care for that resident.

(c) *Visits.* The primary care physician or other licensed medical practitioner, for each visit required by paragraph (d) of this section, must

(1) Review the resident's total program of care, including medications and treatments;

(2) Write, sign, and date progress notes; and

(3) Sign and date all orders.

(d) *Frequency of visits.* The primary care physician or other licensed medical practitioner must conduct an in-person medical assessment of the resident at least once a calendar year, or more frequently based on the resident's condition.

(e) *Availability of emergency care.* The State home must assist residents in obtaining emergency care.

§ 51.350 Provision of certain specialized services and environmental requirements.

The State home domiciliary care programs must comply with the requirements of § 51.140, except § 51.140(f)(2) through (4) concerning dietary services; § 51.170 concerning dental services; § 51.180, except § 51.180(c) concerning pharmacy services; § 51.190 concerning infection control; and § 51.200, except § 51.200(a), (b), (d)(1)(ii) through (x), (f), and (h)(3) concerning the physical environment. For purposes of this section, the references to ''facility'' in the cited sections also refer to a domiciliary.

(a) *Dietary services.* (1) There must be no more than 14 hours between a substantial evening meal and the availability of breakfast the following day, except as provided in (a)(3) of this section.

(2) The facility staff must offer snacks at bedtime daily.

(3) Sixteen hours may elapse between a substantial evening meal and breakfast the following day when a nourishing snack is offered at bedtime.

(b) *Pharmacy services.* (1) The drug regimen of each resident must be reviewed at least once every six months by a licensed pharmacist.

(2) The pharmacist must report any irregularities to the primary care physician and the director of nursing, and these reports must be acted upon.

(c) *Life safety from fire.* The facility must meet the applicable requirements of the National Fire Protection Association's NFPA 101, Life Safety Code, as incorporated by reference in § 51.200.

(d) *Privacy.* The facility must provide the means for visual privacy for each resident.

(The Office of Management and Budget has approved the information collection requirements in this section under control number 2900–0160.)

§ 51.390 Administration.

The State home must follow § 51.210 regarding administration in providing domiciliary care. For purposes of this section, the references in the cited section to nursing home and nursing home care refer to a domiciliary and domiciliary care.

(The Office of Management and Budget has approved the information collection requirements in this section under control number 2900–0160.)

■ 22. Add subpart F, consisting of §§ 51.400 through 51.480, to read as follows:

Subpart F—Standards Applicable to the Payment of per Diem for Adult Day Health Care

Sec.

51.400 Participant rights.
51.405 Participant and family caregiver responsibilities.
51.410 Transfer and discharge.
51.411 Program practices.
51.415 Restraints, abuse, and staff treatment of participants.
51.420 Quality of life.
51.425 Physician orders and participant medical assessment.
51.430 Quality of care.
51.435 Nursing services.
51.440 Dietary services.
51.445 Physician services.
51.450 Specialized rehabilitative services.
51.455 Dental services.
51.460 Administration of drugs.
51.465 Infection control.
51.470 Physical environment.
51.475 Administration.
51.480 Transportation.

Subpart F—Standards Applicable to the Payment of per Diem for Adult Day Health Care

§ 51.400 Participant rights.

The State home must protect and promote the rights of a participant in an adult day health care program, including the rights set forth in § 51.70, except for the right set forth in § 51.70(m). For purposes of this section, the references to resident in the cited section also refer to a participant in this section.

(The Office of Management and Budget has approved the information collection requirements in this section under control number 2900–0160.)

§ 51.405 Participant and family caregiver responsibilities.

The State home must post a written statement of participant and family caregiver responsibilities in a place where participants in the adult day health care program and their families will see it and must provide a copy to the participant and caregiver at or before the time of the intake screening. The statement of responsibilities must include the following:

(a) Treat personnel with respect and courtesy;

(b) Communicate with staff to develop a relationship of trust;

(c) Make appropriate choices and seek appropriate care;

(d) Ask questions and confirm your understanding of instructions;

(e) Share opinions, concerns, and complaints with the program director;

(f) Communicate any changes in the participant's condition;

(g) Communicate to the program director about medications and remedies used by the participant;

(h) Let the program director know if the participant decides not to follow any instructions or treatment; and

(i) Communicate with the adult day health care staff if the participant is unable to attend adult day health care.

(The Office of Management and Budget has approved the information collection requirements in this section under control number 2900–0160.)

§ 51.410 Transfer and discharge.

(a) *Definition.* For purposes of this section, the term ''transfer or discharge'' includes movement of a participant to a program outside of the adult day health care program whether or not the program of care is in the same facility.

(b) *Transfer and discharge requirements.* At the time of intake screening, the State home must discuss the possible reasons for transfer or discharge with the participant and, to the extent practicable and appropriate, with family members (subject to the consent of the participant) or the participant's legal representatives. In the case of a transfer and discharge to a hospital, the transfer and discharge must be to the hospital closest to the adult day health care facility that can provide the necessary care. The State home must permit each participant to remain in the program of care, and not transfer or discharge the participant from the program of care unless:

(1) The transfer and discharge is necessary for the participant's welfare and the participant's needs cannot be met in the adult day health care setting;

(2) The transfer and discharge is appropriate because the participant's health has improved sufficiently so that the participant no longer needs the services provided in the adult day health care program;

(3) The safety of individuals in the facility is endangered;

(4) The health of individuals in the facility would otherwise be endangered;

(5) The participant has failed, after reasonable and appropriate notice, to pay for participation in the adult day health care program; or

(6) The adult day health care program ceases to operate.

(c) *Notice before transfer or discharge.* Before an adult day health care program undertakes the transfer or discharge of a participant, the State home must:

(1) Notify the resident of the transfer or discharge and the reasons for the move in writing and in a language and manner he or she understands. The resident has the right to decide whether to have the State home notify his or her legal representative or interested family member of changes;

(2) Record the reasons in the participant's clinical record; and

(3) Include in the notice the items described in paragraph (e) of this section.

(d) *Timing of the notice.* (1) The notice of transfer or discharge required under paragraph (c) of this section must be made by the State home at least 30 calendar days before the participant is given a transfer or discharge, except when specified in paragraph (d)(2) of this section.

(2) Notice may be made as soon as practicable before a transfer or discharge when

(i) The safety of individuals in the facility would be endangered;

(ii) The health of individuals in the facility would be otherwise endangered;

(iii) The participant's health improves sufficiently that the participant no longer needs the services provided by the adult day health care program of care; or

(iv) The participant's needs cannot be met in the adult day health care program of care.

(e) *Contents of the notice.* The written notice specified in paragraph (c) of this section must include the following:

(1) The reason for the transfer or discharge;

(2) The effective date of the transfer or discharge;

(3) The location to which the participant is taken in accordance with the transfer or discharge, if any;

(4) A statement that the participant has the right to appeal the action to the State official responsible for the oversight of State home programs; and

(5) The name, address and telephone number of the first listed of the following that exists in the State:

(i) The State long-term care ombudsman, if the long-term care ombudsman serves adult day health care facilities; or

(ii) Any State ombudsman or advocate who serves adult day health care participants; or

(iii) The State agency responsible for oversight of State adult day care facilities.

(f) *Orientation for transfer and discharge.* The State home must provide sufficient preparation and orientation to participants to ensure safe and orderly transfer or discharge from the State home.

(g) *Written policy.* The State home must have in effect written transfer and discharge procedures that reasonably ensure that:

(1) Participants will be given a transfer or discharge from the adult day health care program to the hospital when transfer or discharge is medically appropriate as determined by a physician; and

(2) Medical and other information needed for care and treatment of participants will be exchanged between the facility and the hospital.

(The Office of Management and Budget has approved the information collection requirements in this section under control number 2900–0160.)

§ 51.411 Program practices.

(a) *Equal access to quality care.* The State home must establish and maintain identical policies and practices regarding transfer and discharge under § 51.410 and the provision of services for all participants regardless of the source of payment.

(b) *Admission policy.* The State home must not require a third-party guarantee of payment as a condition of admission or expedited admission, or continued admission in the program of care. However, the State home may require a participant or an individual who has legal access to a participant's income or resources to pay for the care from the participant's income or resources, when available.

(c) *Hours of operation.* Each adult day health care program must provide at least 8 hours of operation 5 days a week. The hours of operation must be flexible and responsive to caregiver needs.

§ 51.415 Restraints, abuse, and staff treatment of participants.

The State home must meet the requirements regarding the use of restraints, abuse, and other matters concerning staff treatment of participants set forth in § 51.90. For purposes of this section, the references in the cited section to resident refer to a participant in this section.

(The Office of Management and Budget has approved the information collection requirements in this section under control number 2900–0160.)

§ 51.420 Quality of life.

The State home must provide an environment that supports the quality of life of each participant by maximizing the participant's potential strengths and skills. (a) *Dignity.* The State home must promote care for participants in a manner and in an environment that

maintains or enhances each participant's dignity and respect in full recognition of his or her individuality.

(b) *Self-determination and participation.* The State home must ensure that the participant has the right to:

(1) Choose activities, schedules, and health care consistent with his or her interests, assessments, and plans of care;

(2) Interact with members of the community both inside and outside the facility; and

(3) Make choices about aspects of his or her life in the facility that are significant to the participant.

(c) *Participant and family concerns.* The State home must document any concerns submitted to the management of the program by participants or their family members.

(1) A participant's family has the right to meet with families of other participants in the program.

(2) Staff or visitors may attend meetings of participant or family groups at the group's invitation.

(3) The State home must respond to written requests that result from group meetings.

(4) The State home must listen to the views of any participant or family group and act upon the concerns of participants and families regarding policy and operational decisions affecting participant care in the program.

(d) *Participation in other activities.* The State home must ensure that a participant has the right to participate in social, religious, and community activities that do not interfere with the rights of other participants in the program.

(e) *Therapeutic participant activities.* (1) The State home must provide for an ongoing program of activities designed to meet, in accordance with the comprehensive assessment, the interests and the physical, mental, and psychosocial well-being of each participant.

(2) The activities program must be directed by a qualified professional who is a qualified therapeutic recreation specialist or an activities professional who:

(i) Is licensed, if applicable, by the State in which practicing; and

(ii) Is certified as a therapeutic recreation specialist or an activities professional by a recognized certifying body.

(3) A critical role of adult day health care is to build relationships and create a culture that supports, involves, and validates the participant. Therapeutic activity refers to that supportive culture and is a significant aspect of the individualized comprehensive care plan. A participant's activity includes everything the individual experiences during the day, not just arranged events. As part of effective therapeutic activity, the adult day health care program must:

(i) Provide direction and support for participants, including breaking down activities into small, discrete steps or behaviors, if needed by a participant;

(ii) Have alternative programming available for any participant unable or unwilling to take part in group activity;

(iii) Design activities that promote personal growth and enhance the self-image and/or improve or maintain the functioning level of participants to the extent possible;

(iv) Provide opportunities for a variety of involvements (social, intellectual, cultural, economic, emotional, physical, and spiritual) at different levels, including community activities and events;

(v) Emphasize participants' strengths and abilities rather than impairments, and contribute to participants' feelings of competence and accomplishment; and

(vi) Provide opportunities to voluntarily perform services for community groups and organizations.

(f) *Social services.* (1) The State home must provide medically-related social services to participants and their families.

(2) An adult day health care program must provide a qualified social worker to furnish social services.

(3) A qualified social worker is an individual with:

(i) A bachelor's degree in social work from a school accredited by the Council of Social Work Education (**Note:** A master's degree in social worker with experience in long-term care is preferred);

(ii) A social work license from the State in which the State home is located, if that license is offered by the State; and

(iii) A minimum of one year of supervised social work experience in a health care setting working directly with individuals.

(4) The State home must have sufficient social workers and support staff to meet participant and family social service needs. The adult day health care program must:

(i) Provide counseling to participants and to families/caregivers;

(ii) Facilitate the participant's adaptation to the adult day health care program and active involvement in the comprehensive care plan, if appropriate;

(iii) Arrange for services not provided by adult day health care, and work with these resources to coordinate services;

(iv) Serve as an advocate for participants by asserting and safeguarding the human and civil rights of the participants;

(v) Assess signs of mental illness or dementia and make appropriate referrals;

(vi) Provide information and referral for persons not appropriate for adult day health care;

(vii) Provide family conferences, and serve as liaison between participant, family/caregiver and program staff;

(viii) Provide individual or group counseling and support to caregivers and participants;

(ix) Conduct support groups or facilitate participant or family/caregiver participation in support groups;

(x) Assist program staff in adapting to changes in participants' behavior; and

(xi) Provide or arrange for individual, group, or family psychotherapy for participants with significant psychosocial needs.

(5) Space for social services must be adequate to ensure privacy for interviews.

(g) *Environment.* The State home must provide:

(1) A safe, clean, comfortable, and homelike environment, and support the participants' ability to function as independently as possible and to engage in program activities;

(2) Housekeeping and maintenance services necessary to maintain a sanitary, orderly, and comfortable interior;

(3) Private storage space for each participant sufficient for a change of clothes. Upon request of the participant, the State home must offer storage space that can be secured with a lock;

(4) Interior signs to facilitate participants' ability to move about the facility independently and safely;

(5) A clean bed or reclining chair available for acute illness;

(6) A shower for participants;

(7) Adequate and comfortable lighting levels in all areas;

(8) Comfortable and safe temperature levels; and

(9) Comfortable sound levels.

(The Office of Management and Budget has approved the information collection requirements in this section under control number 2900–0160.)

§ 51.425 Physician orders and participant medical assessment.

The State home must have a written policy to determine how to coordinate and complete the written initial and comprehensive assessment processes upon admission, annually, and as required by a change in the participant's condition. The State home must also

outline in its policy how it will complete, implement, review, and revise the assessments.

(a) *Admission.* At the time each participant is admitted, the State home must have physician orders for the participant's immediate care. An initial medical assessment including a medical history and physical examination with documentation of tuberculosis screening must be completed by a physician or other health care provider qualified under State law no earlier than 30 calendar days before admission and no later than 7 calendar days after admission. The findings must be recorded in the participant's medical record.

(b) *Comprehensive assessments.* The State home must complete the comprehensive assessment no later than 14 calendar days after admission. The State home must develop a comprehensive care plan for each participant based on his or her comprehensive assessment. The State home must review comprehensive assessments annually, as well as promptly after every significant change in the participant's physical, mental, or social condition. The State home must immediately change the participant's comprehensive care plan after a significant change is identified. At minimum, the written comprehensive assessment must address the following:

(1) Ability to ambulate,

(2) Ability to use bathroom facilities,

(3) Ability to eat and swallow,

(4) Ability to hear,

(5) Ability to see,

(6) Ability to experience feeling and movement,

(7) Ability to communicate,

(8) Risk of wandering,

(9) Risk of elopement,

(10) Risk of suicide,

(11) Risk of deficiencies regarding social interactions, and

(12) Special needs (such as medication, diet, nutrition, hydration, or prosthetics).

(c) *Coordination of assessments.* (1) Each initial and subsequent comprehensive assessment must be conducted and coordinated with the participation of appropriate health professionals.

(2) Each person who completes a portion of an assessment must sign and certify the accuracy of that portion of the assessment.

(3) The results of the assessments must be used to develop, review, and revise the participant's individualized comprehensive care plan.

(d) *Comprehensive care plans.* (1) The State home must ensure that each participant has a comprehensive care plan no later than 21 calendar days after admission. A participant's comprehensive care plan must be individualized and must include measurable objectives and timetables to meet all physical, mental, and psychosocial needs identified in the most recent assessment. The comprehensive care plan must describe the following:

(i) The services that are to be provided as part of the program of care and by other sources to attain or maintain the participant's highest physical, mental, and psychosocial well-being as required under § 51.430;

(ii) Any services that would otherwise be required under § 51.430 but are not provided due to the participant's exercise of rights under § 51.70, including the right to refuse treatment under § 51.70(b)(4);

(iii) Type and scope of interventions to be provided in order to reach desired, realistic outcomes;

(iv) Roles of participant and family/caregiver; and

(v) Discharge or transition plan, including specific criteria for discharge or transfer.

(2) The services provided or arranged by the State home must

(i) Meet professional standards of quality; and

(ii) Be provided by qualified persons in accordance with each participant's comprehensive care plan.

(e) *Discharge summary.* Prior to discharging a participant, the State home must prepare a discharge summary that includes the following:

(1) A summary of the participant's care;

(2) A summary of the participant's status at the time of the discharge to include items in paragraph (b) of this section; and

(3) A discharge/transition plan related to changes in service needs and changes in functional status that prompted transition to another program of care.

(The Office of Management and Budget has approved the information collection requirements in this section under control number 2900–0160.)

§ 51.430 Quality of care.

Each participant must receive, and the State home must provide, the necessary care and services to attain or maintain the highest practicable physical, mental, and psychosocial well-being, in accordance with the comprehensive assessment and comprehensive care plan.

(a) *Reporting of sentinel events*—(1) *Definition.* A ''sentinel event'' is defined in § 51.120(a)(1).

(2) *Duty to report sentinel events.* The State home must comply with the duties to report sentinel events as set forth in § 51.120(a)(3), except that the duty to report applies only to a sentinel event that occurs while the participant is under the care of the State home, including while in State home-provided transportation.

(3) *Review and prevention of sentinel events.* The State home must establish a mechanism to review and analyze a sentinel event resulting in a written report to be submitted to the VA Medical Center of jurisdiction no later than 10 working days after the event. The purpose of the review and analysis of a sentinel event is to prevent future injuries to participants, visitors, and personnel.

(b) *Activities of daily living.* Based on the comprehensive assessment of a participant, the State home must ensure that:

(1) *No diminution in activities of daily living.* A participant's abilities in activities of daily living do not diminish unless the circumstances of the individual's clinical condition demonstrate that diminution was unavoidable. This includes the participant's ability to

(i) Bathe, dress, and groom;

(ii) Transfer and ambulate;

(iii) Toilet; and

(iv) Eat.

(2) *Appropriate treatment and services given.* A participant is given the appropriate treatment and services to maintain or improve his or her abilities specified in paragraph (b)(1) of this section.

(3) *Necessary services provided to participant unable to carry out activities of daily living.* A participant who is unable to carry out activities of daily living receives the necessary services to maintain good nutrition, hydration, grooming, personal and oral hygiene, mobility, and bladder and bowel elimination.

(c) *Mental and psychosocial functioning.* The State home must make counseling and related psychosocial services available for improving mental and psychosocial functioning of participants with mental or psychosocial needs. The services available must include counseling and psychosocial services provided by licensed independent mental health professionals.

(d) *Medication errors.* The State home must comply with § 51.120(n) with respect to medication errors.

(The Office of Management and Budget has approved the information collection requirements in this section under control number 2900–0160.)

§ 51.435 Nursing services.

The State home must provide an organized nursing service with a sufficient number of qualified nursing personnel to meet the total nursing care needs, as determined by participant assessments and individualized comprehensive care plans, of all participants in the program.

(a) There must be at least one registered nurse on duty each day of operation of the adult day health care program. This nurse must be currently licensed by the State and must have, in writing, administrative authority, responsibility, and accountability for the functions, activities, and training of the nursing and program assistants.

(b) The number and level of nursing staff is determined by the authorized capacity of participants and the nursing care needs of the participants.

(c) Nurse staffing must be adequate for meeting the standards of this part.

§ 51.440 Dietary services.

The State home must comply with the requirements concerning the dietary services set forth in § 51.140, except paragraph 51.140(f). For purposes of this section, the references in the cited section to resident refer to a participant in subpart F of this part. The State home adult day health care program will provide nourishment to participants on the following schedule:

(a) At regular times comparable to normal mealtimes in the community, each participant may receive and program management must provide at least two meals daily for those veterans staying more than four hours and at least one meal for those staying less than four hours.

(b) The program management must offer snacks and fluids as appropriate to meet the participants' nutritional and fluid needs.

§ 51.445 Physician services.

As a condition of enrollment in adult day health care program, a participant must have a written physician order for admission. Each participant's medical record must contain the name of the participant's primary care physician. If a participant's medical needs require that the participant be placed in an adult day health care program that offers medical supervision, the primary care physician must state so in the order for admission. Each participant must remain under the care of a physician.

(a) *Physician supervision.* If the adult day health care program offers medical supervision, the program management must ensure that

(1) The medical care of each participant is supervised by a primary care physician; and

(2) Another physician is available to supervise the medical care of participants when their primary care physician is unavailable.

(b) *Frequency of physician reviews.* If the adult day health care program offers medical supervision:

(1) The participant must be seen by the primary care physician at least annually and as indicated by a change of condition.

(2) The program management must have a policy to help ensure that adequate medical services are provided to the participant.

(3) At the option of the primary care physician, required reviews in the program after the initial review may alternate between personal physician reviews and reviews by a physician assistant, nurse practitioner, or clinical nurse specialist in accordance with paragraph (e) of this section.

(c) *Availability of acute care.* If the adult day health care program offers medical supervision, the program management must provide or arrange for the provision of acute care when it is indicated.

(d) *Availability of physicians for emergency care.* In case of an emergency, the program management must ensure that participants are able to obtain necessary emergency care.

(e) *Physician delegation of tasks.* (1) A primary care physician may delegate tasks to

(i) A certified physician assistant or a certified nurse practitioner, or

(ii) A clinical nurse specialist who-

(A) Is acting within the scope of practice as defined by State law; and

(B) Is under the supervision of the physician.

(2) The primary care physician may not delegate a task when the provisions of this part specify that the primary care physician must perform it personally, or when the delegation is prohibited under State law or by the State home's policies.

