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Editorial Note: In the printed version of the **Federal Register** Table of Contents for Monday, November 29, 2010, the page numbers from all the entries in the table of contents were inadvertently replaced with document numbers. A corrected table of contents for the November 29, 2010, issue appears after the Readers Aids section at the back of today's **Federal Register.**

Separate Parts In This Issue

Reader Aids

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

CFR PARTS AFFECTED IN THIS ISSUE

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

Rules and Regulations

Federal Register

Vol. 83, No. 230

Thursday, November 29, 2018

DEPARTMENT OF AGRICULTURE

Office of the Secretary

7 CFR Part 2

RIN 0503–AA63

Revision of Delegations of Authority

AGENCY: Office of the Secretary, USDA.

ACTION: Final rule.

SUMMARY: The Secretary of Agriculture is authorized to delegate functions, powers, and duties as the Secretary deems appropriate. This document amends the existing delegations of authority by adding and modifying certain delegations, as explained in the Supplementary Information section below.

DATES: *Effective* November 29, 2018.

FOR FURTHER INFORMATION CONTACT: Melissa McClellan, Office of the General Counsel, (202) 720–5565, *melissa.mcclellan@usda.gov.*

SUPPLEMENTARY INFORMATION: This rule makes several changes to the United States Department of Agriculture's (USDA) delegations of authority in 7 CFR part 2 by adding new delegations and modifying existing delegations.

Overview of Changes

A. Departmental Administration

Throughout part 2, this rule revises references to ''Departmental Management'' to read ''Departmental Administration'' to reflect the renaming of the former Departmental Management mission area, which reports to the Assistant Secretary for Administration. *See* Secretary's Memorandum (SM) 1076–022 (Feb. 2, 2018), available at *https://www.ocio.usda.gov/sites/default/files/docs/2012/SM1076-22_DA_Reorg_20180202.pdf.*

In addition, the rule revises the delegations in part 2 to reflect the reorganization of the former Office of Procurement and Property Management (OPPM). The Director of the new Office of Contracting and Procurement (OCP) will receive the delegations of authority related to contracting and procurement activities formerly delegated by the Assistant Secretary of Administration to the Director of OPPM. The delegations of authority concerning real and personal property, fleet, and materials management that were formerly delegated by the Assistant Secretary for Administration to the Director of OPPM are now delegated to the Director of the newly established Office of Property and Fleet Management.

The rule further revises the delegations of authority to the Chief Information Officer (CIO) and to the Director of the Office of the Executive Secretariat (OES) at § 2.97 to reflect that the authority to ''Administer the Departmental records, forms, reports and Directives Management Programs'' has been transferred from OCIO to OES.

Throughout part 2, this rule changes the name of the ''Office of Homeland Security and Emergency Coordination'' to the ''Office of Homeland Security,'' and makes changes to the delegations of authority to the Director of OHS, including transferring responsibility for USDA response efforts under the Oil Pollution Act of 1990 from OHS to the Office of Property and Fleet Management.

B. Mission Area Business Centers

Pursuant to Secretary's Memorandum 1076–018, this rule establishes new delegations of authority for the Chief Operating Officer of the Farm Production and Conservation (FPAC) Business Center to reflect the consolidation of management support functions for the agencies of the FPAC mission area. The rule also revokes certain delegations of authority to the Administrator of the Farm Service Agency (FSA) that have been transferred to the FPAC Business Center as part of this consolidation of functions.

Similarly, the rule establishes new delegations for the Chief Operating Officer of the Rural Development (RD) Business Center to reflect the consolidation of management support functions for the RD agencies, and revokes certain delegations of authority to the Administrators of the Rural Utilities Service (RUS), Rural Business-Cooperative Service (RBS), and Rural Housing Service (RHS) related to environmental laws that have been transferred to the RD Business Center. In addition, the rule revokes the published delegation of authority to the RHS Administrator to collect, service and liquidate RHS loans, and redelegates these loan servicing functions for the RHS single family housing loan programs to the RD Business Center. The Assistant to the Secretary for RD also may transfer loan servicing for other RHS programs (*e.g.,* Multifamily Housing, Community Facilities) and for RUS and RBS to the RD Business Center in the future. To provide flexibility as the RD Business Center grows, the Assistant to the Secretary for RD will issue written delegations of authority for other RD loan servicing functions as necessary.

The management support functions for the agencies comprising the Research, Education, and Economics (REE) mission area have long been consolidated in an Administrative and Financial Management office organizationally located in the Agricultural Research Service (ARS). This rules updates the existing delegation to the Administrator of ARS to add information technology services to the management support services that the business center in ARS provides to all REE agencies on a reimbursable basis.

Similarly, the management support functions for the agencies in the Marketing and Regulatory Programs mission area have long been consolidated in a business center residing in the Animal and Plant Health Inspection Service (APHIS). This rule updates the existing delegation of authority to the Administrator of APHIS to add information technology services to the consolidated management support functions provided by APHIS to AMS on a reimbursable basis.

This rule further revises the delegations of authority to the Chief Information Officer to reflect that each mission area, rather than each agency, has one Chief Information Officer. *See* SM 1076–18 (Nov. 14, 2017), at *https://www.ocio.usda.gov/sites/default/files/docs/2012/SM%201076-18.pdf.*

C. Office of Partnerships and Public Engagement

The rule also revises the delegations to recognize the establishment of the Office of Partnerships and Public Engagement (OPPE), which now oversees the Office of Advocacy and Outreach (OAO), the Office of Tribal

Relations (OTR), the Military Veterans Agricultural Liaison, the Center for Faith-Based and Neighborhood Partnerships, and certain youth and other public-facing initiatives of the Department. *See* SM 1076–018 (Nov. 14, 2017), available at *https://www.ocio.usda.gov/document/secretarys-memorandum-1076-018.* The rule revokes the obsolete delegations of authority by the Secretary to the ASA related to OAO and OTR. The delegations of authority to the Director of OAO and to the Director of OTR that were formerly published as delegations by the ASA are now located in a new subpart V as delegations by the Director of OPPE. The Director of OTR continues to advise the Secretary on matters of policy related to Indian tribes in accordance with 7 U.S.C. 6921, and to serve as the point of contact in accessing Department-wide information regarding tribal issues.

D. Grain Inspection, Packers and Stockyards Administration, U.S. Warehouse Act, and Commodity Procurement

This rule also revises the delegations of authority to reflect the elimination of the Grain Inspection, Packers, and Stockyards Administration (GIPSA) as a stand-alone agency, and the transfer of the former GIPSA delegations to the AMS Administrator. This rule further transfers to the AMS Administrator the responsibility to administer the U.S. Warehouse Act (7 U.S.C. 241–273), which was formerly delegated to the FSA Administrator. The rule further consolidates commodity procurement across the Department by transferring delegations related to international commodity procurement from the Under Secretary of FPAC and the FSA Administrator to the Under Secretary for Marketing and Regulatory Programs and the AMS Administrator. *See* SM 1076–018 (Nov. 14, 2017).

E. Office of Pest Management Policy

Pursuant to 7 U.S.C. 7653, the Office of Pest Management Policy (OPMP) represents the Department in fulfilling responsibilities related to management of pesticides under the Food Quality Protection Act of 1996, the Federal Insecticide, Fungicide, and Rodenticide Act, and the Federal Food, Drug and Cosmetic Act and other applicable laws, and leads and coordinates the Department's pest management and biotechnology efforts. Prior to the 2017 reorganization of the Department, OPMP was located in ARS, and there were no published delegations of authority to the OPMP Director. This rule reflects the realignment of OPMP within the Office of the Chief Economist (OCE), and establishes a new section of delegations by the Chief Economist to the Director of OPMP at § 2.75. In addition, the rule removes the outdated delegations to the Under Secretary for REE at § 2.21(a)(1)(iii), to the Administrator of ARS at § 2.65(a)(1), and to the Director of the National Institute of Food and Agriculture at § 2.66(a)(115). *See* SM 20176–018 (Nov. 14, 2017). The revocation of these authorities is intended solely to reflect the administrative relocation of OPMP from ARS to OCE, and does not affect the authority of the Under Secretary of REE, the ARS Administrator, or the NIFA Director to carry out their programs.

F. Office of Energy and Environmental Policy

This rule further revises the delegations of authority to reflect the realignment of the climate, environmental markets, and energy policy functions of OCE. The new position of Director of the Office of Energy and Environmental Policy (OEEP) will oversee the Office of Energy Policy and New Uses, the Office of Environmental Markets, and the Climate Change Program Office, and will coordinate policy analysis, long-range planning, research priority setting, and response strategies for addressing energy development and environmental policy. To effect this change, the delegations formerly located at § 2.74, related to the Climate Change Program Office, and at § 2.75, related to the Office of Environmental Markets, are now consolidated under the delegations of authority to the Director of OEEP at § 2.73.

G. Settlement Authority for Commitments That Cannot Be Ratified

This rule also revises the delegations to the Chief Financial Officer (CFO) by adding a new delegation to settle claims that are not otherwise provided for under 31 U.S.C. 3702(a) or another provision of law. Congress granted this claims settlement authority to the Director of the Office of Management and Budget in 31 U.S.C. 3702(a)(4), and the Director further delegated the authority to each Executive Branch agency. *See* Determination with Respect to Transfer of Functions Pursuant to Public Law 104–316, Office of Management and Budget (Dec. 17, 1996).

Pursuant to the new delegation at § 2.28(a)(30), the CFO now has the authority to resolve contract claims that are not ratifiable, including as described in the Federal Acquisition Regulation at 48 CFR 1.602–3(d).

H. Miscellaneous Revisions

This rules also makes the following miscellaneous revisions to the delegations. The authority to collect, summarize, and publish data on the production, distribution, and stocks of sugar is transferred from the Under Secretary for Marketing and Regulatory Programs and AMS Administrator to the Under Secretary for FPAC and FSA Administrator to reflect the current operation of these activities. The delegation of authority to the Under Secretary for FPAC related to defense and emergency preparedness is revised to eliminate references to ''foreign agricultural intelligence and other foreign agricultural matters,'' which are covered by an existing delegation to the Under Secretary for Trade and Foreign Agricultural Affairs. Finally, the delegations of authority to the Under Secretary for Marketing and Regulatory Programs and the Administrator of AMS have been revised to include updated citations to the Agricultural Marketing Act of 1946.

Classification

This rule relates to internal agency management. Accordingly, pursuant to 5 U.S.C. 553, notice of proposed rulemaking and opportunity for comment are not required, and this rule may be made effective less than 30 days after publication in the **Federal Register**. This rule also is exempt from the provisions of Executive Orders 12866 and 13771. This action is not a rule as defined by the Regulatory Flexibility Act, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. 601 *et seq.,* or the Congressional Review Act, 5 U.S.C. 801 *et seq.,* and thus is exempt from the provisions of those acts. This rule contains no information collection or recordkeeping requirements under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

List of Subjects in 7 CFR Part 2

Authority delegations (Government agencies).

Accordingly, as discussed in the preamble, 7 CFR part 2 is amended as follows:

PART 2—DELEGATIONS OF AUTHORITY BY THE SECRETARY OF AGRICULTURE AND GENERAL OFFICERS OF THE DEPARTMENT

■ 1. The authority citation for part 2 continues to read as follows:

Authority: 7 U.S.C. 6912(a)(1); 5 U.S.C. 301; Reorganization Plan No. 2 of 1953, 3 CFR 1949–1953 Comp., p. 1024.

■ 2. In part 2, revise all references to ''Departmental Management'' to read ''Departmental Administration,'' and revise all references to ''Office of Homeland Security and Emergency Coordination'' to read ''Office of Homeland Security''.

Subpart A—General

■ 3. Section 2.4 is revised to read as follows:

§ 2.4 General officers.

The work of the Department is under the supervision and control of the Secretary who is assisted by the following general officers: The Deputy Secretary, the Under Secretary for Farm Production and Conservation; the Under Secretary for Food, Nutrition, and Consumer Services, the Under Secretary for Food Safety; the Under Secretary for Marketing and Regulatory Programs; the Under Secretary for Natural Resources and Environment; the Under Secretary for Research, Education, and Economics; the Under Secretary for Trade and Foreign Agricultural Affairs; the Assistant Secretary for Administration; the Assistant Secretary for Civil Rights; the Assistant Secretary for Congressional Relations; the Assistant to the Secretary for Rural Development; the Chief Economist; the Chief Financial Officer; the Chief Information Officer; the General Counsel; the Inspector General; the Judicial Officer; the Director, National Appeals Division; the Director, Office of Budget and Program Analysis; the Director, Office of Communications; the Director, Office of Partnerships and Public Engagement; the Director, Office of Tribal Relations; and the Director, Office of Small and Disadvantaged Business Utilization.

Subpart C—Delegations of Authority to the Deputy Secretary, Under Secretaries, and Assistant Secretaries

■ 4. Amend § 2.16 by:
■ a. Removing and reserving paragraphs (a)(1),(iv), and (xvi);
■ b. Adding paragraph (a)(1)(xvii);
■ c. Revising the reference to ''Assistant Secretary for Administration'' to read ''Director, Office of Partnerships and Public Engagement'' in paragraphs (a)(1)(xxviii) and (xxxiii); and
■ d. Revising paragraphs (a)(3)(iv)(G) and (a)(6)(i).

The addition and revisions read as follows:

§ 2.16 Under Secretary for Farm Production and Conservation.

(a) * * *

(1) * * *

(xvii) Collect, summarize, and publish data on the production, distribution, and stocks of sugar.

* * * * *

(3) * * *

(iv) * * *

(G) The Emergency Conservation Program and the Emergency Watershed Protection Program under sections 401–405 of the Agricultural Credit Act of 1978, 16 U.S.C. 2201–2205.

* * * * *

(6) * * *

(i) Administer responsibilities and functions assigned under the Defense Production Act of 1950 (50 U.S.C. App. 2061 *et seq.*), and title VI of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5195 *et seq.*), concerning agricultural production; food processing, storage, and distribution; distribution of farm equipment and fertilizer; rehabilitation and use of food, agricultural, and related agribusiness facilities; CCC resources; and farm credit and financial assistance.

* * * * *

§ 2.17 [Amended]

■ 5. Amend § 2.17 by revising the references to ''Assistant Secretary for Administration'' to read ''Director, Office of Partnerships and Public Engagement'' in paragraphs (a)(20)(xi), (a)(21)(xxv), and (a)(22)(viii).

§ 2.21 [Amended]

■ 6. Amend § 2.21 by removing and reserving paragraph (a)(1)(iii).

■ 7. Amend § 2.22 by:
■ a. Revising paragraphs (a)(1)(i) and (a)(1)(viii)(X);
■ b. Removing and reserving paragraphs (a)(1)(viii)(CC) and (a)(1)(x); and
■ c. Adding paragraphs (a)(1)(xiv),(xv), and (xvi).

The revisions and additions read as follows:

§ 2.22 Under Secretary for Marketing and Regulatory Programs.

(a) * * *

(1) * * *

(i) Exercise the functions of the Secretary of Agriculture contained in the Agricultural Marketing Act of 1946, as amended (7 U.S.C. 1621 *et seq.*), including payments to State Departments of Agriculture in connection with cooperative marketing service projects under section 204(b) (7 U.S.C. 1623(b)), but excepting matters otherwise assigned.

* * * * *

(viii) * * *

(X) Beef Research and Information Act, as amended (7 U.S.C. 2901–2918), except as delegated to the Under Secretary for Trade and Foreign Agricultural Affairs in §§ 2.26(a)(1)(xiv) and (a)(3)(x);

* * * * *

(xiv) Administer the U.S. Warehouse Act, as amended (7 U.S.C. 241–273), and perform compliance examinations for Agricultural Marketing Services programs.

(xv) Administer commodity procurement and supply, transportation (other than from point of export, except for movement to trust territories or possessions), handling, payment, and related services in connection with programs under titles II and III of Public Law 480 (7 U.S.C. 1691, 1701, *et seq.*) and section 3107 of the Farm Security and Rural Investment Act of 2002 (7 U.S.C. 1736o–1), and payment and related services with respect to export programs and barter operations.

* * * * *

■ 8. Amend § 2.24 by removing and reserving paragraphs (a)(7), (a)(8)(ii)(F) and (I), revising paragraph (a)(8)(iii), and removing and reserving paragraph (a)(8)(vii).

The revision reads as follows:

§ 2.24 Assistant Secretary for Administration.

(a) * * *

(8) * * *

(iii) Administer the Classified Network, Controlled Unclassified Information, and Insider Threat programs of the Department (E.O. 13587; E.O. 13556 and 32 CFR part 2002).

* * * * *

Subpart D—Delegations of Authority to Other General Officers and Agency Heads

■ 9. Amend § 2.28 by:
■ a. In paragraph (a)(27), removing the term ''Office of Procurement and Property Management'' and adding in its place the term ''Office of Contracting and Procurement''; and
■ b. Adding paragraph (a)(30).

The addition reads as follows:

§ 2.28 Chief Financial Officer.

(a) * * *

(30) Settle claims not otherwise provided for under 31 U.S.C. 3702(a) or another provision of law.

* * * * *

■ 10. Amend § 2.29 by adding paragraph (a)(16) to read as follows:

§ 2.29 Chief Economist.

(a) * * *

(16) *Related to Pest Management and Policy.* Coordinate USDA policy relative to the Federal Insecticide, Fungicide,

and Rodenticide Act, as amended (7 U.S.C. 136 *et seq.*) and coordinate the Department's Integrated Pest Management Programs and the Pesticide Assessment Program (7 U.S.C.136–136y) (7 U.S.C. 7653).

* * * * *

■ 11. Revise § 2.38 to read as follows:

§ 2.38 Director, Office of Partnerships and Public Engagement.

(a) *Delegations.* The following delegations of authority are made by the Secretary of Agriculture to the Director, Office of Partnerships and Public Engagement:

(1) Related to Advocacy and Outreach:

(i) Ensure that small farms and ranches, beginning farmers or ranchers, and socially disadvantaged farmers or ranchers have access to, and equitable participation in, programs and services of the Department pursuant to section 226B(c) of the Department of Agriculture Reorganization Act of 1994 (7 U.S.C. 6934(c)).

(ii) Oversee the Advisory Committee for Beginning Farmers and Ranchers.

(iii) Oversee the operations of the Office of Small Farms Coordination.

(iv) Administer section 2501 of the Food, Agriculture, Conservation, and Trade Act of 1990 (7 U.S.C. 2279), except for authorities related to the Census of Agriculture and economic studies in subsection (h) of that section.

(v) Oversee the Minority Farmer Advisory Committee pursuant to section 14008 of FCEA (7 U.S.C. 2279 note).

(vi) Administer the low-income migrant and seasonal farmworker grants program under section 2281 of the Food, Agriculture, Conservation, and Trade Act of 1990 (42 U.S.C. 5177a).

(vii) Consult with appropriate entities regarding integration of farmworker interests into Department programs, including assisting farmworkers in becoming agricultural producers or landowners, and research, program improvements, and agricultural education opportunities for low-income and migrant seasonal farmworkers.

(viii) Administer the grants program under section 14204 of FCEA (7 U.S.C. 2008q–1) to improve the supply, stability, safety, and training of the agricultural labor force.

(ix) Administer and coordinate a USDA outreach program in collaboration with USDA agencies.

(x) Administer section 2501A of the Food, Agriculture, Conservation, and Trade Act of 1990 (7 U.S.C. 2279–1), including the authority to coordinate Department policy for the issuance of receipts under subsection (e) of that section.

(xi) Provide strategic planning and performance measurement, coordinate outreach activities, monitor goals and objectives, and evaluate programs, of Department programs and activities involving small farms or ranches and beginning or socially disadvantaged farmers or ranchers.

(xii) Administer the USDA/1994 Land Grant Institutions (Tribal Colleges) Programs.

(xiii) Administer the USDA/1890 Liaison Officer Program.

(xiv) Administer the Hispanic Serving Institutions National Program, including through the use of cooperative agreements under 7 U.S.C. 3318(b).

(xv) Serve as a lead agency in carrying out student internship programs (7 U.S.C. 2279c).

(xvi) Coordinate outreach to Asian Americans and Pacific Islanders.

(2) Related to Indian tribes:

(i) Serve as the Department's primary point of contact for tribal issues.

(ii) Advise the Secretary on policies related to Indian tribes.

(iii) Serve as the official with principal responsibility for the implementation of Executive Order 13175, ''Consultation and Coordination with Indian Tribal Governments,'' including the provision of Department-wide guidance and oversight regarding tribal consultation, coordination, and collaboration.

(iv) Coordinate the Department's programs involving assistance to American Indians and Alaska Natives.

(v) Enter into cooperative agreements to improve the coordination and effectiveness of Federal programs, services, and actions affecting rural areas (7 U.S.C. 2204b(b)(4)); and to provide outreach and technical assistance to socially disadvantaged farmers and ranchers and veteran farmers and ranchers (7 U.S.C. 2279(a)(3)).

(3) Oversee the Military Veterans Agricultural Liaison (7 U.S.C. 6919).

(4) Oversee the Center for Faith-Based and Neighborhood Partnerships.

(5) Oversee the Women in Agriculture Initiative.

(6) With the exception of competitive grant programs administered by the National Institute of Food and Agriculture, or any youth employment opportunity programs such as Pathways or Job Corp, serve as the Department lead for strategic planning and coordinating youth outreach activities of USDA agencies' programs (including, but not limited to, 4–H; Science, Technology, Engineering and Math (STEM) programs; information and cyber technology student programs, Future Farmers of America (FFA) activities; summer high school internships; and youth gardening programs); development of program evaluation metrics and consistent messaging for youth outreach activities; and monitoring goals and objectives.

(b) [Reserved]

Subpart F—Delegations of Authority by the Under Secretary for Farm Production and Conservation

■ 12. Add § 2.41 to read as follows:

§ 2.41 Chief Operating Officer, Farm Production and Conservation Business Center.

(a) Delegations. Pursuant to § 2.16(a), subject to the reservations in § 2.16(b)(1), the following delegations of authority are made by the Under Secretary for Farm Production and Conservation to the Chief Operating Officer, Farm Production and Conservation Programs Business Center:

(1) Provide to the Farm Service Agency, Natural Resources Conservation Service, and Risk Management Agency management support services including information technology, financial management, human resources, procurement, property management, and related business and administrative processes.

(2) Administer responsibilities and functions assigned under the Defense Production Act of 1950 (50 U.S.C. App. 2061 *et seq.*), and title VI of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5195 *et seq.*), concerning agricultural production; food processing, storage, and distribution; distribution of farm equipment and fertilizer; rehabilitation and use of food, agricultural, and related agribusiness facilities; CCC resources; and farm credit and financial assistance.

(3) Conduct fiscal, accounting and claims functions relating to CCC programs for which the Foreign Agricultural Service has been delegated authority under § 2.601 and, in conjunction with other agencies of the U.S. Government, develop and formulate agreements to reschedule amounts due from foreign countries.

(4) Administer Section 15353(a) of the Food, Conservation, and Energy Act of 2008, Public Law 110–246 relating to information reporting for Commodity Credit Corporation transactions.

(5) Coordinate and prevent duplication of aerial photographic work of the Department, including:

(i) Clearing photography projects;

(ii) Assigning symbols for new aerial photography, maintaining symbol records, and furnishing symbol books;

(iii) Recording departmental aerial photography flow and coordinating the issuance of aerial photography status maps of latest coverage;

(iv) Promoting interchange of technical information and techniques to develop lower costs and better quality;

(v) Representing the Department on committees, task forces, work groups, and other similar groups concerned with aerial photography acquisition and reproduction;

(vi) Providing a Chairperson for the Photography Sales Committee of the Department;

(vii) Coordinating development, preparation, and issuance of specifications for aerial photography for the Department;

(viii) Coordinating and performing procurement, inspection, and application of specifications for USDA aerial photography;

(ix) Maintaining library and files of USDA aerial film and retrieving and supplying reproductions on request.

(b) [Reserved]

■ 13. Amend § 2.42 by:

■ a. Removing and reserving paragraphs (a)(3) and (4), (a)(5)(i), and (a)(7), (12), and (18);

■ b. Adding paragraph (a)(19); and

■ c. Removing and reserving paragraph (a)(56)(ix).

The addition reads as follows:

§ 2.42 Administrator, Farm Service Agency.

(a) * * *

(19) Collect, summarize, and publish data on the production, distribution, and stocks of sugar.

* * * * *

Subpart G—Delegations of Authority by the Assistant to the Secretary for Rural Development

■ 14. Add § 2.46, to read as follows:

§ 2.46 Chief Operating Officer, Rural Development Business Center.

(a) *Delegations.* Pursuant to § 2.17(a), subject to the reservations in § 2.17(b), the following delegations of authority are made by the Assistant to the Secretary for Rural Development to the Chief Operating Officer, Rural Development Business Center: (1) Provide to the Rural Utilities Service, Rural Housing Service, and Rural Business-Cooperative Service management support services including information technology, financial management, human resources, procurement, property management, and related business and administrative processes.

(2) With respect to land and facilities under the authority of the Assistant to the Secretary for Rural Development, exercise the functions delegated to the Secretary by Executive Order 12580, 3 CFR, 1987 Comp., p. 193, under the following provisions of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (''the Act''), as amended:

(i) Sections 104(a), (b), and (c)(4) of the Act (42 U.S.C. 9604(a), (b), and (c)(4)), with respect to removal and remedial actions in the event of release or threatened release of a hazardous substance, pollutant, or contaminant into the environment;

(ii) Sections 104(e)–(h) of the Act (42 U.S.C. 9604(e)–(h)), with respect to information gathering and access requests and orders; compliance with Federal health and safety standards and wage and labor standards applicable to covered work; and emergency procurement powers;

(iii) Section 104(i)(11) of the Act (42 U.S.C. 9604(i)(11)), with respect to the reduction of exposure to significant risk to human health;

(iv) Section 104(j) of the Act (42 U.S.C. 9604(j)), with respect to the acquisition of real property and interests in real property required to conduct a remedial action;

(v) The first two sentences of section 105(d) of the Act (42 U.S.C. 9605(d)), with respect to petitions for preliminary assessment of a release or threatened release;

(vi) Section 105(f) of the Act (42 U.S.C. 9605(f)), with respect to consideration of the availability of qualified minority firms in awarding contracts, but excluding that portion of section 105(f) pertaining to the annual report to Congress;

(vii) Section 109 of the Act (42 U.S.C. 9609), with respect to the assessment of civil penalties for violations of section 122 of the Act (42 U.S.C. 9622), and the granting of awards to individuals providing information;

(viii) Section 111(f) of the Act (42 U.S.C. 9611(f)), with respect to the designation of officials who may obligate money in the Hazardous Substances Superfund;

(ix) Section 113(k) of the Act (42 U.S.C. 9613(k)), with respect to establishing an administrative record upon which to base the selection of a response action and identifying and notifying potentially responsible parties;

(x) Section 116(a) of the Act (42 U.S.C. 9616(a)), with respect to preliminary assessment and site inspection of facilities;

(xi) Sections 117(a) and (c) of the Act (42 U.S.C. 9617(a) and (c)), with respect to public participation in the preparation of any plan for remedial action and explanation of variances from the final remedial action plan for any remedial action or enforcement action, including any settlement or consent decree entered into;

(xii) Section 119 of the Act (42 U.S.C. 9119), with respect to indemnifying response action contractors;

(xiii) Section 121 of the Act (42 U.S.C. 9621), with respect to cleanup standards; and

(xiv) Section 122 of the Act (42 U.S.C. 9622), with respect to settlements, but excluding section 122(b)(1) of the Act (42 U.S.C. 9622(b)(1)), related to mixed funding agreements.

(3) With respect to facilities and activities under the authority of the Assistant to the Secretary for Rural Development, exercise the authority of the Secretary of Agriculture pursuant to section 1–102 related to compliance with applicable pollution control standards and section 1–601 of Executive Order 12088, 3 CFR, 1978 Comp., p. 243, to enter into an inter-agency agreement with the United States Environmental Protection Agency, or an administrative consent order or a consent judgment in an appropriate State, interstate, or local agency, containing a plan and schedule to achieve and maintain compliance with applicable pollution control standards established pursuant to the following:

(i) Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act, as further amended by the Hazardous and Solid Waste Amendments, and the Federal Facility Compliance Act (42 U.S.C. 6901 *et seq.*);

(ii) Federal Water Pollution Prevention and Control Act, as amended (33 U.S.C. 1251 *et seq.*);

(iii) Safe Drinking Water Act, as amended (42 U.S.C. 300f *et seq.*);

(iv) Clean Air Act, as amended (42 U.S.C. 7401 *et seq.*);

(v) Noise Control Act of 1972, as amended (42 U.S.C. 4901 *et seq.*);

(vi) Toxic Substances Control Act, as amended (15 U.S.C. 2601 *et seq.*);

(vii) Federal Insecticide, Fungicide, and Rodenticide Act, as amended (7 U.S.C. 136 *et seq.*); and

(viii) Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended by the Superfund Amendments and Reauthorization Act of 1986 (42 U.S.C. 9601 *et seq.*).

(4) Collect, service, and liquidate single family housing loans made, insured, or guaranteed by the Rural Housing Service.

(b) [Reserved.]

§ 2.47 [Amended]

■ 15. Amend § 2.47 by removing and reserving paragraphs (a)(11) and (12).

§ 2.48 [Amended]

■ 16. Amend § 2.48 by removing and reserving paragraphs (a)(17) and (18).

§ 2.49 [Amended]

■ 17. Amend § 2.49 by removing and reserving paragraphs (a)(5), (9), and (10).

Subpart K—Delegations of Authority by the Under Secretary for Research, Education, and Economics

■ 18. Amend § 2.65 by removing and reserving paragraph (a)(1) and revising the second sentence in paragraph (a)(59).

The revision reads as follows:

§ 2.65 Administrator, Agricultural Research Service.

(a) * * *

(59) * * * As used herein, the term management support services includes budget, finance, personnel, information technology, procurement, property management, communications, paperwork management, and related administrative services.

* * * * *

§ 2.66 [Amended]

■ 19. Amend § 2.66 by removing and reserving paragraph (a)(115).

Subpart L—Delegations of Authority by the Chief Economist

■ 20. Amend § 2.73 by revising the section heading and paragraph (a) introductory text and adding paragraphs (a)(10) and (11) to read as follows:

§ 2.73 Director, Office of Energy and Environmental Policy.

(a) *Delegations.* Pursuant to § 2.29(a)(11) through (13) the following delegations of authority are made by the Chief Economist to the Director, Office of Energy and Environmental Policy.

* * * * *

(10) *Related to global climate change.* (i) Coordinate policy analysis, long-range planning, research, and response strategies relating to climate change issues.

(ii) Provide liaison with other Federal agencies, through the Office of Science and Technology Policy, regarding climate change issues.

(iii) Inform the Department of scientific developments and policy issues relating to the effects of climate change on agriculture and forestry, including broader issues that affect the impact of climate change on the farms and forests of the United States.

(iv) Recommend to the Chief Economist alternative courses of action with which to respond to such scientific developments and policy issues.

(v) Ensure that recognition of the potential for climate change is fully integrated into the research, planning, and decisionmaking processes of the Department.

(vi) Coordinate global climate change studies.

(vii) Coordinate the participation of the Department in interagency climate-related activities.

(viii) Consult with the National Academy of Sciences and private, academic, State, and local groups with respect to climate research and related activities.

(ix) Represent the Department to the Office of Science and Technology Policy on issues related to climate change.

(x) Represent the Department on the Intergovernmental Panel on Climate Change.

(xi) Review all Department budget items relating to climate change issues, including specifically the research budget to be submitted by the Secretary to the Office of Management and Budget.

(11) *Related to environmental markets.* Coordinate implementation of section 1245 of the Food Security Act of 1985 regarding environmental services markets (16 U.S.C. 3845).

* * * * *

§ 2.74 [Removed and Reserved]

■ 21. Remove and reserve § 2.74.

■ 22. Revise § 2.75 to read as follows:

§ 2.75 Director, Office of Pest Management Policy.

(a) *Delegations.* Pursuant to § 2.29(a)(16), the following delegations of authority are made by the Chief Economist to the Director, Office of Pest Management Policy:

(1) Coordinate USDA policy relative to the Federal Insecticide, Fungicide, and Rodenticide Act, as amended (7 U.S.C. 136, *et seq.*) and coordinate the Department's Integrated Pest Management Programs and the Pesticide Assessment Program (7 U.S.C. 136–136y) (7 U.S.C. 7653).

(2) [Reserved]

(b) [Reserved]

Subpart N—Delegations of Authority by the Under Secretary for Marketing and Regulatory Programs

■ 20. Amend § 2.79 by:

■ a. Revising paragraph (a)(1);

■ b. Removing and reserving paragraphs (a)(8)(xxxvii) and (10); and

■ c. Adding paragraphs (a)(16) through (22).

The revision and additions read as follows:

§ 2.79 Administrator, Agricultural Marketing Service.

(a) * * *

(1) Exercise the functions of the Secretary of Agriculture contained in the Agricultural Marketing Act of 1946, as amended (7 U.S.C. 1621 *et seq.*), including payments to State Departments of Agriculture in connection with cooperative marketing service projects under section 204(b) (7 U.S.C. 1623(b)), but excepting matters otherwise assigned.

* * * * *

(16) Administer the United States Grain Standards Act, as amended (7 U.S.C. 71–87h).

(17) Administer the Packers and Stockyards Act, 1921, as amended and supplemented.

(18) Enforce provisions of the Consumer Credit Protection Act (15 U.S.C. 1601–1665, 1681–1681t), with respect to any activities subject to the Packers and Stockyards Act, 1921, as amended and supplemented.

(19) Exercise the functions of the Secretary of Agriculture contained in section 1324 of the Food Security Act of 1985 (7 U.S.C. 1631).

(20) Administer responsibilities and functions assigned to the Secretary in section 11006 of the Food, Conservation, and Energy Act of 2008 (7 U.S.C. 228 note), with respect to the Packers and Stockyards Act, 1921.

(21) Administer the U. S. Warehouse Act, as amended (7 U.S.C. 241–273), and perform compliance examinations for Agricultural Marketing Services programs.

(22) Administer commodity procurement and supply, transportation (other than from point of export, except for movement to trust territories or possessions), handling, payment, and related services in connection with programs under titles II and III of Public Law 480 (7 U.S.C. 1691, 1701, *et seq.*) and section 3107 of the Farm Security and Rural Investment Act of 2002 (7 U.S.C. 1736o–1), and payment and related services with respect to export programs and barter operations.

* * * * *

■ 21. Amend § 2.80 by revising paragraph (a)(24) to read as follows:

§ 2.80 Administrator, Animal and Plant Health Inspection Service.

(a) * * *

(24) Provide management support services for the Agricultural Marketing Service, as agreed upon by the agencies, with authority to take actions required by law or regulation. As used herein, the

term management support services includes information technology, budget, finance, personnel, procurement, property management, communications, paperwork management, and related administrative services.

* * * * *

§ 2.81 [Removed and Reserved]

■ 22. Remove and reserve § 2.81.

Subpart P—Delegations of Authority by the Assistant Secretary for Administration

§ 2.89 [Amended]

■ 23. Amend § 2.89 by:

■ a. Removing and reserving paragraph (a)(11)(xi);

■ b. Removing the term ''agency'' and adding in its place the term ''mission area'' in paragraphs (a)(12)(ii) and (iii);

■ c. Removing the term ''Agency Heads'' and adding in its place the term ''mission area heads'' in paragraph (a)(12)(iv); and

■ d. Removing the term ''agencies'' and adding in its place the term ''mission areas'' in paragraph (a)(12)(vi).

■ 24. Add § 2.90 to read as follows:

§ 2.90 Director, Office of Property and Fleet Management.

(a) *Delegations.* Pursuant to § 2.24(a)(6) of this chapter, and with due deference for delegations to other Departmental Administration officials, the following delegations of authority are made by the Assistant Secretary for Administration to the Director, Office of Property and Fleet Management:

(1) Promulgate policies, standards, techniques, and procedures, and represent the Department, in the following:

(i) Utilization, value analysis, construction, maintenance, and disposition of real and personal property, including control of space assignments.

(ii) Motor vehicle and aircraft fleet and other vehicular transportation.

(iii) Transportation of things (traffic management).

(iv) Prevention, control, and abatement of pollution with respect to Federal facilities and activities under the control of the Department (Executive Order 12088, ''Federal Compliance With Pollution Control Standards,'' 3 CFR, 1978 Comp., p. 243).

(v) Development and implementation of sustainable operations actions including establishing and achieving greenhouse gas emission reduction goals, reducing energy intensity, increasing renewable energy use, increasing water efficiency, reducing petroleum use and increasing alternative fuel use, increasing recycling and waste diversion, preventing pollution, reducing use of toxic chemicals, procuring sustainable products and services, achieving sustainable principles for new and existing buildings, promoting electronic stewardship, and continuing environmental management system use. Maintain liaison with the Office of the Federal Environmental Executive, the Council on Environmental Quality, the Office of Management and Budget (OMB), the Department of Energy, and other Government agencies in these matters.

(vi) Implementation of a program for the Federal procurement of biobased products and of a voluntary ''USDA Certified Biobased product'' labeling program (7 U.S.C. 8102).

(vii) Entering into cooperative agreements to further research programs in the food and agricultural sciences, related to establishing and implementing Federal biobased procurement and voluntary biobased labeling programs (7 U.S.C. 3318).

(2) Exercise the following special authorities:

(i) Maintain custody and permit appropriate use of the official seal of the Department.

(ii) Establish policy for the use of the official flags of the Secretary and the Department.

(iii) Coordinate collection and disposition of personal property of historical significance.

(iv) Make information returns to the Internal Revenue Service as prescribed by 26 U.S.C. 6050M and by 26 CFR 1.6050M–1 and such other Treasury regulations, guidelines or procedures as may be issued by the Internal Revenue Service in accordance with 26 U.S.C. 6050M. This includes making such verifications or certifications as may be required by 26 CFR 1.6050M–1 and making the election allowed by 26 CFR 1.6050M–1(d)(5)(1).

(v) Represent the Department in working with the Government Accountability Office (GAO), the General Services Administration, OMB, and other organizations or agencies on matters related to assigned responsibilities.

(vi) Redelegate, as appropriate, the authority in paragraphs (a)(4) and (a)(6) of this section to agency Property Officials or other qualified agency officials with no power of further redelegation.

(3) Transfer excess research equipment to eligible educational institutions or certain non-profit organizations for the conduct of technical and scientific education and research activities under section 11(i) of the Stevenson–Wydler Technology Innovation Act of 1980 (15 U.S.C. 3710(i)) (7 CFR part 2812).

(4) Promulgate policy and obtain and furnish Federal excess personal property in accordance with section 923 of Public Law 104–127 (7 U.S.C. 2206a), to support research, educational, technical and scientific activities or for related programs, to:

(i) Any 1994 Institutions (as defined in section 532 of the Equity in Educational Land–Grant Status Act of 1994 (Pub. L. 103–382; 7 U.S.C. 301 note)).

(ii) Any Institutions eligible to receive funds under the Act of August 30, 1890 (7 U.S.C. 321, *et seq.*) including Tuskegee University.

(iii) Any Hispanic-serving Institutions (as defined in section 316(b) of the Higher Education Act of 1965 (20 U.S.C. 1059c(b)).

(5) Make available to organizations excess or surplus computers or other technical equipment of the Department for the purpose of distribution to cities, towns, or local government entities in rural areas (7 U.S.C. 2206b).

(6) Issue regulations and directives to implement or supplement the Federal Property Management Regulations (41 CFR chapter 101) and the Federal Management Regulation (41 CFR chapter 102).

(7) Related to compliance with environmental laws and sustainable operating requirements.

(i) Serve as Departmental Administration Member and Executive Secretary of the USDA Sustainable Operations Council.

(ii) Represent USDA in consulting or working with the EPA, the Council on Environmental Quality, the Domestic Policy Council, and others to develop policies relating to hazardous materials management and Federal facilities compliance with applicable pollution control laws.

(iii) Monitor, review, evaluate, and oversee hazardous materials management program activities and compliance Department-wide.

(iv) Monitor, review, evaluate, and oversee USDA agency expenditures for hazardous materials management program accomplishments.

(v) Represent USDA on the National Response Team and exercise responsibility for USDA response efforts for hazardous substance releases and oil spills pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended (42 U.S.C. 9601, *et seq.*); the Clean Water Act, as amended

(33 U.S.C. 1251, *et seq.*); Oil Pollution Act, as amended (33 U.S.C. 2701, *et seq.*); Executive Order 12580, ''Superfund Implementation,'' 3 CFR, 1987 Comp., p. 193; Executive Order 12777, ''Implementation of section 311 of the Federal Water Pollution Control Act of October 18, 1972, as amended, and the Oil Pollution Act of 1990,'' 3 CFR, 1991 Comp., p. 351, and the National Oil and Hazardous Substances Contingency Plan, 40 CFR part 300. When a spill of national significance is declared under the Oil Pollution Act of 1990, responsibility for USDA response efforts will transfer to the Office of Homeland Security and Emergency Coordination, as determined by the Assistant Secretary for Administration.

(vi) Approve disbursements from the New World Mine Response and Restoration Account, approve the New World Mine Response and Restoration Plan, and make quarterly reports to Congress under Sections 502(d) and (f) of Title V of the Department of the Interior and Related Agencies Appropriations Act of 1998, Public Law 105–83.

(vii) Ensure that the Hazardous Materials Management Program Department-wide is accomplished with regard to, and in compliance with, Executive Order 12898, ''Federal Actions to Address Environmental Justice in Minority Populations and Low–Income Populations,'' 3 CFR, 1994 Comp., p. 859.

(viii) Take such action as may be necessary, with the affected agency head and with the concurrence of the General Counsel, including issuance of administrative orders and agreements with any person to perform any response action under sections 106(a) and 122 (except subsection (b)(1)) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended (42 U.S.C. 9606(a), 9622), pursuant to sections 4(c)(3) and 4(d)(3) of Executive Order 12580, ''Superfund Implementation,'' 3 CFR, 1987 Comp., p. 193, as amended by Executive Order 13016, ''Amendment to Executive Order No. 12580,'' 3 CFR, 1996 Comp., p. 214.

(ix) Represent USDA on the EPA Brownfields Federal Partnership and coordinate USDA support for Brownfields redevelopment and establish policy and guidance for the implementation of the June 2003 amendment to Executive Order 12580, ''Superfund Implementation,'' 3 CFR, 1987 Comp., p. 193 (Executive Order 13308, ''Further Amendment to Executive Order 12580, As Amended, Superfund Implementation,'' 3 CFR, 2003 Comp., p. 239).

(8) Exercise responsibility for USDA response efforts when a spill of national significance is declared under the Oil Pollution Act of 1990, as determined by the Assistant Secretary for Administration.

(b) [Reserved]

■ 25. Amend § 2.91 by revising paragraph (a)(21) and adding paragraph (a)(22) to read as follows:

§ 2.91 Director, Office of Human Resources Management.

(a) * * *

(21) Related to occupational safety and health:

(i) Establish Departmentwide safety and health policy and provide leadership in the development, coordination, and implementation of related standards, techniques, and procedures, and represent the Department in complying with laws, Executive Orders and other policy and procedural issuances and related to occupational safety and health and workers' compensation programs within the Department.

(ii) Represent the Department in all rulemaking, advisory, or legislative capacities on any groups, committees, or Governmentwide activities that affect the USDA Occupational Safety and Health Management Program.

(iii) Determine and provide Departmentwide technical services and regional staff support for the safety and health programs.

(iv) Administer the computerized management information systems for the collection, processing, and dissemination of data related to the Department's occupational safety and health programs.

(v) Administer the Department's Occupational Health and Preventive Medicine Program, as well as design and operate employee assistance and workers' compensation activities.

(vi) Provide education and training on a Departmentwide basis for safety and health-related issues and develop resource and operational manuals.

(22) Redelegate, as appropriate, any authority delegated under paragraphs (a)(1) through (21) of this section to general officers of the Department and heads of Departmental agencies, provided that the Director, Office of Human Resources Management retains the authority to make final decisions in any human resources matter so redelegated.

* * * * *

■ 26. Revise § 2.93 to read as follows:

§ 2.93 Director, Office of Contracting and Procurement.

(a) *Delegations.* Pursuant to § 2.24(a)(6) of this chapter, and with due deference for delegations to other Departmental Administration officials, the following delegations of authority are made by the Assistant Secretary for Administration to the Director, Office of Contracting and Procurement:

(1) Exercise full Departmentwide contracting and procurement authority.

(2) Promulgate policies, standards, techniques, and procedures, and represent the Department, in the following:

(i) Acquisition, including, but not limited to, the procurement of supplies, services, equipment, and construction.

(ii) Socioeconomic programs relating to contracting.

(iii) Selection, standardization, and simplification of program delivery processes utilizing contracts.

(iv) Acquisition and leasing of real and personal property.

(v) Implementation of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (42 U.S.C. 4601, *et seq.*).

(vi) Implementation of the policies and procedures set forth in OMB Circular No. A–76, Performance of Commercial Activities.

(3) Exercise the following special authorities:

(i) The Director, Office of Contracting and Procurement, is designated as the Departmental Debarring Officer and authorized to perform the functions of 48 CFR part 9, subpart 9.4 related to procurement activities, except for commodity acquisitions on behalf of the Commodity Credit Corporation (7 CFR part 1407), with authority to redelegate suspension and debarment authority for contracts awarded under the School Lunch and Surplus Removal Programs (42 U.S.C. 1755 and 7 U.S.C. 612c).

(ii) Promulgate regulations for the management of contracting and procurement for information technology and telecommunication equipment, software, services, maintenance and related supplies.

(iii) Represent the Department in working with the Government Accountability Office (GAO), the General Services Administration, OMB, and other organizations or agencies on matters related to assigned responsibilities.

(iv) Conduct liaison with the Office of Federal Register (1 CFR part 16) including the making of required certifications pursuant to 1 CFR part 18.

(4) Exercise authority under the Department's Chief Acquisition Officer (the Assistant Secretary for

Administration) to integrate and unify the management process for the Department's major system acquisitions and to monitor implementation of the policies and practices set forth in OMB Circular No. A–109, Major Systems Acquisitions, with the exception that major system acquisitions for information technology shall be under the cognizance of the Chief Information Officer. This delegation includes the authority to:

(i) Ensure that OMB Circular No. A–109 is effectively implemented in the Department and that the management objectives of the Circular are realized.

(ii) Review the program management of each major system acquisition, excluding information technology.

(iii) Designate the program manager for each major system acquisition, excluding information technology.

(iv) Designate any Departmental acquisition, excluding information technology, as a major system acquisition under OMB Circular No. A–109.

(5) Pursuant to Executive Order 12931, ''Federal Procurement Reform,'' and 41 U.S.C. 1702(c), serve as the Senior Procurement Executive for the Department with responsibility for the following:

(i) Prescribing and publishing Departmental acquisition policies, advisories, regulations, and procedures.

(ii) Taking any necessary actions consistent with policies, regulations, and procedures, with respect to purchases, contracts, leases, agreements, and other transactions.

(iii) Appointing contracting officers.

(iv) Establishing clear lines and limitations of contracting authority through written delegations of authority.

(v) Approving any Departmental and component agency procurement systems and processes.

(vi) Managing and enhancing career development of the Department's acquisition workforce.

(vii) Participating in the development of Governmentwide procurement policies, regulations and standards, and determining specific areas where Governmentwide performance standards should be established and applied.

(viii) Developing unique Departmental standards as required.

(ix) Overseeing the development of procurement goals, guidelines, and innovation.

(x) Measuring and evaluating procurement office performance against stated goals.

(xi) Advising the Assistant Secretary for Administration whether procurement goals are being achieved.

(xii) Prescribing standards for agency Senior Contracting Officials.

(xiii) Redelegating, suspending, or revoking, as appropriate, the authority in paragraph (a)(5)(i) of this section to agency Senior Contracting Officials or other qualified agency officials with no power of further redelegation.

(xiv) Redelegating, suspending, or revoking, as appropriate, the authorities in paragraphs (a)(5)(ii), (iii), (iv), (vi), and (vii) of this section to agency Senior Contracting Officials or other qualified agency officials with the power of further redelegation.

(6) Represent the Department in establishing standards for acquisition transactions within the electronic data interchange environment.

(7) Designate the Departmental Task Order Ombudsman pursuant to 41 U.S.C. 253j.

(8) Serve as Departmental Remedy Coordination Official pursuant to 41 U.S.C. 255 to determine whether payment to any contractor should be reduced or suspended based on substantial evidence that the request of the contractor for advance, partial, or progress payment is based on fraud.

(9) Review and approve exemptions for USDA contracts, subcontracts, grants, agreements, and loans from the requirements of the Clean Air Act, as amended (42 U.S.C. 7401, *et seq.*), the Federal Water Pollution Control Act, as amended (33 U.S.C. 1251, *et seq.*), and Executive Order 11738, ''Providing for Administration of the Clean Air Act and the Federal Water Pollution Control Act With Respect to Federal Contracts, Grants, or Loans,'' 3 CFR, 1971–1975 Comp., p. 799, when he or she determines that the paramount interest of the United States so requires as provided in these acts and Executive Order and the regulations of the EPA (2 CFR 1532.1140).

(10) Issue regulations and directives to implement or supplement the Federal Acquisition Regulations (48 CFR chapter 1 and 4).

(12) Pursuant to the Office of Federal Procurement Policy Act (Act), as amended (41 U.S.C. 401, *et seq.*), designate the Department's Advocate for Competition with the responsibility for section 20 of the Act (41 U.S.C. 418), including:

(i) Reviewing the procurement activities of the Department.

(ii) Developing new initiatives to increase full and open competition.

(iii) Developing goals and plans and recommending actions to increase competition.

(iv) Challenging conditions unnecessarily restricting competition in the acquisition of supplies and services.

(v) Promoting the acquisition of commercial items.

(vi) Designating an Advocate for Competition for each procuring activity within the Department.

(13) In coordination with the Chief Financial Officer, implement the debarment authorities in section 14211 of the Food, Conservation, and Energy Act of 2008 (7 U.S.C. 2209j), in connection with procurement activities.

(14) Provide services, including procurement of supplies, services, and equipment, with authority to take actions required by law or regulation to perform such services for:

(i) The Secretary of Agriculture.

(ii) The general officers of the Department, except the Inspector General.

(iii) Any other offices or agencies of the Department as may be agreed, including as a Working Capital Fund activity.

(b) [Reserved]

§ 2.94 [Removed and Reserved]

■ 27. Remove and reserve § 2.94.

■ 28. Amend § 2.95 by revising paragraph (b)(1)(vi) and removing and reserving paragraphs (b)(1)(ix) and (xiv) and (b)(2) and (6).

The revision reads as follows:

§ 2.95 Director, Office of Homeland Security.

* * * * *

(b) * * *

(iv) Administer the Classified Network, Controlled Unclassified Information, and Insider Threat programs of the Department (E.O. 13587; E.O. 13556 and 32 CFR part 2002).

* * * * *

■ 29. Amend § 2.97 by adding paragraph (a)(3) to read as follows:

§ 2.97 Director, Office of the Executive Secretariat.

(a) * * *

(3) Administer the Departmental records, forms, reports and directives management programs.

* * * * *

■ 30. Add Subpart V, consisting of §§ 2.700 and 2.701, to read as follows:

Subpart V—Delegations of Authority by the Director, Office of Partnerships and Public Engagement

Sec.

§ 2.700 Director, Office of Advocacy and Outreach.

(a) *Delegations.* Pursuant to § 2.38(a)(1), and with due deference for delegations to other Departmental Administration officials, the following delegations of authority are made by the Director, Office of Partnerships and Public Engagement to the Director, Office of Advocacy and Outreach:

(1) Ensure that small farms and ranches, beginning farmers or ranchers, and socially disadvantaged farmers or ranchers have access to, and equitable participation in, programs and services of the Department pursuant to section 226B(c) of the Department of Agriculture Reorganization Act of 1994 (7 U.S.C. 6934(c)).

(2) Oversee the Advisory Committee for Beginning Farmers and Ranchers.

(3) Oversee the operations of the Office of Small Farms Coordination.

(4) Administer section 2501 of the Food, Agriculture, Conservation, and Trade Act of 1990 (7 U.S.C. 2279), except for authorities related to the Census of Agriculture and economic studies in subsection (h) of that section.

(5) Oversee the Minority Farmer Advisory Committee pursuant to section 14008 of FCEA (7 U.S.C. 2279 note).

(6) Administer the low-income migrant and seasonal farmworker grants program under section 2281 of the Food, Agriculture, Conservation, and Trade Act of 1990 (42 U.S.C. 5177a).

(7) Consult with appropriate entities regarding integration of farmworker interests into Department programs, including assisting farmworkers in becoming agricultural producers or landowners, and research, program improvements, and agricultural education opportunities for low-income and migrant seasonal farmworkers.

(8) Administer the grants program under section 14204 of FCEA (7 U.S.C. 2008q–1) to improve the supply, stability, safety, and training of the agricultural labor force.

(9) Administer and coordinate a USDA outreach program in collaboration with USDA agencies.

(10) Administer section 2501A of the Food, Agriculture, Conservation, and Trade Act of 1990 (7 U.S.C. 2279–1), including the authority to coordinate Department policy for the issuance of receipts under subsection (e) of that section.

(11) Provide strategic planning and performance measurement, coordinate outreach activities, monitor goals and objectives, and evaluate programs, of Department programs and activities involving small farms or ranches and beginning or socially disadvantaged farmers or ranchers.

(12) Administer the USDA/1994 Land Grant Institutions (Tribal Colleges) Programs.

(13) Administer the USDA/1890 Liaison Officer Program.

(14) Administer the Hispanic Serving Institutions National Program, including through the use of cooperative agreements under 7 U.S.C. 3318(b).

(15) Serve as a lead agency in carrying out student internship programs (7 U.S.C. 2279c).

(16) Coordinate outreach to Asian-Americans and Pacific Islanders.

(b) [Reserved]

§ 2.701 Director, Office of Tribal Relations.

(a) *Delegations.* Pursuant to § 2.38(a)(2), the following delegations of authority are made by the Director, Office of Partnerships and Public Engagement to the Director, Office of Tribal Relations.

(1) Serve as the Department's primary point of contact for tribal issues.

(2) Advise the Secretary on policies related to Indian tribes.

(3) Serve as the official with principal responsibility for the implementation of Executive Order 13175, ''Consultation and Coordination with Indian Tribal Governments,'' including the provision of Department-wide guidance and oversight regarding tribal consultation, coordination, and collaboration.

(4) Coordinate the Department's programs involving assistance to American Indians and Alaska Natives.

(5) Enter into cooperative agreements to improve the coordination and effectiveness of Federal programs, services, and actions affecting rural areas (7 U.S.C. 2204b(b)(4)); and to provide outreach and technical assistance to socially disadvantaged farmers and ranchers and veteran farmers and ranchers (7 U.S.C. 2279(a)(3)).

(b) [Reserved]

Dated: November 16, 2018.

Sonny Perdue,

Secretary of Agriculture.

[FR Doc. 2018–25443 Filed 11–28–18; 8:45 am]

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DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

19 CFR Part 4

[CBP Dec. 18–12]

Technical Corrections to the Vessel Repair Unit Regulations

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: Final rule; technical amendment.

SUMMARY: This document amends the U.S. Customs and Border Protection (CBP) regulations to update provisions relating to the declaration, entry and dutiable status of repair expenditures made abroad for certain vessels to reflect the port of New Orleans, Louisiana as the only Vessel Repair Unit (VRU) location. The amendment will improve the efficiency of vessel repair entry processing, ensure the proper assessment and collection of duties, and make the regulations more transparent.

DATES: The final rule is effective November 29, 2018.

FOR FURTHER INFORMATION CONTACT: Donna Dedeaux, Branch Chief, Cargo and Conveyance Security, at *Donna.M.Dedeaux@cbp.dhs.gov* or (202) 325–2497.

SUPPLEMENTARY INFORMATION:

Background

Under section 466, Tariff Act of 1930, as amended (19 U.S.C. 1466), purchases for or repairs made to certain vessels while they are outside the United States are subject to declaration, entry and payment of ad valorem duty. These requirements are effective upon the first arrival of the affected vessel in any port of the United States. The vessels subject to these requirements include those documented under U.S. law for the foreign or coastwise trades, as well as those which were previously documented under the laws of some foreign nation or are undocumented at the time that the foreign shipyard repairs are performed, but which exhibit an intent to engage in those trades.

The regulations implementing 19 U.S.C. 1466 are found in § 4.14 of the CBP regulations (19 CFR 4.14). Section 4.14 provides that when a vessel subject to the vessel repair statute first arrives into the United States or Puerto Rico following a foreign voyage, the owner, master, or authorized agent, or vessel operator must submit a vessel repair entry and declaration on CBP Form 226

(Form), a dual-use form used both for entry and declaration purposes. If no foreign repair-related expenses were incurred, that fact must also be reported either on the Form or by approved electronic means. The owner, master, or authorized agent must ensure the declaration is ready for presentation in the event that a CBP officer boards the vessel. Section 4.14 provides that the CBP port of arrival receiving either a positive or negative vessel repair declaration or electronic equivalent must immediately forward it to the appropriate Vessel Repair Unit (VRU) port of entry via mail, fax, or email. The owner, master, or authorized agent, or vessel operator must also file a vessel repair entry directly with the VRU. *See,* 19 CFR 4.14(c), (e). The regulations list three VRU locations: New York, New York, San Francisco, California, and New Orleans, Louisiana. *See,* 19 CFR 4.14(g).

Discussion of Regulatory Changes

Of the three VRUs listed in § 4.14(g), only the New Orleans location is currently operational. Over the years, there has been a steady decrease in the number of vessel repair entries filed. Based on the small volume of entries being received at the VRU locations in New York and San Francisco and due to CBP's staffing needs, in 2003–2004, CBP informally streamlined VRU operations so that such operations would be performed only at the port of New Orleans VRU. As a result of common practice, the trade generally submits its vessel repair entries directly to the New Orleans VRU.[1] CBP forwards any entries received at the New York or San Francisco VRUs to New Orleans. To reflect this practice and for purposes of transparency, this document makes changes to § 4.14 to reflect the port of New Orleans as the sole VRU location. This document also updates the regulations to reflect a name change of the office within CBP Headquarters referenced in § 4.14. The referenced office is now known as the Cargo Security, Carriers & Restricted Merchandise Branch, Office of Trade. Also, to ensure clarity, the document makes additional minor wording changes to the regulation.

Inapplicability of Prior Notice and Delayed Effective Date

According to section 553 of the Administrative Procedure Act (APA) (5 U.S.C. 553), rulemaking generally requires prior notice and comment, and a 30-day delayed effective date, subject to specified exceptions. Pursuant to 5 U.S.C. 553(a)(2), matters relating to agency management or personnel are excepted from the requirements of section 553. Additionally, as provided in 5 U.S.C. 553(b)(3)(A), the prior notice and comment and delayed effective date requirements do not apply when agencies promulgate rules concerning agency organization, procedure, or practice.

This rule does not require prior notice and comment because it relates to agency management and agency organization, procedures, or practice. As explained above, the rule merely updates the regulations to reflect the informal streamlining of VRU operations in 2003–2004, so that all vessel repair entries are processed by the New Orleans VRU. As a result of common practice, the trade generally submits its vessel repair entries are now submitted directly to the New Orleans VRU. CBP forwards any such entries received in New York or San Francisco to the New Orleans VRU for processing. Accordingly, this rule does not affect the substantive rights or interests of the public, but merely conforms the regulations to existing agency management and agency procedures and organization. This rule also makes other minor wording changes for clarity and includes a technical update to the regulations to reflect a name change in the referenced office within CBP Headquarters.

Executive Orders 12866, 13563, and 13771

Executive Orders 13563 and 12866 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. Executive Order 13771 (''Reducing Regulation and Controlling Regulatory Costs'') directs agencies to reduce regulation and control regulatory costs and provides that ''for every one new regulation issued, at least two prior regulations be identified for elimination, and that the cost of planned regulations be prudently managed and controlled through a budgeting process.''

The Office of Management and Budget (OMB) has not designated this rule as a ''significant regulatory action,'' under section 3(f) of Executive Order 12866. Accordingly, OMB has not reviewed this regulation. This regulation updates CBP's VRU regulations, eliminating costs of processing vessel repair entries that must be forwarded to the New Orleans VRU. Thus, DHS considers this a deregulatory action under Executive Order 13771. *See* OMB's Memorandum, ''Guidance Implementing Executive Order 13771, 'Reducing Regulation and Controlling Regulatory Costs' '' (April 5, 2017).

This rule amends an outdated regulation by removing obsolete provisions to reflect the streamlining of VRU operations. Of the three VRUs listed in § 4.14(g), only the New Orleans location is currently operational. Although, as a result of common practice, the trade generally submits its vessel repair entries directly to the New Orleans VRU for processing, some entries are submitted to the other locations listed in the regulations. Vessel Repair Entries are filed on paper and submitted via postal mail and each entry can be hundreds of pages long. Historically, misdirected entries have been forwarded in hard copy to the New Orleans VRU. This rule eliminates the small costs in processing vessel repair entries that may be initially submitted to the other locations that CBP must then forward to the New Orleans, Louisiana VRU. CBP believes the monetized cost savings of the rule to be insignificant due to the small number of vessel repair entries received each year, an average of 540, of which some are not already submitted to the New Orleans VRU. This rule will make the procedures for processing vessel repair entries more efficient for both CBP and the affected population, with zero additional costs.

Regulatory Flexibility Act

Because this document is not subject to the notice and public procedure requirements of 5 U.S.C. 553, it is not subject to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*).

Signing Authority

This document is being issued in accordance with 19 CFR 0.2(a), which provides that the authority of the Secretary of the Treasury with respect to CBP regulations that are not related to customs revenue functions was transferred to the Secretary of Homeland Security pursuant to Section 403(l) of the Homeland Security Act of 2002. Accordingly, this final rule to amend such regulations may be signed by the Secretary of Homeland Security (or his or her delegate).

[1] Since 2003–2004, the port of New Orleans VRU has averaged approximately 540 entries per year.

List of Subjects in 19 CFR Part 4

Customs duties and inspection, Entry procedures, Repairs, Reporting and recordkeeping requirements, Vessels.

Amendments to the Regulations

For the reasons stated in the preamble, part 4 of the CBP regulations (19 CFR part 4) is amended as set forth below.

PART 4—VESSELS IN FOREIGN AND DOMESTIC TRADES

■ 1. The general authority citation for part 4 and the specific authority citation for § 4.14 continue to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 66, 1431, 1433, 1434, 1624, 2071 note; 46 U.S.C. 501, 60105.

* * * * *

Section 4.14 also issued under 19 U.S.C. 1466, 1498; 31 U.S.C. 9701.

* * * * *

■ 2. Amend § 4.14 as follows:
■ a. Revise the third and fifth sentences of paragraph (c);
■ b. Revise the fourth sentence of paragraph (d);
■ c. Revise the fourth sentence of paragraph (e);
■ d. Revise the second, fourth, seventh and eighth sentences of paragraph (f);
■ e. Revise paragraph (g);
■ f. Revise the eighth and the ninth sentences of paragraph (i)(1);
■ g. Revise the fifth sentence of paragraph (i)(2);
■ h. Revise the third sentence of paragraph (i)(4).

The revisions read as follows:

§ 4.14 Equipment purchases for, and repairs to, American vessels.

* * * * *

(c) *Estimated duty deposit and bond requirements.* * * * At the time the vessel repair entry is submitted by the vessel operator to the Vessel Repair Unit (VRU) as defined in paragraph (g) of this section, that same identifying information must be included on the entry form. * * * CBP officials at the port of arrival may consult the VRU as identified in paragraph (g) of this section or the staff of the Cargo Security, Carriers & Restricted Merchandise Branch, Office of Trade in CBP Headquarters in setting sufficient bond amounts. * * *

(d) *Declaration required.* * * * The CBP port of arrival receiving either a positive or negative vessel repair declaration or electronic equivalent will immediately forward it to the VRU as identified in paragraph (g) of this section.

(e) *Entry required.* * * * The entry must be presented or electronically transmitted by the vessel operator to the VRU as identified in paragraph (g) of this section, so that it is received within ten calendar days after arrival of the vessel. * * *

(f) *Time limit for submitting evidence of cost.* * * * If the entry is incomplete when submitted, evidence to make it complete must be received by the VRU as identified in paragraph (g) of this section within 90 calendar days from the date of vessel arrival.

* * * The VRU may grant one 30-day extension of time to submit final cost evidence if a satisfactory written explanation of the need for an extension is received before the expiration of the original 90-day submission period. * * * Questions as to whether an extension should be granted may be referred to the Cargo Security, Carriers & Restricted Merchandise Branch, Office of Trade in CBP Headquarters by the VRU. Any request for an extension beyond a 30-day grant issued by the VRU must be submitted through that unit to the Cargo Security, Carriers & Restricted Merchandise Branch, Office of Trade, CBP Headquarters. * * *

(g) *Location and jurisdiction of vessel repair unit port of entry.* The VRU, located in New Orleans, Louisiana, processes vessel repair entries received from all United States ports of arrival.

* * * * *

(i) *General procedures for seeking relief*—(1) *Applications for relief.* * * * Applications must be addressed and submitted by the vessel operator to the VRU and will be decided in that unit. The VRU may seek the advice of the Cargo Security, Carriers & Restricted Merchandise Branch, Office of Trade in CBP Headquarters with regard to any specific item or issue which has not been addressed by clear precedent. * * *

(2) *Additional evidence.* * * * After a decision is made on an Application for Relief by the VRU, the applicant will be notified of the right to protest any adverse decision.

* * * * *

(4) *Administrative protest.* * * * In particular, the applicable protest period will begin on the date of the issuance of the decision giving rise to the protest as reflected on the relevant correspondence from the VRU.

* * * * *

Dated: November 21, 2018.

Kevin K. McAleenan,

Commissioner, U.S. Customs and Border Protection.

[FR Doc. 2018–25953 Filed 11–28–18; 8:45 am]

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DEPARTMENT OF JUSTICE

Drug Enforcement Administration

21 CFR Part 1308

[Docket No. DEA–490]

Schedules of Controlled Substances: Placement of Furanyl Fentanyl, 4-Fluoroisobutyryl Fentanyl, Acryl Fentanyl, Tetrahydrofuranyl Fentanyl, and Ocfentanil in Schedule I

AGENCY: Drug Enforcement Administration, Department of Justice.

ACTION: Final order.

SUMMARY: With the issuance of this final order, the Acting Administrator of the Drug Enforcement Administration maintains the placement of the substances furanyl fentanyl [*N*-(1-phenethylpiperidin-4-yl)-*N*-phenylfuran-2-carboxamide], 4-fluoroisobutyryl fentanyl or *para*-fluoroisobutyryl fentanyl [*N*-(4-fluorophenyl)-*N*-(1-phenethylpiperidin-4-yl)isobutyramide], acryl fentanyl or acryloylfentanyl [*N*-(1-phenethylpiperidin-4-yl)-*N*-phenylacrylamide], tetrahydrofuranyl fentanyl [*N*-(1-phenethylpiperidin-4-yl)-*N*-phenyltetrahydrofuran-2-carboxamide], and ocfentanil [*N*-(2-fluorophenyl)-2-methoxy-*N*-(1-phenethylpiperidin-4-yl)acetamide], including their isomers, esters, ethers, salts, and salts of isomers, esters and ethers, in schedule I of the Controlled Substances Act. This scheduling action discharges the United States obligations under the Single Convention on Narcotic Drugs (1961). This action continues to impose the regulatory controls and administrative, civil, and criminal sanctions applicable to schedule I controlled substances on persons who handle (manufacture, distribute, import, export, engage in research or conduct instructional activities with, or possess), or propose to handle, furanyl fentanyl, 4-fluoroisobutyryl fentanyl, acryl fentanyl, tetrahydrofuranyl fentanyl, and ocfentanil.

DATES: Effective November 29, 2018.

FOR FURTHER INFORMATION CONTACT: Kathy L. Federico, Regulatory Drafting and Policy Section, Diversion Control Division, Drug Enforcement Administration; Mailing Address: 8701 Morrissette Drive, Springfield, Virginia 22152; Telephone: (202) 598–6812.

SUPPLEMENTARY INFORMATION:

Legal Authority

Section 201(d)(1) of the Controlled Substances Act (CSA) (21 U.S.C.

811(d)(1)) states that, if control of a substance is required ''by United States obligations under international treaties, conventions, or protocols in effect on October 27, 1970, the Attorney General shall issue an order controlling such drug under the schedule he deems most appropriate to carry out such obligations, without regard to the findings required by [section 201(a) (21 U.S.C. 811(a)] or section [202(b) (21 U.S.C. 812(b)) of the Act] and without regard to the procedures prescribed by [section 201 (a) and (b) (21 U.S.C. 811(a) and (b)].'' If a substance is added to one of the schedules of the Single Convention on Narcotic Drugs (1961), then, in accordance with article 3, paragraph 7 of the Convention, as a signatory Member State, the United States is obligated to control the substance under its national drug control legislation, the CSA. The Attorney General has delegated scheduling authority under 21 U.S.C. 811 to the Administrator of the Drug Enforcement Administration (DEA). 28 CFR 0.100.

Background

On May 15, 2018, the Secretary-General of the United Nations advised the Secretary of State of the United States, that during the 61st session of the Commission on Narcotic Drugs, furanyl fentanyl, 4-fluoroisobutyryl fentanyl, acryl fentanyl, tetrahydrofuranyl fentanyl, and ocfentanil were added to Schedule I of the Single Convention on Narcotic Drugs (1961). This letter was prompted by a decision at the 61st session of the Commission on Narcotic Drugs in March 2018 to schedule furanyl fentanyl, 4-fluoroisobutyryl fentanyl, acryl fentanyl, tetrahydrofuranyl fentanyl, and ocfentanil under Schedule I of the Single Convention on Narcotic Drugs. As a signatory Member State to the Single Convention on Narcotic Drugs, the United States is obligated to control furanyl fentanyl, 4-fluoroisobutyryl fentanyl, acryl fentanyl, tetrahydrofuranyl fentanyl, and ocfentanil under its national drug control legislation, the CSA, in the schedule deemed most appropriate to carry out its international obligations. 21 U.S.C. 811(d)(1).

Furanyl Fentanyl, 4-Fluoroisobutyryl Fentanyl, Acryl Fentanyl, Tetrahydrofuranyl Fentanyl, and Ocfentanil

On November 29, 2016, May 3, 2017, July 14, 2017, October 26, 2017, and February 1, 2018, furanyl fentanyl (81 FR 85873), 4-fluoroisobutyryl fentanyl (82 FR 20544), acryl fentanyl (82 FR 32453), tetrahydrofuranyl fentanyl (82 FR 49504), and ocfentanil (83 FR 4580), respectively, were temporarily placed in schedule I of the CSA upon finding they pose an imminent hazard to the public safety. Furanyl fentanyl, 4-fluoroisobutyryl fentanyl, acryl fentanyl, tetrahydrofuranyl fentanyl, and ocfentanil share pharmacological profiles similar to morphine, fentanyl, and other synthetic opioids. Law enforcement and public health reports demonstrate the illicit use and distribution of these substances, which are available on the internet. Furanyl fentanyl, 4-fluoroisobutyryl fentanyl, acryl fentanyl, tetrahydrofuranyl fentanyl, and ocfentanil are all abused for their opioid-like effects. Evidence suggests the pattern of abuse of these substances parallels that of heroin and prescription opioid analgesics. Because furanyl fentanyl, 4-fluoroisobutyryl fentanyl, acryl fentanyl, tetrahydrofuranyl fentanyl, and ocfentanil can be obtained through illicit sources, information on their purity and potency are unknown; thus these substances pose a significant adverse health risk to the users.

Similar to morphine and fentanyl, furanyl fentanyl, 4-fluoroisobutyryl fentanyl, acryl fentanyl, tetrahydrofuranyl fentanyl, and ocfentanil act as μ-opioid receptor agonists. Data obtained from preclinical studies (*in vitro* and *in vivo*) demonstrate that furanyl fentanyl, 4-fluoroisobutyryl fentanyl, acryl fentanyl, tetrahydrofuranyl fentanyl, and ocfentanil produce pharmacological effects similar to fentanyl and morphine. Specifically, in a drug discrimination study in animals, a behavioral test used to determine subjective effects and pharmacological similarity between a test substance and a known drug of abuse, ocfentanil substituted fully for morphine. Additional data obtained from *in vivo* (in animal) studies demonstrated that furanyl fentanyl, 4-fluoroisobutyryl fentanyl, acryl fentanyl, tetrahydrofuranyl fentanyl, and ocfentanil, similar to fentanyl and morphine, produced an analgesic effect which was attenuated by naltrexone, an opioid receptor antagonist.

Since 2015, furanyl fentanyl has been encountered by law enforcement and public health officials and the adverse health effects and outcomes are demonstrated by fatal overdose cases. At the time of the temporary scheduling action for furanyl fentanyl in 2016, there were at least 128 confirmed fatalities associated with the misuse and/or abuse of furanyl fentanyl in the United States. According to the National Forensic Laboratory Information System (NFLIS [1]) and STARLiMS [2], there were 8,516 drug exhibits containing furanyl fentanyl since 2015. For 4-fluoroisobutyryl fentanyl, law enforcement submitted a total of 2,245 drug exhibits since 2016. The DEA has also received reports of at least 62 confirmed fatalities associated with 4-fluoroisobutyryl fentanyl at the time of the temporary order in 2017. NFLIS and STARLiMS reported a total of 2,054 drug exhibits containing acryl fentanyl since 2016. The DEA also received reports of at least 83 confirmed fatalities associated with acryl fentanyl occurring in 2016 and 2017 in the United States. For tetrahydrofuranyl fentanyl, NFLIS and STARLiMS had a total of 23 drug reports since 2015 and there were two confirmed fatalities in the United States at the time of the temporary scheduling action in 2017. There were no reports in NFLIS and STARLiMS for ocfentanil at the time of this final order. However, ocfentanil was first reported in Belgium in 2015 and the exposure resulted in one death; since then, at least two additional deaths in Belgium and Switzerland related to ocfentanil have been reported. It is likely that the prevalence of these substances in opioid-related emergency room admissions and deaths is underreported as standard immunoassays may not differentiate these substances from fentanyl.

The DEA is not aware of any claims or any medical or scientific literature suggesting that furanyl fentanyl, 4-fluoroisobutyryl fentanyl, acryl fentanyl, tetrahydrofuranyl fentanyl, and ocfentanil have a currently accepted medical use in treatment in the United States. In addition, the Department of Health and Human Services (HHS) advised DEA, by letters dated July 8, 2016, January 17, 2017, May 2, 2017, July 14, 2017, and November 8, 2017, that there were no investigational new drug applications or approved new drug applications for furanyl fentanyl, 4-fluoroisobutyryl fentanyl, acryl fentanyl, tetrahydrofuranyl fentanyl, and ocfentanil, respectively.

The DEA requested that HHS conduct a scientific and medical evaluation and

[1] The National Forensic Laboratory Information System (NFLIS) is a national forensic laboratory reporting system that systematically collects results from drug chemistry analyses conducted by State and local forensic laboratories in the United States. NFLIS data were queried on October 24, 2018. NFLIS is still reporting data for January–July 2018 due to normal lag time in reporting.

[2] STARLiMS is a laboratory information management system that systematically collects results from drug chemistry analyses conducted by DEA laboratories. STARLiMS data were queried on October 24, 2018.

a scheduling recommendation for furanyl fentanyl (by letter dated March 1, 2017), 4-fluoroisobutyryl fentanyl (by letter dated August 28, 2017), acryl fentanyl (by letter dated April 18, 2018), and tetrahydrofuranyl fentanyl (letter dated April 18, 2018). A request for ocfentanil had not previously been submitted. Regardless of these requests and any potential responses from HHS, the DEA is not required under 21 U.S.C. 811(d)(1) to make any findings required by 21 U.S.C. 811(a) or 812(b), and is not required to follow the procedures prescribed by 21 U.S.C. 811(a) and (b). By letter dated June 30, 2018, the Acting Administrator advised HHS that the DEA no longer requires scientific and medical evaluations and scheduling recommendations for furanyl fentanyl, 4-fluoroisobutyryl fentanyl, acryl fentanyl, tetrahydrofuranyl fentanyl, as well as, ocfentanil, although not previously requested. The HHS recommendations were no longer required due to the placement of those substances into Schedule I of the Single Convention on Narcotic Drugs (1961) in March 2018. Therefore, consistent with the framework of 21 U.S.C. 811(d), DEA concludes that furanyl fentanyl, 4-fluoroisobutyryl fentanyl, acryl fentanyl, tetrahydrofuranyl fentanyl, and ocfentanil have no currently accepted medical use in treatment in the United States and are most appropriately placed (as it has been since May 2017, July 2017, October 2017, November 2017, and February 2018, respectively) in schedule I of the CSA. Further, while the DEA temporarily scheduled these substances under 21 CFR 1308.11(h), a subsection reserved for the temporary listing of substances subject to emergency scheduling, this order moves these substances to 21 CFR 1308.11(b). As explained above, since control is required under the Single Convention on Narcotic Drugs (1961), the DEA will not be initiating regular rulemaking proceedings to schedule these substances pursuant to 21 U.S.C. 811(a).

Conclusion

In order to meet the United States' obligations under the Single Convention on Narcotic Drugs (1961) and because furanyl fentanyl, 4-fluoroisobutyryl fentanyl, acryl fentanyl, tetrahydrofuranyl fentanyl, and ocfentanil have no currently accepted medical use in treatment in the United States, the Acting Administrator of the Drug Enforcement Administration has determined that these substances should remain in schedule I of the Controlled Substances Act.

Requirements for Handling

Furanyl fentanyl, 4-fluoroisobutyryl fentanyl, acryl fentanyl, tetrahydrofuranyl fentanyl, and ocfentanil have been controlled as schedule I controlled substances since November 29, 2016, May 3, 2017, July 14, 2017, October 26, 2017, and February 1, 2018, respectively. With publication of this final order, furanyl fentanyl, 4-fluoroisobutyryl fentanyl, acryl fentanyl, tetrahydrofuranyl fentanyl, and ocfentanil remain subject to the CSA's schedule I regulatory controls and administrative, civil, and criminal sanctions applicable to the manufacture, distribution, importation, exportation, engagement in research, and conduct of instructional activities with, and possession of schedule I controlled substances including the following:

1. *Registration.* Any person who handles (manufactures, distributes, imports, exports, engages in research or conducts instructional activities with, or possesses), or who desires to handle, furanyl fentanyl, 4-fluoroisobutyryl fentanyl, acryl fentanyl, tetrahydrofuranyl fentanyl, and ocfentanil must be registered with the DEA to conduct such activities pursuant to 21 U.S.C. 822, 823, 957, and 958 and in accordance with 21 CFR parts 1301 and 1312.

2. *Disposal of stocks.* Furanyl fentanyl, 4-fluoroisobutyryl fentanyl, acryl fentanyl, tetrahydrofuranyl fentanyl and ocfentanil must be disposed of in accordance with 21 CFR part 1317, in addition to all other applicable federal, state, local, and tribal laws.

3. *Security.* Furanyl fentanyl, 4-fluoroisobutyryl fentanyl, acryl fentanyl, tetrahydrofuranyl fentanyl, and ocfentanil are subject to schedule I security requirements and must be handled and stored pursuant to 21 U.S.C. 821, 823, 871(b), and in accordance with 21 CFR 1301.71–1301.93.

4. *Labeling and packaging.* All labels, labeling, and packaging for commercial containers of furanyl fentanyl, 4-fluoroisobutyryl fentanyl, acryl fentanyl, tetrahydrofuranyl fentanyl, and ocfentanil must be in compliance with 21 U.S.C. 825, 958(e), and be in accordance with 21 CFR part 1302.

5. *Quota.* A quota assigned pursuant to 21 U.S.C. 826 and in accordance with 21 CFR part 1303 is required in order to manufacture furanyl fentanyl, 4-fluoroisobutyryl fentanyl, acryl fentanyl, tetrahydrofuranyl fentanyl, and ocfentanil.

6. *Inventory.* Every DEA registrant who possesses any quantity of furanyl fentanyl, 4-fluoroisobutyryl fentanyl, acryl fentanyl, tetrahydrofuranyl fentanyl, and ocfentanil was required to keep an inventory of all stocks of these substances on hand as of November 29, 2016, May 3, 2017, July 14, 2017, October 26, 2017, and February 1, 2018, respectively, pursuant to 21 U.S.C. 827 and 958, and in accordance with 21 CFR 1304.03, 1304.04, and 1304.11.

7. *Records and Reports.* Every DEA registrant must maintain records and submit reports with respect to furanyl fentanyl, 4-fluoroisobutyryl fentanyl, acryl fentanyl, tetrahydrofuranyl fentanyl, and ocfentanil pursuant to 21 U.S.C. 827 and 958, and in accordance with 21 CFR parts 1304 and 1312.

8. *Order Forms.* All DEA registrants who distribute furanyl fentanyl, 4-fluoroisobutyryl fentanyl, acryl fentanyl, tetrahydrofuranyl fentanyl, and ocfentanil must comply with order form requirements pursuant to 21 U.S.C. 828 and in accordance with 21 CFR part 1305.

9. *Importation and Exportation.* All importation and exportation of furanyl fentanyl, 4-fluoroisobutyryl fentanyl, acryl fentanyl, tetrahydrofuranyl fentanyl, and ocfentanil must be in compliance with 21 U.S.C. 952, 953, 957, and 958, and in accordance with 21 CFR part 1312.

10. *Liability.* Any activity involving furanyl fentanyl, 4-fluoroisobutyryl fentanyl, acryl fentanyl, tetrahydrofuranyl fentanyl, and ocfentanil not authorized by, or in violation of the CSA, is unlawful, and may subject the person to administrative, civil, and/or criminal sanctions.

Regulatory Analyses

Executive Order 12866, 13563, and 13771, Regulatory Planning and Review, Improving Regulation and Regulatory Review, and Reducing Regulation and Controlling Regulatory Costs

This action is not a significant regulatory action as defined by Executive Order 12866 (Regulatory Planning and Review), section 3(f), and the principles reaffirmed in Executive Order 13563 (Improving Regulation and Regulatory Review), and, accordingly, this action has not been reviewed by the Office of Management and Budget (OMB).

This order is not an Executive Order 13771 regulatory action.

Executive Order 12988, Civil Justice Reform

This action meets the applicable standards set forth in sections 3(a) and

3(b)(2) of Executive Order 12988 to eliminate drafting errors and ambiguity, minimize litigation, provide a clear legal standard for affected conduct, and promote simplification and burden reduction.

Executive Order 13132, Federalism

This action does not have federalism implications warranting the application of Executive Order 13132. This action does 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.

Executive Order 13175, Consultation and Coordination With Indian Tribal Governments

This action does not have tribal implications warranting the application of Executive Order 13175. The action does not have substantial direct effects on one or more Indian tribes, on the relationship between the Federal government and Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes.

Administrative Procedure Act

The CSA provides for an expedited scheduling action where control is required by the United States obligations under international treaties, conventions, or protocols. 21 U.S.C. 811(d)(1). If control is required pursuant to such international treaty, convention, or protocol, the Attorney General must issue an order controlling such drug under the schedule he deems most appropriate to carry out such obligations, without regard to the findings or procedures otherwise required for scheduling actions. *Id.*

To the extent that 21 U.S.C. 811(d)(1) directs that if control is required by the United States obligations under international treaties, conventions, or protocols in effect on October 27, 1970, scheduling actions shall be issued by order (as compared to scheduling pursuant to 21 U.S.C. 811(a) by rule), the DEA believes that the notice and comment requirements of section 553 of the Administrative Procedure Act (APA), 5 U.S.C. 553, do not apply to this scheduling action. In the alternative, even if this action does constitute ''rule making'' under 5 U.S.C. 551(5), this action is exempt from the notice and comment requirements of 5 U.S.C. 553 pursuant to 21 U.S.C. 553(a)(1) as an action involving a foreign affairs function of the United States given that this action is being done in accordance with 21 U.S.C. 811(d)(1)'s requirement that the United States comply with its obligations under the specified international agreements.

Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) (5 U.S.C. 601–612) applies to rules that are subject to notice and comment under section 553(b) of the APA or any other law. As explained above, the CSA exempts this final order from notice and comment. Consequently, the RFA does not apply to this action.

Paperwork Reduction Act of 1995

This action does not impose a new collection of information requirement under the Paperwork Reduction Act of 1995. 44 U.S.C. 3501–3521. 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.

Congressional Review Act

This action is not a major rule as defined by the Congressional Review Act (CRA), 5 U.S.C. 804. This order will not result in: ''an annual effect on the economy of $100,000,000 or more; a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign based enterprises in domestic and export markets.'' However, pursuant to the CRA, the DEA has submitted a copy of this final order to both Houses of Congress and to the Comptroller General.

List of Subjects in 21 CFR Part 1308

Administrative practice and procedure, Drug traffic control, Reporting and recordkeeping requirements.

For the reasons set out above, the DEA amends 21 CFR part 1308 as follows:

PART 1308—SCHEDULES OF CONTROLLED SUBSTANCES

■ 1. The authority citation for part 1308 continues to read as follows:

Authority: 21 U.S.C. 811, 812, 871(b), 956(b), unless otherwise noted.

■ 2. In § 1308.11:
■ a. Remove from paragraph (b) introductory text the term ''(b)(34)'' and add in its place the term ''(b)(39)'';
■ b. Redesignate paragraphs (b)(57) through (b)(60) as (b)(62) through (b)(65);
■ c. Redesignate paragraphs (b)(46) through (b)(56) as (b)(50) through (b)(60);
■ d. Redesignate paragraphs (b)(32) through (b)(45) as (b)(35) through (b)(48);
■ e. Redesignate paragraphs (b)(4) through (31) as (b)(5) through (32);
■ f. Add new paragraphs (b)(4), (b)(33), (b)(34), (b)(49), and (b)(61);
■ g. Remove and reserve paragraphs (h)(5), (h)(13), (h)(14), (h)(20), and (h)(29).

The revision and additions to read as follows:

§ 1308.11 Schedule I.

* * * * *

(b) * * *

(4) Acryl fentanyl (*N*-(1-phenethylpiperidin-4-yl)-*N*-phenylacrylamide; other name: acryloylfentanyl) . . . 9811

* * * * *

(33) 4-Fluoroisobutyryl fentanyl (*N*-(4-fluorophenyl)-*N*-(1-phenethylpiperidin-4-yl)isobutyramide; other name: *para*-fluoroisobutyryl fentanyl) . . . 9824

(34) Furanyl fentanyl (*N*-(1-phenethylpiperidin-4-yl)-*N*-phenylfuran-2-carboxamide) . . . 9834

* * * * *

(49) Ocfentanil (*N*-(2-fluorophenyl)-2-methoxy-*N*-(1-phenethylpiperidin-4-yl)acetamide) . . . 9838

* * * * *

(61) Tetrahydrofuranyl fentanyl (*N*-(1-phenethylpiperidin-4-yl)-*N*-phenyltetrahydrofuran-2-carboxamide) . . . 9843

* * * * *

Dated: November 26, 2018.

Uttam Dhillon,

Acting Administrator.

[FR Doc. 2018–26045 Filed 11–28–18; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket Number USCG–2018–0917]

RIN 1625–AA11

Regulated Navigation Area; Upper Mississippi River, Sabula Railroad Bridge, Mile Marker 535, Sabula, IA

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard established a temporary regulated navigation area for certain navigable waters of the

Upper Mississippi River under one of the navigable spans of the Sabula Railroad Drawbridge at mile marker (MM) 535. The RNA is necessary to protect persons, vessels, and the marine environment from potential hazards associated with emergency repair work to the Sabula Railroad Bridge following a vessel's allision with the bridge. The regulation applies only to southbound vessel transits through the RNA, and depending on the water flow as measured from Lock and Dam 12, this regulation either prohibits transit or establishes operating requirements unless a deviation is authorized by the Captain of the Port Sector Upper Mississippi River or a designated representative.

DATES: This rule is effective from November 29, 2018 through November 30, 2018.

ADDRESSES: To view documents mentioned in this preamble as being available in the docket, go to *https://www.regulations.gov,* type USCG–2018–0917 in the ''SEARCH'' box and click ''SEARCH.'' Click on Open Docket Folder on the line associated with this rule.

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call or email Lieutenant Commander Kody Stitz, Sector Upper Mississippi River Prevention Department U.S. Coast Guard; telephone 314–269–2568, email *Kody.J.Stitz@uscg.mil.*

SUPPLEMENTARY INFORMATION:

I. Table of Abbreviations

CFR Code of Federal Regulations
COTP Captain of the Port Sector Upper Mississippi River
DHS Department of Homeland Security
FR Federal Register
NPRM Notice of proposed rulemaking
§ Section
U.S.C. United States Code

II. Background Information and Regulatory History

On September 16, 2018, a vessel allided with the Sabula Railroad Drawbridge and immediate action was needed to respond to the potential hazards associated with emergency bridge repairs. On September 28, 2018, the Coast Guard published a temporary final rule; request for comments titled Regulated Navigation Area; Upper Mississippi River, Sabula Railroad Drawbridge, Mile Marker 535, Sabula, IA (83 FR 48954). There we stated why we issued the temporary final rule, and invited comments on our proposed regulatory action related to the operational restrictions in the regulated navigation area (RNA). During the comment period that ended on October 15, 2018, we received two comments.

Under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register**. Delaying the effective date of this rule would be contrary to public interest because immediate action is needed to respond to the potential safety hazards associated with emergency bridge repairs.

III. Legal Authority and Need for Rule

The Coast Guard is issuing this rule under authority in 33 U.S.C. 1231. The Eighth District Commander has determined that potential hazards associated with emergency bridge repairs following an allision will be a safety concern for vessels transiting southbound through the right descending span, also known as Iowa span, of the Sabula Railroad Drawbridge. This rule is necessary to protect persons, vessels, and the marine environment on the navigable waters of the Upper Mississippi River while the bridge is being repaired. The duration of this rule is intended to cover the period of emergency repairs.

IV. Discussion of Comments, Changes, and the Rule

As noted above, we received two comments on our temporary final rule published on September 28, 2018. One comment was unrelated to the substance of the rule, and one comment was not in favor of the rule. The commenter not in favor of the rule disagreed that any navigation should be allowed through the right descending bank span, also known as the Iowa span, of the Sabula Railroad Drawbridge at mile marker (MM) 535 until the rest pier repairs were ''substantial[ly] complet[ed].'' The commenter stated that the Coast Guard failed to engage with Canadian Pacific Railway engineers to evaluate safety concerns, and expressed general dissatisfaction that the Coast Guard's risk analysis was not fairly balanced against the elevated risks to the bridge pier or potential impact to railroad traffic.

The Coast Guard respectfully disagrees. As a preliminary matter, our rule does provide for a prohibition of southbound navigation under the Iowa span under certain conditions. Moreover, because the emergency repairs are necessary only for the rest pier, rather than the actual bridge support piers, a total closure of waterway traffic may not be necessary under all conditions. The Coast Guard inspected the initial damage to the rest pier, and has been engaged with the bridge owner, the repair contractor, and vessel operators since the initial incident on September 16, 2018. Other than requesting a total closure of the Iowa span and expressing disagreement with the Coast Guard's rule generally, Canadian Pacific Railway did not present any facts, data, or engineering analysis to the Coast Guard to support why a total closure is necessary, or propose alternate vessel operating requirements. Although the repairs have been substantially completed, Canadian Pacific Railway engineers may contact the Sector Upper Mississippi River at any time with further information. There are no changes in regulatory text of this rule from the temporary final rule.

This rule establishes a temporary regulated navigation area from September 21, 2018 through November 30, 2018, or until the emergency bridge repairs are completed, whichever occurs first. The regulated area covers all navigable waters of the Upper Mississippi River under the right descending bank span, also known as the Iowa span, of the Sabula Railroad Drawbridge at mile marker (MM) 535. This rule applies only to southbound vessel transits through the RNA, and depending on the water flow as measured from Lock and Dam 12, this regulation either prohibits transit or establishes operating requirements unless a deviation is authorized by the Captain of the Port Sector Upper Mississippi River or a designated representative.

When the water flow rate as measured from Lock and Dam 12 is 100kcfs or greater, vessels are prohibited from transiting southbound through the RNA unless authorized by the Captain of the Port Sector Upper Mississippi River (COTP) or a designated representative. When the water flow rate as measured from Lock and Dam 12 is less than 100kcfs, vessels may transit southbound through the RNA only if navigating at their slowest safe speed and avoiding contact with any part of the Sabula Railroad Drawbridge and the unprotected rest pier located on the right descending side of the Sabula Railroad Drawbridge.

When the water flow rate as measured from Lock and Dam 12 is less than 100kcfs, vessels engaged in towing may transit southbound through the RNA only if the size of the tow does not exceed 15 barges, the towing vessel possesses a minimum of 250 horsepower per loaded barge in the tow, and the towing vessel uses an assist vessel of at least 1,000 horsepower when pushing three or more barges. If an assist vessel is required by this rule, the assist vessel and the towing vessel must discuss a plan to transit through the RNA before doing so and both the assist vessel and the towing vessel must be capable of continuous two-way voice communication during the transit.

The COTP or a designated representative may review, on a case-by-case basis, alternatives to the minimum operating or towing requirements set forth in this rule and may approve a deviation from these requirements should they provide an equivalent level of safety. The COTP or a designated representative may determine, on a case-by-case basis, that although the conditions triggering the RNA may be met, the current potential hazards do not require that each requirement of the RNA be enforced and that only certain of the above-prescribed restrictions are necessary under the circumstances. The COTP or a designated representative may consider environmental factors, the water flow rate at Lock and Dam 12, mitigating safety factors, and the completion progress of the bridge repairs among other factors. The COTP or a designated representative will broadcast notice of such determination and any subsequent changes. Notice that these vessel operational conditions are anticipated to be put into effect, or are in effect, will be given by Broadcast Notice to Mariners, Local Notices to Mariners, Marine Safety Information Broadcasts, and/or actual notice, as appropriate.

V. Regulatory Analyses

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

A. Regulatory Planning and Review

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits. Executive Order 13771 directs agencies to control regulatory costs through a budgeting process. This rule has not been designated a ''significant regulatory action,'' under Executive Order 12866. Accordingly, this rule has not been reviewed by the Office of Management and Budget (OMB), and pursuant to OMB guidance it is exempt from the requirements of Executive Order 13771.

This regulatory action determination is based on the limited applicability of the rule, the availability of an alternate route, and the ability of the COTP to issue a deviation from the requirements of this rule or suspend enforcement of this rule on a case-by-case basis. This rule only affects southbound vessel transits through the RNA; northbound vessels may transit the RNA at any time without restrictions. In addition, the regulated area only covers the navigable waters under the span of the Sabula Railroad Drawbridge that was damaged in the allision, the right descending span, or Iowa span, of the bridge. Vessels may transit north or southbound through the left descending span, or Illinois span, at any time without restriction. Finally, this rule allows vessels to seek permission to transit through the RNA and/or deviate from the operating requirements, and also allows the COTP to suspend enforcement of particular provisions of the RNA under appropriate circumstances.

B. Impact on Small Entities

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

While some owners or operators of vessels intending to transit the temporary regulated navigation area may be small entities, for the reasons stated in section V.A above, this rule will not have a significant economic impact on any vessel owner or operator.

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we want to assist small entities in understanding this rule. If the rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section.

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

C. Collection of Information

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

D. Federalism and Indian Tribal Governments

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

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

E. Unfunded Mandates Reform Act

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

F. Environment

We have analyzed this rule under Department of Homeland Security Directive 023–01 and Commandant Instruction M16475.1D, which guide the Coast Guard in complying with the

National Environmental Policy Act of 1969 (42 U.S.C. 4321–4370f), and have determined that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This rule involves a regulated navigation area lasting approximately two months that prohibits entry or establishes vessel operating requirements for southbound transits through the right descending span of the Sabula Railroad Drawbridge on the Upper Mississippi River while emergency repairs are made to the bridge. It is categorically excluded from further review under paragraph L60 (d) of Appendix A, Table 1 of DHS Instruction Manual 023–01–001–01, Rev. 01. A Record of Environmental Consideration supporting this determination is available in the docket where indicated under **ADDRESSES**.

G. Protest Activities

The Coast Guard respects the First Amendment rights of protesters. Protesters are asked to contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section to coordinate protest activities so that your message can be received without jeopardizing the safety or security of people, places, or vessels.

List of Subjects in 33 CFR Part 165

Harbors, Marine safety, Navigation (water), Reporting and recordkeeping requirements, Security measures, Waterways.

For the reasons discussed in the preamble, the Coast Guard amends 33 CFR part 165 as follows:

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

■ 1. The authority citation for part 165 continues to read as follows:

Authority: 33 U.S.C. 1231; 50 U.S.C. 191; 33 CFR 1.05–1, 6.04–1, 6.04–6, and 160.5; Department of Homeland Security Delegation No. 0170.1.

■ 2. Add § 165.T08–0917 to read as follows:

§ 165.T08–0917 Regulated Navigation Area; Upper Mississippi River, Sabula Railroad Drawbridge, Mile Marker 535, Sabula, IA.

(a) *Location.* The following area is a regulated navigation area (RNA): All navigable waters of the Upper Mississippi River under the right descending bank span, also known as the Iowa span, of the Sabula Railroad Drawbridge at mile marker (MM) 535.

(b) *Effective period.* This section is effective from September 21, 2018 through November 30, 2018, or until the emergency bridge repairs are completed, whichever occurs first.

(c) *Applicability.* This section only applies to vessels transiting southbound through the RNA.

(d) *Regulations.* (1) In accordance with the general regulations contained in 33 CFR 165.11, and 165.13, when the water flow rate as measured from Lock and Dam 12 is 100 KCFS or greater vessels are prohibited from transiting southbound through the RNA unless authorized by the Captain of the Port Sector Upper Mississippi River (COTP) or a designated representative.

(2) When the water flow rate as measured from Lock and Dam 12 is less than 100 kcfs, vessels may transit southbound through the RNA only under the following conditions:

(i) Vessels shall operate at their slowest safe speed.

(ii) Vessels avoid contacting any part of the Sabula Railroad Drawbridge and the unprotected rest pier located on the right descending side of the Sabula Railroad Drawbridge.

(3) When the water flow rate as measured from Lock and Dam 12 is less than 100 kcfs, vessels engaged in towing may transit southbound through the RNA only under the following conditions:

(i) The size of the tow does not exceed 15 barges; and

(ii) The towing vessel possesses a minimum of 250 horsepower per loaded barge in tow, and

(iii) When pushing more than two barges, an assist vessel of at least 1,000 horsepower must be utilized.

(A) Prior to entering the RNA, the assist tow vessel and the primary tow vessel shall discuss a plan to transit through the bridge, and

(B) Both the primary and assist towing vessel shall be capable of continuous two way voice communication while transiting through the bridge.

(4) If an assist vessel is required under this section, before entering the RNA:

(i) The assist vessel and the tow vessel shall discuss a plan to transit through the bridge, and

(ii) Both the assist vessel and the towing vessel shall be capable of continuous two-way voice communication while transiting through the bridge.

(5) The COTP or a designated representative may review, on a case-by-case basis, alternatives to the minimum operating or towing requirements and conditions set forth in paragraphs (d)(2)–(d)(4) of this section and may approve a deviation to these requirements and conditions should they provide an equivalent level of safety.

(6) The COTP or a designated representative may determine, on a case-by-case basis, that although the conditions triggering the RNA may be met, the current potential hazards do not require that each requirement of the RNA be enforced and that only certain of the above-prescribed restrictions are necessary under the circumstances. The COTP or a designated representative may consider environmental factors, the water flow rate at Lock and Dam 12, mitigating safety factors, and the completion progress of bridge the repairs among other factors. The COTP or a designated representative shall broadcast such notice of such determination and any changes under the provisions of paragraph (e).

(e) *Notice of requirements.* Notice that these vessel operational conditions are anticipated to be put into effect, or are in effect, will be given by Broadcast Notice to Mariners, Local Notices to Mariners, and/or actual notice, as appropriate.

Dated: November 15, 2018.

P.F. Thomas,

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

[FR Doc. 2018–25981 Filed 11–28–18; 8:45 am]

BILLING CODE 9110–04–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R09–OAR–2016–0711; FRL–9986–61–Region 9]

Air Plan Approval; California; South Coast Air Quality Management District

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is taking final action to approve a revision to the South Coast Air Quality Management District (SCAQMD) portion of the California State Implementation Plan (SIP). This revision concerns emissions of volatile organic compounds (VOCs) from architectural coatings. We are approving a local rule that regulates these emission sources under the Clean Air Act (CAA or the Act).

DATES: This rule will be effective on December 31, 2018.

ADDRESSES: The EPA has established a docket for this action under Docket ID No. EPA–R09–OAR–2016–0711. 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 (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy form. Publicly available docket materials are available through *https://www.regulations.gov,* or please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section for additional availability information.

FOR FURTHER INFORMATION CONTACT: Arnold Lazarus, EPA Region IX, (415) 972 3024, *Lazarus.Arnold@epa.gov.*

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

Table of Contents

I. Proposed Action

On August 8, 2018 (83 FR 39017), the EPA proposed to approve the following rule into the California SIP.

Local agency	Rule No.	Rule title	Amended	Submitted
SCAQMD	1113	Architectural Coatings	2/5/2016	8/22/2016

The EPA proposed to approve this rule, except for two sentences that were withdrawn from the submission at the request of the SCAQMD. We proposed to approve this rule because we determined that it complies with the relevant CAA requirements. Our proposed action contains more information on the rule and our evaluation.

II. Public Comments and EPA Responses

The EPA's proposed action provided a 30-day public comment period. During this period, we received four anonymous comments. These comments addressed the Cross State Air Pollution Rule, California wildfires, and science policy. None of the comments addressed Rule 1113 or were germane to our evaluation of Rule 1113.

III. EPA Action

No comments were submitted that change our assessment of the rule as described in our proposed action. Therefore, as authorized in section 110(k)(3) of the Act, the EPA is fully approving this rule into the California SIP, with the exception of the two sentences withdrawn by the District.

IV. Incorporation by Reference

In this rule, the EPA is finalizing regulatory text that includes incorporation by reference. In accordance with requirements of 1 CFR 51.5, the EPA is finalizing the incorporation by reference of the SCAQMD rule described in the amendments to 40 CFR part 52 set forth below. The EPA has made, and will continue to make, these documents available through *www.regulations.gov* and at the EPA Region IX Office (please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section of this preamble for more information).

V. Statutory and Executive Order Reviews

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

- Is not a significant regulatory action subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- Is not an Executive Order 13771 (82 FR 9339, February 2, 2017) regulatory action because SIP approvals are exempted under Executive Order 12866;
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the Clean Air Act; and
- Does not provide the EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, the SIP is not approved to apply on any Indian reservation land or in any other area where the EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the rule does not have tribal implications and will not impose substantial direct costs on tribal governments or preempt tribal law as specified by Executive Order 13175 (65 FR 67249, November 9, 2000).

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

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by January 28, 2019. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Ozone, Particulate matter, Reporting and recordkeeping requirements, Volatile organic compounds.

Dated: November 5, 2018.

Deborah Jordan,

Acting Regional Administrator, Region IX.

Part 52, Chapter I, Title 40 of the Code of Federal Regulations is amended as follows:

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

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

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

Subpart F—California

■ 2. Section 52.220 is amended by adding paragraphs (c)(404)(i)(A)(*6*) and (c)(488)(i)(D) to read as follows:

§ 52.220 Identification of plan—in part.

* * * * *

(c) * * *

(404) * * *

(i) * * *

(A) * * *

(*6*) Previously approved on March 26, 2013 in paragraph (c)(404)(i)(A)(*3*) of this section and now deleted with replacement in paragraph (c)(488)(i)(D)(*1*), Rule 1113, ''Architectural Coatings,'' amended on June 3, 2011.

* * * * *

(488) * * *

(i) * * *

(D) South Coast Air Quality Management District.

(*1*) Rule 1113, ''Architectural Coatings,'' amended February 5, 2016, except for the final sentence of paragraphs (b)(8), and (b)(25).

* * * * *

[FR Doc. 2018–25899 Filed 11–28–18; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R02–OAR–2016–0060; FRL–9987–03–Region 2]

Approval of Air Quality Implementation Plans; Puerto Rico; Infrastructure Requirements for the 1997 and 2008 Ozone, 1997 and 2006 Fine Particulate Matter and 2008 Lead NAAQS; Transport Provisions

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is approving State Implementation Plan (SIP) revision submittals from the Commonwealth of Puerto Rico to address the interstate transport of air pollution that may interfere with attainment and maintenance of the National Ambient Air Quality Standards (NAAQS). In this action, EPA is approving Puerto Rico's submissions pertaining to the 1997 and 2008 ozone, 1997 and 2006 fine particulate matter ($PM_{2.5}$) and 2008 lead NAAQS.

DATES: This rule is effective on December 31, 2018.

ADDRESSES: EPA has established a docket for this action under Docket ID No. EPA–R02–OAR–2016–0060. All documents in the docket are listed on the *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 material, is not placed on the internet and will be publicly available only in hard copy form. Publicly available docket materials are available through *www.regulations.gov,* or please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section for additional availability information.

FOR FURTHER INFORMATION CONTACT: Kenneth Fradkin, Air Programs Branch, Environmental Protection Agency, 290 Broadway, 25th Floor, New York, New York 10007–1866, (212) 637–3702, or by email at *fradkin.kenneth@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. What is the background information?

On July 18, 1997, the Environmental Protection Agency (EPA) promulgated a revised National Ambient Air Quality Standards (NAAQS) for ozone (62 FR 38856) and a new NAAQS for fine particle matter ($PM_{2.5}$) (62 FR 38652). The revised ozone NAAQS was based on 8-hour average concentrations. The 8-hour averaging period replaced the previous 1-hour averaging period, and the level of the NAAQS was changed from 0.12 parts per million (ppm) to 0.08 ppm. The new $PM_{2.5}$ NAAQS established a health-based annual standard of 15.0 micrograms per cubic meter ($\mu g/m^3$) based on a 3-year average of annual mean $PM_{2.5}$ concentrations, and a 24-hour standard of 65 $\mu g/m^3$ based on a 3-year average of the 98th percentile of 24-hour concentrations.

On October 17, 2006 (71 FR 61144), effective December 18, 2006, EPA revised the 24-hour average $PM_{2.5}$ primary and secondary NAAQS from 65 $\mu g/m^3$ to 35 $\mu g/m^3$.

On March 27, 2008 (73 FR 16436) EPA strengthened its NAAQS for ground-level ozone, revising the 8-hour primary ozone standard to 0.075 ppm. EPA also strengthened the secondary 8-hour ozone standard to the level of 0.075 ppm making it identical to the revised primary standard.

On November 12, 2008 (73 FR 66964), EPA promulgated a revised NAAQS for lead. The Agency revised the level of the primary lead standard from 1.5 $\mu g/m^3$ to 0.15 $\mu g/m^3$. The EPA also revised the secondary NAAQS to 0.15 $\mu g/m^3$ and made it identical to the revised primary standard.

Pursuant to section 110(a)(1) of the Clean Air Act (CAA), states are required to submit SIPs meeting the applicable requirements of section 110(a)(2) within three years after promulgation of a new or revised NAAQS or within such shorter period as EPA may prescribe. Section 110(a)(2) requires states to address basic SIP elements such as requirements for monitoring, basic program requirements, and legal authority that are designed to assure attainment and maintenance of the NAAQS. Section 110(a) imposes the obligation upon states to make a SIP submission to EPA for a new or revised NAAQS, but the contents of that submission may vary depending upon the facts and circumstances. In particular, the data and analytical tools available at the time the state develops and submits the SIP for a new or revised NAAQS affect the content of the submission. The content of such SIP submission may also vary depending upon what provisions the state's existing SIP already contains.

More specifically, section 110(a)(1) provides the procedural and timing requirements for SIPs. Section 110(a)(2) lists specific elements that states must meet for ''infrastructure'' SIP requirements related to a newly established or revised NAAQS. One of the structural requirements of section 110(a)(2) is section 110(a)(2)(D)(i), which generally requires SIPs to contain adequate provisions to prohibit in-state emissions activities from having certain adverse air quality effects on downwind states due to interstate transport of air pollution. There are four sub-elements, or ''prongs,'' within section 110(a)(2)(D)(i) of the CAA. CAA section 110(a)(2)(D)(i)(I), addressing two of these four prongs, requires SIPs to include provisions prohibiting any source or other type of emissions activity in one state from emitting any air pollutant in amounts that will contribute significantly to nonattainment, or interfere with maintenance, of the NAAQS in another state. The two provisions of this section are referred to as prong 1 (significant contribution to nonattainment) and prong 2 (interference with maintenance).

The Commonwealth of Puerto Rico's Environmental Quality Board (PREQB) submitted five SIP revisions to satisfy the requirements of section 110(a)(2) of the CAA for the 1997 and 2008 ozone, 1997 and 2006 $PM_{2.5}$ and 2008 lead NAAQS. On November 29, 2006, PREQB submitted SIP revisions addressing the infrastructure requirements for the 1997 ozone and $PM_{2.5}$ NAAQS. On January 22, 2013, PREQB submitted SIP revisions addressing the infrastructure requirements for the 2006 $PM_{2.5}$ and 2008 ozone NAAQS. On January 31, 2013, PREQB submitted SIP revisions addressing the infrastructure requirements for the 2008 lead NAAQS. On April 16, 2015, PREQB supplemented the January 22, 2013 submittal for the 2006 $PM_{2.5}$ NAAQS. On February 1, 2016, PREQB submitted additional provisions for inclusion into the SIP which address infrastructure SIP requirements for 1997 and 2008 ozone, 1997 and 2006 $PM_{2.5}$ and 2008 lead NAAQS.

On February 19, 2016 [1] EPA published a rule proposing to approve most of the infrastructure elements and sub-elements submitted by PREQB for the 1997 and 2008 ozone, 1997 and 2006 $PM_{2.5}$ and 2008 lead NAAQS. In the February 2016 rulemaking action, EPA also proposed to approve section 110(a)(2)(D)(i)(I), commonly referred to as prongs 1 and 2. EPA finalized most other infrastructure elements in a September 13, 2016 action.[2] This action finalizes the approval of section 110(a)(2)(D)(i)(I).

II. What comments did EPA receive in response to its proposal?

In response to EPA's proposed approval of Puerto Rico's SIP revision, a comment was received from one interested party. The comment and EPA's response were included in EPA's September 13, 2016 final rule referenced in the previous section.

III. What action is EPA taking?

EPA is approving Puerto Rico's infrastructure submittals dated November 29, 2006, January 22, 2013 and January 31, 2013, and supplemented April 16, 2015 and February 1, 2016, for the 1997 ozone and $PM_{2.5}$, 2008 ozone and 2006 $PM_{2.5}$, and 2008 lead NAAQS, respectively, as meeting the requirements of section 110(a)(2)(D)(i)(I) of the CAA.

A detailed analysis of EPA's review and rationale for approving and disapproving elements of the infrastructure SIP submittals as addressing these CAA requirements may be found in the February 19, 2016 proposed rulemaking action (81 FR 8455) and Technical Support Document (TSD) which are available on line at *www.regulations.gov,* Docket ID Number EPA–R02–OAR–2016–0060.

IV. Statutory and Executive Order Reviews

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

- Is not a significant regulatory action subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- Is not an Executive Order 13771 (82 FR 9339, February 2, 2017) regulatory action because SIP approvals are exempted under Executive Order 12866;
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the Clean Air Act; and
- Does not provide the EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, the SIP is not approved to apply on any Indian reservation land or in any other area where the EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the rule does not have tribal implications and will not impose substantial direct costs on tribal governments or preempt tribal law as specified by Executive Order 13175 (65 FR 67249, November 9, 2000).

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

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United

[1] See 81 FR 8455 (February 19, 2016).

[2] See 81 FR 62813 (September 13, 2016).

States Court of Appeals for the appropriate circuit by January 28, 2019. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2)).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

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

Dated: November 13, 2018.

Peter D. Lopez,

Regional Administrator, Region 2.

For the reasons set forth in the preamble, the Environmental Protection Agency amends part 52 of chapter I, title 40 of the Code of Federal Regulations as follows:

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

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

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

Subpart BBB—Puerto Rico

■ 2. Section 52.2730 is amended by revising paragraphs (a)(1), (b)(1), and (c)(1) to read as follows:

§ 52.2730 Section 110(a)(2) infrastructure requirements.

(a) *1997 8-hour ozone and the 1997 $PM_{2.5}$ NAAQS*—(1) *Approval.* Submittal from Puerto Rico dated November 29, 2006 and supplemented February 1, 2016, to address the CAA infrastructure requirements for the 1997 ozone and the 1997 $PM_{2.5}$ NAAQS. This submittal satisfies the 1997 ozone and the 1997 $PM_{2.5}$ NAAQS requirements of the Clean Air Act (CAA) 110(a)(2)(A), (B), (C) (with the exception of program requirements for PSD), (D)(i)(I), (D)(i)(II) and (ii) (with the exception of program requirements related to PSD), (E), (F), (G), (H), (J) (with the exception of program requirements related to PSD), (K), (L), and (M).

* * * * *

(b) *2008 ozone and the 2006 $PM_{2.5}$ NAAQS*—(1) *Approval.* Submittal from Puerto Rico dated January 22, 2013, supplemented February 1, 2016 to address the CAA infrastructure requirements for the 2008 ozone NAAQS and supplemented April 16, 2015 and February 1, 2016 to address the CAA infrastructure requirements for the 2006 $PM_{2.5}$ NAAQS. This submittal satisfies the 2008 ozone and the 2006 $PM_{2.5}$ NAAQS requirements of the Clean Air Act (CAA) 110(a)(2)(A), (B), (C) (with the exception of program requirements for PSD), (D)(i)(I), (D)(i)(II) and (ii) (with the exception of program requirements related to PSD), (E), (F), (G), (H), (J) (with the exception of program requirements related to PSD), (K), (L), and (M).

* * * * *

(c) *2008 lead NAAQS*—(1) *Approval.* Submittal from Puerto Rico dated January 31, 2013 and supplemented February 1, 2016, to address the CAA infrastructure requirements for the 2008 lead NAAQS. This submittal satisfies the 2008 lead NAAQS requirements of the Clean Air Act (CAA) 110(a)(2)(A), (B), (C) (with the exception of program requirements for PSD), (D)(i)(I), (D)(i)(II) and (ii) (with the exception of program requirements related to PSD), (E), (F), (G), (H), (J) (with the exception of program requirements related to PSD), (K), (L), and (M).

* * * * *

[FR Doc. 2018–25888 Filed 11–28–18; 8:45 am]

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FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 0, 1, and 76

[MB Docket No. 17–290, FCC 18–136]

Form 325 Data Collection; Modernization of Media Regulation Initiative

AGENCY: Federal Communications Commission

ACTION: Final rule.

SUMMARY: In this document, the Federal Communications Commission eliminates the annual FCC Form 325 filing requirement for cable television systems as part of its Modernization of Media Regulation Initiative. As set forth below, the Commission finds that marketplace, operational, and technological changes have overtaken the utility of FCC Form 325, rendering it increasingly obsolete, and that much of the information collected by the form can be obtained from alternative sources. Thus, the Commission concludes that eliminating Form 325 will advance the Commission's goal of reducing outdated regulations and unnecessary regulatory burdens that can impede competition and innovation in media markets.

DATES: Effective November 29, 2018.

ADDRESSES: Federal Communications Commission, 445 12th Street SW, Room TW–C305, Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: Jamile Kadre, *Jamile.Kadre@fcc.gov,* or 202–418–2245.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's *Report and Order,* FCC 18–136, in MB Docket No. 17–290, adopted on September 26, 2018, and released on September 26, 2018. The complete text of this document is available electronically via the search function on the FCC's Electronic Document Management System (EDOCS) web page at *https://apps.fcc.gov/edocs_public/* (*https://apps.fcc.gov/edocs_public/*). The complete document is available for inspection and copying in the FCC Reference Information Center, 445 12th Street SW, Room CY–A257, Washington, DC 20554 (for hours of operation, see *https://www.fcc.gov/general/fcc-reference-information-center*). To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an email to *fcc504@fcc.gov* (mail to: *fcc504@fcc.gov*) or call the FCC's Consumer and Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (TTY).

Synopsis

I. Introduction

1. With this *Report and Order,* we take another important step in our efforts to modernize our media regulations by eliminating the annual FCC Form 325 filing requirement for cable television systems. In November, the Commission issued a Notice of Proposed Rulemaking (*NPRM*) proposing to streamline or eliminate Form 325, Annual Report of Cable Television Systems, which collects operational information from cable television systems nationwide. The majority of commenters support eliminating Form 325. We conclude that eliminating Form 325 will advance the Commission's goal of reducing outdated rules and unnecessary regulatory burdens that can impede competition and innovation in the media marketplace. On balance, we find that the utility of the form is limited and ultimately outweighed by the burden placed on cable operators to file, and on

the Commission to process, this outmoded form.

II. Background

2. Form 325 collects operational information from various cable television systems nationwide, including data about subscriber numbers, equipment information, plant information, frequency and signal distribution information, and programming information. The form is required to be filed annually by: (1) All cable systems with 20,000 or more subscribers (which account for the vast majority of cable subscribers); and (2) a random sampling of smaller cable systems with fewer than 20,000 subscribers. Each December, the Commission sends a notification to each operator required to file Form 325 and instructs the operator to file the form electronically via the FCC's Cable Operations and Licensing System (COALS) within 60 days from the date of the letter.

3. In the *NPRM,* the Commission sought comment on whether to eliminate Form 325 or, in the alternative, improve and streamline the form. The Commission solicited input on ''the continued utility of collecting Form 325 data'' in light of the substantial changes in the multichannel video programming distributor (MVPD) marketplace and in the operations of cable television systems since the Commission last examined the Form 325 data collection in 1999, on the costs associated with completing Form 325, on alternative sources for the information collected by the form, and on whether the benefits of the information collected outweighed those costs. The Commission also sought comment on ways to improve the Form 325 data collection, if it were retained.

III. Discussion

5. With this *Report and Order,* we eliminate the Form 325 filing requirement for cable television systems. As the Commission noted in the *NPRM,* Form 325 was first developed over 50 years ago and the last significant modification of the form was nearly 20 years ago. We find that marketplace, operational, and technological changes have overtaken Form 325 and rendered it increasingly obsolete, as reflected by the Commission's limited use of Form 325 data. Moreover, much of the information collected by the form can be obtained from alternative sources without the burden imposed on cable operators and the Commission by the Form 325 filing requirement. Therefore, we eliminate the requirement set forth in 47 CFR 76.403 of our rules that the operator of every cable television system serving 20,000 or more subscribers and a sampling of operators with systems serving fewer than 20,000 subscribers file Form 325 with the Commission.

Diminished Utility of Form 325

6. In light of substantial changes that have taken place in the MVPD marketplace and in the way that cable systems operate, we find that the information collected by Form 325 is far less relevant today than it was when the Commission last considered, and elected to retain, the form in 1999. As NCTA states, Form 325, with its questions about analog operations and system-based organization, does not reflect the technical realities of present-day cable service where ''individual systems are no longer representative of today's cable network structure due to the use of fiber interconnects and the elimination of numerous standalone headends.'' Importantly, the last time the Commission voted to retain Form 325 in 1999, the cable industry was less than a decade removed from the passage of the Telecommunications Act of 1996 (1996 Act) and the Cable Television Consumer Protection and Competition Act of 1992 (1992 Cable Act)—a time during which the Commission had recently implemented, or was still in the process of implementing, the regulatory mandates of those statutes. It was a time when the MVPD industry—and the prominence of cable operators as video providers—looked very different than it does today. Cable operators at the time accounted for approximately 82 percent of total MVPD subscribers (as compared to roughly 55 percent today) and today's online video streaming services did not yet exist. Accordingly, the Commission noted at the time that Form 325 could be useful for monitoring forthcoming changes in the cable industry, including the introduction of digital cable services. Similarly, the Commission believed that the form could prove useful in collecting information regarding the transition from analog to digital television broadcast signals. Now, the 1996 Act and the 1992 Cable Act are more than 20 years behind us. The digital television transition for full-power broadcast stations occurred over nine years ago and the transition from analog to digital cable service is now almost universal. According to one recent estimate, approximately 97 percent of cable subscribers currently have digital cable service. Therefore, it is clear that many of the expected changes to the cable industry that Form 325 was designed to monitor have already taken place.

7. While we acknowledge that Form 325 may have been useful at one time, and that the data collected by the form have been used by the Commission on various occasions through the years, we find that it has become progressively less useful to, and less used by, the Commission over time and has now reached a point where its limited usefulness can no longer justify its retention. When the Commission elected not to eliminate the form nearly 20 years ago, it envisioned various uses for which the data collected by Form 325 might be useful to the Commission in the future. Today, however, there is little evidence that the information collected by Form 325 continues to be essential for the purposes it once served or could have served. For instance, the Commission found in 1999 that cable modem and set-top box data collected by Form 325 could be useful for ''assess[ing] technical capabilities of cable systems and the future of the industry'' and that information on channel lineups could be used to ''determine the impact of our must-carry and retransmission consent'' rules. Similarly, Public Knowledge contends that Form 325 provides information useful to the Commission in fulfilling its obligations under Section 629 to promote the competitive availability of navigation devices. However, recent Commission rulemakings related to Section 629 and retransmission consent relied on third-party sources of data rather than Form 325 to inform their analysis.

8. Indeed, recent instances where the Commission has cited Form 325 data in rulemaking proceedings are extremely limited, and in those instances where it has been cited, it is not clear that the data cited was critical to any major decision or that it was available exclusively via Form 325. For instance, in the most recent example, the Commission cited Form 325 data in a single footnote of an order to estimate the number of low power television (LPTV) and Class A stations carried on cable systems pursuant to mandatory carriage—data which would continue to be available in public inspection files—and one party in that proceeding directly questioned the accuracy of the Commission's estimate. In another example, the Commission used information collected via Form 325 about the number of deployed set-top boxes to affirm a conclusion that applying IP closed captioning rules only to devices with built-in screens would exclude a common means by which consumers view programming. Beyond these examples, the Commission has

also, on occasion, used Form 325 data to determine how many subscribers could potentially be affected when providing regulatory relief to systems and operators or to craft exemptions on the basis of number of subscribers served. All of this, however, amounts to just a handful of fairly minor uses over the past six-plus years in instances where such data could otherwise have been obtained from information requests or other inquiries.

9. In addition, although the Commission has been statutorily required to produce an annual report to Congress on ''the status of competition in the market for the delivery of video programming,'' rather than use the data from Form 325, the Commission has routinely opened a dedicated proceeding and issued a Public Notice to solicit information to compile the report. As Verizon notes, the two most recent annual video competition reports did not cite to Form 325 at all, relying instead on third-party sources for such statistics as subscribers to cable services and the number of homes passed. Indeed, when the Commission sought to rely on the Form 325 data for more substantial use in its *13th Video Competition Report,* it concluded that the data were inadequate for assessing whether the homes passed and subscriber thresholds had been met under the section 612(g) ''70/70 test''—pursuant to which the Commission has authority to promulgate any additional rules necessary to provide diversity of information sources ''at such time as cable systems with 36 or more activated channels are available to 70 percent of households within the United States and are subscribed to by 70 percent of the households to which such systems are available.'' Instead, the Commission concluded that an industrywide information collection would be necessary to compile the requisite data. Even for the more discrete use of Form 325 data in the *14th Video Competition Report*—to show the percentage of households passed by incumbent cable systems that subscribe to these systems as well as the number of very small cable systems surveyed that offer neither internet access nor telephone services—the report itself noted that data from SNL Kagan could provide similar information. Additionally, although the Media Bureau's annual report on cable prices references Form 325 in a note to a table in the appendix, Bureau staff today relies primarily on other sources to compile the data presented in the table. Moreover, there is minimal public demand for the data presently available; only a single party annually files a Freedom of Information Act request for Form 325 data and no commenters claim to currently use or recently have used Form 325 data.

10. In addition to being little used today, we note that the Form 325 data are subject to certain inherent constraints that render them less than ideal and limit the purposes for which they can be used, such as the fact that Form 325 data do not correspond to common geographic units such as census blocks, counties, or DMAs and the Commission ''has no reliable method for converting the geographic area of a cable system to such units. As noted above, Form 325 data have not been collected universally across the entire cable industry since the 1990s, and Form 325 is not filed by many of the smallest cable systems, a fact that may render it somewhat less useful for purposes of assessing the latter segment of the cable industry in particular. For example, in determining the carriage of in-state broadcast stations on cable systems for congressionally mandated reports pursuant to the Satellite Television Extension and Localism Act of 2010 (STELA) and the STELA Reauthorization Act of 2014 (STELAR), the Commission noted that many rural counties of interest for purposes of the required reports may be served by cable systems not subject to the Form 325 filing requirement. Given the diminishing relevance of, and alternative sources for, the Form 325 data, any attempt to expand the data collection among the smallest cable systems in order to make the collection more comprehensive would likely entail significant burdens for those systems least able to bear them in exchange for little, if any, offsetting benefit. Moreover, in addition to not being filed by many of the smallest cable systems, Form 325 is not filed by non-cable video providers either (*e.g.,* DBS operators), further limiting its ability to shed light on the overall video marketplace.

Alternative Sources for Information Currently Collected by Form 325

11. As mentioned above, the Commission has increasingly been turning to public and third-party sources of data to help guide its policymaking. In this regard, we note that information on subscribers, equipment, physical plant, frequency and signal distribution, or programming, such as that currently collected via Form 325, is available through alternative sources. For instance, although Public Knowledge asserts that the data collected via Form 325 provide valuable information on the broadband industry, the Commission noted in the *NPRM* that the cable modem and telephony subscriber data collected by Form 325 are similar, and likely inferior, to data collected via Form 477—the Commission's primary vehicle for collecting information about the broadband industry. In addition to Form 477, other sources of cable industry data include: Information collected via FCC Forms 320, 322, 324, 327, and 333; information provided pursuant to section 76.1205 and section 76.1709; other governmental filings, such as Securities and Exchange Commission (SEC) filings and Copyright Office Statements of Account; information released by industry groups such as ACA and NCTA; and information available through commercial sources such as SNL Kagan and S&P Global Market Intelligence (S&P Global), BIA/Kelsey (BIA Advisory Services), The Nielsen Company, and Television and Cable Factbook (Warren Communications). In particular, as noted in the *NPRM,* channel lineup information, such as that collected by Form 325, is widely available from public sources that include cable operator websites and third-party guide services. Additionally, information related to the carriage of leased access programming, the availability of which was once a concern underpinning the collection of channel lineup information, is now available through at least one commercial source, and the Commission also provides information on the average number of leased access channels in its *Cable Price Survey Report.* We believe that these other sources available to the Commission generally offer the accuracy, timeliness, and ongoing availability that the Commission once looked to Form 325 to provide, as evidenced by the fact that both the Commission and industry stakeholders regularly rely upon such sources, not Form 325, for various purposes. Specifically, we find that other sources besides Form 325 also provide voluminous, standardized information that can be used to conduct year-over-year comparisons, as the Commission routinely does.

12. Of course, even after eliminating the Form 325 filing requirement, the Commission retains the ability to obtain data on an as-needed basis. For example, the Commission regularly seeks detailed market-by-market information from applicants in transactions involving MVPDs or internet service providers regarding homes passed, numbers of subscribers, services provided, and competitors faced, among other things. The Commission often seeks similar

information from third-party competitors as well. This is ultimately a more cost-effective and targeted approach than trying to collect data through an industrywide mechanism such as Form 325. In addition, the Commission also retains the ability to collect information and data through rulemakings, inquiries, and other collections, which may yield more current data than Form 325.

13. In short, we believe the information available through all of these alternative sources is sufficiently reliable that we can confidently eliminate Form 325. We therefore disagree with Public Knowledge's assertions that information collected in rulemakings and other proceedings cannot be considered a sufficiently reliable alternative to Form 325 data because firms are not compelled to disclose the information and are not subject to a certification of accuracy. First, we note that there is an expectation that parties submitting comments or data in Commission proceedings will not provide false or misleading information to the Commission, and even if a party provides information that arguably could be seen as biased or one-sided in some way, respondents in Commission proceedings have an opportunity to set the record straight by highlighting such bias for the Commission or submitting their own contrary analyses. Moreover, we note that making false statements to the United States government is punishable by law; therefore, many of the other federal filings mentioned above likely would be at least as reliable and accurate as Form 325 filings, and thus could serve a cross-check function similar to that which Public Knowledge asserts Form 325 data fulfill.

14. In addition, we find that other publicly available sources, including those mentioned above, are likely to be more useful than the information collected by Form 325 in keeping the public informed about the cable industry. Such sources generally present a more up-to-date picture of the industry than Form 325 data, which are currently withheld from the public for three years due to competitive concerns. Furthermore, we note that no commenters in this proceeding state that they are currently using, or have recently used, the Form 325 data for any purpose, which is not surprising given the datedness of the information and the abundance of other sources available. Lastly, although Public Knowledge correctly notes that proprietary information from commercial sources can be expensive and subject to restrictive licensing terms, the Commission analyzes such sources in producing video competition reports and other documents available to the public, and many alternatives to Form 325 data are available to and have been used by commenters in Commission proceedings.

15. While we agree with Public Knowledge that the Commission has a responsibility—and Congress and the public have an interest—in remaining informed about the nature and evolution of the cable industry, we find today that Form 325 does not remain necessary to fulfilling that responsibility.

Burdens Imposed by Form 325 Data Collection

16. According to commenters, Form 325 is a significant burden to cable operators. ACA, NCTA, and Verizon report substantial time spent on these forms, in excess of Commission estimates. According to NCTA, even if the Commission's two-hour estimate for completion of a Form 325 reflected operators' experience, larger operators ''would still need to devote 10 weeks' worth of employee time'' to complete the required forms. ACA points to ''several reasons for this lengthy timeframe,'' including that the form requires gathering of information that is not used in the typical course of business and collaboration among employees who do not typically interface. According to ACA, such a burden is particularly challenging for smaller operators with fewer resources at their disposal. NCTA also asserts that, ''[d]epending on internal workload and resources, some operators must hire contract workers to input data.'' In addition, both NCTA and ACA point to the need for operators to retain outside counsel ''to ensure that sensitive Form 325 data is provided confidential treatment.'' While commenters did not provide estimates of the monetary costs associated with completing and filing Form 325, the limited utility of the data collected therein cannot justify the number of hours expended by operators with limited resources in completing Form 325. Further, even the Commission's lower estimate of two hours to complete a Form 325 for each PSID represents a burden that likely outweighs the limited usefulness of Form 325 data today. Finally, we note that the Form 325 data collection also places significant burdens on Commission staff to collect, compile, and maintain the data.

17. In the *NPRM,* the Commission sought comment on ways to improve Form 325, if it were retained. In response, Public Knowledge suggests that rather than eliminate Form 325, the Commission should improve it and make better use of the data collected. However, we find that any attempt to overhaul Form 325 to make it more up-to-date and useful would be substantial and would likely result in creating a form that would duplicate other similarly up-to-date and useful sources that already exist. At the same time, we note that our action today does not obviate the need or legal obligation to file other data with the Commission, nor does it preclude future collection of relevant cable system information by the Office of Economics and Analytics once it is up and running.

18. In sum, we find that the Form 325 is outdated and imposes significant burdens on both cable operators and Commission staff. Because this filing requirement no longer provides sufficient offsetting benefits to justify its retention, we find that its elimination is in the public interest.

IV. Procedural Matters

19. *Paperwork Reduction Analysis.* This document eliminates, and thus does not contain new or revised, information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104–13, 44 U.S.C. 3501–3520. In addition, therefore, it does not contain any new or modified ''information burden for small business concerns with fewer than 25 employees'' pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, 44 U.S.C. 3506(c)(4).

Final Regulatory Flexibility Analysis

20. As required by the Regulatory Flexibility Act of 1980, as amended (RFA), an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the *NPRM* in MB Docket 17–290. The Commission sought written public comments on proposals in the *NPRM,* including comment on the IRFA. The Commission received no direct comments on the IRFA, although some commenters discussed the effect of the proposals on smaller entities, as discussed below. The present Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.

Need for, and Objectives of, the Report and Order

21. The *Report and Order* arises from a Public Notice issued by the Commission in May 2017, launching an initiative to modernize the Commission's media regulations. The *Report and Order* finds that marketplace, operational, and technological changes have overtaken Form 325 and rendered it increasingly

obsolete, as reflected by the Commission's limited use of Form 325 data and reliance on alternative sources of data that offer the accuracy, timeliness, and ongoing availability that the Commission once looked to Form 325 to provide. In addition, the *Report and Order* finds that efforts to make Form 325 more up-to-date and useful would be substantial and would likely result in creating a form that would duplicate other similarly up-to-date and useful sources that already exist. The *Report and Order* concludes that the Form 325 data collection represents a significant burden on cable operators, as well as on Commission staff, and that this burden outweighs the limited usefulness of Form 325 data. Accordingly, the *Report and Order* adopts the *NPRM'*s proposal to eliminate Form 325. Specifically, the *Report and Order* eliminates: (i) The requirement that the operator of every operational cable television system that serves 20,000 or more file with the Commission a Form 325 soliciting general information and frequency and signal distribution information on a Physical System Identification Number (''PSID'') basis; and (ii) the requirement that Form 325 be filed by any cable operator with less than 20,000 subscribers selected by random sampling.

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

22. No comments were filed in direct response to the IRFA.

Response to Comments by the Chief Counsel for Advocacy of the Small Business Administration

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

Description and Estimate of the Number of Small Entities to Which Rules Will Apply

24. The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that will be affected by the rules adopted. The RFA generally defines the term ''small entity'' as having the same meaning as the terms ''small business,'' ''small organization,'' and ''small governmental jurisdiction.'' In addition, the term ''small business'' has the same meaning as the term ''small business concern'' under the Small Business Act. A ''small business concern'' is one which: (1) Is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA. The final rules adopted herein affect small television and radio broadcast stations and small entities that operate daily newspapers. A description of these small entities, as well as an estimate of the number of such small entities, is provided below.

25. *Cable Companies and Systems (Rate Regulation).* The Commission has developed its own small business size standards for the purpose of cable rate regulation. Under the Commission's rules, a ''small cable company'' is one serving 400,000 or fewer subscribers nationwide. In addition, under the Commission's rate regulation rules, a ''small system'' is a cable system serving 15,000 or fewer subscribers. Industry data indicate that there are currently 4,300 active cable systems in the United States. Of this total, 3,550 cable systems have fewer than 15,000 subscribers, and 750 systems have 15,000 or more subscribers. Thus, we estimate that most cable systems are small entities.

26. *Cable System Operators (Telecom Act Standard).* The Communications Act of 1934, as amended, also contains a size standard for small cable system operators, which is ''a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed $250 million.'' There are approximately 51,859,070 cable video subscribers in the United States today. Accordingly, an operator serving fewer than 518,590 subscribers shall be deemed a small operator if its annual revenues, when combined with the total annual revenues of all its affiliates, do not exceed $250 million in the aggregate. Based on available data, we find that all but six incumbent cable operators are small entities under this size standard. We note that the Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed $250 million. Although it seems certain that some of these cable system operators are affiliated with entities whose gross annual revenues exceed $250 million, we are unable at this time to estimate with greater precision the number of cable system operators that would qualify as small cable operators under the definition in the Communications Act.

Description of Reporting, Recordkeeping, and Other Compliance Requirements for Small Entities

27. The *Report and Order* eliminates the rule requiring cable system operators to complete Form 325. Accordingly, the *Report and Order* does not impose any new reporting, recordkeeping, or compliance requirements for small entities. The *Report and Order* thus will not impose additional obligations or expenditure of resources on small businesses.

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

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

29. In this proceeding, the Commission has three chief alternatives available for Form 325—eliminate the form, modernize and streamline it, or retain it. The Commission finds that marketplace, operational, and technological changes have overtaken Form 325 and rendered it increasingly obsolete, as reflected by the Commission's limited use of Form 325 data and reliance on alternative sources of data that offer the accuracy, timeliness, and ongoing availability that the Commission once looked to Form 325 to provide. The Commission finds further that eliminating the form will benefit small entities by reducing the burden and costs of compliance. Thus, the *Report and Order* eliminates the obligation for cable systems to file Form 325. Eliminating this requirement is intended to modernize the Commission's regulations and reduce costs and recordkeeping burdens for affected entities, including small entities. According to commenters, small entities spend as many as ten hours completing Form 325. Under the revised rules, affected entities no longer will need to expend time and resources collecting, maintaining, and organizing the information requested in the form or

completing the form. Therefore, removing this information collection requirement will help small entities in particular to cut unnecessary costs related to gathering the information requested in Form 325 and completing the form. Thus, we anticipate that affected small entities will benefit from these revisions.

Report to Congress

30. The Commission will send a copy of the *Report and Order,* including this FRFA, in a report to be sent to Congress pursuant to the Congressional Review Act. In addition, the Commission will send a copy of the *Report and Order,* including this FRFA, to the Chief Counsel for Advocacy of the SBA.

Federal Rules That May Duplicate, Overlap, or Conflict With the Proposed Rule

31. None.

V. Ordering Clauses

32. Accordingly, *it is ordered* that, pursuant to the authority found in sections 1, 4(i), 4(j), and 303 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154(i), 154(j), and 303, this *Order is adopted.*

33. *It is further ordered* that, pursuant to the authority found in sections 1, 4(i), 4(j), and 303 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154(i), 154(j), and 303, the Commission's rules *ARE AMENDED* as set forth in Appendix A, effective as of the date of publication of a summary in the **Federal Register**.

34. *It is further ordered* that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, *shall send* a copy of this *Order,* including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

35. *It is further ordered* that, pursuant to Section 801(a)(1)(A) of the Congressional Review Act, 5 U.S.C. 801(a)(1)(A), the Commission *shall send* a copy of the *Order* to Congress and to the Government Accountability Office.

36. *It is further ordered* that, should no petitions for reconsideration or petitions for judicial review be timely filed, MB Docket No. 17–290 *shall be terminated* and its docket closed.

Federal Communications Commission.

Cecilia Sigmund,

Federal Register Liaison Officer, Office of the Secretary.

Final Rules

For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR parts 0, 1, and 76 of title 47 as follows:

PART 0—COMMISSION OPERATIONS

■ 1. The authority citation for part 0 continues to read as follows:

Authority: Sec. 5, 48 Stat. 1068, as amended; 47 U.S.C. 155, 225, unless otherwise noted.

§ 0.408 [Amended]

■ 2. Amend § 0.408 in the table in paragraph (b) by removing the entry for ''3060–0061, FCC 325, 01/31/20''.

PART 1—PRACTICE AND PROCEDURE

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

Authority: 47 U.S.C. 151, 154(i), 155, 157, 160, 201, 225, 227, 303, 309, 332, 1403, 1404, 1451, 1452, and 1455, unless otherwise noted.

■ 4. Amend § 1.1703 by revising paragraph (e) to read as follows:

§ 1.1703 Definitions.

* * * * *

(e) *Filings.* Any application, notification, registration statement, or report in plain text, or, when as prescribed, on FCC Forms, 320, 321, 322, 324, or 327, whether filed in paper form or electronically.

* * * * *

§ 1.1705 [Amended]

■ 5. Amend § 1.1705 by removing and reserving paragraph (a)(5) and by removing ''325,'' from paragraph (b) introductory text and from paragraph (c)(1).

PART 76—MULTICHANNEL VIDEO AND CABLE TELEVISION SERVICE

■ 6. 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.

Subpart I—[Removed and Reserved]

■ 7. Remove and reserve subpart I, consisting of § 76.403.

[FR Doc. 2018–25323 Filed 11–28–18; 8:45 am]

BILLING CODE 6712–01–P

Proposed Rules

Federal Register

Vol. 83, No. 230

Thursday, November 29, 2018

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

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2018–0965; Product Identifier 2018–NM–124–AD]

RIN 2120–AA64

Airworthiness Directives; Bombardier, Inc., Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for certain Bombardier, Inc., Model BD–100–1A10 airplanes. This proposed AD was prompted by a report that certain split ball bearings used in main landing gear (MLG) side brace actuator assemblies are manufactured from material that does not meet the required material properties. This proposed AD would require an inspection of the left and right MLG side brace actuator assembly and, if necessary, replacement of the split ball bearing. We are proposing this AD to address the unsafe condition on these products.

DATES: We must receive comments on this proposed AD by January 14, 2019.

ADDRESSES: You may send comments, using the procedures found in 14 CFR 11.43 and 11.45, by any of the following methods:

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

For service information identified in this NPRM, contact Bombardier, Inc., 400 Côte-Vertu Road West, Dorval, Québec H4S 1Y9, Canada; telephone 514–855–5000; fax 514–855–7401; email *thd.crj@aero.bombardier.com;* internet *http://www.bombardier.com.* You may view this service information at the FAA, Transport Standards Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195.

Examining the AD Docket

You may examine the AD docket on the internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2018–0965; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this NPRM, the regulatory evaluation, any comments received, and other information. The street address for Docket Operations (phone: 800–647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Darren Gassetto, Aerospace Engineer, Mechanical Systems and Admin Services Section, FAA, New York ACO Branch, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; telephone 516–228–7323; fax 516–794–5531; email *9-avs-nyaco-cos@faa.gov.*

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposal. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2018–0965; Product Identifier 2018–NM–124–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this NPRM. We will consider all comments received by the closing date and may amend this NPRM because of those comments.

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

Discussion

Transport Canada Civil Aviation (TCCA), which is the aviation authority for Canada, has issued Canadian AD CF–2018–20, dated July 27, 2018 (referred to after this as the Mandatory Continuing Airworthiness Information, or ''the MCAI''), to correct an unsafe condition for certain Bombardier, Inc., Model BD–100–1A10 airplanes. The MCAI states:

> The landing gear supplier has informed Bombardier Aerospace about a quality escape involving Main Landing Gear (MLG) side brace actuators that have been assembled using non-conforming split ball bearings. The affected bearings are manufactured from material that does not meet the required material properties. If not corrected, this condition can result in potentially asymmetric MLG gear extension or retraction and subsequent gear collapse during landing.
>
> This AD mandates verification of the installed MLG side brace actuator assemblies and replacement of the affected parts.

You may examine the MCAI in the AD docket on the internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2018–0965.

Related Service Information Under 1 CFR Part 51

Bombardier, Inc., has issued Service Bulletin 100–32–30, dated December 18, 2017, and Service Bulletin 350–32–006, dated December 18, 2017. The service information describes procedures to perform an inspection of the left and right MLG side brace actuator assembly to verify the serial number and replacement of the split ball bearing. These documents are distinct since they apply to airplanes in different configurations. This service information is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in the **ADDRESSES** section.

FAA's Determination

This product has been approved by the aviation authority of another country, and is approved for operation in the United States. Pursuant to our bilateral agreement with the State of Design Authority, we have been notified of the unsafe condition described in the MCAI and service information referenced above. We are proposing this AD because we evaluated all the relevant information and determined the unsafe condition described previously is likely to exist or develop on other products of the same type design.

Proposed Requirements of This NPRM

This proposed AD would require accomplishing the actions specified in the service information described previously.

Costs of Compliance

We estimate that this proposed AD affects 468 airplanes of U.S. registry. We estimate the following costs to comply with this proposed AD:

ESTIMATED COSTS FOR REQUIRED ACTIONS

Labor cost	Parts cost	Cost per product	Cost on U.S. operators
1 work-hours × $85 per hour = $85	$0	$85	$39,780

We estimate the following costs to do any necessary on-condition actions that would be required based on the results of the required inspection. We have no way of determining the number of aircraft that might need this on-condition actions:

ESTIMATED COSTS OF ON-CONDITION ACTIONS

Labor cost	Parts cost	Cost per product
8 work-hours × $85 per hour = $680	$1,820	$2,500

According to the manufacturer, some or all of the costs of this proposed AD may be covered under warranty, thereby reducing the cost impact on affected individuals. We do not control warranty coverage for affected individuals. As a result, we have included all known costs in our cost estimate.

Authority for This Rulemaking

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

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

This proposed AD is issued in accordance with authority delegated by the Executive Director, Aircraft Certification Service, as authorized by FAA Order 8000.51C. In accordance with that order, issuance of ADs is normally a function of the Compliance and Airworthiness Division, but during this transition period, the Executive Director has delegated the authority to issue ADs applicable to transport category airplanes to the Director of the System Oversight Division.

Regulatory Findings

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

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

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

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

3. Will not affect intrastate aviation in Alaska; and

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

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

Bombardier, Inc.: Docket No. FAA–2018–0965; Product Identifier 2018–NM–124–AD.

(a) Comments Due Date

We must receive comments by January 14, 2019.

(b) Affected ADs

None.

(c) Applicability

This AD applies to Bombardier, Inc., Model BD–100–1A10 airplanes, certificated in any category, serial numbers 20003 through 20500 and 20501 through 20665 inclusive.

(d) Subject

Air Transport Association (ATA) of America Code 32, Landing gear.

(e) Reason

This AD was prompted by a report that certain split ball bearings used in main landing gear (MLG) side brace actuator assemblies are manufactured from material that does not meet the required material properties. We are issuing this AD to address these non-conforming split ball bearings, which, if not corrected, can result in potentially asymmetric MLG extension or retraction and consequent collapse of the MLG during landing.

(f) Compliance

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

(g) Inspection

At the applicable time specified in figure 1 to paragraphs (g) and (h) of this AD: Perform an inspection to verify the serial number of the left and right MLG side brace actuator assembly P/N 40310–103, in accordance with paragraphs 2.A. and 2.B. of the Accomplishment Instructions of Bombardier Service Bulletin 100–32–30, dated December 18, 2017; or perform an inspection to verify the serial number of the left and right MLG side brace actuator assembly P/N 2–8554–2, in accordance with paragraphs 2.A. and 2.B. of the Accomplishment Instructions of Bombardier Service Bulletin 350–32–006, dated December 18, 2017; as applicable.

Figure 1 to paragraphs (g) and (h) of this AD – *Compliance Times*

Airplane cycles	Compliance Time
As of the effective date of this AD: 3,350 total flight cycles or less	Before accumulating 3,750 total flight cycles or 48 months, from the effective date of this AD, whichever occurs first
As of the effective date of this AD: more than 3,350 total flight cycles	Within 400 flight cycles or 12 months, after the effective date of this AD, whichever occurs first

(h) Replacement

If, during the inspection specified in paragraph (g) of this AD, the serial number of the part installed is listed in table 1 of paragraph 2.B. of the Accomplishment Instructions of Bombardier Service Bulletin 100–32–30, dated December 18, 2017; or table 1 of paragraph 2.B. of the Accomplishment Instructions of Bombardier Service Bulletin 350–32–006, dated December 18, 2017; as applicable: at the applicable time specified in figure 1 to paragraphs (g) and (h) of this AD replace the split ball bearing P/N 104467672, in accordance with paragraph 2.C. of the Accomplishment Instructions of Bombardier Service Bulletin 100–32–30, dated December 18, 2017; or paragraph 2.C. of the Accomplishment Instructions of Bombardier Service Bulletin 350–32–006, dated December 18, 2017, as applicable. If the serial number of the installed part is not listed in table 1 of paragraph 2.B. of the Accomplishment Instructions of Bombardier Service Bulletin 100–32–30, dated December 18, 2017; or table 1 of paragraph 2.B. of the Accomplishment Instructions of Bombardier Service Bulletin 350–32–006, dated December 18, 2017; as applicable, no further action is required by this paragraph.

(i) Parts Installation Limitation

As of the effective date of this AD, no person may install on any Bombardier, Inc., Model BD–100–1A10 airplane, any MLG side brace actuator assembly on with a serial number listed in table 1 of paragraph 2.B. of the Accomplishment Instructions of Bombardier Service Bulletin 100–32–30, dated December 18, 2017; or table 1 of paragraph 2.B. of the Accomplishment Instructions of Bombardier Service Bulletin 350–32–006, dated December 18, 2017; as applicable, unless the split ball bearing P/N 104467672 has been previously replaced as specified in paragraph (h) of this AD.

(j) Other FAA AD Provisions

The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, New York ACO Branch, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the manager of the certification office, send it to ATTN: Program Manager, Continuing Operational Safety, FAA, New York ACO Branch, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; telephone 516–228–7300; fax 516–794–5531. Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding district office.

(2) *Contacting the Manufacturer:* For any requirement in this AD to obtain corrective actions from a manufacturer, the action must be accomplished using a method approved by the Manager, New York ACO Branch, FAA; or Transport Canada Civil Aviation (TCCA); or Bombardier, Inc.'s TCCA Design Approval Organization (DAO). If approved by the DAO, the approval must include the DAO-authorized signature.

(k) Related Information

(1) Refer to Mandatory Continuing Airworthiness Information (MCAI) Canadian AD CF–2018–20, dated July 27, 2018, for related information. This MCAI may be found in the AD docket on the internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2018–0965.

(2) For more information about this AD, contact Darren Gassetto, Aerospace Engineer, Mechanical Systems and Admin Services Section, FAA, New York ACO Branch, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; telephone 516–228–7323; fax 516–794–5531; email *9-avs-nyaco-cos@faa.gov.*

(3) For service information identified in this AD, contact Bombardier, Inc., 400 Côte-Vertu Road West, Dorval, Québec H4S 1Y9, Canada; telephone 514–855–5000; fax 514–855–7401; email *thd.crj@aero.bombardier.com;* internet *http://www.bombardier.com.* You may view this service information at the FAA, Transport Standards Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195.

Issued in Des Moines, Washington, on November 15, 2018.

Dionne Palermo,

Acting Director, System Oversight Division, Aircraft Certification Service.

[FR Doc. 2018–25880 Filed 11–28–18; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Part 33

[Docket No. RM19–4–000]

Implementation of Amended Section 203(a)(1)(B) of the Federal Power Act

AGENCY: Federal Energy Regulatory Commission, Department of Energy.

ACTION: Notice of proposed rulemaking.

SUMMARY: Pursuant to ''An Act to amend section 203 of the Federal Power Act'' (Act), the Federal Energy Regulatory Commission (Commission) proposes to revise its regulations relating to mergers or consolidations by a public utility.

Specifically, the Commission proposes to revise its regulations to establish that a public utility must seek authorization under amended section 203(a)(1)(B) of the Federal Power Act to merge or consolidate, directly or indirectly, its facilities subject to the jurisdiction of the Commission, or any part thereof, with the facilities of any other person, or any part thereof, that are subject to the jurisdiction of the Commission and have a value in excess of $10 million, by any means whatsoever. In addition, as required by the Act, the Commission proposes to establish a notification requirement for mergers or consolidations by a public utility if the facilities to be acquired have a value in excess of $1 million and such public utility is not required to secure Commission authorization under amended section 203(a)(1)(B).

DATES: Comments are due December 31, 2018.

ADDRESSES: Comments, identified by docket number, may be filed electronically at *http://www.ferc.gov* in acceptable native applications and print-to-PDF, but not in scanned or picture format. For those unable to file electronically, comments may be filed by mail or hand-delivery to: Federal Energy Regulatory Commission, Secretary of the Commission, 888 First Street NE, Washington, DC 20426. The Comment Procedures Section of this document contains more detailed filing procedures.

FOR FURTHER INFORMATION CONTACT:

Eric Olesh (Technical Information), Office of Energy Market Regulation, Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426, (202) 502–6524.

Regine Baus (Legal Information), Office of the General Counsel, Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426, (202) 502–8757.

SUPPLEMENTARY INFORMATION:

I. Background

1. On September 28, 2018, ''An Act to amend section 203 of the Federal Power Act'' (Act) was signed into law. Section 1 of the Act amended section 203(a)(1)(B) to provide that no public utility shall, without first having secured an order of the Commission authorizing it to do so, merge or consolidate, directly or indirectly, its facilities subject to the jurisdiction of the Commission, or any part thereof, with the facilities of any other person, or any part thereof, that are subject to the jurisdiction of the Commission and have a value in excess of $10 million, by any means whatsoever. Section 3 of the Act provides that the amendment to section 203(a)(1)(B) shall take effect 180 days after the date of enactment of the Act. The primary effect of this amendment is to establish a $10 million threshold on transactions that will be subject to the Commission's review and authorization under section 203(a)(1)(B).

2. In section 2 of the Act, Congress amended section 203(a) to add section (a)(7) to require notification for certain transactions. Section 203(a)(7) provides that, not later than 180 days after the date of the enactment of section 203(a)(7), the Commission shall promulgate a rule requiring any public utility that is seeking to merge or consolidate, directly or indirectly, its facilities subject to the jurisdiction of the Commission, or any part thereof, with those of any other person, to notify the Commission of such transactions not later than 30 days after the date on which the transaction is consummated if: (1) The facilities, or any part thereof, to be acquired are of a value in excess of $1 million; and (2) such public utility is not required to secure a Commission order under amended section 203(a)(1)(B). The Commission's proposed implementation of the above changes is discussed below.

II. Discussion

3. The Commission proposes two changes to part 33 of its regulations to bring them into conformance with the Act. First, the Commission proposes to revise § 33.1(a)(1)(ii) to provide that part 33 will apply to any public utility seeking authorization under section 203 to merge or consolidate, directly or indirectly, its facilities subject to the jurisdiction of the Commission, or any part thereof, with the facilities of any other person, or any part thereof, that are subject to the jurisdiction of the Commission and have a value in excess of $10 million, by any means whatsoever.[1]

4. Second, the Commission proposes to require public utilities whose transactions are subject to section 203(a)(7) to file notification of such transactions with the Commission. Specifically, the Commission proposes that any public utility that is seeking to merge or consolidate, directly or indirectly, its facilities subject to the jurisdiction of the Commission, or any part thereof, with those of any other person must notify the Commission of such transaction not later than 30 days after the date on which the transaction is consummated if: (1) The facilities, or any part thereof, to be acquired are of a value in excess of $1 million; and (2) such public utility is not required to secure an order of the Commission under section 203(a)(1)(B).

5. In this notification filing, the Commission proposes that public utilities subject to section 203(a)(7) file the following information: (1) The exact name of the public utility and its principal business address; and (2) a narrative description of the transaction, including the identity of all parties involved in the transaction and all jurisdictional facilities associated with or affected by the transaction, the location of such jurisdictional facilities involved in the transaction, the date on which the transaction was consummated, the consideration for the transaction, and the effect of the transaction on the ownership and control of such jurisdictional facilities.

6. New section 203(a)(7)(B) requires that, ''[i]n establishing any notification requirement under subparagraph (A), the Commission shall, to the maximum extent practicable, minimize the paperwork burden resulting from the collection of information.'' We believe that the information to be included in the proposed notification filing represents a substantial reduction in paperwork from the full filing requirements under part 33 for applications for transactions that are required to secure an order from the Commission under amended section 203(a)(1)(B). Public utilities subject to section 203(a)(7) were previously required to submit complete applications with all relevant information required by part 33. The information to be included in the proposed notification filing represents only a small fraction of the information contemplated in part 33.

7. Further, the information the Commission proposes to require in the notification filing will allow the Commission to monitor the merger or consolidation of facilities subject to its jurisdiction. Although the transactions contemplated pursuant to section 203(a)(7) are unlikely to present concerns under the Commission's public interest analysis and public utilities entering into these transactions are not required to secure an order of the Commission under amended section 203(a)(1)(B), the information the Commission proposes to require in the notification filing will allow the

[1] Public utilities required to maintain their books of account in accordance with the Commission's Uniform System of Accounts under 18 CFR part 101 must continue to file with the Commission proposed journal entries for the purchase or sale of electric plant, consistent with the instructions to Account 102, Electric Plant Purchased and Sold. The dollar threshold established in this proposed rulemaking does not apply to this accounting filing requirement.

Commission to collect information about the transaction should a question arise related to the underlying facilities and the Commission's oversight under the Federal Power Act.

8. We propose that the notification filing should be filed in the first docket for section 203 filings of the fiscal year (FY). For example, all notification filings made in FY2019 would be filed in Docket No. EC19–1–000; all notification filings for FY2020 would be filed in Docket No. EC20–1–000, etc. We believe that this approach would allow the Commission to track the transactions that fall under section 203(a)(7).

9. Lastly, the Commission clarifies that, except for mergers or consolidations that are valued at $10 million or less, the Commission will not change its interpretation of the transactions that are subject to the jurisdiction of the Commission under the ''merge or consolidate'' clause of section 203(a)(1)(B). That is, the Commission interprets the amendment by Congress to section 203(a)(1)(B) as establishing a $10 million threshold, but not removing the Commission's jurisdiction to review transactions with a higher value that involve a public utility's acquisition of facilities from non-public utilities [2] if those facilities will be subject to the Commission's jurisdiction after the transaction is consummated.[3]

III. Information Collection Statement

10. The collection of information contained in this Notice of Proposed Rulemaking is subject to review by the Office of Management and Budget (OMB) under section 3507(d) of the Paperwork Reduction Act (PRA).[4] The PRA requires each federal agency to seek and obtain OMB approval before undertaking a collection of information directed to 10 or more persons or contained in a rule of general applicability. OMB's regulations [5] require approval of certain information collection requirements imposed by agency rules. Upon approval of a collection of information, OMB will assign an OMB control number and an expiration date. Respondents subject to the filing requirements of an agency rule will not be penalized for failing to respond to the collection of information unless the collection of information displays a valid OMB control number. The Commission solicits comments on the Commission's need for the specific information it proposes to collect, whether the information will have practical utility, the accuracy of the burden estimates, ways to enhance the quality, utility, and clarity of the information to be collected or retained, and any suggested methods for minimizing respondents' burden, including the use of automated information techniques.

11. The revisions to the Commission's regulations proposed in this NOPR would bring the regulations in conformance with the amendments to section 203 enacted by Congress. The first revision would implement Congress' amendment to section 203(a)(1)(B), which provides that a public utility must seek authorization to merge or consolidate, directly or indirectly, its facilities subject to the jurisdiction of the Commission, or any part thereof, with the facilities of any other person, or any part thereof, that are subject to the jurisdiction of the Commission and have a value in excess of $10 million, by any means whatsoever. In addition, the Commission proposes to add § 33.12 to its regulations to implement the directive in new section 203(a)(7) that the Commission require a notification filing for mergers or consolidations by a public utility if the facilities to be acquired have a value in excess of $1 million and such public utility is not required to secure Commission authorization under amended section 203(a)(1)(B). The Commission anticipates that the revisions, once effective, would reduce regulatory burdens. The Commission will submit the proposed reporting requirements to OMB for its review and approval under section 3507(d) of the PRA.[6]

12. While the Commission expects that the regulatory revisions proposed herein will reduce the burdens on affected entities, the Commission nonetheless solicits public comments regarding the accuracy of the burden and cost estimates below.

13. Internal review: The Commission has reviewed the proposed changes and has determined that the changes are necessary.

14. Burden Estimate [7]: The estimated burden and cost for the requirements contained in this NOPR follow.

FERC–519, AS MODIFIED BY NOPR IN DOCKET NO. RM19–4–000

Requirements	Number and type of respondents (1)	Number of responses per respondent (2)	Total number of responses (1) * (2) = (3)	Average burden hours and cost per response (4)	Total burden hours and total cost (3) * (4)
FERC–519 (FPA Section 203 Filings) [8]	26	1	26	1 hr.; $79.00	26 hrs.; $2,054.00

Title: FERC–519, Application under Federal Power Act Section 203.

OMB Control No.: 1902–0082.

Action: Proposed amendment to 18 CFR part 33.

Respondents: Public utilities subject to Federal Power Act.

Abstract: Pursuant to ''An Act to amend section 203 of the Federal Power Act'' (Act), the Commission proposes to revise part 33 of its regulations to establish that mergers or consolidations by a public utility of facilities subject to the jurisdiction of the Commission that have a value in excess of $10 million are subject to Commission authorization. In addition, the Commission proposes to

[2] Non-public utilities refers to entities described in section 201(f) of the Federal Power Act (FPA). 16 U.S.C. 824(f).

[3] *See Duke Power Co.* v. *FPC,* 401 F.2d 930, 941 (DC Cir. 1968) (''We have no doubt that any acquisition from [a non-public utility] by a public utility of what would normally be a jurisdictional facility, such as a transmission line conducting interstate energy, would fall within the purview of the clause under consideration.'').

[4] 44 U.S.C. 3507(d).

[5] 5 CFR 1320.

[6] 44 U.S.C. 3507(d).

[7] ''Burden'' is the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. For further explanation of what is included in the information collection burden, refer to 5 CFR 1320.3.

[8] Commission staff estimates that approximately 26 section 203 filings will change from full section 203 filings to the notification filing described above, and will take one burden hour to complete. The number of respondents and responses is based on Commission staff's estimate that 13 percent of the approximately 200 section 203 filings received will be affected by the NOPR, which represents a significant reduction in burden hours.

add § 33.12 to its regulations to establish a notification requirement for mergers or consolidations by a public utility if the facilities to be acquired have a value in excess of $1 million and such public utility is not required to secure Commission authorization under amended section 203(a)(1)(B).

Overview of the Data Collection: The FERC–519, ''Application under Federal Power Act section 203,'' is necessary to enable the Commission to carry out its responsibilities in implementing the statutory provisions of section 203. Section 203 requires a public utility to seek Commission authorization of transactions in which a public utility disposes of jurisdictional facilities, merges such facilities with the facilities owned by another person, or acquires the securities of another public utility. The Commission must authorize these transactions if it finds that they will be consistent with the public interest.

15. One of the Commission's overarching goals is to promote competition in wholesale power markets, and it has determined that effective competition, as opposed to traditional forms of price regulation, can best protect ratepayer interests. By entering into a certain transaction, a public utility may gain an increased incentive and ability to exercise market power that can be to the detriment of effective competition and customers. As a result, the Commission must review all jurisdictional dispositions, mergers, and acquisitions to evaluate that transaction's effect on competition. The Commission also evaluates whether such transactions have an effect on rates and regulation and whether they result in cross-subsidization. The Commission implements the filing requirements associated with this review in the *Code of Federal Regulations* (CFR) under 18 CFR part 33.

16. This NOPR is limited to implementing amended FPA section 203(a)(1)(B) and proposing a notification requirement for certain other transactions, both of which together represent a reduction in the filing requirements for public utilities under section 203. The Commission proposes this rule by mandate of Congress.

17. Interested persons may obtain information on the reporting requirements by contacting the following: Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426 [Attention: Ellen Brown, Office of the Executive Director] Email: *DataClearance@ferc.gov,* Phone: (202) 502–8663; fax: (202) 273–0873.

18. Comments concerning the collection of information and the associated burden estimate(s) may also be sent to: Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th Street NW, Washington, DC 20503 [Attention: Desk Officer for the Federal Energy Regulatory Commission]. Due to security concerns, comments should be sent electronically to the following email address: *oira_submission@omb.eop.gov.* Please refer to FERC–520, OMB Control No. 1902–0083 in your submission.

IV. Environmental Analysis

19. The Commission is required to prepare an Environmental Assessment or an Environmental Impact Statement for any action that may have a significant adverse effect on the human environment.[9] We conclude that neither an Environmental Assessment nor an Environmental Impact Statement is required for this NOPR under section 380.4(a) of the Commission's regulations, which provides a categorical exemption for ''approval of actions under section[] . . . 203 . . . of the Federal Power Act relating to . . . acquisition or disposition of property. . . .''[10]

V. Regulatory Flexibility Act Certification

20. The Regulatory Flexibility Act of 1980 (RFA)[11] generally requires a description and analysis of proposed rules that will have significant economic impact on a substantial number of small entities. The Small Business Administration's (SBA) Office of Size Standards develops the numerical definition of a small entity. These standards are provided in the SBA regulations at 13 CFR 121.201.[12] The RFA does not mandate any particular outcome in a rulemaking. It only requires consideration of alternatives that are less burdensome to small entities and an agency explanation of why alternatives were rejected.

21. The SBA size standards for electric utilities is based on the number of employees, including affiliates. Under SBA's standards, some transmission owners will fall under the following category and associated size threshold: electric bulk power transmission and control, at 500 employees.[13]

22. The Commission estimates that 26 respondents could file notification filings over the course of a year, with an estimated burden of 1 hour per response, at an estimated cost of $79.00 per respondent. The Commission believes that none of the filers will be small. Therefore, the Commission certifies that this proposed rule will not have a significant economic impact on small entities.

VI. Comment Procedures

23. The Commission invites interested persons to submit comments on the matters and issues proposed in this document to be adopted, including any related matters or alternative proposals that commenters may wish to discuss. Comments are due December 31, 2018. Comments must refer to Docket No. RM19–4–000, and must include the commenter's name, the organization they represent, if applicable, and their address in their comments.

24. The Commission encourages comments to be filed electronically via the eFiling link on the Commission's website at *http://www.ferc.gov.* The Commission accepts most standard word processing formats. Documents created electronically using word processing software should be filed in native applications or print-to-PDF format and not in a scanned format. Commenters filing electronically do not need to make a paper filing.

25. Commenters that are not able to file comments electronically must send an original of their comments to: Federal Energy Regulatory Commission, Secretary of the Commission, 888 First Street NE, Washington, DC 20426.

26. All comments will be placed in the Commission's public files and may be viewed, printed, or downloaded remotely as described in the Document Availability section below. Commenters on this proposal are not required to serve copies of their comments on other commenters.

VII. Document Availability

27. In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the internet through the Commission's Home Page (*http://www.ferc.gov*) and in the Commission's Public Reference Room during normal business hours (8:30 a.m. to 5:00 p.m.

[9] *Regulations Implementing the National Environmental Policy Act of 1969,* Order No. 486, FERC Stats. & Regs. ¶ 30,783 (1987).

[10] 18 CFR 380.4(a)(16).

[11] 5 U.S.C. 601–612.

[12] 13 CFR 121.201. *See also* U.S. Small Business Administration, *Table of Small Business Size Standards Matched to North American Industry Classification System Codes* (effective Feb. 26, 2016), *https://www.sba.gov/sites/default/files/files/Size_Standards_Table.pdf.*

[13] 13 CFR 121.201, Sector 22 (Utilities), NAICS code 221121 (Electric Bulk Power Transmission and Control).

Eastern time) at 888 First Street NE, Room 2A, Washington, DC 20426.

28. From the Commission's Home Page on the internet, this information is available on eLibrary. The full text of this document is available on eLibrary in PDF and Microsoft Word format for viewing, printing, and/or downloading. To access this document in eLibrary, type the docket number excluding the last three digits of this document in the docket number field.

29. User assistance is available for eLibrary and the Commission's website during normal business hours from the Commission's Online Support at 202–502–6652 (toll free at 1–866–208–3676) or email at *ferconlinesupport@ferc.gov,* or the Public Reference Room at (202) 502–8371, TTY (202)502–8659. Email the Public Reference Room at *public.referenceroom@ferc.gov.*

List of Subjects in 18 CFR Part 33

Electric utilities, Reporting and recordkeeping requirements, Securities.

By direction of the Commission. Commissioner McIntyre is not voting on this order.

Issued: November 15, 2018.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

In consideration of the foregoing, the Commission proposes to amend part 33, chapter I, title 18, *Code of Federal Regulations,* as follows.

PART 33—APPLICATIONS UNDER FEDERAL POWER ACT SECTION 203

■ 1. The authority citation for part 33 continues to read as follows:

Authority: 16 U.S.C. 791a-825r, 2601–2645; 31 U.S.C. 9701; 41 U.S.C. 7101–7352

■ 2. Amend § 33.1 by revising paragraph (a)(1)(ii) to read as follows:

§ 33.1 Applicability, definitions, and blanket authorizations.

(a) * * *

(1) * * *

(ii) Merge or consolidate, directly or indirectly, its facilities subject to the jurisdiction of the Commission, or any part thereof, with the facilities of any other person, or any part thereof, that are subject to the jurisdiction of the Commission and have a value in excess of $10 million, by any means whatsoever;

* * * * *

■ 3. Add § 33.12 to read as follows:

§ 33.12 Notification requirement for certain transactions.

(a) Any public utility that is seeking to merge or consolidate, directly or indirectly, its facilities subject to the jurisdiction of the Commission, or any part thereof, with those of any other person, shall notify the Commission of such transaction not later than 30 days after the date on which the transaction is consummated if:

(1) The facilities, or any part thereof, to be acquired are of a value in excess of $1 million; and

(2) Such public utility is not required to secure an order of the Commission under section 203(a)(1)(B) of the Federal Power Act.

(b) Such notification shall consist of the following information:

(1) The exact name of the public utility and its principal business address; and

(2) A narrative description of the transaction, including the identity of all parties involved in the transaction and all jurisdictional facilities associated with or affected by the transaction, the location of such jurisdictional facilities involved in the transaction, the date on which the transaction was consummated, the consideration for the transaction, and the effect of the transaction on the ownership and control of such jurisdictional facilities.

[FR Doc. 2018–25369 Filed 11–28–18; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF EDUCATION

34 CFR Part 200

RIN 1810–AB49

[Docket ID ED–2018–OESE–0079]

Title I—Improving the Academic Achievement of the Disadvantaged; Education of Migratory Children

AGENCY: Office of Elementary and Secondary Education, Department of Education.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Department proposes to modify the current requirements related to the responsibilities of State educational agency (SEA) recipients of funds under title I, part C, of the Elementary and Secondary Education Act of 1965, as amended (ESEA), to conduct annual prospective re-interviews to confirm the eligibility of children under the Migrant Education Program (MEP). Based on input from MEP stakeholders, we propose to clarify who constitutes an independent re-interviewer, and to reduce the costs and burden of prospective re-interviews conducted by independent re-interviewers, while maintaining adequate quality control measures to safeguard the integrity of program eligibility determinations.

DATES: We must receive your comments on or before January 28, 2019.

ADDRESSES: Submit your comments through the Federal eRulemaking Portal or via postal mail, commercial delivery, or hand delivery. We will not accept comments submitted by fax or by email or those submitted after the comment period. To ensure that we do not receive duplicate copies, please submit your comments only once. In addition, please include the Docket ID at the top of your comments.

- *Federal eRulemaking Portal:* Go to *www.regulations.gov* to submit your comments electronically. Information on using *Regulations.gov*, including instructions for accessing agency documents, submitting comments, and viewing the docket, is available on the site under "Help."
- *Postal Mail, Commercial Delivery, or Hand Delivery:* The Department strongly encourages commenters to submit their comments electronically. However, if you mail or deliver your comments about these proposed regulations, address them to Patricia Meyertholen, U.S. Department of Education, 400 Maryland Avenue SW, Room 3E315, Washington, DC 20202.

Privacy Note: The Department's policy is to make all comments received from members of the public available for public viewing in their entirety on the Federal eRulemaking Portal at *www.regulations.gov.* Therefore, commenters should be careful to include in their comments only information that they wish to make publicly available.

FOR FURTHER INFORMATION CONTACT: Patricia Meyertholen, U.S. Department of Education, 400 Maryland Avenue SW, Room 3E315, Washington, DC 20202. Telephone: (202) 260–1394. Email: *patricia.meyertholen@ed.gov.*

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

SUPPLEMENTARY INFORMATION:

Catalog of Federal Domestic Assistance (CFDA) Number: 84.011.

Invitation to Comment: We invite you to submit comments regarding these proposed regulations. To ensure that your comments have maximum effect in developing the final regulations, we urge you to identify clearly the specific section or sections of the proposed regulations that each of your comments addresses and to arrange your comments in the same order as the proposed regulations.

We invite you to assist us in complying with the specific requirements of Executive Orders 12866, 13563, and 13771 and their overall requirement of reducing regulatory burden that might result from these proposed regulations. Please let us know of any further ways we could reduce potential costs or increase potential benefits while preserving the effective and efficient administration of the Department's programs and activities.

During and after the comment period, you may inspect all public comments about these proposed regulations by accessing *Regulations.gov*. You may also inspect the comments in person in room 3E315, 400 Maryland Avenue SW, Washington, DC, between 8:30 a.m. and 4:00 p.m., Eastern Time, Monday through Friday of each week except Federal holidays. Please contact the person listed under **FOR FURTHER INFORMATION CONTACT**.

Assistance to Individuals with Disabilities in Reviewing the Rulemaking Record: On request, we will provide an appropriate accommodation or auxiliary aid to an individual with a disability who needs assistance to review the comments or other documents in the public rulemaking record for these proposed regulations. If you want to schedule an appointment for this type of accommodation or auxiliary aid, please contact the person listed under **FOR FURTHER INFORMATION CONTACT**.

Background and Proposed Regulations

The Secretary proposes to amend the regulations in 34 CFR 200.89(b)(2), which pertain to an SEA's responsibilities for conducting annual prospective re-interviews for children determined to be eligible for the MEP, as part of the SEA's quality control system.

Final requirements for prospective re-interviewing were published in the **Federal Register** on July 29, 2008 (73 FR 44102), and became effective on August 28, 2008. In accordance with these requirements, SEAs must, on an annual basis, validate current-year child eligibility determinations through re-interviews for a randomly selected sample of children previously identified as migratory. Under § 200.89(b)(2)(i), at least once every three years, the annual prospective re-interviews must be conducted by one or more independent re-interviewers—that is, interviewers who are neither SEA nor local operating agency staff working to administer or operate the State MEP nor any other persons who worked on the initial eligibility determinations being tested. The current regulations do not specify who may conduct the annual prospective re-interviews in the years when an independent re-interviewer is not required. However, the Department has previously recommended to SEAs through guidance and technical assistance [1] that the independent re-interviewer should not have been involved in the initial eligibility determination under review.

Prospective re-interviewing is required in order to provide a quality control on the accuracy of an SEA's current-year eligibility determinations (*i.e.,* migratory children for whom the SEA approved a Certificate of Eligibility during the current performance reporting period) and to guide any needed corrective actions or improvements in a State's migratory child identification and recruitment practices. Prospective re-interviewing is one element of an SEA's quality control system, which must also include the minimum requirements set forth in 34 CFR 200.89(d), such as training for recruiters and staff involved in making eligibility determinations, and supervision and annual review and evaluation of the identification and recruitment practices of individual recruiters.

The 2008 requirements stemmed from the Department's concerns about the accuracy and consistency of the processes SEAs had used to determine the eligibility of migratory children and the counts of children eligible for services that SEAs reported to the Department, which were examined in 2004 by the Office of Elementary and Secondary Education and the Office of Inspector General. The examination uncovered widespread errors in program eligibility determinations. In most cases, the errors seemed attributable to the poor training of State and local personnel responsible for determining eligibility, weak quality control procedures for reviewing child eligibility determinations, and a lack of uniformity in the implementation of the MEP eligibility requirements.

Although the accuracy and integrity of program eligibility determinations has vastly improved since 2008, we believe prospective re-interviews remain an essential part of an SEA's quality control system. Maintaining adequate quality control in eligibility determinations is essential to ensuring that MEP-funded services are provided to children who meet the program eligibility criteria, and that the level and quality of those services is not diluted by the delivery of services to children who are not eligible to receive them. In addition, the number of eligible migratory children, as reported by SEAs, is a key factor in determining the amount of MEP funds awarded to SEAs.

We are proposing these amendments to clarify for SEAs that individuals conducting annual prospective re-interviews must be individuals who were not involved in the initial eligibility determination being reviewed, as a quality control measure. This proposed change would codify the method the Department has previously recommended to SEAs through guidance and technical assistance, and is largely consistent with SEAs' current practices. To avoid confusion, the proposed regulations also replace the reference to ''current-year'' eligibility determinations with the term ''current performance reporting period (September 1 to August 31).'' A performance reporting period, sometimes referred to as a child count year, is a more specific timeframe: September 1 through August 31. This modification to the regulatory language is consistent with the Department's technical assistance and guidance on prospective re-interviewing, as well as SEAs' current re-interviewing practices. By adding these clarifications to the regulations, we intend to make this information as transparent and accessible as possible.

We also propose to modify the requirement that SEAs use independent re-interviewers at least once every three years. Instead, the regulations would require the use of independent re-interviewers at least once within the first three full performance reporting periods (September 1 through August 31) following the effective date of a major statutory or regulatory change, as determined by the Secretary, that impacts program eligibility, in order to test eligibility determinations made based on the changed eligibility criteria. The entire sample of eligibility determinations to be tested by independent re-interviewers would be drawn from children determined to be eligible after the major statutory or regulatory change takes effect. This change would reduce the frequency of the required use of independent re-interviewers because after using independent re-interviewers at least once within the first three full performance reporting periods following a major statutory or regulatory change, SEAs would not be required to use independent re-interviewers again until an additional major statutory or

[1] See pages 35–36 of U.S. Department of Education, Office of Elementary and Secondary Education, Office of Migrant Education, *Technical Assistance Guide on Re-interviewing:* Washington, DC 20202 (*https://results-assets.s3.amazonaws.com/tools/mep-reinterviewing-guide-dec-10.pdf*).

regulatory change is implemented that impacts child eligibility. We believe that, by providing an impartial perspective from outside of the program, independent re-interviewers continue to be valuable, but that their perspective would be most beneficial in periods when changes to program eligibility have been recently implemented. We believe that independent re-interviewers' distance from the State or local administration and operation of the program makes them more likely to identify errors or misunderstanding of new or changed eligibility criteria—particularly if those issues are systemic or statewide. After independent re-interviewers identify eligibility issues and the SEA has implemented corrective actions or improvements, as required by current regulations in 200.89(b)(2)(vii), we believe sufficient quality control can be maintained by the SEA's annual prospective re-interviews, which may be conducted by SEA or local staff operating the MEP, as long as those staff members did not work on the initial eligibility determinations being tested. Finally, we propose to make this requirement effective September 1, 2020, to allow SEAs that receive MEP funds to complete their independent re-interviews of eligibility determinations that were made after the effective date (July 1, 2017) of the Every Student Succeeds Act.

Public Participation

In accordance with Executive Order 13777, ''Enforcing the Regulatory Reform Agenda,'' the Department requested input from the public and identified stakeholders on existing program regulations. As part of that effort, on June 1, 2017, OESE staff contacted two of the largest national organizations representing State MEP directors to request input on whether, in their area of expertise, there are regulations that are unnecessary or in need of revision, and whether there are regulations that are particularly important for the Department to keep in place. In response to this outreach, we received responses from one organization, as well as MEP staff in one SEA. Their proposed alternatives to the current prospective re-interviewing requirements included modifying the timing, reducing the frequency, or reducing the number of re-interviews that SEAs are required to complete.

On June 22, 2017, the Department published in the **Federal Register** a notice of evaluation of existing regulations (82 FR 28431), requesting input on regulations that may be appropriate for repeal, replacement, or modification. In response to this notice, we received comments from the same national organization representing State MEP directors that previously responded to the Department's June 1, 2017, outreach. That organization again proposed alternatives to the current prospective re-interviewing requirements, such as modifying the timing, reducing the frequency, or reducing the number of re-interviews that SEAs are required to complete.

In addition, we have received input during ongoing consultation with State MEP directors on possible modifications to the prospective re-interviewing requirements. Most recently, we received input during a November 14, 2017, meeting with the MEP Coordination Work Group, a group of nine State MEP directors who represent State MEP directors in nine U.S. geographic regions.

Executive Orders 12866, 13563, and 13771

Regulatory Impact Analysis

Under Executive Order 12866, it must be determined whether this regulatory action is ''significant'' and, therefore, subject to the requirements of the Executive order and subject to review by the Office of Management and Budget (OMB). Section 3(f) of Executive Order 12866 defines a ''significant regulatory action'' as an action likely to result in a rule that may—

(1) Have an annual effect on the economy of $100 million or more, or adversely affect a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or Tribal governments or communities in a material way (also referred to as an ''economically significant'' rule);

(2) Create serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles stated in the Executive order.

This proposed regulatory action is not a significant regulatory action subject to review by OMB under section 3(f) of Executive Order 12866.

Under Executive Order 13771, for each new regulation that the Department proposes for notice and comment or otherwise promulgates that is a significant regulatory action under Executive Order 12866 and that imposes total costs greater than zero, it must identify two deregulatory actions. For Fiscal Year 2019, any new incremental costs associated with a new regulation must be fully offset by the elimination of existing costs through deregulatory actions. The proposed regulations are not a significant regulatory action. Therefore, the requirements of Executive Order 13771 do not apply.

We have also reviewed these regulations under Executive Order 13563, which supplements and explicitly reaffirms the principles, structures, and definitions governing regulatory review established in Executive Order 12866. To the extent permitted by law, Executive Order 13563 requires that an agency—

(1) Propose or adopt regulations only upon a reasoned determination that their benefits justify their costs (recognizing that some benefits and costs are difficult to quantify);

(2) Tailor its regulations to impose the least burden on society, consistent with obtaining regulatory objectives and taking into account—among other things and to the extent practicable—the costs of cumulative regulations;

(3) In choosing among alternative regulatory approaches, select those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity);

(4) To the extent feasible, specify performance objectives, rather than the behavior or manner of compliance a regulated entity must adopt; and

(5) Identify and assess available alternatives to direct regulation, including economic incentives—such as user fees or marketable permits—to encourage the desired behavior, or provide information that enables the public to make choices.

Executive Order 13563 also requires an agency ''to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible.'' The Office of Information and Regulatory Affairs of OMB has emphasized that these techniques may include ''identifying changing future compliance costs that might result from technological innovation or anticipated behavioral changes.''

We are issuing these proposed regulations only on a reasoned determination that their benefits would justify their costs. In choosing among alternative regulatory approaches, we selected those approaches that would maximize net benefits. Based on the analysis that follows, the Department believes that these proposed regulations are consistent with the principles in Executive Order 13563.

We also have determined that this regulatory action would not unduly interfere with State, local, and Tribal governments in the exercise of their governmental functions.

In accordance with the Executive orders, the Department has assessed the potential costs and benefits, both quantitative and qualitative, of this regulatory action. The potential costs associated with this regulatory action are those resulting from statutory requirements and those regulatory requirements that we have determined to be necessary for administering the Department's programs and activities.

We anticipate that the proposed changes to these regulations will reduce the cost and burden associated with prospective re-interviewing, specifically the use of independent re-interviewers, for some SEAs. While we believe that SEAs will be required to conduct independent re-interviews less frequently under the proposed regulations than they are required to currently, we cannot predict when statutory changes will occur. Under the current and proposed regulations, to qualify as ''independent,'' the interviewers must be neither SEA nor local operating agency staff members working to administer or operate the State MEP nor any other persons who worked on the initial eligibility determinations being tested. Although there is no Federal requirement for SEAs to use a specific funding mechanism to support independent re-interviewers, such as a contract, or to use out-of-State personnel who require travel costs, several SEAs have chosen to use such methods and personnel for independent re-interviews. For those SEAs that have chosen to use more costly methods for independent re-interviews, we anticipate that the reduced frequency of independent re-interviews will result in reduced cost and burden. Further, we do not believe that burden will be affected by the proposed change to clarify that annual prospective re-interviews must not be conducted by individuals who were involved in the initial eligibility determination being reviewed, as this is consistent with the current practices of most SEAs.

Elsewhere in this section under *Paperwork Reduction Act of 1995,* we identify and explain burdens specifically associated with information collection requirements.

Clarity of the Regulations

Executive Order 12866 and the Presidential memorandum ''Plain Language in Government Writing'' require each agency to write regulations that are easy to understand.

The Secretary invites comments on how to make these proposed regulations easier to understand, including answers to questions such as the following:

- Are the requirements in the proposed regulations clearly stated?
- Do the proposed regulations contain technical terms or other wording that interferes with their clarity?
- Does the format of the proposed regulations (grouping and order of sections, use of headings, paragraphing, etc.) aid or reduce their clarity?
- Would the proposed regulations be easier to understand if we divided them into more (but shorter) sections? (A ''section'' is preceded by the symbol ''§ '' and a numbered heading; for example, § 200.89.)
- Could the description of the proposed regulations in the **SUPPLEMENTARY INFORMATION** section of this preamble be more helpful in making the proposed regulations easier to understand? If so, how?
- What else could we do to make the proposed regulations easier to understand?

To send any comments that concern how the Department could make these proposed regulations easier to understand, see the instructions in the **ADDRESSES** section.

Regulatory Flexibility Act Certification

The Secretary certifies that these proposed regulations would not have a significant economic impact on a substantial number of small entities. Because these proposed regulations would affect only States and State agencies, the proposed regulations would not have an impact on small entities. State and State agencies are not defined as ''small entities'' in the Regulatory Flexibility Act.

Paperwork Reduction Act of 1995

As part of its continuing effort to reduce paperwork and respondent burden, the Department provides the general public and Federal agencies with an opportunity to comment on proposed and continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)). This helps ensure that the public understands the Department's collection instructions, respondents can provide the requested data in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the Department can properly assess the impact of collection requirements on respondents.

These proposed regulations contain information collection requirements that are approved by OMB under OMB control number 1810–0662; these proposed regulations do not affect the currently approved data collection.

A Federal agency may not conduct or sponsor a collection of information unless OMB approves the collection under the PRA and the corresponding information collection instrument displays a currently valid OMB control number. Notwithstanding any other provision of law, no person is required to comply with, or is subject to penalty for failure to comply with, a collection of information if the collection instrument does not display a currently valid OMB control number.

Section 200.89(b)(2) contains an information collection requirement. This information collection has been approved by OMB Control Number 1810–0662. The currently approved collection includes cost and burden estimates based on annual prospective re-interviewing which do not vary based on the specific personnel used for re-interviews, including independent re-interviewers. As SEAs would still be required to conduct prospective re-interviews on an annual basis under the proposed regulations, our cost and burden estimates are unchanged.

We estimate a standard number of hours to conduct re-interviews—including multiple attempts to locate the family and travel to their location (2 hours/child), analyze the findings (1 hour/child), and summarize findings for annual reporting (2 hours/SEA). We estimate costs based on a standard hourly rate for staff conducting re-interviews ($10/hour) and a higher standard hourly rate for staff responsible for analysis and reporting ($25/hour). Some SEAs have elected to use more costly resources and methods when conducting independent re-interviews, such as contracts with private organizations and out-of-State personnel. Since these are not Federal requirements, under the PRA, any increased costs associated with these resources and methods were not factored into the cost and burden estimates in the currently approved collection, and, accordingly, any decreased costs associated with these resources and methods that would result from their less frequent use under the proposed regulations also do not affect the cost and burden estimates. Thus, the burden estimated in the approved information collection remains unchanged.

Intergovernmental Review

This program is subject to Executive Order 12372 and the regulations in 34 CFR part 79. One of the objectives of the Executive order is to foster an intergovernmental partnership and a strengthened federalism. The Executive order relies on processes developed by State and local governments for coordination and review of proposed Federal financial assistance.

This document provides early notification of our specific plans and actions for this program.

Federalism

Executive Order 13132 requires us to ensure meaningful and timely input by State and local elected officials in the development of regulatory policies that have federalism implications. ''Federalism implications'' means 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. The proposed regulations in § 200.89(b) may have federalism implications. We encourage State and local elected officials to review and provide comments on these proposed regulations.

Accessible Format: Individuals with disabilities can obtain this document in an accessible format (*e.g.,* braille, large print, audiotape, or compact disc) on request to the person listed under **FOR FURTHER INFORMATION CONTACT**.

Electronic Access to This Document: The official version of this document is the document published in the **Federal Register**. You may access the official edition of the **Federal Register** and the Code of Federal Regulations via the Federal Digital System at: *www.gpo.gov/fdsys.* At this site you can view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Adobe Portable Document Format (PDF). To use PDF you must have Adobe Acrobat Reader, which is available free at the site.

You may also access documents of the Department published in the **Federal Register** by using the article search feature at: *www.federalregister.gov*. Specifically, through the advanced search feature at this site, you can limit your search to documents published by the Department. (Catalog of Federal Domestic Assistance number 84.011: Education of Migratory Children)

List of Subjects in 34 CFR Part 200

Education of disadvantaged, Elementary and secondary education, Grant programs-education, Indians-education, Infants and children, Juvenile delinquency, Migrant labor, Private schools, Reporting and recordkeeping requirements.

Dated: November 23, 2018.

Betsy DeVos,

Secretary of Education.

For the reasons discussed in the preamble, the Secretary proposes to amend part 200 of title 34 of the Code of Federal Regulations as follows:

PART 200—TITLE I—IMPROVING THE ACADEMIC ACHIEVEMENT OF THE DISADVANTAGED

■ 1. The authority citation for part 200 continues to read as follows:

Authority: 20 U.S.C. 6301 through 6576, unless otherwise noted.

■ 2. Section 200.89 is amended by:
■ a. Revising paragraph (b)(2).
■ b. Adding paragraph (b)(3).
■ c. Revising the authority citation.

The revisions and addition read as follows:

§ 200.89 Re-interviewing; Eligibility documentation; and Quality control.

* * * * *

(b) * * *

(2) *Prospective re-interviewing.* As part of the system of quality controls identified in § 200.89(d), an SEA must annually validate child eligibility determinations from the current performance reporting period (September 1 to August 31) through re-interviews for a randomly selected sample of children identified as migratory during the same performance reporting period using re-interviewers, who may be SEA or local operating agency staff members working to administer or operate the State MEP, or any other person trained to conduct personal interviews and who understands program eligibility requirements, but who did not work on the initial eligibility determinations being tested. In conducting these re-interviews, an SEA must—

(i) Use one or more independent re-interviewers (*i.e.*, interviewers who are neither SEA or local operating agency staff members working to administer or operate the State MEP nor any other persons who worked on the initial eligibility determinations being tested and who are trained to conduct personal interviews and to understand and apply program eligibility requirements) at least once every three years until September 1, 2020;

* * * * *

(3) *Prospective re-interviewing following a major statutory or regulatory change to child eligibility.* Beginning September 1, 2020, an SEA must use one or more independent re-interviewers (*i.e.,* interviewers who are neither SEA nor local operating agency staff members working to administer or operate the State MEP, nor any other persons who worked on the initial eligibility determinations being tested and who are trained to conduct personal interviews and to understand and apply program eligibility requirements) to validate child eligibility determinations at least once within the first three full performance reporting periods (September 1 through August 31) following the effective date of a major statutory or regulatory change that directly impacts child eligibility (as determined by the Secretary), consistent with the prospective re-interview process described in paragraph (b)(2)(ii)–(vii) of this section. The entire sample of eligibility determinations to be tested by independent re-interviewers must be drawn from children determined to be eligible after the major statutory or regulatory change took effect.

* * * * *

(Authority: 20 U.S.C. 6391–6399, 6571, 18 U.S.C. 1001)

[FR Doc. 2018–25931 Filed 11–28–18; 8:45 am]

BILLING CODE 4000–01–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R09–OAR–2018–0535; FRL–9987–11–Region 9]

Clean Air Plans; 2008 8-Hour Ozone Nonattainment Area Requirements; San Joaquin Valley, California

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to approve portions of two state implementation plan (SIP) revisions submitted by the State of California to meet Clean Air Act (CAA or ''the Act'') requirements for the 2008 8-hour ozone national ambient air quality standards (NAAQS or ''standards'') in the San Joaquin Valley, California, ozone nonattainment area. First, the EPA is proposing to approve the portion of the ''2016 Ozone Plan for the 2008 8-Hour Ozone Standard'' (''2016 Ozone Plan'') that addresses the requirement for a base year emissions inventory. Second, the EPA is proposing to approve the portions of the ''2018

Updates to the California State Implementation Plan'' (''2018 SIP Update'') that address the requirements for a reasonable further progress (RFP) demonstration and motor vehicle emissions budgets (MVEBs) for the San Joaquin Valley for the 2008 ozone standards. Lastly, the EPA is proposing to conditionally approve portions of the 2018 SIP Update that address the requirement for contingency measures for failure to meet RFP milestones or to attain the NAAQS by the applicable attainment date. The proposed approval is conditional because it relies on commitments by the State air agency and regional air district to supplement the contingency measure portion of the 2018 SIP Update with submission of an additional contingency measure within one year of the EPA's final conditional approval.

DATES: Written comments must arrive on or before December 31, 2018.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R09–OAR–2018–0535 at *https://www.regulations.gov.* For comments submitted at *Regulations.gov*, follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from *Regulations.gov*. The EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.,* on the web, cloud, or other file sharing system). For additional submission methods, please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section. For the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *http://www.epa.gov/dockets/commenting-epa-dockets.*

FOR FURTHER INFORMATION CONTACT: Laura Lawrence, EPA Region IX, (415) 972–3407, *lawrence.laura@epa.gov.*

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

Table of Contents

I. Regulatory Context

A. Ozone Standards, Area Designations and SIPs

Ground-level ozone pollution is formed from the reaction of volatile organic compounds (VOC) and oxides of nitrogen (NO_X) in the presence of sunlight.[1] These two pollutants, referred to as ozone precursors, are emitted by many types of sources, including on-and off-road motor vehicles and engines, power plants and industrial facilities, and smaller area sources such as lawn and garden equipment and paints.

Scientific evidence indicates that adverse public health effects occur following exposure to elevated levels of ozone, particularly in children and adults with lung disease. Breathing air containing ozone can reduce lung function and inflame airways, which can increase respiratory symptoms and aggravate asthma or other lung diseases.[2]

Under section 109 of the CAA, the EPA promulgates NAAQS for pervasive air pollutants, such as ozone. The EPA has previously promulgated NAAQS for ozone in 1979 and 1997.[3] In 2008, the EPA revised and further strengthened the ozone NAAQS by setting the acceptable level of ozone in the ambient air at 0.075 parts per million (ppm) averaged over an 8-hour period.[4] Although the EPA further tightened the 8-hour ozone NAAQS to 0.070 ppm in 2015, this action relates to the requirements for the 2008 ozone NAAQS.[5] The State of California and the EPA will address the 2015 ozone NAAQS in later actions.

Following promulgation of a new or revised NAAQS, the EPA is required under CAA section 107(d) to designate areas throughout the country as attaining or not attaining the NAAQS. The EPA classifies ozone nonattainment areas under CAA section 181 according to the severity of the ozone pollution problem, with classifications ranging from Marginal to Extreme. State planning and emissions control requirements for ozone are determined, in part, by the nonattainment area's classification. The EPA designated the San Joaquin Valley as nonattainment for the 2008 ozone standards on May 21, 2012, and classified the area as Extreme.[6]

Under the CAA, after the EPA designates areas as nonattainment for a NAAQS, states with nonattainment areas are required to submit SIP revisions. For areas classified Moderate and above, these revisions must provide for, among other things, attainment of the NAAQS within certain prescribed periods that vary depending on the severity of nonattainment. Areas classified as Extreme must attain the NAAQS within 20 years of the effective date of the nonattainment designation.[7]

In California, the California Air Resources Board (CARB or ''State'') is the state agency responsible for the adoption and submission to the EPA of California SIPs and SIP revisions, and it has broad authority to establish emissions standards and other requirements for state-wide sources of emissions. Under California law, local and regional air pollution control districts in California are responsible for the regulation of regional/local sources such as stationary sources, and are generally responsible for the development of regional air quality plans. In the San Joaquin Valley, the San Joaquin Valley Air Pollution Control District (SJVAPCD or ''District'') develops and adopts air quality

[1] The State of California typically refers to reactive organic gases (ROG) in its ozone-related submissions since VOC in general can include both reactive and unreactive gases. However, since ROG and VOC inventories pertain to common chemical species (*e.g.,* benzene, xylene, etc.), we refer to this set of gases as VOC in this proposed rule.

[2] See ''Fact Sheet—2008 Final Revisions to the National Ambient Air Quality Standards for Ozone'' dated March 2008.

[3] The ozone NAAQS promulgated in 1979 was 0.12 parts per million (ppm) averaged over a 1-hour period. See 44 FR 8202 (February 8, 1979). The ozone NAAQS promulgated in 1997 was 0.08 ppm averaged over an 8-hour period. See 62 FR 38856 (July 18, 1997).

[4] See 73 FR 16436 (March 27, 2008).

[5] Information on the 2015 ozone NAAQS is available at 80 FR 65292 (October 26, 2015).

[6] See 77 FR 30088 (May 21, 2012).

[7] See CAA section 181(a)(1), 40 CFR 51.1102 and 51.1103(a).

management plans to address CAA planning requirements applicable to that region. The District then submits such plans to CARB for adoption and submission to the EPA as revisions to the California SIP. Such revisions do not become part of the applicable SIP for federal purposes until approved by the EPA.[8]

B. The San Joaquin Valley Ozone Nonattainment Area

The San Joaquin Valley nonattainment area for the 2008 ozone standards consists of San Joaquin, Stanislaus, Merced, Madera, Fresno, Tulare, and Kings counties, and the western portion of Kern County. The San Joaquin Valley nonattainment area stretches over 250 miles from north to south, averages a width of 80 miles, and encompasses over 23,000 square miles. It is partially enclosed by the Coast Mountain range to the west, the Tehachapi Mountains to the south, and the Sierra Nevada range to the east.[9]

The population of the San Joaquin Valley in 2015 was estimated to be nearly 4.2 million people and is projected to increase by 25.3 percent in 2030 to over 5.2 million people.[10] Ambient 8-hour ozone concentrations in the San Joaquin Valley are above the level of the 2008 ozone standards. The maximum design value for the area based on certified data is 0.092 ppm for the 2015–2017 period, which was measured at the Parlier monitor (Air Quality System ID: 06–019–4001).[11]

C. CAA and Regulatory Requirements for 2008 8-Hour Ozone Nonattainment Area SIPs

States must implement the 2008 ozone standards under Title 1, part D of the CAA, which includes sections 171–179B of subpart 1 (''Nonattainment Areas in General'') and sections 181–185 of subpart 2 (''Additional Provisions for Ozone Nonattainment Areas''). To assist states in developing effective plans to address ozone nonattainment problems, in 2015 the EPA issued a SIP Requirements Rule (SRR) for the 2008 ozone standards (''2008 Ozone SRR'') that addressed implementation of the 2008 standards, including attainment dates, requirements for emissions inventories, attainment and RFP demonstrations, as well as the transition from the 1997 ozone standards to the 2008 ozone standards and associated anti-backsliding requirements.[12] The 2008 Ozone SRR is codified at 40 CFR part 51, subpart AA. We discuss the CAA and regulatory requirements for the elements of 2008 ozone plans relevant to this proposal in more detail below.

The EPA's 2008 Ozone SRR was challenged, and on February 16, 2018, the U.S. Court of Appeals for the D.C. Circuit (''D.C. Circuit'') published its decision in *South Coast Air Quality Management. District* v. *EPA* [13] (''*South Coast II*'') [14] vacating portions of the 2008 Ozone SRR. The only aspect of the *South Coast II* decision that affects this proposed action is the vacatur of the alternative baseline year for RFP plans. More specifically, the 2008 Ozone SRR required states to develop the baseline emissions inventory for RFP plans using the emissions for the most recent calendar year for which states submit a triennial inventory to the EPA under subpart A (''Air Emissions Reporting Requirements'') of 40 CFR part 51, which was 2011. However, the 2008 Ozone SRR allowed states to use an alternative year, between 2008 and 2012, for the baseline emissions inventory provided that the state demonstrated why the alternative baseline year was appropriate. The baseline emissions inventory for the RFP demonstration for the 2016 Ozone Plan was based on an alternative year of 2012 rather than 2011. In the *South Coast II* decision, the D.C. Circuit vacated the provisions of the 2008 Ozone SRR that allowed states to use an alternative baseline year for demonstrating RFP.

II. Submissions From the State of California To Address 2008 Ozone Requirements in the San Joaquin Valley

A. Summary of Submissions

On August 24, 2016, in response to the EPA's designation of the area as nonattainment and classification of the area as Extreme for the 2008 ozone NAAQS, CARB submitted the 2016 Ozone Plan to the EPA as a revision to the California SIP.[15] Prior to submission to the EPA, CARB approved the 2016 Ozone Plan, which had previously been adopted by the District and forwarded to CARB for approval and submission to the EPA.

The 2016 Ozone Plan submission consists of documents originating from the District (*e.g.,* the 2016 Ozone Plan with Appendices and the District Governing Board Resolution) and CARB (*e.g.,* the CARB Staff Report and Appendices, and the CARB Resolution adopting the 2016 Ozone Plan and CARB Staff Report as a SIP revision).[16] The 2016 Ozone Plan addresses the requirements for base year and projected future year emissions inventories, air quality modeling demonstrating attainment of the 2008 ozone NAAQS by the applicable attainment year, provisions demonstrating implementation of reasonably available control measures (RACM), provisions for advanced technology/clean fuels for boilers, provisions for transportation control strategies and measures, a demonstration of RFP, motor vehicle emissions budgets, and contingency measures for failure to make RFP or attain, among other requirements. On August 31, 2018, the EPA proposed approval of the attainment demonstration portion of the 2016 Ozone Plan and associated attainment year motor vehicle emission budgets, the RACM demonstration, provisions for advanced technology/clean fuels for boilers, and provisions for transportation control strategies and measures.[17]

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[8] See 40 CFR 51.105. For the purposes of the CAA, the ''applicable plan'' is composed of any portions of the SIP that are approved by the EPA together with any provisions promulgated by the EPA as substitutes for portions of the SIP disapproved by the EPA. 40 CFR 52.02(b). Provisions promulgated by the EPA as SIP substitutes are referred to as federal implementation plans, or FIPs.

[9] For a precise definition of the boundaries of the San Joaquin Valley 2008 ozone nonattainment area, see 40 CFR 81.305.

[10] The population estimates and projections include all of Kern County, not just the portion of Kern County within the jurisdiction of the SJVAPCD. See chapter 1 and table 1–1 of the District's 2016 Ozone Plan.

[11] See Air Quality System (AQS) Design Value Report, 20180621_DVRpt_SJV_2008–8hrO3_2015–2017.pdf in the docket for this proposed action. The AQS is a database containing ambient air pollution data collected by the EPA and state, local, and tribal air pollution control agencies from over thousands of monitors.

[12] See 80 FR 12264, March 6, 2015.

[13] *South Coast Air Quality Management District* v. *EPA,* 882 F.3d 1138 (D.C. Cir. 2018) (''*South Coast II*'').

[14] The term ''*South Coast II*'' is used in reference to the 2018 court decision to distinguish it from a decision published in 2006 also referred to as ''*South Coast.*'' The earlier decision involved a challenge to the EPA's Phase 1 implementation rule for the 1997 ozone standard. *South Coast Air Quality Management Dist.* v. *EPA,* 472 F.3d 882 (D.C. Cir. 2006).

[15] See letter from Richard Corey, Executive Officer, CARB, to Alexis Strauss, Acting Regional Administrator, EPA Region IX, dated August 24, 2016.

[16] See four enclosures to the August 24, 2016 letter from CARB to EPA Region 9: (I) District Submission, including letter from Sheraz Gill, Director of Strategies and Incentives for the District, to Richard Corey, Executive Officer, CARB, and five appendices titled: (1) ARB SIP Completeness Checklist, (2) 2016 Ozone Plan with Appendices, (3) Governing Board Resolution Adopting the 2016 Ozone Plan, (4) Governing Board Memo, and (5) Evidence of Public Hearing; (II) CARB Evidence of Public Notice and Transcript; (III) CARB Staff Report; (IV) CARB Resolution 16–8 adopting the 2016 Ozone Plan and CARB Staff Report.

[17] 83 FR 44528 (August 31, 2018).

In response to the court's decision in *South Coast II* vacating the 2008 Ozone SRR with respect to the use of an alternate baseline year for demonstrating RFP, California developed the 2018 SIP Update, which includes an RFP demonstration for the San Joaquin Valley for the 2008 ozone NAAQS using the required 2011 baseline year. The 2018 SIP Update also includes updated motor vehicle emission budgets and a contingency measure for failure to meet an RFP milestone or attain the NAAQS by the applicable attainment date. CARB released a draft of the 2018 SIP Update for public review on September 21, 2018. On October 3, 2018, CARB requested that the EPA accept the draft 2018 SIP Update for parallel processing with respect to the portions of the 2018 SIP Update that apply to the San Joaquin Valley area.[18] Under the EPA's parallel processing procedure, the EPA may propose action on a public draft version of a SIP revision but will take final action only after the state adopts and submits the final version to the EPA for approval.[19] If there are no significant changes from the draft version of the SIP revision to the final version, the EPA may elect to take final action on the proposal. In this case, on October 25, 2018, CARB has adopted the 2018 SIP Update previously released for public review, without significant modifications, as a revision to the California SIP. The only change of note between the draft and final versions is a menu of specific contingency measure actions that the CARB Board included in the resolution (Resolution 18–50) adopting the 2018 SIP Update. CARB has not yet submitted the final version of the SIP revision to the EPA, and thus we are proposing action based on the draft version of the 2018 SIP Update submitted to us on October 3, 2018, and the contents of CARB Resolution 18–50.

In addition to these submissions, CARB sent additional technical information in two technical supplements on October 17, 2018,[20] and October 19, 2018.[21] Further, on October 30, 2018, CARB forwarded a letter of commitment to the EPA from the District dated October 18, 2018, in which the District commits to revise its architectural coatings rule to create an additional contingency measure that will be triggered if the area fails to meet RFP or to attain by the applicable attainment date.[22] [23] In the October 30, 2018 letter, CARB commits to submit the revised District rule to the EPA as a SIP revision within 12 months of the final action on the 2016 Ozone Plan and relevant portions of the 2018 SIP Update.

B. Clean Air Act Procedural Requirements for Adoption and Submission of SIP Revisions

CAA sections 110(a)(1) and (2) and 110(l) require a state to provide reasonable public notice and opportunity for public hearing prior to the adoption and submission of a SIP or SIP revision. To meet these procedural requirements, every SIP submission should include evidence that the state provided adequate public notice and an opportunity for a public hearing consistent with the EPA's implementing regulations in 40 CFR 51.102.

The San Joaquin Valley District Board adopted the 2016 Ozone Plan on June 16, 2016, following a public hearing. CARB adopted the 2016 Ozone Plan as a revision to the California SIP on July 21, 2016, following a public hearing. Both the District and CARB have satisfied the applicable statutory and regulatory requirements for reasonable public notice and hearing prior to the adoption and submission of the 2016 Ozone Plan. Therefore, we find that the submission of the 2016 Ozone Plan meets the procedural requirements for public notice and hearing in CAA sections 110(a) and 110(l) and 40 CFR 51.102.

CARB published the 2018 SIP Update for public review on September 21, 2018, and adopted the document as a revision to the California SIP following a public hearing on October 25, 2018. As noted above, CARB has not yet submitted the final version of the 2018 SIP Update to the EPA, but we expect to find that CARB has satisfied the applicable statutory and regulatory requirements for reasonable public notice and hearing prior to the adoption of the 2018 SIP Update. Therefore, once we receive the final version, we expect to conclude that the submission of the 2018 SIP Update also meets the procedural requirements for public notice and hearing in CAA sections 110(a) and 110(l) and 40 CFR 51.102.

III. Evaluation of the 2016 Ozone Plan and 2018 SIP Update

A. Emissions Inventories

1. Statutory and Regulatory Requirements

CAA section 172(c)(3) requires that each nonattainment plan SIP submission include a ''comprehensive, accurate, current inventory of actual emissions from all sources of the relevant pollutant or pollutants in [the] area.'' The accounting required by this section provides a ''base year'' inventory that serves as the starting point for attainment demonstration air quality modeling, for assessing RFP, and for determining the need for additional SIP control measures. EPA regulations require that the inventory year be consistent with the baseline year for the RFP demonstration, which is the most recent calendar year for which a complete triennial inventory is required to be submitted to the EPA under the Air Emissions Reporting Requirements.[24]

Future baseline emissions inventories must reflect the most recent population, employment, travel and congestion estimates for the area.[25] Future baseline emissions inventories are necessary to show the projected effectiveness of SIP control measures. Both the base year and future year inventories are necessary for photochemical modeling to demonstrate attainment.

The EPA has issued guidance on the development of base year and future year emissions inventories for ozone and other pollutants.[26] Emissions inventories for ozone must include emissions of VOC and NO_X and represent emissions for a typical ozone

[18] Letter from Richard Corey, CARB Executive Officer, to Michael Stoker, EPA Region IX Regional Administrator, dated October 3, 2018.

[19] See 40 CFR part 51, appendix V.

[20] Email from Sylvia Vanderspek, Chief, CARB Air Quality Planning Branch, to Anita Lee, Chief, EPA Region IX Air Planning Office, dated October 17, 2018.

[21] Email from Sylvia Vanderspek, Chief, CARB Air Quality Planning Branch, to Anita Lee, Chief, EPA Region IX Air Planning Office, dated October 19, 2018.

[22] Letter from Dr. Michael Benjamin, Chief, Air Quality Planning and Science Division, CARB, to Mike Stoker, EPA Region IX Regional Administrator, dated October 30, 2018.

[23] Letter from Sheraz Gill, SJVAPCD Deputy Air Pollution Control Officer, to Richard Corey, CARB Executive Officer, and to Michael Stoker, EPA Region IX Regional Administrator, dated October 18, 2018.

[24] See 2008 Ozone SRR at 40 CFR 51.1115(a) and the Air Emissions Reporting Requirements at 40 CFR part 51 subpart A.

[25] See Emissions Inventory Guidance for Implementation of Ozone and Particulate Matter National Ambient Air Quality Standards (NAAQS) and Regional Haze Regulations, EPA–454/B–17–003, July 2017, chapter 5, Developing Projected Emissions Inventories, pages 113–129.

[26] See ''Emissions Inventory Guidance for Implementation of Ozone and Particulate Matter National Ambient Air Quality Standards (NAAQS) and Regional Haze Regulations,'' (''EI Guidance''), EPA–454/B–17–002, May 2017. At the time the 2016 Ozone Plan was developed, the following EPA emissions inventory guidance applied: ''Emissions Inventory Guidance for Implementation of Ozone and Particulate Matter National Ambient Air Quality Standards (NAAQS) and Regional Haze Regulations'' (''EI Guidance''), EPA–454–R–05–001, November 2005.

season weekday.[27] States should include documentation explaining how it calculated emissions data. In estimating mobile source emissions, states should use the latest emissions models and planning assumptions available at the time it develops the SIP submission.[28]

2. Summary of the State's Submissions

The 2016 Ozone Plan includes a 2012 base year emissions inventory based on actual emissions, to meet the requirements of CAA sections 172(c)(3) and 182(a)(1). The 2018 SIP Update does not include a new base year emissions inventory with actual emissions; rather, for purposes of updating the RFP demonstration, the transportation conformity motor vehicle emission budgets, and the contingency measure calculations, CARB used the 2012 base year inventory from the 2016 Ozone Plan to create new emissions inventory projections for the 2011 RFP baseline year and for RFP milestone years. These new projections are included in the 2018 SIP Update. CARB also submitted a ''San Joaquin Valley Emission Projection Technical Clarification'' to clarify how it calculated the projected inventories in this submission.[29] The EPA has evaluated the 2012 base year inventory from the 2016 Ozone Plan to determine whether it meets the requirements for a base year inventory in CAA sections 172(c)(3) and 182(a)(1), and the projected inventories included in the 2018 SIP Update to determine whether they are appropriate for use in the updated RFP demonstration and other purposes (*e.g.,* establishing revised motor vehicle emissions budgets). A summary of these submissions, and the results of our evaluation, are discussed below.

a. 2016 Ozone Plan

The 2016 Ozone Plan includes a 2012 base year emissions inventory for the San Joaquin Valley nonattainment area, based on actual emissions, to fulfill the requirements in CAA sections 172(c)(3) and 182(a)(1). The inventory includes VOC and NO_X emissions, because these pollutants are precursors to ozone formation, across all source categories during an ozone season day as defined in 40 CFR 51.1100(cc). The 2016 Ozone Plan has identified the summer, defined as May through October, as the time when the highest concentration of ozone is formed.

A description of base year emissions inventory development can be found in the 2016 Ozone Plan, chapter 3.11 through 3.11.2. The complete emissions inventory and documentation are found in Appendix B (''Emissions Inventory'').

VOC and NO_X emissions are grouped into two general categories: stationary sources and mobile sources. Stationary sources are further divided into ''point'' and ''area'' sources. Point sources typically refer to permitted facilities that have one or more identified and fixed pieces of equipment and emissions points. Permitted facilities were required to report their actual emissions to the District by the facility operators through the calendar year 2012. Stationary area sources are many smaller point sources, and include sources that have internal combustion engines, and gasoline dispensing facilities (gas stations). These sources are not inventoried individually; their emissions are estimated as a group and reported as a single source category.

Area sources consist of widespread and numerous smaller emission sources, such as small permitted facilities and households.

The mobile sources category can be divided into two major subcategories: ''on-road'' and ''off-road'' mobile sources. On-road mobile sources include light-duty automobiles, light-, medium-, and heavy-duty trucks, and motorcycles. Off-road mobile sources include aircraft, locomotives, construction equipment, mobile equipment, and recreational vehicles.

The emissions inventories for the San Joaquin Valley 2008 ozone nonattainment area in the 2016 Ozone Plan were developed jointly by CARB and the District. Data were provided by CARB, the California Department of Transportation, the Department of Motor Vehicles, the Department of Pesticide regulation, the California Energy Commission and regional transportation agencies to develop mobile and area-wide source emission estimates. The emission estimates reflect reported emissions for point sources, whereas estimates for mobile and area sources are based on projections obtained through use of emissions models and methodologies along with actual activity data for 2012 (*e.g.,* vehicle miles traveled). The District utilizes different methodologies to estimate over sixty different types of individual stationary area sources. CARB and the District also reviewed the growth profiles for point and areawide source categories and updated them as necessary to ensure that the emission projections were based on data that reflect historical trends, current conditions, and recent economic and demographic forecasts.

CARB provided emission estimates for stationary nonagricultural diesel engines, agricultural irrigation pumps, laundering (dry cleaning), degreasing (solvents), oil and gas production, and gasoline dispensing facilities.

Area sources are categories such as consumer products, pesticides/fertilizers, fireplaces, farming operations, and other emissions which occur over a wide geographic area. Emissions for these categories were estimated by both CARB and the District using various models and methodologies.

CARB developed the emissions inventory for mobile sources, both on-road and off-road. CARB estimated on-road mobile sources emissions, which include passenger vehicles, buses, and trucks, using CARB's EMFAC2014 model.[30] CARB calculated the on-road emissions by applying EMFAC2014 emission factors to the transportation activity data provided by the local San Joaquin Valley transportation agencies from their 2014 adopted Regional Transportation Plan. CARB estimated off-road mobile sources emissions using either newer category-specific models or, where a new model was not available, the OFFROAD2007 model.

Table 1 provides a summary, by major source categories, for the 2012 base year VOC and NO_X emissions inventories in tons per day (tpd) for the San Joaquin Valley 2008 ozone nonattainment area, as presented in the 2016 Ozone Plan. In the 2012 inventory presented in the 2016 Ozone Plan, mobile sources account for approximately 85 percent of NO_X emissions and 32 percent of VOC emissions in the San Joaquin Valley, and total area sources account for approximately 1.3 percent of NO_X emissions and 50 percent of VOC emissions.

[27] 40 CFR 51.1115(a) and (c), and 40 CFR 51.1100(bb) and (cc).

[28] See 80 FR 12264, at 12290 (March 6, 2015).

[29] Email from Stephanie Huber, Manager, CARB Emission Inventory Development Section to Larry Biland, EPA Region IX Air Quality Analysis Office, dated October 17, 2018, transmitting ''San Joaquin Valley Emission Projections Technical Clarification.''

[30] The EPA approved EMFAC2014 for use in SIP development and transportation conformity in California at 80 FR 77337 (December 14, 2015). EMFAC2014 is the most recently-approved model for California for these uses.

TABLE 1—BASE YEAR SUMMER AVERAGE VOC AND NO_X EMISSIONS IN THE 2016 OZONE PLAN

[In tons per day]

Source category	2012	
	VOC (tpd)	NO_X (tpd)
Stationary Sources	85.3	42.4
Area Sources	147.0	4.7
Mobile Sources	105.0	292.4
San Joaquin Valley Total	337.3	339.6

Source: Tables B–1 and B–2 of the 2016 Ozone Plan.

b. 2018 SIP Update

In response to the *South Coast II* decision, CARB developed the 2018 SIP Update, which updates the RFP demonstration and related SIP elements to rely on a 2011 baseline year. The 2018 SIP Update does not include a new base year emissions inventory with actual emissions for the San Joaquin Valley 2008 ozone nonattainment area to meet the requirements of 172(c)(3) and 182(a)(1). Rather, for purposes of the RFP demonstration, CARB used the 2012 base year inventory from the 2016 Ozone Plan to develop new emissions inventory projections for the 2011 RFP baseline year and for all RFP milestone years. These inventories form the basis of the RFP demonstration calculations, the motor vehicle emissions budgets, and the contingency measure calculations for the San Joaquin Valley 2008 ozone nonattainment area, which will be discussed in sections III.B, III.C, and III.D below. In this section, we describe and evaluate these updated inventory projections to determine whether they are appropriate for use in these SIP elements.

As in the 2016 Ozone Plan, the projected inventories in the 2018 SIP Update include NO_X and VOC emissions and are for the summer season defined as May through October. Details on the emissions inventory, documentation, and a complete listing of emissions can be found on pages 51 through 54 and Appendix A, pages A–27 through A–30 of the 2018 SIP Update. Additional emissions inventory information can be found in the ''San Joaquin Valley Emission Projections Technical Clarification'' document which explains the changes made in the methodologies used in emissions inventory development. This document is contained in the docket for this rulemaking.

The State and District developed point and stationary source VOC and NO_X emissions for the 2011 inventory from actual emissions, generally using the same methodologies used in the 2016 Ozone Plan. Stationary aggregate emissions and area source emissions for 2011 were backcast, and for future years were forecast, from the 2012 base year inventory. Mobile sources used the same model, EMFAC2014, as in the 2016 Ozone Plan. While the 2016 Ozone Plan used California Emissions Projections and Analysis Model (CEPAM) version 1.03 to project future year emissions, the 2018 SIP Update used CEPAM version 1.05. CEPAM 1.05 includes updates to methodologies for stationary and area sources in the following source categories: pesticides, cleaning and surface coatings, waste disposal, composting facilities, glass manufacturing, services and commercial/residential fuel combustion-space heating, and petroleum marketing. CARB used current information to update emissions from locomotives. For the rest of the source categories in the emissions inventory, CARB used the same methodologies as in the 2016 Ozone Plan.

Tables 2 and 3 provide summaries, by major source categories, for VOC and NO_X emissions inventories for RFP baseline and milestone years. These emissions are for the San Joaquin Valley 2008 ozone nonattainment area as presented in the Appendix A, pages A–27 through A–30 of the 2018 SIP Update.

TABLE 2—SUMMER AVERAGE VOC EMISSIONS IN THE 2018 SIP UPDATE

[In tons per day]

Source category	2011	2017	2020	2023	2026	2029	2031	2032
VOC (tpd)								
Stationary Sources	83.36	89.55	91.70	94.54	97.86	101.58	104.22	105.62
Area Sources	180.76	148.50	149.80	151.14	152.56	154.00	154.98	155.49
Mobile Sources	114.56	72.52	62.27	54.55	49.88	46.31	43.72	42.87
San Joaquin Valley Total	378.68	310.58	303.77	300.22	300.30	301.89	302.93	303.98

Source: Pages A–27 and A–28 of the 2018 SIP Update.

TABLE 3—SUMMER AVERAGE NO_X EMISSIONS IN THE 2018 SIP UPDATE

[In tons per day]

Source Category	2011	2017	2020	2023	2026	2029	2031	2032
NO_X (tpd)								
Stationary Sources	43.05	30.72	29.95	29.29	28.59	28.10	27.85	27.86
Area Sources	6.84	4.68	4.59	4.43	4.29	4.21	4.15	4.11
Mobile Sources	325.70	208.01	173.40	124.73	110.12	98.81	93.04	90.92

TABLE 3—SUMMER AVERAGE NO_X EMISSIONS IN THE 2018 SIP UPDATE—Continued
[In tons per day]

Source Category	2011	2017	2020	2023	2026	2029	2031	2032
San Joaquin Valley Total	375.58	238.41	207.94	158.44	143.01	131.12	125.03	122.89

Source—Pages A–29 and A–30 of the 2018 SIP Update.

With respect to future year projections, the EPA will approve a state plan that takes emissions reduction credit for a control measure only where the EPA has approved the measure as part of the SIP. Thus, to take credit for the emissions reductions from newly-adopted or amended District rules for stationary sources, the related rules must be approved by the EPA into the SIP. Table 1 in the technical support document (TSD) accompanying this rulemaking shows District rules that were incorporated in the future year inventories, along with information on EPA approval of these rules. In recent years, the EPA has taken action to approve CARB mobile source regulations into the California SIP.[31] Inventories in the 2018 SIP Update include these controls in their projections.

3. The EPA's Review of the State's Submission

We have reviewed the base year emissions inventory in the 2016 Ozone Plan and the RFP baseline and milestone year inventories in the 2018 SIP Update for the San Joaquin Valley 2008 ozone nonattainment area for consistency with CAA requirements and EPA guidance. First, as required by EPA regulation, we note that the inventories include estimates for VOC and NO_X for a typical ozone season weekday, and that CARB has provided adequate documentation explaining how the emissions are calculated. Second, we find that the 2012 base year emissions inventory in the 2016 Ozone Plan reflects appropriate emissions models and methodologies, and, therefore, represents a comprehensive, accurate, and current inventory of actual emissions during that year in the San Joaquin Valley nonattainment area. Further, we find that CARB and the District have used the most recent planning and activity assumptions, emissions models, and methodologies in developing the RFP baseline and milestone year emissions inventories in the 2018 SIP Update.

Therefore, the EPA is proposing to approve the 2012 emissions inventory as meeting the requirements for a base year inventory set forth in CAA section 182(a)(1) and 40 CFR 51.1115. Regarding the requirement in the 2008 Ozone SRR that the base year inventory be consistent with the baseline year for the RFP demonstration, we note that 2012 is the year of the base year inventory, while the RFP demonstration is based on a 2011 baseline year. However, as noted above, the 2011 emissions inventory is backcast from the 2012 base year inventory, and therefore is based on the same data. Therefore, we find that selection of 2012 as the base year for the emissions inventory is consistent with the 2011 baseline year for the RFP demonstration for this nonattainment area as required by 40 CFR 51.1115(a).

The 2018 SIP Update starts with 2011 as the baseline year and shows future baseline emissions inventories out to 2032. The EPA is proposing to find these inventories appropriate for use in developing the RFP demonstration (section III.B below), motor vehicle emissions budgets (section III.C below), and the contingency measure element for the San Joaquin Valley for the 2008 ozone standards (section III.D below).[32]

B. Rate of Progress Plan and Reasonable Further Progress Demonstration

1. Statutory and Regulatory Requirements

Requirements for RFP for ozone nonattainment areas are specified in CAA sections 172(c)(2), 182(b)(1), and 182(c)(2)(B). CAA section 172(c)(2) requires that plans for nonattainment areas provide for RFP, which is defined as such annual incremental reductions in emissions of the relevant air pollutant as are required under part D (''Plan Requirements for Nonattainment Areas'') or may reasonably be required by the EPA for the purpose of ensuring attainment of the applicable NAAQS by the applicable date. CAA section 182(b)(1) specifically requires that ozone nonattainment areas that are classified as Moderate or above demonstrate a 15 percent reduction in VOC between the years of 1990 and 1996. The EPA has typically referred to section 182(b)(1) as the Rate of Progress (ROP) requirement. For ozone nonattainment areas classified as Serious or higher, section 182(c)(2)(B) requires reductions averaged over each consecutive 3-year period, beginning 6 years after the baseline year until the attainment date, of at least 3 percent of baseline emissions per year. The provisions in CAA section 182(c)(2)(B)(ii) allow an amount less than 3 percent of such baseline emissions each year if the state demonstrates to the EPA that the plan includes all measures that can feasibly be implemented in the area in light of technological achievability.

In the 2008 Ozone SRR, the EPA provided that areas classified Moderate or higher will have met the ROP requirements of CAA section 182(b)(1) if the area has a fully approved 15 percent ROP plan for the 1-hour or 1997 8-hour ozone standards, provided the boundaries of the ozone nonattainment areas are the same.[33] For such areas, the EPA interprets the RFP requirements of CAA section 172(c)(2) to require areas classified as Moderate to provide a 15 percent emission reduction of ozone precursors within 6 years of the baseline year. Areas classified as Serious or higher must meet the RFP requirements of CAA section 182(c)(2)(B) by providing an 18 percent reduction of ozone precursors in the first 6-year period, and an average ozone precursor emission reduction of 3 percent per year for all remaining 3-year periods thereafter.[34] Under the CAA 172(c)(2) and CAA 182(c)(2)(B) RFP requirements, the state may substitute NO_X emissions reductions for VOC reductions.[35]

[31] See 81 FR 39424 (June 16, 2016), 82 FR 14446 (March 21, 2017), and 83 FR 23232 (May 18, 2018).

[32] We previously determined that the 2012 base year emission inventory and future year emissions inventories that are derived therefrom in the 2016 Ozone Plan provide an acceptable basis for the attainment demonstration and VMT offset demonstration in the 2016 Ozone Plan. See 83 FR 44528, at 44532/column 1. (August 31, 2018).

[33] See 70 FR 12264 at 12271 (March 6, 2015). In our August 31, 2018 proposed action on certain portions of the 2016 Ozone Plan, we proposed to approve the ROP demonstration as meeting the requirements of CAA section 182(b)(1) based on the previous approval by the EPA of the 15 percent ROP demonstration for the San Joaquin Valley for the 1-hour ozone NAAQS. See 83 FR 44528, at 44539 (August 31, 2018). Therefore, we do not further address the ROP demonstration requirement in this document.

[34] Id.

[35] See 40 CFR 51.1110(a)(2)(i)(C) and 40 CFR 51.1110(a)(2)(ii)(B); and 70 FR 12264 at 12271 (March 6, 2015).

Except as specifically provided in CAA section 182(b)(1)(C), emissions reductions from all SIP-approved, federally promulgated, or otherwise SIP-creditable measures that occur after the baseline year are creditable for purposes of demonstrating that the RFP targets are met. Because the EPA has determined that the passage of time has caused the effect of certain exclusions to be de minimis, the RFP demonstration is no longer required to calculate and specifically exclude reductions from measures related to motor vehicle exhaust or evaporative emissions promulgated by January 1, 1990; regulations concerning Reid vapor pressure promulgated by November 15, 1990; measures to correct previous RACT requirements; and, measures required to correct previous inspection and maintenance (I/M) programs.[36]

The 2008 Ozone SRR requires the RFP baseline year to be the most recent calendar year for which a complete triennial inventory was required to be submitted to the EPA. For the purposes of developing RFP demonstrations for the 2008 ozone standards, the applicable triennial inventory year is 2011. As discussed previously, the 2008 Ozone SRR provided states with the opportunity to use an alternative baseline year for RFP but that particular aspect of the 2008 Ozone SRR was vacated by the D.C. Circuit in the *South Coast II* decision.[37]

2. Summary of the State's Submission

The 2018 SIP Update replaces the RFP portion of the 2016 Ozone Plan and includes updated emissions estimates for the baseline, milestone and attainment years, and an updated RFP demonstration relying on a 2011 baseline year.[38] The updated RFP demonstration is shown in table 4 below:

TABLE 4—REASONABLE FURTHER PROGRESS DEMONSTRATION IN THE 2018 SIP UPDATE

	VOC (tpd)						
	2011	2017	2020	2023	2026	2029	2031
Baseline VOC	378.7	310.6	303.8	300.2	300.3	301.9	302.9
Transportation Conformity Safety Margin	0	0	0	0	0	0	0
Baseline VOC + Safety Margin	378.7	310.6	303.8	300.2	300.3	301.9	302.9
Required % change since 2011 (VOC or NO_X)		18%	27%	36%	45%	54%	60%
Required tpd reductions since 2011		68.2	102.2	136.3	170.4	204.5	227.2
Target VOC Level		310.5	276.4	242.4	208.3	174.2	151.5
Apparent Shortfall (−)/Surplus (+) in VOC		−0.1	−27.3	−57.9	−92.0	−127.7	−151.5
Apparent Shortfall (−)/Surplus (+) in VOC, %		0%	−7.2%	−15.3%	−24.3%	−33.7%	−40.0%
VOC Shortfall previously provided by NO_X Substitution, %		0%	0%	7.2%	15.3%	24.3%	33.7%
Actual VOC shortfall (−)/surplus (+), %		0%	−7.2%	−8.1%	−9.0%	−9.4%	−6.3%
	NO_X (tpd)						
	2011	2017	2020	2023	2026	2029	2031
Baseline NO_X	375.6	238.4	207.9	158.4	143.0	131.1	125.0
Transportation Conformity Safety Margin	0.0	0.0	0.0	2.5	5.3	7.1	8.0
Baseline NO_X + Safety Margin	375.6	238.4	207.9	160.9	148.3	138.2	133.1
Change in NO_X since 2011, tpd		137.2	167.7	214.7	227.3	237.4	242.5
Change in NO_X since 2011, %		36.5%	44.6%	57.2%	60.5%	63.2%	64.6%
NO_X reductions used for VOC substitution through last milestone year, %		0%	0%	7.2%	15.3%	24.3%	33.7%
NO_X reductions since 2011 available for VOC substitution in this milestone year, %		36.5%	44.6%	49.9%	45.2%	38.9%	30.8%
NO_X reductions since 2011 used for VOC substitution in this milestone year, %		0%	7.2%	8.1%	9.0%	9.4%	6.3%
NO_X reductions since 2011 surplus after meeting VOC substitution needs in this milestone year, %		36.5%	37.4%	41.9%	36.2%	29.5%	24.6%
Total shortfall for RFP		0%	0%	0%	0%	0%	0%
RFP Met?		YES	YES	YES	YES	YES	YES

Source: Table VIII–2 of the 2018 SIP Update.

The updated RFP demonstration calculates future year VOC targets from the 2011 baseline, consistent with CAA 182(c)(2)(B)(i), which requires reductions of ''at least 3 percent of baseline emissions each year.'' The updated RFP demonstration in the 2018 SIP Update substitutes NO_X reductions for VOC reductions[39] beginning in milestone year 2020 to meet VOC emission targets. For the San Joaquin Valley nonattainment area, CARB concludes that the RFP demonstration meets the applicable requirements for each milestone year as well as the attainment year.

3. The EPA's Review of the State's Submission

As discussed in section III.A above, we are proposing to find that the baseline and RFP milestone year emissions inventories are acceptable for use in the RFP demonstration. We have reviewed the calculations in table VIII–2 of the 2018 SIP Update and presented in table 4 above, and find that the State has used an appropriate calculation method to demonstrate RFP. For these reasons, we have determined that the State has demonstrated RFP in each milestone year and the attainment year, consistent with applicable CAA requirements and EPA guidance. We therefore propose to approve the RFP demonstrations under sections

[36] See 40 CFR 51.1110(a)(7).

[37] See 40 CFR 51.1110(b).

[38] See the Reasonable Further Progress demonstration, section VIII–B, beginning on page 52.

[39] NO_X substitution is permitted under EPA regulations. See 40 CFR 51.1110(a)(2)(i)(C) and 40 CFR 51.1110(a)(2)(ii)(B); and 70 FR 12264 at 12271 (March 6, 2015).

172(c)(2), 182(b)(1) and 182(c)(2)(B) of the CAA and 40 CFR 51.1110(a)(2)(ii).

C. Motor Vehicle Emissions Budgets for Transportation Conformity

1. Statutory and Regulatory Requirements

Section 176(c) of the CAA requires federal actions in nonattainment and maintenance areas to conform to the SIP's goals of eliminating or reducing the severity and number of violations of the NAAQS and achieving timely attainment of the standards. Conformity to the SIP's goals means that such actions will not: (1) Cause or contribute to violations of a NAAQS, (2) worsen the severity of an existing violation, or (3) delay timely attainment of any NAAQS or any interim milestone.

Actions involving Federal Highway Administration (FHWA) or Federal Transit Administration (FTA) funding or approval are subject to the EPA's transportation conformity rule, codified at 40 CFR part 93, subpart A. Under this rule, MPOs in nonattainment and maintenance areas coordinate with state and local air quality and transportation agencies, the EPA, the FHWA, and the FTA to demonstrate that an area's regional transportation plans and transportation improvement programs conform to the applicable SIP. This demonstration is typically done by showing that estimated emissions from existing and planned highway and transit systems are less than or equal to the motor vehicle emissions budgets (MVEBs or "budgets") contained in all control strategy SIPs. Budgets are generally established for specific years and specific pollutants or precursors. Ozone plans should identify budgets for on-road emissions of ozone precursors (NO_X and VOC) in the area for each RFP milestone year and the attainment year, if the plan demonstrates attainment.[40]

For budgets to be approvable, they must meet, at a minimum, the EPA's adequacy criteria (40 CFR 93.118(e)(4)). To meet these requirements, the budgets must be consistent with the attainment and RFP requirements and reflect all of the motor vehicle control measures contained in the attainment and RFP demonstrations.[41]

The EPA's process for determining adequacy of a budget consists of three basic steps: (1) Providing public notification of a SIP submission; (2) providing the public the opportunity to comment on the budget during a public comment period; and, (3) making a finding of adequacy or inadequacy.[42]

2. Summary of the State's Submission

The 2016 Ozone Plan included sub-regional (*i.e.,* county-based) budgets for the 2018, 2021, 2024, 2027, and 2030 RFP milestone years, and the 2031 attainment year. In June 2017, the EPA found the budgets adequate for transportation conformity purposes,[43] and more recently, proposed approval of the 2031 budgets in our August 31, 2018 action on portions of the 2016 Ozone Plan. The budgets for 2018, 2021, 2024, 2027 and 2030 were derived from the 2012 RFP baseline year and the associated RFP milestone years. As such, the budgets are affected by the *South Coast II* decision vacating the alternative baseline year provision, and therefore, the EPA did not propose action on RFP budgets in our August 31, 2018 proposed rule. On October 3, 2018, CARB requested parallel processing of the 2018 SIP Update before its board's anticipated adoption of the plan on October 25, 2018. The 2018 SIP Update revises the RFP determination and identifies new sub-regional budgets for each county in the nonattainment area for VOC and NO_X for each updated RFP milestone year through 2030 and for the attainment year, 2031. The budgets in this 2018 SIP Update replace all of the budgets contained in the 2016 Ozone Plan.

The budgets in the 2018 SIP Update were calculated using updated vehicle miles traveled (VMT) estimates from the 2018 Regional Transportation Plans from the San Joaquin Valley Metropolitan Transportation Planning agencies and EMFAC2014, CARB's latest approved version of the EMFAC model for estimating emissions from on-road vehicles operating in California, and reflect average summer weekday emissions consistent with the RFP milestone years and the 2031 attainment year for the 2008 ozone NAAQS. The budgets also include a safety margin for some years and some counties. The conformity budgets for NO_X and VOC for each county in the nonattainment area are provided in table 5 below.

TABLE 5—BUDGETS IN THE 2018 SIP UPDATE

[In tons per day]

County	2020		2023		2026		2029		2031	
	VOC (tpd)	NO_X (tpd)	VOC (tpd)	NO_X (tpd)	VOC (tpd)	NO_X (tpd)	VOC (tpd)	NO_X (tpd)	VOC (tpd)	NO_X (tpd)
Fresno	6.7	3.9	5.5	14.1	4.9	13.2	4.5	12.4	4.2	12.1
Kern (SJV)	5.4	23.9	4.5	14.5	4.2	14.4	4.0	14.3	3.9	14.3
Kings	1.2	4.5	1.0	2.7	0.9	2.5	0.8	2.6	0.8	2.6
Madera	1.5	4.3	1.1	2.7	1.0	2.5	0.9	2.4	0.8	2.3
Merced	2.2	8.8	1.7	6.0	1.5	5.9	1.3	5.6	1.2	5.4
San Joaquin	4.7	11.2	3.9	7.4	3.5	7.0	3.1	6.6	2.8	6.3
Stanislaus	3.1	8.8	2.6	5.6	2.2	4.9	2.0	4.5	1.8	4.3
Tulare	3.0	7.6	2.4	4.6	2.1	4.0	1.8	3.7	1.7	3.5

Source: Tables VIII–4 through VIII–10 of the 2018 SIP Update.

3. The EPA's Review of the State's Submission

We have evaluated the submitted budgets in the 2018 SIP Update against our adequacy criteria in 40 CFR 93.118(e)(4) as part of our review of the budgets' approvability (see section III in the EPA's TSD for this proposal) and will complete the adequacy review concurrent with our final action on the ozone plan. The EPA is not required under its transportation conformity rule to find budgets adequate prior to proposing approval of them.[44]

[40] See 40 CFR 93.102(b)(2)(i).

[41] See 40 CFR 93.118(e)(4)(iii), (iv) and (v). For more information on the transportation conformity requirements and applicable policies on MVEBs, please visit our transportation conformity website at: *http://www.epa.gov/otaq/stateresources/transconf/index.htm.*

[42] See 40 CFR 93.118(f)(2).

[43] 82 FR 29547 (June 29, 2017).

[44] Under the Transportation Conformity regulations, the EPA may review the adequacy of submitted motor vehicle emission budgets simultaneously with the EPA's approval or disapproval of the submitted implementation plan 40 CFR 93.118(f)(2).

The EPA has previously determined that the budgets in 2016 Ozone Plan are adequate for use for transportation conformity purposes. On February 23, 2017, the EPA announced the availability of the 2016 Ozone Plan and budgets, which were available for a 30-day public comment period that ended on March 27, 2017.[45] The EPA received no comments from the public. On June 13, 2017, as noted above, the EPA determined the 2018, 2021, 2024, 2027, 2030 and 2031 MVEBs were adequate.[46] On June 29, 2017, the notice of adequacy was published in the **Federal Register**.[47] These budgets became effective on July 14, 2017, and have been used in transportation conformity determinations in the San Joaquin Valley area.

In today's notice, the EPA is proposing to approve the 2020, 2023, 2026, 2029 and 2031 budgets in the 2018 SIP Update for transportation conformity purposes. The EPA has determined through its review of the submitted 2018 SIP Update that these budgets are consistent with emission control measures in the SIP, reasonable further progress and attainment for the 2008 ozone NAAQS. For the reasons discussed in section III.B of this proposed rule, we are proposing to approve the RFP demonstration in the 2018 SIP Update. To supplement the information in the 2018 SIP Update, CARB provided an additional technical supplement [48] demonstrating that the budgets, including safety margins, which are clearly identified in the tables VIII–4 through VIII–10 of the 2018 SIP Update, are consistent with RFP.