(The Office of Management and Budget has approved the information collection requirements in this section under control number 2900–0160.)

§ 51.450 Specialized rehabilitative services.

(a) *Provision of services.* If specialized rehabilitative services such as, but not limited to, physical therapy, speech therapy, occupational therapy, and mental health services for mental illness are required in the participant's comprehensive care plan, program management must

(1) Provide the required services; or

(2) Obtain the required services and equipment from an outside resource, in accordance with § 51.210(h), from a provider of specialized rehabilitative services.

(b) *Written order.* Specialized rehabilitative services must be provided under the written order of a physician by qualified personnel.

§ 51.455 Dental services.

(a) If the adult day health care program offers medical supervision, program management must, if necessary, assist the participant and family/caregiver

(1) In making dental appointments; and

(2) By arranging for transportation to and from the dental services.

(b) If the adult day health care program offers medical supervision, program management must promptly assist and refer participants with lost or damaged dentures to a dentist.

§ 51.460 Administration of drugs.

If the adult day health care program offers medical supervision, the program management must assist participants with the management of medication and have a system for disseminating drug information to participants and program staff in accordance with this section.

(a) *Procedures.* The State home must

(1) Provide reminders or prompts to participants to initiate and follow through with self-administration of medications.

(2) Establish a system of records to document the administration of drugs by participants and/or staff.

(3) Ensure that drugs and biologicals used by participants are labeled in accordance with currently accepted professional principles, and include the appropriate accessory and cautionary instructions, and the expiration dates when applicable.

(4) Store all drugs, biologicals, and controlled schedule II drugs listed in 21 CFR 1308.12 in locked compartments under proper temperature controls, permit only authorized personnel to have access, and otherwise comply with all applicable State and Federal laws.

(b) *Service consultation.* The State home must provide the services of a pharmacist licensed in the State in which the program is located who provides consultation, as needed, on all the provision of drugs.

(The Office of Management and Budget has approved the information collection requirements in this section under control number 2900–0160.)

§ 51.465 Infection control.

The State home must meet the requirements concerning infection control set forth in § 51.190. For purposes of this section, the references in the cited section to resident refer to a participant in this section.

§ 51.470 Physical environment.

The State home must ensure that the physical environment is designed, constructed, equipped, and maintained to protect the health and safety of participants, personnel, and the public.

(a) *Life safety from fire.* The State home must meet the applicable requirements of National Fire Protection Association's NFPA 101, Life Safety from fire, as incorporated by reference in § 51.200.

(b) *Space and equipment.* (1) The State home must—

(i) Provide sufficient space and equipment in dining, health services, recreation, and program areas to enable staff to provide participants with needed services as required by this subpart F and as identified in each participant's comprehensive care plan; and

(ii) Maintain all essential mechanical, electrical, and patient care equipment in safe operating condition.

(2) Each adult day health care program, when it is co-located in a nursing home, domiciliary, or other care facility, must have its own separate designated space during operational hours.

(3) The indoor space for adult day health care must be at least 100 square feet per participant including office space for staff and must be 60 square feet per participant excluding office space for staff.

(4) Each program of care will need to design and partition its space to meet its needs, but the following functional areas must be available:

(i) A dividable multipurpose room or area for group activities, including dining, with adequate table-setting space.

(ii) Rehabilitation rooms or an area for individual and group treatments for occupational therapy, physical therapy, and other treatment modalities.

(iii) A kitchen area for refrigerated food storage, the preparation of meals and/or training participants in activities of daily living.

(iv) An examination and/or medication room.

(v) A quiet room (with a bed or a reclining chair), which functions to separate participants who become ill or disruptive, or who require rest, privacy, or observation. It should be separate from activity areas, near a restroom, and supervised.

(vi) Bathing facilities adequate to facilitate bathing of participants with functional impairments.

(vii) Toilet facilities and bathrooms easily accessible to people with mobility problems, including participants in wheelchairs. There must be at least one toilet for every eight participants. The toilets must be equipped for use by persons with limited mobility, easily accessible from all programs areas, *i.e.,* preferably within 40 feet from that area, designed to allow assistance from one or two staff, and barrier-free.

(viii) Adequate storage space. There should be space to store arts and crafts materials, wheelchairs, chairs, individual handiwork, and general supplies. Locked cabinets must be provided for files, records, supplies, and medications.

(ix) An individual room for counseling and interviewing participants and family members.

(x) A reception area.

(xi) An outside space that is used for outdoor activities that is safe, accessible to indoor areas, and accessible to those with a disability. This space may include recreational space and garden area. It should be easily supervised by staff.

(c) *Furnishings.* Furnishings must be available for all participants. This must include functional furniture appropriate to the participants' needs. Furnishings must be attractive, comfortable, and homelike, while being sturdy and safe.

(d) *Participant call system.* The coordinator's station must be equipped to receive participant calls through a communication system from:

(1) Clinic rooms; and

(2) Toilet and bathing facilities.

(e) *Other environmental conditions.* The State home must provide a safe, functional, sanitary, and comfortable environment for the participants, staff and the public. The facility management must

(1) Establish procedures to ensure that water is available to essential areas if there is a loss of normal water supply;

(2) Have adequate outside ventilation by means of windows, or mechanical ventilation, or a combination of the two;

(3) Equip corridors, when available, with firmly-secured handrails on each side; and

(4) Maintain an effective pest control program so that the facility is free of pests and rodents.

§ 51.475 Administration.

For purposes of this section, the references in the cited section to nursing home and nursing home care refer to adult day health care programs and adult day health care. The State home must comply with all administration requirements set forth in § 51.210 except for the following if the adult day health care program does not offer medical supervision:

(a) *Medical director.* State home adult day health care programs are not required to designate a primary care physician to serve as a medical director, and therefore are not required to comply with § 51.210(i).

(b) *Laboratory services, radiology, and other diagnostic services.* State home adult day health care programs are not required to provide the medical services identified in § 51.210(m) and (n).

(c) *Quality assessment and assurance committee.* State home adult day health care programs are not required to comply with § 51.210(p), regarding quality assessment and assurance committees consisting of specified medical providers and staff.

(The Office of Management and Budget has approved the information collection requirements in this section under control number 2900–0160.)

§ 51.480 Transportation.

Transportation of participants to and from the adult day health care facility must be a component of the overall program of care.

(a)(1) Except as provided in paragraph (a)(2) of this section, the State home must provide for transportation to enable participants, including persons with disabilities, to attend the program and to participate in State home-sponsored outings.

(2) The veteran or the family of a veteran may decline transportation offered by the adult day health care program and make their own arrangements for transportation.

(b) The State home must have a transportation policy that includes procedures for routine and emergency transportation. All transportation (including that provided under contract) must be in compliance with such procedures.

(c) The State home must ensure that the transportation it provides is by drivers who have access to a device for two-way communication.

(d) All systems and vehicles used by the State home to comply with this section must meet all applicable local, State and Federal regulations.

(e) The State home must ensure that the care needs of each participant are addressed during transportation furnished by the home.

PART 52—[REMOVED]

■ 23. Remove part 52, consisting of §§ 52.1 through 52.220.

[FR Doc. 2018–25115 Filed 11–27–18; 8:45 am]

BILLING CODE 8320–01–P

FEDERAL REGISTER

Vol. 83 Wednesday,

No. 229 November 28, 2018

Part IV

Department of the Interior

Fish and Wildlife Service

50 CFR Part 10

General Provisions; Revised List of Migratory Birds; Proposed Rules

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 10

[Docket No. FWS–HQ–MB–2018–0047; FXMB 12320900000//189//FF09M29000]

RIN 1018–BC67

General Provisions; Revised List of Migratory Birds

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), propose to revise the List of Migratory Birds protected by the Migratory Bird Treaty Act (MBTA) by both adding and removing species. Reasons for the changes to the list include adding species based on new taxonomy and new evidence of natural occurrence in the United States or U.S. territories, removing species no longer known to occur within the United States or U.S. territories, and changing names to conform to accepted use. The net increase of 59 species (66 added and 7 removed) would bring the total number of species protected by the MBTA to 1,085. We regulate the taking, possession, transportation, sale, purchase, barter, exportation, and importation of migratory birds. An accurate and up-to-date list of species protected by the MBTA is essential for public notification and regulatory purposes.

DATES: We will accept comments received or postmarked on or before January 28, 2019. Comments submitted electronically using the Federal eRulemaking Portal (see **ADDRESSES**, below) must be received by 11:59 p.m. Eastern Time on the closing date.

ADDRESSES: You may submit comments by one of the following methods:

(1) *Electronically:* Go to the Federal eRulemaking Portal: *http://www.regulations.gov.* In the Search box, enter FWS–HQ–MB–2018–0047, which is the docket number for this rulemaking. Then, click on the Search button. On the resulting page, in the Search panel on the left side of the screen, under the Document Type heading, click on the Proposed Rule box to locate this document. You may submit a comment by clicking on ''Comment Now!''

(2) *By hard copy:* Submit by U.S. mail or hand-delivery to: Public Comments Processing, Attn: FWS–HQ–MB–2018–0047, U.S. Fish and Wildlife Service, MS: BPHC, 5275 Leesburg Pike, Falls Church, VA 22041–3803.

We request that you send comments only by the methods described above. We will post all comments on *http://www.regulations.gov.* This generally means that we will post any personal information you provide us (see Public Comments, below, for more information).

FOR FURTHER INFORMATION CONTACT: Eric L. Kershner, Chief of the Branch of Conservation, Permits, and Regulations; Division of Migratory Bird Management; U.S. Fish and Wildlife Service; MS: MB; 5275 Leesburg Pike, Falls Church, VA 22041–3803; (703) 358–2376.

SUPPLEMENTARY INFORMATION:

What statutory authority does the service have for this rulemaking?

We have statutory authority and responsibility for enforcing the MBTA (16 U.S.C. 703–712), the Fish and Wildlife Improvement Act of 1978 (16 U.S.C. 742l), and the Fish and Wildlife Act of 1956 (16 U.S.C. 742a–j). The MBTA implements Conventions between the United States and four neighboring countries for the protection of migratory birds, as follows:

(1) *Canada:* Convention between the United States and Great Britain [on behalf of Canada] for the Protection of Migratory Birds, August 16, 1916, 39 Stat. 1702 (T.S. No. 628), as amended by Protocol between the Government of the United States and the Government of Canada Amending the 1916 Convention between the United Kingdom and the United States of America for the Protection of Migratory Birds, Sen. Treaty Doc. 104–28 (December 14, 1995);

(2) *Mexico:* Convention between the United States and Mexico for the Protection of Migratory Birds and Game Mammals, February 7, 1936, 50 Stat. 1311 (T.S. No. 912), as amended by Protocol with Mexico amending Convention for Protection of Migratory Birds and Game Mammals, Sen. Treaty Doc. 105–26 (May 5, 1997);

(3) *Japan:* Convention between the Government of the United States of America and the Government of Japan for the Protection of Migratory Birds and Birds in Danger of Extinction, and Their Environment, March 4, 1972, 25 U.S.T. 3329 (T.I.A.S. No. 7990); and

(4) *Russia:* Convention between the United States of America and the Union of Soviet Socialist Republics Concerning the Conservation of Migratory Birds and Their Environment (Russia), November 19, 1976, 29 U.S.T. 4647 (T.I.A.S. No. 9073).

What is the purpose of this rulemaking?

Our purpose is to inform the public of the species protected by the MBTA and its implementing regulations. These regulations are found in Title 50, Code of Federal Regulations (CFR), parts 10, 20, and 21. We regulate the taking, possession, transportation, sale, purchase, barter, exportation, and importation of migratory birds. An accurate and up-to-date list of species protected by the MBTA is essential for notifying the public of regulatory protections.

Why is the amendment of the list of migratory birds necessary?

The amendments we are proposing are needed to:

(1) Add 17 species that qualify for protection under the MBTA;

(2) Correct the spelling of 3 species names on the alphabetized list;

(3) Correct the spelling of 3 species names on the taxonomic list;

(4) Add 22 species based on new distributional records documenting their natural occurrence in the United States or U.S. territories since 2010;

(5) Add one species moved from a family that was not protected to a family now protected under the MBTA as a result of taxonomic changes;

(6) Add 26 species newly recognized as a result of recent taxonomic changes;

(7) Remove 7 species not known to occur within the boundaries of the United States or U.S. territories as a result of recent taxonomic changes;

(8) Change the common (English) names of 40 species to conform to accepted use; and

(9) Change the scientific names of 114 species to conform to accepted use.

The List of Migratory Birds (50 CFR 10.13) was last revised on November 1, 2013 (78 FR 65844). The amendments proposed in this rule were necessitated by eight published supplements to the 7th (1998) edition of the American Ornithologists' Union (AOU, now recognized as American Ornithological Society (AOS)) Check-list of North American Birds (AOU 2011, AOU 2012, AOU 2013, AOU 2014, AOU 2015, AOU 2016, AOS 2017, and AOS 2018) and the 2017 publication of the Clements Checklist of Birds of the World (Clements et al. 2017).

What scientific authorities are used to amend the list of migratory birds?

Although bird names (common and scientific) are relatively stable, staying current with standardized use is necessary to avoid confusion in communications. In making our determinations, we primarily relied on

the AOS's Checklist of North American birds (AOU 1998), as amended annually (AOU 1999 through 2016, AOS 2017, AOS 2018), on matters of taxonomy, nomenclature, and the sequence of species and other higher taxonomic categories (Orders, Families, Subfamilies) for species that occur in North America. The AOS Checklist contains all bird species that have occurred in North America from the Arctic through Panama, including the West Indies and the Hawaiian Islands, and includes distributional information for each species, which specifies whether the species is known to occur in the United States. For the species that occur outside the geographic area covered by the AOS Checklist, we relied on Clements et al. (2017) and peer-reviewed literature. Although we primarily rely on the above sources, when informed taxonomic opinion is inconsistent or controversial, we evaluate available published and unpublished information and come to our own conclusion regarding the validity of taxa.

What criteria are used to identify individual species protected by the MBTA?

A species qualifies for protection under the MBTA by meeting one or more of the following criteria:

(1) It occurs in the United States or U.S. territories as the result of natural biological or ecological processes and is currently, or was previously listed as, a species or part of a family protected by one of the four international treaties or their amendments. Any species that occurs in the United States or U.S. territories solely as a result of intentional or unintentional human-assisted introduction does not qualify for the MBTA list, regardless of whether the family the species belongs to is listed in any of the treaties, unless:

- It was native to the United States or its territories and extant in 1918;
- It was extirpated after 1918 throughout its range in the United States and its territories; and
- After such extirpation, it was reintroduced in the United States or its territories as part of a program carried out by a Federal agency.

(2) Revised taxonomy results in it being newly split from a species that was previously on the list, and the new species occurs in the United States or U.S. territories as the result of natural biological or ecological processes. If a newly recognized native species is considered extinct (following the classification of the American Ornithological Society (AOS) or, for species not covered by the AOS, the Clements checklist or peer-reviewed literature), that species will still be included if either of the following criteria apply:

- The species resembles extant species included in the list that may be affected by trade if the species is not included; or
- Not including the species may create difficulties implementing the MBTA and its underlying Conventions.

(3) New evidence exists for its natural occurrence in the United States or U.S. territories resulting from new or natural distributional changes and the species occurs in a protected family. Records must be documented, accepted, and published by the AOS committee. For the U.S. Pacific territories that fall outside the geographic scope of the AOS and for which there is no identified ornithological authority, new evidence of a species' natural occurrence will be based on the Clements checklist and then published peer-reviewed literature, in that order.

In accordance with the Migratory Bird Treaty Reform Act of 2004 (MBTRA) (Pub. L. 108–447, 118 Stat. 2809, 3071–72), we only include migratory bird species that are native to the United States or U.S. territories. A native migratory bird species is one that is present as a result of natural biological or ecological processes. The list at 50 CFR 10.13 does not include nonnative species that occur in the United States or U.S. territories solely as a result of intentional or unintentional human-assisted introduction(s). Elsewhere in today's **Federal Register**, we publish a notice of availability of the draft revised list of nonnative bird species that are not protected under the MBTA.

How would the proposed changes affect the list of migratory birds?

Several taxonomic changes were made at the Order and Family level by the AOS since our 2013 publication of the list (78 FR 65844; November 1, 2013). These changes affect the inclusion and taxonomic order of species on this list. Specifically, the Order Cathartiformes (New World vultures) was split from the Accipitriformes (diurnal birds of prey). Cathartiformes now includes the Family Cathartidae (vultures and California condor). At the Family level, the Oceanitidae (southern storm-petrels) was split from the Hydrobatidae (northern storm-petrels), the Tityridae (becards and tityras) was split from the Tyrannidae (tyrant flycatchers), the Passerellidae (towhees, sparrows, and juncos) was split from the Emberizidae (buntings), the Megaluridae (*Locustella* warblers) was renamed to Locustellidae. The Ptilogonatidae (silky-flycatchers) was renamed to the Ptiliogonatidae. The Nesospingidae (Puerto Rican tanager) and the Spindalidae (*Spindalis* genus) were split from the Thraupidae (tanagers). The yellow-breasted chat was split from the Parulidae (wood-warblers) and placed into Icteriidae (chats). Within the Scolopacidae (sandpipers, phalaropes, and allies), new Subfamilies were created: The curlews were moved to Numeniinae; the godwits to Limosinae; and small sandpipers to Arenariinae and larger sandpipers to Tringinae, including phalaropes whose previous Subfamily Phalaropodinae was removed. Within the Accipitridae (hawks, eagles, and kites), new Subfamilies were created: The white-tailed kite was move to Elaninae, hook-billed and swallow-tailed kite were moved to Gypaetinae, and all other members of the family were moved to Accipitrinae. Within the Icteridae (blackbirds), new Subfamilies were created: Yellow-headed blackbird was moved to Xanthocephalinae; bobolink was moved to Dolichonychinae; meadowlarks were moved to Sturnellinae; orioles were moved to Icterinae; and blackbirds, cowbirds, and grackles were moved to Agelaiinae. In the Falconidae (caracaras and falcons), collared forest-falcon was moved into the new Subfamily Herpetotherinae, and the Subfamily Caracarinae was removed, with crested caracara moved to the Subfamily Falconinae. In the Fringillidae (finches and allies), the Hawaiian fringillids were moved from the Subfamily Drepanidinae to Carduelinae. The Old World flycatchers in the Turdidae (thrushes) were moved to the Muscicapidae (Old World flycatchers). Bananaquit was moved from the Coerebidae (a family not protected by MBTA) to the Thraupidae (tanagers and allies), which is a family protected by the MBTA. All other tanagers were also moved from the Emberizidae (sparrows) to the Thraupidae. Within Thraupidae, the seedeaters were moved into the Subfamily Sporophilinae, and bananaquit, grassquits, and bullfinches were moved into the Subfamily Coerebinae.

All species previously receiving protection under the MBTA that have been moved to newly created Families continue to be protected under the MBTA.

The proposed amendments (66 additions, 7 removals, and 154 name changes) would affect a total of 204 species and would result in a net addition of 59 species to the List of Migratory Birds, increasing the number of species on the list from 1,026 to

1,085. Of the 66 species that we would add to the list, 26 were previously covered under the MBTA as members of the same species (conspecific) of listed species. These proposed amendments can be logically arranged in the following nine categories:

(1) Add 17 species that qualify for protection by the MBTA but have not been added previously. The addition of these species is the result of either accepting AOS taxonomic updates that were previously excluded or determinations of documented natural occurrence in the United States or U.S. territories. The species and relevant publication(s) are:

Pink-footed Goose, *Anser brachyrhynchus* (AOU 1983);
Cackling Goose, *Branta hutchinsii* (AOU 2003);
European Turtle-Dove, *Streptopelia turtur* (AOU 2007);
Long-tailed Koel, *Urodynamis taitensis* (Wiles 2005);
White-tailed Nightjar, *Hydropsalis cayennensis* (AOU 1983);
Vervain Hummingbird, *Mellisuga minima* (AOU 1983);
Kentish Plover, *Charadrius alexandrinus* (Enbring and Owen 1981);
Common Redshank, *Tringa totanus* (Wiles 2005);
Nazca Booby, *Sula granti* (AOU 2000);
Abbott's Booby, *Papasula abbotti* (Pratt et al. 2009);
Rufous Night-Heron, *Nycticorax caledonicus* (Glass et al. 1990);
Gray-faced Buzzard, *Butastur indicus* (Stinson et al. 1997);
Eastern Marsh-Harrier, *Circus spilonotus* (Wiles et al. 2000);
Amur Falcon, *Falco amurensis* (Stinson et al. 1991);
Eurasian Jackdaw, *Corvus monedula* (AOU 1998);
Redwing, *Turdus iliacus* (AOU 1983);
Common Kingfisher, *Alcedo atthis* (Wiles et al. 1993).