The EPA has previously proposed to approve the attainment demonstration in 2016 Ozone Plan and associated 2031 budgets.[49] The 2018 SIP Update does not update the attainment demonstration, therefore CARB provided an additional technical supplement [50] to assess the effect of the emissions updates in the 2018 SIP Update using modeling from the 2016 Ozone Plan. The supplement showed that the updated on-road emission and safety margins, when considered together with all other emission sources, are consistent with applicable requirements for attainment. A detailed discussion of the EPA's analysis of CARB's technical supplement is provided in section III of the TSD accompanying this rulemaking.

The 2018 SIP Update budgets as shown in table 5, are consistent with the RFP demonstration and attainment demonstration, are clearly identified and precisely quantified, and meet all other applicable statutory and regulatory requirements, including the adequacy criteria in 40 CFR 93.118(e)(4) and (5). For these reasons, the EPA proposes to approve the budgets in table 5. We provide a more detailed discussion in section III of the EPA's TSD, which can be found in the docket for today's action. If we finalize approval of the budgets in the 2018 SIP Update, as proposed, then they will replace the budgets from the 2016 Ozone Plan that we previously found adequate for use in conformity determinations by transportation agencies in the San Joaquin Valley.

D. Contingency Measures for Failure To Meet RFP Milestones or To Attain the NAAQS by the Applicable Attainment Date

1. Statutory and Regulatory Requirements

Under the CAA, ozone nonattainment areas classified under subpart 2 as Serious or above must include in their SIPs contingency measures consistent with sections 172(c)(9) and 182(c)(9). Contingency measures are additional controls or measures to be implemented in the event the area fails to make RFP or to attain the NAAQS by the attainment date. The SIP should contain trigger mechanisms for the contingency measures, specify a schedule for implementation, and indicate that the measure will be implemented without significant further action by the state or the EPA.[51]

Neither the CAA nor the EPA's implementing regulations establish a specific amount of emissions reductions that implementation of contingency measures must achieve, but the 2008 Ozone SRR reiterates the EPA's guidance recommendation that contingency measures should provide for emissions reductions approximately equivalent to one year's worth of RFP, thus amounting to reductions of 3 percent of the baseline emissions inventory for the nonattainment area.[52]

It has been the EPA's longstanding interpretation of section 172(c)(9) that states may rely on existing federal measures (*e.g.,* federal mobile source measures based on the incremental turnover of the motor vehicle fleet each year) and state or local measures in the SIP already scheduled for implementation that provide emissions reductions in excess of those needed to meet any other nonattainment plan requirements, such as meeting RACM/RACT, RFP or expeditious attainment requirements. The key is that the statute requires that contingency measures provide for additional emissions reductions that are not relied on for RFP or attainment and that are not included in the RFP or attainment demonstrations as meeting part or all of the contingency measure requirements. The purpose of contingency measures is to provide continued emissions reductions while the state revises the SIP to meet the missed milestone or attainment date.

The EPA has approved numerous nonattainment area plan SIP submissions under this interpretation, *i.e.,* SIPs that use as contingency measures one or more federal or state control measures that are already in place and provide reductions that are in excess of the reductions required to meet other requirements or relied upon in the modeled attainment demonstration,[53] and there is case law supporting the EPA's interpretation in this regard.[54] However, in *Bahr* v. *EPA,* the Ninth Circuit rejected the EPA's interpretation of CAA section 172(c)(9) as allowing for approval of already implemented control measures as contingency measures.[55] The Ninth Circuit concluded that contingency measures must be measures that would take effect at the time the area fails to make RFP or to attain by the applicable attainment date, not before.[56] Thus, within the geographic jurisdiction of the Ninth Circuit, states cannot rely on already implemented control measures to comply with the contingency

[45] See *http://www.epa.gov/otaq/stateresources/transconf/currsips.htm.*

[46] See June 13, 2017 letter from Elizabeth J. Adams, Acting Director, Air Division, EPA Region IX, to Richard W. Corey, Executive Officer, CARB.

[47] See 82 FR 29547.

[48] See email from Sylvia Vanderspek, Chief, California Air Resources Board Air Planning Branch, to Anita Lee, Chief, EPA Region IX Air Planning Office, October 17, 2018.

[49] See 83 FR 44528 (August 31, 2018).

[50] See email from Sylvia Vanderspek, Chief, California Air Resources Board Air Planning Branch, to Anita Lee, Chief, EPA Region IX Air Planning Office, October 19, 2018.

[51] See 70 FR 71612 (November 29, 2005). See also 2008 Ozone SRR, 80 FR 12264 at 12285 (March 6, 2015).

[52] 80 FR 12264 at 12285 (March 6, 2015).

[53] See, *e.g.,* 62 FR 15844 (April 3, 1997) (direct final rule approving an Indiana ozone SIP revision); 62 FR 66279 (December 18, 1997) (final rule approving an Illinois ozone SIP revision); 66 FR 30811 (June 8, 2001) (direct final rule approving a Rhode Island ozone SIP revision); 66 FR 586 (January 3, 2001) (final rule approving District of Columbia, Maryland, and Virginia ozone SIP revisions); and 66 FR 634 (January 3, 2001) (final rule approving a Connecticut ozone SIP revision).

[54] See, *e.g., LEAN* v. *EPA,* 382 F.3d 575 (5th Cir. 2004) (upholding contingency measures that were previously required and implemented where they were in excess of the attainment demonstration and RFP SIP).

[55] *Bahr* v. *EPA,* 836 F.3d 1218, at 1235–1237 (9th Cir. 2016).

[56] Id. at 1235–1237.

measure requirements under CAA sections 172(c)(9) and 182(c)(9).[57]

2. Summary of the State's Submission

The District and CARB adopted the 2016 Ozone Plan prior to the *Bahr* v. *EPA* decision, and it relies upon surplus emissions reductions from already implemented control measures in the RFP milestone years to demonstrate compliance with the RFP milestone contingency measure requirements of CAA sections 172(c)(9) and 182(c)(9).[58] With respect to the attainment contingency measure requirements, the 2016 Ozone Plan relies upon the incremental reduction in emissions in the year following the attainment year relative to the emissions in the attainment year due to continuing benefits from already implemented control measures, and on the aggregate emission reduction commitment made by CARB in the 2016 State Strategy for San Joaquin Valley.[59]

In the 2018 SIP Update, CARB revises the RFP demonstration for the 2008 ozone standards for the San Joaquin Valley nonattainment area and recalculates the extent of surplus emission reductions (*i.e.,* surplus to meeting the RFP milestone requirement for a given milestone year) in the milestone years, and updates the estimate of the incremental reduction in emissions in the year following the attainment year (relative to the attainment year). In light of the *Bahr* v. *EPA* decision, however, the 2018 SIP Update does not identify such surplus or incremental emissions reductions as contingency measures. Instead, the 2018 SIP Update includes a contingency measure that would take effect upon a failure to meet an RFP milestone or upon a failure to attain the 2008 ozone standards by the applicable attainment date.

The new contingency measure, referred to as the ''Enhanced Enforcement Activities Program,'' is described in chapter X (''Contingency Measures''), section C of the 2018 SIP Update. In short, under the Enhanced Enforcement Activities Program, within 60 days of a determination by the EPA that the San Joaquin Valley nonattainment area failed to meet an RFP milestone or to attain the 2008 ozone NAAQS by the applicable attainment date, the CARB Executive Officer would direct enhanced enforcement activities in San Joaquin Valley consistent with the findings and recommendations in a report (referred to as the Enhanced Enforcement Report) that is to be prepared and published within 60 days of the triggering event. In the 2018 SIP Update, CARB indicates that the Enhanced Enforcement Report will, among other things, describe the compliance status of stationary and mobile sources in the area, determine the probable cause of the failure of RFP or attainment, and specify the type and quantity of additional enforcement resources that will be directed to the area. Lastly, through its resolution of adoption of the 2018 SIP Update, CARB added a menu of specific enforcement activity measures, one or more of which must be identified in the Enhanced Enforcement Report and implemented within 60 days of a triggering event.[60]

In chapter X (''Contingency Measures'') of the 2018 SIP Update, CARB indicates that compliance with the contingency measure requirements of the CAA necessitates that individual air districts adopt a local contingency measure or measures to complement CARB's Enhanced Enforcement Activities Program measure. To address the contingency measure requirement for the 2008 ozone standards in the San Joaquin Valley nonattainment area, the District has committed to adopt and submit a contingency measure to CARB within 11 months of the EPA's final conditional approval of the contingency measure element of the 2016 Ozone Plan, as supplemented by the relevant portions of the 2018 SIP Update.[61] The District's specific commitment is to revise the district's current architectural coatings rule to remove the exemption for architectural coatings sold in containers with a volume of one liter or less if the EPA determines that the San Joaquin Valley nonattainment area has missed an RFP milestone or failed to attain the 2008 ozone NAAQS by the applicable attainment date. The District further commits to submit the revised architectural coatings rule to CARB within 11 months of final EPA action. CARB has attached the District's commitment to revise the architectural coatings rule to a letter committing to adopt and submit the revised rule to the EPA within one year of the EPA's final action on the contingency measure element of the 2016 Ozone Plan (and related portions of the 2018 SIP Update).[62]

3. The EPA's Review of the State's Submission

We have evaluated the contingency measure provisions in the 2016 Ozone Plan, the 2018 SIP Update, and the commitments by the District and CARB to adopt and submit a district contingency measure within one year of the EPA's final action and have concluded that, collectively, these materials provide the basis for us to propose conditional approval of the 2016 Ozone Plan and the relevant portions of 2018 Update.

First, we find that CARB's Enhanced Enforcement Activities Program measure and the revision to the architectural coatings rule (once adopted) represent additional controls or measures to be implemented in the event San Joaquin Valley fails to make RFP or to attain the NAAQS by the applicable attainment date. We also find that CARB's Enhanced Enforcement Activities Program contains, and the revised architectural coatings rule will contain, triggering mechanisms and schedules for implementation for the additional measures. Furthermore, the contingency measures are designed to be implemented without significant further action by the State or the EPA.[63] As such, CARB's Enhanced Enforcement Activities Program measure is structured, and the District's intended measure, as described in the commitment, will be structured, to meet the requirements of CAA sections

[57] The *Bahr* v. *EPA* decision involved a challenge to an EPA approval of contingency measures under the general nonattainment area plan provisions for contingency measures in CAA section 172(c)(9), but, given the similarity between the statutory language in section 172(c)(9) and the ozone-specific contingency measure provision in section 182(c)(9), we find that the decision affects how both sections of the Act must be interpreted.

[58] See the 2016 Ozone Plan, chapter 6, section 6.3.

[59] See the 2016 Ozone Plan, chapter 6, section 6.4 and CARB's Staff Report, ARB Review of the San Joaquin Valley 2016 Plan for the 2008 8-Hour Ozone Standard, release date June 17, 2016, pages 21 and 22. CARB's aggregate commitment is to achieve emission reductions in the San Joaquin Valley of 8 tpd of NO_X by 2031. In our August 31, 2018 proposed action on portions of the 2016 Ozone Plan (83 FR 44528, at 44547), we proposed to approve the aggregate 8-tpd NO_X commitment by CARB from the 2016 State Strategy as a SIP strengthening measure.

[60] CARB Resolution 18–50, dated October 25, 2018, attachment B.

[61] Sheraz Gill, Deputy Air Pollution Control Officer, letter to Richard Corey, Executive Officer, CARB and Michael Stoker, Regional Administrator, EPA Region IX, dated October 18, 2018.

[62] Letter from Dr. Michael Benjamin, Chief, CARB Air Quality Planning and Science Division, to Michael Stoker, Regional EPA Region IX Administrator, dated October 20, 2018.

[63] We recognize that CARB's Enhanced Enforcement Activities Program calls for the preparation of a report before specific actions are taken; however, we view the preparation of the report as a ministerial act that does not require significant action on the part of CARB or the EPA, *e.g.,* does not depend upon rulemaking or any action by the CARB Board. Furthermore, in adopting the 2018 SIP Update, the CARB Board strengthened the Enhanced Enforcement Activities Program contingency measure by adopting a menu of specific actions, one or more of which must be included in the report for implementation beginning 60 days after the triggering event. See CARB Resolution 18–50, October 25, 2018, attachment B (''Menu of Enhanced Enforcement Actions'').

172(c)(9) and 182(c)(9) consistent with the *Bahr* v. *EPA* decision.

As noted above, neither the CAA nor the EPA's implementing regulations for the ozone NAAQS establish a specific amount of emissions reductions that implementation of contingency measures must achieve, but we generally expect that contingency measures should provide for emissions reductions approximately equivalent to one year's worth of RFP, which, for ozone, amounts to reductions of 3 percent of the baseline emissions inventory for the nonattainment area. For the 2008 ozone standards in the San Joaquin Valley nonattainment area, one year's worth of RFP is approximately 11.4 tpd of VOC or NO_X reductions.[64]

The 2018 SIP Update does not include a specific estimate of the emissions reductions that would be achieved by the Enhanced Enforcement Activities program. We recognize the difficulty in calculating such an estimate given the nature of the measure and the range of enforcement actions that could be taken, but we believe that the enhanced enforcement program would achieve emissions reductions above and beyond those that would otherwise be achieved. The District's intended contingency measure, *i.e.,* the removal of the small-container exemption from the current local architectural coatings rule in the SIP upon a triggering event, lends itself more easily to quantification of potential additional emission reductions. Based on emissions estimates developed in connection with the removal of the same small-container exemption from the comparable South Coast Air Quality Management District's architectural coatings rule, we estimate that the removal of the exemption would achieve roughly 1 tpd reduction of VOC in San Joaquin Valley.[65]

Considered together, as described above, the two contingency measures can be quantified to achieve approximately 1 tpd of VOC emissions reductions. Thus the contingency measures, considered in isolation, can be quantified to achieve far less than one year's worth of RFP (11.4 tpd of VOC or NO_X). However, the 2018 SIP Update presents the contingency measures within the larger SIP planning context and concludes that the emissions reductions from the two contingency measures are sufficient to meet CAA contingency measure requirements when considered in conjunction with the surplus emissions reductions estimated to be achieved in the RFP milestone years and the incremental emissions reductions projected to occur in the year following the attainment year. Although these surplus emission reductions and incremental emissions reductions result from existing (*i.e.,* already implemented) measures that are not appropriate as contingency measures under the *Bahr* v. *EPA* court's interpretation of CAA section 172(c)(9), they nonetheless provide additional emission reductions that will improve the ambient ozone levels in the San Joaquin Valley 2008 ozone nonattainment area in the event that RFP or attainment are not met.

In this case, ''surplus'' refers to emissions reductions over and above the reductions necessary to demonstrate RFP in San Joaquin Valley for the 2008 ozone standards. More specifically, table VIII–2 in the 2018 SIP Update identifies surplus NO_X reductions in the various RFP milestone years. For San Joaquin Valley, the estimates of surplus NO_X reductions vary for each RFP milestone year but range from 92.4 tpd (24.6 percent of 2011 baseline NO_X) in milestone year 2031 to 157.4 tpd (41.9 percent of 2011 baseline NO_X) in milestone year 2023. These represent values that far eclipse one year's worth of RFP (11.4 tpd). The surplus reflects already implemented regulations and is primarily the result of vehicle turnover, which refers to the ongoing replacement by individuals, companies, and government agencies of older, more polluting vehicles and engines with newer vehicles and engines designed to meet more stringent CARB mobile source emission standards. In light of the extent of surplus NO_X emissions reductions in the RFP milestone years, we agree with CARB that the emissions reductions from the two contingency measures would be sufficient to meet the contingency measure requirements of the CAA with respect to RFP milestones, even though the measures would achieve emissions reductions lower than the EPA normally recommends for reductions from such measures.

For attainment contingency measure purposes, we view the emissions reductions from the two contingency measures in the context of the expected reduction in emissions within the San Joaquin Valley nonattainment area for the 2008 ozone NAAQS in the year following the attainment year (relative to those occurring in the attainment year). Based on the emission inventories in the Appendix A to the 2018 SIP Update, we note that overall regional emissions are expected to be approximately 1 tpd of NO_X lower in 2032 than in 2031.[66] Considered together with the quantified 1 tpd reduction from the contingency measures, the adopted regulations would not provide sufficient emissions reductions to constitute one year's worth of RFP. However, as part of the 2016 State Strategy, CARB has made an aggregate emission reduction commitment of 8 tpd of NO_X for San Joaquin Valley by 2031 over and above the reductions that are needed for any other CAA purpose with respect to the 2008 ozone standards. Fulfillment of the 8-tpd commitment would reduce the potential for the area to fail to attain the 2008 ozone NAAQS by the 2031 applicable attainment date. Under these circumstances, given the reduced potential for failure to attain and the expected year-over-year net reduction in regional emissions, we find that the emissions reductions from the two contingency measures are sufficient to meet the contingency measure requirements of the CAA with respect to attainment.

For the above reasons, we propose to conditionally approve the contingency measure element of the 2016 Ozone Plan, as modified by the 2018 SIP Update, and supplemented by the commitments by the District and CARB to adopt and submit an additional contingency measure, as meeting the contingency measure requirements of CAA sections 172(c)(9) and 182(c)(9). Our proposed approval is conditional because it relies upon a commitment to adopt a specific enforceable contingency measure. Conditional approvals are authorized under CAA section 110(k)(4) of the CAA.

V. Proposed Action

For the reasons discussed above, under CAA section 110(k)(3), the EPA is proposing to approve as a revision to the California SIP the following portions of the San Joaquin Valley 2016 Ozone Plan[67] submitted by CARB on August 24, 2016:

- Base year emissions inventory as meeting the requirements of CAA

[64] The 2011 baseline for VOC and NO_X is 378.7 tpd and 375.6 tpd, respectively, as shown in table VIII–1 of the 2018 SIP Update. Three percent of the baselines is 11.4 tpd of VOC and 11.3 tpd of NO_X, respectively.

[65] The basis for this estimate is detailed in section II of the TSD accompanying this rulemaking.

[66] A comparison of regional emissions totals in 2032 with those in 2031 shows that VOC emissions are expected to be 1.05 tpd higher, and NO_X emissions are expected to be 2.14 lower, for a net reduction of approximately 1 tpd of NO_X.

[67] As noted previously, the EPA has already approved the portions of the 2016 Ozone Plan (section 3.4 (''Reasonably Available Control Technology (RACT) Demonstration'') and Appendix C (''Stationary and Area Source Control Strategy Evaluations'')) that relate to the RACT requirements under CAA section 182(b)(2) and 40 CFR 51.1112.

sections 172(c)(3) and 182(a)(1) and 40 CFR 51.1115.

The EPA is also proposing to approve as a revision to the California SIP the following portions of the 2018 SIP Update to the California State Implementation Plan, adopted by CARB on October 25, 2018:

- RFP demonstration as meeting the requirements of CAA sections 172(c)(2), 182(b)(1), and 182(c)(2)(B), and 40 CFR 51.1110(a)(2)(ii); and
- Motor vehicle emissions budgets for the RFP milestone years of 2020, 2023, 2026, 2029, and the attainment year of 2031 (see table 5, above) because they are consistent with the RFP demonstration proposed for approval herein and the attainment demonstration previously proposed for approval and meet the other criteria in 40 CFR 93.118(e).

Lastly, we are proposing to conditionally approve the contingency measure element of the 2016 Ozone Plan, as modified by the 2018 SIP Update, as meeting the requirements of CAA sections 172(c)(9) and 182(c)(9) based on commitments by CARB and the District to supplement the element through submission of a SIP revision within 1 year of final conditional approval action that will include a revised District architectural coatings rule.

The EPA is soliciting public comments on the proposed actions listed above, our rationales for the proposed actions, and any other pertinent matters related to the issues discussed in this document. We will accept comments from the public on this proposal for the next 30 days and will consider comments before taking final action.

VI. Statutory and Executive Order Reviews

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

- Is not a ''significant regulatory action'' subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- Is not an Executive Order 13771 (82 FR 9339, February 2, 2017) regulatory action because SIP approvals are exempted under Executive Order 12866;
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the Clean Air Act; and
- Does not provide the EPA with the discretionary authority to address disproportionate human health or environmental effects with practical, appropriate, and legally permissible methods under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, the SIP is not approved to apply on any Indian reservation land or in any other area where the EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the proposed rule does not have tribal implications and will not impose substantial direct costs on tribal governments or preempt tribal law as specified by Executive Order 13175 (65 FR 67249, November 9, 2000).

List of Subjects in 40 CFR Part 52

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

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

Dated: November 19, 2018.

Deborah Jordan,

Acting Regional Administrator, Region IX.

[FR Doc. 2018–25885 Filed 11–28–18; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 61 and 69

[WC Docket Nos. 17–144, 16–143, 05–25; FCC 18–146]

Regulation of Business Data Services for Rate-of-Return Local Exchange Carriers; Business Data Services in an Internet Protocol Environment; Special Access for Price Cap Local Exchange Carriers

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: The Commission seeks comment on proposals to eliminate ex ante pricing regulation for price cap incumbent LECs' provision of TDM and other transport business data services. The Commission also seeks comment on the conditions under which ex ante pricing regulations should be eliminated for lower capacity TDM transport business data services offerings by rate-of-return carriers opting in to the Commission's new light-touch regulatory framework. With these steps, the Commission continues its ongoing efforts to modernize regulations for the dynamic and evolving business data services market.

DATES: Comments are due on or before January 14, 2019. Reply comments are due on or before February 12, 2019.

ADDRESSES: Federal Communications Commission, 445 12th St. SW, Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: Justin Faulb, Wireline Competition Bureau, Pricing Policy Division, at 202–418–1589 or via email at *justin.faulb@fcc.gov.*

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Second Further Notice of Proposed Rulemaking, and Further Notice of Proposed Rulemaking, released October 24, 2018. A full-text copy may be obtained at the following internet address: *https://drupal7admin.fcc.gov/document/fcc-spurs-competition-rural-business-data-services-0.*

Background

1. In light of the Eighth Circuit Court's recent decision upholding the bulk of the Commission's price cap *BDS Order,*

but finding that the Commission provided insufficient notice of its decision to end ex ante pricing regulation of TDM transport services offered by price cap carriers, we now propose to eliminate ex ante pricing regulation of price cap incumbent LECs' provision of TDM transport and other transport (*i.e.,* non-end user channel termination) business data services and seek comment on this proposal. We also take this opportunity to seek comment on the circumstances under which we should eliminate ex ante pricing regulation of lower capacity TDM transport services (at or below a DS3 bandwidth) offered by those rate-of-return carriers that receive fixed high-cost universal service support and elect the lighter touch regulatory framework.

A. Eliminating Ex Ante Pricing Regulation of TDM Transport Services Provided by Price Cap Carriers

2. For the better part of the last two decades, in response to increasing competition for TDM transport in areas of the country served by price cap carriers, the Commission has consistently worked to modify and streamline regulation of such services. Most TDM transport offered by price cap carriers has been subject to some form of pricing flexibility as a result of the Commission's 1999 *Pricing Flexibility Order.* In adopting the *Pricing Flexibility Order,* the Commission acknowledged that, because transport services encompass higher capacity middle-mile segments of the network, facility-based entry was more likely to occur for those services than for end user channel terminations, and therefore set lower thresholds for carriers to demonstrate competition and obtain pricing flexibility. Although the Commission suspended further grants of pricing flexibility in 2012, it did not revoke any pricing flexibility previously granted.

3. In the *BDS Order,* the Commission evaluated the record before it and concluded that there was sufficient competition to justify nationwide pricing relief for TDM transport offered by price cap carriers. The record shows, for example, that some major urban areas have as many as 28 transport competitors while second-tier MSAs commonly have more than a dozen competitors. More broadly, the record shows that in 2013, 92.1% of buildings served with BDS demand in price cap territories were within a half mile of competitive fiber transport facilities. Further, the record shows that 89.6% of all price cap census blocks with BDS demand had at least one served building within a half mile of competitive fiber. Thus, the Commission found that ''the vast majority'' of locations featuring BDS demand had competitive fiber within close proximity. The Commission added that its data were conservative given the limits of the *2015 Collection,* and that the data in that collection are from 2013, and therefore necessarily understate the level of current competition.

4. On appeal, the Eighth Circuit Court largely affirmed the *BDS Order,* but found the Commission did not provide adequate notice on the narrow issue of ending ex ante pricing regulation of TDM transport services. The court vacated those portions of the *BDS Order* dealing with TDM transport and remanded them to the Commission for further action, which we initiate here.

5. The current record includes ''strong evidence of substantial competition'' in price cap TDM transport markets. In addition to showing that there is ''widespread deployment of competitive transport networks'' in price cap areas, the record also indicates that transport services are ''typically higher volume services . . . which can more easily justify competitive investment and deployment.''

6. In light of the current record of substantial competition and competitive pressure on TDM transport services in price cap areas, we now propose to eliminate nationwide ex ante pricing regulation of price cap carriers' TDM transport services and seek comment on our proposal. Specifically, we propose granting price cap carriers forbearance pursuant to section 10 of the Communications Act of 1934, as amended (the Act) from section 203 tariffing requirements for their TDM transport business data services and other transport special access service offerings. Consistent with the transition adopted in the *BDS Order* for packet-based and higher capacity TDM BDS, we propose permissive detariffing for price cap carriers' TDM transport services for a transition period, followed thereafter by mandatory detariffing of these business data services. We propose to end the transition period for price cap carriers' TDM transport services on the same date that the transition period mandated by the *BDS Order* for price cap carriers' other BDS services is scheduled to end—August 1, 2020—to align these transition periods and simplify their administration. In addition, we propose, for six (6) months following the effective date of an order adopting final rules, to require price cap carriers to freeze the tariffed rates for their TDM transport services, as long as those services remain tariffed. We seek comment on these proposals.

7. We propose that during this transition, tariffing for these transport services will be permissive—the Commission will accept new tariffs and revisions to existing tariffs for the affected services. Apart from the rate freeze noted above, carriers will no longer be required to comply with price cap regulation for these services, and once the rules proposed in this Second Further Notice are effective, carriers that wish to continue filing tariffs under the permissive detariffing regime would be free to modify such tariffs to reflect the new regulatory structure outlined in this Second Further Notice for the affected services. We propose allowing price cap carriers to remove the relevant portions of their tariffs for the affected services at any time during the transition, and for the rate freeze to no longer apply to services that are not tariffed. We propose that once the transition ends, no price cap carrier may file or maintain any interstate tariffs for affected business data services. We seek comment on these proposals.

8. We also seek comment on our analysis of the TDM transport market for price cap carriers. To what extent does the Commission's competitive analysis in the *BDS Order* continue to represent an accurate assessment of the competitive nature of the TDM transport market in price cap areas? Has the market for TDM transport in price cap areas changed materially since the Commission adopted the *BDS Order*? Is there evidence that competition for TDM transport has changed in these markets since the Commission last analyzed this market? Are there providers of TDM transport that were not identified by the *2015 Collection*? How has this growth in competition impacted demand for TDM transport? In addition to the evidence the Commission previously considered in finding that there is sufficient competition to justify nationwide pricing relief for TDM transport offered by price cap carriers, there are indications that cable providers' market share of lower speed business data services continues to grow significantly. As a competitor, cable operators self-provision all aspects of their BDS, including transport functionality, and rarely, if ever, collocate at incumbent LEC end offices. This increased competition from cable operators is in addition to competition from other providers. Given that cable competition does not typically rely on the TDM transport provided by incumbent local exchange carriers because they have built out their own networks, how should we factor such competition into

a comprehensive analysis of TDM transport competition in price cap areas? Additionally, to what extent has the increase in demand for packet-based business data services and the resulting decrease in demand for TDM services affected competition for TDM transport?

9. We seek comment on whether we should consider any alternatives to removing ex ante pricing regulation for TDM transport offered by price cap carriers to better align our regulation with the dynamic and evolving nature of the business data services market. Should we, for example, adopt a competitive market test to measure the competitiveness of TDM transport offerings in areas served by price cap carriers? If so, how should such a test be structured? Should such a test assess competition using the counties served by price cap carriers as the relevant geographic market, as we do with the competitive market test for price cap carriers' lower capacity TDM end user channel terminations? Alternatively, should we use the same competitive market test for TDM transport offerings of price cap carriers as we do for lower capacity TDM end user channel terminations offered by price cap carriers? If we adopt a competitive market test for TDM transport offered by price cap carriers, how should we implement the results of such a test? Should we adopt similar transition provisions as those we adopted for the competitive market test for end user channel terminations in the *BDS Order*?

10. We invite interested parties to submit any additional data or information regarding the state of competition for TDM transport services in price cap areas. Are there more current data available on the state of competition for TDM transport services that could enhance our analysis of this market? Are there any other ways of measuring or estimating competition for TDM transport in areas served by price cap carriers that have not already been used by the Commission? Are there other types of data that could represent a proxy for competition in the TDM transport market in areas served by price cap carriers? While the data in the *2015 Collection* are not as current as some more recent sources, the collection nonetheless remains the most comprehensive source of data for business data services. We will therefore again make these data available to interested parties using the same procedures the Commission previously used.

B. Eliminating Ex Ante Pricing Regulation of Lower Capacity TDM Transport Provided by Carriers That Receive Fixed Universal Service Support and Elect Incentive Regulation for Their BDS Offerings

11. We also seek comment on providing a path to eliminating ex ante pricing regulation of lower capacity (*i.e.,* at or below a DS3 bandwidth level) TDM transport services, including other transport (*i.e.,* non-end user channel termination) special access services, offered by rate-of-return carriers that receive fixed high-cost universal service support, and elect our new lighter touch regulatory framework (electing carriers) for their BDS. In that framework, electing carriers' lower capacity circuit-based BDS, including their TDM transport and end user channel terminations, are converted to incentive regulation, and are offered subject to pricing flexibility that includes contract tariff pricing and term and volume discount plans. We also adopt a competitive market test for removing ex ante pricing regulation from electing carriers' lower capacity TDM end user channel terminations. However, based on the current record, we declined to adopt a competitive market test for electing carriers' lower capacity TDM transport, nor did we eliminate all ex ante pricing regulation for lower capacity TDM transport provided by electing carriers. As the Commission explained in the *Notice,* competition for electing carriers' lower capacity TDM transport may not be as robust in the less dense and more rural study areas that rate-of-return carriers typically serve, compared to denser and more populated price cap study areas.

12. The Commission has long recognized transport is more competitive than end user channel terminations and required a different competitive showing for reduced pricing regulation. Given that we are proposing to eliminate ex ante pricing regulation of TDM transport services in price cap areas, we also seek further comment on whether, and under what circumstances, we should remove ex ante pricing regulation for electing carriers' lower capacity TDM transport. We previously declined to remove ex ante pricing regulation of TDM transport services because the record lacks data sufficient to justify such a step. We invite commenters to provide or identify data that would justify further pricing deregulation of electing carriers' lower capacity TDM transport.

13. If there are such data, should we use that data to adopt a competitive market test for determining whether to relieve electing carriers' lower capacity TDM transport of ex ante pricing regulation in a particular study area? Were we to adopt a competitive market test for electing carriers' lower capacity TDM transport, how should it be structured? Should such a test largely mirror the structure of the current electing carrier competitive market test for lower capacity TDM end user channel terminations?

14. If we adopt a competitive market test for lower capacity TDM transport offered by electing carriers, how should we implement the results of such a test? Should we adopt similar transition provisions as those we adopt for the competitive market test for electing carriers' lower capacity TDM end user channel terminations? Are there any reasons to structure the transition differently?

15. In the alternative, we seek comment on whether we should remove ex ante pricing regulations for lower capacity TDM transport offered by electing carriers nationwide. Is there data available that would show nationwide competition sufficient to remove ex ante pricing regulation? How would we analyze the data given the variability of competition in areas served by electing rate-of-return carriers? Is there evidence of competition for lower capacity TDM transport in these areas consistent with the competition the Commission determined was present in price cap areas nationwide?

16. We also seek comment on AT&T's recommendation that we base our decisions on data specific to electing carriers and their operating territories. We recognize that a large data collection would be a burden on rate-of-return carriers' limited resources, and we want to avoid imposing unnecessary regulatory burdens on them. We therefore request that commenters provide or identify additional data or other information relevant to the status of competition for lower capacity TDM transport in the study areas served by the rate-of-return carriers eligible to elect incentive regulation, including data on transport competition and competitive fiber deployment. Are there existing data collections that could be used as a proxy for the presence of lower capacity TDM transport competition in areas served by rate-of-return carriers eligible to elect incentive regulation? For example, in the *BDS Order,* the Commission relied in part on competitive fiber maps, building locations, and Census data to assess competition for TDM transport in price cap areas. Alternatively, Petitioners submitted a study in the record of this

proceeding that included certain types of demographic and competitive data that they contend are reasonable proxies for lower capacity TDM transport competition in their service areas. Parties should comment on the usefulness of these proxies and whether there are others that could provide a reasonable basis for Commission action.

1. Need for, and Objectives of, the Proposed Rules

17. In the FNPRMs, we propose changes to, and seek comment on, the appropriate regulatory treatment of TDM transport business data services (BDS) offerings offered by both price cap carriers and rate-of-return carriers that receive fixed universal service support and elect incentive regulation. In the FNPRMs, the Commission proposes to remove ex ante pricing regulation from TDM transport business data services offered by price cap carriers and seeks comment on doing so for rate-of-return carriers.

a. Legal Basis

18. The legal basis for any action that may be taken pursuant to the FNPRMs is contained in sections 1, 4(i), 10, and 201(b) of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154(i), 160, and 201(b).

2. Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply

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

a. Total Small Entities

20. *Small Businesses, Small Organizations, Small Governmental Jurisdictions.* Our actions, over time, may affect small entities that are not easily categorized at present. We therefore describe here, at the outset, three broad groups of small entities that could be directly affected herein. First, while there are industry specific size standards for small businesses that are used in the regulatory flexibility analysis, according to data from the SBA's Office of Advocacy, in general a small business is an independent business having fewer than 500 employees. These types of small businesses represent 99.9% of all businesses in the United States which translates to 28.8 million businesses.

21. Next, the type of small entity described as a ''small organization'' is generally ''any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.'' Nationwide, as of August 2016, there were approximately 356,494 small organizations based on registration and tax data filed by nonprofits with the Internal Revenue Service (IRS).

22. Finally, the small entity described as a ''small governmental jurisdiction'' is defined generally as ''governments of cities, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand.'' U.S. Census Bureau data from the 2012 Census of Governments indicates that there were 90,056 local governmental jurisdictions consisting of general purpose governments and special purpose governments in the United States. Of this number there were 37,132 general purpose governments (county, municipal and town or township) with populations of less than 50,000 and 12,184 special purpose governments (independent school districts and special districts) with populations of less than 50,000. The 2012 U.S. Census Bureau data for most types of governments in the local government category shows that the majority of these governments have populations of less than 50,000. Based on these data we estimate that at least 49,316 local government jurisdictions fall in the category of ''small governmental jurisdictions.''

b. Broadband Internet Access Service Providers

23. *Internet Service Providers (Broadband).* Broadband internet service providers include wired (*e.g.,* cable, DSL) and VoIP service providers using their own operated wired telecommunications infrastructure fall in the category of Wired Telecommunication Carriers. Wired Telecommunications Carriers are comprised of establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies. The SBA size standard for this category classifies a business as small if it has 1,500 or fewer employees. U.S. Census data for 2012 show that there were 3,117 firms that operated that year. Of this total, 3,083 operated with fewer than 1,000 employees. Consequently, under this size standard the majority of firms in this industry can be considered small.

c. Wireline Providers

24. *Wired Telecommunications Carriers.* The U.S. Census Bureau defines this industry as ''establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired communications networks. Transmission facilities may be based on a single technology or a combination of technologies. Establishments in this industry use the wired telecommunications network facilities that they operate to provide a variety of services, such as wired telephony services, including VoIP services, wired (cable) audio and video programming distribution, and wired broadband internet services. By exception, establishments providing satellite television distribution services using facilities and infrastructure that they operate are included in this industry.'' The SBA has developed a small business size standard for Wired Telecommunications Carriers, which consists of all such companies having 1,500 or fewer employees. Census data for 2012 show that there were 3,117 firms that operated that year. Of this total, 3,083 operated with fewer than 1,000 employees. Thus, under this size standard, the majority of firms in this industry can be considered small.

25. *Incumbent Local Exchange Carriers (Incumbent LECs).* Neither the Commission nor the SBA has developed a small business size standard specifically for incumbent LEC services. The closest applicable size standard under SBA rules is for the category Wired Telecommunications Carriers as defined above. Under that size standard, such a business is small if it has 1,500 or fewer employees. According to Commission data, 3,117 firms operated in that year. Of this total, 3,083 operated with fewer than 1,000 employees. Consequently, the Commission estimates that most providers of incumbent local exchange service are small businesses that may be affected by the rules and policies adopted. A total of 1,307 firms reported that they were incumbent local exchange service

providers. Of this total, an estimated 1,006 have 1,500 or fewer employees.

26. *Competitive Local Exchange Carriers (Competitive LECs), Competitive Access Providers (CAPs), Shared-Tenant Service Providers, and Other Local Service Providers.* Neither the Commission nor the SBA has developed a small business size standard specifically for these service providers. The appropriate NAICS Code category is Wired Telecommunications Carriers, as defined above. Under that size standard, such a business is small if it has 1,500 or fewer employees. U.S. Census data for 2012 indicate that 3,117 firms operated during that year. Of that number, 3,083 operated with fewer than 1,000 employees. Based on this data, the Commission concludes that the majority of Competitive LECS, CAPs, Shared-Tenant Service Providers, and Other Local Service Providers, are small entities. According to Commission data, 1,442 carriers reported that they were engaged in the provision of either competitive local exchange services or competitive access provider services. Of these 1,442 carriers, an estimated 1,256 have 1,500 or fewer employees. In addition, 17 carriers have reported that they are Shared-Tenant Service Providers, and all 17 are estimated to have 1,500 or fewer employees. Also, 72 carriers have reported that they are Other Local Service Providers. Of this total, 70 have 1,500 or fewer employees. Consequently, based on internally researched FCC data, the Commission estimates that most providers of competitive local exchange service, competitive access providers, Shared-Tenant Service Providers, and Other Local Service Providers are small entities.

27. We have included small incumbent LECs in this present RFA analysis. As noted above, a ''small business'' under the RFA is one that, inter alia, meets the pertinent small business size standard (*e.g.,* a telephone communications business having 1,500 or fewer employees), and ''is not dominant in its field of operation.'' The SBA's Office of Advocacy contends that, for RFA purposes, small incumbent LECs are not dominant in their field of operation because any such dominance is not ''national'' in scope. We have therefore included small incumbent LECs in this RFA analysis, although we emphasize that this RFA action has no effect on Commission analyses and determinations in other, non-RFA contexts.

28. *Interexchange Carriers (IXCs).* Neither the Commission nor the SBA has developed a definition for Interexchange Carriers. The closest NAICS Code category is Wired Telecommunications Carriers as defined above. The applicable size standard under SBA rules is that such a business is small if it has 1,500 or fewer employees. U.S. Census data for 2012 indicates that 3,117 firms operated during that year. Of that number, 3,083 operated with fewer than 1,000 employees. According to internally developed Commission data, 359 companies reported that their primary telecommunications service activity was the provision of interexchange services. Of this total, an estimated 317 have 1,500 or fewer employees. Consequently, the Commission estimates that the majority of IXCs are small entities that may be affected by our proposed rules.

29. *Local Resellers.* The SBA has developed a small business size standard for the category of Telecommunications Resellers. The Telecommunications Resellers industry comprises establishments engaged in purchasing access and network capacity from owners and operators of telecommunications networks and reselling wired and wireless telecommunications services (except satellite) to businesses and households. Establishments in this industry resell telecommunications; they do not operate transmission facilities and infrastructure. Mobile virtual network operators (MVNOs) are included in this industry. Under that size standard, such a business is small if it has 1,500 or fewer employees. Census data for 2012 show that 1,341 firms provided resale services during that year. Of that number, all operated with fewer than 1,000 employees. Thus, under this category and the associated small business size standard, the majority of these prepaid calling card providers can be considered small entities.

30. *Toll Resellers.* The Commission has not developed a definition for Toll Resellers. The closest NAICS Code Category is Telecommunications Resellers. The Telecommunications Resellers industry comprises establishments engaged in purchasing access and network capacity from owners and operators of telecommunications networks and reselling wired and wireless telecommunications services (except satellite) to businesses and households. Establishments in this industry resell telecommunications; they do not operate transmission facilities and infrastructure. Mobile virtual network operators (MVNOs) are included in this industry. The SBA has developed a small business size standard for the category of Telecommunications Resellers. Under that size standard, such a business is small if it has 1,500 or fewer employees. Census data for 2012 show that 1,341 firms provided resale services during that year. Of that number, 1,341 operated with fewer than 1,000 employees. Thus, under this category and the associated small business size standard, the majority of these resellers can be considered small entities. According to Commission data, 881 carriers have reported that they are engaged in the provision of toll resale services. Of this total, an estimated 857 have 1,500 or fewer employees. Consequently, the Commission estimates that the majority of toll resellers are small entities.

31. *Other Toll Carriers.* Neither the Commission nor the SBA has developed a definition for small businesses specifically applicable to Other Toll Carriers. This category includes toll carriers that do not fall within the categories of interexchange carriers, operator service providers, prepaid calling card providers, satellite service carriers, or toll resellers. The closest applicable NAICS Code category is for Wired Telecommunications Carriers as defined above. Under the applicable SBA size standard, such a business is small if it has 1,500 or fewer employees. Census data for 2012 show that there were 3,117 firms that operated that year. Of this total, 3,083 operated with fewer than 1,000 employees. Thus, under this category and the associated small business size standard, the majority of Other Toll Carriers can be considered small. According to internally developed Commission data, 284 companies reported that their primary telecommunications service activity was the provision of other toll carriage. Of these, an estimated 279 have 1,500 or fewer employees. Consequently, the Commission estimates that most Other Toll Carriers are small entities that may be affected by rules adopted pursuant to the Second Further Notice.

32. *Operator Service Providers (OSPs).* Neither the Commission nor the SBA has developed a small business size standard specifically for operator service providers. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees. According to Commission data, 33 carriers have reported that they are engaged in the provision of operator services. Of these, an estimated 31 have 1,500 or fewer employees and two have more than 1,500 employees. Consequently, the Commission estimates that the majority of OSPs are small entities.

d. Wireless Providers—Fixed and Mobile

33. *Wireless Telecommunications Carriers (except Satellite).* This industry comprises establishments engaged in operating and maintaining switching and transmission facilities to provide communications via the airwaves. Establishments in this industry have spectrum licenses and provide services using that spectrum, such as cellular services, paging services, wireless internet access, and wireless video services. The appropriate size standard under SBA rules is that such a business is small if it has 1,500 or fewer employees. For this industry, U.S. Census data for 2012 show that there were 967 firms that operated for the entire year. Of this total, 955 firms had employment of 999 or fewer employees and 12 had employment of 1,000 employees or more. Thus under this category and the associated size standard, the Commission estimates that the majority of wireless telecommunications carriers (except satellite) are small entities.

34. The Commission's own data—available in its Universal Licensing System—indicate that, as of October 25, 2016, there are 280 Cellular licensees that will be affected by our actions today. The Commission does not know how many of these licensees are small, as the Commission does not collect that information for these types of entities. Similarly, according to internally developed Commission data, 413 carriers reported that they were engaged in the provision of wireless telephony, including cellular service, Personal Communications Service, and Specialized Mobile Radio Telephony services. Of this total, an estimated 261 have 1,500 or fewer employees, and 152 have more than 1,500 employees. Thus, using available data, we estimate that the majority of wireless firms can be considered small.

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

36. *Wireless Telephony.* Wireless telephony includes cellular, personal communications services, and specialized mobile radio telephony carriers. As noted, the SBA has developed a small business size standard for Wireless Telecommunications Carriers (except Satellite). Under the SBA small business size standard, a business is small if it has 1,500 or fewer employees. According to Commission data, 413 carriers reported that they were engaged in wireless telephony. Of these, an estimated 261 have 1,500 or fewer employees and 152 have more than 1,500 employees. Therefore, a little less than one third of these entities can be considered small.

e. Cable Service Providers

37. Because section 706 requires us to monitor the deployment of broadband using any technology, we anticipate that some broadband service providers may not provide telephone service. Accordingly, we describe below other types of firms that may provide broadband services, including cable companies, MDS providers, and utilities, among others.

38. *Cable and Other Subscription Programming.* This industry comprises establishments primarily engaged in operating studios and facilities for the broadcasting of programs on a subscription or fee basis. The broadcast programming is typically narrowcast in nature (*e.g.* limited format, such as news, sports, education, or youth-oriented). These establishments produce programming in their own facilities or acquire programming from external sources. The programming material is usually delivered to a third party, such as cable systems or direct-to-home satellite systems, for transmission to viewers. The SBA has established a size standard for this industry stating that a business in this industry is small if it has 1,500 or fewer employees. The 2012 Economic Census indicates that 367 firms were operational for that entire year. Of this total, 357 operated with less than 1,000 employees. Accordingly, we conclude that a substantial majority of firms in this industry are small under the applicable SBA size standard.

39. *Cable Companies and Systems (Rate Regulation).* The Commission has developed its own small business size standards for the purpose of cable rate regulation. Under the Commission's rules, a ''small cable company'' is one serving 400,000 or fewer subscribers nationwide. Industry data indicate that there are currently 4,600 active cable systems in the United States. Of this total, all but eleven cable operators nationwide are small under the 400,000-subscriber size standard. In addition, under the Commission's rate regulation rules, a ''small system'' is a cable system serving 15,000 or fewer subscribers. Current Commission records show 4,600 cable systems nationwide. Of this total, 3,900 cable systems have fewer than 15,000 subscribers, and 700 systems have 15,000 or more subscribers, based on the same records. Thus, under this standard as well, we estimate that most cable systems are small entities.

40. *Cable System Operators (Telecom Act Standard).* The Communications Act also contains a size standard for small cable system operators, which is ''a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1% of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed $250,000,000.'' There are approximately 52,403,705 cable video subscribers in the United States today. Accordingly, an operator serving fewer than 524,037 subscribers shall be deemed a small operator if its annual revenues, when combined with the total annual revenues of all its affiliates, do not exceed $250 million in the aggregate. Based on available data, we find that all but nine incumbent cable operators are small entities under this size standard. The Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed $250 million. Although it seems certain that some of these cable system operators are affiliated with entities whose gross annual revenues exceed $250 million, we are unable at this time to estimate with greater precision the number of cable system operators that would qualify as small cable operators under the definition in the Communications Act.

41. *All Other Telecommunications.* ''All Other Telecommunications'' is defined as follows: This U.S. industry is comprised of establishments that are primarily engaged in providing specialized telecommunications services, such as satellite tracking, communications telemetry, and radar station operation. This industry also includes establishments primarily engaged in providing satellite terminal stations and associated facilities connected with one or more terrestrial systems and capable of transmitting telecommunications to, and receiving telecommunications from, satellite systems. Establishments providing internet services or voice over internet protocol (VoIP) services via client-supplied telecommunications connections are also included in this industry. The SBA has developed a small business size standard for ''All

Other Telecommunications,'' which consists of all such firms with gross annual receipts of $32.5 million or less. For this category, census data for 2012 show that there were 1,442 firms that operated for the entire year. Of these firms, a total of 1,400 had gross annual receipts of less than $25 million. Consequently, we estimate that the majority of All Other Telecommunications firms are small entities that might be affected by our action.

3. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements for Small Entities

42. The FNPRMs propose changes to, and seek comment on, the Commission's regulatory treatment of lower capacity TDM transport business data services offered by price cap and certain rate-of-return carriers. The objective of the proposed modifications is to reduce the unnecessary regulatory burdens and inflexibility of BDS regulation for both price cap and for rate-of-return carriers, which are for the most part small businesses, when competition justifies reduced regulation. These proposed rule modifications would provide additional incentives for competitive entry, network investment and the migration to IP-based network technologies and services.

43. Specifically, the FNPRMs propose to eliminate ex ante pricing regulation and tariffing requirements for price cap carriers' TDM transport BDS. This will eliminate reporting, recordkeeping, and other compliance requirements for any price cap carrier. They also seek comment on whether to remove ex ante pricing regulation and tariffing requirements of TDM transport services offered by rate-of-return carriers that received fixed universal service support and elect incentive regulation. This change would impact the reporting, recordkeeping, and other compliance requirements for these rate-of-return carriers, nearly all of which are small entities.

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

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

45. The rule changes proposed by the FNPRMs would reduce the economic impact of the Commission's rules on price cap carriers and rate-of-return carriers that elect incentive regulation in the following ways. The Second Further Notice of Proposed Rulemaking proposes to free price cap carriers from ex ante pricing regulation for their TDM transport offerings, including the requirement to tariff their TDM transport services. The Further Notice of Proposed Rulemaking seeks comment on whether the Commission should do the same for TDM transport offered by rate-of-return carriers that received fixed universal support, or if the Commission should adopt a competitive market test for these carriers' TDM transport services. These rule changes would represent alternatives to the Commission's current rules that would significantly minimize the economic impact of those rules on price cap carriers and electing rate-of-return carriers. Finally, we seek comment as to any additional economic burden incurred by small entities that may result from the rule changes proposed in the FNPRMs.

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

46. None.

II. Procedural Matters

47. *Deadlines and Filing Procedures.* Pursuant to sections 1.415 and 1.419 of the Commission's rules, 47 CFR 1.415, 1.419, interested parties may file comments and reply comments on or before the dates indicated on the first page of this document in Dockets WC 17–144, 16–143, 05–25. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS).

- *Electronic Filers:* Comments may be filed electronically using the internet by accessing the ECFS: *http://apps.fcc.gov/ecfs/*.
- *Paper Filers:* Parties who choose to file by paper must file an original and one copy of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary: Office of the Secretary, Federal Communications Commission.

- All hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12th St. SW, Room TW–A325, Washington, DC 20554. The filing hours are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes and boxes must be disposed of *before* entering the building.
- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9050 Junction Drive, Annapolis Junction, MD 20701.
- U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street SW, Washington DC 20554.
- *People with Disabilities:* To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an email to *fcc504@fcc.gov* or call the Consumer & Governmental Affairs Bureau at 202–418–0530 (voice), 202–418–0432 (TTY).

48. This proceeding shall be treated as a ''permit-but-disclose'' proceeding in accordance with the Commission's *ex parte* rules. Persons making *ex parte* presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies). Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentation must (1) list all persons attending or otherwise participating in the meeting at which the *ex parte* presentation was made, and (2) summarize all data presented and arguments made during the presentation. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter's written comments, memoranda or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to Commission staff during *ex parte* meetings are deemed to be written *ex parte* presentations and must be filed consistent with rule

1.1206(b). In proceedings governed by Rule 1.49(f) or for which the Commission has made available a method of electronic filing, written *ex parte* presentations and memoranda summarizing oral *ex parte* presentations, and all attachments thereto, must be filed through the electronic comment filing system available for that proceeding, and must be filed in their native format (*e.g.,* .doc, .xml, .ppt, searchable .pdf). Participants in this proceeding should familiarize themselves with the Commission's *ex parte* rules.

49. *Paperwork Reduction Act Analysis.* This document may contain proposed new or modified information collection requirements subject to the PRA. The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public and the Office of Management and Budget (OMB) to comment on the information collection requirements contained in this document, as required by the Paperwork Reduction Act of 1995, Public Law 104–13. In addition, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, *see* 44 U.S.C. 3506(c)(4), we seek specific comment on how we might further reduce the information collection burden for small business concerns with fewer than 25 employees.

50. *Initial Regulatory Flexibility Analysis.* As required by the Regulatory Flexibility Act of 1980, as amended (RFA), the Commission has prepared this Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on small entities by the policies and rules proposed in this Second Further Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking (FNPRMs). The Commission requests written public comments on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments provided on the first page of the FNPRMs. The Commission will send a copy of the FNPRMs, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA). In addition, the FNPRMs and IRFA (or summaries thereof) will be published in the **Federal Register**.

III. Ordering Clauses

51. *Accordingly, it is ordered,* pursuant to sections 1, 4(i), 10, and 201(b) of the Communication Act of 1934, as amended, 47 U.S.C. 151, 154(i), 160, and 201(b) that this Second Further Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking *are adopted.*

52. *It is further ordered,* that the Commission's Consumer & Governmental Affairs Bureau, Reference Information Center, *shall send* a copy of this Second Further Notice of Proposed Rulemaking, and Further Notice of Proposed Rulemaking, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

List of Subjects

47 CFR Part 61—Tariffs

Communications common carriers, Radio, Reporting and recordkeeping requirements, Telegraph, Telephone.

47 CFR Part 69—Access Charges

Communications common carriers, Reporting and recordkeeping requirements, Telephone.

Federal Communications Commission.

Katura Jackson,

Federal Register Liaison Officer, Office of the Secretary.

Proposed Rules

The Federal Communications Commission seeks comment on a proposal to amend 47 CFR parts 61 and 69, as follows:

PART 61—TARIFFS

■ 1. The authority citation for part 61 continues to read as follows:

Authority: 47 U.S.C. 151, 154(i), 154(j), 201–205, 403, unless otherwise noted.

■ 2. Section 61.201 is amended by revising paragraph (a)(3) to read:

§ 61.201 Detariffing of price cap local exchange carriers.

* * * * *

(a)(3) Transport services as defined in § 69.801 of this chapter;

* * * * *

PART 69—ACCESS CHARGES

■ 3. The authority citation for part 69 continues to read as follows:

Authority: 47 U.S.C. 154, 201, 202, 203, 205, 218, 220, 254, 403.

■ 4. Section 69.807 paragraph (a) is revised to read as follows:

§ 69.807 Regulatory relief.

(a) Price cap local exchange carrier transport and end user channel terminations in markets deemed competitive and in grandfathered markets for a price cap carrier that was granted Phase II pricing flexibility prior to June 2017 are granted the following regulatory relief:

(1) Elimination of the rate structure requirements in subpart B of this part;

(2) Elimination of price cap regulation; and

(3) Elimination of tariffing requirements as specified in § 61.201 of this chapter.

* * * * *

[FR Doc. 2018–25786 Filed 11–28–18; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF VETERANS AFFAIRS

48 CFR Parts 801, 823, 824, 826, 836, 843, and 852

RIN 2900–AQ24

VA Acquisition Regulation: Environment, Energy and Water Efficiency, Renewable Energy Technologies, Occupational Safety, and Drug-Free Workplace; Protection of Privacy and Freedom of Information; Other Socioeconomic Programs; and Contract Modifications

AGENCY: Department of Veterans Affairs.

ACTION: Proposed rule.

SUMMARY: The Department of Veterans Affairs (VA) is proposing to amend and update its VA Acquisition Regulation (VAAR) in phased increments to revise or remove any policy superseded by changes in the Federal Acquisition Regulation (FAR), to remove procedural guidance that is internal to VA into the VA Acquisition Manual (VAAM), and to incorporate any new agency specific regulations or policies. These changes seek to streamline and align the VAAR with the FAR and remove outdated and duplicative requirements and reduce burden on contractors. The VAAM incorporates portions of the removed VAAR as well as other internal agency acquisition policy. VA will rewrite certain parts of the VAAR and VAAM, and as VAAR parts are rewritten, we will publish them in the **Federal Register**. VA will combine related topics, as appropriate. In particular, this rulemaking would add VAAR coverage concerning Environment, Energy and Water Efficiency, Renewable Energy Technologies, Occupational Safety, and Drug-Free Workplace; Other Socioeconomic Programs; and Contract Modifications. This rulemaking revises VAAR concerning Protection of Privacy and Freedom of Information, Department of Veterans Affairs Acquisition Regulation System, Construction and Architect-Engineer Contracts and Solicitation Provisions and Contract Clauses.

DATES: Comments must be received on or before January 28, 2019 to be considered in the formulation of the final rule.

ADDRESSES: Written comments may be submitted through *www.Regulations.gov*; by mail or hand-delivery to Director, Regulation Policy and Management (00REG), Department of Veterans Affairs, 810 Vermont Avenue NW, Room 1063B, Washington, DC 20420; or by fax to (202) 273–9026. (This is not a toll-free number.) Comments should indicate that they are submitted in response to ''RIN 2900–AQ24–VA Acquisition Regulation: Environment, Energy and Water Efficiency, Renewable Energy Technologies, Occupational Safety, and Drug-Free Workplace; Protection of Privacy and Freedom of Information; Other Socioeconomic Programs; and Contract Modifications.'' 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 *www.Regulations.gov*.

FOR FURTHER INFORMATION CONTACT:
Mr. Rafael N. Taylor, Senior Procurement Analyst, Procurement Policy and Warrant Management Services, 003A2A, 425 I Street NW, Washington, DC 20001, (202) 382–2787. (This is not a toll-free number.)

SUPPLEMENTARY INFORMATION:

Background

This rulemaking is issued under the authority of the Office of Federal Procurement Policy Act, which provides the authority for an agency head to issue agency acquisition regulations that implement or supplement the FAR.

VA is proposing to revise the VAAR to add new policy or regulatory requirements and to remove any redundant guidance and guidance that is applicable only to VA's internal operating processes or procedures. Codified acquisition regulations may be amended and revised only through rulemaking. All amendments, revisions, and removals have been reviewed and concurred with by VA's Integrated Product Team of agency stakeholders.

The VAAR uses the regulatory structure and arrangement of the FAR and headings and subject areas are consistent with FAR content. The VAAR is divided into subchapters, parts (each of which covers a separate aspect of acquisition), subparts, and sections.

The Office of Federal Procurement Policy Act, as codified in 41 U.S.C. 1707, provides the authority for the Federal Acquisition Regulation and for the issuance of agency acquisition regulations consistent with the FAR.

When Federal agencies acquire supplies and services using appropriated funds, the purchase is governed by the FAR, set forth at Title 48 Code of Federal Regulations (CFR), chapter 1, parts 1 through 53, and the agency regulations that implement and supplement the FAR. The VAAR is set forth at Title 48 CFR, chapter 8, parts 801 to 873.

Discussion and Analysis

VA proposes to make the following changes to the VAAR in this phase of its revision and streamlining initiative. For procedural guidance cited below that is proposed to be deleted from the VAAR, each section cited for removal has been considered for inclusion in VA's internal agency operating procedures in accordance with FAR 1.301(a)(2). Similarly, delegations of authorities that are removed from the VAAR will be included in the VAAM as internal departmental guidance. The VAAM is being created in parallel with these revisions to the VAAR and is not subject to the rulemaking process as they are internal VA procedures and guidance. The VAAM will not be finalized until corresponding VAAR parts are finalized, and therefore the VAAM is not yet available on line.

VAAR Part 801—Department of Veterans Affairs Acquisition Regulation System

In the table in section 801.106, this proposed rule would renumber section 852.236–88 to read 852.243–70 against OMB Control Number 2900–0422.

VAAR Part 823—Environment, Energy and Water Efficiency, Renewable Energy Technologies, Occupational Safety, and Drug-Free Workplace

We propose to add part 823, Environment, Energy and Water Efficiency, Renewable Energy Technologies, Occupational Safety, and Drug-Free Workplace. The authorities cited for this part are: 40 U.S.C. 121(c), which grants the authority for the head of each executive agency to issue orders and directives that the agency head considers necessary to carry out the regulations; 41 U.S.C. 1702, which addresses the acquisition planning and management responsibilities of Chief Acquisition Officers and Senior Procurement Executives, to include implementation of unique procurement policies, regulations and standards of the executive agency; and 48 CFR 1.301–1.304, which authorizes agencies to issue acquisition regulations that implement or supplement the FAR.

Under subpart 823.1, Sustainable Acquisition Policy, we propose to add 823.103–70, Policy, to give contracting officers the option to include an evaluation factor for an offeror's Sustainable Action Plan when acquiring sustainable products and services. This section would also require offerors to provide their Sustainable Action Plan in their technical proposals when required by the solicitation.

We propose to add 823.103–71, Solicitation provision, which prescribes use of a new provision at 852.823–70, Instruction to Offerors—Sustainable Acquisition Plan, when the contracting officer requires an offeror to submit a Sustainable Action Plan with its proposal.

We propose to add 823.103–72, Contract file, to require the contracting officer to place the contractor's final Sustainable Acquisition Plan, if one is required, into the official contract file.

In subpart 823.3, Hazardous Material Identification and Material Safety Data, we propose to add 823.300, Scope of subpart, and 823.303–70, Contract clause, to prescribe the use of clause 852.223–71, Safety and Health, for use in administering safety and health requirements in solicitations and contracts for research, development, or test projects; transportation of hazardous materials; and construction.

VAAR Part 824—Protection of Privacy and Freedom of Information

We propose to amend the authority citation for this part to include 5 U.S.C. 552a, the statute governing use and maintenance of records on individuals, conditions of disclosure, and the authority for agencies to promulgate rules governing such records; 41 U.S.C. 1121(c), which speaks to the authority of an executive agency under another law to prescribe policies, regulations, procedures, and forms for procurement; 41 U.S.C. 1702, which addresses the acquisition planning and management responsibilities of Chief Acquisition Officers and Senior Procurement Executives, to include implementation of unique procurement policies, regulations and standards of the executive agency. The authorities cited for this part are 5 U.S.C. 552a; 40 U.S.C. 121(c), which grants the authority for the head of each executive agency to issue orders and directives that the agency head considers necessary to carry out the regulations; 41 U.S.C. 1121(c); 41 U.S.C. 1702; 38 CFR 1.550–1.562, and 1.575–1.584, which contain the rules followed by VA in processing requests for records under the Freedom of Information Act; and 48 CFR 1.301–1.304, which authorizes agencies to issue acquisition regulations that implement or supplement the FAR.

We propose to revise 824.102, General, to add the title of the sections of 38 CFR chapter 1 (1.575 through 1.584), that addresses VA's implementation of the Privacy Act of 1974 (Safeguarding Personal Information in Department of Veterans Affairs Records).

We propose to add 824.103, Procedures, to implement the procedures in FAR 24.103, by citing specific VA Handbooks in solicitations and contracts that require the design, development, or operation of a system of records; and by requiring the contracting officer to include in Statements of Work and Performance Work Statements procedures to follow in the event of a PII breach. This section also calls for Government surveillance plans for contracts that require the design, development, or operation of a system of records to include monitoring of the contractor's adherence to the Privacy Act and PII regulations.

We propose to revise 824.203, Policy, to designate the first sentence as paragraph (a), to update the CFR reference for rules implementing the Freedom of Information Act (FOIA), and to add paragraph (b) to advise the public that the VA FOIA Service Office handles all FOIA requests, and to provide the centralized website and a link to the list of FOIA contacts where FOIA requests can be submitted electronically.

Part 826—Other Socioeconomic Programs

We propose to add part 826, Other Socioeconomic Programs, with a single subpart 826.2, Disaster or Emergency Assistance Activities. The authorities cited for this part are 38 U.S.C. 8127–8128, under which the Secretary may establish goals for awarding to Service-Disabled Veteran-Small Businesses and Veteran-Owned Small-Businesses; 40 U.S.C. 121(c), which grants the authority for the head of each executive agency to issue orders and directives that the agency head considers necessary to carry out the regulations; 41 U.S.C. 1702, which addresses the acquisition planning and management responsibilities of Chief Acquisition Officers and Senior Procurement Executives, to include implementation of unique procurement policies, regulations and standards of the executive agency; 38 CFR 1.550–1.562, and 1.575–1.584, which contain the rules followed by VA in processing requests for records under the Freedom of Information Act; and 48 CFR 1.301–1.304, which authorizes agencies to issue acquisition regulations that implement or supplement the FAR.

We propose to add 826.202–1, Local area set-aside, to require the contracting officer to determine whether a local area set-aside should be further restricted to verified Service-Disabled Veteran-Owned Small Businesses (SDVOSB) or Veteran-Owned Small Businesses (VOSB), because, while the FAR allows further restriction to socioeconomic programs in FAR part 19, it does not mention the VA specific requirements under 38 U.S.C. 8127 and 8128.

We propose to add 826.202–2, Evaluation preference, which would require that, to the extent market research does not support an SDVOSB or VOSB set-aside, the contracting officer shall consider including evaluation factors in accordance with 815.304, and the evaluation criteria clause 852.215–70, Service-Disabled Veteran-Owned and Veteran-Owned Small Business Evaluation Factors, prescribed at 815.304–71(a).

VAAR Part 836—Construction and Architect-Engineer Contracts

We propose to remove 836.578, Changes—supplement, which prescribes clause 852.236–88, Contract changes—supplement. This clause has been revised, retitled and renumbered as 852.243–70, Construction Contract Changes—Supplement, and its prescription has been moved to 843.205–70.

Part 843—Contract Modifications

We propose to add part 843, Contract Modifications, with a single subpart 843.2, Change Orders. The authorities cited for this part are 40 U.S.C. 121(c), which grants the authority for the head of each executive agency to issue orders and directives that the agency head considers necessary to carry out the regulations; 41 U.S.C. 1121(c)(3), which grants the authority of an executive agency under another law to prescribe policies, regulations, procedures, and forms for procurement; 41 U.S.C. 1702, which addresses the acquisition planning and management responsibilities of Chief Acquisition Officers and Senior Procurement Executives, to include implementation of unique procurement policies, regulations and standards of the executive agency; and 48 CFR 1.301–1.304, which authorizes agencies to issue acquisition regulations that implement or supplement the FAR.

We propose to add 843.204–70, Definitization of unpriced change orders, to provide policy on price ceilings, definitization schedules, submission of a definitization proposal, required file documentation, limitations on obligations before definitization, and determining allowable profit depending on costs incurred during contract performance before negotiation of the final price.

We propose to add 843.205, Contract clauses, which would provide contracting officers with guidance for establishing the number of days (up to 60 days), the contractor may be granted to assert its right to an equitable adjustment within the Changes clause. This section would also provide direction to use clause 52.216–24, Limitation of Government Liability, in unpriced change orders estimated to exceed $5 million.

We propose to add 843.205–70, Contract changes—supplement, which prescribes the use of the clause 852.243–70, Construction Contract Changes—Supplement, (formerly numbered 852.236–88), which has been revised and proposed to be moved to this part from VAAR 836.578.

VAAR Part 852—Solicitation Provisions and Contract Clauses

In subpart 852.2, Text of Provisions and Clauses, we propose to add provision 852.223–70, Instructions to Offerors—Sustainable Acquisition Plan, for use when the contracting officer decides to include an evaluation factor for an offeror's Sustainable Action Plan when acquiring sustainable products and services in accordance with 823.103–72, Solicitation provision.

We propose to add clause 852.223–71, Safety and Health, which cites several references requiring contractors to comply with all Federal, State, and local laws and regulations applicable to the work being performed in accordance with 823.303–70, Contract clause.

We propose to amend clause 852.236–88, Contract Changes—Supplement, by renumbering it as 852.243–70, and retitling it as Construction Contract Changes—Supplement. It would clarify the basis for allowing overhead and profit under change orders on construction contracts, add definitization schedule requirements, and reinforce the need for the contractor's timely response with a proposal to definitize the change order. This clause is prescribed in 843.205–70, Contract changes—supplement.

Effect of Rulemaking

Title 48, Federal Acquisition Regulations System, chapter 8, Department of Veterans Affairs, of the Code of Federal Regulations, as proposed to be revised by this rulemaking, would represent VA's implementation of its legal authority and publication of the VAAR for the cited applicable parts. Other than future amendments to this rule or governing statutes for the cited applicable parts, or as otherwise authorized by approved deviations or waivers in accordance with FAR subpart 1.4, Deviations from the FAR, and as implemented by VAAR subpart 801.4, Deviations from the FAR or VAAR, no contrary guidance or procedures would be authorized. All existing or subsequent VA guidance would be read to conform with the rulemaking if possible or, if not possible, such guidance would be superseded by this rulemaking as pertains to the cited applicable VAAR parts.

Executive Orders 12866, 13563 and 13771

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits of reducing costs, of harmonizing rules, and of promoting flexibility. E.O. 12866, Regulatory Planning and Review, defines ''significant regulatory action'' to mean 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.''

VA has examined the economic, interagency, budgetary, legal, and policy implications of this regulatory action, and it has been determined this rule is not a significant regulatory action under E.O. 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 from FY 2004 Through Fiscal Year to Date. This proposed rule is not expected to be an E.O. 13771 regulatory action because this proposed rule is not significant under E.O. 12866.

Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (at 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).

The proposed actions in this rule result in the proposed redesignation of the existing approved OMB collection number and the associated burden as a result of one clause we propose to both retitle and renumber.

This proposed rule would impose the following amended information collection requirement to one of the existing information collection approval numbers associated with this proposed rule. Although this action contains provisions constituting collections of information at 48 CFR at 48 CFR 836.578 and 852.236–88, under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501–3521), no new proposed collections of information are associated with this clause. The information collection requirements for 852.236–88, which is currently prescribed by 836.578, is currently approved by OMB and has been assigned OMB control number 2900–0422. This information collection will be submitted to OMB to revise the title, redesignate the collection and renumber the one clause currently numbered as section 852.236–88, Contract Changes—Supplement. Accordingly, if approved, the clause would reflect the new designation and revised title as set forth in the preamble and the amendatory language of this proposed rule to read: 852.243–70, Construction Contract Changes—Supplement, as prescribed by 843.205–70, Contract changes—supplement, under the associated OMB control number 2900–0422. The reference to the old number—852.236–88, would accordingly be removed. There is no change in the information collection burden that is associated with this proposed request. As required by the Paperwork Reduction Act of 1995 (at 44 U.S.C. 3507(d)), VA will submit these information collection amendments to OMB for its review. Notice of OMB approval for this information collection will be published in a future notice from the Office of Information and Regulatory Affairs at *Reginfo.gov.*

Regulatory Flexibility Act

This proposed rule 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. This proposed rule would generally be small business neutral. The overall impact of the proposed rule would be of benefit to small businesses owned by Veterans or service-disabled Veterans as the VAAR is being updated to remove extraneous procedural information that applies only to VA's internal operating procedures. VA estimates no cost impact to individual business would result from these rule updates. On this basis, this proposed rule 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, under 5 U.S.C. 605(b), this regulatory action is exempt from the initial and final regulatory flexibility analysis requirements of sections 603 and 604.

Unfunded Mandates

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

List of Subjects

48 CFR Part 801

Administrative practice and procedure, Government procurement, Reporting and recordkeeping requirements.

48 CFR Part 823

Air pollution control, Drug abuse, Energy conservation, Government procurement, Hazardous substances, Recycling, Water pollution control.

48 CFR Part 824

Freedom of information, Government procurement, Privacy.

48 CFR Part 826

Disaster assistance, Government procurement, Indians.

48 CFR Part 836

Government procurement, Reporting and recordkeeping requirements.

48 CFR Part 843

Government procurement.

48 CFR Part 852

Government procurement, Reporting and recordkeeping requirements.

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 15, 2018, for publication.

Dated: November 20, 2018.

Consuela Benjamin,

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

For the reasons set out in the preamble, VA is proposing to amend 48 CFR parts 801, 824, 836 and 852 and adding parts 823, 826, and 843 as follows:

PART 801—DEPARTMENT OF VETERANS AFFAIRS ACQUISITION REGULATION SYSTEM

■ 1. The authority citation for part 801 continues to read as follows:

Authority: 40 U.S.C. 121(c); 41 U.S.C. 1121; 41 U.S.C. 1303; 41 U.S.C. 1702; and 48 CFR 1.301–1.304.

■ 2. In section 801.106, table columns titled ''48 CFR part or section where identified and described'' and ''Current OMB Control Number,'' are amended to renumber the reference to section 852.836–88 to read 852.243–70 against the corresponding OMB Control Number 2900–0422.

■ 3. Part 823 is added to read as follows:

PART 823—ENVIRONMENT, ENERGY AND WATER EFFICIENCY, RENEWABLE ENERGY TECHNOLOGIES, OCCUPATIONAL SAFETY, AND DRUG-FREE WORKPLACE

Sec.

Authority: 40 U.S.C. 121(c); 41 U.S.C. 1702 and 48 CFR 1.301–1.304.

Subpart 823.103—Sustainable Acquisition Policy

823.103–70 Policy.

(a) For new contracts and orders above the micro-purchase threshold, VA contracting officers may insert a solicitation provision to include an evaluation factor for an offeror's Sustainable Acquisition Plan when acquiring sustainable products and services. Such contracts and orders include, but are not limited to: Office supplies; construction, renovation or repair; building operations and maintenance; landscaping services; pest management; electronic equipment, including leasing; fleet maintenance; janitorial services; laundry services; cafeteria operations; and meetings and conference services.

(b) When required in the solicitation, offerors shall include a Sustainable Acquisition Plan in their technical proposal addressing the sustainable products and services for delivery under the resulting contract.

823.103–71 Solicitation provision.

When the contracting officer requires a Sustainable Acquisition Plan in accordance with 823.103–70, Policy, the contracting officer shall insert the provision at 852.823–70, Instruction to Offerors—Sustainable Acquisition Plan, in solicitations above the micro-purchase threshold.

823.103–72 Contract file.

When one is required, the contracting officer shall place the contractor's final Sustainable Acquisition Plan into the contract file (Electronic Contract Management System (eCMS)).

Subpart 823.3—Hazardous Material Identification and Material Safety Data

823.300 Scope of subpart.

This subpart provides a contract clause for use in administering safety and health requirements.

823.303–70 Contract clause.

Contracting officers shall insert clause 852.223–71, Safety and Health, in solicitations and contracts that involve hazardous materials or hazardous operations for the following types of requirements:

(1) Research, development, or test projects.

(2) Transportation of hazardous materials.

(3) Construction.

PART 824—PROTECTION OF PRIVACY AND FREEDOM OF INFORMATION

■ 4. The authority citation for part 824 is revised to read as follows:

Authority: 5 U.S.C. 552a; 40 U.S.C. 121(c); 41 U.S.C. 1121(c); 41 U.S.C. 1702; 38 CFR 1.550–1.562 and 1.575–1.584; and 48 CFR 1.301–1.304.

■ 5. Section 824.102 is revised to read as follows:

824.102 General.

VA rules implementing the Privacy Act of 1974 are in 38 CFR 1.575 through 1.584, Safeguarding Personal Information in Department of Veterans Affairs Records.

■ 6. Section 824.103 is added to read as follows:

824.103 Procedures.

(c) The contracting officer shall reference the following documents in solicitations and contracts that require the design, development, or operation of a system of records—

(1) VA Handbook 6500.6, Contract Security;

(2) VA Handbook 6508.1, Procedures for Privacy Threshold Analysis and Privacy Impact Assessment;

(3) VA Handbook 6510, VA Identity and Access Management—

(i) The contracting officer will ensure that statements of work or performance work statements that require the design, development, or operation of a system of records include procedures to follow in the event of a PII breach; and

(ii) The contracting officer shall ensure that Government surveillance plans for contracts that require the design, development, or operation of a system of records include monitoring of the contractor's adherence to Privacy Act/PII regulations. The assessing official should document contractor-caused breaches or other incidents related to PII in past performance reports. Such incidents include instances in which the contractor did not adhere to Privacy Act/PII contractual requirements.

Subpart 824.2—Freedom of Information Act

■ 7. Section 824.203 is revised to read as follows:

824.203 Policy.

(a) VA rules implementing the Freedom of Information Act are in 38 CFR 1.550 through 1.562.

(b) Upon receipt of a request, the contracting officer shall provide the requester with the name of the cognizant VA Freedom of Information Act (FOIA) Service Office. The VA FOIA Service Office (see *http://www.oprm.va.gov/foia/default.aspx*) is the focal point for all FOIA requests and official information may only be released through the cognizant FOIA Service or their authorized designee. FOIA requests may be submitted electronically, see the VA FOIA website at *http://www.oprm.va.gov/foia/foia_contacts.aspx.*

■ 8. Part 826 is added to read as follows:

PART 826—OTHER SOCIOECONOMIC PROGRAMS

Sec.

Subpart 826.2—Disaster or Emergency Assistance Activities

Authority: 38 U.S.C. 8127–8128; 40 U.S.C. 121(c); 41 U.S.C. 1702; 38 CFR 1.550–1.562 and 1.575–1.584; and 48 CFR 1.301–1.304.

Subpart 826.2—Disaster or Emergency Assistance Activities

826.202–1 Local area set-aside.

(c) The contracting officer shall determine whether a local area set-aside should be further restricted to verified Service-Disabled Veteran-Owned Small Businesses (SDVOSBs) or Veteran-Owned Small Businesses (VOSBs) pursuant to subpart 819.70.

826.202–2 Evaluation preference.

Pursuant to 38 U.S.C. 8128 and if market research does not support an SDVOSB or VOSB set-aside, the contracting officer shall consider including evaluation factors in accordance with 815.304 and the evaluation criteria clause prescribed at 815.304–71(a), 852.215–70, Service-Disabled Veteran-Owned and Veteran-Owned Small Business Evaluation Factors.

PART 836—CONSTRUCTION AND ARCHITECT-ENGINEER CONTRACTS

■ 9. The authority citation for part 836 continues to read as follows:

Authority: 40 U.S.C. 121(c); 48 CFR 1.301–1.304.

836.578 [Removed]

■ 10. Section 836.578 is removed.

■ 11. Part 843 is added to read as follows:

PART 843—CONTRACT MODIFICATIONS

Sec.

Subpart 843.2—Change Orders

Authority: 40 U.S.C. 121(c); 41 U.S.C. 1121(c)(3); 41 U.S.C. 1702 and 48 CFR 1.301–1.304.

Subpart 843.2—Change Orders

843.204–70 Definitization of unpriced change orders.

(a) *Scope.* This subsection applies to unpriced change orders with an estimated value exceeding $5 million unless the cognizant HCA establishes a lower level.

(b) *Price ceiling.* Unpriced change orders shall include a not-to-exceed cost or price.

(c) *Definitization schedule.* Unpriced change orders shall contain definitization schedules that provide for definitization by the earlier of—

(1) The date that is 180 days after issuance of the change order (this date may be extended but may not exceed the date that is 180 days after the contractor submits a definitization proposal); or

(2) The date on which the amount of funds obligated under the change order is equal to more than 50 percent of the not-to-exceed price.

(d) *Definitization proposal.* Submission of a definitization proposal in accordance with the definitization schedule is a material element of the contract. If the contractor does not submit a timely definitization proposal, the contacting officer may suspend or reduce payments in accordance with the contract payment clause or take other appropriate action.

(e) *File documentation for definitization delays.* Contracting officers must document the contract file with the justification for any delay and revised definitization milestone schedule.

(f) *Limitations on obligations.*

(1) The Government shall not obligate more than 50 percent of the not-to-exceed price before definitization. However, if a contractor submits a definitization proposal before 50 percent of the not-to-exceed price has been obligated by the Government, the limitation on obligations before definitization may be increased to no more than 75 percent of the not-to-exceed cost or price.

(2) Obligations should be consistent with the contractor's authorized and scheduled work performed during the undefinitized period.

(g) *Allowable profit.*

(1) When the final cost or price of an unpriced change order is negotiated after a substantial portion of the required performance has been completed, the head of the contracting activity shall ensure the fee or profit allowed reflects—

(i) Any reduced cost risk to the contractor for costs incurred during contract performance before negotiation of the final cost or price; and

(ii) The contractor's reduced cost risk for costs incurred during performance of the remainder of the contract; and

(iii) The extent to which costs have been incurred prior to definitization of the contract action.

(2) If a substantial portion of the costs have been incurred prior to definitization, the contracting officer may assign a value as low as zero (0) percent, regardless of contract type. The risk assessment shall be documented in the contract file.

843.205 Contract clauses.

As authorized in the introductory text of clauses FAR 52.243–1, Changes—Fixed-Price; FAR 52.243–2, Changes—Cost-Reimbursement; and FAR 52.243–4, Changes, and in the prescription at FAR 43.205(c) for FAR 52.243–3, Changes—Time-and-Materials or Labor-Hours, the contracting officer may vary the period within which a contractor must assert its right to an equitable adjustment but the extended period shall not exceed 60 calendar days.

843.205–70 Contract changes—supplement.

The contracting officer shall insert the clause at 852.243–70, Construction Contract Changes—Supplement, in solicitations and contracts for construction that are expected to exceed the micro-purchase threshold for construction.

PART 852—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 12. The authority citation for part 852 continues to read as follows:

Authority: 38 U.S.C. 8127–8128, and 8151–8153; 40 U.S.C. 121(c); 41 U.S.C. 1121(c)(3); 41 U.S.C. 1303; 41 U.S.C. 1702; and 48 CFR 1.301–1.304.

■ 13. Section 852.223–70 is added to read as follows:

852.223–70 Instructions to offerors—Sustainable Acquisition Plan.

As prescribed in 823.103–71, when the Contracting Officer deems a Sustainable Acquisition Plan necessary, the Contracting Officer shall insert the following provision:

Instructions to Offerors—Sustainable Acquisition Plan (Date)

Offerors shall include a Sustainable Acquisition Plan in their technical proposals. The plan must describe the approach and quality assurance mechanisms for applying FAR subpart 23.1, Sustainable Acquisition Policy and other Federal laws, regulations and Executive Orders governing sustainable acquisition. The plan shall clearly identify those products and services included in the proposal.

(End of provision)

■ 14. Section 852.223–71 is added to read as follows:

852.223–71 Safety and Health.

As prescribed by 823.303–70, the Contracting Officer shall insert the following clause:

Safety and Health (Date)

(a) To help ensure the protection of the life and health of all persons, and to help prevent damage to property, the Contractor shall comply with all Federal, State, and local laws and regulations applicable to the work being performed under this contract. These laws are implemented or enforced by the Environmental Protection Agency (EPA), Occupational Safety and Health Administration (OSHA) and other regulatory/enforcement agencies at the Federal, State, and local levels.

(1) Additionally, the Contractor shall comply with the following regulations when developing and implementing health and safety operating procedures and practices for both personnel and facilities involving the use or handling of hazardous materials and the conduct of research, development, or test projects:

(i) 29 CFR 1910.1030, Bloodborne pathogens; 29 CFR 1910.1450, Occupational exposure to hazardous chemicals in laboratories. These regulations are available at *https://www.osha.gov/.*

(ii) Nuclear Regulatory Commission Standards and Regulations, pursuant to the Energy Reorganization Act of 1974 (42 U.S.C. 5801 *et seq.*) Copies are available from the U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

(2) The following Government guidelines are recommended for developing and implementing health and safety operating procedures and practices for both personnel and facilities:

(i) Biosafety in Microbiological and Biomedical Laboratories, Centers for Disease Control and Prevention (CDC), available at *http://www.cdc.gov/biosafety/publications/index.htm.*

(ii) Prudent Practices in the Laboratory, National Research Council, National Academy Press, Washington, DC 20001, available at *http://www.nap.edu.*

(b)(1) The Contractor shall maintain an accurate record of, and promptly report to the Contracting Officer, all accidents or incidents resulting in the exposure of persons to toxic substances, hazardous materials or hazardous operations; the injury or death of any person; or damage to property incidental to work performed under the contract resulting from toxic or hazardous materials and resulting in any or all violations for which the Contractor has been cited by any Federal, State or local regulatory/enforcement agency.

(2) The report shall include a copy of the notice of violation and the findings of any inquiry or inspection, and an analysis addressing the impact these violations may have on the work remaining to be performed. The report shall also state the required action(s), if any, to be taken to correct any violation(s) noted by the Federal, State, or local regulatory/enforcement agency and the time frame allowed by the agency to accomplish the necessary corrective action.

(c) If the Contractor fails or refuses to comply with the Federal, State or local regulatory/enforcement agency's directive(s) regarding any violation(s) and prescribed corrective action(s), the Contracting Officer may issue an order stopping all or part of the work until satisfactory corrective action (as approved by the Federal, State, or local regulatory/enforcement agencies) has been taken and documented to the Contracting Officer. No part of the time lost due to any such stop work order shall form the basis for a request for extension or costs or damages by the Contractor.

(d) The Contractor shall insert this clause in each subcontract involving toxic substances, hazardous materials, or hazardous operations. The Contractor is responsible for the compliance of its subcontractors with the provisions of this clause.

(End of clause)

852.236–88 [Removed]

■ 15. Section 852.236–88 is removed.

■ 16. Section 852.243–70 is added to read as follows:

852.243–70 Construction Contract Changes—Supplement.

As prescribed in 843.205–70, the Contracting Officer shall insert this clause in solicitations and contracts for construction that are expected to exceed the micro-purchase threshold. The Contracting Officer shall fill in the number of days in which a Contractor must assert its right to an equitable adjustment; however, such amount shall not exceed 60 calendar days.

Construction Contract Changes—Supplement (Date)

The FAR clauses 52.243–4, Changes; 52.243–5, Changes and Changed Conditions; and 52.236–2, Differing Site Conditions, are supplemented as follows:

(a) Submission of request for equitable adjustment proposals. When directed by the Contracting Officer or requested by the Contractor, the Contractor shall, in accordance with FAR 15.403–5, submit proposals for changes in the work exceeding $500,000 in writing to the Contracting Officer or Administrative Contracting Officer (ACO), and to the resident engineer.

(1) The Contractor must provide an itemized breakdown for changes exceeding the micro-purchase threshold (see FAR 2.101).

(2) The itemized breakdown shall include materials, quantities, unit prices, labor costs (separated into trades), construction equipment, etc. Labor costs shall be identified with specific material placed or operation performed.

(3) Proposals shall be submitted to the Contracting Officer or ACO and the resident engineer as expeditiously as possible, but not later than [fill-in] ____calendar days, after receipt of a written change order by the Contracting Officer.

(4) Proposals shall be signed by each subcontractor participating in the change.

(5) The Contracting Officer will consider issuing a settlement by determination to the contract if the Contractor's proposal required by paragraph (3) is not received within 30 calendar days, or if agreement has not been reached.

(b) Paragraphs (a)(1) through (5) and the following apply to proposed contract changes costing $500,000 or less:

(1) As a basis for negotiation, allowances not to exceed 10 percent each for overhead and profit for the party performing the work will be based on the value of labor, material, and equipment required to accomplish the change. As the value of the change increases, a declining scale will be used in negotiating the percentage of overhead and profit. This declining scale will also be used to negotiate the prime Contractor's or upper-tier subcontractor's fee when work is performed by lower-tier subcontractors (to a maximum of three tiers) and will be based on the net increased cost to the prime or upper-tier subcontractor, as applicable. Profit (fee) shall be computed by multiplying the profit percentage by the sum of the direct costs and computed overhead costs. Allowable percentages on changes will not exceed the following:

(i) 10 percent overhead and/or 10 percent profit (fee) on the first $20,000.

(ii) 7.5 percent overhead and/or 7.5 percent profit (fee) on the next $30,000.

(iii) 5 percent overhead and/or 5 percent profit (fee) on a balance over $50,000.

(2) The Contracting Officer will consider issuing a settlement by determination to the contract if the Contractor's proposal required by paragraph (3) is not received within 30 calendar days, or if agreement has not been reached.

(c)(1) Overhead and Contractor's fee percentages shall be considered to include insurance other than mentioned herein, field and office supervisors and assistants, security police, use of small tools, incidental job burdens, and general home office expenses and no separate allowance will be made. Assistants to office supervisors include all clerical, stenographic and general office help. Incidental job burdens include, but are not necessarily limited to, office equipment and supplies, temporary toilets, telephone and conformance to OSHA requirements. Items such as, but not necessarily limited to, review and coordination, estimating and expediting relative to contract changes are associated with field and office supervision and are considered to be included in the Contractor's overhead and/or fee percentage.

(2) Where the Contractor's or subcontractor's portion of a change involves credit items, such items must be deducted prior to adding overhead and profit for the party performing the work. The Contractor's fee is limited to the net increase to Contractor or subcontractors' portions of cost computed in accordance with this clause.

(3) Where a change involves credit items only, a proper measure of the amount of downward adjustment in the contract price is the reasonable cost to the Contractor if it had performed the deleted work. A reasonable allowance for overhead and profit are properly includable as part of the downward adjustment for a deductive change. The amount of such allowance is subject to negotiation.

(End of clause)

[FR Doc. 2018–25618 Filed 11–28–18; 8:45 am]

BILLING CODE 8320–01–P

Notices

Federal Register

Vol. 83, No. 230

Thursday, November 29, 2018

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

Submission for OMB Review; Comment Request

November 26, 2018.

The Department of Agriculture has submitted the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Comments are requested regarding (1) whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Comments regarding this information collection received by December 31, 2018 will be considered. Written comments should be addressed to: Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), *OIRA_Submission@omb.eop.gov* or fax (202) 395–5806 and to Departmental Clearance Office, USDA, OCIO, Mail Stop 7602, Washington, DC 20250–7602. Copies of the submission(s) may be obtained by calling (202) 720–8958.

An agency may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

Food and Nutrition Service

Title: Farm to School Census and Comprehensive Review.

OMB Control Number: 0584–New.

Summary of Collection: Section 18 of the Richard B. Russell National School Lunch Act (NSLA) (42 U.S.C. 1769) authorized and funded the United States Department of Agriculture (USDA) to establish a farm to school program in order to assist eligible entities, through grants and technical assistance, in implementing farm to school programs that improve access to local foods in schools. To measure progress towards increasing the availability of local foods in schools, the Food and Nutrition Service (FNS) conducted a nationwide Farm to School Census in 2013 and 2015. The Farm to School Program uses data from the Farm to School Census to assess farm to school programs and to set priorities for outreach and technical support, as mandated under the NSLA. This third iteration of the Census will allow FNS to make comparisons of farm to school activities and trends nationally across time and help contribute to a comprehensive review of farm to school activities over the 10 year period since the USDA Farm to School grant program was established.

Need and Use of the Information: This voluntary study will collect information from State Child Nutrition and Agriculture directors, School Food Authority directors of public and private schools, and distributors. FNS will use the data collected from this study to prepare a Comprehensive Farm to School Report that will include a cumulative assessment of the scope, accomplishments, and potential of the farm to school activities of FNS. The results of this study will be used to improve the methods and tools used by FNS to describe the impact and benefits of various farm to school activities administered by grantees, schools, school food authorities, and other stakeholders.

Description of Respondents: Businesses or other for-profit institutions; and State, Local or Tribal Government.

Number of Respondents: 20,083.

Frequency of Responses: Reporting: once; annually.

Total Burden Hours: 25,061.

Food and Nutrition Service

Title: WIC Infant and Toddler Feeding Practices Study-2 (ITFPS–2) Age 6 Extension.

OMB Control Number: 0584–0580.

Summary of Collection: The Healthy, Hunger-Free Kids Act of 2010 (Pub. L. 111–296, Sec. 305) mandates programs under its authorization, including WIC, to cooperate with the United States Department of Agriculture (USDA) program research and evaluation activities. The USDA's Special Supplemental Nutrition Program for Women, Infants and Children (WIC) serves a highly-vulnerable population: Low-income pregnant and post-partum women, infants, and children through their fifth birthday who are at nutritional risk. The program provides supplemental food packages, health referrals and nutrition education for participants. The Age 6 Extension will follow children through the year following the end of their WIC age eligibility, and provide data to answer research questions relevant to WIC program and policy as well as the nutrition and wellbeing of children up to the month of their 6th birthdays.

Need and Use of the Information: This voluntary study will collect information from the caregivers of former WIC children, State WIC staff, WIC site staff, and health care providers. The study is needed to provide the Food and Nutrition Service with information on the factors that influence feeding practices and the nutrition and health outcomes of children in the first five years of their lives, and during their time of WIC age eligibility. The Age 6 Extension study will expand the data collection to their sixth year of life, through the first year in which they can no longer receive WIC services.

Description of Respondents: Individuals or households; Businesses or other for-profit institutions; Not-for-profit institutions; and State, Local or Tribal Government.

Number of Respondents: 5,004.

Frequency of Responses: Reporting: On occasion; Semi-annually.

Total Burden Hours: 4,415.

Ruth Brown,

Departmental Information Collection Clearance Officer.

[FR Doc. 2018–25957 Filed 11–28–18; 8:45 am]

BILLING CODE 3410–30–P

DEPARTMENT OF AGRICULTURE

Submission for OMB Review; Comment Request

November 26, 2018.

The Department of Agriculture has submitted the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Comments are requested regarding (1) whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques and other forms of information technology.

Comments regarding this information collection received by December 31, 2018 will be considered. Written comments should be addressed to: Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), New Executive Office Building, 725 17th Street NW, Washington, DC 20503. Commentors are encouraged to submit their comments to OMB via email to: *OIRA_Submission@omb.eop.gov* or fax (202) 395–5806 and to Departmental Clearance Office, USDA, OCIO, Mail Stop 7602, Washington, DC 20250–7602. Copies of the submission(s) may be obtained by calling (202) 720–8681.

An agency may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

Forest Service

Title: Understanding Value Trade-Offs Regarding Fire Hazard Reduction Programs in the Wildland-Urban Interface.

OMB Control Number: 0596–0189.

Summary of Collection: The Healthy Forests Restoration Act (Pub. L. 108–148), improves the ability of the Secretary of Agriculture and the Secretary of the Interior to plan and conduct hazardous fuels reduction projects on National Forest System and Bureau of Land Management Lands. The Forest Service, Bureau of Land Management, Bureau of Indian Affairs, National Park Service, Fish and Wildlife Service, and many State agencies with fire protection responsibilities have undertaken a very ambitious and expensive forest fuels reduction program. The Forest Service (FS) and university researchers will contact recipients of a phone/mail questionnaire to help forest and fire managers understand value trade-offs regarding fire hazard reduction programs in the wildland-urban interface.

Need and Use of the Information: Through the questionnaire, researchers will evaluate the responses of Arizona, Colorado, New Mexico, Texas, California, and Florida residents to different scenarios related to fire hazard reduction programs; how residents think the programs presented to them are effective, and calculate how much residents would be willing to pay to implement the alternatives. The collected information will help researchers provide better information to natural resources, forest, and fire managers when they are contemplating the kind and type of fire hazard reduction programs to implement to achieve forest land management planning objectives. Without the information the agencies with fire protection responsibilities will lack the capability to evaluate the general public understanding of proposed fuels reduction projects and programs or their willingness to pay for implementing such programs.

Description of Respondents: Individuals or households.

Number of Respondents: 1,675.

Frequency of Responses: Reporting: Other (One time only).

Total Burden Hours: 690.

Kimble Brown,

Departmental Information Collection Clearance Officer.

[FR Doc. 2018–25966 Filed 11–28–18; 8:45 am]

BILLING CODE 3411–15–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: Annual Economic Survey of Federal Gulf and South Atlantic Shrimp Permit Holders.

OMB Control Number: 0648–0591.

Form Number(s): None.

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

Number of Respondents: 650.

Average Hours per Response: 45 minutes.

Burden Hours: 488.

Needs and Uses: This request is for revision and extension of this information collection. We are not including the crew survey that was part of the 2015 submission. The survey was voluntary and there were no responses.

NOAA Fisheries, Southeast Fisheries Science Center, annually collects socioeconomic data from commercial fishermen in the Gulf of Mexico and South Atlantic shrimp fisheries who hold one or more permits for harvesting shrimp from federal waters (U.S. Exclusive Economic Zone). Information about revenues, variable and fixed costs, capital investment and other socioeconomic information is collected from a random sample of permit holders. These data are needed to conduct socioeconomic analyses in support of management of the shrimp fishery and to satisfy legal requirements. The data will be used to assess how fishermen will be impacted by and respond to federal regulation likely to be considered by fishery managers.

Affected Public: Business or other for-profit organizations.

Frequency: 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 26, 2018.

Sarah Brabson,

NOAA PRA Clearance Officer.

[FR Doc. 2018–25983 Filed 11–28–18; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XG517

Endangered Species; File Nos. 19641–01, 20340–05, 20347–03, 20528–02, and 22671

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

ACTION: Notice; receipt of applications for a permit and permit modifications.

SUMMARY: Notice is hereby given that five applicants have applied in due form for a permit or permit modification to take shortnose (*Acipenser brevirostrum*) and Atlantic (*Acipenser oxyrinchus*) sturgeon for purposes of scientific research and enhancement.

DATES: Written, telefaxed, or email comments must be received on or before December 31, 2018.

ADDRESSES: The permit and permit modification requests and related documents are available for review by selecting ''Records Open for Public Comment'' from the Features box on the Applications and Permits for Protected Species (APPS) home page, *https://apps.nmfs.noaa.gov,* and then selecting the applicable File No. from the list of available applications. These documents are also available upon written request or by appointment in the Permits and Conservation Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Room 13705, Silver Spring, MD 20910; phone (301) 427–8401; fax (301) 713–0376.

Written comments on the pertinent application should be submitted to the Chief, Permits and Conservation Division, at the address listed above. Comments may also be submitted by facsimile to (301) 713–0376, or by email to *NMFS.Pr1Comments@noaa.gov.* Please include the File No. in the subject line of the email comment.

Those individuals requesting a public hearing should submit a written request to the Chief, Permits and Conservation Division at the address listed above. The request should set forth the specific reasons why a hearing on the application would be appropriate.

FOR FURTHER INFORMATION CONTACT: Malcolm Mohead (for File Nos. 19641–01, 20347–03, and 22671) or Erin Markin (for File Nos. 20340–05 and 20528–02), (301) 427–8401.

SUPPLEMENTARY INFORMATION: The subject new permit and permit modifications are requested under the authority of the Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531 *et seq.*) and the regulations governing the taking, importing, and exporting of endangered and threatened species (50 CFR parts 222–226).

File No. 19641–01: Permit No. 19641 was issued on March 29, 2017 (82 FR 16996) to the Connecticut Department of Energy and Environmental Protection, Marine Fisheries, P.O. Box 719, Old Lyme, Connecticut 06371 (Responsible Party: Tom Savoy), authorizing collecting, tagging and, monitoring the presence, abundance, diet, age and sex composition of shortnose and Atlantic sturgeon in Connecticut waters. Atlantic and shortnose sturgeon are currently authorized to be captured (using gill nets and trawls) measured, tissue sampled, gastric lavaged, passive integrated transponder (PIT) tagged, anesthetized, internally tagged, age sampled, photographed, and weighed prior to release. The permit holder now requests authorization to: (1) Increase the numbers of Atlantic sturgeon juvenile life stages that may be taken from 50 to 250 annually, (2) increase numbers of shortnose sturgeon adult and sub-adult life stages that may be taken from 130 to 250 annually, and (3) include new take for lethally collecting up to 250 early life stages of shortnose sturgeon using egg mats or D-nets. The additional numbers of captured fish would be measured, weighed, PIT tagged, genetically sampled, and photographed prior to release. The increases are requested to accommodate improvements in population abundance estimates for the respective species. The permit expires March 31, 2027.

File No. 20437–03: Permit No. 20437 was issued March 29, 2017 (82 FR 16996) to the University of Maine, School Of Marine Sciences, 5741 Libby Hall, Room 202A, Orono, ME 04469–5741 (Responsible Party: Gayle Zydlewski, Ph.D.), authorizing research on Atlantic and shortnose sturgeon, collecting all life stages (using trawls, gill nets, trot lines, and beach seines, egg matts and D-nets), internal and external tagging, anesthetizing, borescoping, PIT tagging, Floy tagging, weighing, measuring, tissue sampling, age sampling, and monitoring the presence, abundance, diet, sex composition, and large scale movements of each species in Gulf of Maine (GOM) waters. The permit holder requests authorization to increase the numbers of Atlantic and shortnose sturgeon collected from the Merrimack, Penobscot Rivers, and in other areas of the GOM. In the Merrimack River (MA), the permit holder requests to capture and acoustically tag increased numbers of juvenile Atlantic (from 10 to 15) and shortnose sturgeon (from 15 to 25) to better refine the movements of each species. In other selected GOM rivers, the permit holder also requests 15 additional Atlantic sturgeon juveniles to be taken and acoustically tagged in order to further refine coastal movements. In the Penobscot River (ME), the permit holder requests the numbers of shortnose sturgeon adults and sub-adults taken be increased from 200 to 300 in order to accommodate more precise population abundance estimates for the species. The permit expires March 31, 2027.

File No. 20340–05: Permit No. 20340 was issued March 29, 2017 (82 FR 16996) to the New York State Department of Environmental Conservation, 205 Belle Mead Road, East Setuaket, NY 11733 (Responsible Party: Kim McKown), authorizing research on Atlantic and shortnose sturgeon to determine movement of adult sturgeon in the Hyde Park area of the Hudson River, movement of age-1 sturgeon Hudson River-wide, respective species population estimates, and habitat utilization. Fish may be collected by gill nets or trawls year-round during ice-free periods. Upon capture, fish may be measured, weighed, PIT tagged, tissue sampled, and photographed. A subset of fish may be externally and/or internally tagged, fin ray sampled for ageing, gastric lavaged, gonadal biopsied, and blood sampled. Samples Atlantic sturgeon ELS may also lethally collected to document spawning in systems. Up to four Atlantic sturgeon and three shortnose sturgeon may unintentionally die annually during research. The permit holder requests authorization to: (1) Mark Atlantic and shortnose sturgeon using oxytetracycline for ageing studies, (2) lethally collect shortnose sturgeon ELS, and (3) sample leading fin rays to validate age assignments. The permit expires March 31, 2027.

File No. 20528–02: Permit No. 20528 was issued March 29, 2017 (82 FR 16996) to the South Carolina Department of Natural Resources, 217 Fort Johnson Road, Charleston, SC 29412 (Responsible Party: Bill Post), authorizing a permit to conduct research on Atlantic and shortnose sturgeon to determine their presence, status, health, habitat use, and movements in South Carolina waters. Researchers may use gill nets to capture Atlantic and shortnose sturgeon to measure, weigh, PIT tag, tissue sample, and photograph prior to release. A subset of individuals may be acoustically tagged, fin ray sampled, and gonadal biopsied. Early life stages of each species may be lethally sampled to document occurrence of spawning in systems. Up to two sturgeon of each species may unintentionally die annually during sampling activities. The permit holder is requesting authorization to: (1) Increase the number of juvenile and sub-adult/adult shortnose sturgeon captures in the Edisto River from 5 to 10, respectively, (2) collect blood samples from sub-adult/adult sturgeon for sex determination in the Cooper River, and (3) expand research to the Waccamaw River and Lakes Moultrie and Marion in South Carolina. Up to 150 juvenile Atlantic sturgeon and 50 juvenile shortnose sturgeon may be captured using gill nets in the Waccamaw River and PIT tagged, biologically sampled (fin clip, fin ray clip), weighed, measured, and photographed/videoed prior to release. Up to 10 juvenile and 95 sub-adult/adult shortnose sturgeon may be captured using gill nets in Lakes Moultrie and Marion and PIT tagged, biologically sampled (fin clip, fin ray clip), weighed, measured, and photographed/videoed prior to release. A subset of captured fish may be internally tagged. The permit expires March 31, 2027.

File No. 22671: The Conte Anadromous Fish Research Laboratory, U.S. Geological Survey (USGS), Biological Resources Discipline (BRD), 1 Migratory Way, Turners Falls, MA 01376 (Responsible Party: Adria Elskus, Ph.D.), requests a 10-year permit studying the life history, population size, migration, physiology, and passage of shortnose sturgeon in the Connecticut River. The action area includes three segments: Bellows Falls Dam (Bellows Falls, VT) to the Turner Falls Dam (Montague, MA), Turner Falls Dam to the Holyoke Dam (Holyoke, MA), and Holyoke Dam to the Massachusetts-Connecticut border (Agawam, MA). Additional tracking of telemetered fish would take place to the mouth of the Connecticut River. To conduct studies, the applicant requests capturing up to 195 adult/sub-adult and 185 juvenile shortnose sturgeon annually using gill nets or trawls and 200 early life stages (ELS) would be lethally sampled using egg matts or D-nets to determine the incidence of spawning in the river. The older life stages would be measured, weighed, passive integrated transponder (PIT) tagged, tissue sampled (*i.e.,* genetic and blood), sexed (*i.e.,* using a borescope), photographed, and prophylactically treated prior to release. A subset of the adult, sub-adult and juvenile animals would also be anesthetized and be either internally or externally tagged prior to release. Up to two juvenile and one adult/sub-adult shortnose sturgeon may be incidentally killed caused by capture and sampling activities.

The applicant also proposes using captive (non-releasable) adult, sub-adult, juvenile, and ELS shortnose and Atlantic sturgeon for objectives related to: Pathology, propagation techniques, anesthesiology, neurology, fish passage, fish behavior, technology (*e.g.,* tagging); toxicology, genetics, contaminants, immunology, euthanasia, life history, water quality, nutrition, endocrinology, and captive educational display (*i.e.,* enhancement activities). Additional specimens required would either be propagated or cultured at the facility or acquired elsewhere by import or receipt. Excess numbers of individual sturgeon would be used as a source-supply for co-investigators working collaboratively on the permit while conducting similar research or enhancement activities.

Dated: November 26, 2018.

Julia Marie Harrison,

Chief, Permits and Conservation Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2018–25955 Filed 11–28–18; 8:45 am]

BILLING CODE 3510–22–P

BUREAU OF CONSUMER FINANCIAL PROTECTION

[Docket No. CFPB–2018–0039]

Agency Information Collection Activities: Submission for OMB Review; Comment Request

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Notice and request for comment.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 (PRA), the Bureau of Consumer Financial Protection (Bureau) is requesting to renew the Office of Management and Budget (OMB) approval for an existing information collection titled, ''Mortgage Acts And Practices (Regulation N) 12 CFR 1014.''

DATES: Written comments are encouraged and must be received on or before December 31, 2018 to be assured of consideration.

ADDRESSES: Comments in response to this notice are to be directed towards OMB and to the attention of the OMB Desk Officer for the Bureau of Consumer Financial Protection. You may submit comments, identified by the title of the information collection, OMB Control Number (see below), and docket number (see above), by any of the following methods:

- *Electronic: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Email: OIRA_submission@omb.eop.gov.*
- *Fax:* (202) 395–5806.
- *Mail:* Office of Management and Budget, New Executive Office Building, Room 10235, Washington, DC 20503.

In general, all comments received will become public records, including any personal information provided. Sensitive personal information, such as account numbers or Social Security numbers, should not be included.

FOR FURTHER INFORMATION CONTACT: Documentation prepared in support of this information collection request is available at *www.reginfo.gov* (this link becomes active on the day following publication of this notice). Select ''Information Collection Review,'' under ''Currently under review,'' use the dropdown menu ''Select Agency'' and select ''Consumer Financial Protection Bureau'' (recent submissions to OMB will be at the top of the list). The same documentation is also available at *http://www.regulations.gov.* Requests for additional information should be directed to the Bureau of Consumer Financial Protection (Attention: PRA Office), 1700 G Street NW, Washington, DC 20552, (202) 435–9575, or email: *CFPB_PRA@cfpb.gov.* If you require this document in an alternative electronic format, please contact *CFPB_Accessibility@cfpb.gov.* Please do not submit comments to these email boxes.

SUPPLEMENTARY INFORMATION:

Title of Collection: Mortgage Acts And Practices (Regulation N) 12 CFR 1014.

OMB Control Number: 3170–0009.

Type of Review: Extension without Change of an existing information Collection.

Affected Public: Businesses and other for-profit entities.

Estimated Number of Respondents: 483.

Estimated Total Annual Burden Hours: 242.

Abstract: Regulation N (12 CFR 1014), prohibits misrepresentations about the terms of mortgage credit products in commercial communications and requires that covered persons keep certain related records for a period of twenty-four (24) months from last dissemination. The information that Regulation N requires covered persons to retain is necessary to ensure efficient and effective law enforcement to address deceptive practices that occur in the mortgage advertising area. The Bureau is not proposing any new or revised collections of information pursuant to this request.

Request for Comments: The Bureau issued a 60-day **Federal Register** notice on September 5, 2018, 83 FR 45109, Docket Number: CFPB–2018–0029. Comments were solicited and continue to be invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the Bureau, including whether the information will have practical utility; (b) The accuracy of the Bureau's estimate of the burden of the collection of information, including the validity of the methods and the assumptions used; (c) Ways to enhance the quality, utility, and clarity of the information to be collected; and (d) Ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Comments submitted in response to this notice will be reviewed by OMB as part of its review of this request. All comments will become a matter of public record.

Dated: November 20, 2018.

Darrin A. King,

Paperwork Reduction Act Officer, Bureau of Consumer Financial Protection.

[FR Doc. 2018–25973 Filed 11–28–18; 8:45 am]

BILLING CODE 4810–AM–P

BUREAU OF CONSUMER FINANCIAL PROTECTION

[Docket No. CFPB–2018–0036]

Agency Information Collection Activities: Submission for OMB Review; Comment Request

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Notice and request for comment.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 (PRA), the Bureau of Consumer Financial Protection (Bureau) is requesting to renew the Office of Management and Budget (OMB) approval for an existing information collection titled, ''Registration of Mortgage Loan Originators (Regulation G).''

DATES: Written comments are encouraged and must be received on or before December 31, 2018 to be assured of consideration.

ADDRESSES: Comments in response to this notice are to be directed towards OMB and to the attention of the OMB Desk Officer for the Bureau of Consumer Financial Protection. You may submit comments, identified by the title of the information collection, OMB Control Number (see below), and docket number (see above), by any of the following methods:

- *Electronic: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Email: OIRA_submission@omb.eop.gov.*
- *Fax:* (202) 395–5806.
- *Mail:* Office of Management and Budget, New Executive Office Building, Room 10235, Washington, DC 20503.

In general, all comments received will become public records, including any personal information provided. Sensitive personal information, such as account numbers or Social Security numbers, should not be included.

FOR FURTHER INFORMATION CONTACT: Documentation prepared in support of this information collection request is available at *www.reginfo.gov* (this link becomes active on the day following publication of this notice). Select ''Information Collection Review,'' under ''Currently under review,'' use the dropdown menu ''Select Agency'' and select ''Consumer Financial Protection Bureau'' (recent submissions to OMB will be at the top of the list). The same documentation is also available at *http://www.regulations.gov.* Requests for additional information should be directed to the Bureau of Consumer Financial Protection (Attention: PRA Office), 1700 G Street NW, Washington, DC 20552, (202) 435–9575, or email: *CFPB_PRA@cfpb.gov.* If you require this document in an alternative electronic format, please contact *CFPB_Accessibility@cfpb.gov.* Please do not submit comments to these email boxes.

SUPPLEMENTARY INFORMATION:

Title of Collection: Registration of Mortgage Loan Originators (Regulation G) 12 CFR 1007.

OMB Control Number: 3170–0005.

Type of Review: Extension without change of an existing information collection.

Affected Public: Businesses and other for-profit entities.

Estimated Number of Respondents: 261,638.

Estimated Total Annual Burden Hours: 249,628.

Abstract: Regulation G implements the Secure and Fair Enforcement for Mortgage Licensing Act (the S.A.F.E. Act), Federal registration requirement with respect to any covered financial institutions, and their employees who act as residential mortgage loan originators (MLOs), to register with the Nationwide Mortgage Licensing System and Registry, obtain a unique identifier, maintain this registration, and disclose to consumers the unique identifier. The rule also requires the covered financial institutions employing these MLOs to adopt and follow written policies and procedures to ensure their employees comply with these requirements and to disclose the unique identifiers of their MLOs. The Bureau is not proposing any new or revised collections of information pursuant to this request.

Request for Comments: The Bureau issued a 60-day **Federal Register** notice on September 5, 2018, 83 FR 45110, Docket Number: CFPB–2018–0026. Comments were solicited and continue to be invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the Bureau, including whether the information will have practical utility; (b) The accuracy of the Bureau's estimate of the burden of the collection of information, including the validity of the methods and the assumptions used; (c) Ways to enhance the quality, utility, and clarity of the information to be collected; and (d) Ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Comments submitted in response to this notice will be reviewed by OMB as part of its review of this request. All comments will become a matter of public record.

Dated: November 20, 2018.

Darrin A. King,

Paperwork Reduction Act Officer, Bureau of Consumer Financial Protection.

[FR Doc. 2018–25980 Filed 11–28–18; 8:45 am]

BILLING CODE 4810–AM–P

BUREAU OF CONSUMER FINANCIAL PROTECTION

[Docket No. CFPB–2018–0038]

Agency Information Collection Activities: Submission for OMB Review; Comment Request

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Notice and request for comment.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 (PRA), the Bureau of Consumer Financial Protection (Bureau) is requesting to renew the Office of Management and Budget (OMB) approval for an existing information collection titled, ''Mortgage Assistance Relief Services (Regulation O).''

DATES: Written comments are encouraged and must be received on or before December 31, 2018 to be assured of consideration.

ADDRESSES: Comments in response to this notice are to be directed towards OMB and to the attention of the OMB Desk Officer for the Bureau of Consumer Financial Protection. You may submit comments, identified by the title of the information collection, OMB Control Number (see below), and docket number (see above), by any of the following methods:

- *Electronic: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Email: OIRA_submission@omb.eop.gov.*
- *Fax:* (202) 395–5806.
- *Mail:* Office of Management and Budget, New Executive Office Building, Room 10235, Washington, DC 20503.

In general, all comments received will become public records, including any personal information provided. Sensitive personal information, such as account numbers or Social Security numbers, should not be included.

FOR FURTHER INFORMATION CONTACT: Documentation prepared in support of this information collection request is available at *www.reginfo.gov* (this link becomes active on the day following publication of this notice). Select ''Information Collection Review,'' under ''Currently under review,'' use the dropdown menu ''Select Agency'' and select ''Consumer Financial Protection Bureau'' (recent submissions to OMB will be at the top of the list). The same documentation is also available at *http://www.regulations.gov.* Requests for additional information should be directed to the Bureau of Consumer Financial Protection (Attention: PRA Office), 1700 G Street NW, Washington, DC 20552, (202) 435–9575, or email: *CFPB_PRA@cfpb.gov.* If you require this document in an alternative electronic format, please contact *CFPB_Accessibility@cfpb.gov.* Please do not submit comments to these email boxes.

SUPPLEMENTARY INFORMATION:

Title of Collection: Mortgage Assistance Relief Services (Regulation O) 12 CFR 1015.

OMB Control Number: 3170–0007.

Type of Review: Extension without change of an existing Information Collection.

Affected Public: Businesses and other for-profit entities.

Estimated Number of Respondents: 120.

Estimated Total Annual Burden Hours: 360.

Abstract: The required disclosures under Regulation O 12 CFR 1015 assist prospective purchasers of Mortgage assistance relief services (MARS) in making well-informed decisions and avoiding deceptive and unfair acts and practices. The information that must be kept under Regulation O's recordkeeping requirements is used by the Bureau of Consumer Financial Protection (BCFP) and the Federal Trade Commission (FTC) for enforcement purposes and to ensure compliance by MARS providers with Regulation O. The information is requested only on a case-by-case basis.

Request for Comments: The Bureau issued a 60-day **Federal Register** notice on September 5, 2018, 83 FR 45111, Docket Number: CFPB–2018–0028. Comments were solicited and continue to be invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the Bureau, including whether the information will have practical utility; (b) The accuracy of the Bureau's estimate of the burden of the collection of information, including the validity of the methods and the assumptions used; (c) Ways to enhance the quality, utility, and clarity of the information to be collected; and (d) Ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Comments submitted in response to this notice will be reviewed by OMB as part of its review of this request. All comments will become a matter of public record.

Dated: November 20, 2018.

Darrin A. King,

Paperwork Reduction Act Officer, Bureau of Consumer Financial Protection.

[FR Doc. 2018–25979 Filed 11–28–18; 8:45 am]

BILLING CODE 4810–AM–P

BUREAU OF CONSUMER FINANCIAL PROTECTION

[Docket No. CFPB–2018–0037]

Agency Information Collection Activities: Submission for OMB Review; Comment Request

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Notice and request for comment.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 (PRA), the Bureau of Consumer Financial Protection (Bureau) is requesting to renew the Office of Management and Budget (OMB) approval for an existing information collection titled, ''Consumer Leasing Act (Regulation M) 12 CFR 1013.''

DATES: Written comments are encouraged and must be received on or before December 31, 2018 to be assured of consideration.

ADDRESSES: Comments in response to this notice are to be directed towards OMB and to the attention of the OMB Desk Officer for the Bureau of Consumer Financial Protection. You may submit comments, identified by the title of the information collection, OMB Control Number (see below), and docket number (see above), by any of the following methods:

- *Electronic: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Email: OIRA_submission@omb.eop.gov.*
- *Fax:* (202) 395–5806.
- *Mail:* Office of Management and Budget, New Executive Office Building, Room 10235, Washington, DC 20503.

In general, all comments received will become public records, including any personal information provided. Sensitive personal information, such as account numbers or Social Security numbers, should not be included.

FOR FURTHER INFORMATION CONTACT: Documentation prepared in support of this information collection request is available at *www.reginfo.gov* (this link becomes active on the day following publication of this notice). Select ''Information Collection Review,'' under ''Currently under review,'' use the dropdown menu ''Select Agency'' and select ''Consumer Financial Protection Bureau'' (recent submissions to OMB will be at the top of the list). The same documentation is also available at *http://www.regulations.gov.* Requests for additional information should be directed to Darrin King, PRA Officer, at (202) 435–9575, or email: *CFPB_PRA@cfpb.gov.* If you require this document in an alternative electronic format, please contact *CFPB_Accessibility@cfpb.gov.* Please do not submit comments to these email boxes.

SUPPLEMENTARY INFORMATION:

Title of Collection: Consumer Leasing Act (Regulation M) 12 CFR 1013.

OMB Control Number: 3170–0006.

Type of Review: Extension without change of an existing Information Collection.

Affected Public: Businesses and other for-profit entities.

Estimated Number of Respondents: 13,718.

Estimated Total Annual Burden Hours: 2,126.

Abstract: Consumers rely on the disclosures required by the Consumer

Leasing Act, 15 U.S.C. 1667 *et seq.* (CLA) and Regulation M, 12 CFR 1013, for information to comparison shop among leases, as well as to ascertain the true costs and terms of lease offers. Federal and State enforcement and private litigants use the records to ascertain whether accurate and complete disclosures of the cost of leases have been provided to consumers prior to consummation of the lease. This information provides the primary evidence of law violations in CLA enforcement actions brought by Federal agencies. Without Regulation M's recordkeeping requirement, the agencies' ability to enforce the CLA would be significantly impaired.

Request for Comments: The Bureau issued a 60-day **Federal Register** notice on September 5, 2018, 83 FR 45110, Docket Number: CFPB–2018–0030. Comments were solicited and continue to be invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the Bureau, including whether the information will have practical utility; (b) The accuracy of the Bureau's estimate of the burden of the collection of information, including the validity of the methods and the assumptions used; (c) Ways to enhance the quality, utility, and clarity of the information to be collected; and (d) Ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Comments submitted in response to this notice will be reviewed by OMB as part of its review of this request. All comments will become a matter of public record.

Dated: November 20, 2018.

Darrin A. King,

Paperwork Reduction Act Officer, Bureau of Consumer Financial Protection.

[FR Doc. 2018–25972 Filed 11–28–18; 8:45 am]

BILLING CODE 4810–AM–P

EXPORT-IMPORT BANK

Intent To Conduct a Detailed Economic Impact Analysis

AGENCY: Export-Import Bank.

ACTION: Notice.

SUMMARY: This notice is to inform the public that the Export-Import Bank of the United States has received an application for a $5 billion direct loan to support the export of approximately $4.348 billion in U.S. equipment and services to establish an integrated liquefied natural gas, or LNG, project in Mozambique. The U.S. exports will enable the facility to produce approximately 12.8 million tons per year of liquefied natural gas.

Available information indicates the Mozambique gas producer plans to sell the liquefied natural gas in the Asia-Pacific market (including India, China, Japan, Indonesia, Taiwan, and Thailand), as well as smaller quantities to markets in Europe.

DATES: Comments are due December 13, 2018.

ADDRESSES: Interested parties may submit comments on this transaction by email to *economic.impact@exim.gov* or by mail to Scott Condren, Export-Import Bank of the United States, 811 Vermont Avenue NW, Room 1261, Washington, DC 20571.

Scott Condren,

Policy Analysis.

[FR Doc. 2018–25535 Filed 11–28–18; 8:45 am]

BILLING CODE 6690–01–P

FEDERAL ACCOUNTING STANDARDS ADVISORY BOARD

Notice of Request for Comment on the Annual Report for Fiscal Year 2018 and Three-Year Plan

AGENCY: Federal Accounting Standards Advisory Board.

ACTION: Notice.

Pursuant to 31 U.S.C. 3511(d), the Federal Advisory Committee Act (Pub. L. 92–463), as amended, and the FASAB Rules Of Procedure, as amended in October 2010, notice is hereby given that the Federal Accounting Standards Advisory Board (FASAB) has issued its *Annual Report for Fiscal Year 2018 and Three-Year Plan.*

The *Annual Report for Fiscal Year 2018 and Three-Year Plan* is available on the FASAB website at *http://www.fasab.gov/our-annual-reports/.* Copies can be obtained by contacting FASAB at (202) 512–7350.

Respondents are encouraged to comment on the content of the annual report and FASAB's project priorities for the next three years. Written comments are requested by January 23, 2019, and should be sent to *fasab@fasab.gov* or Wendy M. Payne, Executive Director, Federal Accounting Standards Advisory Board, 441 G Street NW, Suite 1155, Washington, DC 20548.

FOR FURTHER INFORMATION CONTACT: Ms. Wendy M. Payne, Executive Director, 441 G Street NW, Suite 1155, Washington, DC 20548, or call (202) 512–7350.

Authority: Federal Advisory Committee Act, Pub. L. 92–463.

Dated: November 15, 2018.

Wendy M. Payne,

Executive Director.

[FR Doc. 2018–25965 Filed 11–28–18; 8:45 am]

BILLING CODE 1610–02–P

FEDERAL ELECTION COMMISSION

Sunshine Act Meeting

TIME AND DATE: Tuesday, December 4, 2018 at 10:00 a.m.

PLACE: 1050 First Street NE, Washington, DC.

STATUS: This meeting will be closed to the public.

MATTERS TO BE CONSIDERED:

Compliance matters pursuant to 52 U.S.C. 30109.

Matters concerning participation in civil actions or proceedings or arbitration.

Matters relating to internal personnel decisions, or internal rules and practices.

* * * * *

CONTACT PERSON FOR MORE INFORMATION: Judith Ingram, Press Officer, Telephone: (202) 694–1220.

Dayna C. Brown,

Secretary and Clerk of the Commission.

[FR Doc. 2018–26108 Filed 11–27–18; 4:15 pm]

BILLING CODE 6715–01–P

FEDERAL MARITIME COMMISSION

Notice of Agreements Filed

The Commission hereby gives notice of the filing of the following agreements under the Shipping Act of 1984. Interested parties may submit comments on the agreements to the Secretary by email at *Secretary@fmc.gov,* or by mail, Federal Maritime Commission, Washington, DC 20573, within twelve days of the date this notice appears in the **Federal Register**. Copies of agreements are available through the Commission's website (*www.fmc.gov*) or by contacting the Office of Agreements at (202) 523–5793 or *tradeanalysis@fmc.gov.*

Agreement No.: 201284.

Agreement Name: Hyundai Glovis/Sallaum Mediterranean Space Charter Agreement.

Parties: Hyundai Glovis Co., Ltd. and Sallaum Lines DMCC.

Filing Party: Wayne Rohde; Cozen O'Connor.

Synopsis: The Agreement authorizes the parties to charter space to/from one another in the trade between all ports in the U.S. on the one hand and ports in Libya and Lebanon on the other hand.

Proposed Effective Date: 11/20/2018.

Location: https://www2.fmc.gov/FMC.Agreements.Web/Public/AgreementHistory/20309.

Agreement No.: 201143–018.

Agreement Name: West Coast MTO Agreement.

Parties: APM Terminals Pacific LLC; Fenix Marine Services, Ltd.; Everport Terminal Services, Inc.; International Transportation Service, Inc.; LBCT LLC dba Long Beach Container Terminal LLC; Total Terminals International LLC; West Basin Container Terminal LLC; Pacific Maritime Services L.L.C.; SSAT (Pier A), LLC; Trapac LLC; Yusen Terminals LLC; and SSA Terminals, LLC.

Filing Party: Wayne Rohde; Cozen O'Connor.

Synopsis: The amendment reflects the decision of Eagle Marine Services, Ltd. to change its name to Fenix Marine Services, Ltd. The amendment also corrects the names and/or addresses of Fenix and other parties to the Agreement.

Proposed Effective Date: 11/21/2018.

Location: https://www2.fmc.gov/FMC.Agreements.Web/Public/AgreementHistory/2090.

Agreement No.: 201285.

Agreement Name: Siem Car Carriers AS/Accordia Shipping LLC Space Charter Agreement.

Parties: Siem Car Carriers AS and Accordia Shipping LLC.

Filing Party: Elizabeth Lowe; Venable LLP.

Synopsis: The Agreement authorizes the parties to charter space to each other in the trade between the United States and Mexico.

Proposed Effective Date: 11/21/2018.

Location: https://www2.fmc.gov/FMC.Agreements.Web/Public/AgreementHistory/20311.

Agreement No.: 201157–008.

Agreement Name: USMX–ILA Master Contract.

Parties: International Longshoremen's Association, AFL–CIO and United States Maritime Alliance, Ltd.

Filing Party: William Spelman, The Lambos Firm; and Andre Mazzola, Marrinan & Mazzola Mardon, P.C.

Synopsis: The amendment increases the overall assessment from $5.10 per ton to $5.45.

Proposed Effective Date: 11/21/2018.

Location: https://www2.fmc.gov/FMC.Agreements.Web/Public/AgreementHistory/8153.

Agreement No.: 011814–007.

Agreement Name: Maersk/King Ocean Space Charter Agreement.

Parties: Maersk Line A/S and King Ocean Services Limited, Inc.

Filing Party: Wayne Rohde; Cozen O'Connor.

Synopsis: The amendment deletes Hamburg Sud as a party and replaces it with Maersk Line, changes the name of the Agreement and restates the Agreement.

Proposed Effective Date: 1/10/2019.

Location: https://www2.fmc.gov/FMC.Agreements.Web/Public/AgreementHistory/544.

Dated: November 26, 2018.

JoAnne D. O'Bryant,

Program Analyst.

[FR Doc. 2018–25975 Filed 11–28–18; 8:45 am]

BILLING CODE 6731–AA–P

FEDERAL RESERVE SYSTEM

Change in Bank Control Notices; Acquisitions of Shares of a Bank or Bank Holding Company

The notificants listed below have applied under the Change in Bank Control Act (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire shares of a bank or bank holding company. The factors that are considered in acting on the notices are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The notices are available for immediate inspection at the Federal Reserve Bank indicated. The notices also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank indicated for that notice or to the offices of the Board of Governors. Comments must be received not later than December 17, 2018.

A. Federal Reserve Bank of Dallas (Robert L. Triplett III, Senior Vice President) 2200 North Pearl Street, Dallas, Texas 75201–2272:

1. *Mary Candice Barousse, Montgomery, Texas, individually and as trustee of the Candice U. Barousse Exempt Trust (''Notificant'') and Divin L. Upchurch, Bryan, Texas, Robert E.L. Upchurch, IV, Denton, Texas, the Robert E.L. Upchurch III Exempt Trust, Bedias, Texas, (Robert E.L. Upchurch, Trustee) the Candice U. Barousse Exempt Trust, Montgomery, Texas, and the estate of Kathryn D. Upchurch, (Notificant and Robert E.L. Upchurch III, Trustees), to join the Upchurch Family Group, as a group acting in concert;* to acquire shares of Bedias Financial Corporation and thereby acquire shares of First State Bank of Bedias, both of Bedias, Texas.

Board of Governors of the Federal Reserve System, November 26, 2018.

Yao-Chin Chao,

Assistant Secretary of the Board.

[FR Doc. 2018–25974 Filed 11–28–18; 8:45 am]

BILLING CODE P

FEDERAL TRADE COMMISSION

Agency Information Collection Activities; Proposed Collection; Comment Request; Extension

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

ACTION: Notice.

SUMMARY: The information collection requirements described below will be submitted to the Office of Management and Budget (''OMB'') for review, as required by the Paperwork Reduction Act (''PRA''). The FTC seeks public comments on its proposal to extend for an additional three years the current PRA clearance for information collection requirements contained in its Alternative Fuels Rule (''Rule''). That clearance expires on May 31, 2019.

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

ADDRESSES: Interested parties may file a comment online or on paper, by following the instructions in the Request for Comment part of the **SUPPLEMENTARY INFORMATION** section below. Write ''Paperwork Comment: FTC File No. P134200'' on your comment, and file your comment online at *https://ftcpublic.commentworks.com/ftc/altfuelspra* by following the instructions on the web-based form. If you prefer to file your comment on paper, mail your comment to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue NW, Suite CC–5610 (Annex J), Washington, DC 20580, or deliver your comment to the following address: Federal Trade Commission, Office of the Secretary, Constitution Center, 400 7th Street SW, 5th Floor, Suite 5610 (Annex J), Washington, DC 20024.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the proposed information requirements for the Alternative Fuels Rule should be directed to Hampton Newsome, Attorney, (202) 326–2889, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC 20580.

SUPPLEMENTARY INFORMATION: Under the PRA, 44 U.S.C. 3501–3521, federal agencies must obtain approval from

OMB for each collection of information they conduct or sponsor. ''Collection of information'' means agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. 44 U.S.C. 3502(3), 5 CFR 1320.3(c). As required by section 3506(c)(2)(A) of the PRA, the FTC is providing this opportunity for public comment before requesting that OMB extend the existing PRA clearance for the Alternative Fuels Rule, 16 CFR part 309 (OMB Control Number 3084–0094).

The Rule, which implements the Energy Policy Act of 1992, Public Law 102–486, and as revised by the Commission's 2013 final amendments,[1] requires disclosure of specific information on labels posted on fuel dispensers for non-liquid alternative fuels. To ensure the accuracy of these disclosures, the Rule also requires that sellers maintain records substantiating product-specific disclosures they include on these labels.

It is common practice for alternative fuel industry members to determine and monitor fuel ratings in the normal course of their business activities. This is because industry members must know and determine the fuel ratings of their products in order to monitor quality and to decide how to market them. ''Burden'' for PRA purposes is defined to exclude effort that would be expended regardless of any regulatory requirement. 5 CFR 1320.2(b)(2). Moreover, as originally anticipated when the Rule was promulgated in 1995, many of the information collection requirements and the originally estimated hours were associated with one-time start up tasks of implementing standard systems and processes.

Other factors also limit the burden associated with the Rule. Certification may be a one-time event or require only infrequent revision. Disclosures on electric vehicle fuel dispensing systems may be useable for several years. Nonetheless, there is still some burden associated with posting labels. There also will be some minimal burden associated with new or revised certification of fuel ratings and recordkeeping.

I. Annual Hours Burden: 6,000 Hours

Recordkeeping: Affected industry (all non-liquid fuel producers, distributors, and retailers) comprise an estimated 20,000 + members, and staff estimates further that recordkeeping compliance requires approximately one-tenth of an hour each per year for a total of 2,000 hours.

Certification: Staff estimates that the Rule's fuel rating certification requirements will affect approximately 400 industry members (compressed natural gas producers and distributors and manufacturers of electric vehicle fuel dispensing systems) and consume approximately one hour each per year for a total of 400 hours.

Labeling: Staff estimates that labeling requirements affect approximately nine of every ten industry retailers (or roughly 18,000 out of approximately 20,000 retailers), but that the number of annually affected members is approximately 3,600 because labels may remain effective for several years (staff assumes that in any given year approximately 20% of 18,000 industry retailers will need to replace their labels). Staff estimates that retailers require approximately one hour each per year for labeling their fuel dispensers for a total of 3,600 hours.

Thus, estimated total burden for non-liquid alternative fuels is 6,000 hours (400 + 2,000 + 3,600).

II. Labor Costs: $162,157

Labor costs are derived by applying appropriate hourly cost figures to the burden hours described and estimated above. According to Bureau of Labor Statistics data for 2017 (most recent available whole-year information),[2] the average compensation for fuel system operators is $32.78 per hour; and $12.07 per hour for automotive service attendants. These are factored into the FTC's estimates and assumptions below.

Recordkeeping: Staff estimates that only ⅙ of the total recordkeeping hours are performed by fuel system operators (⅙ of 2,000 hours = approximately 333 hours; 333 hours × $32.78 = $10,916) and that automotive service attendants account for the remaining ⅚ of recordkeeping hours (⅚ of 2,000 hours = approximately 1,667 hours; 1,667 hours × $12.07 = $20,121). Thus, the labor cost for recordkeeping for affected industry is approximately $31,037 ($10,916 for fuel system operators + $20,121 for service station employees).

Certification: Staff assumes that certification is performed by fuel system operators. Estimated associated labor costs would be $13,112. [(400 certification hours × $32.78]

Labeling: Staff also assumes that labeling is performed by fuel system operators. Estimated labor costs would be $118,008. [3,600 labeling hours × $32.78]

Associated labor cost: $162,157 ($31,037 for recordkeeping + $13,112 for certification + $118,008 for labeling).

III. Non-Labor Cost Burden: $3,040

Staff believes there are no current start-up costs associated with the Rule, inasmuch as the Rule has been in effect since 1995. Industry members, therefore, have in place the capital equipment and means necessary to determine automotive fuel ratings and comply with the Rule. Industry members, however, incur the cost of procuring fuel dispenser labels to comply with the Rule.

The estimated annual fuel labeling cost, based on estimates of approximately 8,000 fuel dispensers (assumptions: An estimated 20% of 20,000 total fuel retailers need to replace labels in any given year with an approximate five-year life for labels—*i.e.,* 4,000 retailers—multiplied by an average of two dispensers per retailer) at thirty-eight cents for each label (per industry sources), is $3,040 ($0.38 × 8,000).

IV. Request for Comment

Pursuant to Section 3506(c)(2)(A) of the PRA, the FTC invites comments on: (1) Whether the recordkeeping and disclosure requirements are necessary, including whether the information will be practically useful; (2) the accuracy of our burden estimates, including whether the methodology and assumptions used are valid; (3) how to improve the quality, utility, and clarity of the disclosure requirements; and (4) how to minimize the burden of providing the required information to consumers.

You can file a comment online or on paper. For the FTC to consider your comment, we must receive it on or before January 28, 2019. Write ''Paperwork Comment: FTC File No. P134200'' on your comment. Your comment—including your name and your state—will be placed on the public record of this proceeding, including, to the extent practicable, on the public Commission website, at *http://www.ftc.gov/os/publiccomments.shtm.* As a matter of discretion, the

[1] 78 FR 23832 (April 23, 2013). The final amendments consolidated the FTC's alternative fueled vehicles (AFV) labels with the then new fuel economy labels required by the EPA thereby eliminating the FTC's separate labeling requirements for used AFV labels.

[2] The wage estimates in this Notice are based on mean hourly wages found at *http://www.bls.gov/news.release/ocwage.nr0.htm* (''Occupational Employment and Wages—May 2017,'' U.S. Department of Labor, released March 30, 2018, Table 1 (''National employment and wage data from the Occupational Employment Statistics survey by occupation, May 2017''). The figure for fuel system operators is drawn from ''petroleum pump system operators, refinery operators, and gaugers.'' That figure for automotive attendants is drawn from ''Automotive and watercraft service attendants.''

Commission tries to remove individuals' home contact information from comments before placing them on the Commission website.

Postal mail addressed to the Commission is subject to delay due to heightened security screening. As a result, we encourage you to submit your comments online, or to send them to the Commission by courier or overnight service. To make sure that the Commission considers your online comment, you must file it at *https://ftcpublic.commentworks.com/ftc/altfuelspra,* by following the instructions on the web-based form. When this Notice appears at *http://www.regulations.gov/#!home,* you also may file a comment through that website.

If you file your comment on paper, write ''Paperwork Comment: FTC File No. P134200'' on your comment and on the envelope, and mail it to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue NW, Suite CC–5610 (Annex J), Washington, DC 20580, or deliver your comment to the following address: Federal Trade Commission, Office of the Secretary, Constitution Center, 400 7th Street SW, 5th Floor, Suite 5610 (Annex J), Washington, DC 20024. If possible, submit your paper comment to the Commission by courier or overnight service.

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

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

The FTC Act and other laws that the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. The Commission will consider all timely and responsive public comments that it receives on or before January 28, 2019. For information on the Commission's privacy policy, including routine uses permitted by the Privacy Act, see *https://www.ftc.gov/site-information/privacy-policy.*

Heather Hippsley,

Deputy General Counsel.

[FR Doc. 2018–25964 Filed 11–28–18; 8:45 am]

BILLING CODE 6750–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Agency for Healthcare Research and Quality

Common Formats for Patient Safety Data Collection

AGENCY: Agency for Healthcare Research and Quality (AHRQ), Department of Health and Human Services (HHS).

ACTION: Notice of availability—New Common Formats.

SUMMARY: As authorized by the Secretary of HHS, AHRQ coordinates the development of common definitions and reporting formats (Common Formats or formats) for reporting on health care quality and patient safety. The purpose of this notice is to announce the availability of *Common Formats for Surveillance—Hospital Version 0.2 Beta.*

DATES: Ongoing public input.

ADDRESSES: The *Common Formats for Surveillance—Hospital Version 0.2 Beta* can be accessed electronically at the following website: *https://www.psoppc.org/psoppc_web/publicpages/commonFormatsOverview.*

FOR FURTHER INFORMATION CONTACT: Dr. Hamid Jalal, Center for Quality Improvement and Patient Safety, AHRQ, 5600 Fishers Lane, Rockville, MD 20857; Telephone (toll free): (866) 403–3697; Telephone (local): (301) 427–1111; TTY (toll free): (866) 438–7231; TTY (local): (301) 427–1130; Email: *pso@ahrq.hhs.gov.*

SUPPLEMENTARY INFORMATION:

Background on Common Formats Development

The Patient Safety and Quality Improvement Act of 2005, 42 U.S.C. 299b–21 to 299b–26 (Patient Safety Act), and the related Patient Safety and Quality Improvement Final Rule, 42 CFR part 3 (Patient Safety Rule), published in the **Federal Register** on November 21, 2008, 73 FR 70731–70814, provide for the formation of Patient Safety Organizations (PSOs), which collect and analyze confidential and privileged information regarding the quality and safety of health care delivery that meets the definition of patient safety work product. Aggregation of these data enables PSOs and others to identify and address underlying causal factors of patient safety and quality issues.

The Patient Safety Act provides for the development of standardized reporting formats using common language and definitions to ensure that health care quality and patient safety data collected by PSOs and other entities are comparable. The Common Formats facilitate aggregation of comparable data at local, PSO, regional and national levels. In addition, the formats are intended to enhance the reporting of information that is standardized both clinically and electronically.

AHRQ has developed Common Formats for three settings of care—acute care hospitals, skilled nursing facilities and community pharmacies—for use by health care providers and PSOs. AHRQ-listed PSOs are required to collect patient safety work product in a standardized manner to the extent practical and appropriate; this is a requirement the PSO can meet by collecting such information using Common Formats. Additionally, providers and other organizations not working with an AHRQ-listed PSO can use the Common Formats in their work to improve quality and safety; however, they cannot benefit from the federal confidentiality and privilege protections of the Patient Safety Act.

Since February 2005, AHRQ has convened the Federal Patient Safety Work Group (PSWG) to assist with developing and maintaining the Common Formats. The PSWG includes major health agencies within HHS as well as the Departments of Defense and Veterans Affairs. The PSWG helps assure the consistency of definitions/formats with those of relevant government agencies. In addition, AHRQ has solicited comments from the private and public sectors regarding proposed versions of the Common Formats through a contract, since 2008, with the National Quality Forum (NQF), which is a non-profit organization focused on health care quality. After receiving comments, the NQF solicits review of the formats by its Common Formats Expert Panel. Subsequently, NQF provides this input to AHRQ who then uses it to refine the formats.

Previously, AHRQ's primary focus with the Common Formats has been to support traditional event reporting. For the Common Formats, it should be noted that AHRQ uses the term ''surveillance'' to refer to the improved detection of events and calculation of adverse event rates in populations reviewed that will allow for collection of comparable performance data over time and across settings. These formats are designed to provide, through retrospective review of medical records, information that is complementary to that derived from event reporting systems. For more information on AHRQ's efforts measuring patient safety in this area, please go to: *https://www.ahrq.gov/news/blog/ahrqviews/new-system-aims-to-improve-patient-safety-monitoring.html.*

AHRQ announced the availability of the, *Common Formats for Surveillance—Hospital Version 0.2 Beta,* for review and comment on May 9, 2018 in the **Federal Register** (83 FR 21295–21296). After obtaining feedback, the Agency revised and finalized the formats through the development of event descriptions which are definitions of patient safety events, near misses, and unsafe conditions. The *Common Formats for Surveillance—Hospital Version 0.2 Beta* will be posted at the PSOPPC website: *https://www.psoppc.org/psoppc_web.*

Additional information about the Common Formats can be obtained through AHRQ's PSO website: *https://pso.ahrq.gov/.*

Francis D. Chesley, Jr.,

Acting Deputy Director.

[FR Doc. 2018–25971 Filed 11–28–18; 8:45 am]

BILLING CODE 4160–90–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[Document Identifiers CMS–10137 and CMS–10675]

Agency Information Collection Activities: Submission for OMB Review; Comment Request

AGENCY: Centers for Medicare & Medicaid Services, HHS.

ACTION: Notice.

SUMMARY: The Centers for Medicare & Medicaid Services (CMS) is announcing an opportunity for the public to comment on CMS' intention to collect information from the public. Under the Paperwork Reduction Act of 1995 (PRA), federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension or reinstatement of an existing collection of information, and to allow a second opportunity for public comment on the notice. Interested persons are invited to send comments regarding the burden estimate or any other aspect of this collection of information, including the necessity and utility of the proposed information collection for the proper performance of the agency's functions, the accuracy of the estimated burden, ways to enhance the quality, utility, and clarity of the information to be collected, and the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

DATES: Comments on the collection(s) of information must be received by the OMB desk officer by December 31, 2018.

ADDRESSES: When commenting on the proposed information collections, please reference the document identifier or OMB control number. To be assured consideration, comments and recommendations must be received by the OMB desk officer via one of the following transmissions: OMB, Office of Information and Regulatory Affairs, Attention: CMS Desk Officer, Fax Number: (202) 395–5806 *OR*, Email: *OIRA_submission@omb.eop.gov.*

To obtain copies of a supporting statement and any related forms for the proposed collection(s) summarized in this notice, you may make your request using one of following:

1. Access CMS' website address at *https://www.cms.gov/Regulations-and-Guidance/Legislation/PaperworkReductionActof1995/PRA-Listing.html.*
2. Email your request, including your address, phone number, OMB number, and CMS document identifier, to *Paperwork@cms.hhs.gov.*
3. Call the Reports Clearance Office at (410) 786–1326.

FOR FURTHER INFORMATION CONTACT: William Parham at (410) 786–4669.

SUPPLEMENTARY INFORMATION: Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501–3520), federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. The term ''collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3506(c)(2)(A)) requires federal agencies to publish a 30-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension or reinstatement of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, CMS is publishing this notice that summarizes the following proposed collection(s) of information for public comment:

1. *Type of Information Collection Request:* Revision of a currently approved collection; *Title of Information Collection:* Solicitation for Applications for Medicare Prescription Drug Plan 2020 Contracts; *Use:* Coverage for the prescription drug benefit is provided through contracted prescription drug plans (PDPs) or through Medicare Advantage (MA) plans that offer integrated prescription drug and health care coverage (MA–PD plans). Cost Plans that are regulated under Section 1876 of the Social Security Act, and Employer Group Waiver Plans (EGWP) may also provide a Part D benefit. Organizations wishing to provide services under the Prescription Drug Benefit Program must complete an application, negotiate rates, and receive final approval from CMS. Existing Part D Sponsors may also expand their contracted service area by completing the Service Area Expansion (SAE) application. The information will

be collected under the solicitation of proposals from PDP, MA–PD, Cost Plan, Program of All Inclusive Care for the Elderly (PACE), and EGWP applicants. The collected information will be used by CMS to: (1) Ensure that applicants meet CMS requirements for offering Part D plans (including network adequacy, contracting requirements, and compliance program requirements, as described in the application), (2) support the determination of contract awards. *Form Number:* CMS–10137 (OMB control number: 0938–0936); *Frequency:* Yearly; *Affected Public:* Private Sector (Business or other for-profits, Not-for-Profit Institutions); *Number of Respondents:* 243; *Total Annual Responses:* 256; *Total Annual Hours:* 2,351.08. (For policy questions regarding this collection contact Arianne Spaccarelli, at 410–786–5715.)

2. *Type of Information Collection Request:* New c (Request for a new OMB control number); *Title of Information Collection:* Evaluation of the CMS Quality Improvement Organizations: Medication Safety and Adverse Drug Event Prevention; *Use:* The purpose of this Information Collection Request (ICR) is to collect data to inform the program evaluation of the Centers for Medicare & Medicaid Services (CMS) Quality Improvement Organizations (QIO) current contract known as the 11th Scope of Work (SOW). The current ICR focuses on evaluating one component of the quality improvement activities of the Quality Innovation Network Quality Improvement Organizations (QIN–QIOs) and is part of a larger evaluation of the overall impact of the QIO program. This ICR aims to assess the QIN–QIO Task which focuses on Medication Safety and Adverse Drug Event Prevention. For this evaluation, we are using a mixed-methods design to compare quality improvement activities of community-based pharmacists and physician practices participating in the QIN–QIO program (participating) with those not participating in the QIN–QIO program (non-participating).

As mandated by Sections 1152–1154 of the Social Security Act, CMS directs the QIO program, which is one of the largest federal programs dedicated to improving health quality for Medicare beneficiaries. QIOs are groups of health quality experts, clinicians, and consumers who work to assist Medicare providers with quality improvement throughout the spectrum of care and to review quality concerns for the protection of beneficiaries and the Medicare Trust Fund. This program is a key component of the U.S. Department of Health and Human Services' (HHS) National Quality Strategy and the CMS Quality Strategy. The work is aligned with the current HHS and CMS administration priorities to empower patients and doctors to make decisions about their health care; usher in a new era of state flexibility and local leadership; support innovative approaches to improve quality, accessibility, and affordability; and improve the CMS customer experience. In the current SOW, 14 QIN–QIOs coordinate the work in 53 U.S. states and territories.

CMS evaluates the quality and effectiveness of the QIO program as authorized in Part B of Title XI of the Social Security Act. CMS created the Independent Evaluation Center (IEC) to provide CMS and its stakeholders with an independent and objective program evaluation of the 11th SOW.

For the program to improve medication safety and prevent adverse drug events (ADEs), QIN–QIOs provide technical assistance to providers, practitioners, organizations offering Medicare Advantage plans under Medicare Part C, and prescription drug sponsors offering drug plans under Part D. ADEs are defined as ''injury resulting from medical intervention related to a drug,'' and cause the majority of preventable deaths in hospitals. ADEs escalate healthcare costs and utilization, increasing admission and readmission rates, emergency department (ED) visits, and physician visits. ADEs are particularly problematic for older adults who have multiple chronic conditions and interact with many care settings.

Opioid misuse and overdose is a significant cause of ADEs and was declared a public health emergency by the White House in 2017. In 2016, over 14 million Medicare Part D beneficiaries received opioid prescriptions, and many of these beneficiaries received extreme amounts of the drugs. The Medicare population has one of the highest and fastest-growing rates of diagnosed opioid use disorder.

As part of the HHS Opioid Initiative launched in March 2015, CMS developed a multipronged approach to combat misuse and promote programs that support treatment and recovery support services for clinicians, beneficiaries, and families. CMS also worked with HHS and other health agencies to develop a *National Action Plan for Adverse Drug Prevention* (2014). In addition to opioids, the Action Plan focused on ADEs caused by other high-risk medication (HRM) groups: Anticoagulants and diabetic medications. Given the burden of ADEs caused by these three classes of drugs, focusing prevention efforts in these areas could have a significant impact on reducing harm and improving population health among Medicare beneficiaries.

The QIO program provides technical assistance to reduce ADEs in beneficiaries resulting from polypharmacy, specifically those who use three or more medications including a prescription in a HRM) drug groups. In the 11th SOW, specific interventions include training providers through Learning Action Networks; developing collaborations among local providers across care settings; providing materials and information resources; and helping providers collect data to monitor prescribing practices.

To evaluate the effectiveness of this program, we will use a mixed method evaluation combining secondary data analysis of Medicare claims with a community provider survey. We plan to conduct an online survey of 1,200 community-based pharmacists and physician practices. These participants were selected based on their role in prescribing HRM and treating ADEs.

The proposed survey assesses the extent to which the *National Action Plan for Adverse Drug Prevention* strategies have been used, the level of engagement with the QIO, and other influences that can help explain progress towards the goals of the QIN–QIO SOW. The questions used for these constructs related to program and non-program influences have been adopted from previously used and/or validated instruments, including the IEC Nursing Home Survey that was approved under OMB control number 0938–1330.

The survey will also provide estimates of the attribution of the QIN–QIO program for improving ADE prevention, and reported impact of the QIN–QIO program from the perspective of healthcare providers. The perceived influence on quality improvement efforts will be quantified and, along with econometric modeling methods, will be used to assess program attribution. Estimating attribution is a contract requirement for the IEC and helps provide evidence of impact of the QIN–QIO program. Since current analytical methods do not adequately address the overlap of quality improvement initiatives targeting medication safety and ADE prevention, the IEC developed an innovative approach, combining survey input with modeling, to estimate the relative importance of the QIN–QIO program. The concept is supported at the highest level of administration for Quality Improvement at CMS and has been presented at national conferences and to CMS/CCSQ leadership. The survey data is an essential component of this analytic method.

The information collected through the survey will complement the existing data by helping identify factors associated with ADE outcomes of interest from existing data sets such as Medicare claims. For example, claims data can provide information on whether the number of prescriptions for opioids has decreased, but not what has helped to facilitate the decrease. Subsequent to the 60-day **Federal Register** notice which published on July 20, 2018 (83 FR 34593), the collection instrument was revised to clarify wording on questions, adjust the methods for measuring attribution, and nursing homes were removed from the originally-proposed sample. These changes did not result in changes to burden, as additional respondents will be recruited from the pharmacy and practice settings. *Form Number:* CMS–10675 (OMB control number: 0938–NEW); *Frequency:* Annually; *Affected Public:* Private sector (Business or other for-profits); *Number of Respondents:* 1,200; *Total Annual Responses:* 1,200; *Total Annual Hours:* 300. (For policy questions regarding this collection contact Nancy Sonnenfeld at 410–786–1294.)

Dated: November 26, 2018.

William N. Parham, III,

Director, Paperwork Reduction Staff, Office of Strategic Operations and Regulatory Affairs.

[FR Doc. 2018–25978 Filed 11–28–18; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Notice of Allotment Percentages to States for Child Welfare Services State Grants; CFDA Number: 93.645

AGENCY: Children's Bureau, Administration on Children, Youth and Families, Administration for Children and Families, Department of Health and Human Services.

ACTION: Notice of biennial publication of allotment percentages for States under the Title IV–B subpart 1, Stephanie Tubbs Jones Child Welfare Services Program.

SUMMARY: As required by section 423(c) of the Social Security Act, the Department is publishing the allotment percentage for each State under the Title IV–B Subpart 1, Stephanie Tubbs Jones Child Welfare Services Program. Under section 423(a), the allotment percentages are one of the factors used in the computation of the Federal grants awarded under the Program.

DATES: The allotment percentages will be effective for Federal Fiscal Years 2020 and 2021.

FOR FURTHER INFORMATION CONTACT: Daniel Jackson, Grants Fiscal Management Specialist, Office of Grants Management, Office of Administration, Administration for Children and Families, 330 C St. SW, Washington, DC 20201. Telephone: (202) 401–3446. Email: *daniel.jackson@acf.hhs.gov.*

SUPPLEMENTARY INFORMATION: The allotment percentage for each State is determined on the basis of paragraphs (b) and (c) of section 423 of the Social Security Act. These figures are available on the ACF internet homepage at *https://www.acf.hhs.gov/cb.* The allotment percentage for each State is as follows:

ALLOTMENT

State	Percentage
Alabama	60.54
Alaska	43.36
Arizona	59.19
Arkansas	60.16
California	42.50
Colorado	47.06
Connecticut	30.25
Delaware	51.62
District of Columbia	30.00
Florida	53.73
Georgia	57.38
Hawaii	49.16
Idaho	59.41
Illinois	47.37
Indiana	56.44
Iowa	53.57
Kansas	52.37
Kentucky	60.43
Louisiana	57.09
Maine	55.15
Maryland	41.34
Massachusetts	34.73
Michigan	55.31
Minnesota	47.14
Mississippi	64.24
Missouri	56.32
Montana	55.77
Nebraska	49.84
Nevada	55.23
New Hampshire	42.83
New Jersey	37.84
New Mexico	61.06
New York	38.63
North Carolina	57.20
North Dakota	47.32
Ohio	54.67
Oklahoma	56.55
Oregon	53.59
Pennsylvania	48.50
Rhode Island	48.88
South Carolina	59.65
South Dakota	51.47
Tennessee	56.03
Texas	53.39
Utah	57.96
Vermont	49.37
Virginia	46.44
Washington	44.42
West Virginia	62.68
Wisconsin	52.48
Wyoming	43.49
America Samoa	70.00
Guam	70.00
Puerto Rico	70.00
N. Mariana Islands	70.00
Virgin Islands	70.00

Statutory Authority: Section 423(c) of the Social Security Act (42 U.S.C. 623(c)).

Elizabeth Leo,

Grants Policy Specialist, Division of Grants Policy, Office of Administration.

[FR Doc. 2018–25932 Filed 11–28–18; 8:45 am]

BILLING CODE 4184–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2018–N–4337]

Prescription Drug User Fee Act of 2017; Electronic Submissions and Data Standards; Announcement of Public Meeting; Request for Comments

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of public meeting; request for comments.

SUMMARY: The Food and Drug Administration (FDA or Agency) is announcing the following public meeting entitled ''Prescription Drug User Fee Act of 2017; Electronic Submissions and Data Standards.'' FDA is also requesting public comments on the subject. The purpose of the meeting and the request for comments is to fulfill FDA's commitment to seek stakeholder input related to data standards and the electronic submission system's past performance, future targets, emerging industry needs, and technology initiatives. FDA will use the information from the public meeting as well as from comments submitted to the docket to provide input into data standards initiatives, the FDA Information Technology (IT) Strategic Plan, and electronic submissions gateway target timeframes.

DATES: The public meeting will be held on April 10, 2019, from 9 a.m. to 4 p.m. Submit either electronic or written comments by April 10, 2019. See the **SUPPLEMENTARY INFORMATION** section for registration date and information.

ADDRESSES: The public meeting will be held at the FDA White Oak Campus, 10903 New Hampshire Ave., Building 31 Conference Center, the Great Room (Rm. 1503, Section A), Silver Spring, MD 20993–0002. Entrance for public meeting participants (non-FDA employees) is through Building 1, where routine security check procedures will be performed. For parking and security information, please refer to *https://www.fda.gov/AboutFDA/WorkingatFDA/BuildingsandFacilities/WhiteOakCampusInformation/ucm241740.htm.*

You may submit comments as follows. Please note that late, untimely filed comments will not be considered. Electronic comments must be submitted on or before April 10, 2019. The *https://www.regulations.gov* electronic filing system will accept comments until 11:59 p.m. Eastern Time at the end of April 10, 2019. Comments received by mail/hand delivery/courier (for written/paper submissions) will be considered timely if they are postmarked or the delivery service acceptance receipt is on or before that date.

Electronic Submissions

Submit electronic comments in the following way:

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

Written/Paper Submissions

Submit written/paper submissions as follows:

- *Mail/Hand Delivery/Courier (for written/paper submissions):* Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.
- For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in ''Instructions.''

Instructions: All submissions received must include the Docket No. FDA–2018–N–4337 for ''Prescription Drug User Fee Act of 2017; Electronic Submissions and Data Standards.'' Received comments, those filed in a timely manner (see **ADDRESSES**), will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *https://www.regulations.gov* or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday.

- Confidential Submissions—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *https://www.regulations.gov.* Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure laws. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *https://www.gpo.gov/fdsys/pkg/FR-2015-09-18/pdf/2015-23389.pdf.*

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

FOR FURTHER INFORMATION CONTACT: Chenoa Conley, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, Rm. 1117, Silver Spring, MD 20993–0002, 301–796–0035, *chenoa.conley@fda.hhs.gov,* or Stephen Ripley, Center for Biologics Evaluation and Research, Food and Drug Administration, Bldg. 71, Rm. 7301, Silver Spring, MD 20993–0002, 240–402–7911.

SUPPLEMENTARY INFORMATION:

I. Background

FDA is committed to achieve the long-term goal of improving the predictability and consistency of the electronic submission process and enhancing transparency and accountability of FDA information technology-related activities. In the PDUFA VI commitment letter, FDA agreed to hold annual public meetings to seek stakeholder input related to electronic submissions and data standards to inform the FDA IT Strategic Plan and published targets. The commitment letter outlines FDA's performance goals and procedures under the PDUFA program for the years 2018 through 2022. The commitment letter can be found at *https://www.fda.gov/forindustry/userfees/prescriptiondruguserfee/ucm446608.htm.*

FDA will consider all comments made at this meeting or received through the docket (see **ADDRESSES**).

II. Participating in the Public Meeting

Registration: To register to attend ''Prescription Drug User Fee Act of 2017; Electronic Submissions and Data Standards,'' please register at *https://www.eventbrite.com/e/pdufa-vi-public-meeting-on-electronic-submissions-and-data-standards-tickets-49895060469.* Please provide complete contact information for each attendee, including name, title, affiliation, address, email, and telephone. A draft agenda will be posted approximately 1 month prior to the meeting.

Registration is free and based on space availability, with priority given to early registrants. Persons interested in attending this public meeting on April 10, 2019, must register by 11:59 p.m. on March 22, 2019, Eastern Time. Early registration is recommended because seating is limited; therefore, FDA may limit the number of participants from each organization. Registrants will receive confirmation when they have been accepted.

Request for Oral Presentations: During online registration, you may indicate if you wish to present during the public comment session and which topic(s) you would like to address. FDA will do its best to accommodate requests to make public comments. Individuals and organizations with common interests are urged to consolidate or coordinate their presentations. Following the close of registration, FDA will determine the amount of time allotted to each presenter and the approximate time each oral presentation is to begin and will select and notify participants by March 27, 2019. All requests to make oral presentations must be received by the close of registration at 11:59 on March 22, 2019, Eastern Time. If selected for presentation, any presentation materials must be emailed to *cderdatastandards@fda.hhs.gov* no later than April 3, 2019. No commercial or promotional material will be permitted to be presented or distributed at the public meeting.

If you need special accommodations due to a disability, please contact Chenoa Conley, 301–796–0035, email *Chenoa.Conley@fda.hhs.gov,* no later than April 3, 2019.

Transcripts: Please be advised that as soon as a transcript of the public meeting is available, it will accessible at *https://www.regulations.gov.* It may be viewed at the Dockets Management Staff (see **ADDRESSES**). A link to the transcript will also be available on the internet at *https:/www.fda.gov/forindustry/userfees/prescriptiondruguserfee/ucm446608.htm.*

Dated: November 26, 2018.

Leslie Kux,

Associate Commissioner for Policy.

[FR Doc. 2018–25958 Filed 11–28–18; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2017–D–5625]

Recommendations for Dual 510(k) and Clinical Laboratory Improvement Amendments Waiver by Application Studies; Draft Guidance for Industry and Food and Drug Administration Staff; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of availability.

SUMMARY: The Food and Drug Administration (FDA or Agency) is announcing the availability of the draft guidance entitled ''Recommendations for Dual 510(k) and Clinical Laboratory Improvement Amendments (CLIA) Waiver by Application Studies.'' It describes study designs for generating data that supports both 510(k) clearance and CLIA waiver. Use of the Dual 510(k) and CLIA Waiver by Application pathway is optional; however, FDA believes this pathway is in many instances the least burdensome and fastest approach for manufacturers to obtain a CLIA waiver in addition to 510(k) clearance for new in vitro diagnostic (IVD) devices. FDA believes increased use of this pathway will speed up the process of bringing simple and accurate IVD devices to CLIA waived settings, which will better serve patients and providers. This draft guidance is not final nor is it in effect at this time.

DATES: Submit either electronic or written comments on the draft guidance by February 27, 2019 to ensure that the Agency considers your comment on this draft guidance before it begins work on the final version of the guidance.

ADDRESSES: You may submit comments on any guidance at any time as follows:

Electronic Submissions

Submit electronic comments in the following way:

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

Written/Paper Submissions

Submit written/paper submissions as follows:

- *Mail/Hand Delivery/Courier (for written/paper submissions):* Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.
- For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in ''Instructions.''

Instructions: All submissions received must include the Docket No. FDA–2017–D–5625 for ''Recommendations for Dual 510(k) and CLIA Waiver by Application Studies.'' Received comments will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *https://www.regulations.gov* or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday.

- Confidential Submissions—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *https://www.regulations.gov.* Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *https://www.gpo.gov/fdsys/pkg/FR-2015-09-18/pdf/2015-23389.pdf.*

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

You may submit comments on any guidance at any time (see 21 CFR 10.115(g)(5)).

An electronic copy of the guidance document is available for download from the internet. See the **SUPPLEMENTARY INFORMATION** section for information on electronic access to the guidance. Submit written requests for a single hard copy of the draft guidance document entitled ''Recommendations for Dual 510(k) and CLIA Waiver by Application Studies'' to the Office of the Center Director, Guidance and Policy Development, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 5431, Silver Spring, MD 20993–0002. Send one self-addressed adhesive label to assist that office in processing your request.

FOR FURTHER INFORMATION CONTACT: Peter Tobin, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 5657, Silver Spring, MD 20993–0002, 240–402–6169.

SUPPLEMENTARY INFORMATION:

I. Background

Typically, in an application for CLIA waiver (CLIA Waiver by Application) a manufacturer submits evidence to FDA that a previously cleared or approved test, initially categorized as moderate complexity, meets the CLIA statutory criteria for waiver, 42 U.S.C. 263a(d)(3), and requests that FDA categorize the test as waived. This means that historically a CLIA Waiver by Application has followed clearance or approval of an IVD test.

While a premarket notification (510(k)) and CLIA Waiver by Application each include discrete elements not required in the other, both submissions generally include comparison and reproducibility studies. For a 510(k), such studies are often performed by trained operators (*i.e.,* test operators who meet the qualifications to perform moderate complexity testing and with previous training in performing the test; sometimes referred to as ''moderate complexity users''). For a CLIA Waiver by Application, we believe such studies need to be conducted by the intended user (*i.e.,* test operators in waived settings and with limited or no training or hands-on experience in conducting laboratory testing; sometimes referred to as ''untrained operators'' or ''waived users'') (see 42 U.S.C. 263a(d)(3)).

An applicant may choose to conduct a single set of comparison and reproducibility studies with untrained operators to satisfy certain requirements to establish both substantial equivalence under section 513(i) of the FD&C Act (21 U.S.C. 360c(i) for 510(k) clearance and simplicity and insignificant risk of erroneous results under 42 U.S.C. 263a(d)(3) for CLIA waiver. To streamline the review of such data, the Dual 510(k) and CLIA Waiver by Application (Dual Submission) pathway was established as part of the Medical Device User Fee Amendments of 2012 (MDUFA III), allowing the review of both a 510(k) and CLIA Waiver by Application within a single submission with a reduced overall review time compared to sequential submissions.

II. Significance of Guidance

This draft guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The draft guidance, when finalized, will represent the current thinking of FDA on ''Recommendations for Dual 510(k) and CLIA Waiver by Application Studies.'' It does not establish any rights for any person and is not binding on FDA or the public. You can use an alternative approach if it satisfies the requirements of the applicable statutes and regulations. This guidance is not subject to Executive Order 12866.

III. Electronic Access

Persons interested in obtaining a copy of the draft guidance may do so by downloading an electronic copy from the internet. A search capability for all Center for Devices and Radiological Health guidance documents is available at *https://www.fda.gov/MedicalDevices/DeviceRegulationandGuidance/GuidanceDocuments/default.htm.* This guidance document is also available at *https://www.regulations.gov.* Persons unable to download an electronic copy of ''Recommendations for Dual 510(k) and CLIA Waiver by Application Studies'' may send an email request to *CDRH-Guidance@fda.hhs.gov* to receive an electronic copy of the document. Please use the document number 16038 to identify the guidance you are requesting.

IV. Paperwork Reduction Act of 1995

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

21 CFR part; guidance; or FDA form	Topic	OMB Control No.
807, subpart E	Premarket notification	0910–0120
''Recommendations for Clinical Laboratory Improvement Amendments of 1988 (CLIA) Waiver Applications for Manufacturers of In Vitro Diagnostic Devices''.	CLIA Waiver Applications	0910–0598
''Administrative Procedures for CLIA Categorization''	CLIA Categorizations	0910–0607
''Requests for Feedback on Medical Device Submissions: The Pre-Submission Program and Meetings with Food and Drug Administration Staff''.	Q-Submissions	0910–0756

Dated: November 26, 2018.

Leslie Kux,

Associate Commissioner for Policy.

[FR Doc. 2018–25960 Filed 11–28–18; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2007–D–0369]

Product-Specific Guidances; Draft and Revised Draft Guidances for Industry; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of availability.

SUMMARY: The Food and Drug Administration (FDA or Agency) is announcing the availability of additional draft and revised draft product-specific guidances. The guidances provide product-specific recommendations on, among other things, the design of bioequivalence (BE) studies to support abbreviated new drug applications (ANDAs). In the **Federal Register** of June 11, 2010, FDA

announced the availability of a guidance for industry entitled ''Bioequivalence Recommendations for Specific Products'' that explained the process that would be used to make product-specific guidances available to the public on FDA's website. The guidances identified in this notice were developed using the process described in that guidance.

DATES: Submit either electronic or written comments on the draft guidance by January 28, 2019 to ensure that the Agency considers your comment on this draft guidance before it begins work on the final version of the guidance.

ADDRESSES: You may submit comments on any guidance at any time as follows:

Electronic Submissions

Submit electronic comments in the following way:

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

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

Written/Paper Submissions

Submit written/paper submissions as follows:

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

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

Instructions: All submissions received must include the Docket No. FDA–2007–D–0369 for ''Product-Specific Guidances; Draft and Revised Draft Guidances for Industry.'' Received comments will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *https://www.regulations.gov* or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday.

• *Confidential Submissions*—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *https://www.regulations.gov.* Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *https://www.gpo.gov/fdsys/pkg/FR-2015-09-18/pdf/2015-23389.pdf.*

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

You may submit comments on any guidance at any time (see 21 CFR 10.115(g)(5)).

Submit written requests for single copies of the draft guidances to the Division of Drug Information, Center for Drug Evaluation and Research, Food and Drug Administration, 10001 New Hampshire Ave., Hillandale Building, 4th Floor, Silver Spring, MD 20993–0002. Send one self-addressed adhesive label to assist that office in processing your requests. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the draft guidance documents.

FOR FURTHER INFORMATION CONTACT: Wendy Good, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 75, Rm. 4714, Silver Spring, MD 20993–0002, 240–402–1146.

SUPPLEMENTARY INFORMATION:

I. Background

In the **Federal Register** of June 11, 2010 (75 FR 33311), FDA announced the availability of a guidance for industry entitled ''Bioequivalence Recommendations for Specific Products'' that explained the process that would be used to make product-specific guidances available to the public on FDA's website at *https://www.fda.gov/Drugs/GuidanceComplianceRegulatoryInformation/Guidances/default.htm.*

As described in that guidance, FDA adopted this process as a means to develop and disseminate product-specific guidances and provide a meaningful opportunity for the public to consider and comment on those guidances. Under that process, draft guidances are posted on FDA's website and announced periodically in the **Federal Register**. The public is encouraged to submit comments on those recommendations within 60 days of their announcement in the **Federal Register**. FDA considers any comments received and either publishes final guidances or publishes revised draft guidances for comment. Guidances were last announced in the **Federal Register** on October 10, 2018. This notice announces draft product-specific guidances, either new or revised, that are posted on FDA's website.

II. Drug Products for Which New Draft Product-Specific Guidances Are Available

FDA is announcing the availability of new draft product-specific guidances for industry for drug products containing the following active ingredients:

TABLE 1—NEW DRAFT PRODUCT-SPECIFIC GUIDANCES FOR DRUG PRODUCTS

Amphetamine.
Atropine sulfate; Diphenoxylate hydrochloride.
Dichlorphenamide.
Doxepin hydrochloride.
Ertugliflozin.
Ertugliflozin; Metformin hydrochloride.
Ertugliflozin; sitagliptin phosphate.
Estradiol.
Latanoprostene bunod.
Letermovir (multiple Reference Listed Drugs).
Levothyroxine sodium.
Lifitegrast.
Macimorelin acetate.
Metoprolol succinate.
Netarsudil dimesylate.
Nitazoxanide.
Penicillamine.
Plecanatide.
Reserpine.
Ribociclib succinate.
Thiothixene.

III. Drug Products for Which Revised Draft Product-Specific Guidances Are Available

FDA is announcing the availability of revised draft product-specific guidances for industry for drug products containing the following active ingredients:

TABLE 2—REVISED DRAFT PRODUCT-SPECIFIC GUIDANCES FOR DRUG PRODUCTS

Acetaminophen; Butalbital; Caffeine (multiple Reference Listed Drugs).
Acetaminophen; Oxycodone HCl.
Adapalene (multiple Reference Listed Drugs).
Adapalene; Benzoyl peroxide (multiple Reference Listed Drugs).
Asenapine maleate.
Benzoyl peroxide; Clindamycin phosphate (multiple Reference Listed Drugs).
Benzoyl peroxide; Erythromycin (multiple Reference Listed Drugs).
Clindamycin phosphate (multiple Reference Listed Drugs).
Clindamycin phosphate; Tretinoin.
Dapsone (multiple Reference Listed Drugs).
Everolimus.
Isosorbide dinitrate.
Metaxalone.
Mycophenolic acid.
Nitazoxanide.
Sulfacetamide Sodium.
Sulfamethoxazole; Trimethoprim.
Sumatriptan.
Tazarotene (multiple Reference Listed Drugs).
Tretinoin (multiple Reference Listed Drugs and multiple .strengths).
Triamterene.
Zolmitriptan.

For a complete history of previously published **Federal Register** notices related to product-specific guidances, go to *https://www.regulations.gov* and enter Docket No. FDA–2007–D–0369.

These draft guidances are being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). These draft guidances, when finalized, will represent the current thinking of FDA on, among other things, the product-specific design of BE studies to support ANDAs. They do not establish any rights for any person and are not binding on FDA or the public. You can use an alternative approach if it satisfies the requirements of the applicable statutes and regulations. This guidance is not subject to Executive Order 12866.

IV. Electronic Access

Persons with access to the internet may obtain the draft guidances at either *http://www.fda.gov/Drugs/GuidanceComplianceRegulatoryInformation/Guidances/default.htm* or *https://www.regulations.gov.*

Dated: November 23, 2018.

Leslie Kux,

Associate Commissioner for Policy.

[FR Doc. 2018–25950 Filed 11–28–18; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2017–D–5570]

Select Updates for Recommendations for Clinical Laboratory Improvement Amendments of 1988 Waiver Applications for Manufacturers of In Vitro Diagnostic Devices; Draft Guidance for Industry and Food and Drug Administration Staff; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of availability.

SUMMARY: The Food and Drug Administration (FDA or Agency) is announcing the availability of the draft guidance entitled ''Select Updates for Recommendations for Clinical Laboratory Improvement Amendments of 1988 Waiver Applications for Manufacturers of In Vitro Diagnostic Devices.'' FDA has developed this draft guidance to implement the 21st Century Cures Act (the Cures Act), which requires FDA to revise ''Section V. Demonstrating Insignificant Risk of an Erroneous Result—Accuracy'' of the guidance ''Recommendations for Clinical Laboratory Improvement Amendments of 1988 (CLIA) Waiver Applications for Manufacturers of In Vitro Diagnostic Devices'' (''2008 CLIA Waiver Guidance'') that was issued on January 30, 2008. This draft guidance represents FDA's current thinking regarding ''the appropriate use of comparable performance between a waived user and a moderately complex laboratory user to demonstrate accuracy.'' The 2008 CLIA Waiver Guidance remains in effect, in its current form, until this draft guidance is finalized, at which time the updates in section III of this draft guidance will supersede the recommendations in section V of the 2008 CLIA Waiver Guidance. This draft guidance is not final nor is it in effect at this time.

DATES: Submit either electronic or written comments on the draft guidance by February 27, 2019 to ensure that the Agency considers your comment on this draft guidance before it begins work on the final version of the guidance.

ADDRESSES: You may submit comments on any guidance at any time as follows:

Electronic Submissions

Submit electronic comments in the following way:

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

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

Written/Paper Submissions

Submit written/paper submissions as follows:

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

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

Instructions: All submissions received must include the Docket No. FDA–2017–D–5570 for ''Select Updates for Recommendations for Clinical Laboratory Improvement Amendments of 1988 Waiver Applications for Manufacturers of In Vitro Diagnostic Devices.'' Received comments will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *https://www.regulations.gov* or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday.

• Confidential Submissions—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *https://www.regulations.gov.* Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *https://www.gpo.gov/fdsys/pkg/FR-2015-09-18/pdf/2015-23389.pdf.*

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

You may submit comments on any guidance at any time (see 21 CFR 10.115(g)(5)).

An electronic copy of the guidance document is available for download from the internet. See the **SUPPLEMENTARY INFORMATION** section for information on electronic access to the guidance. Submit written requests for a single hard copy of the draft guidance document entitled ''Select Updates for Recommendations for Clinical Laboratory Improvement Amendments of 1988 Waiver Applications for Manufacturers of In Vitro Diagnostic Devices'' to the Office of the Center Director, Guidance and Policy Development, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 5431, Silver Spring, MD 20993–0002; or the Office of Communication, Outreach, and Development, Center for Biologics Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 71, Rm. 3128, Silver Spring, MD 20993–0002. Send one self-addressed adhesive label to assist that office in processing your request.

FOR FURTHER INFORMATION CONTACT: Peter Tobin, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire

Ave., Bldg. 66, Rm. 5657, Silver Spring, MD 20993–0002, 240–402–6169; and Stephen Ripley, Center for Biologics Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 71, Rm. 7301, Silver Spring, MD 20993–0002, 240–402–7911.

SUPPLEMENTARY INFORMATION:

I. Background

FDA has developed this draft guidance to implement section 3057 of the Cures Act (Pub. L. 114–255), which requires FDA to revise ''Section V. Demonstrating Insignificant Risk of an Erroneous Result—Accuracy'' of the guidance ''Recommendations for Clinical Laboratory Improvement Amendments of 1988 (CLIA) Waiver Applications for Manufacturers of In Vitro Diagnostic Devices'' [1] (''2008 CLIA Waiver Guidance'') that was issued on January 30, 2008. This draft guidance represents FDA's current thinking regarding ''the appropriate use of comparable performance between a waived user and a moderately complex laboratory user to demonstrate accuracy.'' The 2008 CLIA Waiver Guidance remains in effect, in its current form, until this draft guidance is finalized, at which time the updates in section III of this draft guidance will supersede the recommendations in section V of the 2008 CLIA Waiver Guidance.

FDA will incorporate the final version of this draft guidance into ''Section V. Demonstrating Insignificant Risk of an Erroneous Result—Accuracy'' of the 2008 CLIA Waiver Guidance. The remainder of the 2008 CLIA Waiver Guidance, with exception of technical edits for consistency with the newly amended section V, will not be substantively changed and will remain in effect.

The Secretary of Health and Human Services has delegated to FDA (69 FR 22849, April 27, 2004) the authority to determine whether particular tests are ''simple'' and have ''an insignificant risk of an erroneous result'' under CLIA and thus are eligible for CLIA waiver (42 U.S.C. 263a(d)(3)). The Centers for Medicare & Medicaid Services is responsible for oversight of clinical laboratories, which includes issuing Certificates of Waiver. CLIA requires that clinical laboratories obtain a certificate before accepting materials derived from the human body for laboratory tests (42 U.S.C. 263a(b)).

The 2008 CLIA Waiver Guidance describes recommendations for device manufacturers about study design and analysis for CLIA Waiver by Application to support an FDA determination as to whether the device meets the statutory criteria for waiver (42 U.S.C. 263a(d)(3)).

On November 29, 2017, FDA announced in the **Federal Register** a draft guidance entitled ''Select Updates for Recommendations for Clinical Laboratory Improvement Amendments of 1988 Waiver Applications for Manufacturers of In Vitro Diagnostic Devices'' (82 FR 56607). This draft guidance proposed additional approaches for demonstrating that a test meets the criteria in 42 U.S.C. 263a(d)(3)(A). FDA is issuing a revised draft guidance by the same title, after considering comments received on the draft guidance issued November 29, 2017.

II. Significance of Guidance

This draft guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The draft guidance, when finalized, will represent the current thinking of FDA on ''Select Updates for Recommendations for Clinical Laboratory Improvement Amendments of 1988 Waiver Applications for Manufacturers of In Vitro Diagnostic Devices.'' It does not establish any rights for any person and is not binding on FDA or the public. You can use an alternative approach if it satisfies the requirements of the applicable statutes and regulations. This guidance is not subject to Executive Order 12866.

III. Electronic Access

Persons interested in obtaining a copy of the draft guidance may do so by downloading an electronic copy from the internet. A search capability for all Center for Devices and Radiological Health guidance documents is available at *https://www.fda.gov/MedicalDevices/DeviceRegulationandGuidance/GuidanceDocuments/default.htm*. This guidance document is also available at *https://www.regulations.gov* or *https://www.fda.gov/BiologicsBloodVaccines/GuidanceComplianceRegulatoryInformation/default.htm.* Persons unable to download an electronic copy of ''Select Updates for Recommendations for Clinical Laboratory Improvement Amendments of 1988 Waiver Applications for Manufacturers of In Vitro Diagnostic Devices'' may send an email request to *CDRH-Guidance@fda.hhs.gov* to receive an electronic copy of the document. Please use the document number 16046 to identify the guidance you are requesting.

IV. Paperwork Reduction Act of 1995

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

21 CFR part; guidance; or FDA form	Topic	OMB Control No.
50, 56	Protection of Human Subjects: Informed Consent; Institutional Review Boards.	0910–0755
54	Financial Disclosure by Clinical Investigators	0910–0396
812	Investigational Device Exemption	0910–0078
''Recommendations for Clinical Laboratory Improvement Amendments of 1988 (CLIA) Waiver Applications for Manufacturers of In Vitro Diagnostic Devices''.	CLIA Waiver Applications	0910–0598
''Administrative Procedures for Clinical Laboratory Improvement Amendments of 1988 Categorization''.	CLIA Categorizations	0910–0607
''Requests for Feedback on Medical Device Submissions: The Pre-Submission Program and Meetings with Food and Drug Administration Staff''.	Q-submissions	0910–0756

[1] *https://www.fda.gov/downloads/MedicalDevices/DeviceRegulationandGuidance/GuidanceDocuments/ucm070890.pdf.*

Dated: November 26, 2018.

Leslie Kux,

Associate Commissioner for Policy.

[FR Doc. 2018–25959 Filed 11–28–18; 8:45 am]

BILLING CODE 4164–01–P

INTERNATIONAL TRADE COMMISSION

[USITC SE–18–057]

Sunshine Act Meetings

AGENCY HOLDING THE MEETING: United States International Trade Commission.

TIME AND DATE: December 7, 2018 at 11:00 a.m.

PLACE: Room 101, 500 E Street SW, Washington, DC 20436, Telephone: (202) 205–2000.

STATUS: Open to the public.

MATTER TO BE CONSIDERED:

1. Agendas for future meetings: None.
2. Minutes.
3. Ratification List.
4. Vote on Inv. Nos. 701–TAn14 and 731–TA–1431 (Preliminary) (Magnesium from Israel). The Commission is currently scheduled to complete and file its determinations on December 10, 2018; views of the Commission are currently scheduled to be completed and filed on December 17, 2018.
5. Outstanding action jackets: None.

In accordance with Commission policy, subject matter listed above, not disposed of at the scheduled meeting, may be carried over to the agenda of the following meeting.

By order of the Commission.

Issued: November 27, 2018.

William Bishop,

Supervisory Hearings and Information Officer.

[FR Doc. 2018–26069 Filed 11–27–18; 4:15 pm]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[USITC SE–18–055]

Sunshine Act Meetings

AGENCY HOLDING THE MEETING: United States International Trade Commission.

TIME AND DATE: December 5, 2018 at 11:00 a.m.

PLACE: Room 101, 500 E Street SW, Washington, DC 20436, Telephone: (202) 205–2000.

STATUS: Open to the public.

MATTER TO BE CONSIDERED:

1. Agendas for future meetings: None.
2. Minutes.
3. Ratification List.
4. Vote on Inv. Nos. 701–TA–591 and 731–TA–1399 (Final) (Common Alloy Aluminum Sheet from China). The Commission is currently scheduled to complete and file its determinations and views of the Commission by December 19, 2018.
5. Outstanding action jackets: None.

In accordance with Commission policy, subject matter listed above, not disposed of at the scheduled meeting, may be carried over to the agenda of the following meeting.

By order of the Commission.

Issued: November 26, 2018.

William Bishop,

Supervisory Hearings and Information Officer.

[FR Doc. 2018–26023 Filed 11–27–18; 11:15 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[USITC SE–18–058]

Sunshine Act Meetings

AGENCY HOLDING THE MEETING: United States International Trade Commission.

TIME AND DATE: December 14, 2018 at 11:00 a.m.

PLACE: Room 101, 500 E Street SW, Washington, DC 20436, Telephone: (202) 205–2000.

STATUS: Open to the public.

MATTER TO BE CONSIDERED:

1. Agendas for future meetings: None.
2. Minutes.
3. Ratification List.
4. Vote on Inv. Nos. 701–TA–598 and 600 and 731–TA–1408 and 1410 (Final) (Rubber Bands from China and Thailand). The Commission is currently scheduled to complete and file its determinations and views of the Commission by December 27, 2018.
5. Outstanding action jackets: None.

In accordance with Commission policy, subject matter listed above, not disposed of at the scheduled meeting, may be carried over to the agenda of the following meeting.

By order of the Commission.

Issued: November 26, 2018.

William Bishop,

Supervisory Hearings and Information Officer.

[FR Doc. 2018–26024 Filed 11–27–18; 11:15 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[USITC SE–18–056]

Sunshine Act Meetings

AGENCY HOLDING THE MEETING: United States International Trade Commission.

TIME AND DATE: December 6, 2018 at 9:30 a.m.

PLACE: Room 101, 500 E Street SW, Washington, DC 20436, Telephone: (202) 205–2000.

STATUS: Open to the public.

MATTERS TO BE CONSIDERED:

1. Agendas for future meetings: None.
2. Minutes.
3. Ratification List.
4. Vote on Inv. Nos. 701–TA–593–596 and 731–TA–1401–1406 (Final) (Large Diameter Welded Pipe from Canada, China, Greece, India, Korea, and Turkey). The Commission is currently scheduled to complete and file its determinations and views of the Commission by December 20, 2018.
5. Outstanding action jackets: None.

In accordance with Commission policy, subject matter listed above, not disposed of at the scheduled meeting, may be carried over to the agenda of the following meeting.

By order of the Commission.

Issued: November 26, 2018.

William Bishop,

Supervisory Hearings and Information Officer.

[FR Doc. 2018–26025 Filed 11–27–18; 11:15 am]

BILLING CODE 7020–02–P

DEPARTMENT OF LABOR

Mine Safety and Health Administration

[OMB Control No. 1219–0026]

Proposed Extension of Information Collection; Ground Control for Surface Coal Mines and Surface Work Areas of Underground Coal Mines

AGENCY: Mine Safety and Health Administration, Labor.

ACTION: Request for public comments.

SUMMARY: The Department of Labor, as part of its continuing effort to reduce paperwork and respondent burden, conducts a pre-clearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed collections of information in accordance with the Paperwork Reduction Act of 1995. This program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed. Currently, the Mine Safety and Health Administration (MSHA) is soliciting comments on the information collection for Ground Control for Surface Coal Mines and Surface Work Areas of Underground Coal Mines.

DATES: All comments must be received on or before January 28, 2019.

ADDRESSES: Comments concerning the information collection requirements of this notice may be sent by any of the methods listed below.

• *Federal E-Rulemaking Portal: http://www.regulations.gov.* Follow the on-line instructions for submitting comments for docket number MSHA–2018–0039.

• *Regular Mail:* Send comments to USDOL—MSHA, Office of Standards, Regulations, and Variances, 201 12th Street South, Suite 4E401, Arlington, VA 22202–5452.

• *Hand Delivery:* USDOL—Mine Safety and Health Administration, 201 12th Street South, Suite 4E401, Arlington, VA 22202–5452. Sign in at the receptionist's desk on the 4th floor via the East elevator.

FOR FURTHER INFORMATION CONTACT: Sheila McConnell, Director, Office of Standards, Regulations, and Variances, MSHA, at *MSHA.information.collections@dol.gov* (email); (202) 693–9440 (voice); or (202) 693–9441 (facsimile).

SUPPLEMENTARY INFORMATION:

I. Background

Each operator of a surface coal mine is required under 30 CFR 77.1000 to establish and follow a ground control plan for highwalls, pits, and spoil banks that is consistent with prudent engineering design and which will ensure safe working conditions. The mine operator is required by section 77.1000–1 to file the ground control plan with the appropriate District Manager. The mining methods employed by the operator are selected to ensure highwall, pit, and spoil bank stability. In the event of a highwall failure or material dislodgment, there may be very little time to escape possible injury; therefore, preventive measures must be taken. Each plan is based on the type of strata expected to be encountered, the height and angle of highwalls and spoil banks, and the equipment to be used at the mine. The plan is used to show how the mine operator will maintain safe working conditions around the highwalls, pits, and spoil banks. Each plan is reviewed by MSHA to ensure that highwalls, pits, and spoil banks are maintained in a safe condition through the use of sound engineering design.

II. Desired Focus of Comments

MSHA is soliciting comments concerning the proposed information collection related to Ground Control for Surface Coal Mines and Surface Work Areas of Underground Coal Mines. MSHA is particularly interested in comments that:

• Evaluate whether the collection of information is necessary for the proper performance of the functions of the Agency, including whether the information has practical utility;

• Evaluate the accuracy of MSHA's estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;

• Suggest methods to enhance the quality, utility, and clarity of the information to be collected; and

• Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

The information collection request will be available on *http://www.regulations.gov.* MSHA cautions the commenter against providing any information in the submission that should not be publicly disclosed. Full comments, including personal information provided, will be made available on *www.regulations.gov* and *www.reginfo.gov.*

The public may also examine publicly available documents at USDOL—Mine Safety and Health Administration, 201 12th Street South, Suite 4E401, Arlington, VA 22202–5452. Sign in at the receptionist's desk on the 4th floor via the East elevator.

Questions about the information collection requirements may be directed to the person listed in the **FOR FURTHER INFORMATION CONTACT** section of this notice.

III. Current Actions

This request for collection of information contains provisions for Ground Control for Surface Coal Mines and Surface Work Areas of Underground Coal Mines. MSHA has updated the data with respect to the number of respondents, responses, burden hours, and burden costs supporting this information collection request.

Type of Review: Extension, without change, of a currently approved collection.

Agency: Mine Safety and Health Administration.

OMB Number: 1219–0026.

Affected Public: Business or other for-profit.

Number of Respondents: 270.

Frequency: On occasion.

Number of Responses: 270.

Annual Burden Hours: 1,848 hours.

Annual Respondent or Recordkeeper Cost: $513.

Comments submitted in response to this notice will be summarized and included in the request for Office of Management and Budget approval of the information collection request; they will also become a matter of public record.

Roslyn B. Fontaine,

Certifying Officer.

[FR Doc. 2018–25963 Filed 11–28–18; 8:45 am]

BILLING CODE 4510–43–P

NATIONAL FOUNDATION OF THE ARTS AND HUMANITIES

National Endowment for the Arts

Membership of the National Endowment for the Arts Senior Executive Service Performance Review Board

SUMMARY: This notice announces the membership of the National Endowment for the Arts (NEA) Senior Executive Service (SES) Performance Review Board (PRB).

DATES: *Applicable Date:* November 15, 2018.

ADDRESSES: Send comments concerning this notice to: National Endowment for the Arts, 400 7th Street SW, Washington, DC 20506.

FOR FURTHER INFORMATION CONTACT: Craig McCord Sr. by telephone at (202) 682–5473 or by email at *mccordc@arts.gov.*

SUPPLEMENTARY INFORMATION: 4314 (c)(1) through (5) of Title 5, U.S.C., requires each agency to establish, in accordance with regulations prescribed by the Office of Personnel Management, one or more SES Performance Review Boards. The Board shall review and evaluate the initial appraisal of a senior executive's performance by the supervisor, along with any response by the senior executive, and make recommendations to the appointing authority relative to the performance of the senior executive.

The following persons have been selected to serve on the Performance Review Board of the National Endowment for the Arts (NEA):

Michael Griffin—Chief of Staff, NEA
Ann Eilers—Deputy Chairman for Management & Budget, NEA
Sunil Iyengar—Director, Research & Analysis, NEA
Jeanette Duncan—Chief Information Officer, NEA
Tony Chauveaux—Deputy Chairman for Programs & Partnerships, NEA
Adam Wolfson—Assistant Chairman for Programs, NEH
Nancy Weiss—General Counsel, IMLS

Dated: November 26, 2018.

Gregory Gendron,

Director of Administrative Services, National Endowment for the Arts.

[FR Doc. 2018–25967 Filed 11–28–18; 8:45 am]

BILLING CODE P

OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE

Privacy Act of 1974; System of Records

AGENCY: Office of the Director of National Intelligence (ODNI).

ACTION: Notice of a new system of records.

SUMMARY: ODNI provides notice that it is establishing one new Privacy Act system of records at the National Counterintelligence and Security Center (NCSC). This new system of records is titled the NCSC Continuous Evaluation System, also identified as ODNI/NCSC–003. This notice is necessary to inform the public of the existence and character of records that the agency maintains.

Continuous Evaluation (CE) is a personnel security investigative process used to review the continued eligibility of individuals who have been determined eligible for access to classified information or to hold a sensitive position. Individuals subject to CE include current Executive Branch employees, detailees, contractors, and other sponsored individuals who are cleared for access to classified information or to hold a sensitive position. The Departments and Agencies (D/As) that sponsor these individuals for access to classified information or to hold a sensitive position ''enroll'' the individuals (enrollees) for CE by electronically entering their identifying information into a technical system that carries out the CE capability.

All D/As are required to submit their qualifying populations to CE. D/As may choose to develop a technical CE system of their own, or subscribe to CE services provided by another agency. The ODNI/NCSC will provide CE services to subscribing agencies. The NCSC CE System leverages electronic checks of government and commercial databases and, based on automated business rules, transmits alerts and reports to the enrolling D/A. Datasets queried in the CE process are those that contain security-relevant information, *e.g.,* government-owned financial, law enforcement, terrorism, foreign travel, and current clearance status information. Credit data and commercially-obtained aggregated data also is utilized. On receipt of the electronic prompt, the personnel security function at the enrolling agency verifies that the alert or report received pertains to the enrollee (the subject of the electronic queries). Where the agency verifies that the alert or report pertains to the enrollee, appropriate personnel security officials review the nature of the alert or report to determine the need for further investigation, as dictated by Federal Investigative Standards requirements. Information obtained through the follow-on investigation is considered in adjudicating the enrollee's continued eligibility for access to classified information or to hold a sensitive position.

The NCSC CE System retains the enrollment information (personal identifiers as provided by the enrolling D/A) in order to facilitate ongoing CE checks. The system does not retain the records returned from the electronic database queries beyond the time needed to ensure proper electronic delivery to the enrolling agency. Data necessary to implement CE business rules, to perform program assessments, and to satisfy auditing requirements will be retained.

D/As conducting CE will adhere to the principles articulated in the Security Executive Agent Directive (SEAD) relating to CE (*i.e.,* SEAD 6). A SEAD provides high level guidance and instruction for the conduct of a personnel security process. SEAD 6 establishes policy and requirements specifically related to CE.

DATES: This System of Records will go into effect on December 31, 2018, unless comments are received that result in a contrary determination.

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

Federal eRulemaking Portal: http://www.regulations.gov.

Email: transparency@dni.gov.

Mail: Director, Information Management Division, Strategy & Engagement, ODNI, Washington, DC 20511.

FOR FURTHER INFORMATION CONTACT: Director, Information Management Division, Strategy & Engagement, Office of the Director of National Intelligence, at the addresses provided above.

SUPPLEMENTARY INFORMATION: The NCSC CE System implements the requirements of Executive Orders 12968, as amended (Access to Classified Information) and 13467, as amended, (Reforming Processes Related to Suitability for Government Employment, Fitness for Contractor Employees, and Eligibility for Access to Classified National Security Information).

To protect classified and sensitive personnel or law enforcement information covered by this new system of records, the Director of National Intelligence (DNI) is proposing to exempt this system from certain requirements of the Privacy Act where necessary, as permitted by law. Accordingly, as required by the Privacy Act, a proposed rule is being published concurrently with this notice seeking public comment regarding exemptions claimed for this system. By previously established rule, the DNI may exercise derivative exemption authority by preserving the exempt status of records received from providing agencies when the reason for the exemption remains valid. See 32 CFR part 1701.20 (a)(2) (73 FR 16531, 16537).

SYSTEM NAME AND NUMBER:

Continuous Evaluation Records (ODNI/NCSC–003).

SECURITY CLASSIFICATION:

The classification of records in this system ranges from UNCLASSIFIED to TOP SECRET.

SYSTEM LOCATION:

National Counterintelligence and Security Center, Office of the Director of National Intelligence, Washington, DC 20511.

SYSTEM MANAGER(S):

Assistant Director, Special Security Directorate, ODNI/NCSC, Washington, DC 20511.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

The Intelligence Reform and Terrorism Prevention Act of 2004, Public Law 108–458, 118 Stat. 3638 (Dec. 17, 2004); the National Security Act of 1947, as amended, 50 U.S.C. 3023 *et seq.;* the Counterintelligence Enhancement Act of 2002, as amended, 50 U.S.C. 3382; Executive Order 12333, 46 FR 59941 (1981), as amended by Executive Order 13284, 68 FR 4075 (2003), Executive Order 13355, 69 FR 53593 (2004), and Executive Order 13470, 73 FR 45325 (2008); Executive Order 13488, 74 FR 4111 (2009), as amended by Executive Order 13764, 82

FR 8115 (2017); Executive Order 13549, 75 FR 51609 (2010); Executive Order 12968, 60 FR 40245 (1995), as amended by Executive Order 13467, 73 FR 38103 (2008), and Executive Order 13764, 82 FR 8115 (2017); Executive Order 13467, as amended by Executive Order 13764 82 FR 8115 (2017).

PURPOSE(S) OF THE SYSTEM:

Records in this system of records are collected for the purpose of electronically comparing enrollee identifying data against specified U.S. Government (financial, law enforcement, terrorism, foreign travel, and clearance status) databases and credit and commercial databases. The comparison serves to identify security-relevant conduct, practices, activities, or incidents that personnel security professionals can use, consistent with the Federal Investigative Standards, to determine an enrollee's continued eligibility for access to classified information or to hold a sensitive position.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Executive Branch employees, detailees, contractors, and other sponsored individuals who have been determined to be eligible for access to classified information or eligible to hold a sensitive position.

CATEGORIES OF RECORDS IN THE SYSTEM:

This system maintains (i) biographic enrollment data including name, date and place of birth, fingerprints, social security number, gender, current address, other first or last names, prior address(es), personal email address(es) and phone numbers, passport information, employment type (contractor/government) or other status, and; (ii) data returned from or about the automated record checks conducted against current clearance status information and against financial, law enforcement, credit, terrorism, foreign travel, and commercial databases.

RECORD SOURCE CATEGORIES:

Record source categories include government-owned financial, law enforcement, terrorism, foreign travel databases, and current clearance status information, as well as credit and commercial entities, and providers of aggregated public source data.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND PURPOSES OF SUCH USES:

The following routine uses, which have programmatic, law enforcement, or oversight purposes, apply to this system of records:

(i) Except as noted on Standard Forms 85 and 86 and supplemental forms thereto (questionnaires for employment in, respectively, ''non-sensitive'' and ''national security'' positions within the Federal Government), a record that on its face or in conjunction with other information indicates or relates to a violation or potential violation of law, whether civil, criminal, administrative, or regulatory in nature, and whether arising by general statute, particular program statute, regulation, rule, or order issued pursuant thereto, may be disclosed as a routine use to an appropriate federal, state, territorial, tribal, local law enforcement authority, foreign government, or international law enforcement authority, or to an appropriate regulatory body charged with investigating, enforcing, or prosecuting such violations;

(ii) A record from a system of records maintained by the ODNI may be disclosed as a routine use to representatives of another IC entity addressing intelligence equities in the context of a legislative proceding or hearing when ODNI interests are implicated, and the record is relevant and necessary to the matter.

(iii) A record from a system of records maintained by the ODNI may be disclosed as a routine use in a proceeding before a court or adjudicative body when any of the following is a party to litigation or has an interest in such litigation, and the ODNI, Office of General Counsel, determines that use of such records is relevant and necessary to the litigation: The ODNI; any staff of the ODNI in his or her official capacity; any staff of the ODNI in his or her individual capacity where the Department of Justice has agreed to represent the staff or has agreed to provide counsel at government expense; or the United States or another federal agency, where the ODNI, Office of General Counsel, determines that litigation is likely to affect the ODNI;

(iv) A record from this system of records may be disclosed to the Department of Justice when (a) the ODNI, or any component thereof; or (b) any employee of the ODNI in his or her official capacity; or (c) any employee of the ODNI in his or her individual capacity where the Department of Justice has agreed to represent the employee; or (d) the United States, where the ODNI determines that litigation is likely to affect the agency, or any of its components, is a party to litigation or has an interest in such litigation, and the use of such records by the Department of Justice is deemed by the agency to be relevant and necessary to the litigation provided, however, that in each case, the agency determines that disclosure of the records to the Department of Justice is a use of the information contained in the records that is compatible with the purpose for which the records were collected.

(v) A record from a system of records maintained by the ODNI may be disclosed as a routine use to representatives of the Department of Justice and other U.S. Government entities, to the extent necessary to obtain advice on any matter within the official responsibilities of such representatives, and the responsibilities of the ODNI;

(vi) A record from a system of records maintained by the ODNI may be disclosed as a routine use to a federal, state, or local agency or other appropriate entities or individuals from which/whom information may be sought relevant to: A decision concerning the hiring or retention of an employee or other personnel action; the issuing or retention of a security clearance or special access, contract, grant, credential, or other benefit; or the conduct of an authorized investigation or inquiry, to the extent necessary to identify the individual, inform the source of the nature and purpose of the inquiry, and identify the type of information requested;

(vii) A record from a system of records maintained by the ODNI may be disclosed as a routine use to any federal, state, local, tribal, or other public authority, or to a legitimate agency of a foreign government or international authority to the extent the record is relevant and necessary to the other entity's decision regarding the hiring or retention of an employee or other personnel action; the issuing or retention of a security clearance or special access, contract, grant, license, or other benefit; or the conduct of an authorized inquiry or investigation;

(viii) A record from a system of records maintained by the ODNI may be disclosed as a routine use to any agency, for authorized audit operations, and for meeting related reporting requirements, including disclosure to the National Archives and Records Administration for records management inspections and such other purposes conducted under the authority of 44 U.S.C. 2904 and 2906, or successor provisions;

(ix) A record from a system of records maintained by the ODNI may be disclosed as a routine use to contractors, grantees, experts, consultants, or others when access to the record is necessary to perform the function or service for which they have been engaged by the ODNI;

(x) A record from a system of records maintained by the ODNI may be disclosed as a routine use to any federal agency that has provided employee enrollment data to the ODNI for purposes of conducting continuous evaluation when records obtained by ODNI are relevant to the enrolling agency's adjudication of the employee's continued eligibility for access to classified information or to hold a sensitive position.

(xi) A record from a system of records maintained by the ODNI may be disclosed as a routine use to appropriate agencies, entities, and persons when (1) ODNI suspects or has confirmed that there has been a breach of the system of records; (2) ODNI has determined that as a result of the suspected or confirmed breach there is a risk of harm to individuals, ODNI (including its information systems, programs, and operations), the Federal Government, or national security; and (3) the disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with the Department's efforts to respond to the suspected or confirmed breach or to prevent, minimize, or remedy such harm.

(xii) A record from a system of records maintained by the ODNI may be disclosed as a routine use to another federal agency or federal entity, when the ODNI determines that information from this system of records is reasonably necessary to assist the recipient agency or entity in (1) responding to a suspected or confirmed breach or (2) preventing, minimizing, or remedying the risk of harm to individuals, the recipient agency or entity (including its information systems, programs, and operations), the Federal Government, or national security, resulting from a suspected or confirmed breach.

(xiii) A record from a system of records maintained by the ODNI may be disclosed as a routine use to a federal, state, local, tribal, territorial, foreign, or multinational agency or entity or to any other appropriate entity or individual for any of the following purposes: To provide notification of a serious terrorist threat for the purpose of guarding against or responding to such threat; to assist in coordination of terrorist threat awareness, assessment, analysis, or response; or to assist the recipient in performing authorized responsibilities relating to terrorism or counterterrorism;

(xiv) A record from a system of records maintained by the ODNI may be disclosed as a routine use for the purpose of conducting or supporting authorized counterintelligence activities as defined by section 3003(3) of the National Security Act of 1947, as amended, to elements of the Intelligence Community, as defined by section 3003(4) of the National Security Act of 1947, as amended; to the head of any federal agency or department; and to selected counterintelligence officers within the Federal Government; and

(xv) A record from a system of records maintained by the ODNI may be disclosed as a routine use to a federal, state, local, tribal, territorial, foreign, or multinational government agency or entity, or to other authorized entities or individuals, but only if such disclosure is undertaken in furtherance of responsibilities conferred by, and in a manner consistent with, the National Security Act of 1947, as amended; the Counterintelligence Enhancement Act of 2002, as amended; Executive Order 12333 or any successor order together with its implementing procedures approved by the Attorney General; and other provisions of law, Executive Order or directive relating to national intelligence, or otherwise applicable to the ODNI. This routine use is not intended to supplant the other routine uses published by the ODNI.

POLICIES AND PRACTICES FOR STORAGE OF RECORDS:

Electronic records are stored in secure file-servers located in government-managed facilities or in government-leased private cloud-based systems.

POLICIES AND PRACTICES FOR RETRIEVAL OF RECORDS:

The records in this system are retrieved by name, social security number, or other unique identifier. Information may be retrieved from this system of records by automated capabilities utilized in the normal course of business. All searches of this system of records are performed by authorized Executive Branch security personnel.

POLICIES AND PRACTICES FOR RETENTION AND DISPOSAL OF RECORDS:

Pursuant to 44 U.S.C. 3303a(d) and 36 CFR Chapter 12, Subchapter B—Records Management, CE records are covered by the National Archives and Records Administration (NARA) General Records Schedule (GRS) 5.6, Security records, Items 170 through 181, and will be retained and disposed of according to those provisions. Biographic data and data about protecting and accessing information will be retained consistent with the Privacy Act of 1974, 5 U.S.C. 552a, and GRS 4.2, Information Access and Protection Records. Records about security data and information systems are listed in GRS 3.2, Information Systems Security Records.

ADMINISTRATIVE, TECHNICAL, AND PHYSICAL SAFEGUARDS:

Information in this system is safeguarded in accordance with recommended and/or prescribed administrative, physical, and technical safeguards. Records are maintained in secure government-owned or leased facilities with access limited to authorized personnel. Physical security protections include guards and locked facilities requiring badges and passwords for access. Records are accessed only by current government-authorized personnel whose official duties require access to the records. Electronic authorization and authentication of users is required at all points before any system information can be accessed. Communications are encrypted where required and other safeguards are in place to monitor and audit access, and to detect intrusions. System backup is maintained separately.

RECORD ACCESS PROCEDURES:

As specified below, records in this system have been exempted from certain notification, access, and amendment procedures. A request for access shall be made in writing with the envelope and letter clearly marked ''Privacy Act Request.'' Requesters shall provide their full name and complete address. The requester must sign the request and have it verified by a notary public. Alternately, the request may be submitted under 28 U.S.C. 1746, certifying the requester's identity and understanding that obtaining a record under false pretenses constitutes a criminal offense. Requests for access to information must be addressed to the Director, Information Management Division, Strategy & Engagement, Office of the Director of National Intelligence, Washington, DC 20511. Regulations governing access to one's records or for appealing an initial determination concerning access to records are contained in the ODNI regulation implementing the Privacy Act, 32 CFR part 1701 (73 FR 16531).

CONTESTING RECORD PROCEDURES:

As specified below, records in this system are exempt from certain notification, access, and amendment procedures. Individuals seeking to correct or amend non-exempt records should address their requests to the ODNI at the address and according to the requirements set forth above under the heading ''Record Access Procedures.'' Regulations governing access to and amendment of one's records or for appealing an initial determination concerning access or amendment of records are contained in the ODNI regulation implementing the Privacy Act, 32 CFR part 1701 (73 FR 16531).

NOTIFICATION PROCEDURES:

As specified below, records in this system are exempt from certain notification, access, and amendment procedures. Individuals seeking to learn whether this system contains non-exempt information about them should address inquiries to the ODNI at the address and according to the requirements set forth above under the heading ''Record Access Procedures.''

EXEMPTIONS PROMULGATED FOR THE SYSTEM:

The Privacy Act authorizes ODNI to exempt records contained in this system of records from the requirements of subsections (c)(3); (d)(1), (d)(2), (d)(3), (d)(4); (e)(1); (e)(4)(G), (H), (I); and (f) of the Privacy Act pursuant to 5 U.S.C. 552a(k)(1), (k)(2) and (k)(5). In addition, pursuant to published rule, ODNI may derivatively exempt records from other agencies in this system from the requirements of the subsections listed above, as well as subsections (c)(4); (e)(2), (e)(3), (e)(5), (e)(8), (e)(12); and (g) of the Privacy Act consistent with any exemptions claimed under 5 U.S.C. 552a(j) or (k) by the originator of the record, provided the reason for the exemption remains valid and necessary.

HISTORY:

The ODNI/NCSC CE Records is a new system of records. No previously published ODNI system of records notice covers any aspect of continuous evaluation.

In accordance with 5 U.S.C. 552(r), the ODNI has provided a report of this new system of records to the Office of Management and Budget and to Congress.

Patricia Gaviria,

Director, Information Management Division, Strategy & Engagement, Office of the Director of National Intelligence.

[FR Doc. 2018–25970 Filed 11–28–18; 8:45 am]

BILLING CODE 3910–79–P–P

DEPARTMENT OF STATE

[Public Notice 10615]

30-Day Notice of Proposed Information Collection: Iraqi Citizens and Nationals Employed by U.S. Federal Contractors and Grantees

ACTION: Notice of request for public comment and submission to OMB of proposed collection of information.

SUMMARY: The Department of State has submitted the information collection described below to the Office of Management and Budget (OMB) for approval. In accordance with the Paperwork Reduction Act of 1995 we are requesting comments on this collection from all interested individuals and organizations. The purpose of this Notice is to allow 30 days for public comment.

DATES: Submit comments directly to the Office of Management and Budget (OMB) up to December 31, 2018.

ADDRESSES: Direct comments to the Department of State Desk Officer in the Office of Information and Regulatory Affairs at the Office of Management and Budget (OMB). You may submit comments by the following methods:

- *Email: oira_submission@omb.eop.gov.* You must include the DS form number, information collection title, and the OMB control number in the subject line of your message.
- *Fax:* 202–395–5806. Attention: Desk Officer for Department of State.

FOR FURTHER INFORMATION CONTACT: Direct requests for additional information regarding the collection listed in this notice, including requests for copies of the proposed collection instrument and supporting documents, to Lea Rivera, PRM/Admissions, 2025 E Street NW, SA–9, 8th Floor, Washington, DC 20522–0908, who may be reached on 202.453.9255 or at *riveralp@state.gov.*

SUPPLEMENTARY INFORMATION:

- *Title of Information Collection:* Iraqi Citizens and Nationals Employed by Federal Contractors and Grantees.
- *OMB Control Number:* 1405–0184.
- *Type of Request:* Extension of a Currently Approved Collection.
- *Originating Office:* PRM/A.
- *Form Number:* DS–7655.
- *Respondents:* Refugee applicants for the U.S. Refugee Admissions Program.
- *Estimated Number of Respondents:* 50.
- *Estimated Number of Responses:* 200.
- *Average Time per Response:* 30 minutes.
- *Total Estimated Burden Time:* 100 hours.
- *Frequency:* On occasion.
- *Obligation to Respond:* Required to Obtain or Retain a Benefit.

We are soliciting public comments to permit the Department to:

- Evaluate whether the proposed information collection is necessary for the proper functions of the Department.
- Evaluate the accuracy of our estimate of the time and cost burden for this proposed collection, including the validity of the methodology and assumptions used.
- Enhance the quality, utility, and clarity of the information to be collected.
- Minimize the reporting burden on those who are to respond, including the use of automated collection techniques or other forms of information technology.

Please note that comments submitted in response to this Notice are public record. Before including any detailed personal information, you should be aware that your comments as submitted, including your personal information, will be available for public review.

Abstract of Proposed Collection

The information requested will be used to verify the employment of Iraqi citizens and nationals for the processing and adjudication of other refugee, asylum, special immigrant visa, and other immigration claims and applications.

Methodology

The method for the collection of information will be via electronic submission. The format for compiling the information will be the Department of State's myData application. Contracting officers and Grants officers will distribute the DS–7655 by email to contractors, grantees and cooperative agreement partners under their authority. Respondents complete the form, and email it to their Contracting Officers or Grant Officers.

Kelly Gauger,

Deputy Director, Office of Admissions, Bureau of Population, Refugees and Migration, Department of State.

[FR Doc. 2018–25889 Filed 11–28–18; 8:45 am]

BILLING CODE 4710–33–P

DEPARTMENT OF STATE

[Public Notice 10606]

30-Day Notice of Proposed Information Collection: Nonimmigrant Treaty Trader/Investor Application

ACTION: Notice of request for public comment and submission to OMB of proposed collection of information.

SUMMARY: The Department of State has submitted the information collection described below to the Office of Management and Budget (OMB) for approval. In accordance with the Paperwork Reduction Act of 1995 we are requesting comments on this collection from all interested individuals and organizations. The

purpose of this Notice is to allow 30 days for public comment.

DATES: Submit comments directly to the Office of Management and Budget (OMB) up to December 31, 2018.

ADDRESSES: Direct comments to the Department of State Desk Officer in the Office of Information and Regulatory Affairs at the Office of Management and Budget (OMB). You may submit comments by the following methods:

- *Email: oira_submission@omb.eop.gov.* You must include the DS form number, information collection title, and the OMB control number in the subject line of your message.
- *Fax:* 202–395–5806. Attention: Desk Officer for Department of State.

SUPPLEMENTARY INFORMATION:

- *Title of Information Collection:* Nonimmigrant Treaty Trader/Investor Application.
- *OMB Control Number:* 1405–0101.
- *Type of Request:* Revision of a Currently Approved Collection.
- *Originating Office:* CA/VO/L/R.
- *Form Number:* DS–156E.
- *Respondents:* Applicants for E nonimmigrant treaty trader/investor visas.
- *Estimated Number of Respondents:* 50,000.
- *Estimated Number of Responses:* 50,000.
- *Average Time per Response:* 4 hours.
- *Total Estimated Burden Time:* 200,000 hours.
- *Frequency:* Once per application.
- *Obligation to Respond:* Required to Obtain or Retain a Benefit.

We are soliciting public comments to permit the Department to:

- Evaluate whether the proposed information collection is necessary for the proper functions of the Department.
- Evaluate the accuracy of our estimate of the time and cost burden for this proposed collection, including the validity of the methodology and assumptions used.
- Enhance the quality, utility, and clarity of the information to be collected.
- Minimize the reporting burden on those who are to respond, including the use of automated collection techniques or other forms of information technology.

Please note that comments submitted in response to this Notice are public record. Before including any detailed personal information, you should be aware that your comments as submitted, including your personal information, will be available for public review.

Abstract of Proposed Collection

Section 101(a)(15)(E) of the Immigration and Nationality Act (INA), 8 U.S.C. 1101(a)(15)(E), includes provisions for the nonimmigrant classification of a national of a country with which the United States maintains an appropriate treaty of commerce and navigation who is coming to the United States to: (i) Carry on substantial trade, including trade in services or technology, principally between the United States and the treaty country; or (ii) develop and direct the operations of an enterprise in which the national has invested, or is actively in the process of investing. Form DS–156E is completed by some applicants seeking E nonimmigrant treaty trader/investor visas to the United States. The Department will use the DS–156E to elicit information necessary to determine a foreign national's visa eligibility for such a visa.

Methodology

After completing Form DS–160, Online Nonimmigrant Visa Application, applicants will fill out the DS- 156E online, print the form, and submit it in person or via mail.

Edward J. Ramotowski,

Deputy Assistant Secretary, Bureau of Consular Affairs, Department of State.

[FR Doc. 2018–25968 Filed 11–28–18; 8:45 am]

BILLING CODE 4710–06–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Summary Notice No. 2018–81]

Petition for Exemption; Summary of Petition Received; Beverly Hills Aerials, LLC

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

ACTION: Notice.

SUMMARY: This notice contains a summary of a petition seeking relief from specified requirements of Federal Aviation Regulations. The purpose of this notice is to improve the public's awareness of, and participation in, the FAA's exemption process. Neither publication of this notice nor the inclusion or omission of information in the summary is intended to affect the legal status of the petition or its final disposition.

DATES: Comments on this petition must identify the petition docket number and must be received on or before December 19, 2018.

ADDRESSES: Send comments identified by docket number FAA–2018–0768 using any of the following methods:

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

Privacy: In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, including any personal information the commenter provides, to *http://www.regulations.gov,* as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *http://www.dot.gov/privacy.*

Docket: Background documents or comments received may be read at *http://www.regulations.gov* at any time. Follow the online instructions for accessing the docket or go to the Docket Operations in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE, Washington, DC 20590–0001, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Jake Troutman, (202) 683–7788, Office of Rulemaking, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591.

This notice is published pursuant to 14 CFR 11.85.

Issued in Washington, DC, on November 23, 2018.

Lirio Liu,

Executive Director, Office of Rulemaking.

Petition for Exemption

Docket No.: FAA–2018–0768.

Petitioner: Beverly Hills Aerials, LLC.

Section(s) of 14 CFR Affected: Part 21 §§ 45.23(b); 61.113(a) & (b); 91.7(a); 91.9(b) (2); 91.103; 91.109; 91.119; 91.121; 91.151(a) & (b); 91.203(a) & (b); 91.405(a); 91.407(a) (l); 91.409(a)(1) & (2); 91.417(a) & (b).

Description of Relief Sought: The proposed exemption, if granted, would allow the operation of unmanned aircraft systems (UAS), greater than 55 pounds, under controlled conditions and in airspace that is limited, predetermined, and controlled as to access. The proposed operation is for aerial data collection, videography, photography, and inspection services.

[FR Doc. 2018–25977 Filed 11–28–18; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Summary Notice No. 2018–85]

Petition for Exemption; Summary of Petition Received; Overwatch Aero, LLC

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

ACTION: Notice.

SUMMARY: This notice contains a summary of a petition seeking relief from specified requirements of Federal Aviation Regulations. The purpose of this notice is to improve the public's awareness of, and participation in, the FAA's exemption process. Neither publication of this notice nor the inclusion or omission of information in the summary is intended to affect the legal status of the petition or its final disposition.

DATES: Comments on this petition must identify the petition docket number and must be received on or before December 19, 2018.

ADDRESSES: Send comments identified by docket number FAA–2018–0857 using any of the following methods:

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

Privacy: In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, including any personal information the commenter provides, to *http://www.regulations.gov,* as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *http://www.dot.gov/privacy.*

Docket: Background documents or comments received may be read at *http://www.regulations.gov* at any time. Follow the online instructions for accessing the docket or go to the Docket Operations in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE, Washington, DC 20590–0001, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Jake Troutman, (202) 683–7788, Office of Rulemaking, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591.

This notice is published pursuant to 14 CFR 11.85.

Issued in Washington, DC, on November 23, 2018.

Lirio Liu,

Executive Director, Office of Rulemaking.

Petition for Exemption

Docket No.: FAA–2018–0857.

Petitioner: Overwatch Aero, LLC.

Section(s) of 14 CFR Affected: Part 21 §§ 43.7; 43.11; 45.11; 45.29; 61.113(a) & (b); 91.9(b)(2) & (c); 91.103(b)(2); 91.105; 91.109; 91.151(a); 91.203(a) & (b); 91.215; 91.403; 91.405(a); 91.407(a)(1); 409(a)(1) & (a)(2); 91.417(a) & (b).

Description of Relief Sought: The proposed exemption, if granted, would allow the petitioner to operate commercial operational and training missions with the HQ–60 and HQ–90 unmanned aircraft systems, which weigh more than 55 pounds, beyond visual line of sight (BVLOS) and within visual line of sight (VLOS), for search and rescue and fire mapping support to first responders in the Bureau of Land Management-managed land near Nipomo, California, private property near Santa Ynez, California, or as prescribed in a Certificate of Authorization or Special Governmental Interest.

[FR Doc. 2018–25976 Filed 11–28–18; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF THE TREASURY

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Multiple FinCEN 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 31, 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:

Financial Crimes Enforcement Network (FinCEN)

1. Title: Report of International Transportation of Currency or Monetary Instruments.

OMB Control Number: 1506–0014.

Type of Review: Extension without change of a currently approved collection.

Description: FinCEN, and the Department of Homeland Security (DHS) and the DHS Bureaus, are required under 31 U.S.C. 5316(a) to collect information regarding mailing, shipment, or transportation of currency or monetary instruments of more than $10,000 in value into or out of the United States.

Form: FinCEN 105.

Affected Public: Businesses or other for-profits.

Estimated Number of Respondents: 280,000.

Frequency of Response: On occasion.

Estimated Total Number of Annual Responses: 280,000.

Estimated Time per Response: 30 minutes.

Estimated Total Annual Burden Hours: 140,000.

2. Title: Customer Identification Programs for Banks, Savings Associations, Credit Unions, and Certain Non-federally Regulated Banks.

OMB Control Number: 1506–0026.

Type of Review: Extension without change of a currently approved collection.

Description: Section 326 of the USA PATRIOT Act added a new subsection (l) to 31 U.S.C. 5318 of the Bank Secrecy Act. Pursuant to section 326, FinCEN issued joint regulations with the federal bank regulatory agencies that require banks, savings associations, credit unions, and certain non-federally regulated banks to establish a written customer identification program and to maintain records related to verifying the identity of customers. See 31 CFR 1020.220. Under the customer identification program regulations, the minimum requirements include: (1) Implementation of a written customer identification program appropriate for the financial institution's size and type of business; (2) identity verification procedures; (3) recordkeeping; (4) comparison with government lists; and (5) customer notice.

Form: None.

Affected Public: Businesses or other for-profits.

Estimated Number of Respondents: 15,960.

Frequency of Response: On Occasion.

Estimated Total Number of Annual Responses: 15,960.

Estimated Time per Response: 11 hours.

Estimated Total Annual Burden Hours: 175,560.

3. Title: Anti-Money Laundering Programs for Dealers in Precious Metals, Precious Stones, or Jewels.

OMB Control Number: 1506–0030.

Type of Review: Extension without change of a currently approved collection.

Description: Section 352 of the USA PATRIOT Act added a new subsection (h) to 31 U.S.C. 5318 of the Bank Secrecy Act that requires the Secretary of the Treasury to require financial institutions to establish and maintain anti-money laundering (''AML'') programs. Pursuant to section 352, FinCEN issued regulations requiring dealers in precious metals, precious stones, or jewels (31 CFR 1027.210) to develop and implement a written anti-money laundering program. The program must be reasonably designed to prevent these financial institutions from being used for money laundering or the financing of terrorist activities, and to achieve and monitor compliance with applicable BSA requirements.

Form: None.

Affected Public: Businesses or other for-profits.

Estimated Number of Respondents: 20,000.

Frequency of Response: Annually.

Estimated Total Number of Annual Responses: 20,000.

Estimated Time per Response: 1 hour.

Estimated Total Annual Burden Hours: 20,000.

4. Title: Customer Identification Programs for Mutual Funds.

OMB Control Number: 1506–0033.

Type of Review: Extension without change of a currently approved collection.

Description: Section 326 of the USA PATRIOT Act added a new subsection (l) to 31 U.S.C. 5318 of the Bank Secrecy Act. Pursuant to section 326, FinCEN issued joint regulations with the Securities and Exchange Commission (''SEC'') that require mutual funds to establish a written customer identification program and to maintain records related to verifying the identity of customers. See 31 CFR 1024.220. Under the customer identification program regulations, the minimum requirements include: (1) Implementation of a written customer identification program appropriate for the financial institution's size and type of business; (2) identity verification procedures; (3) recordkeeping; (4) comparison with government lists; and (5) customer notice.

Form: None.

Affected Public: Businesses or other for-profits.

Estimated Number of Respondents: 1,591.

Frequency of Response: On Occasion.

Estimated Total Number of Annual Responses: 20,000,000.

Estimated Time per Response: 2 minutes.

Estimated Total Annual Burden Hours: 666,667.

5. Title: Customer Information Programs for Broker or Dealers in Securities.

OMB Control Number: 1506–0034.

Type of Review: Extension without change of a currently approved collection.

Description: Section 326 of the USA PATRIOT Act added a new subsection (l) to 31 U.S.C. 5318 of the Bank Secrecy Act. Pursuant to section 326, FinCEN issued joint regulations with the Securities and Exchange Commission (''SEC'') that require broker or dealers in securities to establish a written customer identification program and to maintain records related to verifying the identity of customers. See 31 CFR 1023.220. Under the customer identification program regulations, the minimum requirements include: (1) Implementation of a written customer identification program appropriate for the financial institution's size and type of business; (2) identity verification procedures; (3) recordkeeping; (4) comparison with government lists; and (5) customer notice.

Form: None.

Affected Public: Businesses or other for-profits.

Estimated Number of Respondents: 3,839.

Frequency of Response: On Occasion.

Estimated Total Number of Annual Responses: 9,000,000.

Estimated Time per Response: 2 minutes.

Estimated Total Annual Burden Hours: 300,000.

Authority: 44 U.S.C. 3501 *et seq.*

Dated: November 25, 2018.

Spencer W. Clark,

Treasury PRA Clearance Officer.

[FR Doc. 2018–25947 Filed 11–28–18; 8:45 am]

BILLING CODE 4810–02–P

DEPARTMENT OF THE TREASURY

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Voluntary Chemist Certification Program Applications, Notices, and Records

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 31, 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:

Tax and Trade Bureau (TTB)

1. Title: Voluntary Chemist Certification Program Applications, Notices, and Records.

OMB Control Number: 1513–NEW.

Type of Review: Request for a new OMB Control Number.

Description: The TTB chemist certification program, established under the authority of section 105(e) of the Federal Alcohol Administration Act (FAA Act; 27 U.S.C. 205(e)) and explained in TTB Procedure 2018–2, is a voluntary program that certifies private industry chemists to analyze alcohol beverages and report the results of specific chemical analyses on alcohol beverages to the governments of importing countries. As a condition of importation, some countries require that their own government laboratories (or laboratories certified by their government) perform these analyses, while other countries allow a person certified by the government of the exporting country to perform the analyses. TTB conducts its chemist certification program as a service to the alcohol beverage industry to facilitate the export of domestic alcohol beverage products. This certification program helps ensure that chemists, enologists, brewers, and technicians generate quality data and have the required proficiencies to conduct chemical analyses associated with exportation of alcohol beverages from the United States. This program includes application and notice requirements, including letterhead applications for certification, submission of the results of qualifying analyses of TTB-supplied alcohol beverage samples, and miscellaneous letterhead applications and notices regarding additional certifications, requests for TTB-affirmed reports of analysis, and notices of changes in employment place or status. Under this program, certified chemists and their laboratories must also maintain usual and customary records regarding all analysis results conducted under the authority of a TTB certificate, and records related to laboratory equipment, quality control policies, procedures and systems, and analyst training and competence.

Form: None.

Affected Public: Businesses or other for-profits.

Estimated Number of Respondents: 310.

Frequency of Response: Annually.

Estimated Total Number of Annual Responses: 310.

Estimated Time per Response: 1.33 hours.

Estimated Total Annual Burden Hours: 412.

Authority: 44 U.S.C. 3501 *et seq.*

Dated: November 26, 2018.

Spencer W. Clark,

Treasury PRA Clearance Officer.

[FR Doc. 2018–25949 Filed 11–28–18; 8:45 am]

BILLING CODE 4810–31–P

DEPARTMENT OF THE TREASURY

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Multiple Tax and Trade Bureau 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 31, 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:

Tax and Trade Bureau (TTB)

1. Title: Change in Bond (Consent of Surety).

OMB Control Number: 1513–0013.

Type of Review: Revision of a currently approved collection.

Description: The Internal Revenue Code (IRC), at 26 U.S.C. 5114, 5173, 5272, 5354, 5401, and 5711, requires certain alcohol and tobacco industry proprietors to post a bond in conformity with regulations issued by the Secretary of the Treasury (Secretary) to ensure payment by the bonding company of Federal excise taxes due on alcohol or tobacco products should a proprietor default. When circumstances of a proprietor's operation change from the original bond agreement, the TTB regulations authorized under those IRC sections allow the proprietor to complete form TTB F 5000.18, Change in Bond (Consent of Surety), in lieu of obtaining a new bond. Once executed by the proprietor and an approved surety company, the form is filed with TTB, which retains it as long as the revised bond agreement remains in force.

Form: TTB F 5000.18.

Affected Public: Businesses or other for-profits.

Estimated Number of Respondents: 120.

Frequency of Response: Annually.

Estimated Total Number of Annual Responses: 120.

Estimated Time per Response: 1 hour.

Estimated Total Annual Burden Hours: 120.

2. Title: Application for and Certification/Exemption of Label/Bottle Approval.

OMB Control Number: 1513–0020.

Type of Review: Extension without change of a currently approved collection.

Description: To provide consumers with adequate information as to the identity of alcohol beverages and to prevent consumer deception and the use of misleading statements in the marketing of such products, the Federal Alcohol Administration Act at 27 U.S.C. 205(e) requires that alcohol beverages sold or introduced into interstate or foreign commerce be labeled in conformity with regulations issued by the Secretary of the Treasury. Under that authority, the TTB regulations require that, prior to an alcohol beverage product's introduction into interstate or foreign commerce, the producer, bottler, or importer of the product apply for and receive TTB approval of the product's label. For wines and distilled spirits, such respondents also may apply for exemption from label approval for products not sold or entered into interstate or foreign commerce. For distilled spirits, the TTB regulations also require approval of distinctive liquor bottles. Respondents use form TTB F 5100.31 or its electronic equivalent, COLAs Online, to request and obtain label approval, exemption from label approval, or approval of a distinctive liquor bottle. The form serves as both an application for and, if approved by TTB, a certificate of label approval (COLA), a certificate of exemption from label approval, or distinctive liquor bottle approval.

Form: TTB F 5100.31.

Affected Public: Businesses or other for-profits.

Estimated Number of Respondents: 11,240.

Frequency of Response: Annually, On Occasion.

Estimated Total Number of Annual Responses: 188,495.

Estimated Time per Response: 31 minutes.

Estimated Total Annual Burden Hours: 97,389.

3. Title: Claims for Drawback of Tax on Tobacco Products, Cigarette Papers, and Cigarette Tubes Exported from the United States.

OMB Control Number: 1513–0026.

Type of Review: Revision of a currently approved collection.

Description: The Internal Revenue Code (IRC) at 26 U.S.C. 5706 provides for the drawback (refund) of Federal excise tax paid on tobacco products and cigarette papers and tubes when such articles are shipped from the United States in accordance with the bond and regulatory requirements prescribed by the Secretary. Under that IRC authority, TTB has issued regulations governing such drawback claims, codified in 27 CFR part 44, which allow drawback for tax-paid tobacco products and cigarette papers and tubes shipped to a foreign country, Puerto Rico, the Virgin Islands, or a possession of the United States, but only when the person who paid the tax files a claim and otherwise complies with the relevant regulations. Specific to this information collection request, the TTB regulations require that such drawback claims be filed on form TTB F 5620.7. The regulations also require that all such claims must be accompanied by a bond filed on form TTB F 5200.17, conditioned on the filing of evidence with TTB that the articles landed at a foreign port or were lost after export. In addition, claimants may file letterhead applications for relief from certain regulatory requirements regarding such evidence of export or loss.

Form: TTB F 5200.17, TTB F 5620.7.

Affected Public: Businesses or other for-profits.

Estimated Number of Respondents: 13.

Frequency of Response: Annually, On occasion.

Estimated Total Number of Annual Responses: 13.

Estimated Time per Response: 1.38 hours.

Estimated Total Annual Burden Hours: 18.

4. Title: Removals of Tobacco Products and Cigarette Papers and Tubes without Payment of Tax.

OMB Control Number: 1513–0027.

Type of Review: Revision of a currently approved collection.

Description: The Internal Revenue Code (IRC) at 26 U.S.C. 5704(b) provides that a manufacturer or export warehouse proprietor may, in accordance with regulations prescribed by the Secretary, transfer tobacco products and cigarette papers and tubes, without payment of tax, to the bonded premises of another such entity, or may remove such articles, without payment of tax, for export or consumption beyond the jurisdiction of the internal revenue laws of the United States. In addition, the IRC at 26 U.S.C. 5722 requires that manufacturers of tobacco product and cigarette papers and tubes and export warehouse proprietors make reports as the Secretary may by regulation require. Under those IRC authorities, the TTB regulations in 27 CFR part 44 require manufacturers and export warehouse proprietors to report each such removal to TTB on form TTB F 5200.14, or, under the alternate procedure described in TTB Industry Circular 2004–3, respondents may submit a Monthly Summary Report of such removals provided that the export of each removal is documented by records maintained at the respondent's premises. Respondents also submit letterhead notices to modify certain information on previously-submitted TTB F 5200.1 forms, and they also submit letterhead applications to request TTB authorization to use the alternative Monthly Summary Report procedure. The collected information allows TTB to account for removals of tobacco products and cigarette papers and tubes made without payment of tax and assists in preventing the diversion of such articles to otherwise taxable uses. As such, the collected information is necessary to protect the revenue.

Form: TTB F 5200.14.

Affected Public: Businesses or other for-profits.

Estimated Number of Respondents: 292.

Frequency of Response: Annually, On Occasion.

Estimated Total Number of Annual Responses: 5,772.

Estimated Time per Response: 2 hours.

Estimated Total Annual Burden Hours: 11,532.

5. Title: Claims—Alcohol, Tobacco, and Firearms Taxes.

OMB Control Number: 1513–0030.

Type of Review: Extension without change of a currently approved collection.

Description: The Internal Revenue Code (IRC) at 26 U.S.C. 5008, 5056, 5370, and 5705 authorizes the Secretary of the Treasury to provide for claims for taxpayer relief from Federal excise taxes paid on distilled spirits, wine, beer, and tobacco products lost or destroyed by theft, disaster or some other manner, on products voluntarily destroyed, and on products returned from the market. The IRC at 26 U.S.C. 5044 also allows for the refund of tax for wine returned to bond, and section 5056 and section 5705 allow for refund of tax for beer and tobacco products, respectively, withdrawn from or returned from the market. Under 26 U.S.C. 5111–5114, the Secretary also is authorized to issue drawback (refunds) for a portion of the excise taxes paid on distilled spirits used in the manufacture of certain nonbeverage products. In addition, 26 U.S.C. 6402–6404 provides that taxpayers may file claims to request credit, refund, or abatement of overpaid, excessive, or erroneous taxes collected, 26 U.S.C. 6416 allows for the credit or refund of overpaid firearms and ammunition excise taxes, and 26 U.S.C. 6423 sets conditions on claims for erroneously collected alcohol and tobacco excise taxes. Under these authorities, TTB has issued regulations that require taxpayers to make claims for abatement, allowance, credit, refund, or remission of excise tax on taxable articles (alcohol, tobacco products, firearms, and ammunition) on form TTB F 5620.8. Taxpayers also use this form to request drawback on excise taxes paid on distilled spirits used in non-beverage products. Respondents submit the form to TTB along with supporting documentation, stating the reason for, and circumstances of, the claim. This information is necessary to protect the revenue as it allows TTB to determine if the claim qualifies for relief.

Form: TTB F 5620.8.

Affected Public: Businesses or other for-profits.

Estimated Number of Respondents: 5,000.

Frequency of Response: Annually.

Estimated Total Number of Annual Responses: 5,000.

Estimated Time per Response: 1 hour.

Estimated Total Annual Burden Hours: 5,000.

6. Title: Offer in Compromise of Liability Incurred under the Provisions of Title 26 U.S.C. Enforced and

Administered by TTB; Collection Information Statements for Individuals and Businesses.

OMB Control Number: 1513–0054.

Type of Review: Extension without change of a currently approved collection.

Description: The Internal Revenue Code (IRC) at 26 U.S.C. 7122 provides that the Secretary may compromise any civil or criminal case arising under the IRC, including tax liabilities, in lieu of civil or criminal action. Under this authority, the TTB regulations require persons who wish to make an offer in compromise for violations of the IRC to use form TTB F 5640.1 to identify the tax liabilities or violations being compromised, the amount of the compromise offer, and the respondent's reasons for believing that the offer should be accepted. To support requests for installment payments of compromise offers, TTB may require individual and business respondents to supply information documenting financial hardship on TTB F 5600.17 and TTB F 5600.18, respectively. The information required under this collection is necessary to protect the revenue as it allows TTB to determine the adequacy of the offer in compromise in relation to the alleged violations of the law and to develop a payment plan if the individual or business is unable to immediately pay an accepted offer in compromise in full.

Form: TTB F 5640.1, TTB F 5600.17, TTB F 5600.18.

Affected Public: Businesses or other for-profits.

Estimated Number of Respondents: 40.

Frequency of Response: On occasion.

Estimated Total Number of Annual Responses: 40.

Estimated Time per Response: 2.25 hours.

Estimated Total Annual Burden Hours: 90.

7. Title: Offer in Compromise of Liability Incurred under the Federal Alcohol Administration Act.

OMB Control Number: 1513–0055.

Type of Review: Revision of a currently approved collection.

Description: To regulate interstate and foreign commerce in alcohol beverages, the Federal Alcohol Administration Act (FAA Act; 27 U.S.C. 201 *et seq.*) requires certain industry members to obtain basic permits from the Secretary of the Treasury, and it prohibits unfair trade practices and deceptive advertising and labeling of alcohol beverages. Under the FAA Act at 27 U.S.C. 207, violations of the Act are subject to civil and criminal penalties, but the Secretary also is authorized to accept monetary compromise for such alleged violations. Under that authority, the TTB regulations allow a proponent or their agent to submit a monetary offer in compromise to resolve alleged FAA Act violations using form TTB F 5640.2. The form identifies the alleged violation(s) and violator(s), amount of the compromise offer, and the reason(s) why TTB should accept the offer. TTB uses the information to evaluate the adequacy of the compromise offer in relation to the alleged violation(s) of the FAA Act and to determine if it should accept the offer or pursue civil penalties or criminal prosecution against the alleged violator.

Form: TTB F 5640.2.

Affected Public: Businesses or other for-profits.

Estimated Number of Respondents: 20.

Frequency of Response: On occasion.

Estimated Total Number of Annual Responses: 20.

Estimated Time per Response: 2 hours.

Estimated Total Annual Burden Hours: 40.

8. Title: Excise Tax Return—Alcohol and Tobacco (Puerto Rico).

OMB Control Number: 1513–0090.

Type of Review: Revision of a currently approved collection.

Description: Under its statutory and delegated authorities, TTB is responsible for the collection of the Federal excise taxes imposed on distilled spirits, wine, beer, tobacco products, and cigarette papers and tubes by chapters 51 and 52 of the Internal Revenue Code (IRC). As provided at 26 U.S.C. 5061(a) and 26 U.S.C. 5703(b), the IRC requires that those taxes be collected on the basis of a return, filed for the periods, at the times, and containing the information the Secretary requires by regulation. The IRC at 26 U.S.C. 7652(a) also provides that taxes imposed by the IRC on domestic articles, including those imposed on alcohol and tobacco products, apply at the same rates to similar products manufactured in Puerto Rico and brought into the United States, to be paid and collected under such regulations as the Secretary shall issue. In addition, section 7652(a) requires the majority of such taxes to be covered (transferred) into the treasury of Puerto Rico. Issued under those IRC authorities, the TTB regulations in 27 CFR part 26 (for distilled spirits, wine, and beer) and part 41 (for tobacco products and cigarette papers and tubes), prescribe the use of TTB F 5000.25, Excise Tax Return—Alcohol and Tobacco (Puerto Rico) for the collection of the excise taxes imposed by 26 U.S.C. 7652(a).

Form: TTB F 5000.25.

Affected Public: Businesses or other for-profits.

Estimated Number of Respondents: 24.

Frequency of Response: On Occasion, Quarterly.

Estimated Total Number of Annual Responses: 474.

Estimated Time per Response: 45 minutes.

Estimated Total Annual Burden Hours: 356.

9. Title: Special (Occupational) Tax Registration and Returns.

OMB Control Number: 1513–0112.

Type of Review: Revision of a currently approved collection.