(2) Correct the spelling of three common or scientific names on the alphabetized list:

Eared Quetzel, *Euptilotis neoxenus,* becomes Eared Quetzal
Red-footed falcon, *Flaco vespertinus,* becomes *Falco vespertinus*
Piratic Flycatcher, *Legatus leucophalus* becomes *Legatus leucophaius*

(3) Correct the spelling of three common or scientific names on the taxonomic list:

Eared Quetzel, *Euptilotis neoxenus,* becomes Eared Quetzal
White-crested Eleania, *Elaenia albiceps* becomes White-crested Elaenia
Piratic Flycatcher, *Legatus leucophalus* becomes *Legatus leucophaius*

(4) Add 22 species based on review and acceptance by the AOS (since 2010) or by other appropriate ornithological authorities of new distributional records documenting their occurrence in the United States or U.S. territories. These species belong to families covered by at least one of the four international conventions, and all are considered to be of accidental or casual occurrence. For each species, we list the State in which it has been recorded plus the relevant publication:

Common Scoter, *Melanitta nigra*—California and Oregon (AOS 2017);
Amethyst-throated Hummingbird, *Lampornis amethystinus*—Texas (AOS 2018);
Rufous-necked Wood-Rail, *Aramides axillaris*—New Mexico (AOU 2016);
Solitary Snipe, *Gallinago solitaria*—Alaska (AOU 2011);
Chatham Albatross, *Thalassarche eremita*—California (AOS 2017);
Providence Petrel, *Pterodroma solandri*—Alaska (AOU 2013);
Fea's Petrel, *Pterodroma feae*—North Carolina, Georgia, Virginia (AOU 2013);
Zino's Petrel, *Pterodroma madeira*—North Carolina, (AOU 2015);
White-chinned Petrel, *Procellaria aequinoctialis*—Texas, California, Maine (AOU 2011);
Bryan's Shearwater, *Puffinus bryani*—Hawaii (AOU 2012);
Bare-throated Tiger-Heron, *Tigrisoma mexicanum*—Texas (AOU 2011);
Double-toothed Kite, *Harpagus bidentatus*—Texas (AOU 2013);
Amazon Kingfisher, *Chloroceryle amazona*—Texas (AOU 2011);
Gray-collared Becard, *Pachyramphus major*—Arizona (AOU 2011);
Pine Flycatcher, *Empidonax affinis*—Arizona (AOS 2018);
Cuban Vireo, *Vireo gundlachii*—Florida (AOS 2018);
Common Chiffchaff, *Phylloscopus collybita*—Alaska (AOU 2014);
Blyth's Reed Warbler, *Acrocephalus dumetorum*—Alaska (AOU 2017);
Common Redstart, *Phoenicurus phoenicurus*—Alaska (AOU 2015);
Brown-backed Solitaire, *Myadestes occidentalis*—Arizona (AOU 2011);
Asian Rosy-Finch, *Leucosticte arctoa*—Alaska (AOU 2013);
Red-legged Honeycreeper, *Cyanerpes cyaneus*—Texas (AOS 2017).

(5) Add one species because of recent taxonomic changes transferring a species in a Family formerly not protected by the MBTA (Coerebidae) into a Family protected under the MBTA (Thraupidae). We reference the AOU publication supporting the change: Bananaquit, *Coereba flaveola,* (AOU 2015).

(6) Add 26 species because of recent taxonomic changes in which taxa formerly treated as conspecific have been determined to be distinct species. Given that each of these species was formerly treated as conspecific with a listed species, these additions would not change the protective status of any of these taxa, only the names by which they are known. In each case, we reference the AOS or relevant publication supporting the change:

Ridgway's Rail, *Rallus obsoletus*—formerly considered conspecific with Clapper Rail, *Rallus longirostris* (AOU 2014);
Common Gallinule, *Gallinula galeata*—formerly considered conspecific with Common Moorhen, *Gallinula chloropus* (AOU 2011);
Scripps's Murrelet, *Synthliboramphus scrippsi*—formerly considered conspecific with Xantus's Murrelet, *Synthliboramphus hypoleucus* (AOU 2012);
Salvin's Albatross, *Thalassarche salvini*—formerly considered conspecific with Shy Albatross, *Thalassarche cauta* (AOU 2014);
Trindade Petrel, *Pterodroma arminjoniana*—formerly considered conspecific with Herald Petrel, *Pterodroma heraldica* (AOU 2015);
Newell's Shearwater, *Puffinus newelli*—formerly considered conspecific with Townsend's Shearwater, *Puffinus auricularis* (AOU 2015);
Barolo Shearwater, *Puffinus baroli*—formerly considered conspecific with Little Shearwater, *Puffinus assimilis* (AOU 2013);
Townsend's Storm-Petrel, *Oceanodroma socorroensis*—formerly considered conspecific with Leach's Storm-Petrel, *Oceanodroma leucorhoa* (AOU 2016);
Northern Boobook, *Ninox japonica*—formerly considered conspecific with Brown Hawk-Owl, *Ninox scutulata* (AOU 2014);
Pacific Kingfisher, *Todiramphus sacer*—formerly considered conspecific with Collared Kingfisher, *Todiramphus chloris* (Clements et al. 2015);
Mariana Kingfisher, *Todiramphus albicilla*—formerly considered conspecific with Collared Kingfisher, *Todiramphus chloris* (Clements et al. 2015);
Woodhouse's Scrub-Jay, *Aphelocoma woodhouseii*—formerly considered conspecific with Western Scrub-Jay, *Aphelocoma californica* (AOU 2016);
Kamchatka Leaf Warbler, *Phylloscopus examinandus*—formerly considered conspecific with Arctic Warbler, *Phylloscopus borealis* (AOU 2014);
Saipan Reed Warbler, *Acrocephalus hiwae*—formerly considered conspecific with Nightingale Reed Warbler, *Acrocephalus luscinius* (Clements et al. 2013);
Aguiguan Reed Warbler, *Acrocephalus nijoi*—formerly considered conspecific with Nightingale Reed Warbler, *Acrocephalus luscinius* (Clements et al. 2013);
Pagan Reed Warbler, *Acrocephalus yamashinae*—formerly considered conspecific with Nightingale Reed Warbler, *Acrocephalus luscinius* (Clements et al. 2013);
Laysan Honeycreeper, *Himatione fraithii*—formerly considered conspecific with Apapane, *Himatione sanguinea* (AOU 2015)
Kauai Nukupu'u, *Hemignathus hanapepe*—formerly considered conspecific with Nukupuu, *Hemignathus lucidus* (AOU 2015);
Maui Nukupu'u, *Hemignathus affins*—formerly considered conspecific with

Nukupuu, *Hemignathus lucidus* (AOU 2015);
Kauai ʻAkialoa, *Akialoa stejnegeri*—formerly considered conspecific with Greater Akialoa, *Hemignathus ellisianus* (AOU 2015);
Maui Nui ʻAkialoa, *Akialoa lanaiensis*—formerly considered conspecific with Greater Akialoa, *Hemignathus ellisianus* (AOU 2015);
Oʻahu ʻAkepa, *Loxops wolstenholmei*—formerly considered conspecific with Akepa, *Loxops coccineus* (AOU 2015);
Maui ʻAkepa, *Loxops ochraceus*—formerly considered conspecific with Akepa, *Loxops coccineus* (AOU 2015);
Cassia Crossbill, *Loxia sinesciuris*—formerly considered conspecific with Red Crossbill, *Loxia curvirostra* (AOS 2017);
Sagebrush Sparrow, *Artemisiospiza nevadensis*—formerly considered conspecific with Sage Sparrow, *Amphispiza belli* (AOU 2013);
Morelet's Seedeater, *Sporophila morelleti*—formerly considered conspecific with White-collared Seedeater, *Sporophila torqueola* (AOS 2018).

(7) Remove seven species based on revised taxonomic treatments, either because a species is taxonomically merged with another species, either on or off the list; a species previously on the list is taxonomically split into multiple species and the new species is not known to occur within the United States or U.S. territories; or the species is considered extinct (following the classification of the AOS or, for species not covered by the AOS, the Clements checklist or peer-reviewed literature) unless any of the following criteria apply: It is protected under the Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531 *et seq.*), or the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES; 27 U.S.T. 1087); it resembles extant species included in the list that may be affected by its removal; or its removal would create difficulties implementing the MBTA and its underlying Conventions. In each case, we reference the publication supporting these changes:

Thayer's Gull, *Larus thayeri,* now a subspecies of Iceland Gull, *Larus glaucoides* (AOS 2017);
Townsend's Shearwater, *Puffinus auricularis* (AOU 2015);
Little Shearwater, *Puffinus assimilis* (AOU 2015);
Brown Hawk-Owl, *Ninox scutulata* (AOU 2014);
Caribbean Coot, *Fulica caribaea* (AOU 2016);
Collared Kingfisher, *Todiramphus chloris* (Clements et al. 2015);
White-collared Seedeater, *Sporophila torqueola* (AOS 2018).

(8) Revise the common (English) names of 40 species to conform to the most recent nomenclatural treatment as described in AOU publications 2011, 2012, 2013, 2014, 2015, 2016, AOS 2017, AOS 2018, and Clements et al. (2017). Hawaiian species names are modified to official Hawaiian spelling, following the Pukui-Elbert Hawaiian Dictionary, adding the diacritical marks to the common names where applicable. The Government Publishing Office Style Manual requires the words Hawaii and Kauai to be spelled without the diacritical mark. These revisions do not change the protective status of any of these taxa, only the names by which they are known. In each case, the update is described in the table, below.

(9) Revise the scientific names of 114 species to conform to the most recent nomenclatural treatment as described in AOU publications 2011, 2012, 2013, 2014, 2015, 2016, AOS 2017, AOS 2018, and Clements et al. (2017). These revisions do not change the protective status of any of these taxa, only the names by which they are known. In each case, the update is described in the table, below.

Table of Proposed Name Changes, as described in categories 8 and 9, above. Table is organized following AOS (2017) taxonomic order. The relevant AOS publication is provided. Hawaiian common name changes are indicated with a (—).

Publication source and year	Previous common name	Current common name
AOU 2004	Canada Goose (including *Branta hutchinsii*), *Branta canadensis*.	Canada Goose, *Branta canadensis*.
AOU 2016	Green Violetear, *Colibri thalassinus*	Mexican Violetear, *Colibri thalassinus*.
AOS 2017	Magnificent hummingbird, *Eugenes fulgens*	Rivoli's Hummingbird, *Eugenes fulgens*.
AOU 2012	Xantus's Murrelet, *Synthliboramphus hypoleucus*	Guadalupe Murrelet, *Synthliboramphus hypoleucus*.
AOU 2014	Shy Albatross, *Thalassarche cauta*	White-capped Albatross, *Thalassarche cauta*.
AOU 2015	Herald Petrel, *Pterodroma arminjoniana*	Trindade Petrel, *Pterodroma arminjoniana*.
Clements et al. 2000	Pacific Reef-Egret, *Egretta sacra*	Pacific Reef-Heron, *Egretta sacra*.
AOU 2012	Gray Frog-Hawk, *Accipiter soloensis*	Chinese Sparrowhawk, *Accipiter soloensis*.
AOU 2014	Common Black-Hawk, *Buteogallus anthracinus*	Common Black Hawk, *Buteogallus anthracinus*.
AOS 2018	Gray Jay, *Perisoreus canadensis*	Canada Jay, *Perisoreus canadensis*.
AOU 2016	Western Scrub-Jay, *Aphelocoma californica*	California Scrub-Jay, *Aphelocoma californica*.
AOU 2016	Eurasian Sky Lark, *Alauda arvensis*	Eurasian Skylark, *Alauda arvensis*.
AOU 2014	Pallas's Leaf-Warbler, *Phylloscopus proregulus*	Pallas's Leaf Warbler, *Phylloscopus proregulus*.
—	Kamao, *Myadestes myadestinus*	Kāmaʻo, *Myadestes myadestinus*.
—	Olomao, *Myadestes lanaiensis*	Ǫlomaʻo, *Myadestes lanaiensis*.
—	Omao, *Myadestes obscurus*	ʻŌmaʼo, *Myadestes obscurus*.
AOS 2017	Le Conte's Thrasher, *Toxostoma lecontei*	LeConte's Thrasher, *Toxostoma lecontei*.
AOU 2015	Nukupuu, *Hemignathus lucidus*	Oʻahu Nukupuʻu, *Hemignathus lucidus*.
—	Poo-uli, *Melamprosops phaeosoma*	Poʻouli, *Melamprosops phaeosoma*.
—	Akikiki, *Oreomystis bairdi*	ʻAkikiki, *Oreomystis bairdi*.
—	Oahu Alauahio, *Paroreomyza maculata*	Oʻahu ʻAlauahio, *Paroreomyza maculata*.
—	Kakawahie, *Paroreomyza flammea*	Kākāwahie, *Paroreomyza flammea*.
—	Maui Alauahio, *Paroreomyza montana*	Maui ʻAlauahio, *Paroreomyza montana*.
—	Akohekohe, *Palmeria dolei*	ʻAkohekohe, *Palmeria dolei*.
—	Apapane, *Himatione sanguinea*	ʻApapane, *Himatione sanguinea*.
—	Iiwi, *Drepanis coccinea*	ʻIʻiwi, *Drepanis coccinea*.
—	Ou, *Psittirostra psittacea*	ʻŌʻū, *Psittirostra psittacea*.
—	Anianiau, *Magumma parva*	ʻAnianiau, *Magumma parva*.
—	Akekee, *Loxops caeruleirostris*	ʻAkekeʻe, *Loxops caeruleirostris*.
AOU 2015	Akepa, *Loxops coccineus*	Hawaii ʻAkepa, *Loxops coccineus*.
AOS 2017	Le Conte's Sparrow, *Ammodramus leconteii*	LeConte's Sparrow, *Ammodramus leconteii*.
AOS 2017	Emperor Goose, *Chen canagica*	Emperor Goose, *Anser canagicus*.
AOS 2017	Snow Goose, *Chen caerulescens*	Snow Goose, *Anser caerulescens*.

Publication source and year	Previous common name	Current common name
AOS 2017	Ross's Goose, *Chen rossii*	Ross's Goose, *Anser rossii*.
AOS 2017	Baikal Teal, *Anas formosa*	Baikal Teal, *Sibirionetta formosa*.
AOS 2017	Garganey, *Anas querquedula*	Garganey, *Spatula querquedula*.
AOS 2017	Blue-winged Teal, *Anas discors*	Blue-winged Teal, *Spatula discors*.
AOS 2017	Cinnamon Teal, *Anas cyanoptera*	Cinnamon Teal, *Spatula cyanoptera*.
AOS 2017	Northern Shoveler, *Anas clypeata*	Northern Shoveler, *Spatula clypeata*.
AOS 2017	Gadwall, *Anas strepera*	Gadwall, *Mareca strepera*.
AOS 2017	Falcated Duck, *Anas falcata*	Falcated Duck, *Mareca falcata*.
AOS 2017	Eurasian Wigeon, *Anas penelope*	Eurasian Wigeon, *Mareca penelope*.
AOS 2017	American Wigeon, *Anas americana*	American Wigeon, *Mareca americana*.
Clements et al. 2017	White-throated Ground-Dove, *Gallicolumba xanthonura*	White-throated Ground-Dove, *Alopecoenas xanthonura*.
Clements et al. 2010	Hodgson's Hawk-Cuckoo, *Cuculus fugax*	Hodgson's Hawk-Cuckoo, *Hierococcyx nisicolor*.
AOU 2012	Chuck-will's-widow, *Caprimulgus carolinensis*	Chuck-will's-widow, *Antrostomus carolinensis*.
AOU 2012	Buff-collared Nightjar, *Caprimulgus ridgwayi*	Buff-collared Nightjar, *Antrostomus ridgwayi*.
AOU 2012	Eastern Whip-poor-will, *Caprimulgus vociferus*	Eastern Whip-poor-will, *Antrostomus vociferus*.
AOU 2012	Mexican Whip-poor-will, *Caprimulgus arizonae*	Mexican Whip-poor-will, *Antrostomus arizonae*.
AOU 2012	Puerto Rican Nightjar, *Caprimulgus noctitherus*	Puerto Rican Nightjar, *Antrostomus noctitherus*.
AOS 2018	Gray Nightjar, *Caprimulgus indicus*	Gray Nightjar, *Caprimulgus jotaka*.
AOU 2012	Calliope Hummingbird, *Stellula calliope*	Calliope Hummingbird, *Selasphorus calliope*.
AOU 2014	Clapper Rail, *Rallus longirostris*	Clapper Rail, *Rallus crepitans*.
AOU 2016	Yellow-breasted Crake, *Porzana flaviventer*	Yellow-breasted Crake, *Hapalocrex flaviventer*.
AOU 2012	Purple Gallinule, *Porphyrio martinica*	Purple Gallinule, *Porphyrio martinicus*.
AOU 2016	Sandhill Crane, *Grus canadensis*	Sandhill Crane, *Antigone canadensis*.
AOU 2011	Snowy Plover, *Charadrius alexandrinus*	Snowy Plover, *Charadrius nivosus*.
AOU 2013	Surfbird, *Aphriza virgata*	Surfbird, *Calidris virgata*.
AOU 2013	Ruff, *Philomachus pugnax*	Ruff, *Calidris pugnax*.
AOU 2013	Broad-billed Sandpiper, *Limicola falcinellus*	Broad-billed Sandpiper, *Calidris falcinellus*.
AOU 2013	Spoon-billed Sandpiper, *Eurynorhynchus pygmeus*	Spoon-billed Sandpiper, *Calidris pygmea*.
AOU 2013	Buff-breasted Sandpiper, *Tryngites subruficollis*	Buff-breasted Sandpiper, *Calidris subruficollis*.
AOS 2017	Blue-gray Noddy, *Procelsterna cerulea*	Blue-gray Noddy, *Anous ceruleus*.
AOU 2003	Whiskered Tern, *Chlidonias hybridus*	Whiskered Tern, *Chlidonias hybrida*.
AOS 2018	Tahiti Petrel, *Pterodroma rostrata*	Tahiti Petrel, *Pseudobulweria rostrata*.
AOU 2016	Wedge-tailed Shearwater, *Puffinus pacificus*	Wedge-tailed Shearwater, *Ardenna pacifica*.
AOU 2016	Buller's Shearwater, *Puffinus bulleri*	Buller's Shearwater, *Ardenna bulleri*.
AOU 2016	Short-tailed Shearwater, *Puffinus tenuirostris*	Short-tailed Shearwater, *Ardenna tenuirostris*.
AOU 2016	Sooty Shearwater, *Puffinus griseus*	Sooty Shearwater, *Ardenna grisea*.
AOU 2016	Great Shearwater, *Puffinus gravis*	Great Shearwater, *Ardenna gravis*.
AOU 2016	Pink-footed Shearwater, *Puffinus creatopus*	Pink-footed Shearwater, *Ardenna creatopus*.
AOU 2016	Flesh-footed Shearwater, *Puffinus carneipes*	Flesh-footed Shearwater, *Ardenna carneipes*.
AOS 2017	Intermediate Egret, *Mesophoyx intermedia*	Intermediate Egret, *Ardea intermedia*.
AOS 2017	Northern Harrier, *Circus cyaneus*	Northern Harrier, *Circus hudsonius*.
AOU 2015	Roadside Hawk, *Buteo magnirostris*	Roadside Hawk, *Rupornis magnirostris*.
AOU 2015	White-tailed Hawk, *Buteo albicaudatus*	White-tailed Hawk, *Geranoaetus albicaudatus*.
AOS 2018	Downy Woodpecker, *Picoides pubescens*	Downy Woodpecker, *Dryobates pubescens*.
AOS 2018	Nuttall's Woodpecker, *Picoides nuttallii*	Nuttall's Woodpecker, *Dryobates nuttallii*.
AOS 2018	Ladder-backed Woodpecker, *Picoides scalaris*	Ladder-backed Woodpecker, *Dryobates scalaris*.
AOS 2018	Red-cockaded Woodpecker, *Picoides borealis*	Red-cockaded Woodpecker, *Dryobates borealis*.
AOS 2018	Hairy Woodpecker, *Picoides villosus*	Hairy Woodpecker, *Dryobates villosus*.
AOS 2018	White-headed Woodpecker, *Picoides albolarvatus*	White-headed Woodpecker, *Dryobates albolarvatus*.
AOS 2018	Arizona Woodpecker, *Picoides arizonae*	Arizona Woodpecker, *Dryobates arizonae*.
AOU 2013	Flammulated Owl, *Otus flammeolus*	Flammulated Owl, *Psiloscops flammeolus*.
AOS 2017	Northern Shrike, *Lanius excubitor*	Northern Shrike, *Lanius borealis*.
AOU 2011	Mexican Jay, *Aphelocoma ultramarina*	Mexican Jay, *Aphelocoma wollweberi*.
AOU 2012	Sinaloa Wren, *Thryothorus sinaloa*	Sinaloa Wren, *Thryophilus sinaloa*.
AOS 2018	Siberian Blue Robin, *Luscinia cyane*	Siberian Blue Robin, *Larvivora cyane*.
AOS 2018	Rufous-tailed Robin, *Luscinia sibilans*	Rufous-tailed Robin, *Larvivora sibilans*.
AOS 2018	Bluethroat, *Luscinia svecica*	Bluethroat, *Cyanecula svecica*.
AOS 2018	Siberian Rubythroat, *Luscinia calliope*	Siberian Rubythroat, *Calliope calliope*.
Clements et al. 2015	Chestnut-cheeked Starling, *Sturnus phillippensis*	Chestnut-cheeked Starling, *Agropsar philippensis*.
Clements et al. 2015	White-cheeked Starling, *Sturnus cineraceus*	White-cheeked Starling, *Spodiopsar cineraceus*.
AOU 2013	Gray Silky-flycatcher, *Ptilogonys cinereus*	Gray Silky-flycatcher, *Ptiliogonys cinereus*.
AOU 2012	House Finch, *Carpodacus mexicanus*	House Finch, *Haemorhous mexicanus*.
AOU 2012	Purple Finch, *Carpodacus purpureus*	Purple Finch, *Haemorhous purpureus*.
AOU 2012	Cassin's Finch, *Carpodacus cassinii*	Cassin's Finch, *Haemorhous cassinii*.
AOU 2015	American Tree Sparrow, *Spizella arborea*	American Tree Sparrow, *Spizelloides arborea*.
AOS 2018	Baird's Sparrow, *Ammodramus bairdii*	Baird's Sparrow, *Centronyx bairdii*.
AOS 2018	Henslow's Sparrow, *Ammodramus henslowii*	Henslow's Sparrow, *Centronyx henslowii*.
AOS 2018	LeConte's Sparrow, *Ammodramus leconteii*	LeConte's Sparrow, *Ammospiza leconteii*.
AOS 2018	Seaside Sparrow, *Ammodramus maritima*	Seaside Sparrow, *Ammospiza maritima*.
AOS 2018	Nelson's Sparrow, *Ammodramus nelsoni*	Nelson's Sparrow, *Ammospiza nelsoni*.
AOS 2018	Saltmarsh Sparrow, *Ammodramus caudacuta*	Saltmarsh Sparrow, *Ammospiza caudacuta*.
AOU 2011	MacGillivray's Warbler, *Oporornis tolmiei*	MacGillivray's Warbler, *Geothlypis tolmiei*.
AOU 2011	Mourning Warbler, *Oporornis philadelphia*	Mourning Warbler, *Geothlypis philadelphia*.