Description: Before July 1, 2008, various sections of chapter 51 of the Internal Revenue Code (IRC) required alcohol industry members to register for and pay an annual special occupational tax (SOT). However, section 11125 of Public Law 109–59 permanently repealed, effective July 1, 2008, the SOT on alcohol beverage producers and marketers, non-beverage product manufacturers, tax-free alcohol users, and specially denatured spirits users and dealers. However, any SOT liabilities incurred for periods before the law's 2008 effective date remain. Also, while most alcohol industry SOT registration and payment provisions in the IRC have been repealed, 26 U.S.C. 5124 continues to require wholesale and retail alcohol dealers to register with the Secretary when commencing or ending business or when certain changes to existing registration information are necessary. In addition, the IRC at 26 U.S.C. 5731 and 5732 continues to require manufacturers of tobacco products, manufacturers of cigarette papers and tubes, and export warehouse proprietors to register and pay an annual SOT on the basis of a return under such regulations as the Secretary shall prescribe. The registration and SOT for such entities is due on or before the date of commencing business, and on or before July 1 of every year after that. Under the TTB regulations in 27 CFR part 31, alcohol industry members with pre-July 1, 2008, SOT liabilities use TTB F 5630.5a as the return for such liabilities, while wholesale and retail alcohol dealers register or report registration changes on TTB F 5630.5d. Under the TTB regulations in 27 CFR parts 40, 44, and 46, tobacco industry members use TTB F 5630.5t to register and pay SOT.

Form: TTB F 5630.5a, TTB F 5630.5d, TTB F 5630.5t.

Affected Public: Businesses or other for-profits.

Estimated Number of Respondents: 8,310.

Frequency of Response: On occasion.

Estimated Total Number of Annual Responses: 8,310.

Estimated Time per Response: 25 minutes.

Estimated Total Annual Burden Hours: 3,462.

Authority: 44 U.S.C. 3501 *et seq.*

Dated: November 26, 2018.

Spencer W. Clark,

Treasury PRA Clearance Officer.

[FR Doc. 2018–25948 Filed 11–28–18; 8:45 am]

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Part II

Federal Reserve System

12 CFR Parts 225, 238, 242, et al.

Prudential Standards for Large Bank Holding Companies and Savings and Loan Holding Companies; Proposed Rule

FEDERAL RESERVE SYSTEM

12 CFR Parts 225, 238, 242, and 252

[Regulations Y, LL, PP, and YY; Docket No. R–1627]

RIN 7100–AF20

Prudential Standards for Large Bank Holding Companies and Savings and Loan Holding Companies

AGENCY: Board of Governors of the Federal Reserve System (Board).

ACTION: Proposed rule.

SUMMARY: The Board is requesting comment on a proposed rule that would establish risk-based categories for determining prudential standards for large U.S. banking organizations, consistent with section 401 of the Economic Growth, Regulatory Relief, and Consumer Protection Act. The proposal would also amend certain prudential standards, including standards relating to liquidity, risk management, stress testing, and single-counterparty credit limits, to reflect the risk profiles of banking organizations under each proposed category of standards and would apply prudential standards to certain large savings and loan holding companies using the same categories. In addition, the proposal would make corresponding changes to reporting forms. Separately, the Board, the Office of the Comptroller of the Currency (OCC) and the Federal Deposit Insurance Corporation (FDIC, and together with the Board and the OCC, the agencies), are proposing amendments to the agencies' capital and liquidity requirements based on the same categories. The proposal would not apply to foreign banking organizations, including to an intermediate holding company of a foreign banking organization.

DATES: Comments must be received on or before January 22, 2019.

ADDRESSES: You may submit comments, identified by Docket No. R–1627 and RIN 7100–AF20, by any of the following methods:

- *Agency website: http://www.federalreserve.gov.* Follow the instructions for submitting comments at *https://www.federalreserve.gov/apps/foia/proposedregs.aspx.*
- *Email: regs.comments@federalreserve.gov.* Include docket number and RIN in the subject line of the message.
- *Fax:* (202) 452–3819 or (202) 452–3102.
- *Mail:* Ann E. Misback, Secretary, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue NW, Washington, DC 20551.

All public comments are available from the Board's website at *http://www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm* as submitted, unless modified for technical reasons or to remove sensitive PII at the commenter's request. Public comments may also be viewed electronically or in paper form in Room 3515, 1801 K Street NW, Washington, DC 20006 between 9:00 a.m. and 5:00 p.m. on weekdays.

FOR FURTHER INFORMATION CONTACT: Constance Horsley, Deputy Associate Director, (202) 452–5239, Elizabeth MacDonald, Manager, (202) 475–6316, Brian Chernoff, Senior Supervisory Financial Analyst, (202) 452–2952, Matthew McQueeney, Supervisory Financial Analyst, (202) 452–2942, or Hillel Kipnis, Senior Financial Analyst, (202) 452–2924, Division of Banking Supervision and Regulation; or Laurie Schaffer, Associate General Counsel, (202) 452–2272, Asad Kudiya, Counsel, (202) 475–6358, Mary Watkins, Senior Attorney, (202) 452–3722, or Alyssa O'Connor, Attorney, (202) 452–3886, Legal Division. Board of Governors of the Federal Reserve System, 20th and C Streets NW, Washington, DC 20551.

SUPPLEMENTARY INFORMATION:

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I. Introduction

The Board of Governors of the Federal Reserve System (Board) is requesting comment on a proposed rule (the proposal) that would establish a revised framework for determining the prudential standards that apply to large U.S. banking organizations, based on the risk profiles of these firms.[1] The proposal would build on the Board's existing tailoring of its rules and account for changes made by section 401 of the Economic Growth, Regulatory Relief, and Consumer Protection Act (EGRRCPA) regarding enhanced prudential standards for these firms.[2]

A. Background

The 2007–2009 financial crisis revealed significant weaknesses in resiliency and risk management in the financial sector, and demonstrated how the failure or distress of large, leveraged, and interconnected financial companies could pose a threat to financial stability. The imprudent risk taking of major financial companies, and their subsequent distress—and in some cases disorderly failure—led to severe consequences for U.S. and global households and businesses.

To address weaknesses in the banking sector that were evident in the financial crisis, the Board has strengthened capital, liquidity, risk management, and other prudential standards for banking organizations. Consistent with section 165 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act),[3] the Board applied a broad set of standards to bank holding companies with $50 billion or more in total consolidated assets to help prevent or mitigate risks to U.S. financial stability that could arise from the material financial distress or failure, or ongoing activities of, these firms, as well as to better ensure these firms' safety and soundness. These standards include capital planning requirements; supervisory and company-run stress testing; liquidity risk management, stress testing, and buffer requirements; risk management and risk committee requirements; and single counterparty

[1] The proposal would not apply to a foreign banking organization, including to an intermediate holding company of a foreign banking organization. *See* section II.B of this Supplementary Information section.

[2] Public Law 115–174, 132 Stat. 1296 (2018).

[3] 12 U.S.C. 5365.

credit limits.[4] In addition, with the Federal Deposit Insurance Corporation (FDIC), the Board implemented resolution planning requirements,[5] and with the Office of the Comptroller of the Currency (OCC) and the FDIC (together with the Board and the OCC, the agencies), the Board adopted a revised regulatory capital rule [6] and standardized liquidity requirement (the liquidity coverage ratio (LCR) rule) [7] and proposed a stable funding requirement (the net stable funding ratio (NSFR) proposed rule).[8]

The standards are tailored based on the size and complexity of a firm. For example, heightened capital requirements apply to firms with $250 billion or more in total consolidated assets or $10 billion or more in on-balance-sheet foreign exposure, including the requirement to calculate regulatory capital requirements using internal models and meet a minimum supplementary leverage ratio requirement.[9] In addition to these heightened capital requirements, U.S. global systemically important bank holding companies (GSIBs) are subject to a risk-based capital surcharge [10] and leverage buffer.[11] With respect to liquidity requirements, the Board applies a less stringent, modified liquidity coverage ratio (LCR) requirement to bank holding companies and certain savings and loan holding companies with $50 billion or more, but less than $250 billion, in total consolidated assets and less than $10 billion in total on-balance sheet foreign exposure,[12] and has proposed a less stringent modified net stable funding ratio (NSFR) requirement for these firms.[13]

Post-crisis financial regulations have resulted in substantial gains in resiliency for individual firms and for the financial system as a whole. Notable advances include higher amounts of better quality capital, a robust framework for assessing the capital adequacy of banking organizations under stressful financial and economic conditions, higher buffers of liquid assets and more stable funding profiles, and improvements in resolvability. Firms have also made significant improvements in independent risk identification and management, data infrastructure, and controls. These improvements have helped to build a more resilient financial system that is better positioned to provide American consumers, businesses, and communities access to the credit they need even under challenging economic conditions.

B. Tailoring Enhanced Prudential Standards

The Board conducts periodic reviews of its rules to update, reduce unnecessary costs associated with, and streamline regulatory requirements based on its experience implementing the rules and consistent with the statutory provisions that motivated the rules. These efforts include assessing the costs and benefits of regulations as well as exploring alternative approaches that achieve regulatory objectives but improve upon the simplicity, transparency, and efficiency of requirements. The proposal is the result of this practice and would reflect amendments made by EGRRCPA to the Dodd-Frank Act regarding the application of enhanced prudential standards for large banking organizations.

Specifically, EGRRCPA raised the $50 billion minimum asset threshold for general application of enhanced prudential standards to $250 billion, and provides the Board with discretion to apply standards to bank holding companies with total consolidated assets of $100 billion or more, but less than $250 billion.[14] The threshold increase occurs in two stages. Immediately on the date of enactment, bank holding companies with total consolidated assets of less than $100 billion were no longer subject to section 165, with the exception of section 165's risk committee requirement. The statute requires a risk committee for publicly traded bank holding companies with $50 billion or more in total consolidated assets.[15]

Eighteen months after the date of EGRRCPA's enactment, the threshold is raised to $250 billion.[16] However, EGRRCPA provides the Board with authority to apply any enhanced prudential standard to bank holding companies with total consolidated assets equal to or greater than $100 billion and less than $250 billion.[17] Specifically, under section 165(a)(2)(C) of the Dodd-Frank Act, as revised by EGRRCPA, the Board may, by order or rule, apply any prudential standard established under section 165 to any bank holding company or bank holding companies with total consolidated assets of $100 billion or more if the Board determines that application of the prudential standard is appropriate to prevent or mitigate risks to the financial stability of the United States, or promote the safety and soundness of the bank holding company or bank holding companies. In making this determination, the Board must take into consideration certain statutory factors (capital structure, riskiness, complexity, financial activities (including financial activities of subsidiaries), size, and any other risk-related factors that the Board deems appropriate).[18]

Section 165 also directs the Board, in prescribing enhanced prudential standards, to differentiate among companies on an individual basis or by category, taking into consideration the same risk-related factors.[19]

II. Overview of the Proposal

A. Proposed Approach to Tailoring

The Board is proposing modifications to its rules to further and more consistently differentiate the application of prudential standards to large U.S. banking organizations, consistent with

[4] *See* 12 CFR 225.8, 12 CFR part 252.

[5] *See* 12 CFR part 243.

[6] *See* 12 CFR part 217.

[7] *See* 12 CFR part 249.

[8] *See* Net Stable Funding Ratio: Liquidity Risk Measurement Standards and Disclosure Requirements, 81 FR 35123 (proposed June 1, 2016) (NSFR proposed rule).

[9] *See, e.g.,* 12 CFR 217.10(c), 217.11(b), and 217.100–217.174 (subpart E).

[10] *See* 12 CFR 217 subpart H. In addition, in 2017, the Board amended its capital plan rule to apply more limited capital planning requirements to bank holding companies that are not U.S. GSIBs and that have less than $250 billion in total consolidated assets and less than $75 billion in nonbank assets, as compared to larger, more complex bank holding companies. *See* 12 CFR 225.8.

[11] *See* 12 CFR 217.11(c).

[12] *See* 12 CFR part 249, subpart G.

[13] *See* NSFR proposed rule, proposed subpart M.

[14] EGRRCPA also provides that any bank holding company, regardless of asset size, that has been identified as a GSIB under the Board's GSIB surcharge rule shall be considered a bank holding company with $250 billion or more in total consolidated assets for purposes of the application of standards under section 165 and certain other provisions. EGRRCPA section 401(f).

[15] The Board issued two statements—one individually, and the other jointly with the FDIC and OCC—that provided information on regulations and associated reporting requirements that the Board administers and EGRRCPA immediately affected. *See* Board and Interagency statements regarding the impact of the Economic Growth, Regulatory Relief, and Consumer Protection Act, July 6, 2018, available at *https://www.federalreserve.gov/newsevents/pressreleases/files/bcreg20180706a1.pdf; https://www.federalreserve.gov/newsevents/pressreleases/files/bcreg20180706b1.pdf.* The statements describe interim positions that the Board and other agencies have taken until the agencies finalize amendments to their regulations to implement EGRRCPA.

[16] On that same date, certain other financial companies with total consolidated assets of less than $250 billion, such as savings and loan holding companies, will no longer be subject to the company-run stress test requirements in section 165(i)(2) of the Dodd-Frank Act. EGRRCPA section 401(a)(5)(B) (to be codified at 12 U.S.C. 5365(i)(2)).

[17] EGRRCPA section 401(d)(4).

[18] 12 U.S.C. 5365(a); EGRRCPA section 401(a)(1)(B)(iii) (to be codified at 12 U.S.C. 5365(a)(2)(C)).

[19] *Id.* at section 401(a)(1)(B)(i) (to be codified at 12 U.S.C. 5365(a)(2)(A)).

EGRRCPA. The proposal builds on the Board's existing practice of tailoring capital, liquidity, and other requirements based on the size, complexity, and overall risk of banking organizations. Specifically, the proposal would establish categories of prudential standards to align requirements with a firm's risk profile and apply consistent standards across similarly situated firms. The proposal would amend the Board's enhanced prudential standards rule [20] to modify the application of requirements relating to supervisory and company-run stress testing; liquidity risk management, stress testing, and buffer maintenance; risk committee and risk management; and single-counterparty credit limits.[21] The proposal would also apply similar standards and categories to large savings and loan holding companies (other than those substantially engaged in insurance underwriting or commercial activities) (covered savings and loan holding companies) to increase their resiliency and strengthen their risk management, which supports their safety and soundness and improves the consistency of standards across banking organizations.

While the proposal would amend only the Board's enhanced prudential standards rule and certain related regulations, it sets forth a framework that would be used throughout the Board's prudential standards framework for large financial institutions. Concurrently with this proposal, the Board, with the OCC and FDIC, is separately proposing amendments to the capital and liquidity requirements of the agencies, including the regulatory capital rule, LCR rule, and NSFR proposed rule, to introduce the same risk-based categories for tailoring standards (the interagency capital and liquidity proposal). As described in section IV.D of this Supplementary Information section, the Board also intends to propose at a later date similar amendments to its capital plan rule [22] (the capital plan proposal). In the future, the Board also intends to seek public comment on a proposal that would address the applicability of resolution planning requirements to firms with total consolidated assets in the range of $100 billion to $250 billion. In connection with that process, the Board is working with the FDIC to amend their joint resolution plan rules to, among other things, adjust the scope and applicability of the resolution plan requirements for companies that remain subject to the resolution plan requirement.[23]

The proposal would establish four categories of prudential standards for large U.S. banking organizations. For firms with total consolidated assets of $100 billion or more but less than $250 billion and that are not U.S. GSIBs, EGRRCPA provides the Board with greater flexibility in its application of enhanced prudential standards. Section 165 also directs the Board to consider certain risk-based factors for differentiating the application of enhanced prudential standards to bank holding companies. The proposed categories would set forth a framework for determining the application of prudential standards to firms with total consolidated assets of $100 billion or more but less than $250 billion, and for differentiating the standards that apply to all firms subject to prudential standards based on their size, complexity, and other risk-based factors.

Under the proposed approach, the most stringent set of standards (Category I) would apply to U.S. GSIBs. These firms have the potential to pose the greatest risks to U.S. financial stability, and EGRRCPA requires these firms to be subject to enhanced prudential standards. The existing post-financial crisis framework for U.S. GSIBs has resulted in significant gains in resiliency and risk management. The proposal accordingly would maintain the most stringent standards for these firms.

The second set of standards (Category II) would apply to U.S. banking organizations that are very large or have significant international activity. Like Category I, this category would include standards that are based on standards developed by the Basel Committee on Banking Supervision (BCBS) and other standards appropriate to very large or internationally active banking organizations.[24] The application of consistent prudential standards across jurisdictions to banking organizations with significant size or cross-jurisdictional activity helps to promote competitive equity among U.S. banking organizations and their foreign peers and competitors, and to reduce opportunities for regulatory arbitrage, while applying standards that appropriately reflect the risk profiles of firms in this category. In addition, consistency of standards can facilitate U.S. banking organizations' regulatory compliance in foreign markets. Category II standards would also reflect the risks associated with these firms' very large size or cross-border operations.

The third set of standards (Category III) would apply to bank holding companies that EGRRCPA requires to be subject to enhanced prudential standards, but that do not meet the criteria for Category I or II, and to other firms whose risk profiles warrant the application of similar standards. In particular, these standards would apply to firms with $250 billion or more in total consolidated assets that do not meet the criteria for Category I or II standards. They would also apply to firms with total consolidated assets of $100 billion or more, but less than $250 billion, that meet or exceed specified risk-based indicators. Category III standards would reflect these firms' heightened risk profiles relative to smaller and less complex firms.

The fourth set of standards (Category IV) would apply to banking organizations with total consolidated assets of $100 billion or more that do not meet the thresholds for one of the other categories. These firms generally have greater scale and operational and managerial complexity relative to smaller banking organizations, but less than firms that would be subject to Category I, II, or III standards. In addition, the failure or distress of one or more firms that would be subject to Category IV standards, while not likely to have as significant of an impact on financial stability as the failure or distress of a firm subject to Category I, II or III standards, could nonetheless have a more significant negative effect on economic growth and employment relative to the failure or distress of smaller firms. Category IV standards would accordingly incorporate additional tailoring to reflect the lower risk profile of these firms relative to other firms with $100 billion or more in total consolidated assets. For example, the proposal would maintain liquidity risk management, stress testing, and buffer requirements for these firms, but, commensurate with their size and risk profile, would reduce the required minimum frequency of liquidity stress tests and the granularity of certain liquidity risk management requirements.

[20] 12 CFR part 252.

[21] While the Board intends to separately propose modifications at a future date to capital planning requirements to incorporate the proposed risk-based categories, the proposal would make certain conforming changes to the capital plan rule. *See* section IV of this Supplementary Information section.

[22] 12 CFR 225.8.

[23] 12 CFR part 243; 12 CFR part 381.

[24] The BCBS is a committee of banking supervisory authorities, which was established by the central bank governors of the G–10 countries in 1975. More information regarding the BCBS and its membership is available at *http://www.bis.org/bcbs/about.htm.* Documents issued by the BCBS are available through the Bank for International Settlements website at *http://www.bis.org.*

Section III of this Supplementary Information section discusses the proposed criteria for determining which category of standards would apply to a firm. Section IV of this Supplementary Information section discusses the standards that would apply under each category. Other than risk management requirements, the proposal would not apply enhanced prudential standards to firms with total consolidated assets less than $100 billion, consistent with EGRRCPA.[25]

B. Scope of Application

The proposal would apply to top-tier U.S. bank holding companies and covered savings and loan holding companies.[26] The proposal would not apply to a foreign banking organization, including to an intermediate holding company of a foreign banking organization. The Board continues to consider the appropriate way to assign the U.S. operations of foreign banking organizations to the categories of prudential standards described in this proposal, in light of the special structures through which these firms conduct business in the United States. The Board plans to develop a separate proposal relating to foreign banking organizations that would implement section 401 of EGRRCPA for these firms and reflect the principles of national treatment and equality of competitive opportunity. For the time being, the current enhanced standards that apply to the U.S. operations of foreign banking organizations would continue to apply.[27]

1. Bank Holding Companies

As noted above, EGRRCPA amended section 165 of the Dodd-Frank Act to increase the minimum asset thresholds for the application of enhanced prudential standards to bank holding companies. The proposal would revise the Board's enhanced prudential standard rule to reflect the new thresholds for U.S. top-tier bank holding companies. Under the proposal, a bank holding company with less than $100 billion in total consolidated assets would no longer be subject to the capital stress testing and liquidity risk management, liquidity stress testing, and liquidity buffer requirements of the enhanced prudential standards rule, and a bank holding company with less than $50 billion in total consolidated assets would no longer be subject to risk committee requirements. To maintain consistency with the threshold for application of enhanced prudential standards,[28] the proposal would also raise the applicability threshold for bank holding company capital planning requirements in the Board's Regulation Y from $50 billion to $100 billion in total consolidated assets.[29]

2. Savings and Loan Holding Companies

It is the view of the Board that any company that owns or controls a depository institution should be held to appropriate capital, liquidity, and risk management standards. As with bank holding companies, the Board's objective is to ensure that a savings and loan holding company and any nondepository subsidiaries are effectively supervised and do not threaten the soundness of the subsidiary depository institutions. Furthermore, the Board's rules require a savings and loan holding company to serve as a source of strength for its subsidiary depository institutions.[30] To the greatest extent possible, the Board currently assesses the condition, performance, and activities of savings and loan holding companies on a consolidated, risk-based basis in the same manner that the Board assesses the condition, performance, and activities of a bank holding company, taking into account any unique characteristics of savings and loan holding companies and the requirements of the Home Owners' Loan Act (HOLA).[31]

To further improve the resiliency of savings and loan holding companies and reduce the risk of future failures of large savings and loan holding companies, as well as to reduce risks to the Deposit Insurance Fund, the proposal would build on the regulatory measures currently in effect for covered savings and loan holding companies. Specifically, the proposal would apply supervisory and company-run stress testing; risk management; liquidity risk management, stress testing, and buffer; and single-counterparty credit limits requirements to covered savings and loan holding companies to the same extent as if they were bank holding companies, based on the same categories as would apply to bank holding companies.[32] In addition, the proposal would expand the scope of applicability of the Capital Assessments and Stress Testing (FR Y–14) series of reports to apply to covered savings and loan holding companies with total consolidated assets of $100 billion or more.[33]

The Board previously has applied certain heightened standards to savings and loan holding companies, pursuant to the Board's statutory authority under HOLA.[34] In 2013, the agencies adopted a final rule that updated the Board's capital requirements for banking organizations, including covered

[25] All firms with $50 billion or more in total consolidated assets would remain subject to the risk committee and chief risk officer requirements, which reflect standard risk management practices. *See* section IV.F of this Supplementary Information section.

[26] Section 165 of the Dodd-Frank Act also provides for the application of enhanced prudential standards to nonbank financial companies supervised by the Board. *See* 12 U.S.C. 5365(a). The proposal does not include any changes with respect to the application of enhanced prudential standards for these firms. In addition, under section 165 of the Dodd-Frank Act, state member banks are required to comply with company-run stress testing requirements. *See* 12 U.S.C. 5365(i)(2). This proposal would not alter the implementation of this requirement in the enhanced prudential standards rule. The Board plans to amend these provisions to conform with changes made by EGRRCPA at a later date.

[27] For purposes of the application of enhanced prudential standards under section 165 of the Dodd-Frank Act, bank holding companies include foreign banking organizations with a U.S. subsidiary bank or a U.S. branch or agency. The Dodd-Frank Act requires the Board to give due regard to national treatment and equality of competitive opportunity, which generally means that foreign banking organizations operating in the United States should be treated no less favorably than similarly situated U.S. banking organizations and should generally be subject to the same restrictions and obligations in the United States as those that apply to the domestic operations of U.S. banking organizations. *See* 12 U.S.C. 5365(b)(2).

[28] In 2009, the Board conducted the Supervisory Capital Assessment Program (SCAP), a "stress test" of 19 domestic bank holding companies with total consolidated assets of $100 billion or more. *See* Board of Governors of the Federal Reserve System, The Supervisory Capital Assessment Program: Overview of Results (May 7, 2009), available at *http://www.federalreserve.gov/bankinforeg/bcreg20090507a1.pdf*. In 2011, to establish consistency with section 165 of the Dodd-Frank Act, the Board adopted an asset threshold of $50 billion for the application of the capital plan rule and the Board's Comprehensive Capital Review and Analysis (CCAR). Raising the threshold for application of CCAR and the capital plan rule from $50 billion to $100 billion would maintain consistency with the threshold as amended by EGRRCPA.

[29] Section IV of this Supplementary Information section describes additional changes the Board is considering proposing at a later date in the capital plan proposal to tailor Category IV standards to align with the proposed changes to stress testing provisions and consistent with EGRRCPA.

[30] 12 CFR 238.8(a).

[31] 12 U.S.C. 1461 *et seq.*

[32] The Board also plans to propose applying capital planning requirements to covered savings and loan holding companies with $100 billion or more in total consolidated assets in the capital plan proposal.

[33] Savings and loan holding companies would not be required in connection with this proposal to report certain FR Y–14 schedules related to capital planning. *See* section IV.E of this Supplementary Information section.

[34] HOLA authorizes the Board to issue such regulations and orders, including regulations and orders relating to capital requirements for savings and loan holding companies, as the Board deems necessary or appropriate to enable the Board to administer and carry out the purposes of HOLA, and to require compliance therewith and prevent evasions thereof. 12 U.S.C. 1467a(g)(1).

savings and loan holding companies.[35] This was the first time that any savings and loan holding companies were subject to capital requirements. In 2014, the agencies adopted the LCR rule for large and internationally active banking organizations, including covered savings and loan holding companies, and in 2016, the agencies proposed the NSFR rule for the same set of firms.[36]

Greater parity in the regulation of covered savings and loan holding companies and bank holding companies would be appropriate in light of the significant similarities between the activities and risk profiles of these firms. Large covered savings and loan holding companies engage in many of the same activities, face similar risks, and serve substantially similar economic roles as large bank holding companies.[37] Accordingly, the Board is proposing to apply prudential standards to large savings and loan holding companies that are similar to those applied to large bank holding companies.

The financial crisis revealed weaknesses in resiliency and risk management at large banking organizations, including savings and loan holding companies, that supports application of stronger capital, liquidity, and risk management standards and counterparty limits for these firms. For example, Washington Mutual, a savings and loan holding company, had approximately $300 billion in total consolidated assets at the time of failure. After the collapse of Lehman Brothers, Washington Mutual experienced significant deposit outflows and was unable to raise funds to improve its liquidity position.[38] In September 2008, the Office of Thrift Supervision, Washington Mutual's primary regulator, determined that the firm had insufficient liquidity to meet its obligations, closed the firm, and appointed the FDIC as the receiver. Washington Mutual was thereafter acquired by another firm. The FDIC estimated that it would have cost $42 billion to liquidate Washington Mutual, a sum that would have depleted the entire balance of the Deposit Insurance Fund at the time.[39] Likewise, Countrywide Financial, a savings and loan holding company with approximately $200 billion in total consolidated assets in the third quarter of 2007, experienced significant reported losses during the financial crisis and had difficulty rolling over short-term funding, upon which it heavily relied as a funding source, and was sold in distress to another firm.[40]

III. Scoping Criteria for Proposed Categories

As described above, the proposal would establish four categories for purposes of determining applicable prudential standards for bank holding companies and covered savings and loan holding companies with total consolidated assets of $100 billion or more. To summarize, these categories would be defined based on the following criteria:

- Category I standards would apply to U.S. GSIBs.
- Category II standards would apply to firms with $700 billion or more in total consolidated assets or $75 billion or more in cross-jurisdictional activity, and that are not subject to Category I standards.
- Category III standards would apply to firms that are not subject to Category I or II standards and that have $250 billion or more in total consolidated assets or $75 billion or more in any of the following indicators: Nonbank assets, weighted short-term wholesale funding, or off-balance-sheet exposures.
- Category IV standards would apply to firms with at least $100 billion in total consolidated assets that do not meet any of the thresholds specified for Categories I through III.

To determine which firms are subject to the most stringent standards under Category I, the proposal would use the existing methodology under the Board's GSIB surcharge rule.[41] Under EGRRCPA, firms identified as U.S. GSIBs are subject to enhanced prudential standards, regardless of asset size.[42] The inputs to the GSIB identification methodology calculation also closely align with the risk-based factors specified in section 165 of the Dodd-Frank Act for differentiating among firms.[43] To date, the Board has applied the most stringent prudential standards to U.S. GSIBs because the failure or material distress of a GSIB presents the greatest risks to U.S. financial stability.

To determine the applicability of the remaining categories of standards, the Board is proposing to differentiate requirements based on a firm's level of specific risk-based indicators.[44] This approach is intended to allow firms and the public to easily identify and predict what requirements will apply to a firm, and what requirements would apply if the characteristics of a firm change. Under the proposed approach, Categories II through IV would be defined by five indicators linked to a firm's risk profile: Size, cross-jurisdictional activity, weighted short-term wholesale funding, nonbank assets, and off-balance sheet exposure. By taking into consideration the relative presence or absence of each risk factor, the proposal would provide a basis for assessing a banking organization's financial stability and safety and soundness risks.[45] These indicators

[35] *See* Regulatory Capital Rules: Regulatory Capital, Implementation of Basel III, Capital Adequacy, Transition Provisions, Prompt Corrective Action, Standardized Approach for Risk-weighted Assets, Market Discipline and Disclosure Requirements, Advanced Approaches Risk-Based Capital Rule, and Market Risk Capital Rule, 78 FR 62017 (October 11, 2013). *See also* 12 CFR 217.1(c)(1)(iii) (applicability of part 217), .2 (definition of covered savings and loan holding company).

[36] 12 CFR part 249. *See also* Liquidity Coverage Ratio: Liquidity Risk Management Standards, 79 FR 61523 (Oct. 10, 2014); NSFR proposed rule.

[37] *See, e.g.,* U.S. Department of the Treasury, Blueprint for a Modernized Financial Regulatory Structure (March 2008), available at: *https://www.treasury.gov/press-center/press-releases/Documents/Blueprint.pdf.* (''In the past, the thrift (or savings and loan) and banking industries had distinctly different missions, authorities, regulators, and deposit insurance entities. Now, however, the differences between the two industries have substantially diminished and their respective activities and authorities have converged.'')

[38] Offices of Inspector General, U.S. Department of Treasury and FDIC, Evaluation of Federal Regulatory Oversight of Washington Mutual Bank (April 2010), available at: *https://www.fdicig.gov/sites/default/files/publications/10-002EV.pdf.*

[39] *Id.*

[40] Financial Crisis Inquiry Commission, The Financial Crisis Inquiry Report: Final Report of the National Commission on the Causes of the Financial and Economic Crisis in the United States (2011), available at *http://purl.fdlp.gov/GPO/gpo50165.*

[41] *See* 12 CFR part 217 subpart H; *see also* Regulatory Capital Rules: Implementation of Risk-Based Capital Surcharges for Global Systemically Important Bank Holding Companies, 80 FR 49082 (August 14, 2015).

[42] *See* EGRRCPA section 401(f).

[43] *See* 12 U.S.C. 5365(a)(2)(A). The GSIB identification methodology uses five broad categories that are correlated with systemic risk—size, interconnectedness, cross-jurisdictional activity, substitutability, and complexity—and equally weights each category in order to calculate a firm's score. 12 CFR 217.404; *see also* Regulatory Capital Rules: Implementation of Risk-Based Capital Surcharges for Global Systemically Important Bank Holding Companies, 80 FR 49082 (Aug. 14, 2015).

[44] As an alternative, the Board is also requesting comment on a score-based approach, which would differentiate requirements for firms using an aggregated ''score'' across multiple measures of risk. Section III.C of this Supplementary Information section describes this proposed alternative.

[45] When reviewing agency interpretations of statutes that require an agency to ''take into account'' or ''take into consideration'' a number of factors, courts generally defer to the expertise of the agency in determining how to apply the factors and the relative weight given to each factor. *See, e.g.,* National Wildlife Federation v. EPA, 286 F.3d 554, 570 (D.C. Cir. 2002); Lignite Energy v. EPA, 198 F.3d 930, 933 (D.C. Cir. 1999); Trans World Airlines, Inc. v. Civil Aeronautics Board, 637 F.2d 62, 67–68 (2d Cir. 1980); Weyerhaeuser v. EPA, 590 F.2d 1011, 1046 (D.C. Cir. 1978); Sec'y of Agric. v. Cent. Roig Ref. Co., 338 U.S. 604, 611–12 (1950).

generally track measures already used in the Board's existing regulatory framework and that firms that would be covered by the proposal already publicly report, in order to maintain simplicity, predictability, and transparency of the framework and minimize incremental compliance costs. The proposed thresholds would apply based on the level of each indicator over the preceding four calendar quarters, as described further below, in order to capture significant changes in a firm's risk profile, rather than temporary fluctuations.

A. Size

The proposal would measure size based on a firm's total consolidated assets. The use of an asset size threshold would be consistent with section 165 of the Dodd-Frank Act, as amended by EGRRCPA, which differentiates among firms by asset size for purposes of application of enhanced prudential standards.[46] Size is also among the factors that the Board must take into consideration in differentiating among firms under section 165.[47] The Board has previously used size as a simple measure of a firm's potential systemic impact as well as safety and soundness risks.[48]

The effect of a large banking organization's failure on the economy is likely to be greater than that which occurs when a smaller banking organization fails, even though the two banking organizations might be engaged in similar business lines.[49] Board staff estimates that stress at a single large banking organization with an assumed $100 billion in deposits would result in approximately a 107 percent decline in quarterly real GDP growth, whereas stress among five smaller banking organizations—each with an assumed $20 billion in deposits—would result in roughly a 22 percent decline in quarterly real GDP growth.[50] While both scenarios assume $100 billion in total deposits, the negative impact is greatest when larger banking organizations fail.

In general, a firm's size also provides a measure of the extent to which customers or counterparties may be exposed to a risk of loss or suffer a disruption in the provision of services if a firm were to experience distress, and the extent to which asset fire sales by a firm could transmit distress to other market participants, given that a larger firm has more assets to sell. In addition, the large size of a banking organization may give rise to challenges that complicate resolution of the firm if it were to fail.

The size of a banking organization can also be an indication of operational and managerial complexity, which can present safety and soundness risks even when a firm is not engaged in complex business lines. A larger banking organization operates on a larger scale, has a broader geographic scope, and generally will have more complex internal operations than a smaller banking organization. These differences can increase the likelihood that an organization has operational or control gaps that would raise its probability of severe stress or default if left unaddressed, as well as the risk that such gaps will go undetected. Strong prudential standards—including relating to capital planning, stress testing, liquidity, risk management, and single-counterparty credit limits—accordingly also help to manage these safety and soundness risks for both bank holding companies and savings and loan holding companies.

The proposal would establish thresholds of $700 billion, $250 billion, and $100 billion in total consolidated assets for Category II, III, and IV requirements, respectively, for firms that are not U.S. GSIBs. A firm with $700 billion or more in total consolidated assets would be subject to Category II requirements, in order to address the substantial risks that can arise from the activities and potential distress of very large firms that are not U.S. GSIBs. Historical examples suggest that a firm of this size should be subject to stringent prudential standards. For example, during the financial crisis, significant losses at Wachovia Corporation, which had $780 billion in total consolidated assets at the time of being acquired in distress, had a destabilizing effect on the financial system. A threshold of $700 billion or more in total consolidated assets would ensure that a firm with a size of similar magnitude would be subject to Category II standards.

A firm with $250 billion or more in total consolidated assets that does not meet the requirements for Category II would be subject to Category III requirements. As discussed above, the failure or distress of a firm of this size would likely have a greater economic and financial stability impact than that of a smaller firm,[51] and Category III standards would also further the safety and soundness of a firm of this size. The application of strong prudential standards would also be consistent with weaknesses and risks highlighted during the financial crisis with firms of this size, such as Washington Mutual. A threshold of this level would also align with the $250 billion statutory asset threshold under EGRRCPA, above which the Board must apply enhanced prudential standards to a bank holding company.

A firm with $100 billion or more in total consolidated assets that does not meet the criteria for Categories I, II, or III would be subject to Category IV standards. While the material distress or failure of a firm in this category would likely pose less significant risk to U.S. financial stability, consistent with the considerations and empirical analysis described above, it could still have an amplified negative effect on economic growth, employment, and financial stability relative to the distress or failure of a smaller firm.[52] In addition, these firms generally have greater scale and operational and managerial complexity than smaller firms, and associated safety and soundness risks.

Thresholds of these orders of magnitude would reflect observed levels of operational and managerial complexity and operational risk among firms of these sizes. For example, firms with over $700 billion in assets tend to have the broadest array of business lines and a large amount of employees, with significant operational and managerial complexity. Firms with less than $700 billion in assets, but more than $250 billion in assets tend to have less operational complexity than the largest firms, as they tend to focus on select business lines. In addition, these firms tend to have fewer employees and less managerial complexity. Firms with assets of $100 billion or more, but less than $250 billion, tend to be regionally focused or focus on only one or two business lines, with less operational and managerial complexity than larger firms but more than smaller firms.

Question 1: What are the advantages and disadvantages of using size thresholds to tailor prudential standards? In what ways does the inclusion of asset size thresholds in prudential standards drive changes in bank business models and risk profiles

[46] *See generally* 12 U.S.C. 5635 and EGRRCPA § 401.

[47] EGRRCPA section 401(a)(1)(B)(i) (to be codified at 12 U.S.C. 5365(a)(2)(A)).

[48] For example, advanced approaches capital requirements, the supplementary leverage ratio, and the LCR requirement generally apply to firms with total consolidated assets of $250 billion or more or total consolidated on-balance sheet foreign exposure of $10 billion or more.

[49] *See* Lorenc, Amy G., and Jeffery Y. Zhang (2018). ''The Differential Impact of Bank Size on Systemic Risk,'' *Finance and Economics Discussion Series* 2018–066. Washington: Board of Governors of the Federal Reserve System, available at: *https://doi.org/10.17016/FEDS.2018.066.*

[50] *Id.*

[51] *Id.*

[52] *Id.*

in ways that differ from the effects of thresholds based on other risk-based indicators? To what extent can other factors alone adequately differentiate between the risk profiles of firms and serve as the primary tool to tailor prudential standards?

B. Other Risk-Based Indicators

In addition to size, the proposal would consider a firm's level of cross-jurisdictional activity, weighted short-term wholesale funding, nonbank assets, and off-balance sheet exposure to determine the applicable category of standards. The Board is proposing to apply a uniform threshold of $75 billion for each of these risk-based indicators, based on the degree of concentration this amount would represent for each firm and the proportion of the risk factor among all firms with at least $100 billion in total consolidated assets that would be included by the threshold. In each case, a threshold of $75 billion would represent at least 30 percent and as much as 75 percent of total consolidated assets for firms with between $100 billion and $250 billion in total consolidated assets.[53] Setting the indicators at $75 billion would also ensure that firms that account for the vast majority—over 85 percent—of the total amount of each risk factor among all U.S. depository institution holding companies with $100 billion or more in total consolidated assets would be subject to prudential standards that account for the associated risks of these factors, which facilitates consistent treatment of these risks across firms. To the extent levels and the distribution of an indicator substantially change in the future, the Board may consider modifications if appropriate.

Category II standards would apply to a firm with $100 billion or more in total consolidated assets and $75 billion or more in cross-jurisdictional activity to promote parallel treatment among firms with large global operations. Category III standards would apply to a firm with $100 billion or more in total consolidated assets and at least $75 billion in weighted short-term wholesale funding, nonbank assets, or off-balance sheet exposure.

1. Cross-Jurisdictional Activity

Cross-jurisdictional activity would be defined as the sum of cross-jurisdictional assets and liabilities, as each is reported on the Banking Organization Systemic Risk Report (FR Y–15). Cross-jurisdictional activity can affect the complexity of a firm and give rise to challenges that may complicate the resolution of such a firm if it were to fail. In particular, foreign operations and cross-border positions add operational complexity in normal times and complicate the ability of a firm to undergo an orderly resolution in times of stress, generating both safety and soundness and financial stability risks. For example, a firm with significant cross-border operations may require more sophisticated management relating to risks of ring-fencing by one or more jurisdictions during stress, which could impede the firm's ability to move resources in one jurisdiction to meet needs in another.

The Board's capital and liquidity regulations currently use total on-balance sheet foreign exposure as a metric to determine the application of certain requirements, such as the requirement to use the internal models-based advanced approaches for calculating risk-based capital rule (advanced approaches capital requirements)[54] and the LCR requirement.[55] In the interagency capital and liquidity proposal, the Board is proposing, with the OCC and FDIC, to amend certain of the agencies' capital and liquidity regulations to replace the current $10 billion foreign exposure threshold with a $75 billion cross-jurisdictional activity threshold that would align with the proposal. Compared to the current foreign exposure measure, the proposed cross-jurisdictional activity indicator would include foreign liabilities in addition to foreign assets. In addition, compared to the foreign exposure measure, the proposed cross-jurisdictional activity indicator does not include the assets and liabilities from positions in derivative contracts. Measuring cross-jurisdictional activity using both assets and liabilities—instead of just assets—would provide a broader gauge of the scale of a firm's foreign operations and associated risks, as it includes both borrowing and lending activities outside of the United States.

2. Weighted Short-Term Wholesale Funding

The proposed weighted short-term wholesale funding indicator would track the measure currently reported on the FR Y–15 and be consistent with the calculation used for purposes of the GSIB surcharge rule.[56] This indicator provides a measure of a firm's liquidity risk, as reliance on short-term, generally uninsured funding from more sophisticated counterparties can make a firm vulnerable to large-scale funding runs. In particular, banking organizations that fund long-term assets with short-term liabilities from financial intermediaries such as investment funds may need to rapidly sell less liquid assets to meet withdrawals and maintain their operations in a time of stress, which they may be able to do only at ''fire sale'' prices. Such asset fire sales can cause rapid deterioration in a firm's financial condition and negatively affect broader financial stability by driving down asset prices across the market. As a result, weighted short-term wholesale funding reflects both safety and soundness and financial stability risks. Short-term wholesale funding also provides a measure of interconnectedness among market participants, including other financial sector entities, which can provide a mechanism for transmission of distress.

3. Nonbank Assets

Under the proposal, nonbank assets would be measured as the average amount of equity investments in nonbank subsidiaries.[57] The proposed nonbank assets indicator would align with the measure of nonbank assets currently used in the capital plan rule to tailor certain requirements.[58]

[53] Because a size threshold of $250 billion in total consolidated assets also would apply for Category III, the weighted short-term wholesale funding, nonbank assets, and off-balance sheet exposure indicators would only have effect for a firm with total consolidated assets of $100 billion or more, but less than $250 billion. Similarly, the proposed cross-jurisdictional activity threshold would only have effect for a firm with total consolidated assets of $100 billion or more, but less than $700 billion.

[54] *See* 12 CFR 217.100(b)(1).

[55] *See* 12 CFR 249.1(b)(1)(ii).

[56] Specifically, short-term wholesale funding is the amount of a firm's funding obtained from wholesale counterparties or retail brokered deposits and sweeps with a remaining maturity of one year or less. Categories of short-term wholesale funding are then weighted based on four residual maturity buckets; the asset class of collateral, if any, backing the funding; and characteristics of the counterparty. Weightings reflect risk of runs and attendant fire sales. *See* 12 CFR 217.406 and Regulatory Capital Rules: Implementation of Risk-Based Capital Surcharges for Global Systemically Important Bank Holding Companies, 80 FR 49082 (August 14, 2015).

[57] The proposed measure of nonbank assets would include the assets in each Edge or Agreement Corporation, but would exclude assets in a federal savings association, federal savings bank, or thrift.

[58] The capital plan rule defines ''average total nonbank assets'' as the average of the total nonbank assets of a holding company subject to the capital plan rule, calculated in accordance with the instructions to the Parent Company Only Financial Statements for Large Holding Companies (FR Y–9LP), for the four most recent consecutive quarters or, if the bank holding company has not filed the FR Y–9LP for each of the four most recent consecutive quarters, for the most recent quarter or consecutive quarters, as applicable. 12 CFR 225.8(d)(2). In connection with the proposal, the Board is proposing to require covered savings and loan holding companies with total consolidated

The level of a firm's investment in nonbank subsidiaries provides a measure of the organization's business and operational complexity. Specifically, banking organizations with significant investments in nonbank subsidiaries are more likely to have complex corporate structures, inter-affiliate transactions, and funding relationships. A firm's complexity is positively correlated with the impact of a banking organization's failure or distress. Because nonbank subsidiaries will not be resolved through the FDIC's receivership process, significant investments in nonbank subsidiaries present heightened resolvability risk.

Nonbank activities may involve a broader range of risks than those associated with purely banking activities, and can increase interconnectedness with other financial firms, requiring sophisticated risk management and governance, including capital planning, stress testing, and liquidity risk management. If not adequately managed, the risks associated with nonbanking activities could present significant safety and soundness concerns and increase financial stability risks. The failure of a nonbank subsidiary could be destabilizing to a banking organization, and cause counterparties and creditors to lose confidence in the firm. Nonbank assets also reflect the degree to which a firm may be engaged in activities through legal entities that are not subject to separate capital requirements or to the direct regulation and supervision applicable to a regulated banking entity.

The proposal would accordingly apply more stringent Category III standards to a firm with a significant level of nonbank assets than the less stringent Category IV standards that would otherwise apply based on the firm's size alone.

4. Off-Balance Sheet Exposure

Off-balance sheet assets complements the measure of size by taking into consideration financial and banking activities not reflected on a banking organization's balance sheet. Like a firm's size, off-balance sheet exposure provides a measure of the extent to which customers or counterparties may be exposed to a risk of loss or suffer a disruption in the provision of services. In addition, off-balance sheet exposure can lead to significant future draws on capital and liquidity, particularly in times of stress. In the financial crisis, for example, vulnerabilities at individual firms were exacerbated by margin calls on derivative exposures and calls on commitments. These exposures can be a source of safety and soundness risk, as firms with significant off-balance sheet exposure may have to fund these positions in the market in a time of stress, which can put a strain on both capital and liquidity. The nature of these risks for firms of this size and complexity can also lead to financial stability risk, as they can manifest rapidly and with less transparency to other market participants. In addition, because draws on off-balance sheet exposures such as committed credit and liquidity facilities tend to increase in times of stress, they can exacerbate the effects of stress on a banking organization.[59]

Off-balance sheet exposures may also serve as a measure of a banking organization's interconnectedness. Some off-balance sheet exposures, such as derivatives, are concentrated among the largest financial firms.[60] The distress or failure of one party to a financial contract, such as a derivative or securities financing transaction, can trigger disruptive terminations of these contracts that destabilize the defaulting party's otherwise solvent affiliates.[61] Such a default also can lead to disruptions in markets for financial contracts, including by resulting in rapid market-wide unwinding of trading positions.[62] In this way, the effects of one party's failure or distress can be amplified by its off-balance sheet connections with other financial market participants.

The proposal would define off-balance sheet exposure consistently with measures currently reported by covered firms, as total exposure, as defined on FR Y–15, minus total consolidated assets, as reported on Consolidated Financial Statements for Holding Companies (FR Y–9C).[63] Total exposure includes a firm's on-balance sheet assets plus certain off-balance sheet exposures, including derivative exposures, repo-style transactions, and other off-balance sheet exposures (such as commitments).

Question 2: What would be the advantages and disadvantages of having similar applicable prudential standards for bank holding companies and covered savings and loan holding companies with total consolidated assets of $100 billion or more based on the proposed categories? What would be the advantages and disadvantages of having different standards?

Question 3: What are the advantages and disadvantages of the proposed risk-based indicators? What different indicators should the Board use, and why?

Question 4: At what level should the threshold for each indicator be set, and why? Commenters are encouraged to provide data supporting their recommendations.

Question 5: The Board is considering whether Category II standards should apply based on a firm's weighted short-term wholesale funding, nonbank assets, and off-balance sheet exposure, using a higher threshold than the $75 billion that would apply for Category III standards, in addition to the thresholds discussed above based on asset size and cross-jurisdictional activity. For example, a firm could be subject to Category II standards if one or more of these indicators equaled or exceeded a level such as $100 billion or $200 billion. A threshold of $200 billion would represent at least 30 percent and as much as 80 percent of total assets for firms with between $250 billion and $700 billion in assets. If the Board were to adopt additional indicators for purposes of identifying firms that should be subject to Category II standards, at what level should the threshold for each indicator be set, and why? Commenters are encouraged to provide data supporting their recommendations.

C. Alternative Scoping Criteria

An alternative approach for assessing the risk profile and systemic footprint of a banking organization for purposes of

assets of $100 billion or more to report this information, as well.

[59] *See* William F. Bassett, Simon Gilchrist, Gretchen C. Weinbach, Egon Zakrajšek, "Improving Our Ability to Monitor Bank Lending," in Risk Topography: Systemic Risk and Macro Modeling 149–161 (Markus Brunnermeier and Arvind Krishnamurthy, eds. 2014), available at: *http://www.nber.org/chapters/c12554.*

[60] *See, e.g.,* Sheri M. Markose, Systemic Risk from Global Financial Derivatives: A Network Analysis of Contagion and its Mitigation with Super-Spreader Tax, IMF Working Papers (Nov. 30, 2012), available at: *https://www.imf.org/en/Publications/WP/Issues/2016/12/31/Systemic-Risk-from-Global-Financial-Derivatives-A-Network-Analysis-of-Contagion-and-Its-40130.*

[61] To address these risks, the agencies have established restrictions relating to the qualified financial contracts of U.S. GSIBs, the insured depository institution subsidiaries of U.S. GSIBs, and the U.S. operations of systemically important foreign banking organizations. *See* 12 CFR part 252, subpart I (Board); 12 CFR part 47 (OCC); and 12 CFR part 382 (FDIC). That rule does not apply to savings and loan holding companies or to other large bank holding companies.

[62] *See, e.g.,* The Orderly Liquidation of Lehman Brothers Holdings Inc. under the Dodd-Frank Act, 5 FDIC Quarterly No. 2, 31 (2011), *https://www.fdic.gov/bank/analytical/quarterly/2011-vol5-2/article2.pdf.*

[63] In connection with the proposal, the Board is proposing to add this measure of off-balance sheet exposure to the FR Y–15 reporting form as a separate line item.

tailoring prudential standards would be to use a single, comprehensive score. The Board uses a GSIB identification methodology (scoring methodology) to identify global systemically important bank holding companies and apply risk-based capital surcharges to these firms. The Board could use this same scoring methodology to tailor prudential standards for large, but not globally systemic, bank holding companies.

The scoring methodology calculates a GSIB's capital surcharge under two methods.[64] The first method is based on the sum of a firm's systemic indicator scores reflecting its size, interconnectedness, cross-jurisdictional activity, substitutability, and complexity (method 1). The second method is based on the sum of these same measures of risk, except that the substitutability measures are replaced with a measure of the firm's reliance on short-term wholesale funding (method 2).[65]

The Board designed the scoring methodology to provide a single, comprehensive, integrated assessment of a large bank holding company's systemic footprint. Accordingly, the indicators in the scoring methodology measure the extent to which the failure or distress of a bank holding company could pose a threat to financial stability or inflict material damage on the broader economy. The indicators used in the scoring methodology also could be used to help identify banking organizations that have heightened risk profiles and would closely align with the risk-based factors specified in section 165 of the Dodd-Frank Act for applying enhanced prudential standards and differentiating among firms to which the enhanced prudential standards apply.[66] Importantly, large bank holding companies already submit to the Board periodic public reports on their indicator scores in the scoring methodology. Accordingly, use of the scoring methodology more broadly for tailoring of prudential standards would promote transparency and would economize on compliance costs for large bank holding companies.

Under the alternative scoring approach, a banking organization's size and either its method 1 or method 2 score from the scoring methodology would be used to determine which category of standards would apply to the firm. In light of the changes made by EGRRCPA, the Board conducted an analysis of the distribution of method 1 and method 2 scores of bank holding companies and covered savings and loan holding companies with at least $100 billion in total assets.[67]

Category I: As under the proposal and under the Board's existing enhanced prudential standards framework, Category I standards would continue to apply to U.S. GSIBs, which would continue to be defined as U.S. banking organizations with a method 1 score of 130 or more.

Category II: Category II firms are defined in the proposal as those whose failure or distress could impose costs on the U.S. financial system and economy that are higher than the costs imposed by the failure or distress of an average banking organization with total consolidated assets of $250 billion or more.

In selecting the ranges of method 1 or method 2 scores that could define the application of Category II standards, the Board considered the potential of a firm's material distress or failure to disrupt the U.S. financial system or economy. As noted in section III.A of this Supplementary Information section, during the financial crisis, significant losses at Wachovia Corporation, which had $780 billion in total consolidated assets at the time of being acquired in distress, had a destabilizing effect on the financial system. The Board estimated method 1 and method 2 scores for Wachovia Corporation, based on available data, and also calculated the scores of firms with more than $250 billion in total consolidated assets that are not U.S. GSIBs assuming that each had $700 billion in total consolidated assets (the asset size threshold used to define Category II in the Board's main proposal). The Board also considered the outlier method 1 and method 2 scores for firms with more than $250 billion in total consolidated assets that are not U.S. GSIBs.[68]

Based on this analysis, the Board would apply Category II standards to any non-GSIB banking organization with at least $100 billion in total consolidated assets and with a method 1 score between 60 and 80 or a method 2 score between 100 to 150. If the Board adopts a final rule that uses the scoring methodology to establish tailoring thresholds, the Board would set a single score within the listed ranges for application of Category II standards. The Board invites comment on what score within these ranges would be appropriate.

Category III: As noted, section 165 of the Dodd-Frank Act requires the Board to apply enhanced prudential standards to any bank holding company with total consolidated assets of $250 billion or more and authorizes the Board to apply these standards to bank holding companies with between $100 billion and $250 billion in total consolidated assets if the Board makes certain statutory findings. To determine a scoring methodology threshold for application of Category III standards to firms with between $100 billion and $250 billion in total consolidated assets, the Board considered the scores of these firms as compared to the scores of firms with greater than $250 billion in total consolidated assets that are not U.S. GSIBs. Based on this analysis, the Board determined that, under a scoring methodology approach to tailoring, Category III standards would be applied to banking organizations with total consolidated assets between $100 billion and $250 billion that have a method 1 score between 25 to 45. Banking organizations with a score in this range would have a score similar to that of the average firm with greater than $250 billion in total consolidated assets. Using method 2 scores, the Board would apply Category III standards to any banking organization with assets between $100 billion and $250 billion that have a method 2 score between 50 to 85. Again, if the Board were to adopt the scoring methodology for tailoring in its final rule, the Board would pick a single score within the listed ranges. The Board invites comment on what score within these ranges would be appropriate.

Category IV: Under a score-based approach, category IV standards would apply to firms with at least $100 billion in total assets that do not meet any of the thresholds specified for Categories I through III (that is, a method 1 score of less than 25 to 45 or a method 2 score of less than 50 to 85).

Question 6: What are the advantages and disadvantages to use of the scoring methodology and category thresholds described above relative to the proposed thresholds?

[64] *See* 12 CFR part 217, subpart H.

[65] For more discussion relating to the scoring methodology, please see the Board's final rule establishing the scoring methodology. *See* Regulatory Capital Rules: Implementation of Risk-Based Capital Surcharges for Global Systemically Important Bank Holding Companies, 80 FR 49082 (Aug. 14, 2015).

[66] *See supra* note 43.

[67] In conducting its analysis, the Board considered method 1 and method 2 scores as of December 31, 2017. Consistent with the thresholds in EGRRCPA, the Board considered the scores of bank holding companies and covered savings and loan holding companies with total consolidated assets of $100 billion or more but less than $250 billion, $250 billion or more that are not GSIBs, and GSIBs.

[68] Outliers can be determined by a number of statistical methods. For these purposes, the Board computed an outlier as the third quartile plus three times the interquartile range of method 1 and method 2 scores of these U.S. bank holding companies and covered savings and loan holding companies.

Question 7: If the Board were to use the scoring methodology to differentiate non-GSIB banking organizations for purposes of tailoring prudential standards, should the Board use method 1 scores, method 2 scores, or both?

Question 8: If the Board adopted the scoring methodology, what would be the advantages or disadvantages of the Board requiring firms to calculate their scores at a frequency greater than annually, including, for example, requiring a firm to calculate its score on a quarterly basis?

Question 9: With respect to each category of firms described above, at what level should the method 1 or method 2 score thresholds be set and why, and discuss how those levels could be impacted by considering additional data, or by considering possible changes in the banking system. Commenters are encouraged to provide data supporting their recommendations.

Question 10: What are the advantages and disadvantages in using the scoring methodology to categorize firms with systemic footprints smaller than the GSIBs for purposes of tailoring prudential standards?

Question 11: What other approaches should the Board consider in setting thresholds for tailored prudential standards?

D. Determination of Applicable Category of Standards

Under the proposal, a bank holding company or covered savings and loan holding company with total consolidated assets of $100 billion or more would be required to determine the category of standards to which it is subject. The proposal would add certain defined terms to the enhanced prudential standards rule and the Board's rule on savings and loan holding companies [69] to implement the proposed categories. U.S. GSIBs would continue to be identified using the Board's GSIB surcharge methodology, and the proposal would refer to these firms as global systemically important BHCs, consistent with the term used elsewhere in the Board's regulations.[70] The proposal would also add defined terms for firms subject to Category II, III, or IV standards as Category II banking organizations, Category III banking organizations, or Category IV banking organizations, respectively.

Firms that would be subject to the proposal would be required to report size and other risk-based indicators on a quarterly basis. In order to capture significant changes in a firm's risk profile, rather than temporary fluctuations, a category of standards would apply to a firm based on the average levels of each indicator over the preceding four calendar quarters.[71] A firm would remain subject to a category of standards until the firm no longer meets the indicators for its current category in each of the four most recent calendar quarters, or until the firm meets the criteria for another category of standards based on an increase in the average value of one or more indicators over the preceding four calendar quarters. This approach would be consistent with the existing applicability and cessation requirements of the enhanced prudential standards rule.[72] Changes in requirements that result from a change in category would take effect on the first day of the second quarter following the change in the firm's category. For example, a firm that changes from Category IV to Category III based on an increase in the average value of its indicators over the first, second, third, and fourth quarters of a calendar year would be subject to Category III standards beginning on April 1 (the first day of the second quarter) of the following year.

Question 12: What are the advantages and disadvantages of a firm calculating its category on a quarterly basis? Discuss whether calculation on an annual basis would be more appropriate and why.

Question 13: What are the advantages and disadvantages of the proposed transition period for each of the standards in each of the categories? What would be the advantages or disadvantages of providing additional time to conform to new requirements? If a firm changes category because of an increase in one or more risk-based indicators, discuss the advantages and disadvantages of providing an additional quarter before applying the new category's standards.

IV. Enhanced Prudential Standards for Bank Holding Companies and Depository Savings and Loan Holding Companies

A. Category I Standards

U.S. GSIBs are subject to the most stringent prudential standards relative to other firms, which reflects the heightened risks these firms pose to U.S. financial stability. The proposal would make no changes to the requirements applicable to U.S. GSIBs set forth in the enhanced prudential standards rule, except to implement one change, consistent with EGRRCPA, as described below.

With respect to capital, U.S. GSIBs would remain subject to the most stringent capital planning and stress testing requirements, including the qualitative and quantitative assessment of a firm's capital plan through CCAR, annual supervisory stress testing, FR Y–14 reporting requirements, and a requirement to conduct company-run stress tests on an annual basis. The most stringent liquidity requirements would also continue to apply, including liquidity risk management, monthly internal liquidity stress testing, and liquidity buffer requirements under the enhanced prudential standards rule and reporting of certain liquidity data for each business day through the Complex Institution Liquidity Monitoring Report (FR 2052a). In addition, the most stringent single-counterparty credit limits would continue to apply to U.S. GSIBs without change. Under the interagency capital and liquidity proposal, U.S. GSIBs would remain subject to a capital surcharge and enhanced supplementary leverage ratio standards, as well as the LCR requirement and proposed NSFR requirement.

Prior to the enactment of EGRRCPA, section 165 of the Dodd-Frank Act required a bank holding company subject to enhanced prudential standards to conduct semi-annual company-run stress tests.[73] EGRRCPA revised this requirement to ''periodic.'' [74] In the Board's experience, the mandatory mid-cycle stress test has provided modest risk management benefits and limited incremental information to market participants beyond what the annual company-run stress test provides. Accordingly, the proposal would remove the mid-cycle stress test requirement for all bank holding companies, including U.S. GSIBs, effective in the 2020 cycle. The proposal would maintain the requirement for a U.S. GSIB to conduct an annual company-run stress test.

Question 14: What modifications, if any, should the Board consider to the proposed Category I prudential standards, and why?

B. Category II Standards

The failure or distress of firms that would be subject to Category II standards could impose significant costs on the U.S. financial system and

[69] *See* 12 CFR part 238.

[70] *See, e.g.,* 12 CFR part 217.

[71] With respect to a firm that has reported an indicator for less than four quarters, the proposal would refer to the average of the most recent quarter or quarters.

[72] *See, e.g.,* 12 CFR 252.43.

[73] 12 U.S.C. 5365(i)(2)(A) (2012).

[74] EGRRCPA section 401(a)(5)(B)(i)(I) (to be codified at 12 U.S.C. 5365(i)(2)(A)).

economy, although these firms generally do not present the same degree of systemic risk as U.S. GSIBs. Their size and cross-jurisdictional activity present risks that require more sophisticated capital planning and greater supervisory oversight through stress testing.[75] Further, size and cross-jurisdictional activity can present particularly heightened challenges in the case of a liquidity stress, which can create both financial stability and safety and soundness risks. For example, a very large firm that engages in asset fire sales to meet short-term liquidity needs is more likely to transmit distress on a broader scale because of the greater volume of assets it could sell in a short period of time. Similarly, a firm with significant international activity may be more exposed to the risk of ring-fencing of liquidity resources by one or more jurisdictions that could impede its ability to move liquidity to meet outflows.

Like Category I, Category II would apply the most stringent capital planning and stress testing requirements set forth in the capital plan and enhanced prudential standards rules. The Board would continue to require a firm subject to Category II standards to submit an annual capital plan, and the Federal Reserve would conduct a qualitative and quantitative assessment of the firm's capital plan.[76] Consistent with EGRRCPA, the proposal would maintain annual supervisory stress testing for these firms and require company-run stress testing on an annual basis.[77] In addition, these firms would remain subject to the existing FR Y–14 reporting requirements. Firms subject to Category II standards would remain subject to the most stringent liquidity risk management, stress testing, and buffer requirements under the enhanced prudential standards rule and would be subject to a requirement to report liquidity data for each business day on the FR 2052a.[78]

With respect to single-counterparty credit limits, a U.S. bank holding company with $250 billion or more in total consolidated assets that is not a U.S. GSIB is currently subject to a limit on aggregate net credit exposure to a single counterparty of no more than 25 percent of tier 1 capital.[79] The proposal would modify this threshold to apply the limitation to all firms that would be subject to Category II or III requirements, based on the risks indicated by the firm's high level of cross-jurisdictional activity, weighted short-term wholesale funding, nonbank assets, or off-balance sheet exposure, in addition to the firm's size. This change would align the thresholds for application of single-counterparty credit limits requirements with the proposed thresholds for other prudential standards, which promotes consistency and simplicity across the Board's regulatory framework for large U.S. banking organizations. As discussed above, the proposed indicators represent measures of vulnerability to safety and soundness and financial stability risks, which may be exacerbated if a firm has outsized credit exposure to a single counterparty. Accordingly, application of the limits may help to mitigate this risk. For example, firms that have high reliance on weighted short-term wholesale funding or significant concentration of nonbank assets or off-balance sheet exposure often also have a high degree of interconnectedness with other market participants, and may be likely to transmit their distress or failure to those participants. Single-counterparty credit limits may reduce the extent of that transmission. The limitation on a firm's exposure to a single counterparty also may reduce the likelihood that distress at another firm would be transmitted to the covered firm.

In the interagency capital and liquidity proposal, the Board, with the other agencies, is proposing to apply capital and liquidity standards to firms subject to Category II that are based on standards developed by the BCBS, subject to notice and comment rulemaking in the United States, and are appropriate for very large or internationally active banking organizations. These standards would include the full LCR and proposed NSFR requirements and advanced approaches capital requirements.

Question 15: What modifications, if any, should the Board consider to the proposed Category II prudential standards, and why?

C. Category III Standards

The Board's current regulatory framework generally applies the same prudential standards to all non-GSIB bank holding companies or covered savings and loan holding companies with $250 billion or more in total consolidated assets. For example, advanced approaches capital requirements, the supplementary leverage ratio, and the LCR requirement generally apply to firms with $250 billion or more in total consolidated assets or $10 billion or more in foreign exposure. The proposed framework would further differentiate among firms with $250 billion or more in total consolidated assets, consistent with EGRRCPA.[80] In particular, Categories I and II would include standards generally consistent with standards developed by the BCBS, whereas Category III would include fewer such standards, based on the relatively lower risk profiles and lesser degree of cross-border activity of firms that would be subject to Category III standards. For example, in the interagency capital and liquidity proposal, the agencies are proposing not to apply advanced approaches capital requirements and the requirement to recognize most elements of accumulated other comprehensive income (AOCI) in regulatory capital to firms subject to Category III (and Category IV) standards.

Category III standards would apply to firms with total consolidated assets of $250 billion or more that do not meet the criteria for Category I or II, as well as to certain firms with less than $250 billion in total consolidated assets, based on their risk profile. As noted above, section 165 of the Dodd-Frank

[75] *See* section III of this **SUPPLEMENTARY INFORMATION** section.

[76] For firms subject to Category II standards that have less than $250 billion in average total consolidated assets and less than $75 billion in average total nonbank assets, the proposal would increase the stringency of the capital planning standards by including these firms in the CCAR qualitative assessment.

[77] The proposal would remove the mid-cycle company-run stress testing requirement for firms subject to Category II standards the reasons discussed above for U.S. GSIBs under Category I.

[78] The proposal would revise the FR 2052a reporting requirements to require all firms subject to Category II standards to report the FR 2052a on a daily basis (daily reporting requirements would also apply to firms subject to Category I standards and firms subject to Category III standards that have weighted short-term wholesale funding of $75 billion or more). Under current reporting requirements, U.S. firms with $700 billion or more in total consolidated assets or $10 trillion or more in assets under custody must file the FR 2052a on each business day, while all other firms must file the FR 2052a on a monthly basis. For firms subject to Category II standards that have less than $700 billion in total consolidated assets, the proposal would increase the frequency of FR 2052a reporting from monthly to daily. Reporting of daily liquidity data would facilitate greater supervisory monitoring based on these firms' liquidity risk profile, as indicated by their size and cross-jurisdictional activity. The proposal would simplify the FR 2052a reporting thresholds by eliminating the threshold of $10 trillion or more in assets under custody used to identify daily filers, as a firm that meets this threshold would likely also meet one of the other proposed thresholds for daily reporting requirements.

[79] Single-Counterparty Credit Limits for Bank Holding Companies and Foreign Banking Organizations, 83 FR 38460, 38497 (Aug. 6, 2018) (to be codified at 12 CFR 252.72(a)).

[80] As noted above, Category IV standards would apply only to firms with less than $250 billion in total consolidated assets.

Act, as amended by EGRRCPA, requires the Board to apply enhanced risk-based and leverage capital requirements and annual supervisory stress testing to U.S. GSIBs and bank holding companies with $250 billion or more in total consolidated assets.[81] In addition, section 165(a)(2)(C) authorizes the Board to apply enhanced prudential standards to bank holding companies with total consolidated assets of $100 billion or more but less than $250 billion. Consistent with this authority, the proposal would apply enhanced standards to firms in this asset range that have $75 billion or more in weighted short-term wholesale funding, nonbank assets, or off-balance sheet exposure.[82]

As discussed in section III of this Supplementary Information section, weighted short-term wholesale funding, nonbank assets, and off-balance sheet exposure are factors that contribute to the systemic risk profile and safety and soundness risk profile of a firm. Each of these factors heightens the need for sophisticated capital planning and more intensive supervisory oversight through CCAR, as well as sophisticated measures to monitor and manage liquidity risk.

The proposal would largely maintain the existing capital planning and stress testing standards under the capital plan and enhanced prudential standards rules for firms that would be subject to Category III standards, but remove the mid-cycle company-run stress testing requirement and require public disclosure of company-run stress test results every other year rather than annually. The proposal would require a firm subject to Category III standards to submit an annual capital plan and be subject to the qualitative and quantitative assessment of its capital plan through CCAR.[83] The Board would continue to conduct annual supervisory stress testing of firms subject to Category III standards.

In connection with capital planning requirements, these firms would continue to be required to submit confidential data on the existing schedule for FR Y–14 reports. A firm subject to Category III standards would also be required to conduct an internal stress test (and report the results on the FR Y–14A) in connection with its annual capital plan submission. The internal stress tests and the FR Y–14 reports are inputs into the supervisory stress test and the CCAR qualitative assessment. Moreover, the internal stress tests represent an important risk management capability for firms whose size or other risk factors would meet or exceed the Category III thresholds.

The proposal would require firms subject to Category III standards to publicly disclose the results of company-run stress tests only once every two years, rather than annually.[84] Because firms subject to Category III standards would continue to be required to submit an annual capital plan (including the results of an internal capital stress test) and would be subject to annual supervisory stress testing, a reduction in the frequency of required disclosure of company-run stress test results should reduce compliance costs without a material increase in safety and soundness or financial stability risks.[85] Public disclosure of supervisory stress test results would continue to apply on an annual basis for firms subject to Category III standards.

In the interagency capital and liquidity proposal, the Board, with the other agencies, is separately proposing that firms subject to Category III standards would not be subject to advanced approaches capital requirements and the requirement to recognize most elements of AOCI in regulatory capital. Under that proposal, these firms would be subject to U.S. generally applicable risk-based capital requirements, including capital buffers, as well as the U.S. leverage ratio and the supplementary leverage ratio. The capital buffers would include any applicable countercyclical capital buffer requirement.[86]

The proposal would maintain the existing liquidity risk management, monthly internal liquidity stress testing, and liquidity buffer requirements under the enhanced prudential standards rule for firms subject to Category III standards. The liquidity risk management requirements reflect important elements of liquidity risk management in normal and stressed conditions, such as cash flow projections and contingency funding plan requirements. Similarly, internal liquidity stress testing requires a firm to model liquidity inflows and outflows based on its own risk profile, while ensuring that the firm maintains a level of conservatism in its liquidity stress testing.

The proposal would require a firm subject to Category III standards to report daily or monthly FR 2052a liquidity data depending on the firm's level of weighted short-term wholesale funding. Most firms that would be subject to this category currently report monthly FR 2052a data. However, the Board is proposing to require a firm that has $75 billion or more in weighted short-term wholesale funding to submit FR 2052a data for each business day. A heightened reporting frequency would facilitate greater supervisory monitoring based on these firms' heightened liquidity risk exposure. For example, a greater reliance on short-term wholesale funding may indicate more frequent rollover of liabilities and greater volatility in the funding profile of a firm. Because these firms are more prone to sudden swings in their liquidity position, there is a greater need for supervisory monitoring of their liquidity risk.

Similarly, in the interagency capital and liquidity proposal, the Board and the other agencies are proposing to apply tailored LCR and NSFR requirements for firms subject to Category III standards based on whether a firm has $75 billion or more in weighted short-term wholesale funding.

As discussed above, the proposed Category III standards would include the single-counterparty credit limit requirements that currently apply to bank holding companies with $250

[81] *See* EGRRCPA section 401(a)(1) (to be codified at 12 U.S.C. 5365(a)); 12 U.S.C. 5365(b)(1)(A) (2012).

[82] Section 401(e) of EGRRCPA also requires the Board to conduct periodic supervisory stress tests of bank holding companies and FBOs with $100 billion or more, but less than $250 billion, in total consolidated assets. EGRRCPA section 401(e).

[83] For firms subject to Category III standards that have less than $250 billion in average total consolidated assets and less than $75 billion in average total nonbank assets, the proposal would increase the stringency of the capital planning standards by including these firms in the CCAR qualitative assessment.

[84] The company-run stress testing requirement under the enhanced prudential standards rule includes a mandatory public disclosure component, whereas the capital plan rule does not. *Compare* 12 CFR 252.58 *with* 12 CFR 225.8. The proposal would maintain the annual internal stress test requirement under the capital plan rule, but reduce the required frequency of company-run stress testing under the enhanced prudential standards rule to every other year. As a result, in the intervening year between company-run stress tests under the enhanced prudential standards rule, the proposed Category III standards would require a firm to conduct an internal capital stress test only as part of its annual capital plan submission, without required public disclosure.

[85] As noted above, EGRRCPA altered the frequency of company-run stress testing to ''periodic.'' Consistent with EGRRCPA, the Board would differentiate among firms by requiring firms subject to Category I and II standards to conduct and publicly report the results of a company-run stress test more frequently (annually) than firms subject to Category III standards (every two years), based on the differences in size, cross-jurisdictional activity, complexity, and risk profile indicated by the scoping criteria for each of these categories. *See* EGRRCPA section 401(a)(1)(B)(i) (to be codified at 12 U.S.C. 5365(a)(2)(A)).

[86] A firm that operates below its capital buffer requirement would be subject to limitations on capital distributions and discretionary bonus payments. *See* 12 CFR 217.11.

billion or more in total consolidated assets.

Question 16: What modifications, if any, should the Board consider to the proposed Category III prudential standards, and why?

Question 17: What are the advantages and disadvantages of reducing the frequency to every other year of the requirement for firms subject to Category III standards to conduct and publicly disclose the results of a company-run stress test?

D. Category IV Standards

Under the proposal, Category IV standards would apply to firms with $100 billion or more in total consolidated assets that do not meet the criteria for Categories I, II, or III. The failure or distress of one or more firms that would be subject to Category IV standards, while not likely to have as great of an impact on financial stability as the failure or distress of a firm subject to Category I, II or III standards, could nonetheless have a more significant negative effect on economic growth and employment relative to the failure or distress of smaller firms.[87] During the financial crisis, firms of similar size and risk profiles to firms that would be subject to Category IV standards, including Countrywide Financial and National City Corp, experienced losses that exceeded three percent of risk-weighted assets.[88] While the failure or distress of these firms did not have as significant an effect on U.S. financial stability as the failure or distress of financial companies with larger systemic footprints, they still contributed to instability and stress in the system.

In addition, these firms generally have greater scale and operational and managerial complexity than smaller firms and, as a result, greater safety and soundness risks. Specifically, these firms operate at a larger scale, have broader geographic scope, and typically have more layers of management than a smaller banking organization. These differences can increase the likelihood that such a firm has operational or control gaps that would raise its probability of severe stress or default if left unaddressed, as well as the risk that such gaps will go undetected. The Category IV standards would help promote the safety and soundness of these firms.

Relative to current requirements under the enhanced prudential standards rule, the proposed Category IV standards would maintain core elements of the liquidity and capital standards, and tailor these requirements to reflect these firms' lower risk profile and lesser degree of complexity relative to other large banking organizations.

Category IV standards would include liquidity risk management, stress testing, and buffer requirements. Effective liquidity risk management helps to ensure a banking organization's ability to meet its obligations and continue operations in times of stress. The financial crisis revealed significant weaknesses in liquidity buffers and liquidity risk management practices throughout the financial system.[89] In particular, many banking organizations did not have adequate risk management practices to take into account the liquidity stresses of individual products or business lines, had not adequately accounted for draws from off-balance sheet exposures, or had not adequately planned for a disruption in funding sources.

The liquidity standards help to ensure that these firms have effective governance and risk management processes to measure and estimate liquidity needs, and sufficient liquidity positions to cover risks and exposures and to support activities through a range of conditions. In particular, internal liquidity stress testing, liquidity buffer, and liquidity risk management requirements help to ensure that a large banking organization is equipped to manage its liquidity risk and to withstand disruptions in funding sources.

Under the proposal, liquidity risk management and liquidity stress testing requirements would be further tailored to better reflect the risk profiles of banking organizations subject to Category IV standards. As a class, firms that would be subject to Category IV standards tend to have more stable funding profiles, as measured by their lower level of weighted short-term wholesale funding, and lesser degrees of liquidity risk and operational complexity associated with size, cross-jurisdictional activity, nonbank assets, and off-balance sheet exposure. Accordingly, the proposal would reduce the frequency of required internal liquidity stress testing to at least quarterly, rather than monthly.[90] Category IV standards would continue to require that a firm maintain a liquidity buffer that is sufficient to meet the projected net stressed cash-flow need over the 30-day planning horizon under the firm's internal liquidity stress test.

For these same reasons, the proposal would modify certain liquidity risk management requirements under the enhanced prudential standards rule for firms subject to Category IV standards. First, the proposal would require a firm subject to this category of standards to calculate its collateral positions on a monthly basis, rather than a weekly basis as currently required. Firms that would meet the criteria for Category IV standards tend to be less reliant on activities, such as secured funding and borrowing (*e.g.,* repurchase agreements and reverse repurchase agreements) and derivatives trading, for which greater frequency in updating collateral positions is appropriate. Second, the current enhanced prudential standards rule requires covered bank holding companies to establish risk limits to monitor sources of liquidity risk.[91] The proposal would clarify that firms subject to Category IV standards, due to their lesser size, complexity, and other risk factors relative to other large banking organizations, need not establish limits for activities that are not relevant to the firm, but must establish limits that are consistent with the firm's established liquidity risk tolerance and that reflect the firm's risk profile, complexity, activities, and size. Third, Category IV standards would specify fewer required elements of monitoring of intraday liquidity risk exposures,[92] consistent with the risk profile, complexity, activities, and size of firms subject to this category of standards. This change would reflect the generally more stable funding profiles and lower degrees of intraday risk and operational complexity of these firms relative to larger and more complex firms.

The internal liquidity stress testing, liquidity buffer, and liquidity risk management requirements are more tailored to a firm's risk profile and scope of operations than the standardized quantitative limits of the LCR rule. Continuing to apply these tailored liquidity requirements as part of Category IV standards would maintain these firms' risk management and

[87] *See* Lorenc and Zhang, *supra* note 49, and section III of this SUPPLEMENTARY INFORMATION section.

[88] *See* Strah, Hynes, and Shaffer, The Impact of the Recent Financial Crisis on the Capital Positions of Large U.S. Financial Institutions: An Empirical Analysis, available at: *https://www.bostonfed.org/publications/supervision-and-credit/2013/capital-positions.aspx.*

[89] *See* BCBS, Liquidity Risk: Management and Supervisory Challenges (Feb. 2008), *https://www.bis.org/publ/bcbs136.pdf; see also* BCBS, Principles for Sound Liquidity Risk Management and Supervision (Sept. 2008), *https://www.bis.org/publ/bcbs144.htm.*

[90] Firms subject to Category IV standards would remain subject to monthly, tailored FR 2052a liquidity reporting requirements.

[91] 12 CFR 252.34(g).

[92] *See* 12 CFR 252.34(h)(3).

resiliency, which supports their individual safety and soundness and reduces risks to U.S. financial stability. In the interagency capital and liquidity proposal, the Board, with the other agencies, is proposing to no longer apply the LCR and proposed NSFR rules to firms subject to Category IV standards.

The proposal would also apply tailored capital standards for firms subject to Category IV standards. Specifically, the proposal would revise the frequency of supervisory stress testing to every other year and eliminate the requirement for firms subject to Category IV standards to conduct and publicly report the results of a company-run stress test. Supervisory stress testing on a two-year cycle would implement section 401(e) of EGRRCPA, taking into account the risk profile of these firms relative to larger, more complex firms. The Board is proposing to maintain existing FR Y–14 reporting requirements for firms subject to Category IV standards in order to provide the Board with the data it needs to conduct supervisory stress testing and inform the Board's ongoing supervision of these firms.[93]

The Board continues to expect these firms to have sound capital positions and capital planning practices. Capital is central to a firm's ability to absorb unexpected losses and continue to lend to creditworthy businesses and consumers. A firm must maintain sufficient levels of capital to support the risks associated with its exposures and activities to be resilient. As a result, a firm's processes for managing and allocating its capital resources are critical to its financial strength and resiliency, and also to the stability and effective functioning of the U.S. financial system. In addition, section 401(e) of EGRRCPA requires the Board to conduct periodic supervisory stress tests of bank holding companies and foreign banking organizations with $100 billion or more, but less than $250 billion, in total consolidated assets.

In April 2018, the Board issued a proposal to apply stress buffer requirements to large bank holding companies.[94] As part of a future capital plan proposal, the Board intends to propose that the stress buffer requirements under Category IV would be calculated in a manner that aligns with the proposed two-year supervisory stress testing cycle. Specifically, the Board plans to propose that the stress buffer requirements would be updated annually to reflect planned distributions, but only every two years to reflect stress loss projections.[95]

As part of the capital plan proposal, the Board intends to provide greater flexibility to these firms to develop their annual capital plans. Under this potential approach, Category IV standards would require a firm to include in its capital plans estimates of revenues, losses, reserves, and capital levels based on a forward-looking analysis, taking into account the firm's idiosyncratic risks under a range of conditions, but would not require the firm to submit the results of company-run stress tests on the FR Y–14A. This change would align with the proposed removal of company-run stress testing requirements from Category IV standards under the enhanced prudential standards rule. The Board also intends at a future date to revise its guidance relating to capital planning to align with the proposed categories of standards and to allow more flexibility in how firms subject to Category IV standards perform capital planning.

Currently, firms that meet the proposed criteria for Category IV standards are not subject to the single-counterparty credit limits rule. The proposal would retain this treatment.

Question 18: What modifications, if any, should the Board consider to the proposed Category IV prudential standards, and why?

Question 19: What are the advantages and disadvantages of applying the prudential standards outlined here to banking organizations that meet the proposed criteria for Category IV standards? What prudential standards are appropriate for these firms, based on their risk profiles?

Question 20: What are the advantages and disadvantages of conducting a supervisory stress test every other year, rather than annually, and eliminating the company-run stress testing requirement for these firms? How should the Board think about providing these firms with additional flexibility in their capital plans?

Question 21: The proposal would revise the frequency of supervisory stress testing for firms subject to Category IV standards to every other year. What would be the advantages or disadvantages of the Board conducting supervisory stress tests for these firms on a more frequent basis?

Question 22: What are the advantages and disadvantages of the proposed liquidity risk management, liquidity stress testing requirements, and liquidity buffers for these firms?

Question 23: In the interagency capital and liquidity proposal, the agencies are proposing not to apply the LCR rule and proposed NSFR rule to firms subject to Category IV standards. What are the advantages and disadvantages of this approach? To what extent would scoping out banking organizations subject to Category IV standards from the LCR and proposed NSFR rules affect the safety and soundness of individual banking organizations or raise broader financial stability concerns? To what extent does maintaining liquidity risk management and internal liquidity stress testing and buffer requirements at the holding company level for these firms under the proposal mitigate these concerns? What are the advantages and disadvantages of maintaining standardized liquidity requirements, such as the current LCR requirement and proposed NSFR requirement, for firms subject to Category IV standards? If the Board were to apply some or all of the LCR and proposed NSFR requirements to these firms, what, if any, other regulatory requirements should the Board consider reducing or removing?

E. Covered Savings and Loan Holding Companies

Currently, covered savings and loan holding companies are subject to the Board's regulatory capital rule and LCR rule, and would be subject to the proposed NSFR rule, in the same manner as a similarly situated bank holding company. However, unlike bank holding companies of comparable size and risk profile, covered savings and loan holding companies are not otherwise subject to capital planning or supervisory stress testing requirements.[96] Under the proposal, a covered savings and loan holding company would be subject to supervisory stress testing; a requirement to conduct and publicly disclose the results of a company-run stress test; risk

[93] The Board plans to separately propose reductions in FR Y–14 reporting requirements for firms subject to Category IV standards as part of the capital plan proposal at a later date, to align with changes the Board would propose to the capital plan rule.

[94] Amendments to the Regulatory Capital, Capital Plan, and Stress Test Rules, 83 FR 18160 (proposed April 25, 2018).

[95] Under the capital plan rule, the Board may require a firm to resubmit its capital plan if there has been, or will likely be, a material change in the firm's risk profile, financial condition, or corporate structure. *See* 12 CFR 225.8(e)(4). In the event of a resubmission, the Board may conduct a quantitative evaluation of that capital plan. As noted in the April 2018 proposal, the Board may recalculate a firm's stress buffer requirements whenever the firm chooses or is required to resubmit its capital plan. 83 FR 18171.

[96] *See* 12 CFR 217.1(c)(1)(iii) (applicability of part 217), .2 (defining a covered savings and loan holding company); 12 CFR part 249; NSFR proposed rule.

management and risk committee requirements; liquidity risk management, stress testing, and buffer requirements; and single-counterparty credit limits in the same manner as a similarly situated bank holding company would be subject under the enhanced prudential standards rule.[97]

For capital, these standards would include supervisory stress testing and, for Categories II and III, company-run stress testing requirements. Similar to a bank holding company, the scale, managerial and operational complexity, and other risk factors indicated by the scoping criteria for the proposed categories warrant more sophisticated capital planning, more frequent company-run stress testing, and greater supervisory oversight through supervisory stress testing to further the safety and soundness of these firms. To implement the supervisory stress test, the Board is proposing to require covered savings and loan holding companies to report the FR Y–14 report in the same manner as a bank holding company.[98] In addition, in April 2018, the Board issued a proposal to apply stress buffer requirements to large bank holding companies and intermediate holding companies. As part of the capital plan proposal, the Board would seek comment on a proposal to apply the proposed stress buffer requirements to covered savings and loan holding companies in the same manner as a bank holding company.

HOLA authorizes the Board to issue regulations that the Board determines are necessary and appropriate to carry out the purposes of section 10 of HOLA, including regulations establishing capital requirements.[99] Like bank holding companies, savings and loan holding companies must serve as a source of strength to their subsidiary savings associations and may not conduct operations in an unsafe and unsound manner. For large banking organizations, including covered savings and loan holding companies, safe and sound operations include robust capital and liquidity risk management. The proposed capital planning and stress buffer requirements would provide covered savings and loan holding companies with comparable benefits to safety and soundness as they provide to bank holding companies subject to the requirements. These requirements help ensure that a firm maintains capital commensurate with its risk profile and activities, so that the firm can meet its obligations to creditors and other counterparties, as well as continue to serve as a financial intermediary through periods of financial and economic stress. Stress testing provides a means to better understand the financial condition of the banking organization and risks within the banking organization that may pose a threat to safety and soundness or the stability of the financial system. The capital plan rule also helps to ensure that a firm has internal processes for assessing its capital adequacy that reflect a full understanding of its risks and ensure that it maintains capital corresponding to those risks to maintain overall capital adequacy. These concepts are fundamental to the safety and soundness of all banking organizations, including covered savings and loan holding companies. In addition, stress tests can provide valuable information to market participants and reduce uncertainty about the financial condition of the participating holding companies under stress.

Currently, with respect to liquidity requirements, covered savings and loan holding companies are subject to the full LCR and proposed NSFR requirements if they have $250 billion or more in assets or $10 billion in on-balance sheet foreign exposure. Covered savings and loan holding companies are subject to the modified LCR and proposed modified NSFR requirements if they have $50 billion or more, but less than $250 billion, in assets and less than $10 billion in foreign exposure.[100] Covered savings and loan holding companies are not currently subject to the liquidity risk management, stress testing, and buffer requirements included in the enhanced prudential standards rule, but are expected to have liquidity risk management processes commensurate with their liquidity risk.[101]

The proposal would extend the liquidity risk management, stress testing, and buffer requirements to covered savings and loan holding companies. Specifically, a covered savings and loan holding company with total consolidated assets of $100 billion or more would be required to conduct internal stress tests at least monthly (or quarterly, for a firm that would be subject to Category IV standards) to measure its potential liquidity needs across overnight, 30-day, 90-day, and 1-year planning horizons during times of instability in the financial markets, and to hold highly liquid assets sufficient to meet the projected 30-day net stressed cash-flow need under internal stress scenarios. A covered savings and loan holding company with total consolidated assets of $100 billion or more also would be required to meet specified corporate governance requirements around liquidity risk management, to produce cash flow projections over various time horizons, to establish internal limits on certain liquidity metrics, and to maintain a contingency funding plan that identifies potential sources of liquidity strain and alternative sources of funding when usual sources of liquidity are unavailable. These proposed requirements are important to ensure that covered savings and loan holding companies have effective governance and risk management processes to determine the amount of liquidity to cover risks and exposures, and sufficient liquidity to support their activities through a range of conditions.

In addition, under the current framework, the single-counterparty credit limits rule applies to U.S. bank holding companies with $250 billion or more in total consolidated assets (other than U.S. GSIBs), but not to covered savings and loan holding companies. In general, that rule limits aggregate net credit exposure to a single counterparty to no more than 25 percent of tier 1 capital.[102]

As discussed above, the proposal would modify the threshold of $250 billion or more in total consolidated assets for U.S. bank holding companies that are not U.S. GSIBs to align with the new proposed thresholds for application

[97] A covered savings and loan holding company would not be subject to Category I standards, as the definition of ''global systemically important BHC'' under the GSIB surcharge rule does not include covered savings and loan holding companies. *See* 12 CFR 217.2.

[98] Covered savings and loan holding companies with total consolidated assets of $100 billion or more would be required to report the FR Y–14M and all schedules of the FR Y–14–Q except for Schedule C—Regulatory Capital Instruments and Schedule D—Regulatory Capital Transitions. These firms would also be required to report the FR Y–14A Schedule E—Operational Risk. Covered savings and loan holding companies subject to Category II or III standards would also be required to submit the FR Y–14A Schedule A—Summary and Schedule F—Business Plan Changes in connection with the company-run stress test requirement.

[99] 12 U.S.C. 1467a(g). *See* section II.B.2 of this **SUPPLEMENTARY INFORMATION** section.

[100] The Board, with the OCC and FDIC, is proposing to amend these applicability thresholds in the interagency capital and liquidity proposal.

[101] *See* Supervision and Regulation Letter SR 10–6, available at *http://www.federalreserve.gov/boarddocs/srletters/2010/sr1006.pdf;* Interagency Policy Statement on Funding and Liquidity Risk Management, 75 FR 13656 (March 22, 2010).

[102] For U.S. GSIBs, the single-counterparty credit limits rule applies a stricter requirement. *See* section IV.B of this **SUPPLEMENTARY INFORMATION** section.

of Category II and III standards. The proposal would apply the single-counterparty credit limit requirements to covered savings and loan holding companies that are subject to Category II or III standards in the same manner that the current rule applies to U.S. bank holding companies with $250 billion or more in total consolidated assets that are not U.S. GSIBs (*i.e.,* the 25 percent of tier 1 capital limit would apply for these firms). This limitation on a savings and loan holding company's exposure to a single counterparty would reduce the likelihood that distress at another firm would be transmitted to the covered savings and loan holding company.

Question 24: What are the advantages and disadvantages of applying prudential standards as outlined here to covered savings and loan holding companies? What additional standards would be appropriate for covered savings and loan holding companies?

Question 25: What are the advantages and disadvantages of covered savings and loan holding companies reporting FR Y–14 data as outlined above?

F. Risk Management and Risk Committee Requirements

Sound, enterprise-wide risk management supports the safe and sound operations of banking organizations and reduces the likelihood of their material distress or failure, and thus promotes financial stability. Section 165(h) of the Dodd-Frank Act requires certain publicly traded bank holding companies to establish a risk committee that is ''responsible for the oversight of the enterprise-wide risk management practices'' and meets other statutory requirements.[103] EGRRCPA amended the thresholds for application of the risk committee requirement to require the Board to apply risk committee requirements to publicly traded bank holding companies with $50 billion or more in total consolidated assets. The Board may also apply risk committee requirements to publicly traded bank holding companies under $50 billion in total consolidated assets, as the Board determines would be necessary or appropriate to promote sound risk management practices.

Under the current enhanced prudential standards rule, bank holding companies with total consolidated assets of $50 billion or more and publicly traded bank holding companies with total consolidated assets of $10 billion or more, but less than $50 billion, must maintain a risk committee that meets specified requirements. Consistent with EGRRCPA, the proposal would raise these thresholds for the risk committee requirement to apply to bank holding companies but would not change the substance of the risk committee requirement for these firms.[104] Under the proposal, a publicly traded or privately held bank holding company with total consolidated assets of $50 billion or more must maintain a risk committee. These standards enhance safe and sound operations by supporting independent risk management and are appropriate for all bank holding companies with total consolidated assets of $50 billion or more. The proposal would eliminate the risk committee requirements that apply for publicly traded U.S. bank holding companies with less than $50 billion in total consolidated assets.

Historically, the Board has assessed the adequacy of bank holding company risk management through the examination process as informed by supervisory guidance; the requirements in section 165(h) supplement, but do not replace, the Board's existing risk management guidance and supervisory expectations.[105] Given the activities and risk profile of bank holding companies with less than $50 billion in total consolidated assets, the Board proposes to review these firms' risk management practices through the supervisory process. The Board would continue to expect that bank holding companies with less than $50 billion in total consolidated assets would establish risk management processes and procedures commensurate with their risks.

In addition to the changes for U.S. bank holding companies, the proposal would apply the same risk committee requirements to covered savings and loan holding companies with $50 billion or more in total consolidated assets as would apply to a U.S. bank holding company of the same size. Specifically, all covered savings and loan holding companies with total consolidated assets of $50 billion or more would be required to establish and maintain a board-level risk committee and to employ a chief risk officer with appropriate expertise and stature, among other requirements. These requirements represent important risk management practices for banking organizations of this size to help ensure that the organization is operating in a safe and sound manner. As discussed above, the financial crisis revealed weaknesses in the risk management practices of large banking organizations, including both bank holding companies and savings and loan holding companies. The risk management requirements of the enhanced prudential standards rule were established to address elements of these weaknesses at bank holding companies.[106] Applying the same minimum standards to covered savings and loan holding companies would accordingly further their safety and soundness by addressing concerns that apply equally to all depository institution holding companies.

V. Changes to Dodd-Frank Act Definitions

The proposal would also make changes to the Board's implementation of certain definitions in the Dodd-Frank Act. The Dodd-Frank Act directed the Board to define the terms ''significant bank holding company'' and ''significant nonbank financial company,'' terms that are used in the credit exposure reports provision in section 165(d)(2).[107] The terms ''significant nonbank financial company'' and ''significant bank holding company'' are also used in section 113 of the Dodd-Frank Act, which specifies that the Financial Stability Oversight Council must consider the extent and nature of a nonbank company's transactions and relationships with other ''significant nonbank financial companies'' and ''significant bank holding companies,'' among other factors, in determining whether to designate a nonbank financial company for supervision by the Board.[108] The Board previously defined ''significant bank holding company'' and ''significant nonbank financial company'' using $50 billion minimum asset thresholds to conform with section 165.[109] In light of

[103] 12 U.S.C. 5363(h).

[104] Because bank holding companies with $50 billion or more, but less than $100 billion, in total consolidated assets would no longer be subject to the liquidity risk management requirements cross-referenced in the current risk committee requirements, the proposal would remove this cross-reference for these firms. In addition, to better organize the enhanced prudential standards rule, the proposal would move the risk committee requirement for bank holding companies with $50 billion or more, but less than $100 billion, in total consolidated assets to subpart C, replacing the current requirements that apply under that subpart for firms with $10 billion or more, but less than $50 billion, in total consolidated assets.

[105] *See* Enhanced Prudential Standards for Bank Holding Companies and Foreign Banking Organizations, 79 FR 17239, 17247 (Mar. 27, 2014).

[106] *Id.*

[107] 12 U.S.C. 5311(a)(7) (2012); EGRRCPA section 401(a)(3) (to be codified at U.S.C. 5365(d)(2)). EGRRCPA changed credit exposure reports from a mandatory to discretionary prudential standard under section 165.

[108] *See* 12 U.S.C. 5323.

[109] 12 CFR 242.4.

EGRRCPA's amendments, the Board proposes to amend these definitions to include minimum asset thresholds of $100 billion, and make other conforming edits in the Board's regulation on definitions in Title I of the Dodd-Frank Act.[110]

Question 26: What are the advantages and disadvantages of setting the minimum asset threshold of these definitions at $100 billion? What would be the advantages and disadvantages if the Board set the minimum asset threshold of these definitions at $250 billion?

VI. Proposed Reporting Changes

The proposal would include changes to the reporting panels and requirements of the FR Y–14, FR Y–15, FR 2052a, FR Y–9C, and FR Y–9LP reporting forms.

The proposal would require covered savings and loan holding companies with $100 billion or more in total consolidated assets to report parts of the FR Y–14. As described above, the proposal would require covered savings and loan holding companies with assets of $100 billion or more to participate in supervisory stress tests, with the frequency of supervisory stress testing depending on the category of standards that apply. Accordingly, the proposal would require all covered savings and loan holding companies with $100 billion or more in total consolidated assets to complete the elements of the FR Y–14 report that are used in conducting supervisory stress tests: (1) The FR Y–14M; (2) all schedules of the FR Y–14–Q except for Schedule C—Regulatory Capital Instruments and Schedule D—Regulatory Capital Transitions; and (3) Schedule E—Operational Risk of the FR Y–14A. The proposal would also require covered savings and loan holding companies subject to Category II or III standards to report the FR Y–14A Schedule A—Summary and Schedule F—Business Plan Changes with respect to company run stress testing. As discussed above, covered savings and loan holding companies subject to Category II or Category III standards face heightened risks given their size or level of cross-jurisdictional activity, weighted short-term wholesale funding, nonbank assets, or off-balance sheet exposure. The information from the FR Y–14A Schedules A and F on company-run stress testing would assist supervisors in determining the robustness of company-run stress tests, and thereby help ensure the safety and soundness of covered savings and loan holding companies.

With respect to the FR Y–15, the proposal would add two derived line items on Schedule A to calculate total off-balance sheet exposure, which is one of the indicators used to determine whether a firm with total consolidated assets of $100 billion or more would be subject to Category III standards. New line item M4 (total consolidated assets) would report the total consolidated on-balance sheet assets for the respondent, which is the equivalent to Schedule HC, item 12 (total consolidated assets) on the FR Y–9C. New line item M5 (total off-balance sheet exposures) would be total exposure, as currently defined on the FR Y–15, minus line item M4.

With respect to the FR 2052a report, the proposal would modify the current reporting frequency and granularity to align with the proposed tailoring framework. Specifically, the proposal would require U.S. banking organizations and covered savings and loan holding companies, each with $100 billion or more in total consolidated assets, to report the FR 2052a on a daily basis if they are: (i) Subject to Category I or II standards, or (ii) have $75 billion or more in weighted short-term wholesale funding. This would increase the frequency of reporting for firms subject to Category II standards with less than $700 billion in total consolidated assets and firms subject to Category III standards with $75 billion or more in weighted short-term wholesale funding; both groups of banking organizations currently report the FR 2052a monthly. Reporting of daily liquidity data would facilitate greater supervisory monitoring based on these firms' liquidity risk profile, as indicated by their level of weighted short-term wholesale funding and cross-jurisdictional activity. The proposal also would simplify the FR 2052a reporting thresholds by eliminating the threshold of $10 trillion or more in assets under custody used to identify daily filers, as discussed in section IV.B of this **SUPPLEMENTARY INFORMATION** section.

In addition, consistent with EGRRCPA's changes and the Board's July 2018 statement relating to EGRRCPA, the proposal would revise the reporting forms to provide that bank holding companies with less than $100 billion in total consolidated assets would no longer be required to submit the FR Y–14, FR Y–15 and the FR 2052a, and covered savings and loan holding companies with less than $100 billion in total consolidated assets would no longer be required to submit the FR Y–15 and FR 2052a.[111]

With respect to the FR Y–9C, the proposal would align the instructions and form with the proposed tailoring framework in the interagency capital and liquidity proposal. The proposed revised instructions to the FR Y–9C would clarify that Category III Board-regulated institutions are not included in the proposed definition of ''advanced approaches banking organizations'' in the interagency capital and liquidity proposal, but would be required to comply with the supplementary leverage ratio and countercyclical capital buffer requirements. The proposed revision to the FR Y–9C would amend line item 45, which concerns the supplementary leverage ratio. Previously, line item 45 was required to be completed by advanced approaches holding companies only. The proposed revised FR Y–9C would require line item 45 to be completed by ''advanced approaches banking organizations and Category III Board-regulated institutions.''

Finally, the proposal would require covered savings and loan holding companies with total consolidated assets of $100 billion or more to report total nonbank assets on line item 17, Schedule PC–B of the FR Y–9LP, as this data would be used to determine whether the firm is subject to Category III standards.

As the proposal would not apply to foreign banking organizations, the changes to the FR Y–14, FR Y–15, FR 2052a, FR Y–9C, and FR Y–9LP discussed above would not apply to an intermediate holding company of a foreign banking organization. Therefore, these intermediate holding companies would continue to report these forms as they do currently, and the forms would be amended to reflect this.

Question 27: What are the costs and benefits of the proposed changes to the FR 2052a, including the advantages and disadvantages of the proposed reporting frequency for firms subject to Category II and III standards?

VII. Impact Assessment

In general, the Board expects the proposal would reduce aggregate compliance costs for bank holding companies with $100 billion or more in total consolidated assets, with minimal effects on the safety and soundness of these firms and U.S. financial stability.[112] For additional impact

[110] 12 CFR part 242.

[111] *See* Board statement regarding the impact of the Economic Growth, Regulatory Relief, and Consumer Protection Act, July 6, 2018, available at *https://www.federalreserve.gov/newsevents/pressreleases/bcreg20180706b.htm.*

[112] Firms with less than $100 billion in total consolidated assets would have significantly reduced compliance costs, as these firms would no longer be subject to the enhanced prudential

information, commenters should also review the interagency capital and liquidity proposal.

A. Capital Planning and Stress Testing

First, while the Board expects the proposed changes to capital planning and stress testing requirements to have no material impact on the capital levels of bank holding companies with $100 billion or more in total consolidated assets, for firms that would be subject to Category III or IV standards in particular, the proposal would reduce compliance costs. These firms currently must conduct company-run stress tests on a semi-annual basis. For bank holding companies that would be subject to Category III standards, the proposal would reduce this frequency to every other year.[113] For firms that would be subject to Category IV standards, the proposal would remove this requirement altogether.[114] In addition, under the proposal the Board would conduct supervisory stress tests of firms subject to Category IV standards on a two-year, rather than annual, cycle. Firms subject to Category III or IV standards would therefore either reduce or eliminate, respectively, internal systems and resources for complying with these requirements.

B. Liquidity

The proposed changes to liquidity requirements are also expected to reduce compliance costs for firms that would be subject to Category IV standards by reducing the required frequency of internal liquidity stress tests and modifying the liquidity risk management requirements. The Board does not expect these proposed changes to materially affect the liquidity buffer levels held by these firms or these firms' exposure to liquidity risk.

C. Covered Savings and Loan Holding Companies

For covered savings and loan holding companies, the proposal would increase compliance costs and also reduce risks to the safety and soundness of these firms. By harmonizing prudential standards across similarly situated large domestic banking organizations, the proposal would also reduce opportunities for regulatory arbitrage. The Board expects the proposed new requirements for covered savings and loan holding companies to meaningfully improve the risk management capabilities of these firms and their resiliency to stress, which furthers their safety and soundness.

A covered savings and loan holding company that is subject to Category II or III standards would be required to conduct company-run stress tests, which would be a new requirement. In connection with the application of supervisory and company-run capital stress testing requirements, the Board is proposing to require covered savings and loan holding companies with total consolidated assets of $100 billion or more to report the FR Y–14 reports. In addition, the proposal would require a covered savings and loan holding company with $100 billion or more to conduct internal liquidity stress testing and maintain a liquidity buffer. While covered savings and loan holding companies would incur costs for conducting internal liquidity stress testing, this requirement would improve the capability of these firms to understand, manage, and plan for liquidity risk exposures across a range of conditions. Depending on its liquidity buffer requirement, a covered savings and loan holding company may need to increase the amount of liquid assets it holds or otherwise adjust its risk profile to reduce estimated net stressed cash-flow needs. Because covered savings and loan holding companies are already subject to the LCR rule, which also requires a firm to maintain a minimum amount of liquid assets to meet net outflows under a stress scenario, covered savings and loan holding companies would generally need to hold only an incremental amount—if any—above the levels already required to comply with the LCR rule.

VIII. Administrative Law Matters

A. Solicitation of Comments and Use of Plain Language

Section 722 of the Gramm-Leach-Bliley Act (Pub. L. 106–102, 113 Stat. 1338, 1471, 12 U.S.C. 4809) requires the federal banking agencies to use plain language in all proposed and final rules published after January 1, 2000. The Board has sought to present the proposal in a simple and straightforward manner, and invites comment on the use of plain language. For example:

• Has the Board organized the material to suit your needs? If not, how could it present the proposal more clearly?

• Are the requirements in the proposal clearly stated? If not, how could the proposal be more clearly stated?

• Do the regulations contain technical language or jargon that is not clear? If so, which language requires clarification?

• Would a different format (grouping and order of sections, use of headings, paragraphing) make the regulation easier to understand? If so, what changes would achieve that?

• Would more, but shorter, sections be better? If so, which sections should be changed?

• What other changes can the Board incorporate to make the regulation easier to understand?

B. Paperwork Reduction Act Analysis

Certain provisions of the proposed rule contain ''collections of information'' within the meaning of the Paperwork Reduction Act of 1995 (PRA).[115] The Board may not conduct or sponsor, and a respondent is not required to respond to, an information collection unless it displays a currently valid Office of Management and Budget (OMB) control number. The Board reviewed the proposed rule under the authority delegated to the Board by OMB.

The proposed rule contains reporting requirements subject to the PRA. To implement these requirements, the Board proposes to revise the (1) Complex Institution Liquidity Monitoring Report (FR 2052a; OMB No. 7100–0361), (2) Consolidated Financial Statements for Holding Companies (FR Y–9C; OMB No. 7100–0128), (3) Capital Assessments and Stress Testing (FR Y–14A/Q/M; OMB No. 7100–0341), and (4) Banking Organization Systemic Risk Report (FR Y–15; OMB No. 7100–0352).

Comments are invited on:

(a) Whether the proposed collections of information are necessary for the proper performance of the Board's functions, including whether the information has practical utility;

(b) The accuracy of the estimates of the burden of the proposed information

standards rule or capital plan rule, and would no longer be required to file FR Y–14 or FR Y–15 reports, or the FR 2052a. However, these firms have not been complying with these requirements since July 6, 2018, when the Board issued a statement noting that it would no longer enforce these regulations or reporting requirements with respect to these firms. *See* Board statement regarding the impact of the Economic Growth, Regulatory Relief, and Consumer Protection Act, July 6, 2018, available at *https://www.federalreserve.gov/newsevents/pressreleases/bcreg20180706b.htm.*

[113] A firm subject to Category III standards would still be required to conduct an internal capital stress test on an annual basis as part of its annual capital plan submission. *See* section IV.C of this Supplementary Information section.

[114] Although the proposal would not modify the requirement for a firm that would be subject to Category IV standards to conduct an internal capital stress test as part of its annual capital plan submission, the Board intends to propose changes in the future capital plan proposal to align with the proposed removal of company-run stress testing requirements for these firms. *See* section IV.D of this Supplementary Information section.

[115] 44 U.S.C. 3501–3521.

collections, including the validity of the methodology and assumptions used;

(c) Ways to enhance the quality, utility, and clarity of the information to be collected;

(d) Ways to minimize the burden of the information collections on respondents, including through the use of automated collection techniques or other forms of information technology; and

(e) Estimates of capital or startup costs and costs of operation, maintenance, and purchase of services to provide information.

All comments will become a matter of public record. Comments on aspects of this proposed rule that may affect reporting, recordkeeping, or disclosure requirements and burden estimates should be sent to Ann E. Misback, Secretary, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue NW, Washington, DC 20551. A copy of the comments may also be submitted to the OMB desk officer to the Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Room 10235, 725 17th Street NW, Washington, DC 20503 or by fax to 202–395–6974.

Proposed Revision, With Extension, of the Following Information Collections

(1) *Report title:* Complex Institution Liquidity Monitoring Report.

Agency form number: FR 2052a.

OMB control number: 7100–0361.

Frequency: Monthly, each business day (daily).

Affected Public: Businesses or other for-profit.

Respondents: U.S. bank holding companies, U.S. savings and loan holding companies, and foreign banking organizations with U.S. assets.

Estimated number of respondents: Monthly: 35; Daily: 13.

Estimated average hours per response: Monthly: 120; Daily: 220.

Estimated annual burden hours: 765,400.

General description of report: The FR 2052a is used to monitor the overall liquidity profile of institutions supervised by the Board. These data provide detailed information on the liquidity risks within different business lines (*e.g.,* financing of securities positions, prime brokerage activities). In particular, these data serve as part of the Board's supervisory surveillance program in its liquidity risk management area and provide timely information on firm-specific liquidity risks during periods of stress. Analyses of systemic and idiosyncratic liquidity risk issues are then used to inform the Board's supervisory processes, including the preparation of analytical reports that detail funding vulnerabilities.

Legal authorization and confidentiality: The FR 2052a is authorized pursuant to section 5 of the Bank Holding Company Act,[116] section 8 of the International Banking Act,[117] section 10 of HOLA,[118] and section 165 of the Dodd-Frank Act[119] and is mandatory. Section 5(c) of the Bank Holding Company Act authorizes the Board to require bank holding companies (BHCs) to submit reports to the Board regarding their financial condition. Section 8(a) of the International Banking Act subjects foreign banking organizations to the provisions of the Bank Holding Company Act. Section 10(b)(2) of HOLA authorizes the Board to require savings and loan holding companies (SLHCs) to file reports with the Board concerning their operations. Section 165 of the Dodd-Frank Act requires the Board to establish prudential standards, including liquidity requirements, for certain BHCs and foreign banking organizations.

Financial institution information required by the FR 2052a is collected as part of the Board's supervisory process. Therefore, such information is entitled to confidential treatment under Exemption 8 of the Freedom of Information Act (FOIA).[120] In addition, the institution information provided by each respondent would not be otherwise available to the public and its disclosure could cause substantial competitive harm. Accordingly, it is entitled to confidential treatment under the authority of exemption 4 of the FOIA,[121] which protects from disclosure trade secrets and commercial or financial information.

Current Actions: To implement the reporting requirements of the proposed rule, the Board proposes to revise the FR 2052a (1) so that BHCs and SLHCs with less than $100 billion in total consolidated assets would no longer have to report, (2) BHCs or SLHCs subject to Category II standards ($700 billion or more in total consolidated assets or $75 billion or more in cross jurisdictional activity) would have to report FR 2052a daily, and (3) BHCs or SLHCs subject to Category III standards with $75 billion or more in weighted short-term wholesale funding would have to report FR 2052a daily, rather than monthly. The Board estimates that proposed revisions to the FR 2052a would decrease the respondent count by 4. The Board estimates that proposed revisions to the FR 2052a would increase the estimated annual burden by 47,800 hours. The draft reporting forms and instructions are available on the Board's public website at *https://www.federalreserve.gov/apps/reportforms/review.aspx.*

(2) *Report title:* Consolidated Financial Statements for Holding Companies.

Agency form number: FR Y–9C, FR Y–9LP, FR Y–9SP, FR Y–9ES, and FR Y–9CS.

OMB control number: 7100–0128.

Frequency: Quarterly, semiannually, and annually.

Affected Public: Businesses or other for-profit.

Respondents: Bank holding companies (BHCs), savings and loan holding companies (SLHCs), securities holding companies (SHCs), and U.S. Intermediate Holding Companies (IHCs) (collectively, holding companies (HCs)).

Estimated number of respondents: FR Y–9C (non-advanced approaches holding companies): 292; FR Y–9C (advanced approached holding companies): 18; FR Y–9LP: 338; FR Y–9SP: 4,238; FR Y–9ES: 82; FR Y–9CS: 236.

Estimated average hours per response: FR Y–9C (non-advanced approaches holding companies): 46.29; FR Y–9C (advanced approached holding companies): 47.54; FR Y–9LP: 5.27; FR Y–9SP: 5.40; FR Y–9ES: 0.50; FR Y–9CS: 0.50.

Estimated annual burden hours: FR Y–9C (non advanced approaches holding companies): 54,067; FR Y–9C (advanced approached holding companies): 3,423; FR Y–9LP: 7,125; FR Y–9SP: 45,770; FR Y–9ES: 41; FR Y–9CS: 472.

General description of report: The FR Y–9 family of reporting forms continues to be the primary source of financial data on HCs on which examiners rely between on-site inspections. Financial data from these reporting forms is used to detect emerging financial problems, review performance, conduct pre-inspection analysis, monitor and evaluate capital adequacy, evaluate HC mergers and acquisitions, and analyze an HC's overall financial condition to ensure the safety and soundness of its operations. The FR Y–9C, FR Y–9LP, and FR Y–9SP serve as standardized financial statements for the consolidated holding company. The Board requires HCs to provide standardized financial statements to fulfill the Board's

[116] 12 U.S.C. 1844.

[117] 12 U.S.C. 3106.

[118] 12 U.S.C. 1467a.

[119] 12 U.S.C. 5365.

[120] 5 U.S.C. 552(b)(8).

[121] 5 U.S.C. 552(b)(4).

statutory obligation to supervise these organizations. The FR Y–9ES is a financial statement for HCs that are Employee Stock Ownership Plans. The Board uses the FR Y–9CS (a free-form supplement) to collect additional information deemed to be critical and needed in an expedited manner. HCs file the FR Y–9C on a quarterly basis, the FR Y–9LP quarterly, the FR Y–9SP semiannually, the FR Y–9ES annually, and the FR Y–9CS on a schedule that is determined when this supplement is used.

Legal authorization and confidentiality: The FR Y–9 family of reports is authorized by section 5(c) of the Bank Holding Company Act,[122] section 10(b) of the Home Owners' Loan Act,[123] section 618 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act),[124] and section 165 of the Dodd-Frank Act.[125] The obligation of covered institutions to report this information is mandatory.

With respect to FR Y–9LP, FR Y–9SP, FR Y–ES, and FR Y–9CS, the information collected would generally not be accorded confidential treatment. If confidential treatment is requested by a respondent, the Board will review the request to determine if confidential treatment is appropriate.

With respect to FR Y–9C, Schedule HI's item 7(g) ''FDIC deposit insurance assessments,'' Schedule HC–P's item 7(a) ''Representation and warranty reserves for 1–4 family residential mortgage loans sold to U.S. government agencies and government sponsored agencies,'' and Schedule HC–P's item 7(b) ''Representation and warranty reserves for 1–4 family residential mortgage loans sold to other parties'' are considered confidential. Such treatment is appropriate because the data is not publicly available and the public release of this data is likely to impair the Board's ability to collect necessary information in the future and could cause substantial harm to the competitive position of the respondent. Thus, this information may be kept confidential under exemptions (b)(4) of the Freedom of Information Act, which exempts from disclosure ''trade secrets and commercial or financial information obtained from a person and privileged or confidential'' (5 U.S.C. 552(b)(4)), and (b)(8) of the Freedom of Information Act, which exempts from disclosure information related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions (5 U.S.C. 552(b)(8)).

Current Actions: To implement the reporting requirements of the proposed rule, the Board proposes to revise the FR Y–9C to clarify that Category III Board-regulated institutions are not included in the proposed definition of ''advanced approaches banking organizations'' in the interagency capital and liquidity proposal, but would be required to comply with the supplementary leverage ratio and countercyclical capital buffer requirements. The FR Y–9LP would be revised to require covered savings and loan holding companies with total consolidated assets of $100 billion or more to report total nonbank assets on Schedule PC–B, in order to determine whether the firm would be subject to Category III standards. The draft reporting forms and instructions are available on the Board's public website at *https://www.federalreserve.gov/apps/reportforms/review.aspx.*

(2) *Report title:* Capital Assessments and Stress Testing.

Agency form number: FR Y–14A/Q/M.

OMB control number: 7100–0341.

Frequency: Annually, semiannually, quarterly, and monthly.

Affected Public: Businesses or other for-profit.

Respondents: The respondent panel consists of any top-tier bank holding company (BHC) that has $100 billion or more in total consolidated assets, as determined based on (1) the average of the firm's total consolidated assets in the four most recent quarters as reported quarterly on the firm's FR Y–9C or (2) the average of the firm's total consolidated assets in the most recent consecutive quarters as reported quarterly on the firm's FR Y–9Cs, if the firm has not filed an FR Y–9C for each of the most recent four quarters. The respondent panel also consists of any U.S. intermediate holding company (IHC). Reporting is required as of the first day of the quarter immediately following the quarter in which the respondent meets this asset threshold, unless otherwise directed by the Board.

Estimated number of respondents: 37.

Estimated average hours per response: FR Y–14A: Summary, 887; Macro Scenario, 31; Operational Risk, 18; Regulatory Capital Instruments, 21; Business Plan Changes, 16; and Adjusted Capital Plan Submission, 100. FR Y–14Q: Retail, 15; Securities, 13; PPNR, 711; Wholesale, 151; Trading, 1,926; Regulatory Capital Transitions, 23; Regulatory Capital Instruments, 54; Operational Risk, 50; MSR Valuation, 23; Supplemental, 4; Retail FVO/HFS, 15; Counterparty, 514; and Balances, 16. FR Y–14M: 1st Lien Mortgage, 516; Home Equity, 516; and Credit Card, 512. FR Y–14: Implementation, 7,200; On-going Automation Revisions, 480. FR Y–14 Attestation On-going Audit and Review, 2,560.

Estimated annual burden hours: FR Y–14A: Summary, 65,638; Macro Scenario, 2,232; Operational Risk, 666; Regulatory Capital Instruments, 756; Business Plan Changes, 592; and Adjusted Capital Plan Submission, 500. FR Y–14Q: Retail, 2,200; Securities, 1,924; Pre-Provision Net Revenue (PPNR), 105,228; Wholesale, 22,348; Trading, 92,448; Regulatory Capital Transitions, 3,312; Regulatory Capital Instruments, 7,776; Operational risk, 7,400; Mortgage Servicing Rights (MSR) Valuation, 1,472; Supplemental, 592; Retail Fair Value Option/Held for Sale (Retail FVO/HFS), 1,560; Counterparty, 24,672; and Balances, 2,304. FR Y–14M: 1st Lien Mortgage, 216,720; Home Equity, 179,568; and Credit Card, 92,160. FR Y–14: Implementation, 7,200; On-going Automation Revisions, 17,760. FR Y–14 Attestation On-going Audit and Review, 33,280.

General description of report: These collections of information are applicable to top-tier BHCs with total consolidated assets of $100 billion or more and U.S. IHCs. This family of information collections is composed of the following three reports:

1. The FR Y–14A collects quantitative projections of balance sheet, income, losses, and capital across a range of macroeconomic scenarios and qualitative information on methodologies used to develop internal projections of capital across scenarios either annually or semi-annually.

2. The quarterly FR Y–14Q collects granular data on various asset classes, including loans, securities, and trading assets, and PPNR for the reporting period.

3. The monthly FR Y–14M is comprised of three retail portfolio- and loan-level schedules, and one detailed address-matching schedule to supplement two of the portfolio and loan-level schedules.

The data collected through the FR Y–14A/Q/M reports provide the Board with the information and perspective needed to help ensure that large firms have strong, firm-wide risk measurement and management processes supporting their internal assessments of capital adequacy and that their capital resources are sufficient given their business focus, activities, and resulting risk exposures. The annual CCAR exercise complements

[122] 12 U.S.C. 1844(c).

[123] 12 U.S.C. 1467a(b).

[124] 12 U.S.C. 1850a(c)(1).