Publication source and year	Previous common name	Current common name
AOU 2011	Kentucky Warbler, *Oporornis formosus*	Kentucky Warbler, *Geothlypis formosa*.
AOU 2011	Elfin-woods Warbler, *Dendroica angelae*	Elfin-woods Warbler, *Setophaga angelae*.
AOU 2011	Hooded Warbler, *Wilsonia citrina*	Hooded Warbler, *Setophaga citrina*.
AOU 2011	Kirtland's Warbler, *Dendroica kirtlandii*	Kirtland's Warbler, *Setophaga kirtlandii*.
AOU 2011	Cape May Warbler, *Dendroica tigrina*	Cape May Warbler, *Setophaga tigrina*.
AOU 2011	Cerulean Warbler, *Dendroica cerulea*	Cerulean Warbler, *Setophaga cerulea*.
AOU 2011	Northern Parula, *Parula americana*	Northern Parula, *Setophaga americana*.
AOU 2011	Tropical Parula, *Parula pitiayumi*	Tropical Parula, *Setophaga pitiayumi*.
AOU 2011	Magnolia Warbler, *Dendroica magnolia*	Magnolia Warbler, *Setophaga magnolia*.
AOU 2011	Bay-breasted Warbler, *Dendroica castanea*	Bay-breasted Warbler, *Setophaga castanea*.
AOU 2011	Blackburnian Warbler, *Dendroica fusca*	Blackburnian Warbler, *Setophaga fusca*.
AOU 2011	Yellow Warbler, *Dendroica petechia*	Yellow Warbler, *Setophaga petechia*.
AOU 2011	Chestnut-sided Warbler, *Dendroica pensylvanica*	Chestnut-sided Warbler, *Setophaga pensylvanica*.
AOU 2011	Blackpoll Warbler, *Dendroica striata*	Blackpoll Warbler, *Setophaga striata*.
AOU 2011	Black-throated Blue Warbler, *Dendroica caerulescens*	Black-throated Blue Warbler, *Setophaga caerulescens*.
AOU 2011	Palm Warbler, *Dendroica palmarum*	Palm Warbler, *Setophaga palmarum*.
AOU 2011	Pine Warbler, *Dendroica pinus*	Pine Warbler, *Setophaga pinus*.
AOU 2011	Yellow-rumped Warbler, *Dendroica coronata*	Yellow-rumped Warbler, *Setophaga coronata*.
AOU 2011	Yellow-throated Warbler, *Dendroica dominica*	Yellow-throated Warbler, *Setophaga dominica*.
AOU 2011	Prairie Warbler, *Dendroica discolor*	Prairie Warbler, *Setophaga discolor*.
AOU 2011	Adelaide's Warbler, *Dendroica adelaidae*	Adelaide's Warbler, *Setophaga adelaidae*.
AOU 2011	Grace's Warbler, *Dendroica graciae*	Grace's Warbler, *Setophaga graciae*.
AOU 2011	Black-throated Gray Warbler, *Dendroica nigrescens*	Black-throated Gray Warbler, *Setophaga nigrescens*.
AOU 2011	Townsend's Warbler, *Dendroica townsendi*	Townsend's Warbler, *Setophaga townsendi*.
AOU 2011	Hermit Warbler, *Dendroica occidentalis*	Hermit Warbler, *Setophaga occidentalis*.
AOU 2011	Golden-cheeked Warbler, *Dendroica chrysoparia*	Golden-cheeked Warbler, *Setophaga chrysoparia*.
AOU 2011	Black-throated Green Warbler, *Dendroica virens*	Black-throated Green Warbler, *Setophaga virens*.
AOU 2011	Fan-tailed Warbler, *Euthlypis lachrymosa*	Fan-tailed Warbler, *Basileuterus lachrymosus*.
AOU 2011	Canada Warbler, *Wilsonia canadensis*	Canada Warbler, *Cardellina canadensis*.
AOU 2011	Wilson's Warbler, *Wilsonia pusilla*	Wilson's Warbler, *Cardellina pusilla*.
Clements et al. 2017	Friendly Ground-Dove, *Gallicolumba stairi*	Shy Ground-Dove, *Alopecoenas stairi*.
Clements et al. 2006	Micronesian Kingfisher, *Todirhamphus cinnamominus*	Guam Kingfisher, *Todiramphus cinnamominus*.
Clements et al. 2006, 2017.	Nightingale Reed-Warbler, *Acrocephalus luscinia*	Nightingale Reed Warbler, *Acrocephalus luscinius*.
AOU 2015	Akiapolaau, *Hemignathus munroi*	'Akiapola'au, *Hemignathus wilsoni*.
AOU 2015	Greater Akialoa, *Hemignathus ellisianus*	O'ahu 'Akialoa, *Akialoa ellisiana*.
AOU 2015	Hawaii Amakihi, *Hemignathus virens*	Hawaii 'Amakihi, *Chlorodrepanis virens*.
AOU 2015	Oahu Amakihi, *Hemignathus flavus*	O'ahu 'Amakihi, *Chlorodrepanis flava*.
AOU 2015	Kauai Amakihi, *Hemignathus kauaiensis*	Kauai 'Amakihi, *Chlorodrepanis stejnegeri*.
AOU 2012, 2013	Sage Sparrow, *Amphispiza belli*	Bell's Sparrow, *Artemisiospiza belli*.

How is the list of migratory birds organized?

The species are listed in two formats to suit the needs of different segments of the public: alphabetically in 50 CFR 10.13(c)(1) and taxonomically in 50 CFR 10.13(c)(2). In the alphabetical listing, species are listed by common (English) group names, with the scientific name of each species following the English group name. This format, similar to that used in modern telephone directories, is most useful to members of the lay public. In the taxonomic listing, species are listed in phylogenetic sequence by scientific name, with the English name following the scientific name. To help clarify species relationships, we also list the higher-level taxonomic categories of Order, Family, and Subfamily. This format follows the sequence adopted by the AOS (1998, 2017) and is most useful to ornithologists and other scientists.

What species are not protected by the Migratory Bird Treaty Act?

The MBTA does not apply to:

(1) Nonnative species introduced into the United States or U.S. territories by means of intentional or unintentional human assistance that belong to families or groups covered by the Canadian, Mexican, or Russian Conventions. Elsewhere in today's **Federal Register**, we publish a notice of availability of the draft revised list of nonnative bird species that are not protected under the MBTA. Note, though, that native species that are introduced into parts of the United States where they are not native are still protected under the MBTA regardless of where they occur in the United States or U.S. territories.

(2) Species native or nonnative to the United States or U.S. territories that either belong to families or groups not referred to in the Canada, Mexico, and Russia Conventions or are not included by species name in the Japan Convention. This includes the Tinamidae (tinamous), Megapodiidae (megapodes), Cracidae (chachalacas), Odontophoridae (New World quail), Phasianidae (grouse, ptarmigan, and turkeys), Pteroclidae (sandgrouse), Heliornithidae (finfoots), Burhinidae (thick-knees), Glareolidae (pratincoles), Todidae (todies), Psittacidae (parrots), Psittaculidae (Old World parrots), Meliphagidae (honeyeaters), Dicruridae (drongos), Monarchidae (monarchs), Pycnonotidae (bulbuls), Scotocercidae (bush warblers and allies), Zosteropidae (white-eyes), Sturnidae (starlings, except as listed in Japanese treaty), Ploceidae (weavers), Estrildidae (estrildid finches), and Passeridae (Old World sparrows, including house or English sparrow), as well as numerous other families not represented in the United States or U.S. territories.

Public Comments

Any final action resulting from this proposed rule must be based on the best scientific and commercial data available and be as accurate and as effective as possible. We request comments or information from other concerned governmental agencies, the scientific community, industry, or any other

interested parties concerning this proposed rule.

Please include sufficient information with your submission (such as electronic copies of scientific journal articles or other publications, preferably in English) to allow us to verify any scientific or commercial information you include.

You may submit your comments and materials concerning this proposed rule by one of the methods listed in **ADDRESSES**. We request that you send comments only by the methods described in **ADDRESSES**.

If you submit information via *http://www.regulations.gov,* your entire submission—including any personal identifying information—will be posted on the website. If your submission is made via a hardcopy that includes personal identifying information, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so. We will post all hardcopy submissions on *http://www.regulations.gov.*

Comments and materials we receive, as well as supporting documentation we used in preparing this proposed rule, will be available for public inspection on *http://www.regulations.gov,* or by appointment, during normal business hours, at the U.S. Fish and Wildlife Service, Division of Migratory Bird Management (see **FOR FURTHER INFORMATION CONTACT**).

Required Determinations

Regulatory Planning and Review

Executive Order (E.O.) 12866 provides that the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget will review all significant rules. OIRA has determined that this proposed rule is not significant.

E.O. 13563 reaffirms the principles of E.O. 12866, while calling for improvements in the nation's regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. E.O. 13563 directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. E.O. 13563 emphasizes further that regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. We have developed this proposed rule in a manner consistent with these requirements.

Executive Order 13771—Reducing Regulation and Controlling Regulatory Costs

This proposed rule is not an Executive Order (E.O.) 13771 (82 FR 9339, February 3, 2017) regulatory action because this proposed rule is not significant under E.O. 12866.

Regulatory Flexibility Act (5 U.S.C. 601 et seq.)

Under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.,* as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996 (5 U.S.C. 804(2)), whenever an agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effect of the rule on small entities (*i.e.,* small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of an agency certifies the rule does not have a significant economic impact on a substantial number of small entities.

SBREFA amended the Regulatory Flexibility Act to require Federal agencies to provide the statement of the factual basis for certifying that a rule will not have a significant economic impact on a substantial number of small entities. We have examined this proposed rule's potential effects on small entities as required by the Regulatory Flexibility Act, and have determined that, if adopted as proposed, this action would not have a significant economic impact on a substantial number of small entities. This rule is an administrative action to update the list of migratory bird species protected under the Conventions. Consequently, we certify that, if adopted as proposed, this rule would not have a significant economic impact on a substantial number of small entities; therefore, a regulatory flexibility analysis is not required.

This proposed rule is not a major rule under SBREFA (5 U.S.C. 804(2)). It would not have a significant impact on a substantial number of small entities.

a. This proposed rule would not have an annual effect on the economy of $100 million or more.

b. This proposed rule would not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions.

c. This proposed rule would not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises.

Unfunded Mandates Reform Act

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*), we have determined the following:

a. This proposed rule would not ''significantly or uniquely'' affect small governments. A small government agency plan is not required. This proposed rule is an administrative action to update the list of migratory bird species protected under the Conventions; it would not affect small government activities in any significant way.

b. This proposed rule would not produce a Federal mandate of $100 million or greater in any year; *i.e.,* it is not a ''significant regulatory action'' under the Unfunded Mandates Reform Act.

Takings

In accordance with Executive Order 12630, this proposed rule does not have significant takings implications. This proposed rule does not contain a provision for taking of private property. Therefore, a takings implication assessment is not required.

Federalism

This proposed rule does not have sufficient Federalism effects to warrant preparation of a federalism summary impact statement under Executive Order 13132. It does not interfere with the States' ability to manage themselves or their funds. No significant economic impacts are expected to result from the updating of the list of migratory bird species.

Civil Justice Reform

In accordance with Executive Order 12988, the Office of the Solicitor has determined that this proposed rule does not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of the Order.

Paperwork Reduction Act

This proposed rule does not contain information collection requirements, and a submission to the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) is not required. We may not conduct or sponsor and you are not required to respond to a collection of information unless it displays a currently valid OMB control number.

National Environmental Policy Act (NEPA)

Given that the proposed revision of 50 CFR 10.13 is strictly administrative in nature and will have no or minor environmental effects, it is categorically excluded from further NEPA requirements (43 CFR 46.210(i)).

Endangered Species Act (ESA)

Of the species on the List of Migratory Birds, 84 species, subspecies, or distinct population segments are also listed as endangered or threatened under section 4 of the ESA of 1973, as amended (16 U.S.C. 1531 *et seq.*). No legal complications arise from the dual listing as the two lists are developed under separate authorities and for different purposes. Because this proposed rule is strictly administrative in nature, it has no effect on endangered or threatened species. Thus, it does not require consultation under section 7 of the ESA.

Government-to-Government Relationship With Tribes

In accordance with the President's memorandum of April 29, 1994, ''Government-to-Government Relations with Native American tribal Governments'' (59 FR 22951), Executive Order 13175, and 512 DM 2, we have evaluated potential effects on federally recognized Indian tribes and have determined that there are no potential effects. The proposed revisions to existing regulations in this rule are purely administrative in nature and do not interfere with the tribes' ability to manage themselves or their funds or to regulate migratory bird activities on tribal lands.

Energy Supply, Distribution, or Use (Executive Order 13211)

On May 18, 2001, the President issued Executive Order 13211 addressing regulations that significantly affect energy supply, distribution, and use. Executive Order 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. Because this proposed rule would only affect the listing of protected species in the United States, it is not a significant regulatory action under Executive Order 12866, and does not significantly affect energy supplies, distribution, or use. Therefore, this action is not a significant energy action and no Statement of Energy Effects is required.

Clarity of the Proposed Rule

We are required by Executive Orders 12866 and 12988 and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means that each rule we publish must:

(1) Be logically organized;

(2) Use the active voice to address readers directly;

(3) Use clear language rather than jargon;

(4) Be divided into short sections and sentences; and

(5) Use lists and tables wherever possible.

If you feel that we have not met these requirements, send us comments by one of the methods listed in **ADDRESSES**. To better help us revise the rule, your comments should be as specific as possible. For example, you should tell us the numbers of the sections or paragraphs that are unclearly written, which sections or sentences are too long, the sections where you feel lists or tables would be useful, etc.

References Cited

A complete list of all references cited is available on *http://www.regulations.gov* under Docket No. FWS–HQ–MB–2018–0047, and upon request (see **FOR FURTHER INFORMATION CONTACT**, above).

List of Subjects in Part 10

Exports, Fish, Imports, Law enforcement, Plants, Transportation, Wildlife.

Proposed Regulation Promulgation

For the reasons discussed in the preamble, we propose to amend title 50, chapter I, subchapter B, part 10 of the Code of Federal Regulations, as follows:

PART 10—GENERAL PROVISIONS

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

Authority: 16 U.S.C. 668a–d, 703–712, 742a–j–l, 1361–1384, 1401–1407, 1531–1543, 3371–3378; 18 U.S.C. 42; 19 U.S.C. 1202.

■ 2. Amend § 10.13 by revising paragraph (c) to read as follows:

§ 10.13 List of Migratory Birds.

* * * * *

(c) *What species are protected as migratory birds?* Species protected as migratory birds are listed in two formats to suit the varying needs of the user: Alphabetically in paragraph (c)(1) of this section and taxonomically in paragraph (c)(2) of this section. Taxonomy and nomenclature generally follow the 7th edition of the American Ornithologists' Union's (AOU, now recognized as American Ornithological Society (AOS)) *Check-list of North American birds* (1998, as amended through 2018). For species not treated by the AOS *Check-list,* we generally follow *Clements Checklist of Birds of the World* (Clements et al. 2017).

(1) *Alphabetical listing.* Species are listed alphabetically by common (English) group names, with the scientific name of each species following the common name.

ACCENTOR, Siberian, *Prunella montanella*
'AKEKE'E, *Loxops caeruleirostris*
'AKEPA, Hawaii, *Loxops coccineus*
  Maui, *Loxops ochraceus*
  O'ahu, *Loxops wolstenholmei*
'AKIALOA, Kauai, *Akialoa stejnegeri*
  Maui Nui, *Akialoa lanaiensis*
  O'ahu, *Akialoa ellisiana*
'AKIAPOLA'AU, *Hemignathus wilsoni*
'AKIKIKI, *Oreomystis bairdi*
'AKOHEKOHE, *Palmeria dolei*
'ALAUAHIO, Maui, *Paroreomyza montana*
  O'ahu, *Paroreomyza maculata*
ALBATROSS, Black-browed, *Thalassarche melanophris*
  Black-footed, *Phoebastria nigripes*
  Chatham, *Thalassarche eremita*
  Laysan, *Phoebastria immutabilis*
  Light-mantled, *Phoebetria palpebrata*
  Salvin's, *Thalassarche salvini*
  Short-tailed, *Phoebastria albatrus*
  Wandering, *Diomedea exulans*
  White-capped, *Thalassarche cauta*
  Yellow-nosed, *Thalassarche chlororhynchos*
'AMAKIHI, Hawaii, *Chlorodrepanis virens*
  Kauai, *Chlorodrepanis stejnegeri*
  O'ahu, *Chlorodrepanis flava*
ANHINGA, *Anhinga anhinga*
ANI, Groove-billed, *Crotophaga sulcirostris*
  Smooth-billed, *Crotophaga ani*
'ANIANIAU, *Magumma parva*
'APAPANE, *Himatione sanguinea*
AUKLET, Cassin's, *Ptychoramphus aleuticus*
  Crested, *Aethia cristatella*
  Least, *Aethia pusilla*
  Parakeet, *Aethia psittacula*
  Rhinoceros, *Cerorhinca monocerata*
  Whiskered, *Aethia pygmaea*
AVOCET, American, *Recurvirostra americana*
BANANAQUIT, *Coereba flaveola*
BEAN–GOOSE, Taiga, *Anser fabalis*
  Tundra, *Anser serrirostris*
BEARDLESS–TYRANNULET, Northern, *Camptostoma imberbe*
BECARD, Gray-collared, *Pachyramphus major*
  Rose-throated, *Pachyramphus aglaiae*
BITTERN, American, *Botaurus lentiginosus*
  Black, *Ixobrychus flavicollis*
  Least, *Ixobrychus exilis*
  Schrenck's, *Ixobrychus eurhythmus*
  Yellow, *Ixobrychus sinensis*
BLACKBIRD, Brewer's, *Euphagus cyanocephalus*
  Red-winged, *Agelaius phoeniceus*
  Rusty, *Euphagus carolinus*
  Tawny-shouldered, *Agelaius humeralis*
  Tricolored, *Agelaius tricolor*
  Yellow-headed, *Xanthocephalus xanthocephalus*
  Yellow-shouldered, *Agelaius xanthomus*
BLUEBIRD, Eastern, *Sialia sialis*
  Mountain, *Sialia currucoides*
  Western, *Sialia mexicana*
BLUETAIL, Red-flanked, *Tarsiger cyanurus*
BLUETHROAT, *Cyanecula svecica*

BOBOLINK, *Dolichonyx oryzivorus*
BOOBOOK, Northern, *Ninox japonica*
BOOBY, Abbott's, *Papasula abbotti*
Blue-footed, *Sula nebouxii*
Brown, *Sula leucogaster*
Masked, *Sula dactylatra*
Nazca, *Sula granti*
Red-footed, *Sula sula*
BRAMBLING, *Fringilla montifringilla*
BRANT, *Branta bernicla*
BUFFLEHEAD, *Bucephala albeola*
BULLFINCH, Eurasian, *Pyrrhula pyrrhula*
Puerto Rican, *Melopyrrha portoricensis*
BUNTING, Blue, *Cyanocompsa parellina*
Gray, *Emberiza variabilis*
Indigo, *Passerina cyanea*
Lark, *Calamospiza melanocorys*
Lazuli, *Passerina amoena*
Little, *Emberiza pusilla*
McKay's, *Plectrophenax hyperboreus*
Painted, *Passerina ciris*
Pallas's, *Emberiza pallasi*
Pine, *Emberiza leucocephalos*
Reed, *Emberiza schoeniclus*
Rustic, *Emberiza rustica*
Snow, *Plectrophenax nivalis*
Varied, *Passerina versicolor*
Yellow-breasted, *Emberiza aureola*
Yellow-browed, *Emberiza chrysophrys*
Yellow-throated, *Emberiza elegans*
BUSHTIT, *Psaltriparus minimus*
BUZZARD, Gray-faced, *Butastur indicus*
CANVASBACK, *Aythya valisineria*
CARACARA, Crested, *Caracara cheriway*
CARDINAL, Northern, *Cardinalis cardinalis*
CARIB, Green-throated, *Eulampis holosericeus*
Purple-throated, *Eulampis jugularis*
CATBIRD, Black, *Melanoptila glabrirostris*
Gray, *Dumetella carolinensis*
CHAFFINCH, Common, *Fringilla coelebs*
CHAT, Yellow-breasted, *Icteria virens*
CHICKADEE, Black-capped, *Poecile atricapillus*
Boreal, *Poecile hudsonicus*
Carolina, *Poecile carolinensis*
Chestnut-backed, *Poecile rufescens*
Gray-headed, *Poecile cinctus*
Mexican, *Poecile sclateri*
Mountain, *Poecile gambeli*
CHIFFCHAFF, Common, *Phylloscopus collybita*
CHUCK-WILL'S-WIDOW, *Antrostomus carolinensis*
CONDOR, California, *Gymnogyps californianus*
COOT, American, *Fulica americana*
Eurasian, *Fulica atra*
Hawaiian, *Fulica alai*
CORMORANT, Brandt's, *Phalacrocorax penicillatus*
Double-crested, *Phalacrocorax auritus*
Great, *Phalacrocorax carbo*
Little Pied, *Phalacrocorax melanoleucos*
Neotropic, *Phalacrocorax brasilianus*
Pelagic, *Phalacrocorax pelagicus*
Red-faced, *Phalacrocorax urile*
COWBIRD, Bronzed, *Molothrus aeneus*
Brown-headed, *Molothrus ater*
Shiny, *Molothrus bonariensis*
CRAKE, Corn, *Crex crex*
Paint-billed, *Neocrex erythrops*
Spotless, *Porzana tabuensis*
Yellow-breasted, *Hapalocrex flaviventer*
CRANE, Common, *Grus grus*
Sandhill, *Antigone canadensis*
Whooping, *Grus americana*
CREEPER, Brown, *Certhia americana*
Hawaii, *Loxops mana*
CROSSBILL, Cassia, *Loxia sinesciuris*
Red, *Loxia curvirostra*
White-winged, *Loxia leucoptera*
CROW, American, *Corvus brachyrhynchos*
Fish, *Corvus ossifragus*
Hawaiian, *Corvus hawaiiensis*
Mariana, *Corvus kubaryi*
Northwestern, *Corvus caurinus*
Tamaulipas, *Corvus imparatus*
White-necked, *Corvus leucognaphalus*
CUCKOO, Black-billed, *Coccyzus erythropthalmus*
Common, *Cuculus canorus*
Mangrove, *Coccyzus minor*
Oriental, *Cuculus optatus*
Yellow-billed, *Coccyzus americanus*
CURLEW, Bristle-thighed, *Numenius tahitiensis*
Eskimo, *Numenius borealis*
Eurasian, *Numenius arquata*
Far Eastern, *Numenius madagascariensis*
Little, *Numenius minutus*
Long-billed, *Numenius americanus*
DICKCISSEL, *Spiza americana*
DIPPER, American, *Cinclus mexicanus*
DOTTEREL, Eurasian, *Charadrius morinellus*
DOVE, Inca, *Columbina inca*
Mourning, *Zenaida macroura*
White-tipped, *Leptotila verreauxi*
White-winged, *Zenaida asiatica*
Zenaida, *Zenaida aurita*
DOVEKIE, *Alle alle*
DOWITCHER, Long-billed, *Limnodromus scolopaceus*
Short-billed, *Limnodromus griseus*
DUCK, American Black, *Anas rubripes*
Eastern Spot-billed, *Anas zonorhyncha*
Falcated, *Mareca falcata*
Harlequin, *Histrionicus histrionicus*
Hawaiian, *Anas wyvilliana*
Laysan, *Anas laysanensis*
Long-tailed, *Clangula hyemalis*
Masked, *Nomonyx dominicus*
Mottled, *Anas fulvigula*
Muscovy, *Cairina moschata*
Pacific Black, *Anas superciliosa*
Ring-necked, *Aythya collaris*
Ruddy, *Oxyura jamaicensis*
Tufted, *Aythya fuligula*
Wood, *Aix sponsa*
DUNLIN, *Calidris alpina*
EAGLE, Bald, *Haliaeetus leucocephalus*
Golden, *Aquila chrysaetos*
White-tailed, *Haliaeetus albicilla*
EGRET, Cattle, *Bubulcus ibis*
Chinese, *Egretta eulophotes*
Great, *Ardea alba*
Intermediate, *Ardea intermedia*
Little, *Egretta garzetta*
Reddish, *Egretta rufescens*
Snowy, *Egretta thula*
EIDER, Common, *Somateria mollissima*
King, *Somateria spectabilis*
Spectacled, *Somateria fischeri*
Steller's, *Polysticta stelleri*
ELAENIA, Caribbean, *Elaenia martinica*
Greenish, *Myiopagis viridicata*
White-crested, *Elaenia albiceps*
EMERALD, Puerto Rican, *Chlorostilbon maugaeus*
EUPHONIA, Antillean, *Euphonia musica*
FALCON, Amur, *Falco amurensis*
Aplomado, *Falco femoralis*
Peregrine, *Falco peregrinus*
Prairie, *Falco mexicanus*
Red-footed, *Falco vespertinus*
FIELDFARE, *Turdus pilaris*
FINCH, Cassin's, *Haemorhous cassinii*
House, *Haemorhous mexicanus*
Laysan, *Telespiza cantans*
Nihoa, *Telespiza ultima*
Purple, *Haemorhous purpureus*
FLAMINGO, American, *Phoenicopterus ruber*
FLICKER, Gilded, *Colaptes chrysoides*
Northern, *Colaptes auratus*
FLYCATCHER, Acadian, *Empidonax virescens*
Alder, *Empidonax alnorum*
Ash-throated, *Myiarchus cinerascens*
Asian Brown, *Muscicapa dauurica*
Brown-crested, *Myiarchus tyrannulus*
Buff-breasted, *Empidonax fulvifrons*
Cordilleran, *Empidonax occidentalis*
Crowned Slaty, *Empidonomus aurantioatrocristatus*
Dark-sided, *Muscicapa sibirica*
Dusky, *Empidonax oberholseri*
Dusky-capped, *Myiarchus tuberculifer*
Fork-tailed, *Tyrannus savana*
Gray, *Empidonax wrightii*
Gray-streaked, *Muscicapa griseisticta*
Great Crested, *Myiarchus crinitus*
Hammond's, *Empidonax hammondii*
La Sagra's, *Myiarchus sagrae*
Least, *Empidonax minimus*
Mugimaki, *Ficedula mugimaki*
Narcissus, *Ficedula narcissina*
Nutting's, *Myiarchus nuttingi*
Olive-sided, *Contopus cooperi*
Pacific-slope, *Empidonax difficilis*
Pine, *Empidonax affinis*
Piratic, *Legatus leucophaius*
Puerto Rican, *Myiarchus antillarum*
Scissor-tailed, *Tyrannus forficatus*
Social, *Myiozetetes similis*
Spotted, *Muscicapa striata*
Sulphur-bellied, *Myiodynastes luteiventris*
Taiga, *Ficedula albicilla*
Tufted, *Mitrephanes phaeocercus*
Variegated, *Empidonomus varius*
Vermilion, *Pyrocephalus rubinus*
Willow, *Empidonax traillii*
Yellow-bellied, *Empidonax flaviventris*
FOREST-FALCON, Collared, *Micrastur semitorquatus*
FRIGATEBIRD, Great, *Fregata minor*
Lesser, *Fregata ariel*
Magnificent, *Fregata magnificens*
FRUIT-DOVE, Crimson-crowned, *Ptilinopus porphyraceus*
Many-colored, *Ptilinopus perousii*
Mariana, *Ptilinopus roseicapilla*
FULMAR, Northern, *Fulmarus glacialis*
GADWALL, *Mareca strepera*
GALLINULE, Azure, *Porphyrio flavirostris*
Common, *Gallinula galeata*
Purple, *Porphyrio martinicus*
GANNET, Northern, *Morus bassanus*
GARGANEY, *Spatula querquedula*
GNATCATCHER, Black-capped, *Polioptila nigriceps*
Black-tailed, *Polioptila melanura*
Blue-Gray, *Polioptila caerulea*
California, *Polioptila californica*
GODWIT, Bar-tailed, *Limosa lapponica*
Black-tailed, *Limosa limosa*
Hudsonian, *Limosa haemastica*
Marbled, *Limosa fedoa*

GOLDENEYE, Barrow's, *Bucephala islandica*
Common, *Bucephala clangula*
GOLDEN-PLOVER, American, *Pluvialis dominica*
European, *Pluvialis apricaria*
Pacific, *Pluvialis fulva*
GOLDFINCH, American, *Spinus tristis*
Lawrence's, *Spinus lawrencei*
Lesser, *Spinus psaltria*
GOOSE, Barnacle, *Branta leucopsis*
Cackling, *Branta hutchinsii*
Canada, *Branta canadensis*
Emperor, *Anser canagicus*
Greater White-fronted, *Anser albifrons*
Hawaiian, *Branta sandvicensis*
Lesser White-fronted, *Anser erythropus*
Pink-footed, *Anser brachyrhynchus*
Ross's, *Anser rossii*
Snow, *Anser caerulescens*
GOSHAWK, Northern, *Accipiter gentilis*
GRACKLE, Boat-tailed, *Quiscalus major*
Common, *Quiscalus quiscula*
Greater Antillean, *Quiscalus niger*
Great-tailed, *Quiscalus mexicanus*
GRASSHOPPER-WARBLER, Middendorff's, *Locustella ochotensis*
GRASSQUIT, Black-faced, *Tiaris bicolor*
Yellow-faced, *Tiaris olivaceus*
GREBE, Clark's, *Aechmophorus clarkii*
Eared, *Podiceps nigricollis*
Horned, *Podiceps auritus*
Least, *Tachybaptus dominicus*
Pied-billed, *Podilymbus podiceps*
Red-necked, *Podiceps grisegena*
Western, *Aechmophorus occidentalis*
GREENFINCH, Oriental, *Chloris sinica*
GREENSHANK, Common, *Tringa nebularia*
Nordmann's, *Tringa guttifer*
GROSBEAK, Black-headed, *Pheucticus melanocephalus*
Blue, *Passerina caerulea*
Crimson-collared, *Rhodothraupis celaeno*
Evening, *Coccothraustes vespertinus*
Pine, *Pinicola enucleator*
Rose-breasted, *Pheucticus ludovicianus*
Yellow, *Pheucticus chrysopeplus*
GROUND-DOVE, Common, *Columbina passerina*
Ruddy, *Columbina talpacoti*
Shy, *Alopecoenas stairi*
White-throated, *Alopecoenas xanthonura*
GUILLEMOT, Black, *Cepphus grylle*
Pigeon, *Cepphus columba*
GULL, Belcher's, *Larus belcheri*
Black-headed, *Chroicocephalus ridibundus*
Black-tailed, *Larus crassirostris*
Bonaparte's, *Chroicocephalus philadelphia*
California, *Larus californicus*
Franklin's, *Leucophaeus pipixcan*
Glaucous, *Larus hyperboreus*
Glaucous-winged, *Larus glaucescens*
Gray-hooded, *Chroicocephalus cirrocephalus*
Great Black-backed, *Larus marinus*
Heermann's, *Larus heermanni*
Herring, *Larus argentatus*
Iceland, *Larus glaucoides*
Ivory, *Pagophila eburnea*
Kelp, *Larus dominicanus*
Laughing, *Leucophaeus atricilla*
Lesser Black-backed, *Larus fuscus*
Little, *Hydrocoloeus minutus*
Mew, *Larus canus*
Ring-billed, *Larus delawarensis*
Ross's, *Rhodostethia rosea*
Sabine's, *Xema sabini*
Slaty-backed, *Larus schistisagus*
Swallow-tailed, *Creagrus furcatus*
Western, *Larus occidentalis*
Yellow-footed, *Larus livens*
Yellow-legged, *Larus michahellis*
GYRFALCON, *Falco rusticolus*
HARRIER, Northern, *Circus hudsonius*
HAWFINCH, *Coccothraustes coccothraustes*
HAWK, Broad-winged, *Buteo platypterus*
Common Black, *Buteogallus anthracinus*
Cooper's, *Accipiter cooperii*
Crane, *Geranospiza caerulescens*
Ferruginous, *Buteo regalis*
Gray, *Buteo plagiatus*
Harris's, *Parabuteo unicinctus*
Hawaiian, *Buteo solitarius*
Red-shouldered, *Buteo lineatus*
Red-tailed, *Buteo jamaicensis*
Roadside, *Rupornis magnirostris*
Rough-legged, *Buteo lagopus*
Sharp-shinned, *Accipiter striatus*
Short-tailed, *Buteo brachyurus*
Swainson's, *Buteo swainsoni*
White-tailed, *Geranoaetus albicaudatus*
Zone-tailed, *Buteo albonotatus*
HAWK-CUCKOO, Hodgson's, *Hierococcyx nisicolor*
HERON, Gray, *Ardea cinerea*
Great Blue, *Ardea herodias*
Green, *Butorides virescens*
Little Blue, *Egretta caerulea*
Tricolored, *Egretta tricolor*
HOBBY, Eurasian, *Falco subbuteo*
HONEYCREEPER, Laysan, *Himatione fraithii*
Red-legged, *Cyanerpes cyaneus*
HOOPOE, Eurasian, *Upupa epops*
HOUSE-MARTIN, Common, *Delichon urbicum*
HUMMINGBIRD, Allen's, *Selasphorus sasin*
Amethyst-throated, *Lampornis amethystinus*
Anna's, *Calypte anna*
Antillean Crested, *Orthorhyncus cristatus*
Berylline, *Amazilia beryllina*
Black-chinned, *Archilochus alexandri*
Blue-throated, *Lampornis clemenciae*
Broad-billed, *Cynanthus latirostris*
Broad-tailed, *Selasphorus platycercus*
Buff-bellied, *Amazilia yucatanensis*
Bumblebee, *Atthis heloisa*
Calliope, *Selasphorus calliope*
Cinnamon, *Amazilia rutila*
Costa's, *Calypte costae*
Lucifer, *Calothorax lucifer*
Rivoli's, *Eugenes fulgens*
Ruby-throated, *Archilochus colubris*
Rufous, *Selasphorus rufus*
Vervain, *Mellisuga minima*
Violet-crowned, *Amazilia violiceps*
White-eared, *Hylocharis leucotis*
Xantus's, *Hylocharis xantusii*
IBIS, Glossy, *Plegadis falcinellus*
Scarlet, *Eudocimus ruber*
White, *Eudocimus albus*
White-faced, *Plegadis chihi*
'I'IWI, *Drepanis coccinea*
IMPERIAL-PIGEON, Pacific, *Ducula pacifica*
JABIRU, *Jabiru mycteria*
JACANA, Northern, *Jacana spinosa*
JACKDAW, Eurasian, *Corvus monedula*
JAEGER, Long-tailed, *Stercorarius longicaudus*
Parasitic, *Stercorarius parasiticus*
Pomarine, *Stercorarius pomarinus*
JAY, Blue, *Cyanocitta cristata*
Brown, *Psilorhinus morio*
Canada, *Perisoreus canadensis*
Green, *Cyanocorax yncas*
Mexican, *Aphelocoma wollweberi*
Pinyon, *Gymnorhinus cyanocephalus*
Steller's, *Cyanocitta stelleri*
JUNCO, Dark-eyed, *Junco hyemalis*
Yellow-eyed, *Junco phaeonotus*
KĀKĀWAHIE, *Paroreomyza flammea*
KĀMA'O, *Myadestes myadestinus*
KESTREL, American, *Falco sparverius*
Eurasian, *Falco tinnunculus*
KILLDEER, *Charadrius vociferus*
KINGBIRD, Cassin's, *Tyrannus vociferans*
Couch's, *Tyrannus couchii*
Eastern, *Tyrannus tyrannus*
Gray, *Tyrannus dominicensis*
Loggerhead, *Tyrannus caudifasciatus*
Thick-billed, *Tyrannus crassirostris*
Tropical, *Tyrannus melancholicus*
Western, *Tyrannus verticalis*
KINGFISHER, Amazon, *Chloroceryle amazona*
Belted, *Megaceryle alcyon*
Common, *Alcedo atthis*
Green, *Chloroceryle americana*
Guam, *Todiramphus cinnamominus*
Mariana, *Todiramphus albicilla*
Pacific, *Todiramphus sacer*
Ringed, *Megaceryle torquata*
KINGLET, Golden-crowned, *Regulus satrapa*
Ruby-crowned, *Regulus calendula*
KISKADEE, Great, *Pitangus sulphuratus*
KITE, Black, *Milvus migrans*
Double-toothed, *Harpagus bidentatus*
Hook-billed, *Chondrohierax uncinatus*
Mississippi, *Ictinia mississippiensis*
Snail, *Rostrhamus sociabilis*
Swallow-tailed, *Elanoides forficatus*
White-tailed, *Elanus leucurus*
KITTIWAKE, Black-legged, *Rissa tridactyla*
Red-legged, *Rissa brevirostris*
KNOT, Great, *Calidris tenuirostris*
Red, *Calidris canutus*
KOEL, Long-tailed, *Urodynamis taitensis*
LAPWING, Northern, *Vanellus vanellus*
LARK, Horned, *Eremophila alpestris*
LIMPKIN, *Aramus guarauna*
LIZARD-CUCKOO, Puerto Rican, *Coccyzus vieilloti*
LONGSPUR, Chestnut-collared, *Calcarius ornatus*
Lapland, *Calcarius lapponicus*
McCown's, *Rhynchophanes mccownii*
Smith's, *Calcarius pictus*
LOON, Arctic, *Gavia arctica*
Common, *Gavia immer*
Pacific, *Gavia pacifica*
Red-throated, *Gavia stellata*
Yellow-billed, *Gavia adamsii*
MAGPIE, Black-billed, *Pica hudsonia*
Yellow-billed, *Pica nuttalli*
MALLARD, *Anas platyrhynchos*
MANGO, Antillean, *Anthracothorax dominicus*
Green, *Anthracothorax viridis*
Green-breasted, *Anthracothorax prevostii*
MARSH-HARRIER, Eastern, *Circus spilonotus*
MARTIN, Brown-chested, *Progne tapera*
Caribbean, *Progne dominicensis*
Cuban, *Progne cryptoleuca*
Gray-breasted, *Progne chalybea*
Purple, *Progne subis*
Southern, *Progne elegans*
MEADOWLARK, Eastern, *Sturnella magna*
Western, *Sturnella neglecta*