[125] 12 U.S.C. 5365.

other Board supervisory efforts aimed at enhancing the continued viability of large firms, including continuous monitoring of firms' planning and management of liquidity and funding resources, as well as regular assessments of credit, market and operational risks, and associated risk management practices. Information gathered in this data collection is also used in the supervision and regulation of these financial institutions. To fully evaluate the data submissions, the Board may conduct follow-up discussions with, or request responses to follow up questions from, respondents. Respondent firms are currently required to complete and submit up to 18 filings each year: Two semi-annual FR Y–14A filings, four quarterly FR Y–14Q filings, and 12 monthly FR Y–14M filings. Compliance with the information collection is mandatory.

Legal authorization and confidentiality: The Board has the authority to require BHCs to file the FR Y–14A/Q/M reports pursuant to section 5 of the Bank Holding Company Act (BHC Act) (12 U.S.C. 1844), and to require the U.S. IHCs of FBOs to file the FR Y–14 A/Q/M reports pursuant to section 5 of the BHC Act, in conjunction with section 8 of the International Banking Act (12 U.S.C. 3106). The Board has authority to require SLHCs to file the FR Y–14A/Q/M reports pursuant to section 10 of HOLA.[126]

The information collected in these reports is collected as part of the Board's supervisory process, and therefore is afforded confidential treatment pursuant to exemption 8 of the Freedom of Information Act (FOIA) (5 U.S.C. 552(b)(8)). In addition, individual respondents may request that certain data be afforded confidential treatment pursuant to exemption 4 of FOIA if the data has not previously been publicly disclosed and the release of the data would likely cause substantial harm to the competitive position of the respondent (5 U.S.C. 552(b)(4)). Determinations of confidentiality based on exemption 4 of FOIA would be made on a case-by-case basis.

Current Actions: To implement the reporting requirements of the proposed rule, the Board proposes to revise the FR Y–14 so that (1) BHCs with less than $100 billion in total consolidated assets would no longer have to report[127] and (2) covered SLHCs with $100 billion or more in total consolidated assets are included in the reporting panel for certain FR Y–14 schedules.[128] The Board estimates that proposed revisions to the FR Y–14 would increase the estimated annual burden by 31,944 hours. The draft reporting forms and instructions are available on the Board's public website at *https://www.federalreserve.gov/apps/reportforms/review.aspx.*

(3) *Report title:* Banking Organization Systemic Risk Report.

Agency form number: FR Y–15.

OMB control number: 7100–0352.

Frequency: Quarterly.

Affected Public: Businesses or other for-profit.

Respondents: U.S. bank holding companies (BHCs), covered savings and loan holding companies (SLHCs), and U.S. intermediate holding companies (IHCs) of foreign banking organizations with $100 billion or more in total consolidated assets, and any BHC designated as a global systemically important bank holding company (GSIB) that does not otherwise meet the consolidated assets threshold for BHCs.

Estimated number of respondents: 37.

Estimated average hours per response: 401.

Estimated annual burden hours: 59,348.

General description of report: The FR Y–15 quarterly report collects systemic risk data from U.S. bank holding companies (BHCs), covered savings and loan holding companies (SLHCs), and U.S. intermediate holding companies (IHCs) with total consolidated assets of $50 billion or more, and any BHC identified as a global systemically important banking organization (GSIB) based on its method 1 score calculated as of December 31 of the previous calendar year. The Board uses the FR Y–15 data to monitor, on an ongoing basis, the systemic risk profile of institutions that are subject to enhanced prudential standards under section 165 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act). In addition, the FR Y–15 is used to (1) facilitate the implementation of the GSIB surcharge rule, (2) identify other institutions that may present significant systemic risk, and (3) analyze the systemic risk implications of proposed mergers and acquisitions.

Legal authorization and confidentiality: The mandatory FR Y–15 is authorized by sections 163 and 165 of the Dodd-Frank Act,[129] the International Banking Act,[130] the Bank Holding Company Act,[131] and HOLA.[132]

Most of the data collected on the FR Y–15 is made public unless a specific request for confidentiality is submitted by the reporting entity, either on the FR Y–15 or on the form from which the data item is obtained. Such information will be accorded confidential treatment under exemption 4 of the Freedom of Information Act (FOIA)[133] if the submitter substantiates its assertion that disclosure would likely cause substantial competitive harm. In addition, items 1 through 4 of Schedule G of the FR Y–15, which contain granular information regarding the reporting entity's short-term funding, will be accorded confidential treatment under exemption 4 for observation dates that occur prior to the liquidity coverage ratio disclosure standard being implemented. To the extent confidential data collected under the FR Y–15 will be used for supervisory purposes, it may be exempt from disclosure under Exemption 8 of FOIA.[134]

Current Actions: To implement the reporting requirements of the proposed rule, the Board proposes to revise the FR Y–15 (1) so that BHCs and SLHCs with less than $100 billion in total consolidated assets would no longer have to report, (2) add a line item to measure the total off-balance sheet exposure as a separate line item (total exposure, as defined on FR Y–15, minus total consolidated assets, as reported on FR Y–9C), and (3) add a line item for total consolidated assets (to effectuate above change). The Board estimates that proposed revisions to the FR Y–15 would increase the estimated average hours per response by 0 hours and would increase the estimated annual burden by 0 hours. The draft reporting forms and instructions are available on the Board's public website at *https://www.federalreserve.gov/apps/reportforms/review.aspx.*

C. Regulatory Flexibility Act Analysis

In accordance with the Regulatory Flexibility Act (RFA), 5 U.S.C. 601 *et seq.,* the Board is publishing an initial regulatory flexibility analysis of the proposal. The RFA requires each federal agency to prepare an initial regulatory

[126] 12 U.S.C. 1467a.

[127] Conforming changes would be made to the FR Y–14 instructions.

[128] All covered savings and loan holding companies with $100 billion or more in total consolidated assets to would be required to complete: (1) The FR Y–14M; (2) all schedules of the FR Y–14–Q except for Schedule C—Regulatory Capital Instruments and Schedule D—Regulatory Capital Transitions; and (3) Schedule E—Operational Risk of the FR Y–14A. The proposal would also require covered savings and loan holding companies subject to Category II or III standards to report the FR Y–14A Schedule A—Summary and Schedule F—Business Plan Changes with respect to company run stress testing.

[129] 12 U.S.C. 5463 and 5365.

[130] 12 U.S.C. 3106 and 3108.

[131] 12 U.S.C. 1844.

[132] 12 U.S.C. 1467a.

[133] 5 U.S.C. 552(b)(4).

[134] 5 U.S.C. 552(b)(8).

flexibility analysis in connection with the promulgation of a proposed rule, or certify that the proposed rule will not have a significant economic impact on a substantial number of small entities.[135] Under regulations issued by the SBA, a small entity includes a bank, bank holding company, or savings and loan holding company with assets of $550 million or less (small banking organization).[136] Based on the Board's analysis, and for the reasons stated below, the Board believes that this proposed rule will not have a significant economic impact on a substantial of number of small banking organizations.

As discussed in the Supplementary Information section, the Board is proposing to adopt amendments to Regulations Y,[137] LL,[138] PP,[139] and YY[140] that would affect the regulatory requirements that apply to bank holding companies and covered savings and loan holding companies with $10 billion or more in total consolidated assets. Companies that are affected by the proposal therefore substantially exceed the $550 million asset threshold at which a banking entity is considered a ''small entity'' under SBA regulations.

Because the proposal is not likely to apply to any company with assets of $550 million or less if adopted in final form, the proposal is not expected to affect any small entity for purposes of the RFA. The Board does not believe that the proposal duplicates, overlaps, or conflicts with any other Federal rules. In light of the foregoing, the Board does not believe that the proposal, if adopted in final form, would have a significant economic impact on a substantial number of small entities supervised. Nonetheless, the Board seeks comment on whether the proposal would impose undue burdens on, or have unintended consequences for, small banking organizations, and whether there are ways such potential burdens or consequences could be minimized in a manner consistent the purpose of the proposal.

List of Subjects

12 CFR Part 225

Administrative practice and procedure, Banks, Banking, Capital planning, Holding companies, Reporting and recordkeeping requirements, Securities, Stress testing.

12 CFR Part 238

Administrative practice and procedure, Banks, Banking, Federal Reserve System, Holding companies, Reporting and recordkeeping requirements, Securities.

12 CFR Part 242

Administrative practice and procedure, Holding companies, Nonbank financial companies.

12 CFR Part 252

Administrative practice and procedure, Banks, Banking, Capital planning, Federal Reserve System, Holding companies, Reporting and recordkeeping requirements, Securities, Stress testing.

Authority and Issuance

For the reasons stated in the Supplementary Information, Chapter II of title 12 of the Code of Federal Regulations is proposed to be amended as follows:

PART 225—BANK HOLDING COMPANIES AND CHANGE IN BANK CONTROL (REGULATION Y)

■ 1. The authority citation for part 225 continues to read as follows:

Authority: 12 U.S.C. 1817(j)(13), 1818, 1828(o), 1831i, 1831p–1, 1843(c)(8), 1844(b), 1972(1), 3106, 3108, 3310, 3331–3351, 3906, 3907, and 3909; 15 U.S.C. 1681s, 1681w, 6801 and 6805.

Subpart A—General Provisions

■ 2. Section 225.8(b)(1)(i), (b)(2), (b)(3), (c)(1)(i) and (ii), (d)(9) introductory text, and (d)(9)(i) and (ii) are revised to read as follows:

§ 225.8 Capital planning.

* * * * *

(b) * * *

(1) * * *

(i) Any top-tier bank holding company domiciled in the United States with average total consolidated assets of $100 billion or more ($100 billion asset threshold);

* * * * *

(2) *Average total consolidated assets.* For purposes of this section, average total consolidated assets means the average of the total consolidated assets as reported by a bank holding company on its Consolidated Financial Statements for Holding Companies (FR Y–9C) for the four most recent consecutive quarters. If the bank holding company has not filed the FR Y–9C for each of the four most recent consecutive quarters, average total consolidated assets means the average of the company's total consolidated assets, as reported on the company's FR Y–9C, for the most recent quarter or consecutive quarters, as applicable. Average total consolidated assets are measured on the as-of date of the most recent FR Y–9C used in the calculation of the average.

(3) *Ongoing applicability.* A bank holding company (including any successor bank holding company) that is subject to any requirement in this section shall remain subject to such requirements unless and until its total consolidated assets fall below $100 billion for each of four consecutive quarters, as reported on the FR Y–9C and effective on the as-of date of the fourth consecutive FR Y–9C.

* * * * *

(c) * * * (1) * * * (i) A bank holding company that meets the $100 billion asset threshold (as measured under paragraph (b) of this section) on or before September 30 of a calendar year must comply with the requirements of this section beginning on January 1 of the next calendar year, unless that time is extended by the Board in writing.

(ii) A bank holding company that meets the $100 billion asset threshold after September 30 of a calendar year must comply with the requirements of this section beginning on January 1 of the second calendar year after the bank holding company meets the $100 billion asset threshold, unless that time is extended by the Board in writing.

* * * * *

(d) * * *

(9) *Large and noncomplex bank holding company* means any bank holding company subject to this section that, as of December 31 of the calendar year prior to the capital plan cycle, is:

(i) A Category IV banking organization pursuant to 12 CFR 252.5; or

(ii) A U.S. intermediate holding company subject to this section pursuant to 12 CFR 252.153 that—

(A) Has average total consolidated assets of less than $250 billion; and

(B) Has average total nonbank assets of less than $75 billion.

* * * * *

PART 238—SAVINGS AND LOAN HOLDING COMPANIES (REGULATION LL)

■ 3. The authority citation for part 238 continues to read as follows:

Authority: 5 U.S.C. 552, 559; 12 U.S.C. 1462, 1462a, 1463, 1464, 1467, 1467a, 1468, 1813, 1817, 1829e, 1831i, 1972; 15 U.S.C. 78 l.

[135] *See* 5 U.S.C. 603, 604, and 605.

[136] *See* 13 CFR 121.201.

[137] 12 CFR part 225.

[138] 12 CFR part 238.

[139] 12 CFR part 242.

[140] 12 CFR part 252.

Subpart A—General Provisions

■ 4. Section 238.2 is amended by adding paragraphs (v) through (ss) to read as follows:

§ 238.2 Definitions.

* * * * *

(v) *Average cross-jurisdictional activity.* A banking organization's average cross-jurisdictional activity is equal to the average of its cross jurisdictional activity for the four most recent calendar quarters or, if the company has not filed the FR Y–15 for each of the four most recent calendar quarters, for the most recent quarter or quarters, as applicable. Cross-jurisdictional activity is the sum of cross-jurisdictional claims and cross-jurisdictional liabilities.

(w) *Average off-balance sheet exposure.* A banking organization's average off-balance sheet exposure is equal to the average of its off-balance sheet exposure for the four most recent calendar quarters or, if the banking organization has not filed each of the applicable reporting forms for each of the four most recent calendar quarters, for the most recent quarter or quarters, as applicable. Off-balance sheet exposure is equal to:

(1) The total exposures of the banking organization, as reported by the banking organization on the FR Y–15 for each of the four most recent calendar quarters, or for the most recent quarter or quarters, as applicable; minus

(2) The total consolidated assets of the banking organization.

(x) *Average total consolidated assets.* Average total consolidated assets of a banking organization are equal to its consolidated assets, calculated based on the average of the holding company's total consolidated assets in the four most recent quarters as reported quarterly on the FR Y–9C. If the holding company has not filed the FR Y–9C for each of the four most recent consecutive quarters, total consolidated assets means the average of its total consolidated assets, as reported on the FR Y–9C, for the most recent quarter or consecutive quarters, as applicable. Total consolidated assets are measured on the as-of date of the most recent FR Y–9C used in the calculation of the average.

(y) *Average total nonbank assets.* A banking organization's average total nonbank assets is equal to the average of the total nonbank assets of the banking organization, as reported on the FR Y–9LP, for the four most recent calendar quarters or, if the organization has not filed the FR Y–9LP for each of the four most recent calendar quarters, for the most recent quarter or quarters, as applicable.

(z) *Average weighted short-term wholesale funding.* A banking organization's average weighted short-term wholesale funding is equal to the average of the banking organization's weighted short-term wholesale funding, as reported on the FR Y–15, for each of the four most recent calendar quarters or, if the banking organization has not filed the FR Y–15 for each of the four most recent calendar quarters, for the most recent quarter or quarters, as applicable.

(aa) *Banking organization.* Banking organization means a covered savings and loan holding company that is:

(1) Incorporated in or organized under the laws of the United States or in any State; and

(2) Not a consolidated subsidiary of a covered savings and loan holding company that is incorporated in or organized under the laws of the United States or in any State.

(bb) *Category II savings and loan holding company* means a covered savings and loan holding company identified as a Category II banking organization pursuant to § 238.10.

(cc) *Category III savings and loan holding company* means a covered savings and loan holding company identified as a Category III banking organization pursuant to § 238.10.

(dd) *Category IV savings and loan holding company* means a covered savings and loan holding company identified as a Category IV banking organization pursuant to § 238.10.

(ee) *Covered savings and loan holding company* means a savings and loan holding company other than:

(1) A top-tier savings and loan holding company that is:

(i) A grandfathered unitary savings and loan holding company as defined in section 10(c)(9)(C) of the Home Owners' Loan Act (12 U.S.C. 1461 *et seq.*); and

(ii) As of June 30 of the previous calendar year, derived 50 percent or more of its total consolidated assets or 50 percent of its total revenues on an enterprise-wide basis (as calculated under GAAP) from activities that are not financial in nature under section 4(k) of the Bank Holding Company Act (12 U.S.C. 1842(k));

(2) A top-tier depository institution holding company that is an insurance underwriting company; or

(3)(i) A top-tier depository institution holding company that, as of June 30 of the previous calendar year, held 25 percent or more of its total consolidated assets in subsidiaries that are insurance underwriting companies (other than assets associated with insurance for credit risk); and

(ii) For purposes of paragraph (3)(i) of this definition, the company must calculate its total consolidated assets in accordance with GAAP, or if the company does not calculate its total consolidated assets under GAAP for any regulatory purpose (including compliance with applicable securities laws), the company may estimate its total consolidated assets, subject to review and adjustment by the Board of Governors of the Federal Reserve System.

(ff) *Cross-jurisdictional activity.* A banking organization's cross-jurisdictional activity is equal to the sum of its cross-jurisdictional claims and cross-jurisdictional liabilities, as reported on the FR Y–15.

(gg) *Foreign banking organization* has the same meaning as in § 211.21(o) of this chapter.

(hh) *FR Y–9C* means the Consolidated Financial Statements for Holding Companies reporting form.

(ii) *FR Y–15* means the Banking Organization Systemic Risk Report.

(jj) *FR Y–9LP* means the Parent Company Only Financial Statements of Large Holding Companies.

(kk) *GAAP* means generally accepted accounting principles as used in the United States.

(ll) *Off-balance sheet exposure.* A banking organization's off-balance sheet exposure is equal to:

(1) The total exposure of the banking organization, as reported by the banking organization on the FR Y–15; minus

(2) The total consolidated assets of the banking organization for the same calendar quarter.

(mm) *Section 2(h)(2) company* has the same meaning as in section 2(h)(2) of the Bank Holding Company Act (12 U.S.C. 1841(h)(2)).

(nn) *State* means any state, commonwealth, territory, or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, American Samoa, Guam, or the United States Virgin Islands.

(oo) *Total consolidated assets.* Total consolidated assets of a banking organization are equal to its consolidated assets, as reported on the FR Y–9C.

(pp) *Total nonbank assets.* A banking organization's total nonbank assets are equal to the total nonbank assets of the banking organization, as reported on the FR Y–9LP.

(qq) *U.S. government agency* means an agency or instrumentality of the United States whose obligations are fully and explicitly guaranteed as to the timely payment of principal and interest by the full faith and credit of the United States.

(rr) *U.S. government-sponsored enterprise* means an entity originally established or chartered by the U.S. government to serve public purposes specified by the U.S. Congress, but whose obligations are not explicitly guaranteed by the full faith and credit of the United States.

(ss) *Weighted short-term wholesale funding.* A banking organization's weighted short-term wholesale funding is equal to the banking organization's weighted short-term wholesale funding, as reported on the FR Y–15.

■ 5. Add § 238.10 to subpart A to read as follows:

§ 238.10 Categorization of banking organizations.

(a) *General.* A banking organization with average total consolidated assets of $100 billion or more must determine its category among the three categories described in paragraphs (b) through (d) of this section at least quarterly.

(b) *Category II.* (1) A banking organization is a Category II banking organization if the banking organization has:

(i) $700 billion or more in average total consolidated assets; or

(ii)(A) $75 billion or more in average cross-jurisdictional activity; and

(B) $100 billion or more in average total consolidated assets.

(2) After meeting the criteria in paragraph (b)(1) of this section, a banking organization continues to be a Category II banking organization until the banking organization has:

(i)(A) Less than $700 billion in total consolidated assets for each of the four most recent calendar quarters; and

(B) Less than $75 billion in cross-jurisdictional activity for each of the four most recent calendar quarters; or

(ii) Less than $100 billion in total consolidated assets for each of the four most recent calendar quarters.

(c) *Category III.* (1) A banking organization is a Category III banking organization if the banking organization:

(i) Has (A) $250 billion or more in average total consolidated assets; or

(B) $100 billion or more in average total consolidated assets and at least:

(*1*) $75 billion in average total nonbank assets;

(*2*) $75 billion in average weighted short-term wholesale funding; or

(*3*) $75 billion in average off-balance sheet exposure; and

(ii) Is not a Category II banking organization.

(2) After meeting the criteria in paragraph (c)(1) of this section, a banking organization continues to be a Category III banking organization until the banking organization:

(i) Has—

(A) Less than $250 billion in total consolidated assets for each of the four most recent calendar quarters;

(B) Less than $75 billion in total nonbank assets for each of the four most recent calendar quarters;

(C) Less than $75 billion in weighted short-term wholesale funding for each of the four most recent calendar quarters; and

(D) Less than $75 billion in off-balance sheet exposure for each of the four most recent calendar quarters; or

(ii) Has less than $100 billion in total consolidated assets for each of the four most recent calendar quarters; or

(iii) Meets the criteria in paragraph (b)(1) of this section to be a Category II banking organization.

(d) *Category IV.* (1) A banking organization with average total consolidated assets of $100 billion or more is a Category IV banking organization if the banking organization:

(i) Is not a Category II banking organization; and

(ii) Is not a Category III banking organization.

(2) After meeting the criteria in paragraph (d)(1) of this section, a banking organization continues to be a Category IV banking organization until the banking organization:

(i) Has less than $100 billion in total consolidated assets for each of the four most recent calendar quarters;

(ii) Meets the criteria in paragraph (b)(1) of this section to be a Category II banking organization; or

(iii) Meets the criteria in paragraph (c)(1) of this section to be a Category III banking organization.

■ 6. Add subpart M to read as follows:

Subpart M—Risk Committee Requirement for Covered Savings and Loan Holding Companies With Total Consolidated Assets of $50 Billion or Greater and Less Than $100 Billion

Subpart M—Risk Committee Requirement for Covered Savings and Loan Holding Companies With Total Consolidated Assets of $50 Billion or Greater and Less Than $100 Billion

§ 238.118 Applicability.

(a) *General applicability.* A covered savings and loan bank holding company must comply with the risk-committee requirements set forth in this subpart beginning on the first day of the ninth quarter following the date on which its total consolidated assets equal or exceed $50 billion.

(b) *Total consolidated assets.* Total consolidated assets of a covered savings and loan holding company for purposes of this subpart are equal to its consolidated assets, calculated based on the average of the covered savings and loan holding company's total consolidated assets in the four most recent quarters as reported quarterly on its FR Y–9C. If the covered savings and loan holding company has not filed the FR Y–9C for each of the four most recent calendar quarters, total consolidated assets means the average of its total consolidated assets, as reported on the FR Y–9C, for the most recent calendar quarter or quarters, as applicable. Total consolidated assets are measured on the as-of date of the most recent FR Y–9C used in the calculation of the average.

(c) *Cessation of requirements.* A covered savings and loan holding company will remain subject to the requirements of this subpart until the earlier of the date on which:

(1) Its reported total consolidated assets on the FR Y–9C are below $50 billion for each of four consecutive calendar quarters; and

(2) It becomes subject to the requirements of subpart N of this part.

§ 238.119 Risk committee requirement for covered savings and loan holding companies with total consolidated assets of $50 billion or more.

(a) *Risk committee*—(1) *General.* A covered savings and loan holding company with total consolidated assets of $50 billion or more must maintain a risk committee that approves and periodically reviews the risk-management policies of the covered savings and loan holding company's global operations and oversees the operation of the company's global risk-management framework.

(2) *Risk-management framework.* The covered savings and loan holding company's global risk-management framework must be commensurate with its structure, risk profile, complexity, activities, and size and must include:

(i) Policies and procedures establishing risk-management governance, risk-management procedures, and risk-control infrastructure for its global operations; and

(ii) Processes and systems for implementing and monitoring compliance with such policies and procedures, including:

(A) Processes and systems for identifying and reporting risks and risk-management deficiencies, including regarding emerging risks, and ensuring effective and timely implementation of actions to address emerging risks and risk-management deficiencies for its global operations;

(B) Processes and systems for establishing managerial and employee responsibility for risk management;

(C) Processes and systems for ensuring the independence of the risk-management function; and

(D) Processes and systems to integrate risk management and associated controls with management goals and its compensation structure for its global operations.

(3) *Corporate governance requirements.* The risk committee must:

(i) Have a formal, written charter that is approved by the covered savings and loan holding company's board of directors;

(ii) Be an independent committee of the board of directors that has, as its sole and exclusive function, responsibility for the risk-management policies of the covered savings and loan holding company's global operations and oversight of the operation of the company's global risk-management framework;

(iii) Report directly to the covered savings and loan holding company's board of directors;

(iv) Receive and review regular reports on a not less than a quarterly basis from the covered savings and loan holding company's chief risk officer provided pursuant to paragraph (b)(3)(ii) of this section; and

(v) Meet at least quarterly, or more frequently as needed, and fully document and maintain records of its proceedings, including risk-management decisions.

(4) *Minimum member requirements.* The risk committee must:

(i) Include at least one member having experience in identifying, assessing, and managing risk exposures of large, complex financial firms; and

(ii) Be chaired by a director who:

(A) Is not an officer or employee of the covered savings and loan holding company and has not been an officer or employee of the covered savings and loan holding company during the previous three years;

(B) Is not a member of the immediate family, as defined in § 238.31(b)(3), of a person who is, or has been within the last three years, an executive officer of the covered savings and loan holding company, as defined in § 215.2(e)(1) of this chapter; and

(C)(*1*) Is an independent director under Item 407 of the Securities and Exchange Commission's Regulation S–K (17 CFR 229.407(a)), if the covered savings and loan holding company has an outstanding class of securities traded on an exchange registered with the U.S. Securities and Exchange Commission as a national securities exchange under section 6 of the Securities Exchange Act of 1934 (15 U.S.C. 78f) (national securities exchange); or

(*2*) Would qualify as an independent director under the listing standards of a national securities exchange, as demonstrated to the satisfaction of the Board, if the covered savings and loan holding company does not have an outstanding class of securities traded on a national securities exchange.

(b) *Chief risk officer*—(1) *General.* A covered savings and loan holding company with total consolidated assets of $50 billion or more must appoint a chief risk officer with experience in identifying, assessing, and managing risk exposures of large, complex financial firms.

(2) *Responsibilities.* (i) The chief risk officer is responsible for overseeing:

(A) The establishment of risk limits on an enterprise-wide basis and the monitoring of compliance with such limits;

(B) The implementation of and ongoing compliance with the policies and procedures set forth in paragraph (a)(2)(i) of this section and the development and implementation of the processes and systems set forth in paragraph (a)(2)(ii) of this section; and

(C) The management of risks and risk controls within the parameters of the company's risk control framework, and monitoring and testing of the company's risk controls.

(ii) The chief risk officer is responsible for reporting risk-management deficiencies and emerging risks to the risk committee and resolving risk-management deficiencies in a timely manner.

(3) *Corporate governance requirements.* (i) The covered savings and loan holding company must ensure that the compensation and other incentives provided to the chief risk officer are consistent with providing an objective assessment of the risks taken by the company; and

(ii) The chief risk officer must report directly to both the risk committee and chief executive officer of the company.

■ 7. Add subpart N to read as follows:

Subpart N—Risk Committee, Liquidity Risk Management, and Liquidity Buffer Requirements for Covered Savings and Loan Holding Companies With Total Consolidated Assets of $100 Billion or More

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Subpart N—Risk Committee, Liquidity Risk Management, and Liquidity Buffer Requirements for Covered Savings and Loan Holding Companies With Total Consolidated Assets of $100 Billion or More

§ 238.120 Scope.

This subpart applies to covered savings and loan holding companies with total consolidated assets of $100 billion or more. Total consolidated assets of a covered savings and loan holding company are equal to the consolidated assets of the covered savings and loan holding company, as calculated in accordance with § 238.121(b).

§ 238.121 Applicability.

(a) *Applicability.* (1) Subject to the initial applicability provisions of paragraph (c) of this section, a covered savings and loan holding company must comply with the risk-management and risk-committee requirements set forth in § 238.122 and the liquidity risk-management and liquidity stress test requirements set forth in §§ 238.123 and 238.124 no later than the first day of the fifth quarter following the date on which its total consolidated assets equal or exceed $100 billion.

(2) *Changes in requirements following a change in category.* A covered savings and loan holding company with total consolidated assets of $100 billion or more that changes from one category of covered savings and loan holding company described in § 238.10(b) through (d) to another such category must comply with the requirements applicable to the new category no later than on the first day of the second calendar quarter following the change in the covered savings and loan holding company's category.

(b) *Total consolidated assets.* Total consolidated assets of a covered savings and loan holding company for purposes of this subpart are equal to its consolidated assets, calculated based on the average of the covered savings and loan holding company's total consolidated assets for the four most recent quarters as reported quarterly on the FR Y–9C. If the covered savings and loan holding company has not filed the FR Y–9C for each of the four most recent calendar quarters, total consolidated assets means the average of its total consolidated assets, as reported on the FR Y–9C, for the most recent calendar quarter or quarters, as applicable. Total consolidated assets are measured on the as-of date of the most recent FR Y–9C used in the calculation of the average.

(c) *Cessation of requirements.* A covered savings and loan holding company is subject to the risk-management and risk committee requirements set forth in § 238.122 and the liquidity risk-management and liquidity stress test requirements set forth in §§ 238.123 and 238.124 until its reported total consolidated assets on the FR Y–9C are below $100 billion for each of four consecutive calendar quarters.

§ 238.122 Risk-management and risk committee requirements.

(a) *Risk committee*—(1) *General.* A covered savings and loan holding company with total consolidated assets of $100 billion or more must maintain a risk committee that approves and periodically reviews the risk-management policies of the covered savings and loan holding company's global operations and oversees the operation of the covered savings and loan holding company's global risk-management framework. The risk committee's responsibilities include liquidity risk-management as set forth in § 238.123(b).

(2) *Risk-management framework.* The covered savings and loan holding company's global risk-management framework must be commensurate with its structure, risk profile, complexity, activities, and size and must include:

(i) Policies and procedures establishing risk-management governance, risk-management procedures, and risk-control infrastructure for its global operations; and

(ii) Processes and systems for implementing and monitoring compliance with such policies and procedures, including:

(A) Processes and systems for identifying and reporting risks and risk-management deficiencies, including regarding emerging risks, and ensuring effective and timely implementation of actions to address emerging risks and risk-management deficiencies for its global operations;

(B) Processes and systems for establishing managerial and employee responsibility for risk management;

(C) Processes and systems for ensuring the independence of the risk-management function; and

(D) Processes and systems to integrate risk management and associated controls with management goals and its compensation structure for its global operations.

(3) *Corporate governance requirements.* The risk committee must:

(i) Have a formal, written charter that is approved by the covered savings and loan holding company's board of directors;

(ii) Be an independent committee of the board of directors that has, as its sole and exclusive function, responsibility for the risk-management policies of the covered savings and loan holding company's global operations and oversight of the operation of the covered savings and loan holding company's global risk-management framework;

(iii) Report directly to the covered savings and loan holding company's board of directors;

(iv) Receive and review regular reports on not less than a quarterly basis from the covered savings and loan holding company's chief risk officer provided pursuant to paragraph (b)(3)(ii) of this section; and

(v) Meet at least quarterly, or more frequently as needed, and fully document and maintain records of its proceedings, including risk-management decisions.

(4) *Minimum member requirements.* The risk committee must:

(i) Include at least one member having experience in identifying, assessing, and managing risk exposures of large, complex financial firms; and

(ii) Be chaired by a director who:

(A) Is not an officer or employee of the covered savings and loan holding company and has not been an officer or employee of the covered savings and loan holding company during the previous three years;

(B) Is not a member of the immediate family, as defined in § 238.31(b)(3), of a person who is, or has been within the last three years, an executive officer of the covered savings and loan holding company, as defined in § 215.2(e)(1) of this chapter; and

(C)(*1*) Is an independent director under Item 407 of the Securities and Exchange Commission's Regulation S–K (17 CFR 229.407(a)), if the covered savings and loan holding company has an outstanding class of securities traded on an exchange registered with the U.S. Securities and Exchange Commission as a national securities exchange under section 6 of the Securities Exchange Act of 1934 (15 U.S.C. 78f) (national securities exchange); or

(*2*) Would qualify as an independent director under the listing standards of a national securities exchange, as demonstrated to the satisfaction of the Board, if the covered savings and loan holding company does not have an outstanding class of securities traded on a national securities exchange.

(b) *Chief risk officer*—(1) *General.* A covered savings and loan holding company with total consolidated assets of $100 billion or more must appoint a chief risk officer with experience in identifying, assessing, and managing risk exposures of large, complex financial firms.

(2) *Responsibilities.* (i) The chief risk officer is responsible for overseeing:

(A) The establishment of risk limits on an enterprise-wide basis and the monitoring of compliance with such limits;

(B) The implementation of and ongoing compliance with the policies and procedures set forth in paragraph (a)(2)(i) of this section and the development and implementation of the processes and systems set forth in paragraph (a)(2)(ii) of this section; and

(C) The management of risks and risk controls within the parameters of the company's risk control framework, and monitoring and testing of the company's risk controls.

(ii) The chief risk officer is responsible for reporting risk-management deficiencies and emerging risks to the risk committee and resolving risk-management deficiencies in a timely manner.

(3) *Corporate governance requirements.* (i) The covered savings and loan holding company must ensure that the compensation and other incentives provided to the chief risk officer are consistent with providing an objective assessment of the risks taken by the covered savings and loan holding company; and

(ii) The chief risk officer must report directly to both the risk committee and chief executive officer of the company.

§ 238.123 Liquidity risk-management requirements.

(a) *Responsibilities of the board of directors*—(1) *Liquidity risk tolerance.* The board of directors of a covered savings and loan holding company with total consolidated assets of $100 billion or more must:

(i) Approve the acceptable level of liquidity risk that the covered savings and loan holding company may assume in connection with its operating strategies (liquidity risk tolerance) at least annually, taking into account the covered savings and loan holding company's capital structure, risk profile, complexity, activities, and size; and

(ii) Receive and review at least semi-annually information provided by senior management to determine whether the covered savings and loan holding company is operating in accordance with its established liquidity risk tolerance.

(b) *Responsibilities of the risk committee.* The risk committee (or a designated subcommittee of such committee composed of members of the board of directors) must approve the contingency funding plan described in paragraph (f) of this section at least annually, and must approve any material revisions to the plan prior to the implementation of such revisions.

(c) *Responsibilities of senior management*—(1) *Liquidity risk.* (i) Senior management of a covered savings and loan holding company with total consolidated assets of $100 billion or more must establish and implement strategies, policies, and procedures designed to effectively manage the risk that the covered savings and loan holding company's financial condition or safety and soundness would be adversely affected by its inability or the market's perception of its inability to meet its cash and collateral obligations (liquidity risk). The board of directors must approve the strategies, policies, and procedures pursuant to paragraph (a)(2) of this section.

(ii) Senior management must oversee the development and implementation of liquidity risk measurement and reporting systems, including those required by this section and § 238.124.

(iii) Senior management must determine at least quarterly whether the covered savings and loan holding company is operating in accordance with such policies and procedures and whether the covered savings and loan holding company is in compliance with this section and § 238.124 (or more often, if changes in market conditions or the liquidity position, risk profile, or financial condition warrant), and establish procedures regarding the preparation of such information.

(2) *Liquidity risk tolerance.* Senior management must report to the board of directors or the risk committee regarding the covered savings and loan holding company's liquidity risk profile and liquidity risk tolerance at least quarterly (or more often, if changes in market conditions or the liquidity position, risk profile, or financial condition of the company warrant).

(3) *Business lines or products.* (i) Senior management must approve new products and business lines and evaluate the liquidity costs, benefits, and risks of each new business line and each new product that could have a significant effect on the company's liquidity risk profile. The approval is required before the company implements the business line or offers the product. In determining whether to approve the new business line or product, senior management must consider whether the liquidity risk of the new business line or product (under both current and stressed conditions) is within the company's established liquidity risk tolerance.

(ii) Senior management must review at least annually significant business lines and products to determine whether any line or product creates or has created any unanticipated liquidity risk, and to determine whether the liquidity risk of each strategy or product is within the company's established liquidity risk tolerance.

(4) *Cash-flow projections.* Senior management must review the cash-flow projections produced under paragraph (e) of this section at least quarterly (or more often, if changes in market conditions or the liquidity position, risk profile, or financial condition of the covered savings and loan holding company warrant) to ensure that the liquidity risk is within the established liquidity risk tolerance.

(5) *Liquidity risk limits.* Senior management must establish liquidity risk limits as set forth in paragraph (g) of this section and review the company's compliance with those limits at least quarterly (or more often, if changes in market conditions or the liquidity position, risk profile, or financial condition of the company warrant).

(6) *Liquidity stress testing.* Senior management must:

(i) Approve the liquidity stress testing practices, methodologies, and assumptions required in § 238.124(a) at least quarterly, and whenever the covered savings and loan holding company materially revises its liquidity stress testing practices, methodologies or assumptions;

(ii) Review the liquidity stress testing results produced under § 238.124(a) at least quarterly;

(iii) Review the independent review of the liquidity stress tests under § 238.123(d) periodically; and

(iv) Approve the size and composition of the liquidity buffer established under § 238.124(b) at least quarterly.

(d) *Independent review function.* (1) A covered savings and loan holding company with total consolidated assets of $100 billion or more must establish and maintain a review function that is independent of management functions that execute funding to evaluate its liquidity risk management.

(2) The independent review function must:

(i) Regularly, but no less frequently than annually, review and evaluate the adequacy and effectiveness of the company's liquidity risk management processes, including its liquidity stress test processes and assumptions;

(ii) Assess whether the company's liquidity risk-management function complies with applicable laws and regulations, and sound business practices; and

(iii) Report material liquidity risk management issues to the board of directors or the risk committee in writing for corrective action, to the extent permitted by applicable law.

(e) *Cash-flow projections.* (1) A covered savings and loan holding company with total consolidated assets of $100 billion or more must produce comprehensive cash-flow projections that project cash flows arising from assets, liabilities, and off-balance sheet exposures over, at a minimum, short- and long-term time horizons. The covered savings and loan holding company must update short-term cash-flow projections daily and must update longer-term cash-flow projections at least monthly.

(2) The covered savings and loan holding company must establish a methodology for making cash-flow projections that results in projections that:

(i) Include cash flows arising from contractual maturities, intercompany transactions, new business, funding renewals, customer options, and other potential events that may impact liquidity;

(ii) Include reasonable assumptions regarding the future behavior of assets, liabilities, and off-balance sheet exposures;

(iii) Identify and quantify discrete and cumulative cash flow mismatches over these time periods; and

(iv) Include sufficient detail to reflect the capital structure, risk profile, complexity, currency exposure, activities, and size of the covered savings and loan holding company and include analyses by business line, currency, or legal entity as appropriate.

(3) The covered savings and loan holding company must adequately document its methodology for making cash flow projections and the included assumptions and submit such documentation to the risk committee.

(f) *Contingency funding plan.* (1) A covered savings and loan holding company with total consolidated assets of $100 billion or more must establish and maintain a contingency funding plan that sets out the company's strategies for addressing liquidity needs during liquidity stress events. The contingency funding plan must be commensurate with the company's capital structure, risk profile, complexity, activities, size, and established liquidity risk tolerance. The company must update the contingency funding plan at least annually, and when changes to market and idiosyncratic conditions warrant.

(2) *Components of the contingency funding plan*—(i) *Quantitative assessment.* The contingency funding plan must:

(A) Identify liquidity stress events that could have a significant impact on the covered savings and loan holding company's liquidity;

(B) Assess the level and nature of the impact on the covered savings and loan holding company's liquidity that may occur during identified liquidity stress events;

(C) Identify the circumstances in which the covered savings and loan holding company would implement its action plan described in paragraph (f)(2)(ii)(A) of this section, which circumstances must include failure to meet any minimum liquidity requirement imposed by the Board;

(D) Assess available funding sources and needs during the identified liquidity stress events;

(E) Identify alternative funding sources that may be used during the identified liquidity stress events; and

(F) Incorporate information generated by the liquidity stress testing required under § 238.124(a).

(ii) *Liquidity event management process.* The contingency funding plan must include an event management process that sets out the covered savings and loan holding company's procedures for managing liquidity during identified liquidity stress events. The liquidity event management process must:

(A) Include an action plan that clearly describes the strategies the company will use to respond to liquidity shortfalls for identified liquidity stress events, including the methods that the company will use to access alternative funding sources;

(B) Identify a liquidity stress event management team that would execute the action plan described in paragraph (f)(2)(ii)(A) of this section;

(C) Specify the process, responsibilities, and triggers for invoking the contingency funding plan, describe the decision-making process during the identified liquidity stress events, and describe the process for executing contingency measures identified in the action plan; and

(D) Provide a mechanism that ensures effective reporting and communication within the covered savings and loan holding company and with outside parties, including the Board and other relevant supervisors, counterparties, and other stakeholders.

(iii) *Monitoring.* The contingency funding plan must include procedures for monitoring emerging liquidity stress events. The procedures must identify early warning indicators that are tailored to the company's capital structure, risk profile, complexity, activities, and size.

(iv) *Testing.* The covered savings and loan holding company must periodically test:

(A) The components of the contingency funding plan to assess the plan's reliability during liquidity stress events;

(B) The operational elements of the contingency funding plan, including operational simulations to test communications, coordination, and decision-making by relevant management; and

(C) The methods the covered savings and loan holding company will use to access alternative funding sources to determine whether these funding sources will be readily available when needed.

(g) *Liquidity risk limits*—(1) *General.* (i) A Category II savings and loan holding company or Category III savings and loan holding company must monitor sources of liquidity risk and establish limits on liquidity risk, including limits on:

(A) Concentrations in sources of funding by instrument type, single counterparty, counterparty type, secured and unsecured funding, and as applicable, other forms of liquidity risk;

(B) The amount of liabilities that mature within various time horizons; and

(C) Off-balance sheet exposures and other exposures that could create funding needs during liquidity stress events.

(ii) Each limit established pursuant to paragraph (g)(1) of this section must be consistent with the company's established liquidity risk tolerance and must reflect the company's capital structure, risk profile, complexity, activities, and size.

(2) *Liquidity risk limits for Category IV savings and loan holding companies.* A Category IV savings and loan holding company must monitor sources of liquidity risk and establish limits on liquidity risk that are consistent with the company's established liquidity risk tolerance and that reflect the company's capital structure, risk profile, complexity, activities, and size.

(h) *Collateral, legal entity, and intraday liquidity risk monitoring.* A covered savings and loan holding company with total consolidated assets of $100 billion or more must establish and maintain procedures for monitoring liquidity risk as set forth in this paragraph.

(1) *Collateral.* The covered savings and loan holding company must establish and maintain policies and procedures to monitor assets that have been, or are available to be, pledged as collateral in connection with transactions to which it or its affiliates are counterparties. These policies and procedures must provide that the covered savings and loan holding company:

(i) Calculates all of its collateral positions according to the frequency specified in paragraph (h)(1)(i)(A) and (B) or as directed by the Board, specifying the value of pledged assets relative to the amount of security required under the relevant contracts and the value of unencumbered assets available to be pledged:

(A) If the covered savings and loan holding company is not a Category IV savings and loan holding company, on a weekly basis;

(B) If the covered savings and loan holding company is a Category IV savings and loan holding company, on a monthly basis;

(ii) Monitors the levels of unencumbered assets available to be pledged by legal entity, jurisdiction, and currency exposure;

(iii) Monitors shifts in the covered savings and loan holding company's funding patterns, such as shifts between intraday, overnight, and term pledging of collateral; and

(iv) Tracks operational and timing requirements associated with accessing collateral at its physical location (for example, the custodian or securities settlement system that holds the collateral).

(2) *Legal entities, currencies and business lines.* The covered savings and loan holding company must establish and maintain procedures for monitoring and controlling liquidity risk exposures and funding needs within and across significant legal entities, currencies, and business lines, taking into account legal and regulatory restrictions on the transfer of liquidity between legal entities.

(3) *Intraday exposures.* The covered savings and loan holding company must establish and maintain procedures for monitoring intraday liquidity risk exposure that are consistent with the covered savings and loan holding company's capital structure, risk profile, complexity, activities, and size. If the covered savings and loan holding company is a Category II savings and loan holding company or a Category III

savings and loan holding company, these procedures must address how the management of the covered savings and loan holding company will:

(i) Monitor and measure expected daily gross liquidity inflows and outflows;

(ii) Manage and transfer collateral to obtain intraday credit;

(iii) Identify and prioritize time-specific obligations so that the covered savings and loan holding company can meet these obligations as expected and settle less critical obligations as soon as possible;

(iv) Manage the issuance of credit to customers where necessary; and

(v) Consider the amounts of collateral and liquidity needed to meet payment systems obligations when assessing the covered savings and loan holding company's overall liquidity needs.

§ 238.124 Liquidity stress testing and buffer requirements.

(a) *Liquidity stress testing requirement*—(1) *General.* A covered savings and loan holding company with total consolidated assets of $100 billion or more must conduct stress tests to assess the potential impact of the liquidity stress scenarios set forth in paragraph (a)(3) on its cash flows, liquidity position, profitability, and solvency, taking into account its current liquidity condition, risks, exposures, strategies, and activities.

(i) The covered savings and loan holding company must take into consideration its balance sheet exposures, off-balance sheet exposures, size, risk profile, complexity, business lines, organizational structure, and other characteristics of the covered savings and loan holding company that affect its liquidity risk profile in conducting its stress test.

(ii) In conducting a liquidity stress test using the scenarios described in paragraphs (a)(3)(i) and (ii) of this section, the covered savings and loan holding company must address the potential direct adverse impact of associated market disruptions on the covered savings and loan holding company and incorporate the potential actions of other market participants experiencing liquidity stresses under the market disruptions that would adversely affect the covered savings and loan holding company.

(2) *Frequency.* The covered savings and loan holding company must perform the liquidity stress tests required under paragraph (a)(1) of this section according to the frequency specified in paragraph (a)(2)(i) and (ii) or as directed by the Board:

(i) If the covered savings and loan holding company is not a Category IV savings and loan holding company, at least monthly; or

(ii) If the covered savings and loan holding company is a Category IV savings and loan holding company, at least quarterly.

(3) *Stress scenarios.* (i) Each liquidity stress test conducted under paragraph (a)(1) of this section must include, at a minimum:

(A) A scenario reflecting adverse market conditions;

(B) A scenario reflecting an idiosyncratic stress event for the covered savings and loan holding company; and

(C) A scenario reflecting combined market and idiosyncratic stresses.

(ii) The covered savings and loan holding company must incorporate additional liquidity stress scenarios into its liquidity stress test, as appropriate, based on its financial condition, size, complexity, risk profile, scope of operations, or activities. The Board may require the covered savings and loan holding company to vary the underlying assumptions and stress scenarios.

(4) *Planning horizon.* Each stress test conducted under paragraph (a)(1) of this section must include an overnight planning horizon, a 30-day planning horizon, a 90-day planning horizon, a one-year planning horizon, and any other planning horizons that are relevant to the covered savings and loan holding company's liquidity risk profile. For purposes of this section, a ''planning horizon'' is the period over which the relevant stressed projections extend. The covered savings and loan holding company must use the results of the stress test over the 30-day planning horizon to calculate the size of the liquidity buffer under paragraph (b) of this section.

(5) *Requirements for assets used as cash-flow sources in a stress test.* (i) To the extent an asset is used as a cash flow source to offset projected funding needs during the planning horizon in a liquidity stress test, the fair market value of the asset must be discounted to reflect any credit risk and market volatility of the asset.

(ii) Assets used as cash-flow sources during a planning horizon must be diversified by collateral, counterparty, borrowing capacity, and other factors associated with the liquidity risk of the assets.

(iii) A line of credit does not qualify as a cash flow source for purposes of a stress test with a planning horizon of 30 days or less. A line of credit may qualify as a cash flow source for purposes of a stress test with a planning horizon that exceeds 30 days.

(6) *Tailoring.* Stress testing must be tailored to, and provide sufficient detail to reflect, a covered savings and loan holding company's capital structure, risk profile, complexity, activities, and size.

(7) *Governance*—(i) *Policies and procedures.* A covered savings and loan holding company with total consolidated assets of $100 billion or more must establish and maintain policies and procedures governing its liquidity stress testing practices, methodologies, and assumptions that provide for the incorporation of the results of liquidity stress tests in future stress testing and for the enhancement of stress testing practices over time.

(ii) *Controls and oversight.* A covered savings and loan holding company with total consolidated assets of $100 billion or more must establish and maintain a system of controls and oversight that is designed to ensure that its liquidity stress testing processes are effective in meeting the requirements of this section. The controls and oversight must ensure that each liquidity stress test appropriately incorporates conservative assumptions with respect to the stress scenario in paragraph (a)(3) of this section and other elements of the stress test process, taking into consideration the covered savings and loan holding company's capital structure, risk profile, complexity, activities, size, business lines, legal entity or jurisdiction, and other relevant factors. The assumptions must be approved by the chief risk officer and be subject to the independent review under § 238.123(d).

(iii) *Management information systems.* The covered savings and loan holding company must maintain management information systems and data processes sufficient to enable it to effectively and reliably collect, sort, and aggregate data and other information related to liquidity stress testing.

(b) *Liquidity buffer requirement.* (1) A covered savings and loan holding company with total consolidated assets of $100 billion or more must maintain a liquidity buffer that is sufficient to meet the projected net stressed cash-flow need over the 30-day planning horizon of a liquidity stress test conducted in accordance with paragraph (a) of this section under each scenario set forth in paragraph (a)(3)(i) through (ii) of this section.

(2) *Net stressed cash-flow need.* The net stressed cash-flow need for a covered savings and loan holding company is the difference between the amount of its cash-flow need and the

amount of its cash flow sources over the 30-day planning horizon.

(3) *Asset requirements.* The liquidity buffer must consist of highly liquid assets that are unencumbered, as defined in paragraph (b)(3)(ii) of this section:

(i) *Highly liquid asset.* A highly liquid asset includes:

(A) Cash;

(B) Securities issued or guaranteed by the United States, a U.S. government agency, or a U.S. government-sponsored enterprise; or

(C) Any other asset that the covered savings and loan holding company demonstrates to the satisfaction of the Board:

(*1*) Has low credit risk and low market risk;

(*2*) Is traded in an active secondary two-way market that has committed market makers and independent bona fide offers to buy and sell so that a price reasonably related to the last sales price or current bona fide competitive bid and offer quotations can be determined within one day and settled at that price within a reasonable time period conforming with trade custom; and

(*3*) Is a type of asset that investors historically have purchased in periods of financial market distress during which market liquidity has been impaired.

(ii) *Unencumbered.* An asset is unencumbered if it:

(A) Is free of legal, regulatory, contractual, or other restrictions on the ability of such company promptly to liquidate, sell or transfer the asset; and

(B) Is either:

(*1*) Not pledged or used to secure or provide credit enhancement to any transaction; or

(*2*) Pledged to a central bank or a U.S. government-sponsored enterprise, to the extent potential credit secured by the asset is not currently extended by such central bank or U.S. government-sponsored enterprise or any of its consolidated subsidiaries.

(iii) *Calculating the amount of a highly liquid asset.* In calculating the amount of a highly liquid asset included in the liquidity buffer, the covered savings and loan holding company must discount the fair market value of the asset to reflect any credit risk and market price volatility of the asset.

(iv) *Diversification.* The liquidity buffer must not contain significant concentrations of highly liquid assets by issuer, business sector, region, or other factor related to the covered savings and loan holding company's risk, except with respect to cash and securities issued or guaranteed by the United States, a U.S. government agency, or a U.S. government-sponsored enterprise.

■ 8. Add subpart O to read as follows:

Subpart O—Supervisory Stress Test Requirements for Covered Savings and Loan Holding Companies

Sec.

Subpart O—Supervisory Stress Test Requirements for Covered Savings and Loan Holding Companies

§ 238.130 Definitions.

For purposes of this subpart, the following definitions apply:

Advanced approaches means the risk-weighted assets calculation methodologies at 12 CFR part 217, subpart E, as applicable.

Adverse scenario means a set of conditions that affect the U.S. economy or the financial condition of a covered company that are more adverse than those associated with the baseline scenario and may include trading or other additional components.

Baseline scenario means a set of conditions that affect the U.S. economy or the financial condition of a covered company and that reflect the consensus views of the economic and financial outlook.

Covered company means a covered savings and loan holding company (other than a foreign banking organization) with average total consolidated assets of $100 billion or more.

Planning horizon means the period of at least nine consecutive quarters, beginning on the first day of a stress test cycle over which the relevant projections extend.

Pre-provision net revenue means the sum of net interest income and non-interest income less expenses before adjusting for loss provisions.

Provision for credit losses means:

(1) Until December 31, 2019:

(i) With respect to a covered company that has not adopted the current expected credit losses methodology under GAAP, the provision for loan and lease losses as reported on the FR Y–9C (and as would be reported on the FR Y–9C in the current stress test cycle); and

(ii) With respect to a covered company that has adopted the current expected credit losses methodology under GAAP, the provision for loan and lease losses, as would be calculated and reported on the FR Y–9C by a covered company that has not adopted the current expected credit losses methodology under GAAP; and

(2) Beginning January 1, 2020:

(i) With respect to a covered company that has adopted the current expected credit losses methodology under GAAP, the provision for credit losses, as would be reported by the covered company on the FR Y–9C in the current stress test cycle; and,

(ii) With respect to a covered company that has not adopted the current expected credit losses methodology under GAAP, the provision for loan and lease losses as would be reported by the covered company on the FR Y–9C in the current stress test cycle.

Regulatory capital ratio means a capital ratio for which the Board has established minimum requirements for the covered savings and loan holding company by regulation or order, including, as applicable, the company's regulatory capital ratios calculated under 12 CFR part 217 and the deductions required under 12 CFR 248.12; except that the company shall not use the advanced approaches to calculate its regulatory capital ratios.

Scenarios are those sets of conditions that affect the U.S. economy or the financial condition of a covered company that the Board annually determines are appropriate for use in the supervisory stress tests, including, but not limited to, baseline, adverse, and severely adverse scenarios.

Severely adverse scenario means a set of conditions that affect the U.S. economy or the financial condition of a covered company and that overall are more severe than those associated with the adverse scenario and may include trading or other additional components.

Stress test cycle means the period beginning on January 1 of a calendar year and ending on December 31 of that year.

Subsidiary has the same meaning as in § 225.2(o) of this chapter.

§ 238.131 Applicability.

(a) *Scope*—(1) *Applicability.* Except as provided in paragraph (b) of this section, this subpart applies to any covered company.

(2) *Ongoing applicability.* A covered savings and loan holding company (including any successor company) that is subject to any requirement in this subpart shall remain subject to any such requirement unless and until its total consolidated assets fall below $100 billion for each of four consecutive quarters, as reported on the FR Y–9C

and, effective on the as-of date of the fourth consecutive FR Y–9C.

(b) *Transitional arrangements.* (1) A covered savings and loan holding company that becomes a covered company on or before September 30 of a calendar year must comply with the requirements of this subpart beginning on January 1 of the second calendar year after the covered savings and loan holding company becomes a covered company, unless that time is extended by the Board in writing.

(2) A covered savings and loan holding company that becomes a covered company after September 30 of a calendar year must comply with the requirements of this subpart beginning on January 1 of the third calendar year after the covered savings and loan holding company becomes a covered company, unless that time is extended by the Board in writing.

§ 238.132 Analysis conducted by the Board.

(a) *In general.* (1) The Board will conduct an analysis of each covered company's capital, on a total consolidated basis, taking into account all relevant exposures and activities of that covered company, to evaluate the ability of the covered company to absorb losses in specified economic and financial conditions.

(2) The analysis will include an assessment of the projected losses, net income, and pro forma capital levels and regulatory capital ratios and other capital ratios for the covered company and use such analytical techniques that the Board determines are appropriate to identify, measure, and monitor risks of the covered company.

(3) In conducting the analyses, the Board will coordinate with the appropriate primary financial regulatory agencies and the Federal Insurance Office, as appropriate.

(b) *Economic and financial scenarios related to the Board's analysis.* The Board will conduct its analysis using a minimum of three different scenarios, including a baseline scenario, adverse scenario, and severely adverse scenario. The Board will notify covered companies of the scenarios that the Board will apply to conduct the analysis for each stress test cycle to which the covered company is subject by no later than February 15 of that year, except with respect to trading or any other components of the scenarios and any additional scenarios that the Board will apply to conduct the analysis, which will be communicated by no later than March 1 of that year.

(c) *Frequency of analysis conducted by the Board.* (1) Except as provided in paragraph (c)(2) of this section, the Board will conduct its analysis of a covered company on an annual basis.

(2) The Board will conduct its analysis of a Category IV savings and loan holding company on a biennial basis and occurring in each year ending in an even number.

§ 238.133 Data and information required to be submitted in support of the Board's analyses.

(a) *Regular submissions.* Each covered company must submit to the Board such data, on a consolidated basis, that the Board determines is necessary in order for the Board to derive the relevant pro forma estimates of the covered company over the planning horizon under the scenarios described in § 238.132(b).

(b) *Additional submissions required by the Board.* The Board may require a covered company to submit any other information on a consolidated basis that the Board deems necessary in order to:

(1) Ensure that the Board has sufficient information to conduct its analysis under this subpart; and

(2) Project a company's pre-provision net revenue, losses, provision for credit losses, and net income; and pro forma capital levels, regulatory capital ratios, and any other capital ratio specified by the Board under the scenarios described in § 238.132(b).

(c) *Confidential treatment of information submitted.* The confidentiality of information submitted to the Board under this subpart and related materials shall be determined in accordance with the Freedom of Information Act (5 U.S.C. 552(b)) and the Board's Rules Regarding Availability of Information (12 CFR part 261).

§ 238.134 Review of the Board's analysis; publication of summary results.

(a) *Review of results.* Based on the results of the analysis conducted under this subpart, the Board will conduct an evaluation to determine whether the covered company has the capital, on a total consolidated basis, necessary to absorb losses and continue its operation by maintaining ready access to funding, meeting its obligations to creditors and other counterparties, and continuing to serve as a credit intermediary under baseline, adverse and severely adverse scenarios, and any additional scenarios.

(b) *Publication of results by the Board.* (1) The Board will publicly disclose a summary of the results of the Board's analyses of a covered company by June 30 of the calendar year in which the stress test was conducted pursuant to § 238.132.

(2) The Board will notify companies of the date on which it expects to publicly disclose a summary of the Board's analyses pursuant to paragraph (b)(1) of this section at least 14 calendar days prior to the expected disclosure date.

§ 238.135 Corporate use of stress test results.

The board of directors and senior management of each covered company must consider the results of the analysis conducted by the Board under this subpart, as appropriate:

(a) As part of the covered company's capital plan and capital planning process, including when making changes to the covered company's capital structure (including the level and composition of capital); and

(b) When assessing the covered company's exposures, concentrations, and risk positions.

■ 9. Add subpart P to read as follows:

Subpart P—Company-Run Stress Test Requirements for Savings and Loan Holding Companies

Subpart P—Company-Run Stress Test Requirements for Savings and Loan Holding Companies

§ 238.140 Authority and purpose.

(a) *Authority.* 12 U.S.C. 1467; 1467a, 1818, 5361, 5365.

(b) *Purpose.* This subpart establishes the requirement for a covered company to conduct stress tests. This subpart also establishes definitions of stress test and related terms, methodologies for conducting stress tests, and reporting and disclosure requirements.

§ 238.141 Definitions.

For purposes of this subpart, the following definitions apply:

Advanced approaches means the risk-weighted assets calculation methodologies at 12 CFR part 217, subpart E, as applicable.

Adverse scenario means a set of conditions that affect the U.S. economy or the financial condition of a covered company that are more adverse than those associated with the baseline scenario and may include trading or other additional components.

Baseline scenario means a set of conditions that affect the U.S. economy or the financial condition of a covered company and that reflect the consensus views of the economic and financial outlook.

Capital action has the same meaning as in § 225.8 of this chapter.

Covered company means:

(1) A Category II savings and loan holding company; or

(2) A Category III savings and loan holding company.

Planning horizon means the period of at least nine consecutive quarters, beginning on the first day of a stress test cycle over which the relevant projections extend.

Pre-provision net revenue means the sum of net interest income and non-interest income less expenses before adjusting for loss provisions.

Provision for credit losses means:

(1) Until December 31, 2019:

(i) With respect to a covered company that has not adopted the current expected credit losses methodology under GAAP, the provision for loan and lease losses as reported on the FR Y–9C (and as would be reported on the FR Y–9C in the current stress test cycle); and

(ii) With respect to a covered company that has adopted the current expected credit losses methodology under GAAP, the provision for loan and lease losses, as would be calculated and reported on the FR Y–9C by a covered company that has not adopted the current expected credit losses methodology under GAAP; and

(2) Beginning January 1, 2020:

(i) With respect to a covered company that has adopted the current expected credit losses methodology under GAAP, the provision for credit losses, as would be reported by the covered company on the FR Y–9C in the current stress test cycle; and

(ii) With respect to a covered company that has not adopted the current expected credit losses methodology under GAAP, the provision for loan and lease losses as would be reported by the covered company on the FR Y–9C in the current stress test cycle.

Regulatory capital ratio means a capital ratio for which the Board has established minimum requirements for the covered savings and loan holding company by regulation or order, including, as applicable, the company's regulatory capital ratios calculated under 12 CFR part 217 and the deductions required under 12 CFR 248.12; except that the company shall not use the advanced approaches to calculate its regulatory capital ratios.

Scenarios are those sets of conditions that affect the U.S. economy or the financial condition of a covered company that the Board annually or biennially determines are appropriate for use in the company-run stress tests, including, but not limited to, baseline, adverse, and severely adverse scenarios.

Severely adverse scenario means a set of conditions that affect the U.S. economy or the financial condition of a covered company and that overall are more severe than those associated with the adverse scenario and may include trading or other additional components.

Stress test means a process to assess the potential impact of scenarios on the consolidated earnings, losses, and capital of a covered company over the planning horizon, taking into account its current condition, risks, exposures, strategies, and activities.

Stress test cycle means the period beginning on January 1 of a calendar year and ending on December 31 of that year.

Subsidiary has the same meaning as in § 225.2(o) of this chapter.

§ 238.142 Applicability.

(a) *Scope*—(1) *Applicability.* Except as provided in paragraph (b) of this section, this subpart applies to any covered company, which includes:

(i) Any Category II savings and loan holding company; and

(ii) Any Category III savings and loan holding company.

(2) *Ongoing applicability.* A covered savings and loan holding company (including any successor company) that is subject to any requirement in this subpart shall remain subject to any such requirement unless and until the covered savings and loan holding company:

(i) Is not a Category II savings and loan holding company; and

(ii) Is not a Category III savings and loan holding company.

(b) *Transitional arrangements.* (1) A covered savings and loan holding company that becomes a covered company on or before September 30 of a calendar year must comply with the requirements of this subpart beginning on January 1 of the second calendar year after the covered savings and loan holding company becomes a covered company, unless that time is extended by the Board in writing.

(2) A covered savings and loan holding company that becomes a covered company after September 30 of a calendar year must comply with the requirements of this subpart beginning on January 1 of the third calendar year after the covered savings and loan holding company becomes a covered company, unless that time is extended by the Board in writing.

§ 238.143 Stress test.

(a) *Stress test requirement*—(1) *In general.* A covered company must conduct a stress test as required under this subpart.

(2) *Frequency.* (i) Except as provided in paragraph (a)(2)(ii) of this section, a covered company must conduct an annual stress test. The stress test must be conducted by April 5 of each calendar year based on data as of December 31 of the preceding calendar year, unless the time or the as-of date is extended by the Board in writing.

(ii) A Category III savings and loan holding company must conduct a biennial stress test. The stress test must be conducted by April 5 of each calendar year ending in an even number, based on data as of December 31 of the preceding calendar year, unless the time or the as-of date is extended by the Board in writing.

(b) *Scenarios provided by the Board*—(1) *In general.* In conducting a stress test under this section, a covered company must, at a minimum, use the scenarios provided by the Board. Except as provided in paragraphs (b)(2) and (3) of this section, the Board will provide a description of the scenarios to each covered company no later than February 15 of the calendar year in which the stress test is performed pursuant to this section.

(2) *Additional components.* (i) The Board may require a covered company with significant trading activity, as determined by the Board and specified in the Capital Assessments and Stress Testing report (FR Y–14), to include a trading and counterparty component in its adverse and severely adverse scenarios in the stress test required by this section. The data used in this component must be as-of a date selected by the Board between October 1 of the previous calendar year and March 1 of the calendar year in which the stress test is performed pursuant to this section, and the Board will communicate the as-of date and a description of the component to the company no later than March 1 of the calendar year in which the stress test is performed pursuant to this section.

(ii) The Board may require a covered company to include one or more additional components in its adverse and severely adverse scenarios in the stress test required by this section based on the company's financial condition, size, complexity, risk profile, scope of operations, or activities, or risks to the U.S. economy.

(3) *Additional scenarios.* The Board may require a covered company to use one or more additional scenarios in the stress test required by this section based on the company's financial condition, size, complexity, risk profile, scope of

operations, or activities, or risks to the U.S. economy.

(4) *Notice and response*—(i) *Notification of additional component.* If the Board requires a covered company to include one or more additional components in its adverse and severely adverse scenarios under paragraph (b)(2) of this section or to use one or more additional scenarios under paragraph (b)(3) of this section, the Board will notify the company in writing. The Board will provide such notification no later than December 31 of the preceding calendar year. The notification will include a general description of the additional component(s) or additional scenario(s) and the basis for requiring the company to include the additional component(s) or additional scenario(s).

(ii) *Request for reconsideration and Board response.* Within 14 calendar days of receipt of a notification under this paragraph, the covered company may request in writing that the Board reconsider the requirement that the company include the additional component(s) or additional scenario(s), including an explanation as to why the request for reconsideration should be granted. The Board will respond in writing within 14 calendar days of receipt of the company's request.

(iii) *Description of component.* The Board will provide the covered company with a description of any additional component(s) or additional scenario(s) by March 1 of the calendar year in which the stress test is performed pursuant to this section.

§ 238.144 Methodologies and practices.

(a) *Potential impact on capital.* In conducting a stress test under § 238.143, for each quarter of the planning horizon, a covered company must estimate the following for each scenario required to be used:

(1) Losses, pre-provision net revenue, provision for credit losses, and net income; and

(2) The potential impact on pro forma regulatory capital levels and pro forma capital ratios (including regulatory capital ratios and any other capital ratios specified by the Board), incorporating the effects of any capital actions over the planning horizon and maintenance of an allowance for credit losses appropriate for credit exposures throughout the planning horizon.

(b) *Assumptions regarding capital actions.* In conducting a stress test under § 238.143, a covered company is required to make the following assumptions regarding its capital actions over the planning horizon:

(1) For the first quarter of the planning horizon, the covered company must take into account its actual capital actions as of the end of that quarter; and

(2) For each of the second through ninth quarters of the planning horizon, the covered company must include in the projections of capital:

(i) Common stock dividends equal to the quarterly average dollar amount of common stock dividends that the company paid in the previous year (that is, the first quarter of the planning horizon and the preceding three calendar quarters) plus common stock dividends attributable to issuances related to expensed employee compensation or in connection with a planned merger or acquisition to the extent that the merger or acquisition is reflected in the covered company's pro forma balance sheet estimates;

(ii) Payments on any other instrument that is eligible for inclusion in the numerator of a regulatory capital ratio equal to the stated dividend, interest, or principal due on such instrument during the quarter;

(iii) An assumption of no redemption or repurchase of any capital instrument that is eligible for inclusion in the numerator of a regulatory capital ratio; and

(iv) An assumption of no issuances of common stock or preferred stock, except for issuances related to expensed employee compensation or in connection with a planned merger or acquisition to the extent that the merger or acquisition is reflected in the covered company's pro forma balance sheet estimates.

(c) *Controls and oversight of stress testing processes*—(1) *In general.* The senior management of a covered company must establish and maintain a system of controls, oversight, and documentation, including policies and procedures, that are designed to ensure that its stress testing processes are effective in meeting the requirements in this subpart. These policies and procedures must, at a minimum, describe the covered company's stress testing practices and methodologies, and processes for validating and updating the company's stress test practices and methodologies consistent with applicable laws and regulations.

(2) *Oversight of stress testing processes.* The board of directors, or a committee thereof, of a covered company must review and approve the policies and procedures of the stress testing processes as frequently as economic conditions or the condition of the covered company may warrant, but no less than annually. The board of directors and senior management of the covered company must receive a summary of the results of any stress test conducted under this subpart.

(3) *Role of stress testing results.* The board of directors and senior management of each covered company must consider the results of the analysis it conducts under this subpart, as appropriate:

(i) As part of the covered company's capital plan and capital planning process, including when making changes to the covered company's capital structure (including the level and composition of capital); and

(ii) When assessing the covered company's exposures, concentrations, and risk positions.

§ 238.145 Reports of stress test results.

(a) *Reports to the Board of stress test results.* A covered company must report the results of the stress test required under § 238.143 to the Board in the manner and form prescribed by the Board. Such results must be submitted by April 5 of the calendar year in which the stress test is performed pursuant to § 238.143, unless that time is extended by the Board in writing.

(b) *Confidential treatment of information submitted.* The confidentiality of information submitted to the Board under this subpart and related materials shall be determined in accordance with applicable exemptions under the Freedom of Information Act (5 U.S.C. 552(b)) and the Board's Rules Regarding Availability of Information (12 CFR part 261).

§ 238.146 Disclosure of stress test results.

(a) *Public disclosure of results*—(1) *In general.* A covered company must publicly disclose a summary of the results of the stress test required under § 238.143 within the period that is 15 calendar days after the Board publicly discloses the results of its supervisory stress test of the covered company pursuant to § 238.134, unless that time is extended by the Board in writing.

(2) *Disclosure method.* The summary required under this section may be disclosed on the website of a covered company, or in any other forum that is reasonably accessible to the public.

(b) *Summary of results.* The summary results must, at a minimum, contain the following information regarding the severely adverse scenario:

(1) A description of the types of risks included in the stress test;

(2) A general description of the methodologies used in the stress test, including those employed to estimate losses, revenues, provision for credit losses, and changes in capital positions over the planning horizon;

(3) Estimates of—

(i) Pre-provision net revenue and other revenue;

(ii) Provision for credit losses, realized losses or gains on available-for-sale and held-to-maturity securities, trading and counterparty losses, and other losses or gains;

(iii) Net income before taxes;

(iv) Loan losses (dollar amount and as a percentage of average portfolio balance) in the aggregate and by subportfolio, including: Domestic closed-end first-lien mortgages; domestic junior lien mortgages and home equity lines of credit; commercial and industrial loans; commercial real estate loans; credit card exposures; other consumer loans; and all other loans; and

(v) Pro forma regulatory capital ratios and any other capital ratios specified by the Board; and

(4) An explanation of the most significant causes for the changes in regulatory capital ratios; and

(5) With respect to any depository institution subsidiary that is subject to stress testing requirements pursuant to 12 U.S.C. 5365(i)(2), as implemented by subpart B of this part, 12 CFR part 46 (OCC), or 12 CFR part 325, subpart C (FDIC), changes over the planning horizon in regulatory capital ratios and any other capital ratios specified by the Board and an explanation of the most significant causes for the changes in regulatory capital ratios.

(c) *Content of results.* (1) The following disclosures required under paragraph (b) of this section must be on a cumulative basis over the planning horizon:

(i) Pre-provision net revenue and other revenue;

(ii) Provision for credit losses, realized losses/gains on available-for-sale and held-to-maturity securities, trading and counterparty losses, and other losses or gains;

(iii) Net income before taxes; and

(iv) Loan losses in the aggregate and by subportfolio.

(2) The disclosure of pro forma regulatory capital ratios and any other capital ratios specified by the Board that is required under paragraph (b) of this section must include the beginning value, ending value, and minimum value of each ratio over the planning horizon.

■ 10. Add subpart Q to read as follows:

Subpart Q—Single Counterparty Credit Limits for Covered Savings and Loan Holding Companies

Subpart Q—Single Counterparty Credit Limits for Covered Savings and Loan Holding Companies

§ 238.150 Applicability and general provisions.

(a) *In general.* (1) This subpart establishes single counterparty credit limits for a covered company.

(2) For purposes of this subpart:

(i) *Covered company* means

(A) A Category II savings and loan holding company; or

(B) A Category III savings and loan holding company.

(b) *Credit exposure limits.* (1) Section 238.152 establishes credit exposure limits for a covered company.

(2) A covered company is required to calculate its aggregate net credit exposure, gross credit exposure, and net credit exposure to a counterparty using the methods in this subpart.

(c) *Applicability of this subpart.* (1) A company that is a covered company as of [DATE 60 DAYS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE **Federal Register**], must comply with the requirements of this subpart, including but not limited to § 238.152, beginning on July 1, 2020, unless that time is extended by the Board in writing;

(2) A covered company that becomes subject to this subpart after [DATE 60 DAYS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE **Federal Register**] must comply with the requirements of this subpart beginning on the first day of the ninth calendar quarter after it becomes a covered company, unless that time is accelerated or extended by the Board in writing.

(d) *Cessation of requirements.* Any company that becomes a covered company will remain subject to the requirements of this subpart unless and until it is not a Category II savings and loan holding company or a Category III savings and loan holding company.

§ 238.151 Definitions.

Unless defined in this section, terms that are set forth in § 238.2 and used in this subpart have the definitions assigned in § 238.2. For purposes of this subpart:

(a) *Adjusted market value* means:

(1) With respect to the value of cash, securities, or other eligible collateral transferred by the covered company to a counterparty, the sum of:

(i) The market value of the cash, securities, or other eligible collateral; and

(ii) The product of the market value of the securities or other eligible collateral multiplied by the applicable collateral haircut in Table 1 to § 217.132 of this chapter; and

(2) With respect to cash, securities, or other eligible collateral received by the covered company from a counterparty:

(i) The market value of the cash, securities, or other eligible collateral; minus

(ii) The market value of the securities or other eligible collateral multiplied by the applicable collateral haircut in Table 1 to § 217.132 of this chapter.

(3) Prior to calculating the adjusted market value pursuant to paragraphs (a)(1) and (2) of this section, with regard to a transaction that meets the definition of ''repo-style transaction'' in § 217.2 of this chapter, the covered company would first multiply the applicable collateral haircuts in Table 1 to § 217.132 of this chapter by the square root of ½.

(b) *Affiliate* means, with respect to a company:

(1) Any subsidiary of the company and any other company that is consolidated with the company under applicable accounting standards; or

(2) For a company that is not subject to principles or standards referenced in paragraph (b)(1) of this section, any subsidiary of the company and any other company that would be consolidated with the company, if consolidation would have occurred if such principles or standards had applied.

(c) *Aggregate net credit exposure* means the sum of all net credit exposures of a covered company and all of its subsidiaries to a single counterparty as calculated under this subpart.

(d) *Bank-eligible investments* means investment securities that a national bank is permitted to purchase, sell, deal in, underwrite, and hold under 12 U.S.C. 24 (Seventh) and 12 CFR part 1.

(e) *Counterparty* means, with respect to a credit transaction:

(1) With respect to a natural person, the natural person, and, if the credit exposure of the covered company to such natural person exceeds 5 percent of the covered company's tier 1 capital, the natural person and members of the person's immediate family collectively;

(2) With respect to any company that is not a subsidiary of the covered

company, the company and its affiliates collectively;

(3) With respect to a State, the State and all of its agencies, instrumentalities, and political subdivisions (including any municipalities) collectively;

(4) With respect to a foreign sovereign entity that is not assigned a zero percent risk weight under the standardized approach in 12 CFR part 217, subpart D, the foreign sovereign entity and all of its agencies and instrumentalities (but not including any political subdivision) collectively; and

(5) With respect to a political subdivision of a foreign sovereign entity such as a state, province, or municipality, any political subdivision of the foreign sovereign entity and all of such political subdivision's agencies and instrumentalities, collectively.[1]

(f) *Covered company* is defined in § 238.150(a)(2)(i).

(g) *Credit derivative* has the same meaning as in § 217.2 of this chapter.

(h) *Credit transaction* means, with respect to a counterparty:

(1) Any extension of credit to the counterparty, including loans, deposits, and lines of credit, but excluding uncommitted lines of credit;

(2) Any repurchase agreement or reverse repurchase agreement with the counterparty;

(3) Any securities lending or securities borrowing transaction with the counterparty;

(4) Any guarantee, acceptance, or letter of credit (including any endorsement, confirmed letter of credit, or standby letter of credit) issued on behalf of the counterparty;

(5) Any purchase of securities issued by or other investment in the counterparty;

(6) Any credit exposure to the counterparty in connection with a derivative transaction between the covered company and the counterparty;

(7) Any credit exposure to the counterparty in connection with a credit derivative or equity derivative between the covered company and a third party, the reference asset of which is an obligation or equity security of, or equity investment in, the counterparty; and

(8) Any transaction that is the functional equivalent of the above, and any other similar transaction that the Board, by regulation or order, determines to be a credit transaction for purposes of this subpart.

(i) *Depository institution* has the same meaning as in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813(c)).

(j) *Derivative transaction* means any transaction that is a contract, agreement, swap, warrant, note, or option that is based, in whole or in part, on the value of, any interest in, or any quantitative measure or the occurrence of any event relating to, one or more commodities, securities, currencies, interest or other rates, indices, or other assets.

(k) *Eligible collateral* means collateral in which, notwithstanding the prior security interest of any custodial agent, the covered company has a perfected, first priority security interest (or the legal equivalent thereof, if outside of the United States), with the exception of cash on deposit, and is in the form of:

(1) Cash on deposit with the covered company or a subsidiary of the covered company (including cash in foreign currency or U.S. dollars held for the covered company by a custodian or trustee, whether inside or outside of the United States);

(2) Debt securities (other than mortgage- or asset-backed securities and resecuritization securities, unless those securities are issued by a U.S. government-sponsored enterprise) that are bank-eligible investments and that are investment grade, except for any debt securities issued by the covered company or any subsidiary of the covered company;

(3) Equity securities that are publicly traded, except for any equity securities issued by the covered company or any subsidiary of the covered company;

(4) Convertible bonds that are publicly traded, except for any convertible bonds issued by the covered company or any subsidiary of the covered company; or

(5) Gold bullion.

(l) *Eligible credit derivative* means a single-name credit derivative or a standard, non-tranched index credit derivative, provided that:

(1) The contract meets the requirements of an eligible guarantee and has been confirmed by the protection purchaser and the protection provider;

(2) Any assignment of the contract has been confirmed by all relevant parties;

(3) If the credit derivative is a credit default swap, the contract includes the following credit events:

(i) Failure to pay any amount due under the terms of the reference exposure, subject to any applicable minimal payment threshold that is consistent with standard market practice and with a grace period that is closely in line with the grace period of the reference exposure; and

(ii) Receivership, insolvency, liquidation, conservatorship, or inability of the reference exposure issuer to pay its debts, or its failure or admission in writing of its inability generally to pay its debts as they become due, and similar events;

(4) The terms and conditions dictating the manner in which the contract is to be settled are incorporated into the contract;

(5) If the contract allows for cash settlement, the contract incorporates a robust valuation process to estimate loss reliably and specifies a reasonable period for obtaining post-credit event valuations of the reference exposure;

(6) If the contract requires the protection purchaser to transfer an exposure to the protection provider at settlement, the terms of at least one of the exposures that is permitted to be transferred under the contract provide that any required consent to transfer may not be unreasonably withheld; and

(7) If the credit derivative is a credit default swap, the contract clearly identifies the parties responsible for determining whether a credit event has occurred, specifies that this determination is not the sole responsibility of the protection provider, and gives the protection purchaser the right to notify the protection provider of the occurrence of a credit event.

(m) *Eligible equity derivative* means an equity derivative, provided that:

(1) The derivative contract has been confirmed by all relevant parties;

(2) Any assignment of the derivative contract has been confirmed by all relevant parties; and

(3) The terms and conditions dictating the manner in which the derivative contract is to be settled are incorporated into the contract.

(n) *Eligible guarantee* has the same meaning as in § 217.2 of this chapter.

(o) *Eligible guarantor* has the same meaning as in § 217.2 of this chapter.

(p) *Equity derivative* has the same meaning as ''equity derivative contract'' in § 217.2 of this chapter.

(q) *Exempt counterparty* means an entity that is identified as exempt from the requirements of this subpart under § 238.157, or that is otherwise excluded from this subpart, including any sovereign entity assigned a zero percent risk weight under the standardized approach in 12 CFR part 217, subpart D.

(r) *Financial entity* means:

(1)(i) A bank holding company or an affiliate thereof; a savings and loan holding company; a U.S. intermediate holding company established or designated pursuant to 12 CFR 252.153;

[1] In addition, under § 238.156, under certain circumstances, a covered company is required to aggregate its net credit exposure to one or more counterparties for all purposes under this subpart.

or a nonbank financial company supervised by the Board;

(ii) A depository institution as defined in section 3(c) of the Federal Deposit Insurance Act (12 U.S.C. 1813(c)); an organization that is organized under the laws of a foreign country and that engages directly in the business of banking outside the United States; a federal credit union or state credit union as defined in section 2 of the Federal Credit Union Act (12 U.S.C. 1752(1) and (6)); a national association, state member bank, or state nonmember bank that is not a depository institution; an institution that functions solely in a trust or fiduciary capacity as described in section 2(c)(2)(D) of the Bank Holding Company Act (12 U.S.C. 1841(c)(2)(D)); an industrial loan company, an industrial bank, or other similar institution described in section 2(c)(2)(H) of the Bank Holding Company Act (12 U.S.C. 1841(c)(2)(H));

(iii) An entity that is state-licensed or registered as:

(A) A credit or lending entity, including a finance company; money lender; installment lender; consumer lender or lending company; mortgage lender, broker, or bank; motor vehicle title pledge lender; payday or deferred deposit lender; premium finance company; commercial finance or lending company; or commercial mortgage company; except entities registered or licensed solely on account of financing the entity's direct sales of goods or services to customers;

(B) A money services business, including a check casher; money transmitter; currency dealer or exchange; or money order or traveler's check issuer;

(iv) Any person registered with the Commodity Futures Trading Commission as a swap dealer or major swap participant pursuant to the Commodity Exchange Act of 1936 (7 U.S.C. 1 *et seq.*), or an entity that is registered with the U.S. Securities and Exchange Commission as a security-based swap dealer or a major security-based swap participant pursuant to the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*);

(v) A securities holding company as defined in section 618 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (12 U.S.C. 1850a); a broker or dealer as defined in sections 3(a)(4) and 3(a)(5) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(4)–(5)); an investment adviser as defined in section 202(a) of the Investment Advisers Act of 1940 (15 U.S.C. 80b–2(a)); an investment company registered with the U.S. Securities and Exchange Commission under the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*); or a company that has elected to be regulated as a business development company pursuant to section 54(a) of the Investment Company Act of 1940 (15 U.S.C. 80a–53(a));

(vi) A private fund as defined in section 202(a) of the Investment Advisers Act of 1940 (15 U.S.C. 80b–2(a)); an entity that would be an investment company under section 3 of the Investment Company Act of 1940 (15 U.S.C. 80a–3) but for section 3(c)(5)(C); or an entity that is deemed not to be an investment company under section 3 of the Investment Company Act of 1940 pursuant to Investment Company Act Rule 3a–7 (17 CFR 270.3a–7) of the U.S. Securities and Exchange Commission;

(vii) A commodity pool, a commodity pool operator, or a commodity trading advisor as defined, respectively, in sections 1a(10), 1a(11), and 1a(12) of the Commodity Exchange Act of 1936 (7 U.S.C. 1a(10), 1a(11), and 1a(12)); a floor broker, a floor trader, or introducing broker as defined, respectively, in sections 1a(22), 1a(23) and 1a(31) of the Commodity Exchange Act of 1936 (7 U.S.C. 1a(22), 1a(23), and 1a(31)); or a futures commission merchant as defined in section 1a(28) of the Commodity Exchange Act of 1936 (7 U.S.C. 1a(28));

(viii) An employee benefit plan as defined in paragraphs (3) and (32) of section 3 of the Employee Retirement Income and Security Act of 1974 (29 U.S.C. 1002);

(ix) An entity that is organized as an insurance company, primarily engaged in writing insurance or reinsuring risks underwritten by insurance companies, or is subject to supervision as such by a State insurance regulator or foreign insurance regulator;

(x) Any designated financial market utility, as defined in section 803 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (12 U.S.C. 5462); and

(xi) An entity that would be a financial entity described in paragraphs (r)(1)(i) through (x) of this section, if it were organized under the laws of the United States or any State thereof; and

(2) Provided that, for purposes of this subpart, ''financial entity'' does not include any counterparty that is a foreign sovereign entity or multilateral development bank.

(s) *Foreign sovereign entity* means a sovereign entity other than the United States government and the entity's agencies, departments, ministries, and central bank collectively.

(t) *Gross credit exposure* means, with respect to any credit transaction, the credit exposure of the covered company before adjusting, pursuant to § 238.154, for the effect of any eligible collateral, eligible guarantee, eligible credit derivative, eligible equity derivative, other eligible hedge, and any unused portion of certain extensions of credit.

(u) *Immediate family* means the spouse of an individual, the individual's minor children, and any of the individual's children (including adults) residing in the individual's home.

(v) *Intraday credit exposure* means credit exposure of a covered company to a counterparty that by its terms is to be repaid, sold, or terminated by the end of its business day in the United States.

(w) *Investment grade* has the same meaning as in § 217.2 of this chapter.

(x) *Multilateral development bank* has the same meaning as in § 217.2 of this chapter.

(y) *Net credit exposure* means, with respect to any credit transaction, the gross credit exposure of a covered company and all of its subsidiaries calculated under § 238.153, as adjusted in accordance with § 238.154.

(z) *Qualifying central counterparty* has the same meaning as in § 217.2 of this chapter.

(aa) *Qualifying master netting agreement* has the same meaning as in § 217.2 of this chapter.

(bb) *Securities financing transaction* means any repurchase agreement, reverse repurchase agreement, securities borrowing transaction, or securities lending transaction.

(cc) *Short sale* means any sale of a security which the seller does not own or any sale which is consummated by the delivery of a security borrowed by, or for the account of, the seller.

(dd) *Sovereign entity* means a central national government (including the U.S. government) or an agency, department, ministry, or central bank, but not including any political subdivision such as a state, province, or municipality.

(ee) *Subsidiary*. A company is a *subsidiary* of another company if:

(1) The company is consolidated by the other company under applicable accounting standards; or

(2) For a company that is not subject to principles or standards referenced in paragraph (ee)(1) of this definition, consolidation would have occurred if such principles or standards had applied.

(ff) *Tier 1 capital* means common equity tier 1 capital and additional tier 1 capital, as defined in 12 CFR part 217 and as reported by the covered savings and loan holding company on the most recent FR Y–9C report on a consolidated basis.

(gg) *Total consolidated assets.* A company's total consolidated assets are determined based on:

(1) The average of the company's total consolidated assets in the four most recent consecutive quarters as reported quarterly on the FR Y–9C; or

(2) If the company has not filed an FR Y–9C for each of the four most recent consecutive quarters, the average of the company's total consolidated assets, as reported on the company's FR Y–9C, for the most recent quarter or consecutive quarters, as applicable.

§ 238.152 Credit exposure limits.

General limit on aggregate net credit exposure. No covered company may have an aggregate net credit exposure to any counterparty that exceeds 25 percent of the tier 1 capital of the covered company.

§ 238.153 Gross credit exposure.

(a) *Calculation of gross credit exposure.* The amount of gross credit exposure of a covered company to a counterparty with respect to a credit transaction is, in the case of:

(1) A deposit of the covered company held by the counterparty, loan by a covered company to the counterparty, and lease in which the covered company is the lessor and the counterparty is the lessee, equal to the amount owed by the counterparty to the covered company under the transaction.

(2) A debt security or debt investment held by the covered company that is issued by the counterparty, equal to:

(i) The market value of the securities, for trading and available-for-sale securities; and

(ii) The amortized purchase price of the securities or investments, for securities or investments held to maturity.

(3) An equity security held by the covered company that is issued by the counterparty, equity investment in a counterparty, and other direct investments in a counterparty, equal to the market value.

(4) A securities financing transaction must be valued using any of the methods that the covered company is authorized to use under 12 CFR part 217, subparts D and E to value such transactions:

(i)(A) As calculated for each transaction, in the case of a securities financing transaction between the covered company and the counterparty that is not subject to a bilateral netting agreement or does not meet the definition of ''repo-style transaction'' in § 217.2 of this chapter; or

(B) As calculated for a netting set, in the case of a securities financing transaction between the covered company and the counterparty that is subject to a bilateral netting agreement with that counterparty and meets the definition of ''repo-style transaction'' in § 217.2 of this chapter;

(ii) For purposes of paragraph (a)(4)(i) of this section, the covered company must:

(A) Assign a value of zero to any security received from the counterparty that does not meet the definition of ''eligible collateral'' in § 238.151; and

(B) Include the value of securities that are eligible collateral received by the covered company from the counterparty (including any exempt counterparty), calculated in accordance with paragraphs (a)(4)(i) through (iv) of this section, when calculating its gross credit exposure to the issuer of those securities;

(iii) Notwithstanding paragraphs (a)(4)(i) and (ii) of this section and with respect to each credit transaction, a covered company's gross credit exposure to a collateral issuer under this paragraph (a)(4) is limited to the covered company's gross credit exposure to the counterparty on the credit transaction; and

(iv) In cases where the covered company receives eligible collateral from a counterparty in addition to the cash or securities received from that counterparty, the counterparty may reduce its gross credit exposure to that counterparty in accordance with § 238.154(b).

(5) A committed credit line extended by a covered company to a counterparty, equal to the face amount of the committed credit line.

(6) A guarantee or letter of credit issued by a covered company on behalf of a counterparty, equal to the maximum potential loss to the covered company on the transaction.

(7) A derivative transaction must be valued using any of the methods that the covered company is authorized to use under 12 CFR part 217, subparts D and E to value such transactions:

(i)(A) As calculated for each transaction, in the case of a derivative transaction between the covered company and the counterparty, including an equity derivative but excluding a credit derivative described in paragraph (a)(8) of this section, that is not subject to a qualifying master netting agreement; or

(B) As calculated for a netting set, in the case of a derivative transaction between the covered company and the counterparty, including an equity derivative but excluding a credit derivative described in paragraph (a)(8) of this section, that is subject to a qualifying master netting agreement.

(ii) In cases where a covered company is required to recognize an exposure to an eligible guarantor pursuant to § 238.154(d), the covered company must exclude the relevant derivative transaction when calculating its gross exposure to the original counterparty under this section.

(8) A credit derivative between the covered company and a third party where the covered company is the protection provider and the reference asset is an obligation or debt security of the counterparty, equal to the maximum potential loss to the covered company on the transaction.

(b) *Investments in and exposures to securitization vehicles, investment funds, and other special purpose vehicles that are not subsidiaries.* Notwithstanding paragraph (a) of this section, a covered company must calculate pursuant to § 238.155 its gross credit exposure due to any investment in the debt or equity of, and any credit derivative or equity derivative between the covered company and a third party where the covered company is the protection provider and the reference asset is an obligation or equity security of, or equity investment in, a securitization vehicle, investment fund, and other special purpose vehicle that is not a subsidiary of the covered company.

(c) *Attribution rule.* Notwithstanding any other requirement in this subpart, a covered company must treat any transaction with any natural person or entity as a credit transaction with another party, to the extent that the proceeds of the transaction are used for the benefit of, or transferred to, the other party.

§ 238.154 Net credit exposure.

(a) *In general.* For purposes of this subpart, a covered company must calculate its net credit exposure to a counterparty by adjusting its gross credit exposure to that counterparty in accordance with the rules set forth in this section.

(b) *Eligible collateral.* (1) In computing its net credit exposure to a counterparty for any credit transaction other than a securities financing transaction, a covered company must reduce its gross credit exposure on the transaction by the adjusted market value of any eligible collateral.

(2) A covered company that reduces its gross credit exposure to a counterparty as required under paragraph (b)(1) of this section must include the adjusted market value of the eligible collateral, when calculating its

gross credit exposure to the collateral issuer.

(3) Notwithstanding paragraph (b)(2) of this section, a covered company's gross credit exposure to a collateral issuer under this paragraph (b) is limited to:

(i) Its gross credit exposure to the counterparty on the credit transaction, or

(ii) In the case of an exempt counterparty, the gross credit exposure that would have been attributable to that exempt counterparty on the credit transaction if valued in accordance with § 238.153(a).

(c) *Eligible guarantees.* (1) In calculating net credit exposure to a counterparty for any credit transaction, a covered company must reduce its gross credit exposure to the counterparty by the amount of any eligible guarantee from an eligible guarantor that covers the transaction.

(2) A covered company that reduces its gross credit exposure to a counterparty as required under paragraph (c)(1) of this section must include the amount of eligible guarantees when calculating its gross credit exposure to the eligible guarantor.

(3) Notwithstanding paragraph (c)(2) of this section, a covered company's gross credit exposure to an eligible guarantor with respect to an eligible guarantee under this paragraph (c) is limited to:

(i) Its gross credit exposure to the counterparty on the credit transaction prior to recognition of the eligible guarantee, or

(ii) In the case of an exempt counterparty, the gross credit exposure that would have been attributable to that exempt counterparty on the credit transaction prior to recognition of the eligible guarantee if valued in accordance with § 238.153(a).

(d) *Eligible credit and equity derivatives.* (1) In calculating net credit exposure to a counterparty for a credit transaction under this section, a covered company must reduce its gross credit exposure to the counterparty by:

(i) In the case of any eligible credit derivative from an eligible guarantor, the notional amount of the eligible credit derivative; or

(ii) In the case of any eligible equity derivative from an eligible guarantor, the gross credit exposure amount to the counterparty (calculated in accordance with § 238.153(a)(7)).

(2)(i) A covered company that reduces its gross credit exposure to a counterparty as provided under paragraph (d)(1) of this section must include, when calculating its net credit exposure to the eligible guarantor, including in instances where the underlying credit transaction would not be subject to the credit limits of § 238.152 (for example, due to an exempt counterparty), either

(A) In the case of any eligible credit derivative from an eligible guarantor, the notional amount of the eligible credit derivative; or

(B) In the case of any eligible equity derivative from an eligible guarantor, the gross credit exposure amount to the counterparty (calculated in accordance with § 238.153(a)(7)).

(ii) Notwithstanding paragraph (d)(2)(i) of this section, in cases where the eligible credit derivative or eligible equity derivative is used to hedge covered positions that are subject to the Board's market risk rule (12 CFR part 217, subpart F) and the counterparty on the hedged transaction is not a financial entity, the amount of credit exposure that a company must recognize to the eligible guarantor is the amount that would be calculated pursuant to § 238.153(a).

(3) Notwithstanding paragraph (d)(2) of this section, a covered company's gross credit exposure to an eligible guarantor with respect to an eligible credit derivative or an eligible equity derivative under this paragraph (d) is limited to:

(i) Its gross credit exposure to the counterparty on the credit transaction prior to recognition of the eligible credit derivative or the eligible equity derivative, or

(ii) In the case of an exempt counterparty, the gross credit exposure that would have been attributable to that exempt counterparty on the credit transaction prior to recognition of the eligible credit derivative or the eligible equity derivative if valued in accordance with § 238.153(a).

(e) *Other eligible hedges.* In calculating net credit exposure to a counterparty for a credit transaction under this section, a covered company may reduce its gross credit exposure to the counterparty by the face amount of a short sale of the counterparty's debt security or equity security, provided that:

(1) The instrument in which the covered company has a short position is junior to, or pari passu with, the instrument in which the covered company has the long position; and

(2) The instrument in which the covered company has a short position and the instrument in which the covered company has the long position are either both treated as trading or available-for-sale exposures or both treated as held-to-maturity exposures.

(f) *Unused portion of certain extensions of credit.* (1) In computing its net credit exposure to a counterparty for a committed credit line or revolving credit facility under this section, a covered company may reduce its gross credit exposure by the amount of the unused portion of the credit extension to the extent that the covered company does not have any legal obligation to advance additional funds under the extension of credit and the used portion of the credit extension has been fully secured by eligible collateral.

(2) To the extent that the used portion of a credit extension has been secured by eligible collateral, the covered company may reduce its gross credit exposure by the adjusted market value of any eligible collateral received from the counterparty, even if the used portion has not been fully secured by eligible collateral.

(3) To qualify for the reduction in net credit exposure under this paragraph, the credit contract must specify that any used portion of the credit extension must be fully secured by the adjusted market value of any eligible collateral.

(g) *Credit transactions involving exempt counterparties.* (1) A covered company's credit transactions with an exempt counterparty are not subject to the requirements of this subpart, including but not limited to § 238.152.

(2) Notwithstanding paragraph (g)(1) of this section, in cases where a covered company has a credit transaction with an exempt counterparty and the covered company has obtained eligible collateral from that exempt counterparty or an eligible guarantee or eligible credit or equity derivative from an eligible guarantor, the covered company must include (for purposes of this subpart) such exposure to the issuer of such eligible collateral or the eligible guarantor, as calculated in accordance with the rules set forth in this section, when calculating its gross credit exposure to that issuer of eligible collateral or eligible guarantor.

(h) *Currency mismatch adjustments.* For purposes of calculating its net credit exposure to a counterparty under this section, a covered company must apply, as applicable:

(1) When reducing its gross credit exposure to a counterparty resulting from any credit transaction due to any eligible collateral and calculating its gross credit exposure to an issuer of eligible collateral, pursuant to paragraph (b) of this section, the currency mismatch adjustment approach of § 217.37(c)(3)(ii) of this chapter; and

(2) When reducing its gross credit exposure to a counterparty resulting from any credit transaction due to any

eligible guarantee, eligible equity derivative, or eligible credit derivative from an eligible guarantor and calculating its gross credit exposure to an eligible guarantor, pursuant to paragraphs (c) and (d) of this section, the currency mismatch adjustment approach of § 217.36(f) of this chapter.

(i) *Maturity mismatch adjustments.* For purposes of calculating its net credit exposure to a counterparty under this section, a covered company must apply, as applicable, the maturity mismatch adjustment approach of § 217.36(d) of this chapter:

(1) When reducing its gross credit exposure to a counterparty resulting from any credit transaction due to any eligible collateral or any eligible guarantees, eligible equity derivatives, or eligible credit derivatives from an eligible guarantor, pursuant to paragraphs (b) through (d) of this section, and

(2) In calculating its gross credit exposure to an issuer of eligible collateral, pursuant to paragraph (b) of this section, or to an eligible guarantor, pursuant to paragraphs (c) and (d) of this section; provided that

(3) The eligible collateral, eligible guarantee, eligible equity derivative, or eligible credit derivative subject to paragraph (i)(1) of this section:

(i) Has a shorter maturity than the credit transaction;

(ii) Has an original maturity equal to or greater than one year;

(iii) Has a residual maturity of not less than three months; and

(iv) The adjustment approach is otherwise applicable.

§ 238.155 Investments in and exposures to securitization vehicles, investment funds, and other special purpose vehicles that are not subsidiaries of the covered company.

(a) *In general.* (1) For purposes of this section, the following definitions apply:

(i) *SPV* means a securitization vehicle, investment fund, or other special purpose vehicle that is not a subsidiary of the covered company.

(ii) *SPV exposure* means an investment in the debt or equity of an SPV, or a credit derivative or equity derivative between the covered company and a third party where the covered company is the protection provider and the reference asset is an obligation or equity security of, or equity investment in, an SPV.

(2)(i) A covered company must determine whether the amount of its gross credit exposure to an issuer of assets in an SPV, due to an SPV exposure, is equal to or greater than 0.25 percent of the covered company's tier 1 capital using one of the following two methods:

(A) The sum of all of the issuer's assets (with each asset valued in accordance with § 238.153(a)) in the SPV; or

(B) The application of the look-through approach described in paragraph (b) of this section.

(ii) With respect to the determination required under paragraph (a)(2)(i) of this section, a covered company must use the same method to calculate gross credit exposure to each issuer of assets in a particular SPV.

(iii) In making a determination under paragraph (a)(2)(i) of this section, the covered company must consider only the credit exposure to the issuer arising from the covered company's SPV exposure.

(iv) For purposes of this paragraph (a)(2), a covered company that is unable to identify each issuer of assets in an SPV must attribute to a single unknown counterparty the amount of its gross credit exposure to all unidentified issuers and calculate such gross credit exposure using one method in either paragraph (a)(2)(i)(A) or (a)(2)(i)(B) of this section.

(3)(i) If a covered company determines pursuant to paragraph (a)(2) of this section that the amount of its gross credit exposure to an issuer of assets in an SPV is less than 0.25 percent of the covered company's tier 1 capital, the amount of the covered company's gross credit exposure to that issuer may be attributed to either that issuer of assets or the SPV:

(A) If attributed to the issuer of assets, the issuer of assets must be identified as a counterparty, and the gross credit exposure calculated under paragraph (a)(2)(i)(A) of this section to that issuer of assets must be aggregated with any other gross credit exposures (valued in accordance with § 238.153) to that same counterparty; and

(B) If attributed to the SPV, the covered company's gross credit exposure is equal to the covered company's SPV exposure, valued in accordance with § 238.153(a).

(ii) If a covered company determines pursuant to paragraph (a)(2) of this section that the amount of its gross credit exposure to an issuer of assets in an SPV is equal to or greater than 0.25 percent of the covered company's tier 1 capital or the covered company is unable to determine that the amount of the gross credit exposure is less than 0.25 percent of the covered company's tier 1 capital:

(A) The covered company must calculate the amount of its gross credit exposure to the issuer of assets in the SPV using the look-through approach in paragraph (b) of this section;

(B) The issuer of assets in the SPV must be identified as a counterparty, and the gross credit exposure calculated in accordance with paragraph (b) must be aggregated with any other gross credit exposures (valued in accordance with § 238.153) to that same counterparty; and

(C) When applying the look-through approach in paragraph (b) of this section, a covered company that is unable to identify each issuer of assets in an SPV must attribute to a single unknown counterparty the amount of its gross credit exposure, calculated in accordance with paragraph (b) of this section, to all unidentified issuers.

(iii) For purposes of this section, a covered company must aggregate all gross credit exposures to unknown counterparties for all SPVs as if the exposures related to a single unknown counterparty; this single unknown counterparty is subject to the limits of § 238.152 as if it were a single counterparty.

(b) *Look-through approach.* A covered company that is required to calculate the amount of its gross credit exposure with respect to an issuer of assets in accordance with this paragraph (b) must calculate the amount as follows:

(1) Where all investors in the SPV rank *pari passu,* the amount of the gross credit exposure to the issuer of assets is equal to the covered company's pro rata share of the SPV multiplied by the value of the underlying asset in the SPV, valued in accordance with § 238.153(a); and

(2) Where all investors in the SPV do not rank *pari passu,* the amount of the gross credit exposure to the issuer of assets is equal to:

(i) The pro rata share of the covered company's investment in the tranche of the SPV; multiplied by

(ii) The lesser of:

(A) The market value of the tranche in which the covered company has invested, except in the case of a debt security that is held to maturity, in which case the tranche must be valued at the amortized purchase price of the securities; and

(B) The value of each underlying asset attributed to the issuer in the SPV, each as calculated pursuant to § 238.153(a).

(c) *Exposures to third parties.* (1) Notwithstanding any other requirement in this section, a covered company must recognize, for purposes of this subpart, a gross credit exposure to each third party that has a contractual obligation to provide credit or liquidity support to an SPV whose failure or material financial distress would cause a loss in the value of the covered company's SPV exposure.

(2) The amount of any gross credit exposure that is required to be recognized to a third party under paragraph (c)(1) of this section is equal to the covered company's SPV exposure, up to the maximum contractual obligation of that third party to the SPV, valued in accordance with § 238.153(a). (This gross credit exposure is in addition to the covered company's gross credit exposure to the SPV or the issuers of assets of the SPV, calculated in accordance with paragraphs (a) and (b) of this section.)

(3) A covered company must aggregate the gross credit exposure to a third party recognized in accordance with paragraphs (c)(1) and (2) of this section with its other gross credit exposures to that third party (that are unrelated to the SPV) for purposes of compliance with the limits of § 238.152.

§ 238.156 Aggregation of exposures to more than one counterparty due to economic interdependence or control relationships.

(a) *In general.* (1) If a covered company has an aggregate net credit exposure to any counterparty that exceeds 5 percent of its tier 1 capital, the covered company must assess its relationship with the counterparty under paragraph (b)(2) of this section to determine whether the counterparty is economically interdependent with one or more other counterparties of the covered company and under paragraph (c)(1) of this section to determine whether the counterparty is connected by a control relationship with one or more other counterparties.

(2) If, pursuant to an assessment required under paragraph (a)(1) of this section, the covered company determines that one or more of the factors of paragraph (b)(2) or (c)(1) of this section are met with respect to one or more counterparties, or the Board determines pursuant to paragraph (d) of this section that one or more other counterparties of a covered company are economically interdependent or that one or more other counterparties of a covered company are connected by a control relationship, the covered company must aggregate its net credit exposure to the counterparties for all purposes under this subpart, including, but not limited to, § 238.152.

(3) In connection with any request pursuant to paragraph (b)(3) or (c)(2) of this section, the Board may require the covered company to provide additional information.

(b) *Aggregation of exposures to more than one counterparty due to economic interdependence.* (1) For purposes of this paragraph, two counterparties are economically interdependent if the failure, default, insolvency, or material financial distress of one counterparty would cause the failure, default, insolvency, or material financial distress of the other counterparty, taking into account the factors in paragraph (b)(2) of this section.

(2) A covered company must assess whether the financial distress of one counterparty (counterparty A) would prevent the ability of the other counterparty (counterparty B) to fully and timely repay counterparty B's liabilities and whether the insolvency or default of counterparty A is likely to be associated with the insolvency or default of counterparty B and, therefore, these counterparties are economically interdependent, by evaluating the following:

(i) Whether 50 percent or more of one counterparty's gross revenue is derived from, or gross expenditures are directed to, transactions with the other counterparty;

(ii) Whether counterparty A has fully or partly guaranteed the credit exposure of counterparty B, or is liable by other means, in an amount that is 50 percent or more of the covered company's net credit exposure to counterparty A;

(iii) Whether 25 percent or more of one counterparty's production or output is sold to the other counterparty, which cannot easily be replaced by other customers;

(iv) Whether the expected source of funds to repay the loans of both counterparties is the same and neither counterparty has another independent source of income from which the loans may be serviced and fully repaid; [1] and

(v) Whether two or more counterparties rely on the same source for the majority of their funding and, in the event of the common provider's default, an alternative provider cannot be found.

(3)(i) Notwithstanding paragraph (b)(2) of this section, if a covered company determines that one or more of the factors in paragraph (b)(2) is met, the covered company may request in writing a determination from the Board that those counterparties are not economically interdependent and that the covered company is not required to aggregate those counterparties.

(ii) Upon a request by a covered company pursuant to paragraph (b)(3) of this section, the Board may grant temporary relief to the covered company and not require the covered company to aggregate one counterparty with another counterparty provided that the counterparty could promptly modify its business relationships, such as by reducing its reliance on the other counterparty, to address any economic interdependence concerns, and provided that such relief is in the public interest and is consistent with the purpose of this subpart.

(c) *Aggregation of exposures to more than one counterparty due to certain control relationships.* (1) For purposes of this subpart, one counterparty (counterparty A) is deemed to control the other counterparty (counterparty B) if:

(i) Counterparty A owns, controls, or holds with the power to vote 25 percent or more of any class of voting securities of counterparty B; or

(ii) Counterparty A controls in any manner the election of a majority of the directors, trustees, or general partners (or individuals exercising similar functions) of counterparty B.

(2)(i) Notwithstanding paragraph (c)(1) of this section, if a covered company determines that one or more of the factors in paragraph (c)(1) is met, the covered company may request in writing a determination from the Board that counterparty A does not control counterparty B and that the covered company is not required to aggregate those counterparties.

(ii) Upon a request by a covered company pursuant to paragraph (c)(2) of this section, the Board may grant temporary relief to the covered company and not require the covered company to aggregate counterparty A with counterparty B provided that, taking into account the specific facts and circumstances, such indicia of control does not result in the entities being connected by control relationships for purposes of this subpart, and provided that such relief is in the public interest and is consistent with the purpose of this subpart.

(d) *Board determinations for aggregation of counterparties due to economic interdependence or control relationships.* The Board may determine, after notice to the covered company and opportunity for hearing, that one or more counterparties of a covered company are:

(1) Economically interdependent for purposes of this subpart, considering the factors in paragraph (b)(2) of this section, as well as any other indicia of economic interdependence that the Board determines in its discretion to be relevant; or

(2) Connected by control relationships for purposes of this subpart, considering the factors in paragraph (c)(1) of this section and whether counterparty A:

[1] An employer will not be treated as a source of repayment under this paragraph because of wages and salaries paid to an employee.

(i) Controls the power to vote 25 percent or more of any class of voting securities of Counterparty B pursuant to a voting agreement;

(ii) Has significant influence on the appointment or dismissal of counterparty B's administrative, management, or governing body, or the fact that a majority of members of such body have been appointed solely as a result of the exercise of counterparty A's voting rights; or

(iii) Has the power to exercise a controlling influence over the management or policies of counterparty B.

(e) *Board determinations for aggregation of counterparties to prevent evasion.* Notwithstanding paragraphs (b) and (c) of this section, a covered company must aggregate its exposures to a counterparty with the covered company's exposures to another counterparty if the Board determines in writing after notice and opportunity for hearing, that the exposures to the two counterparties must be aggregated to prevent evasions of the purposes of this subpart, including, but not limited to § 238.156.

§ 238.157 Exemptions.

(a) *Exempted exposure categories.* The following categories of credit transactions are exempt from the limits on credit exposure under this subpart:

(1) Any direct claim on, and the portion of a claim that is directly and fully guaranteed as to principal and interest by, the Federal National Mortgage Association and the Federal Home Loan Mortgage Corporation, only while operating under the conservatorship or receivership of the Federal Housing Finance Agency, and any additional obligation issued by a U.S. government-sponsored entity as determined by the Board;

(2) Intraday credit exposure to a counterparty;

(3) Any trade exposure to a qualifying central counterparty related to the covered company's clearing activity, including potential future exposure arising from transactions cleared by the qualifying central counterparty and pre-funded default fund contributions;

(4) Any credit transaction with the Bank for International Settlements, the International Monetary Fund, the International Bank for Reconstruction and Development, the International Finance Corporation, the International Development Association, the Multilateral Investment Guarantee Agency, or the International Centre for Settlement of Investment Disputes;

(5) Any credit transaction with the European Commission or the European Central Bank; and

(6) Any transaction that the Board exempts if the Board finds that such exemption is in the public interest and is consistent with the purpose of this subpart.

(b) *Exemption for Federal Home Loan Banks.* For purposes of this subpart, a covered company does not include any Federal Home Loan Bank.

(c) *Additional exemptions by the Board.* The Board may, by regulation or order, exempt transactions, in whole or in part, from the definition of the term "credit exposure," if the Board finds that the exemption is in the public interest.

§ 238.158 Compliance.

(a) *Scope of compliance.* (1) Using all available data, including any data required to be maintained or reported to the Federal Reserve under this subpart, a covered company must comply with the requirements of this subpart on a daily basis at the end of each business day.

(2) A covered company must report its compliance to the Federal Reserve as of the end of the quarter, unless the Board determines and notifies that company in writing that more frequent reporting is required.

(3) In reporting its compliance, a covered company must calculate and include in its gross credit exposure to an issuer of eligible collateral or eligible guarantor the amounts of eligible collateral, eligible guarantees, eligible equity derivatives, and eligible credit derivatives that were provided to the covered company in connection with credit transactions with exempt counterparties, valued in accordance with and as required by § 238.154(b) through (d) and (g).

(b) *Qualifying master netting agreement.* With respect to any qualifying master netting agreement, a covered company must establish and maintain procedures that meet or exceed the requirements of § 217.3(d) of this chapter to monitor possible changes in relevant law and to ensure that the agreement continues to satisfy these requirements.

(c) *Noncompliance.* (1) Except as otherwise provided in this section, if a covered company is not in compliance with this subpart with respect to a counterparty solely due to the circumstances listed in paragraphs (c)(2)(i) through (v) of this section, the covered company will not be subject to enforcement actions for a period of 90 days (or, with prior notice to the company, such shorter or longer period determined by the Board, in its sole discretion, to be appropriate to preserve the safety and soundness of the covered company), if the covered company uses reasonable efforts to return to compliance with this subpart during this period. The covered company may not engage in any additional credit transactions with such a counterparty in contravention of this rule during the period of noncompliance, except as provided in paragraph (c)(2) of this section.

(2) A covered company may request a special temporary credit exposure limit exemption from the Board. The Board may grant approval for such exemption in cases where the Board determines that such credit transactions are necessary or appropriate to preserve the safety and soundness of the covered company. In acting on a request for an exemption, the Board will consider the following:

(i) A decrease in the covered company's capital stock and surplus;

(ii) The merger of the covered company with another covered company;

(iii) A merger of two counterparties; or

(iv) An unforeseen and abrupt change in the status of a counterparty as a result of which the covered company's credit exposure to the counterparty becomes limited by the requirements of this section; or

(v) Any other factor(s) the Board determines, in its discretion, is appropriate.

(d) *Other measures.* The Board may impose supervisory oversight and additional reporting measures that it determines are appropriate to monitor compliance with this subpart. Covered companies must furnish, in the manner and form prescribed by the Board, such information to monitor compliance with this subpart and the limits therein as the Board may require.

PART 242—DEFINITIONS RELATING TO TITLE I OF THE DODD-FRANK ACT (REGULATION PP)

■ 11. The authority citation for part 242 continues to read as follows:

Authority: 12 U.S.C. 5311.

■ 12. In § 242.1, paragraph (b)(1)(ii)(B) is revised to read as follows:

§ 242.1 Authority and purpose

* * * * *

(b) * * *

(i) * * *

(ii) * * *

(B) A bank holding company or foreign bank subject to the Bank Holding Company Act (BHC Act) (12

U.S.C. 1841 *et seq.*) that is a bank holding company described in section 165(a) of the Dodd-Frank Act (12 U.S.C. 5365(a)).

* * * * *

■ 13. Section 242.4 is revised to read as follows:

§ 242.4 Significant nonbank financial companies and significant bank holding companies

For purposes of Title I of the Dodd-Frank Act, the following definitions shall apply:

(a) *Significant nonbank financial company.* A ''significant nonbank financial company'' means—

(1) Any nonbank financial company supervised by the Board; and

(2) Any other nonbank financial company that had $100 billion or more in total consolidated assets (as determined in accordance with applicable accounting standards) as of the end of its most recently completed fiscal year.

(b) *Significant bank holding company.* A ''significant bank holding company'' means any bank holding company or company that is, or is treated in the United States as, a bank holding company, that had $100 billion or more in total consolidated assets as of the end of the most recently completed calendar year, as reported on either the Federal Reserve's FR Y–9C (Consolidated Financial Statement for Holding Companies), or any successor form thereto, or the Federal Reserve's Form FR Y–7Q (Capital and Asset Report for Foreign Banking Organizations), or any successor form thereto.

PART 252—ENHANCED PRUDENTIAL STANDARDS (REGULATION YY)

■ 14. The authority citation for part 252 continues to read as follows:

Authority: 12 U.S.C. 321–338a, 481–486, 1467a, 1818, 1828, 1831n, 1831o, 1831p–l, 1831w, 1835, 1844(b), 1844(c), 3101 *et seq.,* 3101 note, 3904, 3906–3909, 4808, 5361, 5362, 5365, 5366, 5367, 5368, 5371.

Subpart A—General Provisions

■ 15. In § 252.1, paragraph (b) is revised to read as follows:

§ 252.1 Authority and purpose.

(a) * * *

(b) *Purpose.* This part implements certain provisions of section 165 of the Dodd-Frank Act (12 U.S.C. 5365), which require the Board to establish enhanced prudential standards for certain bank holding companies, foreign banking organizations, nonbank financial companies supervised by the Board, and certain other companies.

■ 16. Section 252.2 is revised as follows:

§ 252.2 Definitions.

Unless otherwise specified, the following definitions apply for purposes of this part:

Affiliate has the same meaning as in section 2(k) of the Bank Holding Company Act (12 U.S.C. 1841(k)) and § 225.2(a) of this chapter.

Applicable accounting standards means U.S. generally accepted accounting principles, international financial reporting standards, or such other accounting standards that a company uses in the ordinary course of its business in preparing its consolidated financial statements.

Average cross-jurisdictional activity. A banking organization's average cross-jurisdictional activity is equal to the average of its cross jurisdictional activity for the four most recent calendar quarters or, if the company has not filed the FR Y–15 for each of the four most recent calendar quarters, for the most recent quarter or quarters, as applicable. Cross-jurisdictional activity is the sum of cross-jurisdictional claims and cross-jurisdictional liabilities.

Average off-balance sheet exposure. A banking organization's average off-balance sheet exposure is equal to the average of its off-balance sheet exposure for the four most recent calendar quarters or, if the banking organization has not filed each of the applicable reporting forms for each of the four most recent calendar quarters, for the most recent quarter or quarters, as applicable. Off-balance sheet exposure is equal to:

(1) The total exposures of the banking organization, as reported by the banking organization on the FR Y–15 for each of the four most recent calendar quarters, or for the most recent quarter or quarters, as applicable; minus

(2) The total consolidated assets of the banking organization.

Average total consolidated assets. Average total consolidated assets of a banking organization are equal to its consolidated assets, calculated based on the average of the holding company's total consolidated assets in the four most recent quarters as reported quarterly on the FR Y–9C. If the holding company has not filed the FR Y–9C for each of the four most recent consecutive quarters, total consolidated assets means the average of its total consolidated assets, as reported on the FR Y–9C, for the most recent quarter or consecutive quarters, as applicable. Total consolidated assets are measured on the as-of date of the most recent FR Y–9C used in the calculation of the average.

Average total nonbank assets. A banking organization's average total nonbank assets is equal to the average of the total nonbank assets of the banking organization, as reported on the FR Y–9LP, for the four most recent calendar quarters or, if the organization has not filed the FR Y–9LP for each of the four most recent calendar quarters, for the most recent quarter or quarters, as applicable.

Average weighted short-term wholesale funding. A banking organization's average weighted short-term wholesale funding is equal to the average of the banking organization's weighted short-term wholesale funding, as reported on the FR Y–15, for each of the four most recent calendar quarters or, if the banking organization has not filed the FR Y–15 for each of the four most recent calendar quarters, for the most recent quarter or quarters, as applicable.

Bank holding company has the same meaning as in section 2(a) of the Bank Holding Company Act (12 U.S.C. 1841(a)) and § 225.2(c) of this chapter.

Banking organization. Banking organization means a bank holding company that is:

(1) Incorporated in or organized under the laws of the United States or in any State;

(2) Not a consolidated subsidiary of a bank holding company that is incorporated in or organized under the laws of the United States or in any State; and

(3) Is not a U.S. intermediate holding company established or designated by a foreign banking organization.

Board means the Board of Governors of the Federal Reserve System.

Category II bank holding company means a bank holding company identified as a Category II banking organization pursuant to § 252.5.

Category III bank holding company means a bank holding company identified as a Category III banking organization pursuant to § 252.5.

Category IV bank holding company means a bank holding company identified as a Category IV banking organization pursuant to § 252.5.

Combined U.S. operations of a foreign banking organization means:

(1) Its U.S. branches and agencies, if any; and

(2)(i) If the foreign banking organization has established a U.S. intermediate holding company, the U.S. intermediate holding company and the subsidiaries of such U.S. intermediate holding company; or

(ii) If the foreign banking organization has not established a U.S. intermediate holding company, the U.S. subsidiaries of the foreign banking organization (excluding any section 2(h)(2) company, if applicable), and subsidiaries of such U.S. subsidiaries.

Company means a corporation, partnership, limited liability company, depository institution, business trust, special purpose entity, association, or similar organization.