MERGANSER, Common, *Mergus merganser*
Hooded, *Lophodytes cucullatus*
Red-breasted, *Mergus serrator*
MERLIN, *Falco columbarius*
MILLERBIRD, *Acrocephalus familiaris*
MOCKINGBIRD, Bahama, *Mimus gundlachii*
Blue, *Melanotis caerulescens*
Northern, *Mimus polyglottos*
MOORHEN, Common, *Gallinula chloropus*
MURRE, Common, *Uria aalge*
Thick-billed, *Uria lomvia*
MURRELET, Ancient, *Synthliboramphus antiquus*
Craveri's, *Synthliboramphus craveri*
Guadalupe, *Synthliboramphus hypoleucus*
Kittlitz's, *Brachyramphus brevirostris*
Long-billed, *Brachyramphus perdix*
Marbled, *Brachyramphus marmoratus*
Scripps's, *Synthliboramphus scrippsi*
NEEDLETAIL, White-throated, *Hirundapus caudacutus*
NIGHTHAWK, Antillean, *Chordeiles gundlachii*
Common, *Chordeiles minor*
Lesser, *Chordeiles acutipennis*
NIGHT-HERON, Black-crowned, *Nycticorax nycticorax*
Japanese, *Gorsachius goisagi*
Malayan, *Gorsachius melanolophus*
Rufous, *Nycticorax caledonicus*
Yellow-crowned, *Nyctanassa violacea*
NIGHTINGALE-THRUSH, Black-headed, *Catharus mexicanus*
Orange-billed, *Catharus aurantiirostris*
NIGHTJAR, Buff-collared, *Antrostomus ridgwayi*
Gray, *Caprimulgus jotaka*
Puerto Rican, *Antrostomus noctitherus*
White-tailed, *Hydropsalis cayennensis*
NODDY, Black, *Anous minutus*
Blue-gray, *Anous ceruleus*
Brown, *Anous stolidus*
NUKUPU'U, Kauai, *Hemignathus hanapepe*
Maui, *Hemignathus affinis*
O'ahu, *Hemignathus lucidus*
NUTCRACKER, Clark's, *Nucifraga columbiana*
NUTHATCH, Brown-headed, *Sitta pusilla*
Pygmy, *Sitta pygmaea*
Red-breasted, *Sitta canadensis*
White-breasted, *Sitta carolinensis*
OLOMA'O, *Myadestes lanaiensis*
'ÕMA'O, *Myadestes obscurus*
ORIOLE, Altamira, *Icterus gularis*
Audubon's, *Icterus graduacauda*
Baltimore, *Icterus galbula*
Black-vented, *Icterus wagleri*
Bullock's, *Icterus bullockii*
Hooded, *Icterus cucullatus*
Orchard, *Icterus spurius*
Puerto Rican, *Icterus portoricensis*
Scott's, *Icterus parisorum*
Streak-backed, *Icterus pustulatus*
OSPREY, *Pandion haliaetus*
'Õ'Ũ, *Psittirostra psittacea*
OVENBIRD, *Seiurus aurocapilla*
OWL, Barn, *Tyto alba*
Barred, *Strix varia*
Boreal, *Aegolius funereus*
Burrowing, *Athene cunicularia*
Elf, *Micrathene whitneyi*
Flammulated, *Psiloscops flammeolus*
Great Gray, *Strix nebulosa*
Great Horned, *Bubo virginianus*
Long-eared, *Asio otus*
Mottled, *Ciccaba virgata*
Northern Hawk, *Surnia ulula*
Northern Saw-whet, *Aegolius acadicus*
Short-eared, *Asio flammeus*
Snowy, *Bubo scandiacus*
Spotted, *Strix occidentalis*
Stygian, *Asio stygius*
OYSTERCATCHER, American, *Haematopus palliatus*
Black, *Haematopus bachmani*
Eurasian, *Haematopus ostralegus*
PALILA, *Loxioides bailleui*
PALM-SWIFT, Antillean, *Tachornis phoenicobia*
PARROTBILL, Maui, *Pseudonestor xanthophrys*
PARULA, Northern, *Setophaga americana*
Tropical, *Setophaga pitiayumi*
PAURAQUE, Common, *Nyctidromus albicollis*
PELICAN, American White, *Pelecanus erythrorhynchos*
Brown, *Pelecanus occidentalis*
PETREL, Bermuda, *Pterodroma cahow*
Black-capped, *Pterodroma hasitata*
Black-winged, *Pterodroma nigripennis*
Bonin, *Pterodroma hypoleuca*
Bulwer's, *Bulweria bulwerii*
Cook's, *Pterodroma cookii*
Fea's, *Pterodroma feae*
Gould's, *Pterodroma leucoptera*
Great-winged, *Pterodroma macroptera*
Hawaiian, *Pterodroma sandwichensis*
Herald, *Pterodroma heraldica*
Jouanin's, *Bulweria fallax*
Juan Fernandez, *Pterodroma externa*
Kermadec, *Pterodroma neglecta*
Mottled, *Pterodroma inexpectata*
Murphy's, *Pterodroma ultima*
Parkinson's, *Procellaria parkinsoni*
Phoenix, *Pterodroma alba*
Providence, *Pterodroma solandri*
Stejneger's, *Pterodroma longirostris*
Tahiti, *Pseudobulweria rostrata*
Trindade, *Pterodroma arminjoniana*
White-chinned, *Procellaria aequinoctialis*
White-necked, *Pterodroma cervicalis*
Zino's, *Pterodroma madeira*
PEWEE, Cuban, *Contopus caribaeus*
Greater, *Contopus pertinax*
Hispaniolan, *Contopus hispaniolensis*
Lesser Antillean, *Contopus latirostris*
PHAINOPEPLA, *Phainopepla nitens*
PHALAROPE, Red, *Phalaropus fulicarius*
Red-necked, *Phalaropus lobatus*
Wilson's, *Phalaropus tricolor*
PHOEBE, Black, *Sayornis nigricans*
Eastern, *Sayornis phoebe*
Say's, *Sayornis saya*
PIGEON, Band-tailed, *Patagioenas fasciata*
Plain, *Patagioenas inornata*
Red-billed, *Patagioenas flavirostris*
Scaly-naped, *Patagioenas squamosa*
White-crowned, *Patagioenas leucocephala*
PINTAIL, Northern, *Anas acuta*
White-cheeked, *Anas bahamensis*
PIPIT, American, *Anthus rubescens*
Olive-backed, *Anthus hodgsoni*
Pechora, *Anthus gustavi*
Red-throated, *Anthus cervinus*
Sprague's, *Anthus spragueii*
Tree, *Anthus trivialis*
PLOVER, Black-bellied, *Pluvialis squatarola*
Collared, *Charadrius collaris*
Common Ringed, *Charadrius hiaticula*
Kentish, *Charadrius alexandrinus*
Little Ringed, *Charadrius dubius*
Mountain, *Charadrius montanus*
Piping, *Charadrius melodus*
Semipalmated, *Charadrius semipalmatus*
Snowy, *Charadrius nivosus*
Wilson's, *Charadrius wilsonia*
POCHARD, Baer's, *Aythya baeri*
Common, *Aythya ferina*
POND-HERON, Chinese, *Ardeola bacchus*
POORWILL, Common, *Phalaenoptilus nuttallii*
PO'OULI, *Melamprosops phaeosoma*
PUAIOHI, *Myadestes palmeri*
PUFFIN, Atlantic, *Fratercula arctica*
Horned, *Fratercula corniculata*
Tufted, *Fratercula cirrhata*
PYGMY-OWL, Ferruginous, *Glaucidium brasilianum*
Northern, *Glaucidium gnoma*
PYRRHULOXIA, *Cardinalis sinuatus*
QUAIL-DOVE, Bridled, *Geotrygon mystacea*
Key West, *Geotrygon chrysia*
Ruddy, *Geotrygon montana*
QUETZAL, Eared, *Euptilotis neoxenus*
RAIL, Black, *Laterallus jamaicensis*
Buff-banded, *Gallirallus philippensis*
Clapper, *Rallus crepitans*
Guam, *Gallirallus owstoni*
King, *Rallus elegans*
Ridgway's, *Rallus obsoletus*
Spotted, *Pardirallus maculatus*
Virginia, *Rallus limicola*
Yellow, *Coturnicops noveboracensis*
RAVEN, Chihuahuan, *Corvus cryptoleucus*
Common, *Corvus corax*
RAZORBILL, *Alca torda*
REDHEAD, *Aythya americana*
REDPOLL, Common, *Acanthis flammea*
Hoary, *Acanthis hornemanni*
REDSHANK, Common, *Tringa totanus*
Spotted, *Tringa erythropus*
REDSTART, American, *Setophaga ruticilla*
Common, *Phoenicurus phoenicurus*
Painted, *Myioborus pictus*
Slate-throated, *Myioborus miniatus*
REDWING, *Turdus iliacus*
REEF-HERON, Pacific, *Egretta sacra*
Western, *Egretta gularis*
ROADRUNNER, Greater, *Geococcyx californianus*
ROBIN, American, *Turdus migratorius*
Rufous-backed, *Turdus rufopalliatus*
Rufous-tailed, *Larvivora sibilans*
Siberian Blue, *Larvivora cyane*
ROCK-THRUSH, Blue, *Monticola solitarius*
ROSEFINCH, Common, *Carpodacus erythrinus*
ROSY-FINCH, Asian, *Leucosticte arctoa*
Black, *Leucosticte atrata*
Brown-capped, *Leucosticte australis*
Gray-crowned, *Leucosticte tephrocotis*
RUBYTHROAT, Siberian, *Calliope calliope*
RUFF, *Calidris pugnax*
SANDERLING, *Calidris alba*
SANDPIPER, Baird's, *Calidris bairdii*
Broad-billed, *Calidris falcinellus*
Buff-breasted, *Calidris subruficollis*
Common, *Actitis hypoleucos*
Curlew, *Calidris ferruginea*
Green, *Tringa ochropus*
Least, *Calidris minutilla*
Marsh, *Tringa stagnatilis*
Pectoral, *Calidris melanotos*
Purple, *Calidris maritima*
Rock, *Calidris ptilocnemis*
Semipalmated, *Calidris pusilla*
Sharp-tailed, *Calidris acuminata*

Solitary, *Tringa solitaria*
Spoon-billed, *Calidris pygmea*
Spotted, *Actitis macularius*
Stilt, *Calidris himantopus*
Terek, *Xenus cinereus*
Upland, *Bartramia longicauda*
Western, *Calidris mauri*
White-rumped, *Calidris fuscicollis*
Wood, *Tringa glareola*
SAND-PLOVER, Greater, *Charadrius leschenaultii*
Lesser, *Charadrius mongolus*
SAPSUCKER, Red-breasted, *Sphyrapicus ruber*
Red-naped, *Sphyrapicus nuchalis*
Williamson's, *Sphyrapicus thyroideus*
Yellow-bellied, *Sphyrapicus varius*
SCAUP, Greater, *Aythya marila*
Lesser, *Aythya affinis*
SCOPS-OWL, Oriental, *Otus sunia*
SCOTER, Black, *Melanitta americana*
Common, *Melanitta nigra*
Surf, *Melanitta perspicillata*
White-winged, *Melanitta fusca*
SCREECH-OWL, Eastern, *Megascops asio*
Puerto Rican, *Megascops nudipes*
Western, *Megascops kennicottii*
Whiskered, *Megascops trichopsis*
SCRUB-JAY, California, *Aphelocoma californica*
Florida, *Aphelocoma coerulescens*
Island, *Aphelocoma insularis*
Woodhouse's, *Aphelocoma woodhouseii*
SEA-EAGLE, Steller's, *Haliaeetus pelagicus*
SEEDEATER, Morelet's, *Sporophila morelleti*
SHEARWATER, Audubon's, *Puffinus lherminieri*
Barolo, *Puffinus baroli*
Black-vented, *Puffinus opisthomelas*
Bryan's, *Puffinus bryani*
Buller's, *Ardenna bulleri*
Cape Verde, *Calonectris edwardsii*
Christmas, *Puffinus nativitatis*
Cory's, *Calonectris diomedea*
Flesh-footed, *Ardenna carneipes*
Great, *Ardenna gravis*
Manx, *Puffinus puffinus*
Newell's, *Puffinus newelli*
Pink-footed, *Ardenna creatopus*
Short-tailed, *Ardenna tenuirostris*
Sooty, *Ardenna grisea*
Streaked, *Calonectris leucomelas*
Wedge-tailed, *Ardenna pacifica*
SHOVELER, Northern, *Spatula clypeata*
SHRIKE, Brown, *Lanius cristatus*
Loggerhead, *Lanius ludovicianus*
Northern, *Lanius borealis*
SILKY-FLYCATCHER, Gray, *Ptiliogonys cinereus*
SISKIN, Eurasian, *Spinus spinus*
Pine, *Spinus pinus*
SKIMMER, Black, *Rynchops niger*
SKUA, Great, *Stercorarius skua*
South Polar, *Stercorarius maccormicki*
SKYLARK, Eurasian, *Alauda arvensis*
SMEW, *Mergellus albellus*
SNIPE, Common, *Gallinago gallinago*
Jack, *Lymnocryptes minimus*
Pin-tailed, *Gallinago stenura*
Solitary, *Gallinago solitaria*
Swinhoe's, *Gallinago megala*
Wilson's, *Gallinago delicata*
SOLITAIRE, Brown-backed, *Myadestes occidentalis*
Townsend's, *Myadestes townsendi*
SORA, *Porzana carolina*
SPARROW, American Tree, *Spizelloides arborea*
Bachman's, *Peucaea aestivalis*
Baird's, *Centronyx bairdii*
Bell's, *Artemisiospiza belli*
Black-chinned, *Spizella atrogularis*
Black-throated, *Amphispiza bilineata*
Botteri's, *Peucaea botterii*
Brewer's, *Spizella breweri*
Cassin's, *Peucaea cassinii*
Chipping, *Spizella passerina*
Clay-colored, *Spizella pallida*
Field, *Spizella pusilla*
Five-striped, *Amphispiza quinquestriata*
Fox, *Passerella iliaca*
Golden-crowned, *Zonotrichia atricapilla*
Grasshopper, *Ammodramus savannarum*
Harris's, *Zonotrichia querula*
Henslow's, *Centronyx henslowii*
Lark, *Chondestes grammacus*
LeConte's, *Ammospiza leconteii*
Lincoln's, *Melospiza lincolnii*
Nelson's, *Ammospiza nelsoni*
Olive, *Arremonops rufivirgatus*
Rufous-crowned, *Aimophila ruficeps*
Rufous-winged, *Peucaea carpalis*
Sagebrush, *Artemisiospiza nevadensis*
Saltmarsh, *Ammospiza caudacuta*
Savannah, *Passerculus sandwichensis*
Seaside, *Ammospiza maritima*
Song, *Melospiza melodia*
Swamp, *Melospiza georgiana*
Vesper, *Pooecetes gramineus*
White-crowned, *Zonotrichia leucophrys*
White-throated, *Zonotrichia albicollis*
Worthen's, *Spizella wortheni*
SPARROWHAWK, Chinese, *Accipiter soloensis*
Japanese, *Accipiter gularis*
SPINDALIS, Puerto Rican, *Spindalis portoricensis*
Western, *Spindalis zena*
SPOONBILL, Roseate, *Platalea ajaja*
STARLING, Chestnut-cheeked, *Agropsar philippensis*
White-cheeked, *Spodiopsar cineraceus*
STARTHROAT, Plain-capped, *Heliomaster constantii*
STILT, Black-necked, *Himantopus mexicanus*
Black-winged, *Himantopus himantopus*
STINT, Little, *Calidris minuta*
Long-toed, *Calidris subminuta*
Red-necked, *Calidris ruficollis*
Temminck's, *Calidris temminckii*
STONECHAT, *Saxicola torquatus*
STORK, Wood, *Mycteria americana*
STORM-PETREL, Ashy, *Oceanodroma homochroa*
Band-rumped, *Oceanodroma castro*
Black, *Oceanodroma melania*
Black-bellied, *Fregetta tropica*
Fork-tailed, *Oceanodroma furcata*
Leach's, *Oceanodroma leucorhoa*
Least, *Oceanodroma microsoma*
Matsudaira's, *Oceanodroma matsudairae*
Polynesian, *Nesofregetta fuliginosa*
Ringed, *Oceanodroma hornbyi*
Swinhoe's, *Oceanodroma monorhis*
Townsend's, *Oceanodroma socorroensis*
Tristram's, *Oceanodroma tristrami*
Wedge-rumped, *Oceanodroma tethys*
White-bellied, *Fregetta grallaria*
White-faced, *Pelagodroma marina*
Wilson's, *Oceanites oceanicus*
SURFBIRD, *Calidris virgata*
SWALLOW, Bahama, *Tachycineta cyaneoviridis*
Bank, *Riparia riparia*
Barn, *Hirundo rustica*
Cave, *Petrochelidon fulva*
Cliff, *Petrochelidon pyrrhonota*
Mangrove, *Tachycineta albilinea*
Northern Rough-winged, *Stelgidopteryx serripennis*
Tree, *Tachycineta bicolor*
Violet-green, *Tachycineta thalassina*
SWAMPHEN, Purple, *Porphyrio porphyrio*
SWAN, Trumpeter, *Cygnus buccinator*
Tundra, *Cygnus columbianus*
Whooper, *Cygnus cygnus*
SWIFT, Alpine, *Apus melba*
Black, *Cypseloides niger*
Chimney, *Chaetura pelagica*
Common, *Apus apus*
Fork-tailed, *Apus pacificus*
Short-tailed, *Chaetura brachyura*
Vaux's, *Chaetura vauxi*
White-collared, *Streptoprocne zonaris*
White-throated, *Aeronautes saxatalis*
SWIFTLET, Mariana, *Aerodramus bartschi*
White-rumped, *Aerodramus spodiopygius*
TANAGER, Flame-colored, *Piranga bidentata*
Hepatic, *Piranga flava*
Puerto Rican, *Nesospingus speculiferus*
Scarlet, *Piranga olivacea*
Summer, *Piranga rubra*
Western, *Piranga ludoviciana*
TATTLER, Gray-tailed, *Tringa brevipes*
Wandering, *Tringa incana*
TEAL, Baikal, *Sibirionetta formosa*
Blue-winged, *Spatula discors*
Cinnamon, *Spatula cyanoptera*
Green-winged, *Anas crecca*
TERN, Aleutian, *Onychoprion aleuticus*
Arctic, *Sterna paradisaea*
Black, *Chlidonias niger*
Black-naped, *Sterna sumatrana*
Bridled, *Onychoprion anaethetus*
Caspian, *Hydroprogne caspia*
Common, *Sterna hirundo*
Elegant, *Thalasseus elegans*
Forster's, *Sterna forsteri*
Gray-backed, *Onychoprion lunatus*
Great Crested, *Thalasseus bergii*
Gull-billed, *Gelochelidon nilotica*
Large-billed, *Phaetusa simplex*
Least, *Sternula antillarum*
Little, *Sternula albifrons*
Roseate, *Sterna dougallii*
Royal, *Thalasseus maximus*
Sandwich, *Thalasseus sandvicensis*
Sooty, *Onychoprion fuscatus*
Whiskered, *Chlidonias hybrida*
White, *Gygis alba*
White-winged, *Chlidonias leucopterus*
THRASHER, Bendire's, *Toxostoma bendirei*
Brown, *Toxostoma rufum*
California, *Toxostoma redivivum*
Crissal, *Toxostoma crissale*
Curve-billed, *Toxostoma curvirostre*
LeConte's, *Toxostoma lecontei*
Long-billed, *Toxostoma longirostre*
Pearly-eyed, *Margarops fuscatus*
Sage, *Oreoscoptes montanus*
THRUSH, Aztec, *Ridgwayia pinicola*
Bicknell's, *Catharus bicknelli*
Clay-colored, *Turdus grayi*
Dusky, *Turdus naumanni*
Eyebrowed, *Turdus obscurus*
Gray-cheeked, *Catharus minimus*
Hermit, *Catharus guttatus*

Red-legged, *Turdus plumbeus*
Swainson's, *Catharus ustulatus*
Varied, *Ixoreus naevius*
White-throated, *Turdus assimilis*
Wood, *Hylocichla mustelina*
TIGER-HERON, Bare-throated, *Tigrisoma mexicanum*
TITMOUSE, Black-crested, *Baeolophus atricristatus*
Bridled, *Baeolophus wollweberi*
Juniper, *Baeolophus ridgwayi*
Oak, *Baeolophus inornatus*
Tufted, *Baeolophus bicolor*
TITYRA, Masked, *Tityra semifasciata*
TOWHEE, Abert's, *Melozone aberti*
California, *Melozone crissalis*
Canyon, *Melozone fusca*
Eastern, *Pipilo erythrophthalmus*
Green-tailed, *Pipilo chlorurus*
Spotted, *Pipilo maculatus*
TROGON, Elegant, *Trogon elegans*
TROPICBIRD, Red-billed, *Phaethon aethereus*
Red-tailed, *Phaethon rubricauda*
White-tailed, *Phaethon lepturus*
TURNSTONE, Black, *Arenaria melanocephala*
Ruddy, *Arenaria interpres*
TURTLE-DOVE, European, *Streptopelia turtur*
Oriental, *Streptopelia orientalis*
VEERY, *Catharus fuscescens*
VERDIN, *Auriparus flaviceps*
VIOLETEAR, Mexican, *Colibri thalassinus*
VIREO, Bell's, *Vireo bellii*
Black-capped, *Vireo atricapilla*
Black-whiskered, *Vireo altiloquus*
Blue-headed, *Vireo solitarius*
Cassin's, *Vireo cassinii*
Cuban, *Vireo gundlachii*
Gray, *Vireo vicinior*
Hutton's, *Vireo huttoni*
Philadelphia, *Vireo philadelphicus*
Plumbeous, *Vireo plumbeus*
Puerto Rican, *Vireo latimeri*
Red-eyed, *Vireo olivaceus*
Thick-billed, *Vireo crassirostris*
Warbling, *Vireo gilvus*
White-eyed, *Vireo griseus*
Yellow-green, *Vireo flavoviridis*
Yellow-throated, *Vireo flavifrons*
Yucatan, *Vireo magister*
VULTURE, Black, *Coragyps atratus*
Turkey, *Cathartes aura*
WAGTAIL, Citrine, *Motacilla citreola*
Eastern Yellow, *Motacilla tschutschensis*
Gray, *Motacilla cinerea*
White, *Motacilla alba*
WARBLER, Adelaide's, *Setophaga adelaidae*
Aguiguan Reed, *Acrocephalus nijoi*
Arctic, *Phylloscopus borealis*
Bachman's, *Vermivora bachmanii*
Bay-breasted, *Setophaga castanea*
Black-and-white, *Mniotilta varia*
Blackburnian, *Setophaga fusca*
Blackpoll, *Setophaga striata*
Black-throated Blue, *Setophaga caerulescens*
Black-throated Gray, *Setophaga nigrescens*
Black-throated Green, *Setophaga virens*
Blue-winged, *Vermivora cyanoptera*
Blyth's Reed, *Acrocephalus dumetorum*
Canada, *Cardellina canadensis*
Cape May, *Setophaga tigrina*
Cerulean, *Setophaga cerulea*
Chestnut-sided, *Setophaga pensylvanica*
Colima, *Oreothlypis crissalis*
Connecticut, *Oporornis agilis*
Crescent-chested, *Oreothlypis superciliosa*
Dusky, *Phylloscopus fuscatus*
Elfin-woods, *Setophaga angelae*
Fan-tailed, *Basileuterus lachrymosus*
Golden-cheeked, *Setophaga chrysoparia*
Golden-crowned, *Basileuterus culicivorus*
Golden-winged, *Vermivora chrysoptera*
Grace's, *Setophaga graciae*
Hermit, *Setophaga occidentalis*
Hooded, *Setophaga citrina*
Kamchatka Leaf, *Phylloscopus examinandus*
Kentucky, *Geothlypis formosa*
Kirtland's, *Setophaga kirtlandii*
Lanceolated, *Locustella lanceolata*
Lucy's, *Oreothlypis luciae*
MacGillivray's, *Geothlypis tolmiei*
Magnolia, *Setophaga magnolia*
Mourning, *Geothlypis philadelphia*
Nashville, *Oreothlypis ruficapilla*
Nightingale Reed, *Acrocephalus luscinius*
Olive, *Peucedramus taeniatus*
Orange-crowned, *Oreothlypis celata*
Pagan Reed, *Acrocephalus yamashinae*
Pallas's Leaf, *Phylloscopus proregulus*
Palm, *Setophaga palmarum*
Pine, *Setophaga pinus*
Prairie, *Setophaga discolor*
Prothonotary, *Protonotaria citrea*
Red-faced, *Cardellina rubrifrons*
Rufous-capped, *Basileuterus rufifrons*
Saipan Reed, *Acrocephalus hiwae*
Sedge, *Acrocephalus schoenobaenus*
Swainson's, *Limnothlypis swainsonii*
Tennessee, *Oreothlypis peregrina*
Townsend's, *Setophaga townsendi*
Virginia's, *Oreothlypis virginiae*
Willow, *Phylloscopus trochilus*
Wilson's, *Cardellina pusilla*
Wood, *Phylloscopus sibilatrix*
Worm-eating, *Helmitheros vermivorum*
Yellow, *Setophaga petechia*
Yellow-browed, *Phylloscopus inornatus*
Yellow-rumped, *Setophaga coronata*
Yellow-throated, *Setophaga dominica*
WATERTHRUSH, Louisiana, *Parkesia motacilla*
Northern, *Parkesia noveboracensis*
WAXWING, Bohemian, *Bombycilla garrulus*
Cedar, *Bombycilla cedrorum*
WHEATEAR, Northern, *Oenanthe oenanthe*
WHIMBREL, *Numenius phaeopus*
WHIP-POOR-WILL, Eastern, *Antrostomus vociferus*
Mexican, *Antrostomus arizonae*
WHISTLING-DUCK, Black-bellied, *Dendrocygna autumnalis*
Fulvous, *Dendrocygna bicolor*
West Indian, *Dendrocygna arborea*
WHITETHROAT, Lesser, *Sylvia curruca*
WIGEON, American, *Mareca americana*
Eurasian, *Mareca penelope*
WILLET, *Tringa semipalmata*
WOODCOCK, American, *Scolopax minor*
Eurasian, *Scolopax rusticola*
WOODPECKER, Acorn, *Melanerpes formicivorus*
American Three-toed, *Picoides dorsalis*
Arizona, *Dryobates arizonae*
Black-backed, *Picoides arcticus*
Downy, *Dryobates pubescens*
Gila, *Melanerpes uropygialis*
Golden-fronted, *Melanerpes aurifrons*
Great Spotted, *Dendrocopos major*
Hairy, *Dryobates villosus*
Ivory-billed, *Campephilus principalis*
Ladder-backed, *Dryobates scalaris*
Lewis's, *Melanerpes lewis*
Nuttall's, *Dryobates nuttallii*
Pileated, *Dryocopus pileatus*
Puerto Rican, *Melanerpes portoricensis*
Red-bellied, *Melanerpes carolinus*
Red-cockaded, *Dryobates borealis*
Red-headed, *Melanerpes erythrocephalus*
White-headed, *Dryobates albolarvatus*
WOOD-PEWEE, Eastern, *Contopus virens*
Western, *Contopus sordidulus*
WOOD-RAIL, Rufous-necked, *Aramides axillaris*
WOODSTAR, Bahama, *Calliphlox evelynae*
WREN, Bewick's, *Thryomanes bewickii*
Cactus, *Campylorhynchus brunneicapillus*
Canyon, *Catherpes mexicanus*
Carolina, *Thryothorus ludovicianus*
House, *Troglodytes aedon*
Marsh, *Cistothorus palustris*
Pacific, *Troglodytes pacificus*
Rock, *Salpinctes obsoletus*
Sedge, *Cistothorus platensis*
Sinaloa, *Thryophilus sinaloa*
Winter, *Troglodytes hiemalis*
WRENTIT, *Chamaea fasciata*
WRYNECK, Eurasian, *Jynx torquilla*
YELLOWLEGS, Greater, *Tringa melanoleuca*
Lesser, *Tringa flavipes*
YELLOWTHROAT, Common, *Geothlypis trichas*
Gray-crowned, *Geothlypis poliocephala*

(2) *Taxonomic listing.* Species are listed in phylogenetic sequence by scientific name, with the common (English) name following the scientific name. To help clarify species relationships, we also list the higher-level taxonomic categories of Order, Family, and Subfamily.

Order ANSERIFORMES
Family ANATIDAE
Subfamily DENDROCYGNINAE
Dendrocygna autumnalis, Black-bellied Whistling-Duck
Dendrocygna arborea, West Indian Whistling-Duck
Dendrocygna bicolor, Fulvous Whistling-Duck
Subfamily ANSERINAE
Anser canagicus, Emperor Goose
Anser caerulescens, Snow Goose
Anser rossii, Ross's Goose
Anser albifrons, Greater White-fronted Goose
Anser erythropus, Lesser White-fronted Goose
Anser fabalis, Taiga Bean-Goose
Anser serrirostris, Tundra Bean-Goose
Anser brachyrhynchus, Pink-footed Goose
Branta bernicla, Brant
Branta leucopsis, Barnacle Goose
Branta hutchinsii, Cackling Goose
Branta canadensis, Canada Goose
Branta sandvicensis, Hawaiian Goose
Cygnus buccinator, Trumpeter Swan
Cygnus columbianus, Tundra Swan
Cygnus cygnus, Whooper Swan
Subfamily ANATINAE
Cairina moschata, Muscovy Duck
Aix sponsa, Wood Duck
Sibirionetta formosa, Baikal Teal
Spatula querquedula, Garganey
Spatula discors, Blue-winged Teal
Spatula cyanoptera, Cinnamon Teal

Spatula clypeata, Northern Shoveler
Mareca strepera, Gadwall
Mareca falcata, Falcated Duck
Mareca penelope, Eurasian Wigeon
Mareca americana, American Wigeon
Anas laysanensis, Laysan Duck
Anas wyvilliana, Hawaiian Duck
Anas zonorhyncha, Eastern Spot-billed Duck
Anas platyrhynchos, Mallard
Anas rubripes, American Black Duck
Anas fulvigula, Mottled Duck
Anas superciliosa, Pacific Black Duck
Anas bahamensis, White-cheeked Pintail
Anas acuta, Northern Pintail
Anas crecca, Green-winged Teal
Aythya valisineria, Canvasback
Aythya americana, Redhead
Aythya ferina, Common Pochard
Aythya baeri, Baer's Pochard
Aythya collaris, Ring-necked Duck
Aythya fuligula, Tufted Duck
Aythya marila, Greater Scaup
Aythya affinis, Lesser Scaup
Polysticta stelleri, Steller's Eider
Somateria fischeri, Spectacled Eider
Somateria spectabilis, King Eider
Somateria mollissima, Common Eider
Histrionicus histrionicus, Harlequin Duck
Melanitta perspicillata, Surf Scoter
Melanitta fusca, White-winged Scoter
Melanitta nigra, Common Scoter
Melanitta americana, Black Scoter
Clangula hyemalis, Long-tailed Duck
Bucephala albeola, Bufflehead
Bucephala clangula, Common Goldeneye
Bucephala islandica, Barrow's Goldeneye
Mergellus albellus, Smew
Lophodytes cucullatus, Hooded Merganser
Mergus merganser, Common Merganser
Mergus serrator, Red-breasted Merganser
Nomonyx dominicus, Masked Duck
Oxyura jamaicensis, Ruddy Duck
Order PHOENICOPTERIFORMES
Family PHOENICOPTERIDAE
Phoenicopterus ruber, American Flamingo
Order PODICIPEDIFORMES
Family PODICIPEDIDAE
Tachybaptus dominicus, Least Grebe
Podilymbus podiceps, Pied-billed Grebe
Podiceps auritus, Horned Grebe
Podiceps grisegena, Red-necked Grebe
Podiceps nigricollis, Eared Grebe
Aechmophorus occidentalis, Western Grebe
Aechmophorus clarkii, Clark's Grebe
Order COLUMBIFORMES
Family COLUMBIDAE
Patagioenas squamosa, Scaly-naped Pigeon
Patagioenas leucocephala, White-crowned Pigeon
Patagioenas flavirostris, Red-billed Pigeon
Patagioenas inornata, Plain Pigeon
Patagioenas fasciata, Band-tailed Pigeon
Streptopelia orientalis, Oriental Turtle-Dove
Alopecoenas xanthonura, White-throated Ground-Dove
Alopecoenas stairi, Shy Ground-Dove
Streptopelia turtur, European Turtle-Dove
Columbina inca, Inca Dove
Columbina passerina, Common Ground-Dove
Columbina talpacoti, Ruddy Ground-Dove
Geotrygon montana, Ruddy Quail-Dove
Geotrygon chrysia, Key West Quail-Dove
Geotrygon mystacea, Bridled Quail-Dove
Leptotila verreauxi, White-tipped Dove
Zenaida asiatica, White-winged Dove
Zenaida aurita, Zenaida Dove
Zenaida macroura, Mourning Dove
Ptilinopus perousii, Many-colored Fruit-Dove
Ptilinopus porphyraceus, Crimson-crowned Fruit-Dove
Ptilinopus roseicapilla, Mariana Fruit-Dove
Ducula pacifica, Pacific Imperial-Pigeon
Order CUCULIFORMES
Family CUCULIDAE
Subfamily CUCULINAE
Urodynamis taitensis, Long-tailed Koel
Hierococcyx nisicolor, Hodgson's Hawk-Cuckoo
Cuculus canorus, Common Cuckoo
Cuculus optatus, Oriental Cuckoo
Coccyzus americanus, Yellow-billed Cuckoo
Coccyzus minor, Mangrove Cuckoo
Coccyzus erythropthalmus, Black-billed Cuckoo
Coccyzus vieilloti, Puerto Rican Lizard-Cuckoo
Subfamily NEOMORPHINAE
Geococcyx californianus, Greater Roadrunner
Subfamily CROTOPHAGINAE
Crotophaga ani, Smooth-billed Ani
Crotophaga sulcirostris, Groove-billed Ani
Order CAPRIMULGIFORMES
Family CAPRIMULGIDAE
Subfamily CHORDEILINAE
Chordeiles acutipennis, Lesser Nighthawk
Chordeiles minor, Common Nighthawk
Chordeiles gundlachii, Antillean Nighthawk
Subfamily CAPRIMULGINAE
Nyctidromus albicollis, Common Pauraque
Phalaenoptilus nuttallii, Common Poorwill
Antrostomus carolinensis, Chuck-will's-widow
Antrostomus ridgwayi, Buff-collared Nightjar
Antrostomus vociferus, Eastern Whip-poor-will
Antrostomus arizonae, Mexican Whip-poor-will
Antrostomus noctitherus, Puerto Rican Nightjar
Hydropsalis cayennensis, White-tailed Nightjar
Caprimulgus jotaka, Gray Nightjar
Order APODIFORMES
Family APODIDAE
Subfamily CYPSELOIDINAE
Cypseloides niger, Black Swift
Streptoprocne zonaris, White-collared Swift
Subfamily CHAETURINAE
Chaetura pelagica, Chimney Swift
Chaetura vauxi, Vaux's Swift
Chaetura brachyura, Short-tailed Swift
Hirundapus caudacutus, White-throated Needletail
Aerodramus spodiopygius, White-rumped Swiftlet
Aerodramus bartschi, Mariana Swiftlet
Subfamily APODINAE
Apus apus, Common Swift
Apus pacificus, Fork-tailed Swift
Apus melba, Alpine Swift
Aeronautes saxatalis, White-throated Swift
Tachornis phoenicobia, Antillean Palm-Swift
Family TROCHILIDAE
Subfamily TROCHILINAE
Colibri thalassinus, Mexican Violetear
Anthracothorax prevostii, Green-breasted Mango
Anthracothorax dominicus, Antillean Mango
Anthracothorax viridis, Green Mango
Eulampis jugularis, Purple-throated Carib
Eulampis holosericeus, Green-throated Carib
Eugenes fulgens, Rivoli's Hummingbird
Heliomaster constantii, Plain-capped Starthroat
Lampornis amethystinus, Amethyst-throated Hummingbird
Lampornis clemenciae, Blue-throated Hummingbird
Calliphlox evelynae, Bahama Woodstar
Calothorax lucifer, Lucifer Hummingbird
Archilochus colubris, Ruby-throated Hummingbird
Archilochus alexandri, Black-chinned Hummingbird
Mellisuga minima, Vervain Hummingbird
Calypte anna, Anna's Hummingbird
Calypte costae, Costa's Hummingbird
Atthis heloisa, Bumblebee Hummingbird
Selasphorus platycercus, Broad-tailed Hummingbird
Selasphorus rufus, Rufous Hummingbird
Selasphorus sasin, Allen's Hummingbird
Selasphorus calliope, Calliope Hummingbird
Chlorostilbon maugaeus, Puerto Rican Emerald
Cynanthus latirostris, Broad-billed Hummingbird
Orthorhyncus cristatus, Antillean Crested Hummingbird
Amazilia beryllina, Berylline Hummingbird
Amazilia yucatanensis, Buff-bellied Hummingbird
Amazilia rutila, Cinnamon Hummingbird
Amazilia violiceps, Violet-crowned Hummingbird
Hylocharis leucotis, White-eared Hummingbird
Hylocharis xantusii, Xantus's Hummingbird
Order GRUIFORMES
Family RALLIDAE
Coturnicops noveboracensis, Yellow Rail
Laterallus jamaicensis, Black Rail
Gallirallus philippensis, Buff-banded Rail
Gallirallus owstoni, Guam Rail
Crex crex, Corn Crake
Rallus obsoletus, Ridgway's Rail
Rallus crepitans, Clapper Rail
Rallus elegans, King Rail
Rallus limicola, Virginia Rail
Aramides axillaris, Rufous-necked Wood-Rail
Porzana carolina, Sora
Porzana tabuensis, Spotless Crake
Hapalocrex flaviventer, Yellow-breasted Crake
Neocrex erythrops, Paint-billed Crake
Pardirallus maculatus, Spotted Rail
Porphyrio martinicus, Purple Gallinule
Porphyrio flavirostris, Azure Gallinule
Porphyrio porphyrio, Purple Swamphen
Gallinula galeata, Common Gallinule

Gallinula chloropus, Common Moorhen
Fulica atra, Eurasian Coot
Fulica alai, Hawaiian Coot
Fulica americana, American Coot
Family ARAMIDAE
Aramus guarauna, Limpkin
Family GRUIDAE
Subfamily GRUINAE
Antigone canadensis, Sandhill Crane
Grus grus, Common Crane
Grus americana, Whooping Crane
Order CHARADRIIFORMES
Family RECURVIROSTRIDAE
Himantopus himantopus, Black-winged Stilt
Himantopus mexicanus, Black-necked Stilt
Recurvirostra americana, American Avocet
Family HAEMATOPODIDAE
Haematopus ostralegus, Eurasian Oystercatcher
Haematopus palliatus, American Oystercatcher
Haematopus bachmani, Black Oystercatcher
Family CHARADRIIDAE
Subfamily VANELLINAE
Vanellus vanellus, Northern Lapwing
Subfamily CHARADRIINAE
Pluvialis squatarola, Black-bellied Plover
Pluvialis apricaria, European Golden-Plover
Pluvialis dominica, American Golden-Plover
Pluvialis fulva, Pacific Golden-Plover
Charadrius mongolus, Lesser Sand-Plover
Charadrius leschenaultii, Greater Sand-Plover
Charadrius collaris, Collared Plover
Charadrius alexandrinus, Kentish Plover
Charadrius nivosus, Snowy Plover
Charadrius wilsonia, Wilson's Plover
Charadrius hiaticula, Common Ringed Plover
Charadrius semipalmatus, Semipalmated Plover
Charadrius melodus, Piping Plover
Charadrius dubius, Little Ringed Plover
Charadrius vociferus, Killdeer
Charadrius montanus, Mountain Plover
Charadrius morinellus, Eurasian Dotterel
Family JACANIDAE
Jacana spinosa, Northern Jacana
Family SCOLOPACIDAE
Subfamily NUMENIINAE
Bartramia longicauda, Upland Sandpiper
Numenius tahitiensis, Bristle-thighed Curlew
Numenius phaeopus, Whimbrel
Numenius minutus, Little Curlew
Numenius borealis, Eskimo Curlew
Numenius americanus, Long-billed Curlew
Numenius madagascariensis, Far Eastern Curlew
Numenius arquata, Eurasian Curlew
Subfamily LIMOSINAE
Limosa lapponica, Bar-tailed Godwit
Limosa limosa, Black-tailed Godwit
Limosa haemastica, Hudsonian Godwit
Limosa fedoa, Marbled Godwit
Subfamily ARENARIINAE
Arenaria interpres, Ruddy Turnstone
Arenaria melanocephala, Black Turnstone
Calidris tenuirostris, Great Knot
Calidris canutus, Red Knot
Calidris virgata, Surfbird
Calidris pugnax, Ruff
Calidris falcinellus, Broad-billed Sandpiper
Calidris acuminata, Sharp-tailed Sandpiper
Calidris himantopus, Stilt Sandpiper
Calidris ferruginea, Curlew Sandpiper
Calidris temminckii, Temminck's Stint
Calidris subminuta, Long-toed Stint
Calidris pygmea, Spoon-billed Sandpiper
Calidris ruficollis, Red-necked Stint
Calidris alba, Sanderling
Calidris alpina, Dunlin
Calidris ptilocnemis, Rock Sandpiper
Calidris maritima, Purple Sandpiper
Calidris bairdii, Baird's Sandpiper
Calidris minuta, Little Stint
Calidris minutilla, Least Sandpiper
Calidris fuscicollis, White-rumped Sandpiper
Calidris subruficollis, Buff-breasted Sandpiper
Calidris melanotos, Pectoral Sandpiper
Calidris pusilla, Semipalmated Sandpiper
Calidris mauri, Western Sandpiper
Subfamily SCOLOPACINAE
Limnodromus griseus, Short-billed Dowitcher
Limnodromus scolopaceus, Long-billed Dowitcher
Lymnocryptes minimus, Jack Snipe
Scolopax rusticola, Eurasian Woodcock
Scolopax minor, American Woodcock
Gallinago solitaria, Solitary Snipe
Gallinago stenura, Pin-tailed Snipe
Gallinago megala, Swinhoe's Snipe
Gallinago gallinago, Common Snipe
Gallinago delicata, Wilson's Snipe
Subfamily TRINGINAE
Xenus cinereus, Terek Sandpiper
Actitis hypoleucos, Common Sandpiper
Actitis macularius, Spotted Sandpiper
Tringa ochropus, Green Sandpiper
Tringa solitaria, Solitary Sandpiper
Tringa brevipes, Gray-tailed Tattler
Tringa incana, Wandering Tattler
Tringa flavipes, Lesser Yellowlegs
Tringa semipalmata, Willet
Tringa erythropus, Spotted Redshank
Tringa nebularia, Common Greenshank
Tringa guttifer, Nordmann's Greenshank
Tringa melanoleuca, Greater Yellowlegs
Tringa totanus, Common Redshank
Tringa glareola, Wood Sandpiper
Tringa stagnatilis, Marsh Sandpiper
Phalaropus tricolor, Wilson's Phalarope
Phalaropus lobatus, Red-necked Phalarope
Phalaropus fulicarius, Red Phalarope
Family STERCORARIIDAE
Stercorarius skua, Great Skua
Stercorarius maccormicki, South Polar Skua
Stercorarius pomarinus, Pomarine Jaeger
Stercorarius parasiticus, Parasitic Jaeger
Stercorarius longicaudus, Long-tailed Jaeger
Family ALCIDAE
Alle alle, Dovekie
Uria aalge, Common Murre
Uria lomvia, Thick-billed Murre
Alca torda, Razorbill
Cepphus grylle, Black Guillemot
Cepphus columba, Pigeon Guillemot
Brachyramphus perdix, Long-billed Murrelet
Brachyramphus marmoratus, Marbled Murrelet
Brachyramphus brevirostris, Kittlitz's Murrelet
Synthliboramphus scrippsi, Scripps's Murrelet
Synthliboramphus hypoleucus, Guadalupe Murrelet
Synthliboramphus craveri, Craveri's Murrelet
Synthliboramphus antiquus, Ancient Murrelet
Ptychoramphus aleuticus, Cassin's Auklet
Aethia psittacula, Parakeet Auklet
Aethia pusilla, Least Auklet
Aethia pygmaea, Whiskered Auklet
Aethia cristatella, Crested Auklet
Cerorhinca monocerata, Rhinoceros Auklet
Fratercula arctica, Atlantic Puffin
Fratercula corniculata, Horned Puffin
Fratercula cirrhata, Tufted Puffin
Family LARIDAE
Subfamily LARINAE
Creagrus furcatus, Swallow-tailed Gull
Rissa tridactyla, Black-legged Kittiwake
Rissa brevirostris, Red-legged Kittiwake
Pagophila eburnea, Ivory Gull
Xema sabini, Sabine's Gull
Chroicocephalus philadelphia, Bonaparte's Gull
Chroicocephalus cirrocephalus, Gray-hooded Gull
Chroicocephalus ridibundus, Black-headed Gull
Hydrocoloeus minutus, Little Gull
Rhodostethia rosea, Ross's Gull
Leucophaeus atricilla, Laughing Gull
Leucophaeus pipixcan, Franklin's Gull
Larus belcheri, Belcher's Gull
Larus crassirostris, Black-tailed Gull
Larus heermanni, Heermann's Gull
Larus canus, Mew Gull
Larus delawarensis, Ring-billed Gull
Larus occidentalis, Western Gull
Larus livens, Yellow-footed Gull
Larus californicus, California Gull
Larus argentatus, Herring Gull
Larus michahellis, Yellow-legged Gull
Larus glaucoides, Iceland Gull
Larus fuscus, Lesser Black-backed Gull
Larus schistisagus, Slaty-backed Gull
Larus glaucescens, Glaucous-winged Gull
Larus hyperboreus, Glaucous Gull
Larus marinus, Great Black-backed Gull
Larus dominicanus, Kelp Gull
Subfamily STERNINAE
Anous stolidus, Brown Noddy
Anous minutus, Black Noddy
Anous ceruleus, Blue-gray Noddy
Gygis alba, White Tern
Onychoprion fuscatus, Sooty Tern
Onychoprion lunatus, Gray-backed Tern
Onychoprion anaethetus, Bridled Tern
Onychoprion aleuticus, Aleutian Tern
Sternula albifrons, Little Tern
Sternula antillarum, Least Tern
Phaetusa simplex, Large-billed Tern
Gelochelidon nilotica, Gull-billed Tern
Hydroprogne caspia, Caspian Tern
Chlidonias niger, Black Tern
Chlidonias leucopterus, White-winged Tern
Chlidonias hybrida, Whiskered Tern
Sterna dougallii, Roseate Tern
Sterna sumatrana, Black-naped Tern
Sterna hirundo, Common Tern
Sterna paradisaea, Arctic Tern
Sterna forsteri, Forster's Tern