Control has the same meaning as in section 2(a) of the Bank Holding Company Act (12 U.S.C. 1841(a)), and the terms controlled and controlling shall be construed consistently with the term control.

Council means the Financial Stability Oversight Council established by section 111 of the Dodd-Frank Act (12 U.S.C. 5321).

Credit enhancement means a qualified financial contract of the type set forth in section 210(c)(8)(D)(ii)(XII), (iii)(X), (iv)(V), (v)(VI), or (vi)(VI) of Title II of the Dodd-Frank Wall Street Reform and Consumer Protection Act (12 U.S.C. 5390(c)(8)(D)(ii)(XII), (iii)(X), (iv)(V), (v)(VI), or (vi)(VI)) or a credit enhancement that the Federal Deposit Insurance Corporation determines by regulation is a qualified financial contract pursuant to section 210(c)(8)(D)(i) of Title II of the act (12 U.S.C. 5390(c)(8)(D)(i)).

Cross-jurisdictional activity. A banking organization's cross-jurisdictional activity is equal to the sum of its cross-jurisdictional claims and cross-jurisdictional liabilities, as reported on the FR Y–15.

Depository institution has the same meaning as in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813(c)).

DPC branch subsidiary means any subsidiary of a U.S. branch or a U.S. agency acquired, or formed to hold assets acquired, in the ordinary course of business and for the sole purpose of securing or collecting debt previously contracted in good faith by that branch or agency.

Foreign banking organization has the same meaning as in § 211.21(o) of this chapter, provided that if the top-tier foreign banking organization is incorporated in or organized under the laws of any State, the foreign banking organization shall not be treated as a foreign banking organization for purposes of this part.

FR Y–7 means the Annual Report of Foreign Banking Organizations reporting form.

FR Y–7Q means the Capital and Asset Report for Foreign Banking Organizations reporting form.

FR Y–9C means the Consolidated Financial Statements for Holding Companies reporting form.

FR Y–9LP means the Parent Company Only Financial Statements of Large Holding Companies.

FR Y–15 means the Banking Organization Systemic Risk Report.

Global methodology means the assessment methodology and the higher loss absorbency requirement for global systemically important banks issued by the Basel Committee on Banking Supervision, as updated from time to time.

Global systemically important BHC means a bank holding company identified as a global systemically important BHC pursuant to 12 CFR 217.402.

Global systemically important banking organization means a global systemically important bank, as such term is defined in the global methodology.

Global systemically important foreign banking organization means a top-tier foreign banking organization that is identified as a global systemically important foreign banking organization under § 252.153(b)(4).

GAAP means generally accepted accounting principles as used in the United States.

Home country, with respect to a foreign banking organization, means the country in which the foreign banking organization is chartered or incorporated.

Home country resolution authority, with respect to a foreign banking organization, means the governmental entity or entities that under the laws of the foreign banking organization's home county has responsibility for the resolution of the top-tier foreign banking organization.

Home country supervisor, with respect to a foreign banking organization, means the governmental entity or entities that under the laws of the foreign banking organization's home county has responsibility for the supervision and regulation of the top-tier foreign banking organization.

Nonbank financial company supervised by the Board means a company that the Council has determined under section 113 of the Dodd-Frank Act (12 U.S.C. 5323) shall be supervised by the Board and for which such determination is still in effect.

Non-U.S. affiliate means any affiliate of a foreign banking organization that is incorporated or organized in a country other than the United States.

Off-balance sheet exposure A banking organization's off-balance sheet exposure is equal to:

(1) The total exposure of the banking organization, as reported by the banking organization on the FR Y–15; minus

(2) The total consolidated assets of the banking organization for the same calendar quarter.

Publicly traded means an instrument that is traded on:

(1) Any exchange registered with the U.S. Securities and Exchange Commission as a national securities exchange under section 6 of the Securities Exchange Act of 1934 (15 U.S.C. 78f); or

(2) Any non-U.S.-based securities exchange that:

(i) Is registered with, or approved by, a non-U.S. national securities regulatory authority; and

(ii) Provides a liquid, two-way market for the instrument in question, meaning that there are enough independent bona fide offers to buy and sell so that a sales price reasonably related to the last sales price or current bona fide competitive bid and offer quotations can be determined promptly and a trade can be settled at such price within a reasonable time period conforming with trade custom.

(3) A company can rely on its determination that a particular non-U.S.-based securities exchange provides a liquid two-way market unless the Board determines that the exchange does not provide a liquid two-way market.

Section 2(h)(2) company has the same meaning as in section 2(h)(2) of the Bank Holding Company Act (12 U.S.C. 1841(h)(2)).

State means any state, commonwealth, territory, or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, American Samoa, Guam, or the United States Virgin Islands.

Subsidiary has the same meaning as in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813).

Top-tier foreign banking organization, with respect to a foreign bank, means the top-tier foreign banking organization or, alternatively, a subsidiary of the top-tier foreign banking organization designated by the Board.

Total consolidated assets Total consolidated assets of a banking organization are equal to its consolidated assets, as reported on the FR Y–9C.

Total nonbank assets A banking organization's total nonbank assets are equal to the total nonbank assets of the banking organization, as reported on the FR Y–9LP.

U.S. agency has the same meaning as the term ''agency'' in § 211.21(b) of this chapter.

U.S. branch has the same meaning as the term ''branch'' in § 211.21(e) of this chapter.

U.S. branches and agencies means the U.S. branches and U.S. agencies of a foreign banking organization.

U.S. government agency means an agency or instrumentality of the United States whose obligations are fully and explicitly guaranteed as to the timely payment of principal and interest by the full faith and credit of the United States.

U.S. government-sponsored enterprise means an entity originally established or chartered by the U.S. government to serve public purposes specified by the U.S. Congress, but whose obligations are not explicitly guaranteed by the full faith and credit of the United States.

U.S. intermediate holding company means the top-tier U.S. company that is required to be established pursuant to § 252.153.

U.S. subsidiary means any subsidiary that is incorporated in or organized under the laws of the United States or in any State, commonwealth, territory, or possession of the United States, the Commonwealth of Puerto Rico, the Commonwealth of the North Mariana Islands, the American Samoa, Guam, or the United States Virgin Islands.

Weighted short-term wholesale funding means a banking organization's weighted short-term wholesale funding that is equal to the banking organization's weighted short-term wholesale funding, as reported on the FR Y–15.

■ 17. Add § 252.5 to subpart A to read as follows:

§ 252.5 Categorization of banking organizations.

(a) *General.* A banking organization with average total consolidated assets of $100 billion or more must determine its category among the four categories described in paragraphs (b) through (e) of this section at least quarterly.

(b) *Global systemically important BHC.* (1) A banking organization is a global systemically important BHC if the banking organization is identified as a global systemically important BHC pursuant to 12 CFR 217.402.

(2) After meeting the criteria in paragraph (b)(1) of this section, a banking organization continues to be a global systemically important BHC until the banking organization has not been identified as a global systemically important BHC in each of the four most recent calendar quarters.

(c) *Category II.* (1) A banking organization is a Category II banking organization if the banking organization:

(i)(A) Has $700 billion or more in average total consolidated assets; or

(B) Has $75 billion or more in average cross-jurisdictional activity and $100 billion or more in average total consolidated assets; and

(ii) Is not a global systemically important BHC.

(2) After meeting the criteria in paragraph (c)(1) of this section, a banking organization continues to be a Category II banking organization until the banking organization:

(i) Has:

(A) Less than $700 billion in total consolidated assets for each of the four most recent calendar quarters; and

(B) Less than $75 billion in cross-jurisdictional activity for each of the four most recent calendar quarters;

(ii) Has less than $100 billion in total consolidated assets for each of the four most recent calendar quarters; or

(iii) Meets the criteria in paragraph (b)(1) to be a global systemically important BHC.

(d) *Category III.* (1) A banking organization is a Category III banking organization if the banking organization:

(i) Has:

(A) $250 billion or more in average total consolidated assets; or

(B) $100 billion or more in average total consolidated assets and at least:

(*1*) $75 billion in average total nonbank assets;

(*2*) $75 billion in average weighted short-term wholesale funding; or

(*3*) $75 billion in average off-balance sheet exposure;

(ii) Is not a global systemically important BHC; and

(iii) Is not a Category II banking organization.

(2) After meeting the criteria in paragraph (d)(1) of this section, a banking organization continues to be a Category III banking organization until the banking organization:

(i) Has:

(A) Less than $250 billion in total consolidated assets for each of the four most recent calendar quarters;

(B) Less than $75 billion in total nonbank assets for each of the four most recent calendar quarters;

(C) Less than $75 billion in weighted short-term wholesale funding for each of the four most recent calendar quarters; and

(D) Less than $75 billion in off-balance sheet exposure for each of the four most recent calendar quarters; or

(ii) Has less than $100 billion in total consolidated assets for each of the four most recent calendar quarters;

(iii) Meets the criteria in paragraph (b)(1) of this section to be a global systemically important BHC; or

(iv) Meets the criteria in paragraph (c)(1) of this section to be a Category II banking organization.

(e) *Category IV.* (1) A banking organization with average total consolidated assets of $100 billion or more is a Category IV banking organization if the banking organization:

(i) Is not global systemically important BHC;

(ii) Is not a Category II banking organization; and

(iii) Is not a Category III banking organization.

(2) After meeting the criteria in paragraph (e)(1), a banking organization continues to be a Category IV banking organization until the banking organization:

(i) Has less than $100 billion in total consolidated assets for each of the four most recent calendar quarters;

(ii) Meets the criteria in paragraph (b)(1) of this section to be a global systemically important BHC;

(iii) Meets the criteria in paragraph (c)(1) of this section to be a Category II banking organization; or

(iv) Meets the criteria in paragraph (d)(1) of this section to be a Category III banking organization.

Subpart B—Company-Run Stress Test Requirements for State Member Banks With Total Consolidated Assets Over $10 Billion

■ 18. Section 252.11 is revised to read as follows:

§ 252.11 Authority and purpose

(a) *Authority.* 12 U.S.C. 321–338a, 1818, 1831p–1, 3906–3909, 5365.

(b) *Purpose.* This subpart implements section 165(i)(2) of the Dodd-Frank Act (12 U.S.C. 5365(i)(2)), which requires state member banks with total consolidated assets of greater than $10 billion to conduct annual stress tests. This subpart also establishes definitions of stress tests and related terms, methodologies for conducting stress tests, and reporting and disclosure requirements.

■ 19. In § 252.12:

■ a. Paragraphs (c), (d), (f), (g), and (n) are revised;

■ b. Paragraph (o) is removed; and

■ c. Paragraphs (p) through (u) are redesignated as paragraphs (o) through (t) and revised.

The revisions read as follows:

§ 252.12 Definitions.

* * * * *

(c) *Asset threshold* means a state member bank with average total consolidated assets of greater than $10 billion.

(d) *Average total consolidated assets* means the average of the total consolidated assets as reported by a state member bank on its Consolidated Report of Condition and Income (Call Report) for the four most recent consecutive quarters. If the state member bank has not filed the Call Report, as applicable, for each of the four most recent consecutive quarters, average total consolidated assets means the average of the company's total consolidated assets, as reported on the state member bank's Call Report for the most recent consecutive quarters. Average total consolidated assets are measured on the as-of date of the most recent Call Report used in the calculation of the average.

* * * * *

(f) *Baseline scenario* means a set of conditions that affect the U.S. economy or the financial condition of a state member bank, and that reflect the consensus views of the economic and financial outlook.

(g) *Capital action* has the same meaning as in § 225.8 of this chapter.

* * * * *

(n) *Regulatory capital ratio* means a capital ratio for which the Board established minimum requirements for the state member bank by regulation or order, including a company's tier 1 and supplementary leverage ratio as calculated under 12 CFR part 217, including the deductions required under 12 CFR 248.12, as applicable, and the company's common equity tier 1, tier 1, and total risk-based capital ratios as calculated under 12 CFR part 217, including the deductions required under 12 CFR 248.12 and the transition provisions at 12 CFR 217.1(f)(4) and 217.300; except that the company shall not use the advanced approaches to calculate its regulatory capital ratios.

(o) *Scenarios* are those sets of conditions that affect the U.S. economy or the financial condition of a state member bank that the Board annually determines are appropriate for use in the company-run stress tests, including, but not limited to, baseline, adverse, and severely adverse scenarios.

(p) *Severely adverse scenario* means a set of conditions that affect the U.S. economy or the financial condition of a state member bank and that overall are more severe than those associated with the adverse scenario and may include trading or other additional components.

(q) *State member bank* has the same meaning as in § 208.2(g) of this chapter.

(r) *Stress test* means a process to assess the potential impact of scenarios on the consolidated earnings, losses, and capital of a state member bank over the planning horizon, taking into account the current condition, risks, exposures, strategies, and activities.

(s) *Stress test cycle* means:

(1) Until September 30, 2015, the period beginning on October 1 of a calendar year and ending on September 30 of the following calendar year, and

(2) Beginning October 1, 2015, the period beginning on January 1 of a calendar year and ending on December 31 of that year.

(t) *Subsidiary* has the same meaning as in § 225.2(o) of this chapter.

■ 20. Section 252.13 is revised to read as follows:

§ 252.13 Applicability.

(a) *Scope*—(1) *Applicability.* Except as provided in paragraph (b) of this section, this subpart applies to any state member bank with average total consolidated assets (as defined in § 252.12(d)) of greater than $10 billion.

(2) *Ongoing applicability.* A state member bank (including any successor company) that is subject to any requirement in this subpart shall remain subject to any such requirement unless and until its total consolidated assets fall below $10 billion for each of four consecutive quarters, as reported on the Call Report and effective on the as-of date of the fourth consecutive Call Report.

(b) *Transition period.* (1) A state member bank that exceeds the asset threshold for the first time on or before March 31 of a given year, must comply with the requirements of this subpart beginning on January 1 of the following year, unless that time is extended by the Board in writing.

(2) A state member bank that exceeds the asset threshold for the first time after March 31 of a given year must comply with the requirements of this subpart beginning on January 1 of the second year following that given year, unless that time is extended by the Board in writing.

(3) *Transition periods for companies subject to the supplementary leverage ratio.* Notwithstanding § 252.12(n), for purposes of the stress test cycle beginning on January 1, 2016, a company shall not include an estimate of its supplementary leverage ratio.

■ 21. Section 252.14 is revised to read as follows:

§ 252.14 Annual stress test.

(a) *General requirements*—(1) *General.* A state member bank must conduct an annual stress test in accordance with paragraphs (a)(2) and (3) of this section.

(2) *Timing for the stress test cycle beginning on October 1, 2014.* For the stress test cycle beginning on October 1, 2014:

(i) A state member bank that is a covered company subsidiary must conduct its stress test by January 5, 2015, based on data as of September 30, 2014, unless the time or the as-of date is extended by the Board in writing; and

(ii) A state member bank that is not a covered company subsidiary and a bank holding company must conduct its stress test by March 31, 2015, based on data as of September 30, 2014, unless the time or the as-of date is extended by the Board in writing.

(3) *Timing for each stress test cycle beginning after October 1, 2014.* For each stress test cycle beginning after October 1, 2014:

(i) A state member bank that is a covered company subsidiary must conduct its stress test by April 5 of each calendar year based on data as of December 31 of the preceding calendar year, unless the time or the as-of date is extended by the Board in writing; and

(ii) A state member bank that is not a covered company subsidiary must conduct its stress test by July 31 of each calendar year using financial statement data as of December 31 of the preceding calendar year, unless the time or the as-of date is extended by the Board in writing.

(b) *Scenarios provided by the Board*—(1) *In general.* In conducting a stress test under this section, a state member bank must, at a minimum, use the scenarios provided by the Board. Except as provided in paragraphs (b)(2) and (3) of this section, the Board will provide a description of the scenarios to each state member bank no later than November 15, 2014 (for the stress test cycle beginning on October 1, 2014) and no later than February 15 of that calendar year (for each stress test cycle beginning thereafter).

(2) *Additional components.* (i) The Board may require a state member bank with significant trading activity, as determined by the Board and specified in the Capital Assessments and Stress Testing report (FR Y–14), to include a trading and counterparty component in its adverse and severely adverse scenarios in the stress test required by this section. The Board may also require a state member bank that is subject to 12 CFR part 208, appendix E (or, beginning on January 1, 2015, 12 CFR part 217, subpart F) or that is a subsidiary of a bank holding company that is subject to either this paragraph or § 252.54(b)(2)(i) to include a trading and counterparty component in the state member bank's adverse and severely adverse scenarios in the stress test required by this section. For the stress test cycle beginning on October 1, 2014, the data used in this component must be

as of a date between October 1 and December 1 of 2014 selected by the Board, and the Board will communicate the as-of date and a description of the component to the company no later than December 1 of the calendar year. For each stress test cycle beginning thereafter, the data used in this component must be as of a date between January 1 and March 1 of that calendar year selected by the Board, and the Board will communicate the as-of date and a description of the component to the company no later than March 1 of that calendar year.

(ii) The Board may require a state member bank to include one or more additional components in its adverse and severely adverse scenarios in the stress test required by this section based on the company's financial condition, size, complexity, risk profile, scope of operations, or activities, or risks to the U.S. economy.

(3) *Additional scenarios.* The Board may require a state member bank to include one or more additional scenarios in the stress test required by this section based on the company's financial condition, size, complexity, risk profile, scope of operations, or activities, or risks to the U.S. economy.

(4) *Notice and response*—(i) *Notification of additional component.* If the Board requires a state member bank to include one or more additional components in its adverse and severely adverse scenarios under paragraph (b)(2) of this section or to use one or more additional scenarios under paragraph (b)(3) of this section, the Board will notify the company in writing by September 30, 2014 (for the stress test cycle beginning on October 1, 2014) and by December 31 (for each stress test cycle beginning thereafter).

(ii) *Request for reconsideration and Board response.* Within 14 calendar days of receipt of a notification under this paragraph, the state member bank may request in writing that the Board reconsider the requirement that the company include the additional component(s) or additional scenario(s), including an explanation as to why the reconsideration should be granted. The Board will respond in writing within 14 calendar days of receipt of the company's request.

(iii) *Description of component.* The Board will provide the state member bank with a description of any additional component(s) or additional scenario(s) by December 1, 2014 (for the stress test cycle beginning on October 1, 2014) and by March 1 (for each stress test cycle beginning thereafter).

■ 22. Section 252.15 is amended by:

■ a. Revising paragraph (a) introductory text;

■ b. Removing paragraph (b); and

■ c. Redesignating paragraph (c) as paragraph (b) and revising it.

The revisions read as follows:

§ 252.15 Methodologies and practices.

(a) *Potential impact on capital.* In conducting a stress test under § 252.14, for each quarter of the planning horizon, a state member bank must estimate the following for each scenario required to be used:

* * * * *

(b) *Controls and oversight of stress testing processes*—(1) *In general.* The senior management of a state member bank must establish and maintain a system of controls, oversight, and documentation, including policies and procedures, that are designed to ensure that its stress testing processes are effective in meeting the requirements in this subpart. These policies and procedures must, at a minimum, describe the company's stress testing practices and methodologies, and processes for validating and updating the company's stress test practices and methodologies consistent with applicable laws, regulations, and supervisory guidance.

(2) *Oversight of stress testing processes.* The board of directors, or a committee thereof, of a state member bank must review and approve the policies and procedures of the stress testing processes as frequently as economic conditions or the condition of the company may warrant, but no less than annually. The board of directors and senior management of the state member bank must receive a summary of the results of the stress test conducted under this section.

(3) *Role of stress testing results.* The board of directors and senior management of a state member bank must consider the results of the stress test in the normal course of business, including but not limited to, the state member bank's capital planning, assessment of capital adequacy, and risk management practices.

■ 23. Section 252.16(a)(1) and (3) are revised to read as follows:

§ 252.16 Reports of stress test results.

(a) *Reports to the Board of stress test results*—(1) *General.* A state member bank must report the results of the stress test to the Board in the manner and form prescribed by the Board, in accordance with paragraphs (a)(2) and (3) of this section.

* * * * *

(3) *Timing for each stress test cycle beginning after October 1, 2014.* For each stress test cycle beginning after October 1, 2014:

(i) A state member bank that is a covered company subsidiary must report the results of the stress test to the Board by April 5, unless that time is extended by the Board in writing; and

(ii) A state member bank that is not a covered company subsidiary must report the results of the stress test to the Board by July 31, unless that time is extended by the Board in writing.

* * * * *

■ 24. Section 252.17 is amended by:

■ a. Revising paragraph (a)(1) and the first paragraph (a)(3);

■ b. Correctly designating the second paragraph (a)(3) as paragraph (a)(4) and revising it; and

■ c. Revising paragraph (b).

The revisions read as follows:

§ 252.17 Disclosure of stress test results.

(a) *Public disclosure of results*—(1) *General.* (i) A state member bank must publicly disclose a summary of the results of the stress test required under this subpart.

(ii) [Reserved]

* * * * *

(3) *Timing for each stress test cycle beginning after October 1, 2014.* For each stress test cycle beginning after October 1, 2014:

(i) A state member bank that is a covered company subsidiary must publicly disclose a summary of the results of the stress test within 15 calendar days after the Board discloses the results of its supervisory stress test of the covered company pursuant to § 252.46(c), unless that time is extended by the Board in writing; and

(ii) A state member bank that is not a covered company subsidiary must publicly disclose a summary of the results of the stress test in the period beginning on October 15 and ending on October 31, unless that time is extended by the Board in writing.

(4) *Disclosure method.* The summary required under this section may be disclosed on the website of a state member bank, or in any other forum that is reasonably accessible to the public.

(b) *Summary of results*—(1) *State member banks that are subsidiaries of bank holding companies.* A state member bank that is a subsidiary of a bank holding company satisfies the public disclosure requirements under this subpart if the bank holding company publicly discloses summary results of its stress test pursuant to this section or § 252.58, unless the Board determines that the disclosures at the holding company level do not adequately capture the potential impact of the scenarios on the capital of the state member bank and requires the state member bank to make public disclosures.

(2) *State member banks that are not subsidiaries of bank holding companies.* A state member bank that is not a subsidiary of a bank holding company or that is required to make disclosures under paragraph (b)(1) of this section must publicly disclose, at a minimum, the following information regarding the severely adverse scenario:

(i) A description of the types of risks being included in the stress test;

(ii) A summary description of the methodologies used in the stress test;

(iii) Estimates of—

(A) Aggregate losses;

(B) Pre-provision net revenue

(C) Provision for credit losses;

(D) Net income; and

(E) Pro forma regulatory capital ratios and any other capital ratios specified by the Board; and

(iv) An explanation of the most significant causes for the changes in regulatory capital ratios.

* * * * *

Subpart C—Risk Committee Requirement for Bank Holding Companies With Total Consolidated Assets of $50 Billion or More and Less Than $100 Billion

■ 25. The heading of subpart C is revised to read as set forth above.

■ 26. Section 252.21 paragraphs (a) through (c) are revised to read as follows:

§ 252.21 Applicability.

(a) *General applicability.* A bank holding company must comply with the risk-committee requirements set forth in this subpart beginning on the first day of the ninth quarter following the date on which its total consolidated assets equal or exceed $50 billion.

(b) *Total consolidated assets.* Total consolidated assets of a bank holding company for purposes of this subpart are equal to its consolidated assets, calculated based on the average of the bank holding company's total consolidated assets in the four most recent quarters as reported quarterly on its FR Y–9C. If the bank holding company has not filed the FR Y–9C for each of the four most recent consecutive quarters, total consolidated assets means the average of its total consolidated assets, as reported on the FR Y–9C, for the most recent quarter or consecutive quarters, as applicable. Total consolidated assets are measured on the as-of date of the most recent FR Y–9C used in the calculation of the average.

(c) *Cessation of requirements.* A bank holding company will remain subject to the requirements of this subpart until the earlier of the date on which:

(1) Its reported total consolidated assets on the FR Y–9C are below $50 billion for each of four consecutive calendar quarters; and

(2) It becomes subject to the requirements of subpart D of this part.

* * * * *

■ 27. Section 252.22 is revised to read as follows:

§ 252.22 Risk committee requirement for bank holding companies with total consolidated assets of $50 billion or more.

(a) *Risk committee*—(1) *General.* A bank holding company with total consolidated assets of $50 billion or more must maintain a risk committee that approves and periodically reviews the risk-management policies of the bank holding company's global operations and oversees the operation of the bank holding company's global risk-management framework.

(2) *Risk-management framework.* The bank holding company's global risk-management framework must be commensurate with its structure, risk profile, complexity, activities, and size and must include:

(i) Policies and procedures establishing risk-management governance, risk-management procedures, and risk-control infrastructure for its global operations; and

(ii) Processes and systems for implementing and monitoring compliance with such policies and procedures, including:

(A) Processes and systems for identifying and reporting risks and risk-management deficiencies, including regarding emerging risks, and ensuring effective and timely implementation of actions to address emerging risks and risk-management deficiencies for its global operations;

(B) Processes and systems for establishing managerial and employee responsibility for risk management;

(C) Processes and systems for ensuring the independence of the risk-management function; and

(D) Processes and systems to integrate risk management and associated controls with management goals and its compensation structure for its global operations.

(3) *Corporate governance requirements.* The risk committee must:

(i) Have a formal, written charter that is approved by the bank holding company's board of directors;

(ii) Be an independent committee of the board of directors that has, as its sole and exclusive function, responsibility for the risk-management policies of the bank holding company's global operations and oversight of the operation of the bank holding company's global risk-management framework;

(iii) Report directly to the bank holding company's board of directors;

(iv) Receive and review regular reports on not less than a quarterly basis from the bank holding company's chief risk officer provided pursuant to paragraph (b)(3)(ii) of this section; and

(v) Meet at least quarterly, or more frequently as needed, and fully document and maintain records of its proceedings, including risk-management decisions.

(4) *Minimum member requirements.* The risk committee must:

(i) Include at least one member having experience in identifying, assessing, and managing risk exposures of large, complex financial firms; and

(ii) Be chaired by a director who:

(A) Is not an officer or employee of the bank holding company and has not been an officer or employee of the bank holding company during the previous three years;

(B) Is not a member of the immediate family, as defined in § 225.41(b)(3) of this chapter, of a person who is, or has been within the last three years, an executive officer of the bank holding company, as defined in § 215.2(e)(1) of this chapter; and

(C)(*1*) Is an independent director under Item 407 of the Securities and Exchange Commission's Regulation S–K (17 CFR 229.407(a)), if the bank holding company has an outstanding class of securities traded on an exchange registered with the U.S. Securities and Exchange Commission as a national securities exchange under section 6 of the Securities Exchange Act of 1934 (15 U.S.C. 78f) (national securities exchange); or

(*2*) Would qualify as an independent director under the listing standards of a national securities exchange, as demonstrated to the satisfaction of the Board, if the bank holding company does not have an outstanding class of securities traded on a national securities exchange.

(b) *Chief risk officer*—(1) *General.* A bank holding company with total consolidated assets of $50 billion or more must appoint a chief risk officer with experience in identifying, assessing, and managing risk exposures of large, complex financial firms.

(2) *Responsibilities.* (i) The chief risk officer is responsible for overseeing:

(A) The establishment of risk limits on an enterprise-wide basis and the monitoring of compliance with such limits;

(B) The implementation of and ongoing compliance with the policies and procedures set forth in paragraph (a)(2)(i) of this section and the development and implementation of the processes and systems set forth in paragraph (a)(2)(ii) of this section; and

(C) The management of risks and risk controls within the parameters of the company's risk control framework, and monitoring and testing of the company's risk controls.

(ii) The chief risk officer is responsible for reporting risk-management deficiencies and emerging risks to the risk committee and resolving risk-management deficiencies in a timely manner.

(3) *Corporate governance requirements.* (i) The bank holding company must ensure that the compensation and other incentives provided to the chief risk officer are consistent with providing an objective assessment of the risks taken by the bank holding company; and

(ii) The chief risk officer must report directly to both the risk committee and chief executive officer of the company.

Subpart D—Enhanced Prudential Standards for Bank Holding Companies With Total Consolidated Assets of $100 Billion or More

■ 28. The heading of subpart D is revised to read as set forth above.

■ 29. Section 252.30 is revised to read as follows:

§ 252.30 Scope.

This subpart applies to bank holding companies with total consolidated assets of $100 billion or more. Total consolidated assets of a bank holding company are equal to the consolidated assets of the bank holding company, as calculated in accordance with § 252.31(b).

■ 30. Section 252.31 is revised to read as follows:

§ 252.31 Applicability.

(a) *Applicability*—(1) *Initial applicability.* Subject to paragraph (d) of this section, a bank holding company must comply with the risk-management and risk-committee requirements set forth in § 252.33 and the liquidity risk-management and liquidity stress test requirements set forth in §§ 252.34 and 252.35 no later than the first day of the fifth quarter following the date on which its total consolidated assets equal or exceed $100 billion.

(2) *Changes in requirements following a change in category.* A bank holding company with total consolidated assets of $100 billion or more that changes from one category of banking organization described in § 252.5(b) through (e) to another of such categories must comply with the requirements applicable to the new category no later than on the first day of the second quarter following the change in the bank holding company's category.

(b) *Total consolidated assets.* Total consolidated assets of a bank holding company for purposes of this subpart are equal to its consolidated assets, calculated based on the average of the bank holding company's total consolidated assets in the four most recent quarters as reported quarterly on the FR Y–9C. If the bank holding company has not filed the FR Y–9C for each of the four most recent consecutive quarters, total consolidated assets means the average of its total consolidated assets, as reported on the FR Y–9C, for the most recent quarter or consecutive quarters, as applicable. Total consolidated assets are measured on the as-of date of the most recent FR Y–9C used in the calculation of the average.

(c) *Cessation of requirements.* Except as provided in paragraph (d) of this section, a bank holding company is subject to the risk-management and risk committee requirements set forth in § 252.33 and the liquidity risk-management and liquidity stress test requirements set forth in §§ 252.34 and 252.35 until its reported total consolidated assets on the FR Y–9C are below $100 billion for each of four consecutive calendar quarters.

(d) *Applicability for bank holding companies that are subsidiaries of foreign banking organizations.* In the event that a bank holding company that has total consolidated assets of $100 billion or more is controlled by a foreign banking organization, the U.S. intermediate holding company established or designated by the foreign banking organization must comply with the risk-management and risk committee requirements set forth in § 252.153(e)(3) and the liquidity risk-management and liquidity stress test requirements set forth in § 252.153(e)(4).

■ 31. Section 252.32 is revised to read as follows:

§ 252.32 Risk-based and leverage capital and stress test requirements.

A bank holding company with total consolidated assets of $100 billion or more must comply with, and hold capital commensurate with the requirements of, any regulations adopted by the Board relating to capital planning and stress tests, in accordance with the applicability provisions set forth therein.

■ 32. Section 252.33(a)(1) and (b)(1) are revised to read as follows:

§ 252.33 Risk-management and risk committee requirements.

(a) *Risk committee*—(1) *General.* A bank holding company with total consolidated assets of $100 billion or more must maintain a risk committee that approves and periodically reviews the risk-management policies of the bank holding company's global operations and oversees the operation of the bank holding company's global risk-management framework. The risk committee's responsibilities include liquidity risk-management as set forth in § 252.34(b).

* * * * *

(b) *Chief risk officer*—(1) *General.* A bank holding company with total consolidated assets of $100 billion or more must appoint a chief risk officer with experience in identifying, assessing, and managing risk exposures of large, complex financial firms.

* * * * *

■ 33. Section 252.34(a)(1) introductory text, (c)(1)(i), (d), (e)(1), (f)(1), (f)(2)(i), (g), and (h) are revised to read as follows:

§ 252.34 Liquidity risk-management requirements.

(a) * * * (1) *Liquidity risk tolerance.* The board of directors of a bank holding company with total consolidated assets of $100 billion or more must:

* * * * *

(c) * * * (1) * * * (i) Senior management of a bank holding company with total consolidated assets of $100 billion or more must establish and implement strategies, policies, and procedures designed to effectively manage the risk that the bank holding company's financial condition or safety and soundness would be adversely affected by its inability or the market's perception of its inability to meet its cash and collateral obligations (liquidity risk). The board of directors must approve the strategies, policies, and procedures pursuant to paragraph (a)(2) of this section.

* * * * *

(d) *Independent review function.* (1) A bank holding company with total consolidated assets of $100 billion or more must establish and maintain a review function that is independent of management functions that execute funding to evaluate its liquidity risk management.

(2) The independent review function must:

(i) Regularly, but no less frequently than annually, review and evaluate the adequacy and effectiveness of the company's liquidity risk management processes, including its liquidity stress test processes and assumptions;

(ii) Assess whether the company's liquidity risk-management function complies with applicable laws and regulations, and sound business practices; and

(iii) Report material liquidity risk management issues to the board of directors or the risk committee in writing for corrective action, to the extent permitted by applicable law.

(e) * * * (1) A bank holding company with total consolidated assets of $100 billion or more must produce comprehensive cash-flow projections that project cash flows arising from assets, liabilities, and off-balance sheet exposures over, at a minimum, short- and long-term time horizons. The bank holding company must update short-term cash-flow projections daily and must update longer-term cash-flow projections at least monthly.

* * * * *

(f) * * * (1) A bank holding company with total consolidated assets of $100 billion or more must establish and maintain a contingency funding plan that sets out the company's strategies for addressing liquidity needs during liquidity stress events. The contingency funding plan must be commensurate with the company's capital structure, risk profile, complexity, activities, size, and established liquidity risk tolerance. The company must update the contingency funding plan at least annually, and when changes to market and idiosyncratic conditions warrant.

(2) * * * (i) *Quantitative assessment.* The contingency funding plan must:

(A) Identify liquidity stress events that could have a significant impact on the bank holding company's liquidity;

(B) Assess the level and nature of the impact on the bank holding company's liquidity that may occur during identified liquidity stress events;

(C) Identify the circumstances in which the bank holding company would implement its action plan described in paragraph (f)(2)(ii)(A) of this section, which circumstances must include failure to meet any minimum liquidity requirement imposed by the Board;

(D) Assess available funding sources and needs during the identified liquidity stress events;

(E) Identify alternative funding sources that may be used during the identified liquidity stress events; and

(F) Incorporate information generated by the liquidity stress testing required under § 252.35(a).

* * * * *

(g) *Liquidity risk limits*—(1) *General.* (i) A global systemically important BHC, Category II bank holding company, or Category III bank holding company must monitor sources of liquidity risk and establish limits on liquidity risk, including limits on:

(A) Concentrations in sources of funding by instrument type, single counterparty, counterparty type, secured and unsecured funding, and as applicable, other forms of liquidity risk;

(B) The amount of liabilities that mature within various time horizons; and

(C) Off-balance sheet exposures and other exposures that could create funding needs during liquidity stress events.

(ii) Each limit established pursuant to paragraph (g)(1) of this section must be consistent with the company's established liquidity risk tolerance and must reflect the company's capital structure, risk profile, complexity, activities, and size.

(2) *Liquidity risk limits for Category IV bank holding companies.* A Category IV bank holding company must monitor sources of liquidity risk and establish limits on liquidity risk that are consistent with the company's established liquidity risk tolerance and that reflect the company's capital structure, risk profile, complexity, activities, and size.

(h) *Collateral, legal entity, and intraday liquidity risk monitoring.* A bank holding company with total consolidated assets of $100 billion or more must establish and maintain procedures for monitoring liquidity risk as set forth in this paragraph.

(1) *Collateral.* The bank holding company must establish and maintain policies and procedures to monitor assets that have been, or are available to be, pledged as collateral in connection with transactions to which it or its affiliates are counterparties. These policies and procedures must provide that the bank holding company:

(i) Calculates all of its collateral positions according to the frequency specified in paragraph (h)(1)(i)(A) and (B) or as directed by the Board, specifying the value of pledged assets relative to the amount of security required under the relevant contracts and the value of unencumbered assets available to be pledged;

(A) If the bank holding company is not a Category IV bank holding company, on a weekly basis; or

(B) If the bank holding company is a Category IV bank holding company, on a monthly basis;

(ii) Monitors the levels of unencumbered assets available to be pledged by legal entity, jurisdiction, and currency exposure;

(iii) Monitors shifts in the bank holding company's funding patterns, such as shifts between intraday, overnight, and term pledging of collateral; and

(iv) Tracks operational and timing requirements associated with accessing collateral at its physical location (for example, the custodian or securities settlement system that holds the collateral).

(2) *Legal entities, currencies, and business lines.* The bank holding company must establish and maintain procedures for monitoring and controlling liquidity risk exposures and funding needs within and across significant legal entities, currencies, and business lines, taking into account legal and regulatory restrictions on the transfer of liquidity between legal entities.

(3) *Intraday exposures.* The bank holding company must establish and maintain procedures for monitoring intraday liquidity risk exposure that are consistent with the bank holding company's capital structure, risk profile, complexity, activities, and size. If the bank holding company is a global systemically important BHC, Category II bank holding company, or a Category III bank holding company, these procedures must address how the management of the bank holding company will:

(i) Monitor and measure expected daily gross liquidity inflows and outflows;

(ii) Manage and transfer collateral to obtain intraday credit;

(iii) Identify and prioritize time-specific obligations so that the bank holding company can meet these obligations as expected and settle less critical obligations as soon as possible;

(iv) Manage the issuance of credit to customers where necessary; and

(v) Consider the amounts of collateral and liquidity needed to meet payment systems obligations when assessing the bank holding company's overall liquidity needs.

■ 34. Section 252.35 paragraphs (a)(1) introductory text, (a)(2), (a)(7)(i) and (ii), and (b)(1) are revised to read as follows:

§ 252.35 Liquidity stress testing and buffer requirements.

(a) * * * (1) *General.* A bank holding company with total consolidated assets of $100 billion or more must conduct stress tests to assess the potential impact of the liquidity stress scenarios set forth in paragraph (a)(3) of this section on its cash flows, liquidity position, profitability, and solvency, taking into account its current liquidity condition, risks, exposures, strategies, and activities.

* * * * *

(2) *Frequency.* The bank holding company must perform the liquidity stress tests required under paragraph (a)(1) of this section according to the frequency specified in paragraph (a)(2)(i) and (ii) or as directed by the Board:

(i) If the bank holding company is not a Category IV bank holding company, at least monthly; or

(ii) If the bank holding company is a Category IV bank holding company, at least quarterly.

* * * * *

(7) * * * (i) *Policies and procedures.* A bank holding company with total consolidated assets of $100 billion or more must establish and maintain policies and procedures governing its liquidity stress testing practices, methodologies, and assumptions that provide for the incorporation of the results of liquidity stress tests in future stress testing and for the enhancement of stress testing practices over time.

(ii) *Controls and oversight.* A bank holding company with total consolidated assets of $100 billion or more must establish and maintain a system of controls and oversight that is designed to ensure that its liquidity stress testing processes are effective in meeting the requirements of this section. The controls and oversight must ensure that each liquidity stress test appropriately incorporates conservative assumptions with respect to the stress scenario in paragraph (a)(3) of this section and other elements of the stress test process, taking into consideration the bank holding company's capital structure, risk profile, complexity, activities, size, business lines, legal entity or jurisdiction, and other relevant factors. The assumptions must be approved by the chief risk officer and be subject to the independent review under § 252.34(d) of this subpart.

* * * * *

(b) *Liquidity buffer requirement.* (1) A bank holding company with total consolidated assets of $100 billion or more must maintain a liquidity buffer that is sufficient to meet the projected net stressed cash-flow need over the 30-day planning horizon of a liquidity stress test conducted in accordance with paragraph (a) of this section under each scenario set forth in paragraph (a)(3)(i) through (iii) of this section.

* * * * *

Subpart E—Supervisory Stress Test Requirements for Certain U.S. Banking Organizations With $100 Billion or More in Total Consolidated Assets and Nonbank Financial Companies Supervised by the Board

■ 35. The heading of subpart E is revised to read as set forth above.

■ 36. Section 252.41 is revised to read as follows

§ 252.41 Authority and purpose.

(a) *Authority.* 12 U.S.C. 321–338a, 1467a(g), 1818, 1831p–1, 1844(b), 1844(c), 5361, 5365, 5366, sec. 401(e), Public Law 115–174, 132 Stat. 1296.

(b) *Purpose.* This subpart implements section 165 of the Dodd-Frank Act (12 U.S.C. 5365) and section 401(e) of the Economic Growth, Regulatory Relief, and Consumer Protection Act, which requires the Board to conduct annual analyses of nonbank financial companies supervised by the Board and bank holding companies with $100 billion or more in total consolidated assets to evaluate whether such companies have the capital, on a total consolidated basis, necessary to absorb losses as a result of adverse economic conditions.

■ 37. Section 252.42 paragraphs (c), (e), (f) and (m) are revised to read as follows:

§ 252.42 Definitions.

* * * * *

(c) *Average total consolidated assets* means the average of the total consolidated assets as reported by a bank holding company on its Consolidated Financial Statements for Holding Companies (FR Y–9C) for the four most recent consecutive quarters. If the bank holding company has not filed the FR Y–9C for each of the four most recent consecutive quarters, average total consolidated assets means the average of the company's total consolidated assets, as reported on the company's FR Y–9C, for the most recent quarter or consecutive quarters. Average total consolidated assets are measured on the as-of date of the most recent FR Y–9C used in the calculation of the average.

* * * * *

(e) *Baseline scenario* means a set of conditions that affect the U.S. economy or the financial condition of a covered company and that reflect the consensus views of the economic and financial outlook.

(f) *Covered company* means:

(1) A bank holding company (other than a foreign banking organization) with average total consolidated assets of $100 billion or more;

(2) A U.S. intermediate holding company subject to this section pursuant to § 252.153; and

(3) A nonbank financial company supervised by the Board.

* * * * *

(m) *Regulatory capital ratio* means a capital ratio for which the Board has established minimum requirements for the bank holding company by regulation or order, including, as applicable, the company's regulatory capital ratios calculated under 12 CFR part 217 and the deductions required under 12 CFR 248.12; except that the company shall not use the advanced approaches to calculate its regulatory capital ratios.

* * * * *

■ 38. Section 252.43 paragraph (a) is revised to read as follows

§ 252.43 Applicability.

(a) *Scope*—(1) *Applicability.* Except as provided in paragraph (b) of this section, this subpart applies to any covered company, which includes:

(i) Any bank holding company with average total consolidated assets of $100 billion or more;

(ii) Any U.S. intermediate holding company subject to this section pursuant to § 252.153; and

(iii) Any nonbank financial company supervised by the Board that is made subject to this section pursuant to a rule or order of the Board.

(2) *Ongoing applicability.* A bank holding company (including any successor company) that is subject to any requirement in this subpart shall remain subject to any such requirement unless and until its total consolidated assets fall below $100 billion for each of four consecutive quarters, as reported on the FR Y–9C and, effective on the as-of date of the fourth consecutive FR Y–9C.

* * * * *

■ 39. Section 252.44 is amended by:

■ a. Revising the section heading and paragraphs (a)(1), (a)(3) and (b); and

■ b. Adding paragraph (c).

The revisions and addition read as follows:

§ 252.44 Analysis conducted by the Board.

(a) *In general.* (1) The Board will conduct an analysis of each covered company's capital, on a total consolidated basis, taking into account all relevant exposures and activities of that covered company, to evaluate the ability of the covered company to absorb losses in specified economic and financial conditions.

* * * * *

(3) In conducting the analyses, the Board will coordinate with the

appropriate primary financial regulatory agencies and the Federal Insurance Office, as appropriate.

(b) *Economic and financial scenarios related to the Board's analysis.* The Board will conduct its analysis using a minimum of three different scenarios, including a baseline scenario, adverse scenario, and severely adverse scenario. The Board will notify covered companies of the scenarios that the Board will apply to conduct the analysis for each stress test cycle to which the covered company is subject by no later than February 15 of that year, except with respect to trading or any other components of the scenarios and any additional scenarios that the Board will apply to conduct the analysis, which will be communicated by no later than March 1 of that year.

(c) *Frequency of analysis conducted by the Board.* (1) Except as provided in paragraph (c)(2) of this section, the Board will conduct its analysis of a covered company on an annual basis.

(2) The Board will conduct its analysis of a Category IV bank holding company on a biennial basis and occurring in each year ending in an even number.

Subpart F—Company-Run Stress Test Requirements for Certain U.S. Bank Holding Companies and Nonbank Financial Companies Supervised by the Board

■ 40. The heading of subpart F is revised to read as set forth above.

■ 41. Section 252.51 is revised to read as follows:

§ 252.51 Authority and purpose.

(a) *Authority.* 12 U.S.C. 321–338a, 1818, 1831p–1, 1844(b), 1844(c), 5361, 5365, 5366.

(b) *Purpose.* This subpart establishes the requirement for a covered company to conduct stress tests. This subpart also establishes definitions of stress test and related terms, methodologies for conducting stress tests, and reporting and disclosure requirements.

■ 42. Section 252.52 paragraphs (c), (f), (g), (n) and (o) are revised to read as follows:

§ 252.52 Definitions.

* * * * *

(c) *Average total consolidated assets* means the average of the total consolidated assets as reported by a bank holding company on its Consolidated Financial Statements for Holding Companies (FR Y–9C) for the four most recent consecutive quarters. If the bank holding company has not filed the FR Y–9C for each of the four most recent consecutive quarters, average total consolidated assets means the average of the company's total consolidated assets, as reported on the company's FR Y–9C, for the most recent quarter or consecutive quarters. Average total consolidated assets are measured on the as-of date of the most recent FR Y–9C used in the calculation of the average.

* * * * *

(f) *Capital action* has the same meaning as in § 225.8 of this chapter.

(g) *Covered company* means:

(1) A global systemically important BHC;

(2) A Category II bank holding company;

(3) A Category III bank holding company;

(4) A U.S. intermediate holding company subject to this section pursuant to § 252.153; and

(5) A nonbank financial company supervised by the Board.

* * * * *

(n) *Regulatory capital ratio* means a capital ratio for which the Board has established minimum requirements for the bank holding company by regulation or order, including, as applicable, the company's regulatory capital ratios calculated under 12 CFR part 217 and the deductions required under 12 CFR 248.12; except that the company shall not use the advanced approaches to calculate its regulatory capital ratios.

* * * * *

(o) *Scenarios* are those sets of conditions that affect the U.S. economy or the financial condition of a covered company that the Board annually or biennially determines are appropriate for use in the company-run stress tests, including, but not limited to, baseline, adverse, and severely adverse scenarios.

* * * * *

■ 43. Section 252.53(a) is revised to read as follows:

§ 252.53 Applicability.

(a) *Scope*—(1) *Applicability.* Except as provided in paragraph (b) of this section, this subpart applies to any covered company, which includes:

(i) A global systemically important BHC;

(ii) Any Category II bank holding company;

(iii) Any Category III bank holding company;

(iv) Any U.S. intermediate holding company subject to this section pursuant to § 252.153; and

(v) Any nonbank financial company supervised by the Board that is made subject to this section pursuant to a rule or order of the Board.

(2) *Ongoing applicability.* A bank holding company (including any successor company) that is subject to any requirement in this subpart shall remain subject to any such requirement unless and until the bank holding company

(i) Is not a global systemically important BHC;

(ii) Is not a Category II bank holding company; and

(iii) Is not a Category III bank holding company.

* * * * *

■ 44. Section 252.54 is amended by revising the section heading, and paragraphs (a), (b)(2)(i), and (b)(4)(ii) and (iii) to read as follows:

§ 252.54 Stress test.

(a) Stress test—(1) *In general.* A covered company must conduct a stress test as required under this subpart.

(2) *Frequency.* (i) Except as provided in paragraph (a)(2)(ii) of this section, a covered company must conduct an annual stress test. The stress test must be conducted by April 5 of each calendar year based on data as of December 31 of the preceding calendar year, unless the time or the as-of date is extended by the Board in writing.

(ii) A Category III bank holding company must conduct a biennial stress test. The stress test must be conducted by April 5 of each calendar year ending in an even number, based on data as of December 31 of the preceding calendar year, unless the time or the as-of date is extended by the Board in writing.

(b) * * *

(2) * * * (i) The Board may require a covered company with significant trading activity, as determined by the Board and specified in the Capital Assessments and Stress Testing report (FR Y–14), to include a trading and counterparty component in its adverse and severely adverse scenarios in the stress test required by this section. The data used in this component must be as of a date selected by the Board between October 1 of the previous calendar year and March 1 of the calendar year in which the stress test is performed pursuant to this section, and the Board will communicate the as-of date and a description of the component to the company no later than March 1 of the calendar year in which the stress test is performed pursuant to this section.

* * * * *

(4) * * *

(ii) *Request for reconsideration and Board response.* Within 14 calendar days of receipt of a notification under this paragraph, the covered company may request in writing that the Board reconsider the requirement that the company include the additional component(s) or additional scenario(s), including an explanation as to why the request for reconsideration should be granted. The Board will respond in writing within 14 calendar days of receipt of the company's request.

(iii) *Description of component.* The Board will provide the covered company with a description of any additional component(s) or additional scenario(s) by March 1 of the calendar year in which the stress test is performed pursuant to this section.

■ 45. Section 252.55 is revised to read as follows:

§ 252.55 Mid-cycle stress test.

(a) *Mid-cycle stress test requirement.* In addition to the stress test required under § 252.54, a U.S. intermediate holding company must conduct a mid-cycle stress test. The stress test must be conducted by September 30 of each calendar year based on data as of June 30 of that calendar year, unless the time or the as-of date is extended by the Board in writing.

(b) *Scenarios related to mid-cycle stress tests*—(1) *In general.* A U.S. intermediate holding company must develop and employ a minimum of three scenarios, including a baseline scenario, adverse scenario, and severely adverse scenario that are appropriate for its own risk profile and operations, in conducting the stress test required by this section.

(2) *Additional components.* The Board may require a U.S. intermediate holding company to include one or more additional components in its adverse and severely adverse scenarios in the stress test required by this section based on the company's financial condition, size, complexity, risk profile, scope of operations, or activities, or risks to the U.S. economy.

(3) *Additional scenarios.* The Board may require a U.S. intermediate holding company to use one or more additional scenarios in the stress test required by this section based on the company's financial condition, size, complexity, risk profile, scope of operations, or activities, or risks to the U.S. economy.

(4) *Notice and response*—(i) *Notification of additional component.* If the Board requires a U.S. intermediate holding company to include one or more additional components in its adverse and severely adverse scenarios under paragraph (b)(2) of this section or one or more additional scenarios under paragraph (b)(3) of this section, the Board will notify the company in writing. The Board will provide such notification no later than June 30. The notification will include a general description of the additional component(s) or additional scenario(s) and the basis for requiring the company to include the additional component(s) or additional scenario(s).

(ii) *Request for reconsideration and Board response.* Within 14 calendar days of receipt of a notification under this paragraph, the U.S. intermediate holding company may request in writing that the Board reconsider the requirement that the company include the additional component(s) or additional scenario(s), including an explanation as to why the reconsideration should be granted. The Board will respond in writing within 14 calendar days of receipt of the company's request.

(iii) *Description of component.* The Board will provide the U.S. intermediate holding company with a description of any additional component(s) or additional scenario(s) by September 1 of the calendar year prior to the year in which the stress test is performed pursuant to this section.

■ 46. Section 252.56 is amended by revising the introductory text to paragraphs (a) and (b) and paragraph (c)(1) to read as follows:

§ 252.56 Methodologies and practices.

(a) *Potential impact on capital.* In conducting a stress test under §§ 252.54 and 252.55, as applicable, for each quarter of the planning horizon, a covered company must estimate the following for each scenario required to be used:

* * * * *

(b) *Assumptions regarding capital actions.* In conducting a stress test under §§ 252.54 and 252.55, as applicable, a covered company is required to make the following assumptions regarding its capital actions over the planning horizon:

* * * * *

(c) * * * (1) *In general.* The senior management of a covered company must establish and maintain a system of controls, oversight, and documentation, including policies and procedures, that are designed to ensure that its stress testing processes are effective in meeting the requirements in this subpart. These policies and procedures must, at a minimum, describe the covered company's stress testing practices and methodologies, and processes for validating and updating the company's stress test practices and methodologies consistent with applicable laws and regulations. The policies of a U.S. intermediate holding company must also describe processes for scenario development for the mid-cycle stress test required under § 252.55.

* * * * *

■ 47. Section 252.57 paragraph (a) is revised to read as follows:

§ 252.57 Reports of stress test results.

(a) *Reports to the Board of stress test results.* (1) A covered company must report the results of the stress test required under § 252.54 to the Board in the manner and form prescribed by the Board. Such results must be submitted by April 5 of the calendar year in which the stress test is performed pursuant to § 252.54, unless that time is extended by the Board in writing.

(2) A U.S. intermediate holding company must report the results of the stress test required under § 252.55 to the Board in a manner and form prescribed by the Board. Such results must be submitted by October 5 of the calendar year in which the stress test is performed pursuant to § 252.55, unless that time is extended by the Board in writing.

* * * * *

■ 48. Section 252.58 paragraph (a)(1) is revised to read as follows:

§ 252.58 Disclosure of stress test results.

(a) *Public disclosure of results*—(1) *In general.* (i) A covered company must publicly disclose a summary of the results of the stress test required under § 252.54 within the period that is 15 calendar days after the Board publicly discloses the results of its supervisory stress test of the covered company pursuant to § 252.46(c), unless that time is extended by the Board in writing.

(ii) A U.S. intermediate holding company must publicly disclose a summary of the results of the stress test required under § 252.55. This disclosure must occur in the period beginning on October 5 and ending on November 4 of the calendar year in which the stress test is performed pursuant to § 252.55, unless that time is extended by the Board in writing.

* * * * *

Subpart H—Single-Counterparty Credit Limits

■ 49. Section 252.70 paragraphs (a) and (d)(1) are revised to read as follows:

§ 252.70 Applicability and general provisions.

(a) *In general.* (1) This subpart establishes single counterparty credit limits for a covered company.

(2) For purposes of this subpart:

(i) *Covered company* means

(A) A global systemically important BHC;

(B) A Category II bank holding company;

(C) A Category III bank holding company;

(ii) *Major covered company* means any covered company that is a global systemically important BHC.

* * * * *

(d) *Cessation of requirements.* (1) Any company that becomes a covered company will remain subject to the requirements of this subpart unless and until:

(i) The covered company is not a global systemically important BHC;

(ii) The covered company is not a Category II bank holding company; and

(iii) The covered company is not a Category III bank holding company.

* * * * *

By order of the Board of Governors of the Federal Reserve System, November 1, 2018.

Ann Misback,

Secretary of the Board.

[FR Doc. 2018–24464 Filed 11–28–18; 8:45 am]

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Part III

Department of Education

34 CFR Part 106
Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance; Proposed Rules

DEPARTMENT OF EDUCATION

34 CFR Part 106

[Docket ID ED–2018–OCR–0064]

RIN 1870–AA14

Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance

AGENCY: Office for Civil Rights, Department of Education.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Secretary of Education proposes to amend regulations implementing Title IX of the Education Amendments of 1972 (Title IX). The proposed regulations would clarify and modify Title IX regulatory requirements pertaining to the availability of remedies for violations, the effect of Constitutional protections, the designation of a coordinator to address sex discrimination issues, the dissemination of a nondiscrimination policy, the adoption of grievance procedures, and the process to claim a religious exemption. The proposed regulations would also specify how recipient schools and institutions covered by Title IX (hereinafter collectively referred to as recipients or schools) must respond to incidents of sexual harassment consistent with Title IX's prohibition against sex discrimination. The proposed regulations are intended to promote the purpose of Title IX by requiring recipients to address sexual harassment, assisting and protecting victims of sexual harassment and ensuring that due process protections are in place for individuals accused of sexual harassment.

DATES: We must receive your comments on or before January 28, 2019.

ADDRESSES: Submit your comments through the Federal eRulemaking Portal or via postal mail, commercial delivery, or hand delivery. We will not accept comments by fax or by email, or comments submitted after the comment period closes. To ensure that we do not receive duplicate copies, please submit your comments only once. Additionally, please include the Docket ID at the top of your comments.

If you are submitting comments electronically, we strongly encourage you to submit any comments or attachments in Microsoft Word format. If you must submit a comment in Adobe Portable Document Format (PDF), we strongly encourage you to convert the PDF to ''print-to-PDF'' format, or to use some other commonly-used searchable text format. Please do not submit the PDF in a scanned format. Using a print-to-PDF format allows the U.S. Department of Education (the Department) to electronically search and copy certain portions of your submissions.

- *Federal eRulemaking Portal:* Go to *www.regulations.gov* to submit your comments electronically. Information on using *Regulations.gov*, including instructions for finding a rule on the site and submitting comments, is available on the site under ''How to use *Regulations.gov*'' in the Help section.
- *Postal Mail, Commercial Delivery, or Hand Delivery:* The Department strongly encourages commenters to submit their comments electronically. If, however, you mail or deliver your comments about these proposed regulations, address them to Brittany Bull, U.S. Department of Education, 400 Maryland Avenue SW, Room 6E310, Washington, DC 20202. Telephone: (202) 453–7100.

Privacy Note: The Department's policy is to make all comments received from members of the public available for public viewing in their entirety on the Federal eRulemaking Portal at *www.regulations.gov.* Therefore, commenters should be careful to include in their comments only information that they wish to make publicly available.

FOR FURTHER INFORMATION CONTACT: Brittany Bull, U.S. Department of Education, 400 Maryland Avenue SW, Room 6E310, Washington, DC 20202. Telephone: (202) 453–7100. You may also email your questions to *TitleIXNPRM@ed.gov,* but, as described above, comments must be submitted via the Federal eRulemaking Portal, postal mail, commercial delivery, or hand delivery.

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

SUPPLEMENTARY INFORMATION:

Executive Summary

Purpose of This Regulatory Action

Based on its extensive review of the critical issues addressed in this rulemaking, the Department has determined that current regulations and guidance do not provide appropriate standards for how recipients must respond to incidents of sexual harassment. To address this concern, we propose regulations addressing sexual harassment under Title IX to better align the Department's regulations with the text and purpose of Title IX and Supreme Court precedent and other case law. This will help to ensure that recipients understand their legal obligations including what conduct is actionable as sexual harassment under Title IX, the conditions that activate a mandatory response by the recipient, and particular requirements that such a response must meet so that recipients protect the rights of their students to access education free from sex discrimination.

In addition to providing recipients with clear legal obligations, the transparency of the proposed regulations will help empower students to hold their schools accountable for failure to meet those obligations. Under the proposed regulations, complainants reporting sexual harassment will have greater control over the process. The Department recognizes that every situation is unique and that individuals react to sexual harassment differently; thus, the proposed regulations help ensure that schools provide complainants with clear options and honor the wishes of the reporting individual about how to respond to the situation, including increased access to supportive measures. Where a reporting complainant elects to file a formal complaint triggering the school's grievance process, the proposed regulations require the school's investigation to be fair and impartial, applying mandatory procedural checks and balances, thus producing more reliable factual outcomes, with the goal of encouraging more students to turn to their schools for support in the wake of sexual harassment.

Summary of the Major Provisions of This Regulatory Action

With regard to sexual harassment, the proposed regulations would:

- Define the conduct constituting sexual harassment for Title IX purposes;
- Specify the conditions that activate a recipient's obligation to respond to allegations of sexual harassment and impose a general standard for the sufficiency of a recipient's response;
- Specify situations that require a recipient to initiate its grievance procedures; and
- Establish procedural safeguards that must be incorporated into a recipient's grievance procedures to ensure a fair and reliable factual determination when a recipient investigates and adjudicates a sexual harassment complaint.

In addition, the proposed regulations would: Clarify that in responding to any claim of sex discrimination under Title IX, recipients are not required to deprive an individual of rights that would be otherwise guaranteed under the U.S. Constitution; prohibit the Department's Office for Civil Rights

(OCR) from requiring a recipient to pay money damages as a remedy for a violation of any Title IX regulation; and eliminate the requirement that religious institutions submit a written statement to qualify for the Title IX religious exemption.

Costs and Benefits

As further detailed in the *Regulatory Impact Analysis,* we estimate that the total monetary cost savings of these regulations over ten years would be in the range of $286.4 million to $367.7 million. In addition, the major benefits of these proposed regulations, taken as a whole, include achieving the protective purposes of Title IX via fair, reliable procedures that provide adequate due process protections for those involved in grievance processes.

Invitation to Comment: We invite you to submit comments regarding these proposed regulations and directed questions. To ensure that your comments have the maximum effect on developing the final regulations, *you should identify clearly the specific section or sections of the proposed regulations that each of your comments addresses,* and arrange your comments in the same order as the proposed regulations.

We invite you to assist us in complying with the specific requirements of Executive Orders 12866 and 13563 (explained further below), and their overall goal of reducing the regulatory burden that might result from these proposed regulations. Please let us know of any further ways that we may reduce potential costs or increase potential benefits, while preserving the effective and efficient administration of the Department's programs and activities.

During and after the comment period, you may inspect all public comments about these proposed regulations by accessing *Regulations.gov*. You also may inspect the comments in person at 400 Maryland Avenue SW, Room 6E310, Washington, DC, between the hours of 8:30 a.m. and 4:00 p.m., Eastern Time, Monday through Friday of each week, except federal holidays. Please contact the person listed under **FOR FURTHER INFORMATION CONTACT**.

Assistance to Individuals with Disabilities in Reviewing the Rulemaking Record: Upon request, we will provide an appropriate accommodation or auxiliary aid to an individual with a disability who needs assistance to review the comments or other documents in the public rulemaking record for these proposed regulations. If you want to schedule an appointment for this type of accommodation or auxiliary aid, please contact the person listed under **FOR FURTHER INFORMATION CONTACT**.

Background

Title IX prohibits discrimination on the basis of sex in education programs and activities that receive federal financial assistance. *See* 20 U.S.C. 1681(a). Existing Title IX regulations contain specific provisions regarding (i) the Assistant Secretary's authority to determine remedies necessary to overcome effects of discrimination (34 CFR 106.3), (ii) the effect of other requirements (34 CFR 106.6), (iii) designation of a responsible employee (34 CFR 106.8(a)), (iv) adoption of grievance procedures (34 CFR 106.8(b)), (v) dissemination of policy (34 CFR 106.9), and (vi) exemption for religious schools (34 CFR 106.12). For reasons described in this preamble, the Secretary proposes to amend the Title IX regulations at 34 CFR 106.3, 106.6, 106.8, 106.9, and 106.12, as well as add new §§ 106.30, 106.44, and 106.45.

The Department's predecessor, the Department of Health, Education and Welfare (HEW), promulgated implementing regulations under Title IX effective in 1975.[1] Among other things, those regulations require recipients to create and disseminate a policy of non-discrimination based on sex, designate a Title IX Coordinator, and adopt and publish grievance procedures providing for prompt and equitable resolution of complaints that a school is discriminating based on sex.

When the current regulations were issued in 1975, the federal courts had not yet addressed recipients' Title IX obligations to address sexual harassment as a form of sex discrimination. The Supreme Court subsequently elaborated on the scope of Title IX, ruling that money damages are available for private actions under Title IX based on sexual harassment by a teacher against a student, *Franklin* v. *Gwinnett Cty. Pub. Sch.,* 503 U.S. 60 (1992); that such damages may only be recovered under Title IX when a school official with authority to institute corrective measures has actual notice of the harassment but is deliberately indifferent to it, *Gebser* v. *Lago Vista Ind. Sch. Dist.,* 524 U.S. 274 (1998); and that a school can likewise be liable under Title IX based on sexual harassment by a *student* against a student but only if ''the recipient is deliberately indifferent to known acts of student-on-student sexual harassment,'' ''the harasser is under the school's disciplinary authority,'' and ''the behavior is so severe, pervasive, and objectively offensive that it denies its victims the equal access to education that Title IX is designed to protect,'' *Davis* v. *Monroe Cty. Bd. of Educ.,* 526 U.S. 629, 647, 652 (1999).

In the four decades since HEW issued the 1975 rule, no Title IX regulations have been promulgated to address sexual harassment as a form of sex discrimination; instead, the Department has addressed this subject through a series of guidance documents. *See, e.g.,* Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 FR 12034 (March 13, 1997); Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties (January 19, 2001) (2001 Guidance); Dear Colleague Letter on Sexual Harassment (January 25, 2006); Dear Colleague Letter: Sexual Violence (issued April 4, 2011, withdrawn September 22, 2017) (2011 Dear Colleague Letter); Questions and Answers on Title IX and Sexual Violence (issued April 29, 2014, withdrawn September 22, 2017) (2014 Q&A); Questions and Answers on Campus Sexual Misconduct (September 22, 2017) (2017 Q&A). The decades since the passage of Title IX have revealed that how schools address sexual harassment and sexual assault (collectively referred to herein as sexual harassment) affects the educational access and opportunities of large numbers of students in elementary, secondary, and postsecondary schools across the nation.

Beginning in mid-2017, the Department started to examine how schools and colleges were applying Title IX to sexual harassment under then-applicable guidance. The Department conducted listening sessions and discussions with stakeholders expressing a variety of positions for and against the status quo, including advocates for survivors of sexual violence; advocates for accused students; organizations representing schools and colleges; attorneys representing survivors, the accused, and institutions; Title IX Coordinators and other school and college administrators; child and sex abuse prosecutors;

[1] 40 FR 24128 (June 4, 1975) (codified at 45 CFR part 86). In 1980, Congress created the United States Department of Education. Public Law 96–88, sec. 201, 93 Stat. 669, 671 (1979); Exec. Order No. 12212, 45 FR 29557 (May 2, 1980). By operation of law, all of HEW's determinations, rules, and regulations continued in effect and all functions of HEW's Office for Civil Rights, with respect to educational programs, were transferred to the Secretary of Education. 20 U.S.C. 3441(a)(3). The regulations implementing Title IX were recodified without substantive change in 34 CFR part 106. *See* 45 FR 30802, 30955–65 (May 9, 1980).

scholars and experts in law, psychology, and neuroscience; and numerous individuals who have experienced school-level Title IX proceedings as a complainant or respondent. The Department also reviewed information that includes white papers, reports, and recommendations issued over the past several years by legal and public policy scholars, civil rights groups, and committees of nonpartisan organizations [2] as well as books detailing case studies of campus Title IX proceedings.[3]

The Department learned that schools and colleges were uncertain about whether the Department's guidance was or was not legally binding. To the extent that guidance was viewed as mandatory, the obligations set forth in previous guidance were issued without the benefit of notice and comment that would have permitted the public and all stakeholders to comment on the feasibility and effectiveness of the guidance. Several of the prescriptions set forth in previous guidance (for example, compulsory use by all schools and colleges of the preponderance of the evidence standard and prohibition of mediation in Title IX sexual assault cases) generated particular criticism and controversy.

Other criticisms of the previous guidance included that those guidance documents pressured schools and colleges to forgo robust due process protections; [4] captured too wide a range of misconduct, resulting in infringement on academic freedom and free speech and government regulation of consensual, noncriminal sexual activity; [5] and removed reasonable options for how schools should structure their grievance processes to accommodate each school's unique pedagogical mission, resources, and educational community.[6]

After personally engaging with numerous stakeholders including sexual violence survivors, students accused of campus sexual assault, and school and college attorneys and administrators, the Secretary of Education delivered a speech in September 2017 [7] in which she emphasized the importance of Title IX and the high stakes of sexual misconduct. The Secretary identified problems with the current state of Title IX's application in schools and colleges, including overly broad definitions of sexual harassment, lack of notice to the parties, lack of consistency regarding both parties' right to know the evidence relied on by the school investigator and right to cross-examine parties and witnesses, and adjudications reached by school administrators operating under a federal mandate to apply the lowest possible standard of evidence. Secretary DeVos stated that in endeavoring to find a ''better way forward'' that works for all students, ''non-negotiable principles'' include the right of every survivor to be taken seriously and the right of every person accused to know that guilt is not predetermined.[8] Quoting an open letter from law school faculty,[9] Secretary DeVos affirmed that ''there is nothing inconsistent with a policy that both strongly condemns and punishes sexual misconduct and ensures a fair adjudicatory process.''

On September 22, 2017, the Department rescinded previous guidance documents that had never had

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[2] *E.g.,* Jacob Gersen and Jeannie Suk, The Sex Bureaucracy, 104 Calif. L. Rev. 881 (2016); John Villasenor, *A probabilistic framework for modelling false Title IX 'convictions' under the preponderance of the evidence standard,* 15 Law, Probability and Risk 223, 223–37 (2016), *https://doi.org/10.1093/lpr/mgw006;* Open Letter from Members of the Penn Law School Faculty, *Sexual Assault Complaints: Protecting Complainants and the Accused Students at Universities,* Wall St. J. Online (Feb. 18, 2015), *http://online.wsj.com/public/resources/documents/2015_0218_upenn.pdf* (statement of 16 members of the University of Pennsylvania Law School faculty); *Rethink Harvard's Sexual Harassment Policy,* Boston Globe (Oct. 15, 2014), *https://www.bostonglobe.com/opinion/2014/10/14/rethink-harvard-sexual-harassment-policy/HFDDiZN7nU2UwuUuWMnqbM/story.html* (Statement of 28 members of the Harvard Law School faculty); Am. Bar Assn., ABA Criminal Justice Section Task Force on College Due Process Rights and Victim Protections: Recommendations for Colleges and Universities in Resolving Allegations of Campus Sexual Misconduct (2017), *https://www.americanbar.org/content/dam/aba/publications/criminaljustice/2017/ABA-Due-Process-Task-Force-Recommendations-and-Report.authcheckdam.pdf;* American College of Trial Lawyers, Task Force on the Response of Universities and Colleges to Allegations of Sexual Violence, White Paper on Campus Sexual Assault Investigations (2017), *https://www.actl.com/docs/default-source/default-document-library/position-statements-and-white-papers/task_force_allegations_of_sexual_violence_white_paper_final.pdf;* Elizabeth Bartholet, Nancy Gertner, Janet Halley & Jeannie Suk Gersen, Fairness For All Students Under Title IX (Aug. 21, 2017), *http://nrs.harvard.edu/urn-3:HUL.InstRepos:33789434. See also* Nedda Black et al., The NCHERM Group, LLC, 2017 NCHERM Group White Paper: Due Process and the Sex Police (2017), *https://www.ncherm.org/wp-content/uploads/2017/04/TNG-Whitepaper-Final-Electronic-Version.pdf;* Sharyn Potter et al., Prevention Innovations Research Ctr., Univ. of New Hampshire, It's Not Just the What but the How: Informing Students about Campus Policies and Resources (2015), *https://cola.unh.edu/sites/cola.unh.edu/files/departments/Prevention%20Innovations%20Research%20Center/White_Paper_87367_for_web.pdf;* Dana Bolger, *Gender Violence Costs: Schools' Financial Obligations Under Title IX,* 125 Yale L. J. 2106 (2016), *https://www.yalelawjournal.org/feature/gender-violence-costs-schools-financial-obligations-under-title-ix;* Katherine K. Baker et al., Title IX and the Preponderance of the Evidence: A White Paper, *http://www.feministlawprofessors.com/wp-content/uploads/2016/11/Title-IX-Preponderance-White-Paper-signed-11.29.16.pdf* (signed by dozens of law professors and scholars); Alexandra Brodsky, *A Rising Tide: Learning About Fair Disciplinary Process from Title IX,* 66 J. of Legal Educ. 822 (2017), *https://jle.aals.org/cgi/viewcontent.cgi?article=1517&context=home.*

[3] *E.g.,* K.C. Johnson and Stuart Taylor, Jr., Campus Rape Frenzy, (2017); Laura Kipnis, Unwanted Advances (2017). *See also Annie E. Clark and Andrea L. Pino, We Believe You: Survivors of Campus Sexual Assault Speak Out* (2016); Jon Krakauer, Missoula: Rape and the Justice System in a College Town, (2015).

[4] *E.g.,* Open Letter from Members of the Penn Law School Faculty, *supra* note 2 (''[W]e believe that OCR's approach exerts improper pressure upon universities to adopt procedures that do not afford fundamental fairness.''). *See also* Bartholet et al., *supra* note 2, at 1 (''In the past six years, under pressure from the previous Administration, many colleges and universities all over the country have put in place new rules defining sexual misconduct and new procedures for enforcing them. While the Administration's goals were to provide better protections for women . . . the new policies and procedures have created problems of their own, many of them attributable to directives coming from [OCR]. Most of these problems involve unfairness to the accused; some involve unfairness to both accuser and accused[.] OCR has an obligation to address the unfairness that has resulted from its previous actions and the related college and university responses''). *See also Plummer* v. *Univ. of Houston,* 860 F.3d 767, 777–78 (5th Cir. 2017) (Jones, J., dissenting) (The 2011 Dear Colleague Letter ''was not adopted according to notice-and-comment rulemaking procedures; its extremely broad definition of 'sexual harassment' has no counterpart in federal civil rights case law; and the procedures prescribed for adjudication of sexual misconduct are heavily weighted in favor of finding guilt'').

[5] *E.g.,* Kipnis, *supra* note 3, at 33 (''The reality is that a set of incomprehensible directives, issued by a branch of the federal government, are being wielded in wildly idiosyncratic ways, according to the whims and biases of individual Title IX officers operating with no public scrutiny or accountability. Some of them are also all too willing to tread on academic and creative freedom as they see fit''). *See also* Gersen and Suk, *supra* note 2, at 902–03 (Asserting that OCR's guidance requires schools to regulate student conduct ''that is not creating a hostile environment and therefore is not sexual harassment and therefore not sex discrimination'' and concluding that OCR's guidance oversteps OCR's jurisdictional authority); *see also* Jacob Gersen and Jeannie Suk, *The Sex Bureaucracy,* The Chronicle of Higher Educ. (Jan. 6, 2017) (*https://www.chronicle.com/article/The-College-Sex-Bureaucracy/238805*) (OCR's ''broad definition'' of sexual harassment has ''grown to include most voluntary and willing sexual contact''). *See also* Open Letter from Members of the Penn Law School Faculty, *supra* note 2 (''These cases are likely to involve highly disputed facts, and the 'he said/she said' conflict is often complicated by the effects of alcohol and drugs'').

[6] *E.g., Institutional Challenges in Responding to Sexual Violence On College Campuses: Testimony Provided to the Subcomm. on Higher Educ. and Workforce Training,* 114th Cong. 2, 5–6 (2015) (statement of Dana Scaduto, Campus Counsel, Dickinson College, discussing the problems with attempting to impose one-size-fits-all rules that fail to account for the wide diversity of institutions of higher education across the country), *https://edworkforce.house.gov/uploadedfiles/testimony_scaduto.pdf.*

[7] Betsy DeVos, U.S. Sec'y of Educ., Prepared Remarks on Title IX Enforcement (Sept. 7, 2017), *https://www.ed.gov/news/speeches/secretary-devos-prepared-remarks-title-ix-enforcement.*

[8] *Id.*

[9] Open Letter from Members of the Penn Law School Faculty, *supra* note 2.

the benefit of the public notice and comment process;[10] left in place the 2001 Guidance that had been subjected to public notice and comment (though not rulemaking); issued the 2017 Q&A as an interim question and answer document to identify recipients' obligations under Title IX to address sexual harassment as a temporary measure to provide necessary information while proceeding with the time-intensive process of notice and comment rulemaking; and announced its intent to promulgate regulations under Title IX following the rulemaking requirements of the Administrative Procedure Act. The Department has continued to hold listening sessions and discussions with stakeholders and experts since the rescission of the previous guidance to inform the Department's proposed Title IX regulations including hearing from stakeholders who believe the Department should adopt the policies embodied in its previous or current guidance. The need to address through rulemaking the serious subject of how schools respond to sexual harassment was well expressed by sixteen law school faculty at University of Pennsylvania Law School:

> Both the legislative process and notice-and-comment rulemaking are transparent, participatory processes that afford the opportunity for input from a diversity of viewpoints. That range of views is critical because this area implicates competing values, including privacy, safety, the functioning of the academic community, and the integrity of the educational process for both the victim and the accused, as well as the fundamental fairness of the disciplinary process. . . . In addition, adherence to a rule-of-law standard would have resulted in procedures with greater legitimacy and buy-in from the universities subject to the resulting rules.[11]

While implementing regulations under Title IX since 1975 have required schools to provide for a ''prompt and equitable'' grievance process to resolve complaints of sex discrimination by the school, the Department's guidance (both the guidance documents rescinded in 2017 and the ones remaining) fails to provide the clarity, permanence, and prudence of regulation properly informed by public participation in the full rulemaking process. Under the system created by the Department's guidance, hundreds of students have filed complaints with OCR alleging their school failed to provide a prompt or equitable process in response to a report of sexual harassment,[12] and over 200 students have filed lawsuits against colleges and universities alleging their school disciplined them for sexual misconduct without providing due process protections.[13]

The Department recognizes that despite well-intentioned efforts by school districts, colleges and universities, advocacy organizations, and the Department itself, sexual harassment continues to present serious problems across the nation's campuses. The lack of clear regulatory standards has contributed to processes that have not been fair to all parties involved, that have lacked appropriate procedural protections, and that have undermined confidence in the reliability of the outcomes of investigations of sexual harassment allegations. Such deficiencies harm complainants, respondents, and recipients alike.

The framework created under these proposed regulations stems from the Department's commitment to the rule of law and the Department's recognition that it has statutory authority under 20 U.S.C. 1682 to issue regulations that effectuate Title IX's provisions—to protect all students from sex discrimination (here, in the form of sexual harassment) that jeopardizes equal access to education. The proposed regulations would help ensure that the obligations imposed on recipients fall within the scope of the civil rights law that Congress created and, where persuasive, align with relevant case law. Thus, the proposed regulations set forth clear standards that trigger a recipient's obligation to respond to sexual harassment, including defining the conduct that rises to the level of Title IX as conduct serious enough to jeopardize a person's equal access to the recipient's education program or activity, and confining a recipient's Title IX obligations to sexual harassment of which it has actual knowledge.

Within those clarified standards triggering a recipient's Title IX obligations, the proposed regulations instruct recipients to take certain steps that, in the Department's judgment based on extensive interaction with stakeholders, will foster educational environments where all students and employees know that every school must respond appropriately to sexual harassment. The proposed regulations provide that complainants experiencing sexual harassment may report allegations to their school and expect their school to respond in a manner that is not clearly unreasonable and incentivize recipients to give various supportive measures to complainants to restore or preserve the individual's equal access to education as a way of demonstrating that the recipient's response to the complainant's report was not deliberately indifferent.

The proposed regulations require schools to investigate and adjudicate formal complaints of sexual harassment, and to treat complainants and respondents equally, giving each a meaningful opportunity to participate in the investigation and requiring the recipient to apply substantive and procedural safeguards that provide a predictable, consistent, impartial process for both parties and increase the likelihood that the recipient will reach a determination regarding the respondent's responsibility based on objective standards and relevant facts and evidence. By separating a recipient's obligation to *respond to each known report* of sexual harassment from the recipient's obligation to *investigate formal complaints* of sexual harassment, the proposed regulations give sexual harassment complainants greater confidence to report and expect their school to respond in a meaningful way, while requiring that where a complainant also wants a formal investigation to potentially result in discipline against a respondent, that grievance process will be predictable and fair to both parties, resulting in a factually reliable determination about the complainant's allegations.

Significant Proposed Regulations

Rather than proceeding sequentially, we group and discuss the proposed amendments under the substantive or procedural issues to which they pertain. We do not address proposed regulatory changes that are technical or otherwise minor in effect.

In discussing the proposed regulations, we first address how recipients must respond to sexual harassment and the procedures for resolving formal complaints of sexual harassment. Under the response provisions, we address: Adoption of standards from Title IX Supreme Court

[10] Specifically, the Department rescinded the 2011 Dear Colleague Letter and the 2014 Q&A.

[11] Open Letter from Members of the Penn Law School Faculty, *supra* note 2.

[12] *See, e.g.,* OCR's website listing currently pending investigations into sex discrimination, sexual harassment, and sexual violence: *https://www2.ed.gov/about/offices/list/ocr/docs/investigations/open-investigations/index.html.*

[13] *See* KC Johnson, *Judge Xinis' Outrage,* Acad. Wonderland: Comments on the Contemp. Acad. (Apr. 3, 2018), *https://academicwonderland.com/2018/04/03/judge-xinis-outrage/* (over 200 students have sued their colleges over due process issues since the 2011 Dear Colleague Letter); KC Johnson, *Pomona, the Courts, & Basic Fairness,* Acad. Wonderland: Comments on the Contemp. Acad. (Dec. 8, 2017), *https://academicwonderland.com/2017/12/08/pomona-the-courts-basic-fairness/* (over 90 colleges have lost due process challenges by respondent students since the 2011 Dear Colleague Letter).

precedent and other case law (proposed §§ 106.44(a) and 106.30); responses required in specific circumstances and accompanying safe harbors (proposed § 106.44(b)); emergency removals (proposed § 106.44(c)); and the use of administrative leave (proposed § 106.44(d)). We next turn to grievance procedures for addressing formal complaints of sexual harassment (proposed § 106.45) including: Clarification that the recipient's treatment of both complainant and respondent could constitute discrimination on the basis of sex (proposed § 106.45(a)); general requirements for grievance procedures (proposed § 106.45(b)(1)); notice to the parties (proposed § 106.45(b)(2)); and procedures for investigations (proposed § 106.45(b)(3)). Also within the grievance procedures section we address evidentiary standards for determinations of responsibility (proposed § 106.45(b)(4)(i)); the content of such written determinations (proposed § 106.45(b)(4)(ii)); and the timing of providing the determinations to the parties (proposed § 106.45(b)(4)(iii)). We next address procedures for appeals of written determinations (proposed § 106.45(b)(5)); informal resolution procedures (proposed § 106.45(b)(6)); and recordkeeping procedures (proposed § 106.45(b)(7)).

The proposed regulations also seek to clarify existing Title IX regulations in other areas beyond sexual harassment. Specifically, we state that OCR shall not deem necessary the payment of money damages to remedy violations under part 106 (proposed § 106.3(a)). We address the intersection among Title IX regulations, constitutional rights, student privacy rights, and Title VII of the Civil Rights Act of 1964 (proposed § 106.6). We clarify the provisions governing the designation of a Title IX Coordinator (proposed § 106.8). And we clarify that a recipient that qualifies for the religious exemption under Title IX can claim its exemption without seeking written assurance of the exemption from the Department (proposed § 106.12).

I. Recipient's Response to Sexual Harassment

(Proposed § 106.44)

Statute: Title IX states generally that no person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance, 20 U.S.C. 1681(a), but does not specifically mention sexual harassment.

Current Regulations: None.

A. Adoption of Supreme Court Standards for Sexual Harassment

Section 106.44(a) General; Section 106.30

Proposed Regulations: We propose adding a new § 106.44 covering a recipient's response to sexual harassment. Proposed § 106.44(a) would state that a recipient with actual knowledge of sexual harassment in an education program or activity of the recipient against a person in the United States must respond in a manner that is not deliberately indifferent. Proposed § 106.44(a) would also state that a recipient is deliberately indifferent only if its response to sexual harassment is clearly unreasonable in light of the known circumstances.

We propose definitions for ''sexual harassment'' and ''actual knowledge'' in § 106.30. The Department defines ''sexual harassment'' to mean either an employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct; or unwelcome conduct on the basis of sex that is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity; or sexual assault as defined in 34 CFR 668.46(a), implementing the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (Clery Act). We define ''actual knowledge'' as notice of sexual harassment or allegations of sexual harassment to a recipient's Title IX Coordinator or any official of the recipient who has authority to institute corrective measures on behalf of the recipient, or to a teacher in the elementary and secondary context with regard to student-on-student harassment. The proposed definition of ''actual knowledge'' also states that imputation of knowledge based solely on respondeat superior or constructive notice is insufficient to constitute actual knowledge, that the standard is not met when the only official of the recipient with actual knowledge is also the respondent, and that the mere ability or obligation to report sexual harassment does not qualify an employee, even if that employee is an official, as one who has authority to institute corrective measures on behalf of the recipient.

Reasons: The Department believes that the administrative standards governing recipients' responses to sexual harassment should be generally aligned with the standards developed by the Supreme Court in cases assessing liability under Title IX for money damages in private litigation. The Department believes that students and institutions would benefit from the clarity of an essentially uniform standard. More importantly, the Department believes that the Supreme Court's foundational decisions in this area, *Gebser* and *Davis,* are based on a textual interpretation of Title IX and on policy rationales that the Department finds persuasive for the administrative context. The Department's proposed regulations significantly reflect legal precedent because, while we could have chosen to regulate in a somewhat different manner, we believe that the standards articulated by the Court in these areas are the best interpretation of Title IX and that a consistent body of law will facilitate appropriate implementation.

First, the Court has held that Title IX governs misconduct by recipients, not by third parties such as teachers and students. As the Court noted in *Gebser,* Title IX is a statute ''designed primarily to prevent recipients of federal financial assistance from using the funds in a discriminatory manner.'' *Gebser,* 524 U.S. at 292; *Cannon* v. *Univ. of Chicago,* 414 U.S. 677, 704 (1979) (noting that the primary congressional purpose behind the statutes was ''to avoid the use of federal resources to support discriminatory practices''). It is thus a recipient's *own* misconduct—not the actions of employees, students, or other third parties—that subjects the recipient to liability under Title IX.

Second, because Congress enacted Title IX under its Spending Clause authority, the obligations it imposes on recipients are in the nature of a contract. *Gebser,* 524 U.S. at 286; *Davis,* 526 U.S. at 640. The Court has reasoned that it follows from this that recipients must be on clear notice of what conduct is prohibited and that recipients must be held liable only for conduct over which they have control. *Id.* at 644–45.

Third, the text of Title IX prohibits only discrimination that has the effect of denying access to the recipient's educational program or activities. *Id.* at 650–52. Accordingly, Title IX does not prohibit sex-based misconduct that does not rise to that level of severity.

And finally, the Court reasoned in *Davis* that Title IX must be interpreted in a manner that leaves room for flexibility in schools' disciplinary decisions and that does not place courts in the position of second-guessing the disciplinary decisions made by school administrators. *Id.* at 648.

As a matter of policy, the Department believes that these same principles should govern administrative enforcement of Title IX. To that end, the proposed regulation would provide that actual knowledge—rather than mere constructive knowledge or imputation of knowledge based on a respondeat superior theory—triggers the recipient's duty to respond. Consistent with Title IX's focus on the recipient's own misconduct and with the contractual nature of the duty imposed by Title IX, this standard ensures that the recipient is on clear notice of the discrimination (or alleged discrimination) that it must address. By contrast, as the Court observed in *Gebser,* a constructive knowledge standard would make a funding recipient liable for misconduct of which it was unaware. *Gebser,* 524 U.S. at 287. Further, applying this standard in the administrative enforcement context is consistent with ''Title IX's express means of enforcement—by administrative agencies—[which] operates on the assumption of actual notice to officials of the funding recipient.'' *Id.* at 288.

Similarly, proposed § 106.44(a) adopts the *Gebser/Davis* standard that actual knowledge means ''notice of sexual harassment or allegations of sexual harassment to an official of the recipient who has authority to institute corrective measures on behalf of the recipient.'' Consistent with the text and purpose of Title IX, this standard ensures that a recipient is liable only for its own misconduct. As the Court noted in *Gebser* and *Davis,* it is only when the recipient makes an intentional decision not to respond to third-party discrimination that the recipient itself can be said to ''subject'' its students to such discrimination. *Gebser,* 524 U.S. at 291–92; *Davis,* 526 U.S. at 642–43. Determining whether someone is an official with authority to take corrective action is a fact-specific inquiry. *See e.g., Doe* v. *Sch. Bd. of Broward Cty., Fla.,* 604 F.3d 1248, 1256 (11th Cir. 2010) (''we also note that the ultimate question of who is an appropriate person is 'necessarily a fact-based inquiry' because 'officials' roles vary among school districts.' '') (quoting *Murrell* v. *Sch. Dist. No. 1, Denver, Colo.,* 186 F.3d 1238, 1247 (10th Cir. 1999)).

For recipients that are elementary and secondary schools, with respect to student-on-student sexual harassment, proposed § 106.30 states that actual knowledge can also come from notice to a teacher. The Department recognizes that the Supreme Court has not held definitively that teachers are ''appropriate officials with the authority to take corrective action'' with respect to student-on-student sexual harassment; however, in the elementary and secondary school setting where school administrators and teachers are more likely to act *in loco parentis,* and exercise a considerable degree of control and supervision over their students, the Department believes this interpretation is reasonable. *Davis,* 526 U.S. at 646, citing *Veronica Sch. Dist.* v. *Acton,* 515 U.S. 646, 655 (1995) (noting that a public school's power over its students is ''custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults''). Teachers specifically have a ''degree of familiarity with, and authority over, their students that is unparalleled except perhaps in the relationship between parent and child.'' *New Jersey* v. *T.L.O.,* 469 U.S. 325, 348 (1985) (Powell, J., concurring). Thus, the Department believes that teachers at elementary and secondary schools should be considered to have the requisite authority to impart actual knowledge to the recipient regarding student-on-student conduct that could constitute sexual harassment and to trigger a recipient's obligations under Title IX. Whether in the context of elementary and secondary schools, or institutions of higher education, determining who is an official to whom notice of sexual harassment gives actual knowledge to the recipient will be fact-specific. Notice to a recipients' Title IX Coordinator, however, will always confer actual knowledge on the recipient; therefore, every student has a clearly designated option for reporting sexual harassment to trigger their school's response obligations.

The definition in proposed § 106.30 also states that the mere ability or obligation to report sexual harassment does not qualify an employee, even if that employee is an official, as one who has authority to institute corrective measures on behalf of the recipient. *Plamp* v. *Mitchell Sch. Dist. No. 17–2,* 565 F.3d 450, 459 (8th Cir. 2009) (''After all, each teacher, counselor, administrator, and support-staffer in a school building has the authority, if not the duty, to report to the school administration or school board potentially discriminatory conduct. But that authority does not amount to an authority to take a corrective measure or institute remedial action within the meaning of Title IX. Such a holding would run contrary to the purposes of the statute''); *see also Santiago* v. *Puerto Rico,* 655 F.3d 61, 75 (1st Cir. 2011) (''The empty allegation that a school employee 'failed to report' harassment to someone higher up in the chain of command who could have taken corrective action is not enough to establish institutional liability. Title IX does not sweep so broadly as to permit a suit for harm-inducing conduct that was not brought to the attention of someone with the authority to stop it.'') (internal citation omitted).

Further, a recipient's actual knowledge must be regarding conduct of the type proscribed under Title IX. The Department intends that the proposed definition of sexual harassment be consistent with the text of Title IX and with the Court's decisions in *Gebser* and *Davis.* The proposed regulation defines sexual harassment as either an employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct; or unwelcome conduct on the basis of sex that is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity; or sexual assault as defined in 34 CFR 668.46(a) (implementing the Clery Act). In each instance, following the text and purpose of Title IX, the definition thus seeks to include only sex-based discrimination that is sufficiently serious as to effectively deprive a student of equal access to a funding recipient's educational program or activity. Institutions of higher education must comply with both the Clery Act and Title IX. Because the purpose of Title IX is to prohibit a recipient from subjecting individuals to sex discrimination in its education program or activity, the definition of sexual harassment under Title IX focuses on sexual conduct that jeopardizes a person's equal access to an education program or activity. Such sexual harassment includes conduct that is also a crime (such as sexual assault), but Title IX does not focus on crimes per se. By contrast, the Clery Act focuses on particular crimes (stalking, dating violence, domestic violence, sexual assault) and an institution's obligation to disclose information and services to victims, and otherwise respond, to reports of such crimes. Although the Clery Act focuses on crimes that may also meet the definition of ''sexual harassment'' under the Title IX definition proposed in § 106.30, such crimes do not always necessarily meet that definition (for example, where an incident of stalking is not ''based on sex'' as required under the Title IX definition of sexual harassment). The proposed regulations set forth definitions and obligations that further the purpose of Title IX with the goal of ensuring that institutions of higher education can also comply with their Clery Act obligations without conflict or inconsistency.

Proposed § 106.44(a) also reflects the statutory provision that a recipient is only responsible for responding to conduct that occurs within its ''education program or activity.'' *See* 20 U.S.C. 1681(a) (prohibiting a recipient from subjecting persons in the United States to discrimination ''under any education program or activity''). The Title IX statute defines ''program or activity'' as ''all of the operations of'' a recipient. *See* 20 U.S.C. 1687. An ''education program or activity'' includes ''any academic, extracurricular, research, [or] occupational training.'' 34 CFR 106.31. *See also Doe* v. *Brown Univ.,* 896 F.3d 127, 132 n.6 (1st Cir. 2018) (''an institution's education program or activity'' may include ''university libraries, computer labs, and vocational resources . . . campus tours, public lectures, sporting events, and other activities at covered institutions''). Whether conduct occurs within a recipient's education program or activity does not necessarily depend on the geographic location of an incident (*e.g.,* on a recipient's campus versus off of a recipient's campus). *See e.g., Rost ex rel. K.C.* v. *Steamboat Springs RE–2 Sch. Dist.,* 511 F.3d 1114, 1121 n.1 (10th Cir. 2008) (''We do not suggest that harassment occurring off school grounds cannot as a matter of law create liability under Title IX'').

In determining whether a sexual harassment incident occurred within a recipient's program or activity, courts have examined factors such as whether the conduct occurred in a location or in a context where the recipient owned the premises; exercised oversight, supervision, or discipline; or funded, sponsored, promoted, or endorsed the event or circumstance. *See e.g., Davis,* 526 U.S. at 646 (''Where, as here, the misconduct occurs during school hours and on school grounds—the bulk of G.F.'s misconduct, in fact, took place in the classroom—the misconduct is taking place 'under' an 'operation' of the funding recipient.''); *Samuelson* v. *Or. State Univ.,* 725 Fed. Appx. 598, 599 (9th Cir. 2018) (affirming dismissal of plaintiff's Title IX claim against OSU because she ''failed to allege that her sexual assault occurred 'under' an OSU 'program or activity' '' where plaintiff alleged that she was assaulted ''off campus by a non-university student at a location that had no sponsorship by or association with OSU''); *Farmer* v. *Kansas State Univ.,* 2017 WL 980460, at * 8 (D. Kan. Mar. 14, 2017) (holding that a KSU fraternity is an ''education program or activity'' for purposes of Title IX because ''KSU allegedly devotes significant resources to the promotion and oversight of fraternities through its websites, rules, and Office of Greek Affairs. Additionally, although the fraternity is housed off campus, it is considered a 'Kansas State University Organization,' is open only to KSU students, and is directed by a KSU instructor. Finally, KSU sanctioned the alleged assailant for his alcohol use, but not for the alleged assault. Presented with these allegations, the Court is convinced that the fraternity is an 'operation' of the University, and that KSU has substantial control over student conduct within the fraternity.'').

Importantly, nothing in the proposed regulations would prevent a recipient from initiating a student conduct proceeding or offering supportive measures to students who report sexual harassment that occurs outside the recipient's education program or activity (or as to conduct that harms a person located outside the United States, such as a student participating in a study abroad program). Notably, there may be circumstances where the harassment occurs in a recipient's program or activity, but the recipient's response obligation is not triggered because the complainant was not participating in, or even attempting to participate in, the education programs or activities provided by that recipient. *See e.g., Doe,* 896 F.3d at 132–33 (affirming judgment on the pleadings and ''[f]inding no plausible claim under Title IX'' where plaintiff alleged that, while a Providence College student, three Brown University students sexually assaulted her on Brown's campus, and Brown notified the plaintiff that she had a right to file a complaint under Brown's Code of Student Conduct—but not Title IX—because she had not availed herself or attempted to avail herself of any of Brown's educational programs and therefore could not have been denied those benefits).

The Department wishes to emphasize that when determining how to respond to sexual harassment, recipients have flexibility to employ age-appropriate methods, exercise common sense and good judgment, and take into account the needs of the parties involved. Finally, the Department wishes to clarify that Title IX's ''education program or activity'' language should not be conflated with Clery Act geography; these are distinct jurisdictional schemes, though they may overlap in certain situations.

Once it has been established that a recipient has actual knowledge of sexual harassment in its education program or activity, it becomes necessary to evaluate the recipient's response. Although the Department is not required to adopt the deliberate indifference standard articulated by the Court, we are persuaded by the policy rationales relied on by it and believe it's the best policy approach. As the Court reasoned in *Davis,* a recipient acts with deliberate indifference only when it responds to sexual harassment in a manner that is ''clearly unreasonable in light of the known circumstances.'' *Davis,* 526 U.S. at 648–49. The Department believes this standard holds recipients accountable without depriving them of legitimate and necessary flexibility to make disciplinary decisions and to provide supportive measures that might be necessary in response to sexual harassment. Moreover, the Department believes that teachers and local school leaders with unique knowledge of the school culture and student body are best positioned to make disciplinary decisions; thus, unless the recipient's response to sexual harassment is clearly unreasonable in light of known circumstances, the Department will not second guess such decisions. In fact, the Court observed in *Davis* that courts must not second guess recipients' disciplinary decisions. *Id.* As a matter of policy, the Department believes that it would be equally wrong for it to second guess recipients' disciplinary decisions through the administrative enforcement process. Where a respondent has been found responsible for sexual harassment, any disciplinary sanction decision rests within the discretion of the recipient, although the recipient must also provide remedies, as appropriate, to the complainant designed to restore or preserve the complainant's educational access, as provided for in proposed § 106.45(b)(1)(i).

The Department acknowledges that proposed § 106.44(a) would adopt standards that depart from those set forth in prior guidance and OCR enforcement of Title IX. The Department's guidance and enforcement practices have taken the position that constructive notice—as opposed to actual notice—triggered a recipient's duty to respond to sexual harassment; that recipients had a duty to respond to a broader range of sex-based misconduct than the sexual harassment defined in the proposed regulation; and that recipients' response to sexual harassment should be judged under a reasonableness standard, rather than under the deliberate indifference standard adopted by the proposed regulation. In 2001, the Department asserted that the Court's decisions in *Gebser* and *Davis* and the liability standard set out for private actions for monetary damages did not preclude the Department from maintaining its administrative enforcement standards reflected in the 1997 guidance. *See* 2001 Guidance at iii–iv.

Based on its consideration of the text and purpose of Title IX, of the reasoning underlying the Court's decisions in *Gebser* and *Davis,* and of the views of the stakeholders it has consulted, the Department now believes that the earlier guidance should be reconsidered. Contrary to the text of Title IX and inconsistent with the contractual nature of the obligations the statute imposes pursuant to Congress' Spending Clause authority, the guidance's constructive notice standard made funding recipients liable for conduct of which they were unaware. Similarly, the guidance arguably exceeded the text of the statute by requiring institutions to respond to conduct less severe than that proscribed by Title IX. And, by evaluating schools' responses under a mere reasonableness standard, the guidance improperly deprived administrators of needed flexibility to make disciplinary decisions affecting their students.

The deliberate indifference standard set forth in *Davis* and in proposed § 106.44(a) allows schools predictably to evaluate their response to sexual harassment for purposes of both civil litigation and administrative enforcement by the Department based on a consistent standard. Although the Department is not required to adopt the liability standards applied by the Supreme Court in private suits for money damages, the Department is persuaded by the policy rationales relied on by the Court. Generally, the liability standards of actual knowledge and deliberate indifference are also appropriate in administrative enforcement of Title IX, where a recipient's federal funding is at stake if it fails to comply with Title IX, because such standards are premised on holding recipients accountable for responding to discrimination of which the recipients know and have control. Recognizing that the Department has broad authority under the Title IX statute to issue regulations that effectuate the provisions of Title IX, the Department is retaining and proposes to add in the proposed regulation provisions that would clarify that, in addition to a general deliberate indifference standard, schools must take other actions that courts do not require in private litigation under Title IX (*e.g.,* requiring a designated Title IX Coordinator, requiring written grievance procedures, describing the supportive measures that a non-deliberatively indifferent response may require, requiring a school to investigate and adjudicate formal complaints, and other requirements found in proposed §§ 106.8, 106.44, and 106.45).

B. Responding to Formal Complaints of Sexual Harassment; Safe Harbors

Section 106.44(b) Specific Circumstances; Section 106.30

Proposed Regulations: We propose adding § 106.44(b) to address specific circumstances under which a recipient will respond to sexual harassment. We propose adding paragraph (b)(1) stating that a recipient must follow procedures (including implementing any appropriate remedy as required) consistent with § 106.45 in response to a formal complaint as to allegations of conduct within its education program or activity, and that if the recipient follows procedures consistent with § 106.45 in response to a formal complaint, the recipient's response to the formal complaint is not deliberately indifferent and does not otherwise constitute sex discrimination under Title IX. Proposed § 106.30 defines ''formal complaint'' as a document signed by a complainant or by the Title IX Coordinator alleging sexual harassment against a respondent about conduct within its education program or activity, and requesting initiation of the recipient's grievance procedures consistent with § 106.45.

We also propose adding paragraph (b)(2), stating that when a recipient has actual knowledge of reports by multiple complainants of conduct by the same respondent that could constitute sexual harassment, the Title IX Coordinator must file a formal complaint; if the Title IX Coordinator files a formal complaint in response to such allegations, and the recipient follows procedures (including implementing any appropriate remedy where required) consistent with § 106.45 in response to the formal complaint, the recipient's response to the reports is not deliberately indifferent.

In addition, we propose adding paragraph (b)(3), which states that, for institutions of higher education, in the absence of a formal complaint, a recipient is not deliberately indifferent when it implements supportive measures designed to effectively restore or preserve access to the recipient's education program or activity. We further proposed that the recipient must also at the same time give written notice to the complainant stating that the complainant can choose to file a formal complaint at a later time despite having declined to file a formal complaint at the time the supportive measures are offered.

We propose adding paragraph (b)(4), which states that where paragraphs (b)(1) through (3) are not implicated, a recipient with actual knowledge of sexual harassment in its education program or activity against a person in the United States must, consistent with paragraph (a), respond in a manner that is not deliberately indifferent. A recipient is deliberately indifferent only if its response to sexual harassment is clearly unreasonable in light of the known circumstances.

Proposed § 106.30 defines ''complainant'' as an individual who has reported being the victim of conduct that could constitute sexual harassment, or on whose behalf the Title IX Coordinator has filed a formal complaint. Additionally, for purposes of this proposed paragraph, the person to whom the individual has reported must be the Title IX Coordinator or another person to whom notice of sexual harassment results in the recipient's actual knowledge under § 106.30.

Proposed § 106.30 defines ''respondent'' as an individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment.

Proposed § 106.30 defines ''supportive measures'' as non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge, to the complainant or the respondent before or after the filing of a formal complaint or where no formal complaint has been filed. Section 106.30 goes on to explain that such measures are designed to restore or preserve access to the recipient's education program or activity, without unreasonably burdening the other party; protect the safety of all parties and the recipient's educational environment; and deter sexual harassment. Supportive measures may include counseling, extensions of deadlines or other course-related adjustments, modifications of work or class schedules, campus escort services, mutual restrictions on contact between the parties, changes in work or housing locations, leaves of absence, increased security and monitoring of certain areas of the campus, and other similar measures. Section 106.30 also states that the recipient must maintain as confidential any supportive measures provided to the complainant or respondent, to the extent that maintaining such confidentiality would not impair the ability of the institution to provide the supportive measures. Furthermore, § 106.30 clarifies that the Title IX Coordinator is responsible for coordinating the effective implementation of supportive measures.

Finally, we propose adding § 106.44(b)(5), which explains that the Assistant Secretary will not deem a recipient's determination regarding responsibility to be evidence of deliberate indifference by the recipient merely because the Assistant Secretary would have reached a different determination based on an independent weighing of the evidence.

Reasons: To clarify a recipient's responsibilities under this standard, proposed § 106.44(b) would specify two circumstances under which a recipient must initiate its grievance procedures, and in those situations provide a safe harbor from a finding of deliberate indifference where the recipient does in fact implement grievance procedures consistent with the proposed § 106.45. Those two situations are (i) where a formal complaint is filed, or (ii) where the recipient has actual knowledge of reports by multiple complainants of conduct by the same respondent that could constitute sexual harassment (in which case the proposed regulations require the recipient's Title IX Coordinator to file a formal complaint if none has already been filed). In response to either of these two situations, if the recipient follows grievance procedures consistent with proposed § 106.45, including implementing any appropriate remedy as required for the complainant, the recipient is given a safe harbor from a finding of deliberate indifference by the Department with respect to its response to the formal complaint, because the recipient's response would not be ''clearly unreasonable in light of the known circumstances.'' *Davis,* 526 U.S. at 648–49, 654. The Department believes that including these safe harbors in the regulations emphasizes a recipient's obligation to respond to known sexual harassment and to ensure a complainant's access to the recipient's education program or activity in situations where a finding of responsibility has been made, while preserving the recipient's flexibility to implement its grievance procedures, provided those procedures comply with the requirements of proposed § 106.45. The safe harbor available in proposed § 106.44(b)(1) would shield the recipient from a finding by the Department that the recipient's response to the formal complaint constituted sex discrimination under Title IX, regardless of whether the complainant claimed that the response was deliberately indifferent, or whether the respondent claimed that the recipient's response otherwise constituted sex discrimination. For institutions of higher education, proposed § 106.44(b)(3) provides a safe harbor against a finding of deliberate indifference where, in the absence of a formal complaint, a school's response to known, reported, or alleged sexual harassment is to offer and provide the complainant supportive measures designed to effectively restore or preserve the complainant's access to the recipient's education program or activity. This provision is intended to call recipients' attention to the importance of offering supportive measures to students who may not wish to file a formal complaint that would initiate a grievance process. The Department has heard from a wide range of stakeholders about the importance of a school taking into account the wishes of the complainant in deciding whether or not a formal investigation and adjudication is warranted. The proposed regulation creates a framework where a complainant has the right to file a formal complaint and the school must then initiate its grievance procedures, but in proposed § 106.44(b)(3) the Department also recognizes that for a variety of reasons, not all complainants want to file a formal complaint, and that in many situations a complainant's access to his or her education can be effectively restored or preserved through the school providing supportive measures. The proposed regulation requires that, to be entitled to this safe harbor, the recipient must first inform the complainant in writing of his or her right to pursue a formal complaint, including the right to later file a formal complaint (consistent with any other requirements of the proposed regulation). Proposed § 106.44(b)(3) gives a safe harbor only to institutions of higher education, in recognition that college and university students are generally adults capable of deciding whether supportive measures alone suffice to protect their educational access.

Proposed § 106.44(b)(4) states that even if none of the safe harbor situations is present, the recipient's response to sexual harassment must still meet the general requirement in § 106.44(a) to not be deliberately indifferent, which means the recipient's response must not be clearly unreasonable in light of the known circumstances. Section 106.44(b)(1)–(3) explains what deliberate indifference means in three specific contexts. Section 106.44(b)(4) clarifies that when those three situations are not implicated, the general deliberate indifference standard specific in § 106.44(a) applies to a recipient with actual knowledge of sexual harassment in an education program or activity of the recipient against a person in the United States that effectively denies an individual equal access to the recipient's education program or activity.

To define the respective parties involved in a recipient's grievance procedures, proposed § 106.30 defines ''complainant'' as one who has reported being the victim of sexually harassing conduct. To be considered a ''complainant,'' such a report must be made to the recipient's Title IX Coordinator or other official to whom notice of sexual harassment results in the recipient having actual knowledge as described in § 106.30. This clarifies when a recipient must view a person as a complainant for purposes of offering supportive measures, investigating a formal complaint, and any other response necessary to meet the recipient's obligation to not be deliberately indifferent. Proposed § 106.30 defines ''respondent'' as an individual who has been the subject of a report of sexual harassment.

Consistent with feedback from many stakeholders, the Department recognizes that often the most effective measures a recipient can take to support its students in the aftermath of an alleged incident of sexual harassment are outside the grievance process and involve working with the affected individuals to provide reasonable supportive measures that increase the likelihood that they will be able to continue their education in a safe, supportive environment.

Also consistent with feedback from stakeholders on the issue of supportive measures and to provide needed clarity, we (1) propose to define them as non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge, to the complainant or the respondent before or after the filing of a formal complaint or where no formal complaint has been filed; (2) propose to specify, in the definition, that the recipient must maintain as confidential any supportive measures provided to the complainant or respondent, to the extent that maintaining such confidentiality would not impair the ability of the institution to provide the supportive measures; and (3) further specify that such measures are designed to restore or preserve access to the recipient's education program or activity, without unreasonably burdening the other party; protect the safety of all parties and the recipient's educational environment; and deter sexual harassment. For added clarity on supportive measures, proposed § 106.30 contains a non-exclusive list of examples of supportive measures. Recipients are encouraged to broadly consider what measures they can reasonably provide to individual students to ensure continued equal access to educational programs, activities, opportunities, and benefits for a complainant at the time the complainant reports or files a formal complaint, and for a respondent when a formal complaint is being investigated.

We also specify in the proposed definition that the recipient's Title IX Coordinator is responsible for coordinating effective implementation of supportive measures. Many supportive measures involve implementation through various offices or departments within a school; when supportive measures are part of a school's response to a Title IX sexual harassment report or formal complaint, the Title IX Coordinator must serve as the point of contact for the affected students to ensure that the supportive measures are effectively implemented so that the burden of navigating paperwork or other policy requirements within the recipient's own system does not fall on the student receiving the supportive measure. For example, where a mutual no-contact order has been imposed as a supportive measure, the affected complainant and respondent should know to contact the Title IX Coordinator with questions about how to interpret or enforce the no-contact order; as a further example, where a student receives an academic course adjustment as a supportive measure, the Title IX Coordinator is responsible for communicating with other offices within the school as needed to ensure that the adjustment occurs as intended and without fee or charge to the student. As another example, if counseling services are provided as a supportive measure, the Title IX Coordinator should help coordinate the service and ensure the sessions occur without fee or charge. Proposed § 106.44(b)(5) would provide that the Assistant Secretary will not deem a recipient's determination regarding responsibility that results from the implementation of its grievance procedures to be evidence of deliberate indifference by the recipient merely because the Assistant Secretary would have reached a different determination based on an independent weighing of the evidence. During a complaint investigation or compliance review, OCR's role is not to conduct a de novo review of the recipient's investigation and determination of responsibility for a particular respondent. Rather, OCR's role is to determine whether a recipient has complied with Title IX and its implementing regulations. Thus, OCR will not find a recipient to have violated Title IX or this part solely because OCR may have weighed the evidence differently in a given case. The Department believes it is important to include this provision in the regulations to provide notice and transparency to recipients about OCR's role and standard of review in enforcing Title IX. This provision does not, however, preclude OCR from requiring a recipient's determination of responsibility to be set aside if the recipient did not comply with proposed § 106.45.

C. Additional Rules Governing Recipients' Responses to Sexual Harassment

Section 106.44(c) Emergency Removal

Proposed Regulations: We propose adding § 106.44(c) stating that nothing in § 106.44 precludes a recipient from removing a respondent from the recipient's education program or activity on an emergency basis, provided that the recipient undertakes an individualized safety and risk analysis, determines that an immediate threat to the health or safety of students or employees justifies removal, and provides the respondent with notice and an opportunity to challenge the decision immediately following the removal. Paragraph (c) also states that the paragraph shall not be construed to modify any rights under the Individuals with Disabilities Education Act (IDEA), Section 504 of the Rehabilitation Act of 1973 (Section 504), or Title II of the Americans with Disabilities Act (ADA).

Reasons: Recognizing that there are situations in which a respondent may pose an immediate threat to the health and safety of the campus community before an investigation concludes, proposed § 106.44(c) would allow recipients to remove such respondents, provided that the recipient undertakes a safety and risk analysis and provides notice and opportunity to the respondent to challenge the decision immediately following removal. This proposed provision tracks the language in the Clery Act regulations at 34 CFR 668.46(g) and would apply to all recipients subject to Title IX. The Department believes that this provision for emergency removals should be applicable at the elementary and secondary education level as well as the postsecondary education level to ensure the health and safety of all students. When considering removing a respondent pursuant to this provision, the proposed regulations require that a recipient follow the requirements of the IDEA, Section 504, and Title II of the ADA. Thus, a recipient may remove a student on an emergency basis under § 106.44(c), but only to the extent that such removal conforms with the requirements of the IDEA, Section 504 and Title II of the ADA.

Section 106.44(d) Administrative Leave

Proposed Regulations: We propose adding § 106.44(d) stating that nothing in § 106.44 precludes a recipient from placing a non-student employee respondent on administrative leave during the pendency of an investigation.

Reasons: Because placing a non-student respondent on administrative leave does not implicate access to the recipient's education programs and activities in the same way that other respondent-focused measures might, and in light of the potentially negative impact of forcing a recipient to continue an active agency relationship with a respondent while accusations are being investigated, the Department concludes that it is appropriate to allow recipients to temporarily put non-student employees on administrative leave pending an investigation.

II. Grievance Procedures for Formal Complaints of Sexual Harassment

(Proposed § 106.45)

Statute: The statute does not directly address grievance procedures for formal complaints of sexual harassment. The Secretary has the authority to regulate with regard to discrimination on the basis of sex in education programs or activities receiving federal financial assistance specifically under 20 U.S.C. 1682 and generally under 20 U.S.C. 1221e–3 and 3474.

Current Regulations: 34 CFR 106.8(b) states that ''A recipient shall adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee complaints alleging any action which would be prohibited by this part.''

Section 106.45(a) Discrimination on the Basis of Sex

Proposed Regulations: We propose adding a new § 106.45 addressing the required grievance procedures for formal complaints of sexual harassment. Proposed paragraph (a) states that a recipient's treatment of a complainant in response to a formal complaint of sexual harassment may constitute discrimination on the basis of sex, and also states that a recipient's treatment of the respondent may constitute discrimination on the basis of sex under Title IX.

Reasons: Deliberate indifference to a complainant's allegations of sexual harassment may violate Title IX by separating the student from his or her education on the basis of sex; likewise, a respondent can be unjustifiably separated from his or her education on the basis of sex, in violation of Title IX, if the recipient does not investigate and adjudicate using fair procedures before imposing discipline. Fair procedures benefit all parties by creating trust in both the grievance process itself and the outcomes of the process.

A. General Requirements for Grievance Procedures

Section 106.45(b)(1)

Proposed Regulations: We propose adding § 106.45(b) to specify that for the purpose of addressing formal complaints of sexual harassment, grievance procedures must comply with the requirements of proposed § 106.45. Paragraph (b)(1) states that grievance procedures must—

- Treat complainants and respondents equitably; an equitable resolution must include remedies for the complainant where a finding of responsibility against the respondent has been made, with such remedies designed to restore or preserve access to the recipient's education program or activity, and due process protections for the respondent before any disciplinary sanctions are imposed;
- Require an investigation of the allegations and an objective evaluation of all relevant evidence—including both inculpatory and exculpatory evidence—and provide that credibility determinations may not be based on a person's status as a complainant, respondent, or witness;
- Require that any individual designated by a recipient as a coordinator, investigator, or decision-maker not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent; and that a recipient ensure that coordinators, investigators, and decision-makers receive training on the definition of sexual harassment and how to conduct an investigation and grievance process—including hearings, if applicable—that protect the safety of students, ensure due process protections for all parties, and promote accountability; and that any materials used to train coordinators, investigators, or decision-makers not rely on sex stereotypes and instead promote impartial investigations and adjudications of sexual harassment;
- Include a presumption that the respondent is not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process;
- Include reasonably prompt timeframes for completion of the grievance process, including reasonably prompt timeframes for filing and resolving appeals if the recipient offers an appeal, and including a process that allows for the temporary delay of the grievance process or the limited extension of timeframes for good cause with written notice to the complainant and the respondent of the delay or extension, and the reasons for the action; good cause may include considerations such as the absence of the parties or witnesses, concurrent law enforcement activity, or the need for language assistance or accommodation of disabilities;
- Describe the range of possible sanctions and remedies that the recipient may implement following any determination of responsibility;
- Describe the standard of evidence to be used to determine responsibility;
- Include the procedures and permissible bases for the complainant and respondent to appeal if the recipient offers an appeal; and
- Describe the range of supportive measures available to complainants and respondents.

Reasons: In describing the requirements for grievance procedures for formal complaints of sexual harassment in paragraph (b)(1), the Department's intent is to balance the need to establish procedural safeguards providing a fair process for all parties with recognition that a recipient needs flexibility to employ grievance procedures that work best for the recipient's educational environment.

Proposed § 106.45(b)(1)(i) would require that grievance procedures treat complainants and respondents equitably, echoing the existing requirement in 34 CFR 106.8 that a recipient's grievance procedures provide for ''prompt and equitable resolution'' of complaints. Stakeholders have urged the Department to protect the interests of both the complainant and the respondent, and to ensure that recipients' procedures treat both parties equitably and fairly throughout the process, including incorporating the protections described throughout proposed § 106.45(b). A fair and equitable grievance process benefits all parties because they are more likely to trust in, engage with, and rely upon the process as legitimate. The Department recognizes that some recipients are state actors with responsibilities to provide protections to students and employees under the Fourteenth Amendment's Due Process Clause. Other recipients are private institutions that do not have constitutional obligations to their students and employees. The due process protections provided under these proposed regulations aim to effectuate the objectives of Title IX by creating consistent, fair, objective grievance processes that make the process equitable for both parties and are more likely to generate reliable outcomes. When presented with an allegation of sexual harassment the recipient must respond in a manner that is not deliberately indifferent, but to evaluate what constitutes an appropriate response, the recipient must first reach factual determinations about the allegations at issue. This requires the recipient to employ a grievance process that rests on fundamental notions of fairness and due process protections so that findings of responsibility rest on facts and evidence. Only when an outcome is the product of a predictable, fair process that gives both parties meaningful opportunity to participate will the recipient be in a position to determine what remedies and/or disciplinary sanctions are warranted. When a recipient establishes an equitable process with due process protections and implements it consistently, its findings will be viewed with more confidence by the parties and the public.

Although both complainants and respondents have a common interest in a fair process, they also have distinct interests that are recognized in paragraph (b)(1)(i). For example, paragraph (b)(1)(i) explains that equitable grievance procedures will provide remedies for the complainant as appropriate and due process protections for the respondent before any disciplinary action is taken. Because a grievance process could result in a determination that the respondent sexually harassed the complainant, and because the resulting sanctions against the respondent could include a complete loss of access to the education program or activity of the recipient, an equitable grievance procedure will only reach such a conclusion following a process that seriously considers any contrary arguments or evidence the respondent might have, including by providing the respondent with all of the specific due process protections outlined in the rest of the proposed regulations. Likewise, because the complainant's access to the recipient's education program or activity can be limited by sexual harassment, an equitable grievance procedure will provide relief from any sexual harassment found under the procedures required in the proposed regulations and restore access to the complainant accordingly.

Proposed § 106.45(b)(1)(ii) requires that a recipient investigate a complaint and that grievance procedures include an objective evaluation of the evidence. Stakeholders have raised concerns that recipients sometimes ignore evidence that does not fit with a predetermined outcome, and that investigators and decision-makers have inappropriately discounted testimony based on whether it comes from the complainant or the respondent. Paragraph (b)(1)(ii) responds to these concerns by requiring the recipient to conduct an investigation and objectively evaluate all evidence, and by prohibiting the recipient from basing its evaluation of testimony on the person's status as a complainant, respondent, or witness.