Thalasseus maximus, Royal Tern
Thalasseus bergii, Great Crested Tern
Thalasseus sandvicensis, Sandwich Tern
Thalasseus elegans, Elegant Tern
Subfamily RYNCHOPINAE
Rynchops niger, Black Skimmer
Order PHAETHONTIFORMES
Family PHAETHONTIDAE
Phaethon lepturus, White-tailed Tropicbird
Phaethon aethereus, Red-billed Tropicbird
Phaethon rubricauda, Red-tailed Tropicbird
Order GAVIIFORMES
Family GAVIIDAE
Gavia stellata, Red-throated Loon
Gavia arctica, Arctic Loon
Gavia pacifica, Pacific Loon
Gavia immer, Common Loon
Gavia adamsii, Yellow-billed Loon
Order PROCELLARIIFORMES
Family DIOMEDEIDAE
Thalassarche chlororhynchos, Yellow-nosed Albatross
Thalassarche cauta, White-capped Albatross
Thalassarche eremita, Chatham Albatross
Thalassarche salvini, Salvin's Albatross
Thalassarche melanophris, Black-browed Albatross
Phoebetria palpebrata, Light-mantled Albatross
Diomedea exulans, Wandering Albatross
Phoebastria immutabilis, Laysan Albatross
Phoebastria nigripes, Black-footed Albatross
Phoebastria albatrus, Short-tailed Albatross
Family OCEANITIDAE
Oceanites oceanicus, Wilson's Storm-Petrel
Pelagodroma marina, White-faced Storm-Petrel
Fregetta tropica, Black-bellied Storm-Petrel
Family HYDROBATIDAE
Fregetta grallaria, White-bellied Storm-Petrel
Nesofregetta fuliginosa, Polynesian Storm-Petrel
Oceanodroma furcata, Fork-tailed Storm-Petrel
Oceanodroma hornbyi, Ringed Storm-Petrel
Oceanodroma monorhis, Swinhoe's Storm-Petrel
Oceanodroma leucorhoa, Leach's Storm-Petrel
Oceanodroma socorroensis, Townsend's Storm-Petrel
Oceanodroma homochroa, Ashy Storm-Petrel
Oceanodroma castro, Band-rumped Storm-Petrel
Oceanodroma tethys, Wedge-rumped Storm-Petrel
Oceanodroma matsudairae, Matsudaira's Storm-Petrel
Oceanodroma melania, Black Storm-Petrel
Oceanodroma tristrami, Tristram's Storm-Petrel
Oceanodroma microsoma, Least Storm-Petrel
Family PROCELLARIIDAE
Fulmarus glacialis, Northern Fulmar
Pterodroma macroptera, Great-winged Petrel
Pterodroma solandri, Providence Petrel
Pterodroma neglecta, Kermadec Petrel
Pterodroma arminjoniana, Trindade Petrel
Pterodroma heraldica, Herald Petrel
Pterodroma ultima, Murphy's Petrel
Pterodroma inexpectata, Mottled Petrel
Pterodroma cahow, Bermuda Petrel
Pterodroma hasitata, Black-capped Petrel
Pterodroma externa, Juan Fernandez Petrel
Pterodroma sandwichensis, Hawaiian Petrel
Pterodroma cervicalis, White-necked Petrel
Pterodroma hypoleuca, Bonin Petrel
Pterodroma nigripennis, Black-winged Petrel
Pterodroma feae, Fea's Petrel
Pterodroma madeira, Zino's Petrel
Pterodroma cookii, Cook's Petrel
Pterodroma longirostris, Stejneger's Petrel
Pterodroma alba, Phoenix Petrel
Pterodroma leucoptera, Gould's Petrel
Pseudobulweria rostrata, Tahiti Petrel
Bulweria bulwerii, Bulwer's Petrel
Bulweria fallax, Jouanin's Petrel
Procellaria aequinoctialis, White-chinned Petrel
Procellaria parkinsoni, Parkinson's Petrel
Calonectris leucomelas, Streaked Shearwater
Calonectris diomedea, Cory's Shearwater
Calonectris edwardsii, Cape Verde Shearwater
Ardenna pacifica, Wedge-tailed Shearwater
Ardenna bulleri, Buller's Shearwater
Ardenna tenuirostris, Short-tailed Shearwater
Ardenna grisea, Sooty Shearwater
Ardenna gravis, Great Shearwater
Ardenna creatopus, Pink-footed Shearwater
Ardenna carneipes, Flesh-footed Shearwater
Puffinus nativitatis, Christmas Shearwater
Puffinus puffinus, Manx Shearwater
Puffinus newelli, Newell's Shearwater
Puffinus bryani, Bryan's Shearwater
Puffinus opisthomelas, Black-vented Shearwater
Puffinus lherminieri, Audubon's Shearwater
Puffinus baroli, Barolo Shearwater
Order CICONIIFORMES
Family CICONIIDAE
Jabiru mycteria, Jabiru
Mycteria americana, Wood Stork
Order SULIFORMES
Family FREGATIDAE
Fregata magnificens, Magnificent Frigatebird
Fregata minor, Great Frigatebird
Fregata ariel, Lesser Frigatebird
Family SULIDAE
Sula dactylatra, Masked Booby
Sula granti, Nazca Booby
Sula nebouxii, Blue-footed Booby
Sula leucogaster, Brown Booby
Sula sula, Red-footed Booby
Papasula abbotti, Abbott's Booby
Morus bassanus, Northern Gannet
Family PHALACROCORACIDAE
Phalacrocorax melanoleucos, Little Pied Cormorant
Phalacrocorax penicillatus, Brandt's Cormorant
Phalacrocorax brasilianus, Neotropic Cormorant
Phalacrocorax auritus, Double-crested Cormorant
Phalacrocorax carbo, Great Cormorant
Phalacrocorax urile, Red-faced Cormorant
Phalacrocorax pelagicus, Pelagic Cormorant
Family ANHINGIDAE
Anhinga anhinga, Anhinga
Order PELECANIFORMES
Family PELECANIDAE
Pelecanus erythrorhynchos, American White Pelican
Pelecanus occidentalis, Brown Pelican
Family ARDEIDAE
Botaurus lentiginosus, American Bittern
Ixobrychus sinensis, Yellow Bittern
Ixobrychus exilis, Least Bittern
Ixobrychus eurhythmus, Schrenck's Bittern
Ixobrychus flavicollis, Black Bittern
Tigrisoma mexicanum, Bare-throated Tiger-Heron
Ardea herodias, Great Blue Heron
Ardea cinerea, Gray Heron
Ardea alba, Great Egret
Ardea intermedia, Intermediate Egret
Egretta eulophotes, Chinese Egret
Egretta garzetta, Little Egret
Egretta sacra, Pacific Reef-Heron
Egretta gularis, Western Reef-Heron
Egretta thula, Snowy Egret
Egretta caerulea, Little Blue Heron
Egretta tricolor, Tricolored Heron
Egretta rufescens, Reddish Egret
Bubulcus ibis, Cattle Egret
Ardeola bacchus, Chinese Pond-Heron
Butorides virescens, Green Heron
Nycticorax nycticorax, Black-crowned Night-Heron
Nycticorax caledonicus, Rufous Night-Heron
Nyctanassa violacea, Yellow-crowned Night-Heron
Gorsachius goisagi, Japanese Night-Heron
Gorsachius melanolophus, Malayan Night-Heron
Family THRESKIORNITHIDAE
Subfamily THRESKIORNITHINAE
Eudocimus albus, White Ibis
Eudocimus ruber, Scarlet Ibis
Plegadis falcinellus, Glossy Ibis
Plegadis chihi, White-faced Ibis
Subfamily PLATALEINAE
Platalea ajaja, Roseate Spoonbill
Order CARTHARTIFORMES
Family CATHARTIDAE
Coragyps atratus, Black Vulture
Cathartes aura, Turkey Vulture
Gymnogyps californianus, California Condor
Order ACCIPITRIFORMES
Family PANDIONIDAE
Pandion haliaetus, Osprey
Family ACCIPITRIDAE
Subfamily ELANINAE
Elanus leucurus, White-tailed Kite
Subfamily GYPAETINAE
Chondrohierax uncinatus, Hook-billed Kite
Elanoides forficatus, Swallow-tailed Kite
Subfamily ACCIPITRINAE
Aquila chrysaetos, Golden Eagle
Harpagus bidentatus, Double-toothed Kite
Circus spilonotus, Eastern Marsh-Harrier
Circus hudsonius, Northern Harrier
Accipiter soloensis, Chinese Sparrowhawk
Accipiter gularis, Japanese Sparrowhawk
Accipiter striatus, Sharp-shinned Hawk

Accipiter cooperii, Cooper's Hawk
Accipiter gentilis, Northern Goshawk
Milvus migrans, Black Kite
Haliaeetus leucocephalus, Bald Eagle
Haliaeetus albicilla, White-tailed Eagle
Haliaeetus pelagicus, Steller's Sea-Eagle
Ictinia mississippiensis, Mississippi Kite
Butastur indicus, Gray-faced Buzzard
Geranospiza caerulescens, Crane Hawk
Rostrhamus sociabilis, Snail Kite
Buteogallus anthracinus, Common Black Hawk
Rupornis magnirostris, Roadside Hawk
Parabuteo unicinctus, Harris's Hawk
Geranoaetus albicaudatus, White-tailed Hawk
Buteo plagiatus, Gray Hawk
Buteo lineatus, Red-shouldered Hawk
Buteo platypterus, Broad-winged Hawk
Buteo solitarius, Hawaiian Hawk
Buteo brachyurus, Short-tailed Hawk
Buteo swainsoni, Swainson's Hawk
Buteo albonotatus, Zone-tailed Hawk
Buteo jamaicensis, Red-tailed Hawk
Buteo lagopus, Rough-legged Hawk
Buteo regalis, Ferruginous Hawk
Order STRIGIFORMES
Family TYTONIDAE
Tyto alba, Barn Owl
Family STRIGIDAE
Otus sunia, Oriental Scops-Owl
Psiloscops flammeolus, Flammulated Owl
Megascops kennicottii, Western Screech-Owl
Megascops asio, Eastern Screech-Owl
Megascops trichopsis, Whiskered Screech-Owl
Megascops nudipes, Puerto Rican Screech-Owl
Bubo virginianus, Great Horned Owl
Bubo scandiacus, Snowy Owl
Surnia ulula, Northern Hawk Owl
Glaucidium gnoma, Northern Pygmy-Owl
Glaucidium brasilianum, Ferruginous Pygmy-Owl
Micrathene whitneyi, Elf Owl
Athene cunicularia, Burrowing Owl
Ciccaba virgata, Mottled Owl
Strix occidentalis, Spotted Owl
Strix varia, Barred Owl
Strix nebulosa, Great Gray Owl
Asio otus, Long-eared Owl
Asio stygius, Stygian Owl
Asio flammeus, Short-eared Owl
Aegolius funereus, Boreal Owl
Aegolius acadicus, Northern Saw-whet Owl
Ninox japonica, Northern Boobook
Order TROGONIFORMES
Family TROGONIDAE
Subfamily TROGONINAE
Trogon elegans, Elegant Trogon
Euptilotis neoxenus, Eared Quetzal
Order UPUPIFORMES
Family UPUPIDAE
Upupa epops, Eurasian Hoopoe
Order CORACIIFORMES
Family ALCEDINIDAE
Subfamily ALCEDININAE
Alcedo atthis, Common Kingfisher
Subfamily HALCYONINAE
Todiramphus sacer, Pacific Kingfisher
Todiramphus cinnamominus, Guam Kingfisher
Todiramphus albicilla, Mariana Kingfisher
Subfamily CERYLINAE
Megaceryle torquata, Ringed Kingfisher
Megaceryle alcyon, Belted Kingfisher
Chloroceryle amazona, Amazon Kingfisher
Chloroceryle americana, Green Kingfisher
Order PICIFORMES
Family PICIDAE
Subfamily JYNGINAE
Jynx torquilla, Eurasian Wryneck
Subfamily PICINAE
Melanerpes lewis, Lewis's Woodpecker
Melanerpes portoricensis, Puerto Rican Woodpecker
Melanerpes erythrocephalus, Red-headed Woodpecker
Melanerpes formicivorus, Acorn Woodpecker
Melanerpes uropygialis, Gila Woodpecker
Melanerpes aurifrons, Golden-fronted Woodpecker
Melanerpes carolinus, Red-bellied Woodpecker
Sphyrapicus thyroideus, Williamson's Sapsucker
Sphyrapicus varius, Yellow-bellied Sapsucker
Sphyrapicus nuchalis, Red-naped Sapsucker
Sphyrapicus ruber, Red-breasted Sapsucker
Picoides dorsalis, American Three-toed Woodpecker
Picoides arcticus, Black-backed Woodpecker
Dendrocopos major, Great Spotted Woodpecker
Dryobates pubescens, Downy Woodpecker
Dryobates nuttallii, Nuttall's Woodpecker
Dryobates scalaris, Ladder-backed Woodpecker
Dryobates borealis, Red-cockaded Woodpecker
Dryobates villosus, Hairy Woodpecker
Dryobates albolarvatus, White-headed Woodpecker
Dryobates arizonae, Arizona Woodpecker
Colaptes auratus, Northern Flicker
Colaptes chrysoides, Gilded Flicker
Dryocopus pileatus, Pileated Woodpecker
Campephilus principalis, Ivory-billed Woodpecker
Order FALCONIFORMES
Family FALCONIDAE
Subfamily HERPETOTHERINAE
Micrastur semitorquatus, Collared Forest-Falcon
Subfamily FALCONINAE
Caracara cheriway, Crested Caracara
Falco tinnunculus, Eurasian Kestrel
Falco sparverius, American Kestrel
Falco vespertinus, Red-footed Falcon
Falco amurensis, Amur Falcon
Falco columbarius, Merlin
Falco subbuteo, Eurasian Hobby
Falco femoralis, Aplomado Falcon
Falco rusticolus, Gyrfalcon
Falco peregrinus, Peregrine Falcon
Falco mexicanus, Prairie Falcon
Order PASSERIFORMES
Family TITYRIDAE
Tityra semifasciata, Masked Tityra
Pachyramphus major, Gray-collared Becard
Pachyramphus aglaiae, Rose-throated Becard
Family TYRANNIDAE
Subfamily ELAENIINAE
Camptostoma imberbe, Northern Beardless-Tyrannulet
Myiopagis viridicata, Greenish Elaenia
Elaenia martinica, Caribbean Elaenia
Elaenia albiceps, White-crested Elaenia
Subfamily FLUVICOLINAE
Mitrephanes phaeocercus, Tufted Flycatcher
Contopus cooperi, Olive-sided Flycatcher
Contopus pertinax, Greater Pewee
Contopus sordidulus, Western Wood-Pewee
Contopus virens, Eastern Wood-Pewee
Contopus caribaeus, Cuban Pewee
Contopus hispaniolensis, Hispaniolan Pewee
Contopus latirostris, Lesser Antillean Pewee
Empidonax flaviventris, Yellow-bellied Flycatcher
Empidonax virescens, Acadian Flycatcher
Empidonax alnorum, Alder Flycatcher
Empidonax traillii, Willow Flycatcher
Empidonax minimus, Least Flycatcher
Empidonax hammondii, Hammond's Flycatcher
Empidonax wrightii, Gray Flycatcher
Empidonax oberholseri, Dusky Flycatcher
Empidonax affinis, Pine Flycatcher
Empidonax difficilis, Pacific-slope Flycatcher
Empidonax occidentalis, Cordilleran Flycatcher
Empidonax fulvifrons, Buff-breasted Flycatcher
Sayornis nigricans, Black Phoebe
Sayornis phoebe, Eastern Phoebe
Sayornis saya, Say's Phoebe
Pyrocephalus rubinus, Vermilion Flycatcher
Subfamily TYRANNINAE
Myiarchus tuberculifer, Dusky-capped Flycatcher
Myiarchus cinerascens, Ash-throated Flycatcher
Myiarchus nuttingi, Nutting's Flycatcher
Myiarchus crinitus, Great Crested Flycatcher
Myiarchus tyrannulus, Brown-crested Flycatcher
Myiarchus sagrae, La Sagra's Flycatcher
Myiarchus antillarum, Puerto Rican Flycatcher
Pitangus sulphuratus, Great Kiskadee
Myiozetetes similis, Social Flycatcher
Myiodynastes luteiventris, Sulphur-bellied Flycatcher
Legatus leucophaius, Piratic Flycatcher
Empidonomus varius, Variegated Flycatcher
Empidonomus aurantioatrocristatus, Crowned Slaty Flycatcher
Tyrannus melancholicus, Tropical Kingbird
Tyrannus couchii, Couch's Kingbird
Tyrannus vociferans, Cassin's Kingbird
Tyrannus crassirostris, Thick-billed Kingbird
Tyrannus verticalis, Western Kingbird
Tyrannus tyrannus, Eastern Kingbird
Tyrannus dominicensis, Gray Kingbird
Tyrannus caudifasciatus, Loggerhead Kingbird
Tyrannus forficatus, Scissor-tailed Flycatcher
Tyrannus savana, Fork-tailed Flycatcher
Family LANIIDAE
Lanius cristatus, Brown Shrike

Lanius ludovicianus, Loggerhead Shrike
Lanius borealis, Northern Shrike
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Vireo atricapilla, Black-capped Vireo
Vireo griseus, White-eyed Vireo
Vireo crassirostris, Thick-billed Vireo
Vireo latimeri, Puerto Rican Vireo
Vireo gundlachii, Cuban Vireo
Vireo bellii, Bell's Vireo
Vireo vicinior, Gray Vireo
Vireo huttoni, Hutton's Vireo
Vireo flavifrons, Yellow-throated Vireo
Vireo cassinii, Cassin's Vireo
Vireo solitarius, Blue-headed Vireo
Vireo plumbeus, Plumbeous Vireo
Vireo philadelphicus, Philadelphia Vireo
Vireo gilvus, Warbling Vireo
Vireo olivaceus, Red-eyed Vireo
Vireo flavoviridis, Yellow-green Vireo
Vireo altiloquus, Black-whiskered Vireo
Vireo magister, Yucatan Vireo
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Psilorhinus morio, Brown Jay
Cyanocorax yncas, Green Jay
Gymnorhinus cyanocephalus, Pinyon Jay
Cyanocitta stelleri, Steller's Jay
Cyanocitta cristata, Blue Jay
Aphelocoma coerulescens, Florida Scrub-Jay
Aphelocoma insularis, Island Scrub-Jay
Aphelocoma californica, California Scrub-Jay
Aphelocoma woodhouseii, Woodhouse's Scrub-Jay
Aphelocoma wollweberi, Mexican Jay
Nucifraga columbiana, Clark's Nutcracker
Pica hudsonia, Black-billed Magpie
Pica nuttalli, Yellow-billed Magpie
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Corvus caurinus, Northwestern Crow
Corvus leucognaphalus, White-necked Crow
Corvus imparatus, Tamaulipas Crow
Corvus ossifragus, Fish Crow
Corvus hawaiiensis, Hawaiian Crow
Corvus cryptoleucus, Chihuahuan Raven
Corvus corax, Common Raven
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Progne cryptoleuca, Cuban Martin
Progne dominicensis, Caribbean Martin
Progne chalybea, Gray-breasted Martin
Progne elegans, Southern Martin
Progne tapera, Brown-chested Martin
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Tachycineta albilinea, Mangrove Swallow
Tachycineta thalassina, Violet-green Swallow
Tachycineta cyaneoviridis, Bahama Swallow
Stelgidopteryx serripennis, Northern Rough-winged Swallow
Riparia riparia, Bank Swallow
Petrochelidon pyrrhonota, Cliff Swallow
Petrochelidon fulva, Cave Swallow
Hirundo rustica, Barn Swallow
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Poecile atricapillus, Black-capped Chickadee
Poecile gambeli, Mountain Chickadee
Poecile sclateri, Mexican Chickadee
Poecile rufescens, Chestnut-backed Chickadee
Poecile hudsonicus, Boreal Chickadee
Poecile cinctus, Gray-headed Chickadee
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Baeolophus inornatus, Oak Titmouse
Baeolophus ridgwayi, Juniper Titmouse
Baeolophus bicolor, Tufted Titmouse
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Sitta carolinensis, White-breasted Nuthatch
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Sitta pusilla, Brown-headed Nuthatch
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Polioptila melanura, Black-tailed Gnatcatcher
Polioptila nigriceps, Black-capped Gnatcatcher
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* * * * *

Dated: October 29, 2018.

Andrea Travnicek,

Principal Deputy Assistant Secretary—Water and Science, Exercising the Authority of the Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 2018–25634 Filed 11–27–18; 8:45 am]

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