Proposed § 106.45(b)(1)(iii) would address the problems that have arisen for complainants and respondents as a result of coordinators, investigators, and decision-makers making decisions based on bias by requiring recipients to fill such positions with individuals free from bias or conflicts of interest. This proposed provision generally tracks the language in the Clery Act regulations at 34 CFR 668.46(k)(3)(i)(C) and would apply to all recipients subject to Title IX. Paragraph (b)(1)(iii) would also require that coordinators, investigators, and decision-makers receive training on (1) the definition of sexual harassment and (2) how to conduct the investigation and grievance process in a way that protects student safety, due process, and accountability. This proposed provision generally tracks the language in the Clery Act regulations at 34 CFR 668.46(k)(2)(ii) and would apply to all recipients subject to Title IX. The Department believes that such training will help ensure that those individuals responsible for implementing the recipient's grievance procedures are appropriately informed at the elementary and secondary education level as well as the postsecondary education level. Recipients would also be required to use training materials that promote impartial investigations and adjudications and that do not rely on sex stereotypes, so as to avoid training that would cause the grievance process to favor one side or the other or bias outcomes in favor of complainants or respondents. Recipients would continue to have the discretion to use their own employees to investigate and/or adjudicate matters under Title IX or to hire outside individuals to fulfill these responsibilities.

Proposed § 106.45(b)(1)(iv) would require that a recipient's grievance procedures establish a presumption that the respondent is not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process. This requirement is added to ensure impartiality by the recipient until a determination is made. The requirement also bolsters other provisions in the proposed regulation that place the burden of proof on the recipient, rather than on the parties; indicate that supportive measures are ''non-disciplinary'' and ''non-punitive'' (implying that the recipient may not punish an accused person prior to a determination regarding responsibility); and impose due process protections throughout the grievance process. Finally, pending the finding of facts sufficient for the recipient to make a determination regarding responsibility, the requirement mitigates the stigma and reputational harm that accompany an allegation of sexual misconduct. A fundamental notion of a fair proceeding is that a legal system does not prejudge a person's guilt or liability.

The proposed regulations recognize that the time that it takes to complete the grievance process will vary depending on, among others things, the complexity of the investigation, and that prompt resolution of the grievance process is important to both complainants and respondents. Proposed paragraph (b)(1)(v) would require recipients to designate reasonably prompt timeframes for the grievance process, including for appeals if the recipient offers an appeal, but also provide that timeframes may be extended for good cause with written notice to the parties and an explanation for the delay. This proposed provision generally tracks the language in the Clery Act regulations at 34 CFR 668.46(k)(3)(i)(A), which the Department believes is important to include for all recipients subject to Title IX. Some recipients felt pressure in light of prior Department guidance to resolve the grievance process within 60 days regardless of the particulars of the situation, and in some instances, this resulted in hurried investigations and adjudications, which sacrificed accuracy and fairness for speed. Proposed paragraph (b)(1)(v) specifies examples of possible reasons for such a delay, such as absence of the parties or witnesses, concurrent law enforcement activity, or the need for language assistance or accommodation of disabilities. For example, if a concurrent law enforcement investigation has uncovered evidence that the police plan to release on a specific timeframe and that evidence would likely be material to determining responsibility, a recipient could reasonably extend the timeframe of the grievance process in order to allow that evidence to be included in the final determination of responsibility. Any reason for a delay must be justified by good cause and communicated by written notice to the complainant and the respondent of the delay or extension and the reasons for the action; delays caused solely by administrative needs are insufficient to satisfy this standard. Moreover, recipients must meet their legal obligation to provide timely auxiliary aids and services and reasonable accommodations under Title II of the ADA, Section 504, and Title VI of the Civil Rights Act of 1964, and should reasonably consider other services such as meaningful access to language assistance.

It is important for individuals to have a clear understanding of the recipients' policies and procedures related to sexual harassment, including the consequences of being found responsible for sexual harassment, and the procedures the recipient will use to make such a determination; otherwise, the parties may not have a full and fair opportunity to present evidence and arguments in favor of their side, and the accuracy and impartiality of the process could suffer as a result. Proposed paragraphs (b)(1)(vi) through (ix) would require that the parties be informed of the possible sanctions and remedies that may be implemented following the determination of responsibility, the standard of evidence to be used during the grievance process, the procedures and permissible bases for appeals if the recipient offers an appeal, and the range of supportive measures available to complainants and respondents. These proposed provisions generally track the language in the Clery Act regulations at 34 CFR 668.46(k)(1) and would apply to all recipients subject to Title IX. The Department believes that requiring a recipient to notify the parties of these matters in advance is equally important at the elementary and secondary education level as it is at the postsecondary education level to ensure the parties are fully informed.

B. Notice and Investigation

Section 106.45(b)(2) Notice of Allegations

Proposed Regulations: We propose adding § 106.45(b)(2) stating that upon receipt of a formal complaint, a recipient must provide written notice to the parties of the recipient's grievance procedures and of the allegations. Such notice must include sufficient details (such as the identities of the parties involved in the incident, if known, the specific section of the recipient's code of conduct allegedly violated, the conduct allegedly constituting sexual harassment under this part and under the recipient's code of conduct, and the date and location of the alleged incident, if known) and provide sufficient time to prepare a response before any initial interview. The written notice must also include a statement that the respondent is presumed not responsible for the alleged conduct and that a determination regarding responsibility is made at the conclusion of the grievance process. The notice must inform the parties that they may request to inspect and review evidence under § 106.45(b)(3)(viii). Additionally, the notice must inform the parties of any provision in the recipient's code of conduct that prohibits knowingly making false statements or knowingly submitting false information during the grievance process. Also, if the recipient decides later to investigate allegations not included in the notice provided pursuant to paragraph (b)(2)(i)(B), the recipient must provide notice of the additional allegations to known parties.

Reasons: To meaningfully participate in the process, all parties must have adequate notice of the allegations and grievance procedures. Without the information included in the written notice required by proposed § 106.45(b)(2), a respondent would be unable to adequately respond to allegations. This notice will also ensure that the complainant is able to understand the grievance process, including what allegations are part of the investigation. The requirement to provide sufficient details (such as the identities of the parties involved in the incident, if known, the specific section of the recipient's code of conduct allegedly violated, the conduct allegedly constituting sexual harassment under this part and under the recipient's code of conduct, and the date and location of the alleged incident, if known) applies whenever a formal complaint is filed against a respondent, whether the complaint is signed by the complainant or by the Title IX Coordinator. The qualifier ''if known'' reflects that in some cases, a complainant may not know details that ideally would be included in the written notice, such as the identity of the respondent, or the date or location of the incident. If during the investigation the recipient learns these details then the recipient should promptly send the written notice as required by paragraph (b)(2)(i) to the now-identified respondent, as applicable, and/or inform the respondent of the details of allegations that were previously unknown (such as the date or location of the alleged incident). The unavailability of material details, particularly the identity of the respondent, may impede a recipient's ability to investigate and thus impact whether the recipient's response is deliberately indifferent. If, during the investigation, the recipient decides to investigate additional allegations, the recipient must provide notice of those allegations to the parties. This notice would keep the parties meaningfully informed of any expansion in the scope of the investigation. It is also important for recipients to notify parties about any provisions in its code of conduct that prohibit knowingly making false statements or knowingly submitting false information during the grievance process so as to emphasize the recipients' serious commitment to the truth-seeking nature of the grievance process and to incentivize honest, candid participation in it.

Section 106.45(b)(3) Investigations of a Formal Complaint

Proposed Regulations: We propose adding § 106.45(b)(3) stating that the recipient must conduct an investigation of the allegations in a formal complaint. Proposed § 106.45(b)(3) also states that if the conduct alleged by the complainant would not constitute sexual harassment as defined in § 106.30 even if proved or did not occur within the recipient's program or activity, the recipient must terminate its grievance process with regard to that conduct, and that when investigating a formal complaint, a recipient must—

- Ensure that the burden of proof and the burden of gathering evidence sufficient to reach a determination regarding responsibility rest on the recipient and not on the parties;
- Provide equal opportunity for the parties to present witnesses and other inculpatory and exculpatory evidence;
- Not restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence;
- Provide the parties with the same opportunities to have others present during any grievance proceeding, including the opportunity to be accompanied to any related meeting or proceeding by the advisor of their choice, and not limit the choice of advisor or presence for either the complainant or respondent in any meeting or grievance proceeding; however, the recipient may establish restrictions regarding the extent to which the advisor may participate in the proceedings, as long as the restrictions apply equally to both parties;
- Provide to the party whose participation is invited or expected written notice of the date, time, location, participants, and purpose of all hearings, investigative interviews, or other meetings with a party, with sufficient time for the party to prepare to participate;
- For recipients that are elementary and secondary schools, the recipient's grievance procedures may require a live hearing. With or without a hearing, the decision-maker must, after the recipient has incorporated the parties' responses to the investigative report under § 106.45(b)(3)(ix), ask each party and any witnesses any relevant questions and follow-up questions, including those challenging credibility, that a party wants asked of any party or witnesses. If no hearing is held, the decision-maker must afford each party the opportunity to submit written questions, provide each party with the answers, and allow for additional, limited follow-up questions from each party. With or without a hearing, all questioning must exclude evidence of the complainant's sexual behavior or predisposition, unless such evidence about the complainant's sexual behavior is offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or if the evidence concerns specific incidents of the complainant's sexual behavior with respect to the respondent and is offered to prove consent. The decision-maker must explain to the party proposing the questions any decision to exclude questions as not relevant;
- For institutions of higher education, the recipient's grievance procedure must provide for a live hearing. At the hearing, the decision-maker must permit each party to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility. Such cross-examination at a hearing must be conducted by the party's advisor of choice, notwithstanding the discretion of the recipient under § 106.45(b)(3)(iv) to otherwise restrict the extent to which advisors may participate in the proceedings. If a party does not have an

advisor present at the hearing, the recipient must provide that party an advisor aligned with that party to conduct cross-examination. All cross-examination must exclude evidence of the complainant's sexual behavior or predisposition, unless such evidence about the complainant's sexual behavior is offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or if the evidence concerns specific incidents of the complainant's sexual behavior with respect to the respondent and is offered to prove consent. At the request of either party, the recipient must provide for cross-examination to occur with the parties located in separate rooms with technology enabling the decision-maker and parties to simultaneously see and hear the party answering questions. The decision-maker must explain to the party's advisor asking cross-examination questions any decision to exclude questions as not relevant. If a party or witness does not submit to cross-examination at the hearing, the decision-maker must not rely on any statement of that party or witness in reaching a determination regarding responsibility;

• Provide both parties an equal opportunity to inspect and review evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint, including the evidence upon which the recipient does not intend to rely in reaching a determination regarding responsibility, so that each party can meaningfully respond to the evidence prior to conclusion of the investigation. Prior to completion of the investigative report, the recipient must send to each party and the party's advisor, if any, the evidence subject to inspection and review in an electronic format, such as a file sharing platform, that restricts the parties and advisors from downloading or copying the evidence, and the parties shall have at least ten days to submit a written response, which the investigator will consider prior to completion of the investigative report. The recipient must make all such evidence subject herein to the parties' inspection and review available at any hearing to give each party equal opportunity to refer to such evidence during the hearing, including for purposes of cross-examination; and

• Create an investigative report that fairly summarizes relevant evidence and, at least ten days prior to a hearing (if a hearing is required under § 106.45) or other time of determination regarding responsibility, provide a copy of the report to the parties for their review and written response.

Reasons: Proposed § 106.45(b)(3) would set forth specific standards to govern investigations of formal complaints of sexual harassment. To ensure a recipient's resources are directed appropriately at handling complaints of sexual harassment, proposed paragraph (b)(3) would require recipients to dismiss a formal complaint or an allegation within a complaint without conducting an investigation if the alleged conduct, taken as true, is not sexual harassment as defined in the proposed regulations or if the conduct did not occur within the recipient's program or activity. This ensures that only conduct covered by Title IX is treated as a Title IX issue in a school's grievance process. The Department emphasizes that a recipient remains free to respond to conduct that does not meet the Title IX definition of sexual harassment, or that did not occur within the recipient's program or activity, including by responding with supportive measures for the affected student or investigating the allegations through the recipient's student conduct code, but such decisions are left to the recipient's discretion in situations that do not involve conduct falling under Title IX's purview.

Proposed paragraph (b)(3)(i) would place the burden of proof and the burden of gathering evidence sufficient to reach a determination regarding responsibility on the recipient, not on the parties. Recipients, not complainants or respondents, must comply with Title IX, so the burden of gathering evidence relating to allegations of sexual harassment under Title IX and determining whether the evidence shows responsibility appropriately falls to the recipient. Although a school could contract with a third-party agent to perform an investigation or otherwise satisfy its responsibilities under this section, including to gather evidence, the recipient will be held to the same standards under this section regardless of whether those responsibilities are performed by the recipient directly through its employees or through a third party such as a contractor. Likewise, although schools will often report misconduct under this section to the appropriate authorities, including as required under state law, a report to police or the presence of a police investigation regarding misconduct under this section does not relieve a recipient of its obligations under this section. Nothing in the proposed regulation prevents a recipient from using evidence merely because it was collected by law enforcement.

With the goal of ensuring fairness and equity for all parties throughout the investigation process, proposed paragraphs (b)(3)(ii), (iii), (iv), and (viii) would require recipients to provide the parties with an equal opportunity to present witnesses and other inculpatory and exculpatory evidence; permit the parties to discuss the investigation; provide the parties with the same opportunities to have others present during any grievance proceeding, including the opportunity to be accompanied by an advisor of their choice with any restrictions on the advisor's participation being applied equally to both parties; provide the parties with equal opportunity to inspect and review any evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint, including the evidence upon which the recipient does not intend to rely in reaching a determination regarding responsibility; equal opportunity to respond to such evidence; and equal opportunity to refer to such evidence during the hearing, including for purposes of cross-examination. Because both parties can review and respond to this evidence, discuss the investigation with others in order to identify additional evidence, introduce any additional evidence into the proceeding, and receive guidance from an advisor of their choice throughout, the process will be substantially more thorough and fair and the resulting outcomes will be more reliable. Proposed paragraph (b)(3)(iv) generally tracks the language in the Clery Act regulations at 34 CFR 688.46(k)(2)(iii) and (iv) and would apply to all recipients subject to Title IX. And, proposed paragraph (b)(3)(viii) is consistent with the Family Educational Rights and Privacy Act (FERPA), under which a student has a right to inspect and review records that directly relate to that student. The Department believes that permitting both parties to be accompanied by an advisor or other individual of their choice (who may be an attorney) is also important at the elementary and secondary education level to ensure that both parties are treated equitably.

To ensure that the complainant and respondent are able to meaningfully participate in the process and that any witnesses have adequate time to prepare, proposed § 106.45(b)(3)(v) would require recipients to provide to the party whose participation is invited or expected written notice of all hearings, investigative interviews, or other meetings with a party, with sufficient time for the party to prepare to participate in the proceeding. Without this protection, a party's ability to participate in a hearing, interview, or meeting might not be meaningful or add any value to the proceeding. The Department believes that this proposed provision, which is similar to the Clery Act regulation at 34 CFR 688.46(k)(3)(i)(B) with respect to timely notice of meetings, is equally important at the elementary and secondary education level and the postsecondary education level to ensure that both parties are treated equitably.

Cross-examination is the ''greatest legal engine ever invented for the discovery of truth.'' *California* v. *Green,* 399 U.S. 149, 158 (1970) (quoting John H. Wigmore, 5 Evidence sec. 1367, at 29 (3d ed., Little, Brown & Co. 1940)). The Department recognizes the high stakes for all parties involved in a sexual harassment investigation, and recognizes that the need for recipients to reach reliable determinations lies at the heart of Title IX's guarantees for all parties. Indeed, at least one federal circuit court has held that in the Title IX context cross-examination is not just a wise policy, but is a constitutional requirement of Due Process. *Doe* v. *Baum,* 903 F.3d 575, 581 (6th Cir. 2018) (''Not only does cross-examination allow the accused to identify inconsistencies in the other side's story, but it also gives the fact-finder an opportunity to assess a witness's demeanor and determine who can be trusted'').

The Department has carefully considered how best to incorporate the value of cross-examination for proceedings at both the postsecondary level and the elementary and secondary level. Because most parties and many witnesses are minors in the elementary and secondary school context, sensitivities associated with age and developmental ability may outweigh the benefits of cross-examination at a live hearing. Proposed § 106.45(b)(3)(vi) allows—but does not require—elementary and secondary schools to hold a live hearing as part of their grievance procedures. With or without a hearing, the complainant and the respondent must have an equal opportunity to pose questions to the other party and to witnesses prior to a determination of responsibility, with each party being permitted the opportunity to ask all relevant questions and follow-up questions, including those challenging credibility, and a requirement that the recipient explain any decision to exclude questions on the basis of relevance. If no hearing is held, each party must have the opportunity to conduct its questioning of other parties and witnesses by submitting written questions to the decision-maker, who must provide the answers to the asking party and allow for additional, limited follow-up questions from each party.

In contrast, the Department has determined that at institutions of higher education, where most parties and witnesses are adults, grievance procedures must include live cross-examination at a hearing. Proposed § 106.45(b)(3)(vii) requires institutions to provide a live hearing, and to allow the parties' advisors to cross-examine the other party and witnesses. If a party does not have an advisor at the hearing, the recipient must provide that party an advisor aligned with that party to conduct cross-examination. Cross-examination conducted by the parties' advisors (who may be attorneys) must be permitted notwithstanding the discretion of the recipient under § 106.45(b)(3)(iv) to otherwise restrict the extent to which advisors may participate in the proceedings. In the context of institutions of higher education, the proposed regulation balances the importance of cross-examination with any potential harm from personal confrontation between the complainant and the respondent by requiring questions to be asked by an advisor aligned with the party. Further, the proposed regulation allows either party to request that the recipient facilitate the parties being located in separate rooms during cross-examination while observing the questioning live via technological means. The proposed regulations thereby provide the benefits of cross-examination while avoiding any unnecessary trauma that could arise from personal confrontation between the complainant and the respondent. *Cf. Baum,* 903 F.3d at 583 (''Universities have a legitimate interest in avoiding procedures that may subject an alleged victim to further harm or harassment. And in sexual misconduct cases, allowing the accused to cross-examine the accuser may do just that. But in circumstances like these, the answer is not to deny cross-examination altogether. Instead, the university could allow the accused student's agent to conduct cross-examination on his behalf. After all, an individual aligned with the accused student can accomplish the benefits of cross-examination—its adversarial nature and the opportunity for follow-up—without subjecting the accuser to the emotional trauma of directly confronting her alleged attacker.'').

In addition, proposed § 106.45(b)(3)(vi) and (vii) would set forth a standard for when questions regarding a complainant's sexual behavior may be asked, applicable to all recipients. These sections incorporate language from (and are in the spirit of) the rape shield protections found in Federal Rule of Evidence 412, which is intended to safeguard complainants against invasion of privacy, potential embarrassment, and stereotyping. *See* Fed. R. Evid. 412 Advisory Committee's Note. As the Court has explained, rape shield protections are intended to protect complainants ''from being exposed at trial to harassing or irrelevant questions concerning their past sexual behavior.'' *Michigan* v. *Lucas,* 500 U.S. 145, 146 (1991). Similarly, proposed § 106.45(b)(3)(vi) and (vii) would prevent harassing or irrelevant questions about a complainant's sexual behavior or predisposition from being asked. Importantly, these proposed paragraphs also ensure that questions about a complainant's sexual behavior can be asked to prove that someone other than the respondent committed the conduct alleged by the complainant, or when evidence about specific incidents of the complainant's sexual behavior with respect to the respondent is offered to prove consent. Federal Rule of Evidence 412 applies these exceptions to the general prohibition against asking about a complainant's sexual behavior, and for the same reasons, such exceptions promote truth-seeking in campus proceedings.

To maintain a transparent process, the parties need a complete understanding of the evidence obtained by the recipient and how a determination regarding responsibility is made. For that reason, proposed § 106.45(b)(3)(viii) would require recipients to provide both parties an equal opportunity to inspect and review any evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint, including evidence upon which the recipient does not intend to rely in making a determination regarding responsibility. The evidence must also be provided electronically and the parties must be given at least ten days to submit a written response; these requirements will facilitate each party's ability to identify evidence that supports their position and emphasize such evidence in their arguments to the decision-maker. The scope of the parties' right to inspect and review evidence collected by the recipient is consistent with students' privacy rights under FERPA, under which a student has a right to inspect and review records that directly relate to that student.

Proposed § 106.45(b)(3)(ix) would require recipients to create an investigative report that summarizes relevant evidence and provide a copy of the report to the parties, allowing both parties at least ten days prior to any hearing or other time of determination regarding responsibility the opportunity to respond in writing to the report. These requirements will put the parties on the same level in terms of access to information to ensure that both parties participate in a fair, predictable process that will allow the parties to serve as a check on any decisions the recipient makes regarding the inclusion or relevance of evidence. Notwithstanding the foregoing rights of the parties to review and respond to the evidence collected by the recipient, the recipient must at all times proceed with the burden of conducting the investigation into all reasonably available, relevant evidence; the burden of collecting and presenting evidence should always remain on the recipient and not on the parties.

C. Standard of Evidence

Section 106.45(b)(4)(i)

Proposed Regulations: We propose adding § 106.45(b)(4)(i) stating that in reaching a determination regarding responsibility, the recipient must apply either the preponderance of the evidence standard or the clear and convincing evidence standard. The recipient may, however, employ the preponderance of the evidence standard only if the recipient uses that standard for conduct code violations that do not involve sexual harassment but carry the same maximum disciplinary sanction. The recipient must also apply the same standard of evidence for complaints against students as it does for complaints against employees, including faculty.

Reasons: The statutory text of Title IX does not dictate a standard of evidence to be used by recipients in investigations of sexual harassment. Past guidance from the Department originally allowed recipients to choose which standard to employ, but was later changed to require recipients to use only the preponderance of the evidence. When the Department issued guidance requiring recipients to use only preponderance of the evidence, it justified the requirement by comparing the grievance process to civil litigation, and to the Department's own process for investigating complaints against recipients under Title IX. Although it is true that civil litigation generally uses preponderance of the evidence, and that Title IX grievance processes are analogous to civil litigation in many ways, it is also true that Title IX grievance processes lack certain features that promote reliability in civil litigation. For example, many recipients will choose not to allow active participation by counsel; there are no rules of evidence in Title IX grievance processes; and Title IX grievance processes do not afford parties discovery to the same extent required by rules of civil procedure.

Moreover, Title IX grievance processes are also analogous to various kinds of civil administrative proceedings, which often employ a clear and convincing evidence standard. *See, e.g., Nguyen* v. *Washington Dept. of Health,* 144 Wash. 2d 516 (2001) (requiring clear and convincing evidence in sexual misconduct case in a professional disciplinary proceeding for a medical doctor as a way of protecting due process); *Disciplinary Counsel* v. *Bunstine,* 136 Ohio St. 3d 276 (2013) (clear and convincing evidence applied in sexual harassment case involving lawyer). These cases recognize that, where a finding of responsibility carries particularly grave consequences for a respondent's reputation and ability to pursue a profession or career, a higher standard of proof can be warranted. Indeed, one court has held that in student disciplinary cases involving serious accusations like sexual assault where the consequences of a finding of responsibility would be significant, permanent, and far-reaching, a preponderance of the evidence standard is inadequate. *Lee* v. *University of New Mexico,* No. 1:17–cv–01230–JB–LF (D. N.M. Sept. 20, 2018) (''Moreover, the Court concludes that preponderance of the evidence is not the proper standard for disciplinary investigations such as the one that led to Lee's expulsion, given the significant consequences of having a permanent notation such as the one UNM placed on Lee's transcript'').

After considering this issue, the Department decided that its proposed regulation should leave recipients with the discretion to use either a preponderance or a clear and convincing standard in their grievance procedures. The Department does not believe it would be appropriate to impose a preponderance requirement in the absence of all of the features of civil litigation that are designed to promote reliability and fairness. Likewise, the Department believes that in light of the due process and reliability protections afforded under the proposed regulations, it could be reasonable for recipients to choose the preponderance standard instead of the clear and convincing standard, and thus, it is appropriate for the Department to give them the flexibility to do so.

To ensure that recipients do not single out respondents in sexual harassment matters for uniquely unfavorable treatment, a recipient would only be allowed to use the preponderance of the evidence standard for sexual harassment complaints if it uses that standard for other conduct code violations that carry the same potential maximum sanction as the recipient could impose for a sexual harassment conduct code violation. Likewise, to avoid the specially disfavored treatment of student respondents in comparison to respondents who are employees such as faculty members, who often have superior leverage as a group in extracting guarantees of protection under a recipient's disciplinary procedures, recipients are also required to apply the same standard of evidence for complaints against students as they do for complaints against employees, including faculty. In contrast, because of the heightened stigma often associated with a complaint regarding sexual harassment, the proposed regulation gives recipients the discretion to impose a clear and convincing evidence standard with regard to sexual harassment complaints even if other types of complaints are subject to a preponderance of the evidence standard. Within these constraints, the proposed regulation recognizes that recipients should be able to choose a standard of proof that is appropriate for investigating and adjudicating complaints of sex discrimination given the unique needs of their community.

D. Additional Requirements for Grievance Procedures

Section 106.45(b)(4) Determination Regarding Responsibility

Proposed Regulations: We propose adding § 106.45(b)(4) stating that the decision-maker(s), who cannot be the same person(s) as the Title IX Coordinator or the investigator(s), must issue a written determination regarding responsibility applying the appropriate standard of evidence as discussed above.

The written determination must include—

- Identification of the section(s) of the recipient's code of conduct alleged to have been violated;
- A description of the procedural steps taken from the receipt of the complaint through the determination, including any notifications to the

parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held;

- Findings of fact supporting the determination;
- Conclusions regarding the application of the recipient's code of conduct to the facts;
- A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility, any sanctions the recipient imposes on the respondent, and any remedies provided to the complainant designed to restore or preserve access to the recipient's education program or activity; and
- The recipient's procedures and permissible bases for the complainant and respondent to appeal.

The recipient must provide the written determination to the parties simultaneously. If the recipient does not offer an appeal, the determination regarding responsibility becomes final on the date that the recipient provides the parties with the written determination. If the recipient offers an appeal, the determination regarding responsibility becomes final at either the conclusion of the appeal process, if an appeal is filed, or, if an appeal is not filed, the date on which an appeal would no longer be considered timely.

Reasons: Proposed § 106.45(b)(4) would address the process that recipients use to make determinations regarding responsibility, with requirements designed to ensure that recipients make sound and supportable decisions through a process that incorporates appropriate protections for all parties while providing adequate notice of such decisions. Requiring the decision-maker to be different from any person who served as the Title IX Coordinator or investigator forecloses a recipient from utilizing a ''single investigator'' or ''investigator-only'' model for Title IX grievance processes. The Department believes that fundamental fairness to both parties requires that the intake of a report and formal complaint, the investigation (including party and witness interviews and collection of documentary and other evidence), drafting of an investigative report, and ultimate decision about responsibility should not be left in the hands of a single person. Rather, after the recipient has conducted its impartial investigation, a separate decision-maker must reach the determination regarding responsibility; that determination can be made by one or more decision-makers (*e.g.,* a panel), but no decision-maker can be the same person who served as the Title IX Coordinator or investigator.

To foster reliability and thoroughness and to ensure that a recipient's findings are adequately explained, proposed § 106.45(b)(4)(i) would require recipients to issue a written determination regarding responsibility. So that the parties have a complete understanding of the process and information considered by the recipient to reach its decision, proposed § 106.45(b)(4)(ii) would require the notice of determination to include: The sections of the recipient's code of conduct alleged to have been violated; the procedural steps taken from the receipt of the complaint through the determination; findings of fact supporting the determination; conclusions regarding the application of the recipient's code of conduct to the facts; a statement of, and the recipient's rationale for, the result, including a determination regarding responsibility; any sanctions the recipient imposes on the respondent; and information regarding the appeals process and the recipient's procedures and permissible bases for the complainant and respondent to appeal.

Proposed § 106.45(b)(4)(ii)(E) requires that the written determination contain a statement of, and rationale for, the result, including any sanctions imposed by the recipient and any remedy given to the complainant. Proposed § 106.45(b)(4)(iii) requires that this written determination be provided simultaneously to the parties. These provisions generally track the language of the Clery Act regulations at 34 CFR 668.46(k)(2)(v) and (k)(3)(iv) already applicable to institutions of higher education. The Department believes that the benefits of these provisions, including promoting transparency and equal treatment of the parties, are equally applicable at the elementary and secondary level.

Proposed § 106.45(b)(4)(iii) instructs recipients to provide the written determination simultaneously to both parties so that both parties know the outcome and, if an appeal is available, both parties have equal opportunity to consider filing an appeal. If the recipient does not offer an appeal, the determination regarding responsibility becomes final on the date that the recipient provides the parties with the written determination. If the recipient offers an appeal, the determination regarding responsibility becomes final when the appeal process is concluded, or if no appeal is filed, on the date on which an appeal would not be timely under the recipient's designated time frames. Once the determination regarding responsibility has become final, in cases where the respondent is found responsible, the recipient must promptly implement remedies designed to help the complainant maintain equal access to the recipient's educational programs, activities, benefits, and opportunities. In cases where the respondent is found not responsible, no remedies are required for the complainant, although a recipient may continue to offer supportive measures to either party.

Section 106.45(b)(5) Appeals

Proposed Regulations: We propose adding § 106.45(b)(5) stating that a recipient may choose to offer an appeal. If a recipient offers an appeal, it must allow both parties to appeal. In cases where there has been a finding of responsibility, although a complainant may appeal on the ground that the remedies are not designed to restore or preserve the complainant's access to the recipient's education program or activity, a complainant is not entitled to a particular sanction against the respondent. As to all appeals, the recipient must: (i) Notify the other party in writing when an appeal is filed and implement appeal procedures equally for both parties; (ii) ensure that the appeal decision-maker is not the same person as any investigator(s) or decision-maker(s) that reached the determination regarding responsibility; (iii) ensure that the appeal decision-maker complies with the standards set forth in § 106.45(b)(1)(iii); (iv) give both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome; (v) issue a written decision describing the result of the appeal and the rationale for the result; and (vi) provide the written decision simultaneously to both parties.

Reasons: Many recipients offer an appeal from the outcome of a Title IX grievance process. After extensive stakeholder engagement on the subject of school-level appeals, the Department believes that by offering that opportunity to both parties, recipients will be more likely to reach sound determinations, giving the parties greater confidence in the ultimate outcome. Complainants and respondents have different interests in the outcome of a sexual harassment complaint. Complainants ''have a right, and are entitled to expect, that they may attend [school] without fear of sexual assault or harassment,'' while for respondents a ''finding of responsibility for a sexual offense can have a lasting impact on a student's personal life, in addition to [the student's] educational and employment opportunities[.]'' *Doe*

v. *Univ. of Cincinnati,* 872 F.3d 393, 400, 403 (6th Cir. 2017) (internal quotation marks and citations omitted). Although these interests differ, each represents high-stakes, potentially life-altering consequences deserving of an accurate outcome. *See id.* at 404 (recognizing that the complainant ''deserves a reliable, accurate outcome as much as'' the respondent). The Department proposes that where a recipient offers an appeal, such appeal should be equally available to both parties, reflecting that each party has an important stake in the reliability of the outcome. Importantly, the proposed regulation notes that in cases where there has been a finding of responsibility, although a complainant may appeal on the ground that the remedies are not designed to restore or preserve the complainant's access to the recipient's education program or activity, a complainant is not entitled to a particular sanction against the respondent. *See e.g., Davis,* 526 U.S. at 648 (''the dissent erroneously imagines that victims of peer harassment now have a Title IX right to make particular remedial demands.''); *Stiles ex rel. D.S.* v. *Grainger Co., Tenn.,* 819 F.3d 834, 848 (6th Cir. 2016) (''Title IX does not give victims a right to make particular remedial demands.'') (internal quotations omitted); *Sanches* v. *Carrollton-Farmers Branch Indep. Sch. Dist.,* 647 F.3d 156, 167–68 (5th Cir. 2011) (''Schools are not required to . . . accede to a parent's remedial demands'') (internal citations omitted).

Similarly to the initial investigation and adjudication, the recipient must ensure that any appeal process is conducted in a timely manner and gives both parties an equal opportunity to argue for or against the outcome. Like any of the recipient's Title IX Coordinators, investigators, or decision-makers, the appeal decision-maker must be free from bias or conflicts of interest, and must be trained on the definition of sexual harassment and the recipient's grievance process using training materials that promote impartial decision-making and are free from sex stereotypes. When designating reasonable timeframes for the filing and resolution of appeals, recipients should endeavor to permit parties sufficient time to file an appeal and submit written arguments, yet resolve the appeal process as expeditiously as possible to provide finality of the grievance process for the benefit of all parties.

Section 106.45(b)(6) Informal Resolution

Proposed Regulations: We propose adding § 106.45(b)(6) stating that at any time prior to reaching a determination regarding responsibility the recipient may facilitate an informal resolution process, such as mediation, that does not involve a full investigation and adjudication, provided that the recipient provides to the parties a written notice disclosing—

- The allegations;
- The requirements of the informal resolution process including the circumstances under which it precludes the parties from resuming a formal complaint arising from the same allegations, if any; and
- Any consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared.

The recipient must also obtain the parties' voluntary, written consent to the informal resolution process.

Reasons: As mentioned previously, the proposed regulations reflect the Department's recognition that recipients' good judgment and common sense are important elements of a response to sex discrimination that meets the requirements of Title IX. The Department also recognizes that in responding to sexual harassment, it is important to take into account the needs of the parties involved in each individual case, some of whom may prefer not to go through a formal complaint process. Recognizing these factors, proposed § 106.45(b)(6) would permit recipients to facilitate an informal resolution process of an allegation of sexual harassment at any time prior to issuing a final determination regarding responsibility, if deemed appropriate by the recipient and the parties. To ensure that the parties do not feel forced into an informal resolution by a recipient, and to ensure that the parties have the ability to make an informed decision, proposed paragraph (b)(6)(i) would require recipients to inform the parties in writing of the allegations, the requirements of the informal resolution process, and any consequences resulting from participating in the informal process. For example, the recipient would need to explain to the parties if one or more available informal resolution options would become binding on the parties at any point, as is often the case with arbitration-style processes, or if the process would remain non-binding throughout, as is often the case with mediation-style processes. Informal resolution options may lead to more favorable outcomes for everyone involved, depending upon factors such as the age, developmental level, and other capabilities of the parties; the knowledge, skills, and experience level of those facilitating or conducting the informal resolution process; the severity of the misconduct alleged; and likelihood of recurrence of the misconduct. Proposed paragraph (b)(6)(ii) would require the recipient to obtain voluntary, written consent from the parties in advance of any informal resolution process in order to ensure that no party is involuntarily denied the protections that would otherwise be provided by these regulations.

Section 106.45(b)(7) Recordkeeping

Proposed Regulations: We propose adding § 106.45(b)(7) stating that a recipient must create, make available to the complainant and respondent, and maintain for a period of three years records of—

- The sexual harassment investigation, including any determination regarding responsibility, disciplinary sanctions imposed on the respondent, and remedies provided to the complainant;
- Any appeal and the result therefrom;
- Informal resolution, if any; and
- All materials used to train coordinators, investigators, decision-makers with regard to sexual harassment.

This provision would also provide that a recipient must create and maintain for a period of three years records of any actions, including any supportive measures, taken in response to a report or formal complaint of sexual harassment. In each instance, the recipient must document the basis for its conclusion that its response was not clearly unreasonable, and document that it has taken measures designed to restore or preserve access to the recipient's educational program or activity. The documentation of certain bases or measures does not limit the recipient in the future from providing additional explanations or detailing additional measures taken.

Reasons: To ensure that the parties, the Department, and recipients have access to relevant information for an appropriate period of time following the completion of the grievance procedure process, proposed § 106.45(b)(7) would address the recordkeeping requirements related to formal complaints of sexual harassment with which recipients must comply. These requirements would benefit complainants and respondents by empowering them to more effectively hold their recipient schools and institutions accountable for Title IX compliance by ensuring the existence of records that could be used during an investigation by the Department or in private litigation. We believe the required three-year retention period is sufficient to allow the Department and the parties to ensure compliance with the proposed regulations, but we specifically seek comment on the appropriate period for retention in a directed question below. During the record retention period, these records would continue to be subject to the applicable provisions of FERPA, as discussed below.

III. Clarifying Amendments to Existing Regulations

Remedial and Affirmative Action and Self-Evaluation (Current § 106.3(a) and Proposed § 106.3(a))

Statute: The statute does not directly address the issue of particular types of remedies, beyond the statement that compliance may be effected by a withdrawal of federal funding or ''by any other means authorized by law.'' 20 U.S.C. 1682. The Secretary has the authority to regulate with regard to discrimination on the basis of sex in education programs or activities receiving federal financial assistance specifically under 20 U.S.C. 1682 and generally under 20 U.S.C. 1221e–3 and 3474.

Current Regulations: Current § 106.3(a) provides that if the Assistant Secretary for Civil Rights finds that a recipient has discriminated against a person on the basis of sex in an education program or activity, the recipient shall be required to take remedial action that the Assistant Secretary deems necessary ''to overcome the effects of such discrimination.''

Proposed Regulations: We propose modifying the language to apply to any violation of part 106 and adding language to § 106.3(a) stating that the remedial action deemed necessary by the Assistant Secretary shall not include assessment of damages.

Reasons: The proposed changes would clarify, consistent with the Supreme Court's case law in this area and mindful of the difference between a private right of action opening the door to damages assessed by a court and the Department's role administratively enforcing Title IX without express statutory authority to collect damages, that the Assistant Secretary shall not assess damages against a recipient. *Gebser,* 524 U.S. at 288–89 (''While agencies have conditioned continued funding on providing equitable relief to the victim, the regulations do not appear to contemplate a condition ordering payment of monetary damages, and there is no indication that payment of damages has been demanded as a condition of finding a recipient to be in compliance with the statute'') (internal citation omitted).

For example, if a student entitled to speech therapy under her Individualized Education Program (IEP) complains that a school district did not provide the therapy, the Department may permissibly require that the school district reimburse the parents for their reasonable and documented expenses for obtaining services that that the school district was required to provide. *Cf. Sch. Comm. of Burlington* v. *Dep't of Educ.,* 471 U.S. 359, 370 (1985) (''[T]he Town repeatedly characterizes reimbursement as 'damages,' but that simply is not the case. Reimbursement merely requires the Town to belatedly pay expenses that it should have paid all along and would have borne in the first instance had it developed a proper IEP.''). Likewise, in the context of Title IX, if a recipient allowed male students with athletic scholarships to retain their scholarships even if they are removed from the team or stop participating on the team, but did not allow female students the same ability to retain their scholarship, the Department could require a recipient to come into compliance with Title IX by restoring the relevant scholarship, even though the restoration will require the payment of monies by the recipient. *See, e.g., Romeo Community Schools* v. *United States Dep't of Health, Education & Welfare,* 600 F.2d 581, 583 (6th Cir. 1979) (emphasis added) (''Romeo received a letter from the regional director of HEW demanding that it alter its practices with respect to pregnancy leave to conform to § 86.57(c) and reimburse and adjust the salaries and retirement credits of any employees who had not been permitted to use accrued sick leave while on pregnancy related leave since June 23, 1972. The letter from HEW also required assurances from Romeo that it would comply with § 86.57, and that reimbursement had been made.''). Thus, in those narrow instances where a failure to pay a specific amount for a specific purpose constitutes the crux of the violation, the resolution can include a monetary payment and still be an equitable remedy squarely tied to the violation the Department identified. Notably, this proposed modification does not affect the Department's statutory authority to suspend or terminate federal funding from a recipient that has violated Title IX and refused to come into compliance.

Effect of Other Requirements and Preservation of Rights (Current § 106.6 and Proposed § 106.6)

Statute: The statute does not directly address the effect of other requirements or the preservation of rights. The Secretary has the authority to regulate with regard to discrimination on the basis of sex in education programs or activities receiving federal financial assistance specifically under 20 U.S.C. 1682 and generally under 20 U.S.C. 1221e–3 and 3474.

Current Regulations: Current § 106.6 provides that the obligations under the Title IX regulations do not alter obligations not to discriminate on the basis of sex under other specified laws and Executive Orders, and the obligation to comply with Title IX is not obviated or alleviated by State or local laws or by a rule or regulation of any organization, club, or league.

Section 106.6(d) Constitutional Protections

Proposed Regulations: We are proposing to add paragraph (d) to § 106.6 to affirm that nothing in 34 CFR part 106 requires a recipient to: Restrict any rights that are protected from governmental action by the First Amendment of the U.S. Constitution; deprive an individual of rights that would otherwise be protected from governmental action under the Due Process Clauses of the Fifth and Fourteenth Amendments; or restrict any other rights guaranteed against governmental action by the U.S. Constitution.

Reasons: Despite the language in current § 106.6 and the discussions in Department guidance regarding the due process protections for public school students and employees and free speech rights under the First Amendment (2001 Guidance at 22) there appears to be significant confusion regarding the intersection of individuals' rights under the U.S. Constitution with a recipient's obligations under Title IX. In particular, during listening sessions the Department heard concerns that Title IX enforcement has had a chilling effect on free speech. We are proposing to add paragraph (d) to clarify that nothing in these regulations requires a recipient to infringe upon any individual's rights protected under the First Amendment or the Due Process Clauses, or other any other rights guaranteed by the U.S. Constitution. The language also makes it clear that, under the Title IX regulations, recipients—including private recipients—are not obligated by

Title IX to restrict speech or other behavior that the federal government could not restrict directly. Consistent with Supreme Court case law, the government may not compel private actors to restrict conduct that the government itself could not constitutionally restrict. *See e.g., Peterson* v. *City of Greenville,* 373 U.S. 244 (1963); *Truax* v. *Raich,* 239 U.S. 33, 38 (1915). Thus, recipients that are private entities are not required by Title IX or its regulations to restrict speech or other behavior that would be protected against restriction by governmental entities. This protection against governmental restrictions on constitutional rights applies to all the civil rights laws that Department enforces, but we are adding paragraph (d) to the Title IX regulations because the issue arises frequently in the context of sexual harassment. When the Department enforces Title IX and its accompanying regulations, the constitutional rights of individuals involved in a recipient's grievance process will always be considered and protected.

Section 106.6(e) Interaction With FERPA

Proposed Regulations: We are also proposing to add paragraph (e) to § 106.6 to clarify that obligations under this part are not obviated or alleviated by the requirements in the FERPA statute or regulations.

Reasons: In 1994, as part of the Improving America's Schools Act, Congress amended the General Education Provisions Act (GEPA), of which FERPA is a part, to state that nothing in GEPA ''shall be construed to affect the applicability of . . . title IX of the Education Amendments of 1972 . . . .'' 20 U.S.C. 1221(d). The proposed regulations under Title IX should be read to be consistent with a recipient's obligations under FERPA.

Section 106.6(f) Interaction With Title VII

Proposed Regulations: We are also proposing to add paragraph (f) to § 106.6 to clarify that nothing in the proposed regulations shall be read in derogation of an employee's rights under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* and its implementing regulations.

Reasons: Employees of a school may have rights under both Title IX and Title VII. To the extent that any rights, remedies, or procedures differ under Title IX and Title VII, this provision clarifies that nothing about the proposed regulations is intended to diminish, restrict, or lessen any rights an employee may have against his or her school under Title VII.

Designation of Coordinator, Dissemination of Policy, Adoption of Grievance Procedures (Current §§ 106.8 and 106.9 and Proposed § 106.8)

Statute: The statute does not directly address the designation of a Title IX Coordinator, the dissemination of policy, or the adoption of grievance procedures. The Secretary has the authority to regulate with regard to discrimination on the basis of sex in education programs or activities receiving federal financial assistance, specifically under 20 U.S.C. 1682 and generally under 20 U.S.C. 1221e–3 and 3474.

Current Regulations: Current § 106.8(a) requires a recipient to designate at least one employee to be the ''responsible employee'' who has the duty to coordinate the recipient's efforts to comply with and carry out its responsibilities under the regulations, including any investigation of any complaint alleging a recipient's noncompliance with, or actions which would be prohibited by, 34 CFR part 106. Section 106.8(a) also requires recipients to notify all students and employees of the name, office address, and telephone number of such employee or employees.

Title 34 CFR 106.8(b) requires recipients to adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee complaints of sex discrimination.

Title 34 CFR 106.9(a)(1) requires recipients to notify applicants for admission and employment, students and parents of elementary and secondary school students, employees, sources of referral for applicants for admission and employment, and unions or professional organizations holding collective bargaining agreements or professional agreements with the recipient that it does not discriminate on the basis of sex in the education program or activity which it operates. Such notice must state that inquiries about the application of Title IX may be referred to the employee designated pursuant to § 106.8, or to the Assistant Secretary.

Title 34 CFR 106.9(b) lists the types of publications where the recipient shall publish its nondiscrimination policy, and 34 CFR 106.9(c) specifies the manner of distribution of such publications.

Proposed Regulations: We are proposing to clarify the requirements of 34 CFR 106.8(a). Proposed § 106.8(a) would state that the designated individual is referred to as the ''coordinator,'' and would alter the required methods for notification. Proposed § 106.8(a) would also remove potentially unclear language in the existing regulation that could be read to require that the coordinator must be the one that handles the investigations and otherwise directly carries out the recipient's responsibilities.

We also propose moving the ''notification of policy'' requirement in current § 106.9(a)(1) to proposed § 106.8(b)(1). Proposed § 106.8(b)(1) would streamline the list of people whom recipients must notify of its policy of non-discrimination based on sex, and clarify that such a notice must state that inquiries about application of Title IX to the recipient may be made to the recipient's Title IX Coordinator or the Assistant Secretary, or to both.

Proposed § 106.8(b)(2) requires recipients to prominently display their Title IX non-discrimination policy on their website (if any) and in each handbook or catalog that it makes available to the list of people who must be notified in paragraph (b)(1), and prohibits recipients from using or distributing publications stating that the recipient treats applicants, students, or employees differently on the basis of sex except as such different treatment is permitted by this part.

We also propose moving the requirements in current 34 CFR 106.8(b) to proposed § 106.8(c), with modifications as proposed below. Proposed § 106.8(c) would clarify that with respect to sexual harassment, the grievance procedures requirements specifically apply to formal complaints as defined in § 106.30. Proposed § 106.8(c) would also require recipients to provide notice of their grievance procedures to students and employees.

We also propose adding paragraph (d) to § 106.8 to clarify that the policy and grievance procedures described in this section need not apply to persons outside the United States.

Reasons: Proposed § 106.8(a) would reflect the current reality of Title IX compliance—namely, that recipients generally name a Title IX Coordinator and designate that individual to coordinate their efforts to comply with Title IX. It appears that the phrase ''and carry out'' in the existing regulation could be read to suggest that the Title IX Coordinator must be the one who carries out the recipient's duties under Title IX, rather than allowing the coordinator to coordinate the actions of others in carrying out those duties. Since the phrase is redundant and can be confusing, we propose removing it. In addition, in light of the expansion of the regulations elsewhere to expressly cover investigations of Title IX complaints, the language specifically including coordination of such investigations in the responsibilities of the designated individual would no longer be necessary, and would therefore be removed.

Proposed § 106.8(a) would also modernize the notification requirements to better ensure that students and employees are aware of how to contact a recipient's Title IX Coordinator. Given the changes in methods of communication since the regulations were issued in 1975, the proposed amendments would require the recipient to notify students and employees of the electronic mail address of the employee or employees designated as Title IX Coordinators, in addition to providing the coordinator's office address and phone number. To alleviate the administrative and financial burden on a recipient to provide a new notice every time it designates an additional or different coordinator, the proposed amendments permit recipients to provide notice of a coordinator's name and contact information or, alternatively, simply a title with an established method of contacting the coordinator that does not change as the identity of the coordinator changes. The Department solicits comments on whether larger institutions of higher education should have a minimum number of individuals with whom individuals can file a complaint of sex discrimination.

Proposed § 106.8(b)(2) would require recipients to prominently display their non-discrimination policy on their websites, if any, and in each handbook or catalog made available to the list of people to whom notice must be sent under paragraph (b)(1). Proposed § 106.8(b)(2) streamlines the list of required publications that must display the recipient's Title IX non-discrimination policy, to reduce the burden on recipients (including the requirement for distribution of written publications included in current § 106.9(c)) while still ensuring that the policy is adequately communicated to all required persons, in light of the reality that most recipients have websites where the non-discrimination policy would have to be prominently displayed. In addition, proposed § 106.8(b)(2) would replace the existing restriction on publications that *suggest* a policy of sex discrimination (either by text or illustration) with a restriction on publications that *state* a policy of sex discrimination. This change would remove the subjective determination of whether the illustrations in a publication could be construed to suggest a policy of sex discrimination and instead focus the requirement on recipients' express statements of policy. As a result, the requirement would be more clear, both for recipients seeking to comply with the requirement and for those enforcing the requirement. Because most recipients have websites on which they must display their Title IX non-discrimination policy pursuant to proposed § 106.8(b)(2), proposed § 106.8(b)(1) streamlines the list of people to whom the recipient must send notice of its policy. Applicants for admission and employment, students, employees, and employee unions and professional organizations must receive the notice under proposed § 106.8(b)(2).

Proposed § 106.8(d) would clarify that the recipient's code of conduct and grievance procedures apply to all students and employees located in the United States with respect to allegations of sex discrimination in an education program or activity of the recipient. The statutory language of Title IX limits its application to protecting ''person[s] in the United States.'' 20 U.S.C. 1681(a).

Educational Institutions Controlled by Religious Organizations (Current and Proposed § 106.12)

Statute: The statute addresses educational institutions controlled by religious organizations, stating that Title IX ''shall not apply to an educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization,'' 20 U.S.C. 1681(a)(3), and that the term ''program or activity'' ''does not include any operation of an entity which is controlled by a religious organization if the application of section 1681 of this title to such operation would not be consistent with the religious tenets of such organization,'' 20 U.S.C. 1687.

Current Regulations: Current 34 CFR 106.12(a) provides an exemption for educational institutions controlled by a religious organization, to the extent that application of the regulation would be inconsistent with the religious tenets of the organization. To claim this exemption, § 106.12(b) requires recipients to submit a letter to the Assistant Secretary stating which parts of the regulation conflict with a specific tenet of the religion.

Proposed Regulations: We propose revising § 106.12(b) to clarify that an educational institution may—but is not required to—seek assurance of its religious exemption by submitting a written request for such an assurance to the Assistant Secretary. Further, § 106.12(b) is revised to state that even if an institution has not sought assurance of its exemption, the institution may still invoke its religious exemption during the course of any investigation pursued against the institution by the Department.

Reasons: The current regulations suggest that the recipients may only claim the exemption from paragraph (a) by submitting a letter to the Assistant Secretary. The additional language clarifying that the letter to the Assistant Secretary is not required to assert the exemption brings the regulatory language into alignment with longstanding Department practice. The statutory text of Title IX offers an exemption to religious entities without expressly requiring submission of a letter, and the Department believes such a requirement is unnecessary. The Department should not impose confusing or burdensome requirements on religious institutions that qualify for the exemption.

Exercise of Rights by Parents/Guardians of Students

The Department recognizes that when a party is a minor, has been appointed a guardian, is attending an elementary or secondary school, or is under the age of 18, recipients have the discretion to look to state law and local educational practice in determining whether the rights of the party shall be exercised by the parent(s) or guardian(s) instead of or in addition to the party. For example, if the parent or guardian of a minor student at an elementary or secondary school files a complaint on behalf of the student, and state law and local educational practice recognize the parent or guardian as the appropriate person to exercise that student's legal rights, the student would be a ''complainant'' under the proposed regulation even though the action of filing the complaint was taken by the parent or guardian instead of the student.

Directed Questions

The Department seeks additional comments on the questions below:

1. *Applicability of the rule to elementary and secondary schools.* The proposed rule would apply to all recipients of federal financial assistance, including institutions of higher education and elementary and secondary schools. The Department is interested in whether there are parts of the proposed rule that will be unworkable at the elementary and secondary school level, if there are additional parts of the proposed rule where the Department should direct

recipients to take into account the age and developmental level of the parties involved and involve parents or guardians, and whether there are other unique aspects of addressing sexual harassment at the elementary and secondary school level that the Department should consider, such as systemic differences between institutions of higher education and elementary and secondary schools.

2. *Applicability of provisions based on type of recipient or age of parties.* Some aspects of our proposed regulations, for instance, the provision regarding a safe harbor in the absence of a formal complaint in proposed § 106.44(b)(3) and the provision regarding written questions or cross-examination in proposed § 106.45(b)(3)(vi) and (vii), differ in applicability between institutions of higher education and elementary and secondary schools. We seek comment on whether our regulations should instead differentiate the applicability of these or other provisions on the basis of whether the complainant and respondent are 18 or over, in recognition of the fact that 18-year-olds are generally considered to be adults for many legal purposes.

3. *Applicability of the rule to employees.* Like the existing regulations, the proposed regulations would apply to sexual harassment by students, employees, and third parties. The Department seeks the public's perspective on whether there are any parts of the proposed rule that will prove unworkable in the context of sexual harassment by employees, and whether there are any unique circumstances that apply to processes involving employees that the Department should consider.

4. *Training.* The proposed rule would require recipients to ensure that Title IX Coordinators, investigators, and decision-makers receive training on the definition of sexual harassment, and on how to conduct an investigation and grievance process, including hearings, that protect the safety of students, ensures due process for all parties, and promotes accountability. The Department is interested in seeking comments from the public as to whether this requirement is adequate to ensure that recipients will provide necessary training to all appropriate individuals, including those at the elementary and secondary school level.

5. *Individuals with disabilities.* The proposed rule addresses the rights of students with disabilities under the IDEA, Section 504, and Title II of the ADA in the context of emergency removals (proposed § 106.44(c)). The Department is interested in comments from the public as to whether the proposed rule adequately takes into account other issues related to the needs of students and employees with disabilities when such individuals are parties in a sex discrimination complaint, or whether the Department should consider including additional language to address the needs of students and employees with disabilities as complainants and respondents. The Department also requests consideration of the different experiences, challenges, and needs of students with disabilities in elementary and secondary schools and in postsecondary institutions related to sexual harassment.

6. *Standard of Evidence.* In § 106.45(b)(4)(i), we are proposing that the determination regarding responsibility be reached by applying either a preponderance of the evidence standard or the clear and convincing standard, and that the preponderance standard be used only if it is also used for conduct code violations that do not involve sexual harassment but carry the same maximum disciplinary sanction. We seek comment on (1) whether it is desirable to require a uniform standard of evidence for all Title IX cases rather than leave the option to schools to choose a standard, and if so then what standard is most appropriate; and (2) if schools retain the option to select the standard they wish to apply, whether it is appropriate to require schools to use the same standard in Title IX cases that they apply to other cases in which a similar disciplinary sanction may be imposed.

7. *Potential clarification regarding ''directly related to the allegations'' language.* Proposed § 106.45(b)(3)(viii) requires recipients to provide each party with an equal opportunity to inspect and review any evidence directly related to the allegations obtained as part of the investigation, including the evidence upon which the recipient does not intend to rely in reaching a determination regarding responsibility, and provide each party with an equal opportunity to respond to that evidence prior to completion of the investigative report. The ''directly related to the allegations'' language stems from requirements in FERPA, 20 U.S. Code 1232g(a)(4)(A)(i). We seek comment on whether or not to regulate further with regard to the phrase, ''directly related to the allegations'' in this provision.

8. *Appropriate time period for record retention.* In § 106.45(b)(7), we are proposing that a recipient must create, make available to the complainant and respondent, and maintain records for a period of three years. We seek comments on what the appropriate time period is for this record retention.

9. *Technology needed to grant requests for parties to be in separate rooms at live hearings.* In § 106.45(b)(3)(vii) we require institutions of higher education to grant requests from parties to be in separate rooms at live hearings, with technology enabling the decision-maker and parties to see and hear each other simultaneously. We seek comments on the extent to which institutions already have and use technology that would enable the institution to fulfill this requirement without incurring new costs or whether institutions would likely incur new costs associated with this requirement.

Executive Orders 12866 and 13563

Regulatory Impact Analysis (RIA)

Under Executive Order 12866, the Office of Management and Budget (OMB) must determine whether this regulatory action is ''significant'' and, therefore, subject to the requirements of the Executive order and subject to review by OMB. Section 3(f) of Executive Order 12866 defines a ''significant regulatory action'' as an action likely to result in a rule that may—

(1) Have an annual effect on the economy of $100 million or more, or adversely affect a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities in a material way (also referred to as an ''economically significant'' rule);

(2) Create serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles stated in the Executive order.

Under Executive Order 12866,[14] section 3(f)(1), the changes made in this regulatory action materially alter the rights and obligations of recipients of federal financial assistance under Title IV of the Higher Education Act of 1965 (Title IV). Therefore, the Secretary certifies that this is a significant regulatory action subject to review by OMB. Also under Executive Order 12866 and the Presidential

[14] Exec. Order No. 12866, Regulatory Planning and Review, 58 FR 190 (Oct. 4, 1993), *www.reginfo.gov/public/jsp/Utilities/EO_12866.pdf.*

Memorandum ''Plain Language in Government Writing,'' the Secretary invites comment on how easy these regulations are to understand in the *Clarity of the Regulations* section.

Under Executive Order 13771, for each new regulation that the Department proposes for notice and comment or otherwise promulgates that is a significant regulatory action under Executive Order 12866 and that imposes total costs greater than zero, it must identify two deregulatory actions. For FY 2019, no regulations exceeding the agency's total incremental cost allowance will be permitted, unless required by law or approved in writing by the Director of the Office of Management and Budget. The proposed regulations are a significant regulatory action under E.O. 12866 but do not impose total costs greater than zero. Accordingly, the Department is not required to identify two deregulatory actions under E.O. 13771.[15]

We have also reviewed these proposed regulations under Executive Order 13563, which supplements and explicitly reaffirms the principles, structures, and definitions governing regulatory review established in Executive Order 12866. To the extent permitted by law, Executive Order 13563 requires that an agency—

(1) Propose or adopt regulations only on a reasoned determination that their benefits justify their costs (recognizing that some benefits and costs are difficult to quantify);

(2) Tailor its regulations to impose the least burden on society, consistent with obtaining regulatory objectives and taking into account—among other things and to the extent practicable—the costs of cumulative regulations;

(3) In choosing among alternative regulatory approaches, select those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity);

(4) To the extent feasible, specify performance objectives, rather than the behavior or manner of compliance a regulated entity must adopt; and

(5) Identify and assess available alternatives to direct regulation, including economic incentives—such as user fees or marketable permits—to encourage the desired behavior, or provide information that enables the public to make choices.

Executive Order 13563 also requires an agency ''to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible.'' The Office of Information and Regulatory Affairs of OMB has emphasized that these techniques may include ''identifying changing future compliance costs that might result from technological innovation or anticipated behavioral changes.''

We are issuing these proposed regulations only on a reasoned determination that their benefits justify their costs. Based on the analysis that follows, the Department believes that these regulations are consistent with the principles in Executive Order 13563.

We also have determined that this regulatory action does not unduly interfere with State, local, or tribal governments in the exercise of their governmental functions.

In this RIA we discuss the need for regulatory action, the potential costs and benefits, assumptions, limitations, and data sources, as well as regulatory alternatives we considered. Although the majority of the costs related to information collection are discussed within this RIA, elsewhere in this notice under Paperwork Reduction Act of 1995 we also identify and further explain burdens specifically associated with information collection requirements.

1. Need for Regulatory Action

Based on its extensive review of the critical issues addressed in this rulemaking, the Department has determined that current regulations and guidance do not provide sufficiently clear standards for how recipients must respond to incidents of sexual harassment, including defining what conduct constitutes sexual harassment. To address this concern, we propose this regulatory action to address sexual harassment under Title IX for the central purpose of ensuring that recipients understand their legal obligations, including what conduct is actionable as harassment under Title IX, the conditions that activate a mandatory response by the recipient, and particular requirements that such a response must meet in order to ensure that the recipient is protecting the rights of all its students to equal access to education free from sex discrimination.

In addition to addressing sexual harassment, the Department has concluded it is also necessary to amend three parts of the existing regulations that apply to all sex discrimination under Title IX. We propose expressly stating that Title IX does not require recipients to infringe upon existing constitutional protections, that the Department may not require money damages as a remedy for violations under Title IX, and that recipients that qualify for a religious exemption under Title IX need not submit a letter to the Department as a prerequisite to claiming the exemption.

2. Discussion of Costs, Benefits, and Transfers

The Department has analyzed the costs and benefits of complying with these proposed regulations. Due to the number of affected entities, the variation in likely responses, and the limited information available about current practices, particularly at the local educational agency (LEA) level, we cannot estimate the likely effects of these proposed regulations with absolute precision. The Department specifically invites public comment on: Data sources which would provide comprehensive information regarding current practices in Title IX enforcement, information regarding the number of recipients in each analytical group described in section 4.b below, and time estimates for the activities described in 4.c disaggregated by type of recipient. Despite these limitations, we estimate that these regulations would result in a net cost savings of between $286.4 million to $367.7 million over ten years.

3. Benefits of the Proposed Regulations

The proposed regulatory action will result in recipients better understanding their legal obligations to address sexual harassment under Title IX by providing a legal framework for recipients' responses to sexual harassment that ensures all reports of sexual harassment are treated seriously and all persons accused are given due process protections before being disciplined for sexual harassment. The proposed regulatory action will correct problems identified by the Department with the current framework governing sexual harassment (under current regulations and guidance), such as recipients not understanding their duties and responsibilities and a lack of robust due process protections in recipient grievance procedures under Title IX. In addition, the proposed regulatory action will correct capturing too wide a range of misconduct resulting in infringement on academic freedom and free speech.

4. Costs of the Proposed Regulations

These proposed regulations would among other things: Define sexual harassment for Title IX purposes; clarify when a recipient's obligation to investigate a complaint of sexual harassment is activated; define the minimum requirements of grievance

[15] Exec. Order No. 13771, Reducing Regulation and Controlling Regulatory Costs, 82 FR 22 (Jan. 30, 2017), *www.gpo.gov/fdsys/pkg/FR-2017-02-03/pdf/2017-02451.pdf.*

procedures for Title IX purposes; establish a process for informal resolution of sexual harassment claims; and require appropriate documentation of all Title IX complaints and investigations.

Prior to discussing the Department's estimates, we believe it is important to emphasize that these estimates are not an attempt to quantify the economic effects of sexual harassment, broadly, or sexual assault, specifically. Other studies [16] have attempted to quantify such costs and, while incidents of sexual assault may have real economic consequences, these estimates are only intended to capture the economic impacts of this proposed regulatory action. The Department does not believe it is reasonable to assume that these proposed regulations will have a quantifiable effect on the underlying rate of sexual harassment occurring in the education programs or activities of recipients. As a result, we do not attempt to capture costs that arise out of the underlying incidents themselves, but rather those associated with the actions prescribed by the proposed regulations and the likely response of regulated entities to those proposed requirements.

4.a. Establishing a Baseline

To accurately estimate the costs of these proposed regulations, the Department needed to establish an appropriate baseline for current practice. In doing so, it was necessary to know the current number of Title IX investigations occurring in LEAs and institutions of higher education (IHEs) eligible for Title IV federal funding. In 2014, the U.S. Senate Subcommittee on Financial and Contracting Oversight released a report [17] which included survey data from 440 four-year IHEs regarding the number of investigations of sexual violence that had been conducted during the previous five year period. Two of the five possible responses to the survey were definite numbers (0, 1), while the other three were ranges (2–5, 6–10, >10). Responses were also disaggregated by size of institution (Large, Medium, or Small). Although the report does not clearly identify a definition of ''sexual violence'' provided to survey respondents, the term would appear to capture only a subset of the types of incidents that may result in a Title IX investigation. Indeed, when the Department examined public reports of Title IX reports and investigations at 55 IHEs nationwide, incidents of sexual misconduct represented, on average, 45 percent of investigations conducted. Further, a number of the types of incidents that were categorized as ''sexual misconduct'' in those reports may, or may not, have been categorized as ''sexual violence,'' depending on the survey respondent. To address the fact that the subcommittee report may fail to capture all incidents of sexual misconduct at responding IHEs, the Department first top-coded the survey data. To the extent that survey respondents treated the terms ''sexual misconduct'' and ''sexual violence'' interchangeably, this top-coding approach may result in an overestimate of the number of sexual misconduct investigations conducted at institutions. By top-coding the ranges (*e.g.,* ''5'' for any respondent indicating ''2–5'') and assuming 50 investigations for any respondent indicating more than 10 investigations, the Department was able to estimate the average number of sexual misconduct investigations conducted by four-year institutions in each size category. We then divided this estimate by five to arrive at an estimated number of investigations per year. To address the fact that incidents of sexual misconduct only represent a subset of all Title IX investigations conducted by IHEs in any given year, we then multiplied this result by two, assuming (consistent with our convenience sample of public Title IX reporting) that sexual misconduct investigations represented approximately 50 percent of all Title IX investigations conducted by institutions.

Because the report only surveyed four-year institutions, the Department needed to impute similar data for two-year and less-than-two-year institutions, which represent approximately 57 percent of all Title IV-eligible institutions. In order to do so, the Department analyzed sexual offenses reported under the Clery Act and combined those data with total enrollment information from the Integrated Postsecondary Education Data System (IPEDS) for all Title IV-eligible institutions within the United States. Assuming that the number of reports of sexual offenses under the Clery Act is positively correlated with the number of investigations, the Department arrived at a general rate of investigations per reported sexual offense at four-year IHEs by institutional enrollment. These rates were then applied to two-year and less-than-two-year institutions within the same category using the average number of sexual offenses reported under the Clery Act for such institutions to arrive at an average number of investigations per year by size and level of institution. These estimates were then weighted by the number of Title IV-eligible institutions in each category to arrive at an estimated average 2.36 investigations of sexual harassment per IHE per year.[18] To the extent that the number of investigations and the number of Clery Act reports of sexual offenses are not uniformly correlated across types of institutions (*i.e.,* less-than-two-year, two-year, and four-year), this may represent an over- or-under-estimate of the actual number of investigations per IHE per year. We invite the public to provide any pertinent evidence on determining investigations of sexual harassment per IHE per year to improve our baseline estimates.

The Department does not have information on the average number of investigations of sexual harassment occurring each year in LEAs. As part of the Civil Rights Data Collection (CRDC), the Department does, however, gather information on the number of incidents of harassment based on sex in LEAs each year. During school year 2015–2016, LEAs reported an average of 3.23 of such incidents. Therefore, the Department assumes that LEAs, on average, currently conduct approximately 3.23 Title IX investigations each year. We invite public comment on the extent to which this is a reasonable assumption.

4.b. Developing the Model

After the Department issued guidance regarding Title IX compliance in 2011, the Department noted a much larger number of incidents of sexual harassment being reported to and investigated by LEAs and IHEs each year. In 2017, the Department rescinded that guidance and published alternative, interim guidance while this proposed regulatory action was underway. The Department reaffirmed that the interim guidance is not legally binding on recipients. Wiersma-Mosley and DiLoreto [19] did not identify substantial

[16] *See, e.g.,* Cora Peterson et al., *Lifetime Economic Burden of Rape Among U.S. Adults,* 52 Am. J. of Preventative Med. 691 (2017).

[17] Claire McCaskill, S. Subcomm. on Financial Contracting Oversight—Majority Staff, Sexual Violence on Campus, 113th Cong. (2014), *https://www.mccaskill.senate.gov/SurveyReportwithAppendix.pdf.*

[18] To determine the sensitivity of this estimate to our coding of the survey data, the Department also conducted these analyses by coding the data using medians for each range (*e.g.,* 3.5 for the ''2–5'' range) with a code of 30 for the ''>10'' group and by top-coding using a 100 for the ''>10'' group. These alternative approaches would result in baseline estimates ranging from 1.48 to 4.31 investigations per year per IHE.

[19] Jacquelyn D. Wiersma-Mosley and James DiLoreto, *The Role of Title IX Coordinators on*

Continued

rollback of Title IX activities among IHEs compared to Richards,[20] who found substantial changes relative to Karjane, Fisher, and Cullen.[21] Consistent with those studies, we believe it is highly likely that a subset of recipients have continued Title IX enforcement in accordance with the prior, now rescinded guidance, due to the uncertainty of the regulatory environment, and that it is reasonable to assume that some subset of recipients either never complied with the 2011 DCL or the 2014 Q&A or amended their compliance activities after the rescission of that guidance. We do not, however, know with absolute certainty how many recipients fall into each category, making it difficult to accurately predict the likely effects of this proposed regulatory action.

In general, the Department assumes that recipients fall into one of three groups: (1) Recipients who have complied with the statutory and regulatory requirements and either did not comply with the 2011 DCL or the 2014 Q&A or who reduced Title IX activities to the level required by statute and regulation after the rescission of the 2011 DCL or the 2014 Q&A and will continue to do so; (2) recipients who continued Title IX activities at the level required by the 2011 DCL or the 2014 Q&A but will amend their Title IX activities to the level required under current statute and the proposed regulations issued in this proceeding; and (3) recipients who continued Title IX activities at the level required under the 2011 DCL or the 2014 Q&A and will continue to do so after final regulations are issued. In this structure, we believe that recipients in the second group are most likely to experience a net cost savings under these proposed regulations. We therefore only estimate savings for this group of recipients. To the extent that recipients in the other two groups experience savings, we herein underestimate the savings from this proposed action. We note that we calculate some increased costs for recipients in all three categories.

In estimating the number of recipients in each group, we assume that most LEAs and Title IV-eligible IHEs are generally risk averse regarding Title IX compliance, and so we assume that very few would have adjusted their enforcement efforts after the rescission of the 2011 DCL or the 2014 Q&A or would have failed to align their activities with the guidance initially. Therefore, we estimate that only 5 percent of LEAs and 5 percent of IHEs fall into Group 1.[22] Given the particularly acute financial constraints on LEAs, we assume that a vast majority (90 percent) will fall into Group 2—meeting all requirements of the proposed regulations and applicable laws, but not using limited resources to maintain a Title IX compliance structure beyond such requirements. Among IHEs, we assume that, for a large subset of recipients, various pressures will result in retention of the status quo in every manner that is permitted under the proposed regulations. These institutions are voluntarily assuming higher costs than the regulations require. Nonetheless, our model does account for their decision to do so, and we only assume that 50 percent of IHEs experience any cost savings from these proposed regulations (placing them in Group 2). Therefore, we estimate that Group 3 will consist of 5 percent of LEAs and 45 percent of IHEs. We invite public comment on the extent to which the estimated number of entities in each group is appropriate, or whether recipients would expect costs or costs savings from the proposed regulations, and why.

Unless otherwise specified, our model uses median hourly wages for personnel employed in the education sector as reported by the Bureau of Labor Statistics[23] and an employer cost for employee compensation rate of 1.46.[24]

4.c. Cost Estimates

We assume that, once the Department issues final regulations, all recipients will need to review the regulations. At the LEA level, we assume this would involve the Title IX Coordinator (assuming a loaded wage rate of $65.22 per hour for educational administrators) for 4 hours and a lawyer (at a rate of $90.71 per hour) for 8 hours. At the IHE level, we assume the Title IX Coordinator and lawyer would spend more time reviewing the regulations, at 8 hours and 16 hours, respectively. This results in a total cost of $29,732,680 in Year 1.

We also assume that recipients would be required to revise their grievance procedures to ensure compliance with the proposed regulations. Although the requirements of these proposed regulations closely mirror requirements in other regulations and statutes, we assume that all recipients will need to revise their procedures. We believe that revising grievance procedures at the LEA level will require the work of the Title IX Coordinator for 4 hours and a lawyer for 16 hours. At the IHE level, we assume this would require the Title IX Coordinator devote 8 hours and a lawyer devote 32 hours. In total, we estimate the cost of revising grievance procedures to be approximately $51,603,180 in Year 1.

The proposed regulations also require recipients to post nondiscrimination statements on their websites as required under the existing regulation. We assume, however, that this is already standard practice for many recipients. We assume that 40 percent of LEAs and 20 percent of IHEs[25] will need to do work to post these statements. At the LEA level, we assume that this work will require 0.5 hours from the Title IX Coordinator, 0.5 hours from a lawyer, and 2 hours from a web developer (at $44.12 per hour). At the IHE level, we assume this would require 1 hour from the Title IX Coordinator, 1 hour from a lawyer, and 2 hours from a web developer. We estimate the total cost of posting nondiscrimination statements on the recipient's website will cost $1,347,520 in Year 1.

The proposed regulations also require relevant staff to receive training on the requirements of Title IX. Although recipients may currently engage in annual training of Title IX staff,[26] we assume that all recipients will conduct new or revised training aligned with these proposed regulations. We assume that the training will take 16 hours each for the Title IX Coordinator, the investigator, and a decision-maker at both the LEA and IHE level for a total estimated cost of approximately $14,458,650 in Year 1. We do not

College and University Campuses, 8 Behav. Sci. 1, 5–6 (2018), *available at https://www.mdpi.com/2076-328X/8/4/38/htm* (click on ''Full-Text PDF'').

[20] Tara N. Richards, *An updated review of institutions of higher education's (IHEs) response to sexual assault: Results from a nationally representative sample,* J. of Interpersonal Violence 1, 11–12 (2016).

[21] Heather M. Karjane, Bonnie S. Fisher, and Francis T. Cullen, Educ. Development Ctr., Inc., Campus Sexual Assault: How America's Institutions of Higher Education Respond 62–94 (2002), *https://www.ncjrs.gov/pdffiles1/nij/grants/196676.pdf.*

[22] If our estimates were revised to increase the number of recipients in this group, our calculated net savings would be reduced. *See* section 4.e. Sensitivity Analysis for more information.

[23] U.S. Dept. of Labor, Bureau of Labor Statistics, *May 2017 National Industry-Specific Occupational Employment and Wage Estimates: Sector 61—Educational Services* (Mar. 30, 2018), *https://www.bls.gov/oes/current/naics2_61.htm.*

[24] U.S. Dept. of Labor, Bureau of Labor Statistics, *Economic News Release: Table 1. Civilian Workers, by Major Occupational and Industry Group* (Sept. 18, 2018), *https://www.bls.gov/news.release/ecec.t01.htm.*

[25] Richards, *supra* note 20, at 11 and Wiersma-Mosley & DiLoreto, *supra* note 19, at 5 found that approximately 80 percent of IHEs (81 percent and 79 percent, respectively) posted their policies and procedures.

[26] Angela F. Amar et al., *Administrators' perceptions of college campus protocols, response, and student prevention efforts for sexual assault,* 29 Violence Vict. 167 (2014).

calculate additional costs in future years as we assume that recipients will resume training of staff one their prior schedule after Year 1.

The proposed regulations require recipients to conduct an investigation only in the event of a formal complaint of sexual harassment. In reviewing a sample of public Title IX documents, the Department noted that larger IHEs were more likely than smaller IHEs to conduct investigations only in the event of formal complaints, as opposed to investigating all reports they received. Consistent with this observation, the Department found that the rate of average investigations relative to the number of reports of sexual offenses under the Clery Act was lower at large (more than 10,000 students) four-year institutions than it was at smaller four-year institutions. As a result, the Department used the Clery Act data to impute the likely effect of these proposed regulations on various institutions. Specifically, we assume that, under these regulations, the gap in the rate of investigations between large IHEs and smaller ones would decrease by approximately 50 percent. Therefore, we estimate that the requirement to investigate only in the event of formal complaints would result in a reduction in the average number of investigations per IHE per year of 0.75. This reduction is equivalent to all IHEs in Group 2 experiencing a reduction in investigations of approximately 32 percent. In addition, the proposed regulations only require investigations in the event of sexual harassment within a recipient's education program or activity. Again, assuming that Clery Act reports correlate with all incidents of sexual harassment (as defined in these proposed regulations), we assume a further reduction in the number of investigations per IHE per year of approximately 0.18, using the number of non-campus, public property, and reported-by-police reports as a proxy for the number of off-campus sexual harassment investigations currently being conducted by IHEs.[27] As a result, we estimate that each IHE in Group 2 will experience a reduction in the number of Title IX investigations of approximately 0.93 per year.[28]

At the LEA level, given the lack of information regarding the actual number of investigations conducted each year, the Department assumes that only 50% of the incidents reported in the CRDC would result in a formal complaint, for a reduction in the number of investigations of 1.62 per year. We invite the public to provide any information on the extent to which this is a reasonable assumption.

To be clear, these estimates are not meant to discourage recipients from investigating at a higher rate. Nor do these estimates of a decrease in investigations predict a decrease in recipient's obligation to respond in some appropriate way to a report of sexual harassment. For example, as noted earlier, nothing in the proposed regulations would prevent a recipient from initiating a student conduct proceeding or offering supportive measures to students who report sexual harassment that occurs outside the recipient's education program or activity.

Although we estimate that the number of investigations under the proposed regulations will decrease at both the IHE and LEA levels, Title IX Coordinators are still expected to respond to informal complaints or reports. Such responses will not be dictated by the recipient's grievance procedures, but may involve talking with the reporting party, discussing options, connecting him or her with relevant on- or off-campus resources, conducting some sort of further investigation, and other supportive measures.[29] Although the proposed regulations require such supportive measures to be offered without fee or charge, we do not estimate specific costs associated with the provision of particular supportive measures. We have chosen not to include such costs for several reasons. First, in many instances, particular services are already offered without fee or cost to students. For example, many IHEs offer free mental health services to students. In such an instance, it is difficult to identify the marginal cost of an additional individual seeking out such already covered services. Second, even if we were able to identify the marginal cost of the provision of such services to the recipient, it would be difficult to accurately capture the portion of that cost attributable to the referral by the Title IX coordinator rather than to the underlying reported harassment. For example, Krebs et al.[30] found that 22 percent of victims of forced sexual assault sought out psychological counseling, 11 percent moved residences, and 8 percent dropped a class. It is difficult to assess what marginal impact these proposed regulations would have on the likelihood of complainants and respondents taking such actions. In the event that a clear fee exists for a particular service that the recipient would waive in accordance with these proposed regulations, we could calculate a cost arising from the lost revenue to the recipient. Due to the lack of adequate information about such fee structures and the highly personalized nature of supportive measures provided to complainants and respondents, we cannot at this time provide such estimates with any precision. We invite the public to provide any information on the relative fees that may be waived by recipients as a result of these proposed regulations and the frequency with which such measures are implemented.

We assume that the provision of supportive measures will take approximately 3 hours per report for Title IX coordinators and 8 hours for an administrative assistant at the LEA level. At the IHE level, we estimate that it would require 3 hours per incident for the Title IX coordinator and 16 hours for an administrative assistant. We therefore estimate that the response to informal complaints will cost approximately $5,356,590 per year.

At the LEA level, we assume that the average response to a formal complaint will require 8 hours from the Title IX Coordinator, 16 hours for an administrative assistant, one hour each for two lawyers (assuming both parties obtain legal counsel),[31] 20 hours from an investigator, and 8 hours from a decision-maker. We also assume that, in 75 percent of LEAs, the Title IX

[27] The Department notes that this likely represents a severe under-estimate of the actual proportion of incidents of sexual harassment that occur off-campus. According to a study from United Educators, approximately 41 percent of sexual assault claims examined occurred off-campus. United Educators, Facts from United Educator's Report *Confronting Campus Sexual Assault* (2015), *https://www.ue.org/sexual_assault_claims_study/.* Nonetheless, it is likely that some subset of these incidents occurred "under" the recipients' "education program or activity" and would still require a response by the recipient. If the Department were to assume 25 percent of those incidents required investigation under the proposed rules and increased its estimate of the number of off-campus incidents that would no longer require investigation to 30 percent (rather than the current 11 percent), the estimated cost savings of these proposed regulations would increase to approximately $359 to $456 million over ten years.

[28] We note that the alternative coding options discussed above would result in an estimated reduction in the number of investigations each year between 0.60 and 1.58.

[29] Amar et al. *supra* note 26, at 174 identified the most common campus services provided at the IHE level were mental health services, health services, law enforcement, and victim assistance/advocacy.

[30] Christopher P. Krebs et al.,The Campus Sexual Assault (CSA) Study: Final Report, Nat'l Inst. of Just. (2007), *https://www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf.*

[31] This average is based on the assumption that in a significant number of cases at the LEA level, either or both of the parties will choose to proceed without an attorney, or with a non-attorney advisor, such that the average cost for advisors will be two attorney hours.

coordinator also acts as the decision-maker, which would not be allowable under the proposed regulations. Assuming a reduction in the average number of investigations of 1.62 per LEA per year and the use of an independent decision-maker in each investigation, these proposed regulations would result in a cost savings of $57,136,120 per year at the LEA level.

At the IHE level, we assume that the average response to a formal complaint would require 24 hours from the Title IX Coordinator, 40 hours from an administrative assistant, 40 hours each for 2 lawyers (assuming both parties obtain counsel), 40 hours for an investigator, and 16 hours for a decision-maker. We note that, under these proposed regulations, recipients are required to provide parties with advisors to conduct cross-examination if they do not have an advisor present. Given that our estimates assume all parties obtain counsel, we do not believe that this additional requirement would result in an increased cost not otherwise captured by our estimates. Consistent with Wiersma-Mosley and DiLareto, we also assume that the Title IX coordinator serves as the decision-maker in 60 percent of IHEs. Assuming an average reduction of 0.0.93 investigations per year per IHE and the use of independent decision-makers, we estimate these proposed regulations to result in a net cost savings of $41,440,300 per year at the IHE level.

We recognize that some recipients may currently conduct investigations in a manner with a less robust due process framework than what would be required under the proposed regulations. For these recipients, included in Group 1 as described in section 4.b, the regulations may result in an increased cost per investigations. At the LEA level, we assume these regulations would require 2 additional hours from the Title IX coordinator, 4 hours from an administrative assistant, 1 hour each from two lawyers, 10 additional hours from an investigator, and 8 additional hours from a decision-maker per investigation, for a total increased cost of approximately $1,609,200 per year. At the IHE level, we assume that these proposed regulations would require an additional 6 hours from a Title IX coordinator, 10 hours from an administrative assistant, 20 hours each from two lawyers, 20 hours from an investigator, and 16 hours from a decision-maker, for a total increased cost of $2,829,570 per year.

We note that the proposed regulations require a hearing for formal complaints at the IHE level. We do not estimate any additional cost associated with this provision beyond those outlined above, given that the use of hearing boards has become a relatively common practice at the IHE level.[32]

In addition, the proposed regulations allow for formal complaints to be informally resolved. We assume that 10 percent of all formal complaints at the LEA and IHE level would be resolved through informal resolution.[33] In such instances at the LEA level, we assume the Title IX Coordinator and administrative assistant will each have to dedicate 4 hours beyond what they would have for a full adjudication to reflect the potential additional administrative tasks associated with this approach. Nonetheless, we estimate that informal resolution will save half of the time outlined above for lawyers and investigators, and save the full estimated time commitment of decision-makers. At the IHE level, we assume similar time savings for lawyers, investigators, and decision-makers, with Title IX Coordinators and administrative assistants each dedicating an additional 8 hours per case. In total, we assume informal resolution will result in a cost savings of approximately $3,414,980 per year.

The proposed regulations also require grievance procedures to include the opportunity for both parties to appeal if an appeal is offered. Richards indicates that approximately 84 percent of IHEs have an appeals process. For purposes of these estimates, we assume that any recipient in Group 3, as described in section 4.b, currently operates an appeals process. However, all recipients in Groups 1 and 2 would need to institute such a structure. Given that many recipients in Groups 1 and 2 may currently operate an appeals process, this approach would overestimate the costs of these proposed regulations. Based on our review of Title IX documents from various institutions, we assume that approximately 50 percent of investigations taken through to a determination of responsibility will result in an appeal by either party. We assume that, at the LEA level, each appeal will require 4 hours from the Title IX coordinator, 8 hours from an administrative assistant, one hour each from two lawyers, and 8 hours from a decision-maker. At the IHE level, we assume each appeal will require 12 hours from a Title IX coordinator, 20 hours from an administrative assistant, 10 hours each from 2 lawyers, and 8 hours from a decision-maker. In total, we estimate the appeals process will cost approximately $20,770,220 per year. To the extent that IHEs choose not to offer appeals, this calculation would represent an overestimate of actual burden.

The proposed regulations require recipients to maintain certain documentation regarding their Title IX activities. We assume that the proposed recordkeeping and documentation requirements would have a higher first year cost associated with establishing the system for documentation with a lower out-year cost for maintaining it. At the LEA level, we assume that the Title IX Coordinator would spend 4 hours in Year 1 establishing the system and an administrative assistant would spend 8 hours doing so. At the IHE level, we assume recipients are less likely to use a paper filing system and are likely to use an electronic database for managing such information. Therefore, we assume it will take a Title IX Coordinator 24 hours, an administrative assistant 40 hours, and a database administrator ($50.71) 40 hours to set up the system for a total Year 1 estimated cost of approximately $38,836,760.

In later years, we assume that the systems will be relatively simple to maintain. At the LEA level, we assume it will take the Title IX Coordinator 2 hours and an administrative assistant 4 hours to do so. At the IHE level, we assume 4 hours from the Title IX Coordinator, 40 hours from an administrative assistant, and 8 hours from a database administrator. In total, we estimate an ongoing cost of approximately $15,189,260 per year.

In total, the Department estimates these proposed regulations will result in a net cost savings of approximately $286.4 million to $367.7 million over ten years on a net present value basis.

4.d. Other Issues in the Proposed Regulations

The proposed regulations address three topics that do not involve a recipient's response to sexual harassment and which the Department estimates will not result in any net cost or benefit to regulated entities.

First, the proposed regulations emphasize that nothing about enforcement of Title IX shall require the

[32] Amar et al., *supra* note 26, at 172–3 found that approximately 87 percent of institutions used a hearing board which typically involved students, faculty, staff, and administrators. To the extent that these proposed regulations result in IHEs reducing the membership of hearing boards to, for example, a single decision-maker, these regulations would result in additional cost savings not otherwise captured here.

[33] This figure likely represents an underestimate of the actual number that would be resolved informally. Wiersma-Mosley & DiLoreto, *supra* note 19, at 6, report that 34 percent of cases were resolved through informal resolution.

Department or a recipient to violate the constitutional rights of any person. The Departments estimates that there are no costs or cost savings arising from this proposed provision because it does not require any new act on the part of a recipient.

Second, the proposed regulations state that money damages shall not be required by the Department as a remedy for a recipient's violation of Title IX or its regulations. The Department's OCR generally does not impose money damages as a remedy under Title IX; however, occasionally OCR does require a recipient to pay sums of money as reimbursement to remedy a Title IX violation. Although the number of instances in which OCR imposes money damages is minimal, the Department wishes to emphasize through the proposed regulation that any remedy involving payment of money must be linked to bringing the recipient into compliance with Title IX, rather than falling into a category of imposing money damages. There is no cost associated with this proposed regulation because no new act is required of recipients.

Third, the proposed regulations clarify that a religious institution is not required to preemptively submit a written letter to the Department to claim the religious exemption from Title IX provided for by statute. There is no cost associated with the proposed regulation concerning religious institutions because the proposed regulation simply clarifies that such institutions do not need to submit a written letter to the Department to claim the religious exemption available under the Title IX statute, and does not require any new action by recipients.

4.e. Sensitivity Analysis

The Department's estimated costs and benefits for these proposed regulations are largely driven by two assumptions: The number of recipients that will not conduct activities beyond those required for compliance with the final regulations, and the change in the number of investigations conducted each year by each of those recipients. To assess the robustness of our estimates, we have conducted nine different simulations of our model with varying combinations of an upper, lower, and current estimate for each of these two factors. Regarding the upper bound for the number of recipients that will not conduct activities beyond those required for compliance with the final regulations, we assume 100 percent of LEAs and 85 percent of IHEs. For the lower bound, we assume 50 percent of LEAs and 33 percent of IHEs. In both instances, we assume the remainder of recipients are in Group 3. As discussed above, alternative coding of investigation rate data would have resulted in an estimated reduction in the number of investigations per IHE per year ranging from 0.60 to 1.58. Therefore, these estimates served as our upper and lower bound estimates for those institutions with a 25 percent to 75 percent reduction for LEAs. The estimated net present value of each of these alternative models, discounted at seven percent, is included in the table below.[34]

TABLE 1—SENSITIVITY ANALYSIS

		Number of recipients reducing number of investigations		
		Upper bound	Primary estimate	Lower bound
Estimated reduction in investigations per recipient	Upper Bound	($820,648,142)	($431,940,097)	($221,468,788)
	Primary Estimate	(534,363,019)	(286,449,261)	(110,309,915)
	Lower Bound	(388,322,321)	(210,250,875)	(53,605,189)

Based on this analysis, the Department believes that its evaluation of the likely costs and benefits is accurate in assuming these proposed regulations would result in a net cost savings to recipients over a ten year period. Although we believe the estimates presented herein are conservative estimates of savings, even extreme lower bound estimates result in a calculated net cost savings.

5. Regulatory Alternatives Considered

The Department considered the following alternatives to the proposed regulations: (1) Leaving the current regulations and current guidance in place and issuing no proposed regulations at all; (2) leaving the current regulations in place and reinstating the 2011 DCL or the 2014 Q&A; and (3) issuing proposed regulations that added to the current regulations broad statements of general principles under which recipients must promulgate grievance procedures. Alternative (2) was rejected by the Department for the reasons expressed in the preamble to these proposed regulations; the procedural and substantive problems with the 2011 DCL and the 2014 Q&A that prompted the Department to rescind that guidance remained as concerning now as when the guidance was rescinded, and the Department determined that restoring that guidance would once again leave recipients unclear about how to ensure they implemented prompt and equitable grievance procedures. Alternative (1) was rejected by the Department because even though current regulations require recipients to have grievance procedures providing for ''prompt and equitable'' resolution of sex discrimination complaints, current regulations are entirely silent on whether Title IX and those implementing regulations cover sexual harassment; addressing a crucial topic like sexual harassment through guidance would unnecessarily leave this serious issue subject only to non-legally binding guidance rather than regulatory prescriptions. The lack of legally binding standards would leave survivors of sexual harassment with fewer legal protections and persons accused of sexual harassment with no predictable, consistent expectation of the level of fairness or due process available from recipients' grievance procedures. Alternative (3) was rejected by the Department because the problems with the status quo regarding recipients' Title IX procedures, as identified by numerous stakeholders and experts, made it clear that a regulation that was too vague or broad (*e.g.,* ''Provide due process protections before disciplining a student for sexual harassment'') would not provide sufficient predictability or consistency across recipients to achieve the benefits sought by the Department. After careful consideration of various alternatives, the Department believes that the proposed regulations represent

[34] We note that a three percent discount rate would result in larger estimated savings over the ten year time horizon.

the most prudent and cost effective way of achieving the desired benefits of (a) ensuring that recipients know their specific legal obligations with respect to responses to sexual harassment and (b) ensuring that schools and colleges take all reports of sexual harassment seriously and all persons accused of sexual harassment are treated fairly.

6. Accounting Statement

As required by OMB Circular A–4, in the following table we have prepared an accounting statement showing the classification of the expenditures associated with the provisions of these proposed regulations. This table provides our best estimate of the changes in annual monetized costs, benefits, and transfers as a result of the proposed regulations.

TABLE 2—ACCOUNTING STATEMENT

Category	Benefits	
Clarity, specificity, and permanence with respect to recipient schools and colleges knowing their legal obligations under Title IX with respect to sexual harassment.	Not Quantified.	
A legal framework for schools' and colleges' response to sexual harassment that ensures all reports of sexual harassment are treated seriously and all persons accused are given due process before being disciplined for sexual harassment.	Not Quantified.	
Preserve constitutional rights, assure recipients that monetary damages will not be required by the Department, recognize religious exemptions in the absence of written request.	Not Quantified.	
	Costs	
	7%	3%
Reading and understanding the rule	$3,956,322	$3,384,055
Revision of grievance procedures	6,866,478	5,873,268
Posting of non-discrimination statement	179,305	153,369
Training of Title IX Coordinators, investigators, decision-makers	1,923,912	1,645,626
Response to informal reports	5,336,591	5,336,591
Reduction in the number of investigations	(99,176,416)	(99,176,416)
Increased investigation requirements	4,438,769	4,438,769
Appeal process	20,770,218	20,770,218
Informal resolution of complaints	(3,414,979)	(3,414,979)
Creation and maintenance of documentation	18,335,868	17,880,723

Clarity of the Regulations

Executive Order 12866 and the Presidential memorandum ''Plain Language in Government Writing'' require each agency to write regulations that are easy to understand. The Secretary invites comments on how to make these proposed regulations easier to understand, including answers to questions such as the following:

- Are the requirements in the proposed regulations clearly stated?
- Do the proposed regulations contain technical terms or other wording that interferes with their clarity?
- Does the format of the proposed regulations (use of headings, paragraphing, etc.) aid or reduce their clarity?
- Would the proposed regulations be easier to understand if we divided them into more (but shorter) sections? (A ''section'' is preceded by the symbol ''section'' and a numbered heading; for example, section 106.9 Dissemination of policy.)
- Could the description of the proposed regulations in the **SUPPLEMENTARY INFORMATION** section of this preamble be more helpful in making the proposed regulations easier to understand? If so, how?
- What else could we do to make the proposed regulations easier to understand?

To send any comments that concern how the Department could make these proposed regulations easier to understand, see the instructions in the **ADDRESSES** section of the preamble.

Deregulatory Action

Consistent with Executive Order 13771 (82 FR 9339, February 3, 2017), we have estimated that this proposed rule will result in cost savings. Therefore, this proposed rule would be considered an Executive Order 13771 deregulatory action.

Regulatory Flexibility Act (Small Business Impacts)

This analysis, required by the Regulatory Flexibility Act, presents an estimate of the effect of the proposed regulations on small entities. The U.S. Small Business Administration (SBA) Size Standards define proprietary institutions of higher education as small businesses if they are independently owned and operated, are not dominant in their field of operation, and have total annual revenue below $7,000,000. Nonprofit institutions are defined as small entities if they are independently owned and operated and not dominant in their field of operation. Public institutions and local educational agencies are defined as small organizations if they are operated by a government overseeing a population below 50,000.

Publicly available data from the National Center on Education Statistics' Common Core of Data indicate that, during the 2015–2016 school year, 99.4 percent of local educational agencies had enrollments of less than 50,000 students.

The Department's eZ-Audit data shows that there were 1,522 Title IV proprietary schools with revenue less than $7,000,000 for the 2015–2016 Award Year;[35] however, the Department lacks data to identify which public and private, nonprofit institutions qualify as small. Given the data limitations, the Department proposes a data-driven definition for ''small institution'' in each sector.

1. Proposed Definition

The Department has historically assumed that all private nonprofit institutions were small because none were considered dominant in their field. However, this approach masks significant differences in resources among different segments of these

[35] U.S. Dept. of Educ., Federal Student Aid, *Proprietary School 90/10 Revenue Percentages, studentaid.ed.gov/sa/about/data-center/school/proprietary* (select ''2015–2016 Award Year: Report and Summary Chart'' from the dropdown menu; click ''Go'').

institutions. The Department proposes to use enrollment data for its definition of small institutions of postsecondary education. Prior analyses show that enrollment and revenue are correlated for proprietary institutions. Further, enrollment data are readily available to the Department for every postsecondary institution while revenue is not. The Department analyzed a number of data elements available in IPEDS, including Carnegie Size Definitions, IPEDS institutional size categories, total FTE, and its own previous research on proprietary institutions referenced in ED–2017–OPE–0076i. As a result of this analysis, the Department proposes to use this definition to define small institutions:

• Two-year IHEs, enrollment less than 500 FTE; and

• Four-year IHEs, enrollment less than 1,000 FTE.

Table 3 shows the distribution of small institutions under this proposed definition using the 2016 IPEDS institution file.[36]

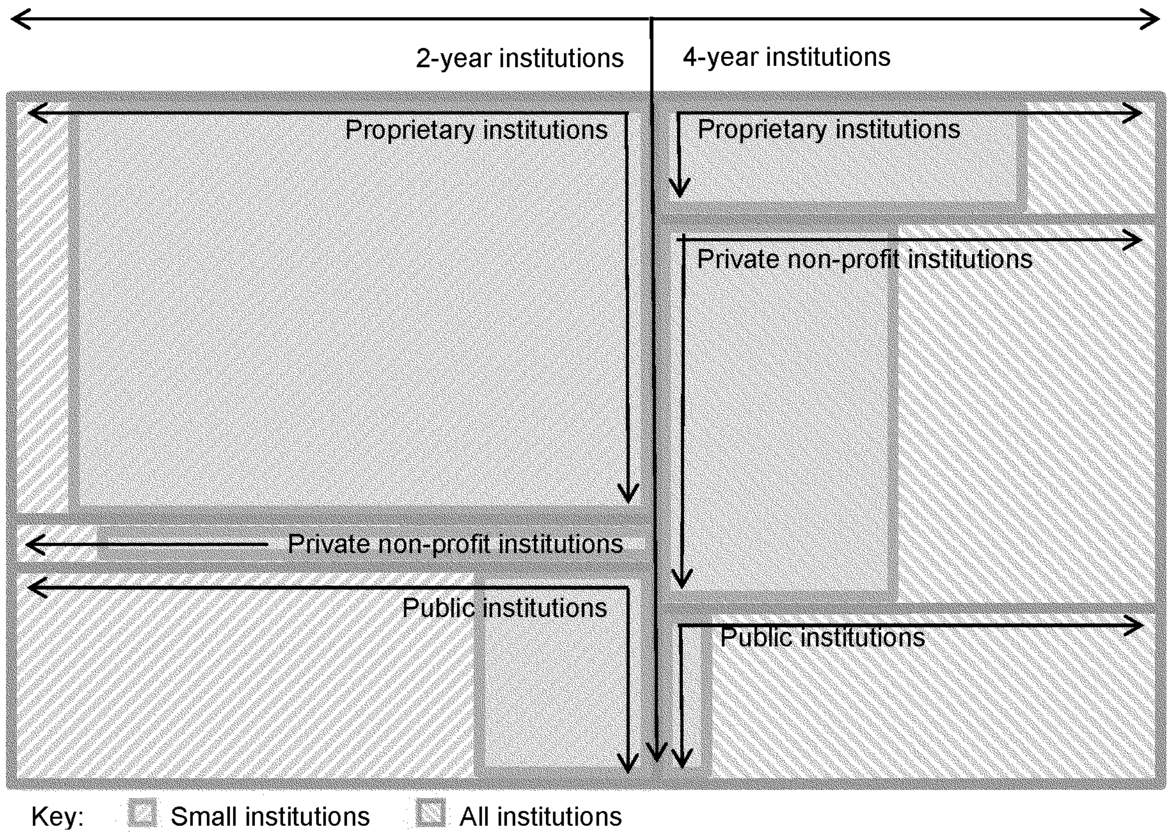
TABLE 3—SMALL INSTITUTIONS UNDER PROPOSED DEFINITION

Level	Type	Small	Total	Percent
2-year	Public	342	1,240	28
2-year	Private	219	259	85
2-year	Proprietary	2,147	2,463	87
4-year	Public	64	759	8
4-year	Private	799	1,672	48
4-year	Proprietary	425	558	76
Total		3,996	6,951	57

Under the proposed definition, the two-year small institutions are 68% of all two-year institutions (2,708/3,962), 68% of all small institutions (2,708/3,996), and 39% of the overall population of institutions (2,708/6,951); whereas, four-year small institutions are 43% of all four-year institutions (1,288/2,989), 32% of all small institutions (1,288/3,996), and 19% of the overall population of institutions (1,288/6,951). Figure 1 shows a visual representation of the universe and the percentage that would be defined as small using the above proposed definition.

[36] *See* U.S. Dept. of Educ., Nat'l Ctr. for Educ. Statistics, Integrated Postsecondary Educ. Data System 2016 Institutional Characteristics: Directory Information survey file (2016), *nces.ed.gov/ipeds/datacenter/DataFiles.aspx* (select ''Compare institutions;'' select ''By Groups'' and then ''EZ Group'' in the drop down menu; select ''Title IV Participating'' and ''U.S. Only'' and then click the ''Search'' button; click ''Continue;'' select ''Browse/Search Variables;'' click the plus sign next to ''institutional Characteristics'' > ''Control or Affiliation'' > ''Institutional Control or Affiliation'' and click the check boxes for ''2016–2017'' and ''Control of Institution;'' then select ''Institutional Characteristics'' > ''Institution classifications'' > ''1980–81 to current year'' and check the boxes for ''2016–2017'' and ''Sector of institution;'' click the plus sign next to ''Frequently Used/Derived Variables'' > ''Fall enrollment/retention rates'' > Total, full- and part-time enrollment and fall FTE'' and check the boxes next to ''Fall 2016–'' and ''Total enrollment'').

Figure 1: Small Institutions as a subset of all institutions



Similarly, small public institutions are 20% of all public institutions (406/1,999), 10% of all small public institutions (406/3,996), and 6% of the overall population of institutions (406/6,951). Small private nonprofit institutions are 53% of all private nonprofit institutions (1,018/1,999), 25% of all small institutions (1,018/3,996), and 15% of the overall population of institutions (1,018/6,951). Finally, and small proprietary institutions are 85% of all proprietary institutions (2,572/1,999), 64% of all small institutions (2,572/3,996), and 37% of the overall population of institutions (2,572/6,951).

The Department requests comment on the proposed definition. It will consider these suggestions in development of the final rule.

2. Impact Estimate Using Proposed Definition

2.a. Impact on Local Education Agencies

As disused in the *Discussion of Costs, Benefits, and Transfers* section of the *Regulatory Impact Analysis,* the Department estimates that these proposed regulations will result in a net cost savings for regulated entities, including LEAs. Although the savings accruing to any particular LEA depend on a number of factors, including the LEA's Title IX enforcement history, its response to the proposed regulations, and the number of formal complaints of sexual harassment the LEA receives in the future, the Department was interested in whether the regulations would have a disproportionate effect on small LEAs—that is, whether small LEAs were likely to realize benefits proportionate to their size and number.

Using data from the 2015–2016 Civil Rights Data Collection, we examined the number of allegations of harassment and bullying based on sex by LEA size. Given the extreme upper end of the enrollment distribution that qualifies an LEA as no longer a small entity for these purposes—less than one percent of all LEAs—it is reasonable to expect that the number of reported incidents of such harassment in small LEAs closely aligns with the average number for all LEAs. On average, LEAs reported 3.23 allegations of harassment or bullying on the basis of sex in the 2015–2016 school year. By comparison, large LEAs (those with more than 50,000 students) reported an average of 112.54 such incidents and small LEAs reported 2.64 allegations on average.

Based on the model described in the *Discussion of Costs, Benefits, and Transfers* section above, the Department estimates that a small LEA that experienced only an 8 percent reduction in investigations annually would experience a net cost savings over the ten year time horizon.

2.b. Impact on Institutions of Higher Education

As with LEAs, the Department estimates that these proposed regulations will result in a net cost savings for IHEs over the ten year time horizon. The amount of savings that any particular IHE will realize, if any, depends on a wide number of factors, including its Title IX compliance history, its response to the proposed regulations, and the number of formal complaints of sexual harassment the IHE receives in the future. Regardless of these variables, the Department did analyze extant data sources to attempt to analyze the likely differential impact across IHEs of various sizes.

As noted in the *Discussion of Costs, Benefits, and Transfers* section of the *Regulatory Impact Analysis,* an analysis of data reported by IHEs under the Clery Act found that smaller institutions tended to have, on average, fewer such reports per IHE.[37] Applying the definitions noted above, we also found that small entities had far fewer reports than did large entities.[38]

TABLE 4—AVERAGE CLERY ACT REPORTS OF SEXUAL OFFENSES BY SIZE/TYPE OF INSTITUTION

Level	Type	Not small	Small	Total
4-year	Public	12.1	1.1	11.3
4-year	Private	8.7	0.7	4.7
4-year	Proprietary	0.5	0.1	0.2
2-year	Public	0.7	0.2	0.7
2-year	Private	1.2	0.1	0.3
2-year	Proprietary	0.1	0.0	0.0

Assuming that Clery Act reports are correlated with the number of incidents of sexual harassment under Title IX, we would assume that small institutions have a lower number of Title IX complaints each year. As a result, they may experience less cost savings under this proposed rule given the smaller baseline. This lower baseline may, however, be offset slightly by the higher relative number of investigations undertaken at smaller institutions, as noted in the Senate report. Additionally, we note that small institutions also have a higher than average number of Clery Act reports occurring off-campus, indicating that they may also have a larger number of Title IX sexual harassment reports originating off-campus. In examining the model described in the *Discussion of Costs, Benefits, and Transfers Section* above, the Department estimates that, due to the small baseline number of investigations likely conducted by such entities currently, small institutions would need to realize a 37 percent reduction in investigations (equivalent to approximately one fewer investigation every five years) in order to realize a net cost savings across the 10 year time horizon. If the institution did not need to update its grievance procedures, it would only need to recognize a 33 percent reduction (approximately one fewer investigation every six years).

Paperwork Reduction Act of 1995

As part of its continuing effort to reduce paperwork and the burden of responding, the Department provides the general public and federal agencies with an opportunity to comment on proposed and continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)). This requirement helps ensure that: The public understands the Department's collection instructions; respondents can provide the requested data in the desired format; reporting burden (time and financial resources) is minimized; collection instruments are clearly understood; and the Department can properly assess the impact of collection requirements on respondents.

The following sections contain information collection requirements:

Section 106.45(b)(7)—Recordkeeping

Section 106.45(b)(7) would require recipients to maintain certain documentation regarding their Title IX activities. LEAs and IHEs would be required to create and maintain for a period of three years records of: Sexual harassment investigations; determinations; appeals; disciplinary sanctions and remedies; informal resolutions; materials used to train coordinators, investigators, and decision-makers; any actions, including supportive measures, taken in response to a report or formal complaint of sexual harassment; and documentation of the bases upon which the recipient concluded that its response was not clearly unreasonable and that its measures taken were designed to restore or preserve access to the recipient's educational program or activity. This information will allow a recipient and OCR to assess on a longitudinal basis the prevalence of sexual harassment affecting access to a recipient's programs and activities, whether a recipient is complying with Title IX when responding to reports and formal complaints, and the necessity for additional or different training. We estimate the volume of records to be created and retained may represent a decline from current recordkeeping due to clarification elsewhere in the proposed regulations that no investigation needs to be conducted where allegations, if true, do not constitute sexual harassment as defined under the regulations, and that informal means may be used to resolve sexual harassment complaints, both changes likely resulting in fewer investigative records being generated.

We estimate that recipients would have a higher first-year cost associated with establishing the system for documentation with a lower out-year cost for maintaining it. At the LEA level, we assume that the Title IX Coordinator would spend 4 hours in Year 1 establishing the system and an administrative assistant would spend 8 hours doing so. At the IHE level, we assume recipients are less likely to use a paper filing system and are likely to use an electronic database for managing such information. Therefore, we assume it will take a Title IX Coordinator 24 hours, an administrative assistant 40 hours, and a database administrator 40 hours to set up the system for a total Year 1 estimated cost for 16,606 LEAs and 6,766 IHEs of approximately $38,836,760.

In later years, we assume that the systems will be relatively simple to maintain. At the LEA level, we assume it will take the Title IX Coordinator 2 hours and an administrative assistant 4 hours to do so. At the IHE level, we assume 4 hours from the Title IX Coordinator, 40 hours from an administrative assistant, and 8 hours from a database administrator. In total, we estimate an ongoing cost of approximately $15,189,260 per year.

We estimate that LEAs would take 12 hours and IHEs would take 104 hours to establish and maintain a recordkeeping system for the required sexual harassment documentation during Year 1. In out-years, we estimate that LEAs

[37] We note that although enrollment and the number of Clery Act reports are positively correlated, enrollment alone explains only 26 percent of the observed variation in the number of reports.

[38] We note that this finding is driven largely by institutional size rather than a higher rate of offenses at larger institutions. Across all levels and school types, except for private 4-year institutions, small entities had higher rates of Clery Act reports per enrolled student than did larger ones. Private institutions generally had the highest rates, with private 4-year institutions having the highest rate of Clery Act reports of any category examined.

would take 6 hours annually and IHEs would take 52 hours annually to maintain the recordkeeping requirement for Title IX sexual harassment documentation. The total burden for this recordkeeping requirement over three years is 398,544 hours for LEAs and 1,407,328 hours for IHEs. Collectively, we estimate the burden over three years for LEAs and IHEs for recordkeeping of Title IX sexual harassment documents would be 1,805,872 hours under OMB Control Number 1870–NEW.

Section 106.44(b)(3)

Section 106.44(b)(3) applies only to IHEs and would require that where a complainant reports sexual harassment but does not wish to file a formal complaint, the IHE would have a safe harbor against a finding of deliberate indifference where it offers the complainant supportive measures, but must inform the complainant in writing of the complainant's right to file a formal complaint. This information provided by IHEs to complainants will ensure that complainants receive supportive measures to assist them in the aftermath of sexual harassment and also remain aware of their right to file a formal complaint that requires the IHE to investigate the sexual harassment allegations.

We estimate that most IHEs will need to create a form, or modify a form they already use, to comply with this requirement to inform the complainant in writing. We estimate that it will take Title IX Coordinators one (1) hour in Year 1 to create or modify a form to use for these purposes, that there will be no cost in out-years, and that the cost of maintaining such a form is captured under the recordkeeping requirements of § 106.45(b)(7) described above, for a total Year 1 cost of $441,270. Total burden for this requirement over three years is 6,766 hours.

Section 106.45(b)(2)—Notice of Allegations

Section 106.45(b)(2) would require all recipients, upon receipt of a formal complaint, to provide written notice to the complainant the respondent, informing the parties of the recipient's grievance procedures and providing sufficient details of the sexual harassment allegations being investigated. This written notice will help ensure that the nature and scope of the investigation, and the recipient's procedures, are clearly understood by the parties at the commencement of an investigation.

We estimate that most LEAs and IHEs will need to create a form, or modify one already used, to comply with these requirements. We estimate that it will take Title IX Coordinators one (1) hour to create or modify a form to use for these purposes, and that an attorney will spend 0.5 hours reviewing the form for compliance with § 106.45(b)(2). We estimate there will be no cost in out-years, and that the cost of maintaining such a form is captured under the recordkeeping requirements of § 106.45(b)(7) described above, for a total Year 1 cost of $2,584,310. Total burden for this requirement over three years is 35,058 hours.

Section 106.45(b)(6)—Informal Resolution

Section 106.45(b)(6) would require that recipients who wish to provide parties with the option of informal resolution of formal complaints, may offer this option to the parties but may only proceed by: First, providing the parties with written notice disclosing the sexual harassment allegations, the requirements of an informal resolution process, any consequences from participating in the informal resolution process; and second, obtaining the parties' voluntary, written consent to the informal resolution process.

This provision permits—but does not require—LEAs and IHEs to allow for voluntary participation informal resolution as a method of resolving the allegations raised in formal complaints without completing the investigation and adjudication.

We estimate that not all LEAs or IHEs will choose to offer informal resolution as a feature of their grievance process; of those who do, we estimate that most will need to create a form, or modify one already used, to comply with the requirements of this section. We estimate that it will take Title IX Coordinators one (1) hour to create or modify a form to use for these purposes, and that an attorney will spend 0.5 hours reviewing the form for compliance with § 106.45(b)(6). We estimate there will be no cost in out-years, and that the cost of maintaining such a form is captured under the recordkeeping requirements of § 106.45(b)(7) described above, for a total Year 1 cost of $2,584,310. The total burden for this requirement over three years is 35,058 hours.

COLLECTION OF INFORMATION

Regulatory section	Information collection	OMB control No. and estimated burden [change in burden]
106.45(b)(7)	This proposed regulatory provision would require LEAs and IHEs to maintain certain documentation related to Title IX activities.	OMB 1870–NEW. The burden over the first three years would be $69,215,280 and 1,805,872 hours.
106.44(b)(3)	This proposed regulatory provision would require IHEs who offer supportive measures to notify the complainant of the right to file a formal complaint.	OMB 1870–NEW. The burden over the first three years would be $441,270 and 6,766 hours.
106.45(b)(2)	This proposed regulatory provision would require LEAs and IHEs to provide parties with written notice when investigating a formal complaint.	OMB 1870–NEW. The burden over the first three years would be $2,584,310 and 35,058 hours.
106.45(b)(6)	This proposed regulatory provision would require LEAs and IHEs to provide written notice to parties wishing to participate in informal resolution of a formal complaint.	OMB 1870–NEW. The burden over the first three years would be $2,584,310 and 35,058 hours.

We have prepared an Information Collection Request (ICR) for these proposed requirements. If you want to review and comment on the ICR(s), please follow the instructions listed under the **ADDRESSES** section of this notice. Please note that the Office of Information and Regulatory Affairs (OMB) and the Department of Education review all comments posted at *www.regulations.gov.*

When commenting on the information collection requirements, we consider your comments on these collections of information in—

- Deciding whether the collections are necessary for the proper performance of our functions, including whether the information will have practical use;
- Evaluating the accuracy of our estimate of the burden of the collections, including the validity of our methodology and assumptions;
- Enhancing the quality, usefulness, and clarity of the information we collect; and
- Minimizing the burden on those who must respond, which includes exploring the use of appropriate automated, electronic, mechanical, or other technological collection techniques.

Addresses: Comments submitted in response to this notice should be submitted electronically through the Federal eRulemaking Portal at *www.regulations.gov* by selecting Docket ID No. ED 2018–OCR–0064 or via postal mail, commercial delivery, or hand delivery. Please specify the Docket ID number and indicate ''Information Collection Comments'' on the top of your comments if your comment(s) relate to the information collection for this rule. Written requests for information or comments submitted by postal mail or delivery should be addressed to the Director of the Information Collection Clearance Division, U.S. Department of Education, 400 Maryland Avenue SW, LBJ 216–36, Washington, DC 20202–4537. Comments submitted by fax or email and those submitted after the comment period will not be accepted. **FOR FURTHER INFORMATION CONTACT:** Electronically mail *ICDocketMgr@ed.gov.* Please do not send comments here.

Intergovernmental Review

This program is not subject to Executive Order 12372 and the regulations in 34 CFR part 79 because it is not a program or activity of the Department that provides federal financial assistance.

Assessment of Educational Impact

In accordance with section 411 of the General Education Provisions Act, 20 U.S.C. 1221e–4, the Secretary particularly requests comments on whether these proposed regulations would require transmission of information that any other agency or authority of the United States gathers or makes available.

Federalism

Executive Order 13132 requires us to ensure meaningful and timely input by State and local elected officials in the development of regulatory policies that have federalism implications. ''Federalism implications'' means 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. The proposed regulations in 34 CFR 106.34 and 34 CFR 106.35 may have federalism implications, as defined in Executive Order 13132. We encourage State and local elected officials to review and provide comments on these proposed regulations.

Accessible Format

Individuals with disabilities can obtain this document in an accessible format (*e.g.,* braille, large print, audiotape, or compact disc) on request to the person listed under **FOR FURTHER INFORMATION CONTACT.**

Electronic Access to This Document

The official version of this document is the document published in the **Federal Register**. Free internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available via the Federal Digital System at: *www.gpo.gov/fdsys.* You can view this document at that site, as well as all other documents of this Department published in the **Federal Register**, in text or PDF. To use PDF, you must have Adobe Acrobat Reader, which is available free at the site.

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

List of Subjects in 34 CFR Part 106

Education, Sex discrimination, Civil rights, Sexual harassment.

Dated: November 15, 2018.

Betsy DeVos,

Secretary of Education.

For the reasons discussed in the preamble, the Secretary proposes to amend part 106 of title 34 of the Code of Federal Regulations as follows:

PART 106—NONDISCRIMINATION ON THE BASIS OF SEX IN EDUCATION PROGRAMS OR ACTIVITIES RECEIVING FEDERAL FINANCIAL ASSISTANCE

■ 1. The authority citation for part 106 continues to read as follows:

Authority: 20 U.S.C. 1681 *et seq.,* unless otherwise noted.

■ 2. Section 106.3 is amended by revising the section heading and paragraph (a) to read as follows:

§ 106.3 Available remedies.

(a) *Remedial action.* If the Assistant Secretary finds that a recipient has violated this part, such recipient shall take such remedial action as the Assistant Secretary deems necessary to remedy the violation, which shall not include assessment of damages against the recipient. Nothing herein prohibits the Assistant Secretary from deeming necessary equitable relief to remedy a violation of this part.

* * * * *

■ 3. Section 106.6 is amended by revising the section heading and adding paragraphs (d), (e) and (f) to read as follows:

§ 106.6 Effect of other requirements and preservation of rights.

* * * * *

(d) *Constitutional protections.* Nothing in this part requires a recipient to:

(1) Restrict any rights that would otherwise be protected from government action by the First Amendment of the U.S. Constitution;

(2) Deprive a person of any rights that would otherwise be protected from government action under the Due Process Clauses of the Fifth and Fourteenth Amendments of the U.S. Constitution; or

(3) Restrict any other rights guaranteed against government action by the U.S. Constitution.

(e) *Effect of Section 444 of General Education Provisions Act (GEPA)/Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. 1232g and 34 CFR part 99.* The obligation to comply with this part is not obviated or alleviated by the FERPA statute or regulations.

(f) *Title VII of the Civil Rights Act of 1964.* Nothing in this part shall be read in derogation of an employee's rights under title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* or any regulations promulgated thereunder.

■ 4. Section 106.8 is revised to read as follows:

§ 106.8 Designation of coordinator, dissemination of policy, and adoption of grievance procedures.

(a) *Designation of coordinator.* Each recipient must designate at least one employee to coordinate its efforts to comply with its responsibilities under this part. The recipient must notify all its students and employees of the name or title, office address, electronic mail address, and telephone number of the employee or employees designated pursuant to this paragraph (a).

(b) *Dissemination of policy*—(1) *Notification of policy.* Each recipient must notify applicants for admission and employment, students, employees, and all unions or professional organizations holding collective bargaining or professional agreements with the recipient that it does not discriminate on the basis of sex in the education program or activity that it operates, and that it is required by title IX and this part not to discriminate in such a manner. Such notification must state that the requirement not to discriminate in the education program or activity extends to employment and admission (unless subpart C of this part does not apply to the recipient) and that inquiries about the application of title IX and this part to such recipient may be referred to the employee designated pursuant to paragraph (a) of this section, to the Assistant Secretary, or both.

(2) *Publications.* (i) Each recipient must prominently display a statement of the policy described in paragraph (b)(1) of this section on its website, if any, and in each handbook or catalog that it makes available to persons entitled to a notification under paragraph (b)(1) of this section.

(ii) A recipient must not use or distribute a publication stating that the recipient treats applicants, students, or employees differently on the basis of sex except as such treatment is permitted by this part.

(c) *Adoption of grievance procedures.* A recipient must adopt and publish grievance procedures that provide for the prompt and equitable resolution of student and employee complaints alleging any action that would be prohibited by this part and of formal complaints as defined in § 106.30. A recipient must provide notice of the recipient's grievance procedures, including how to report sex discrimination and how to file or respond to a complaint of sex discrimination, to students and employees.

(d) *Application.* The requirements that a recipient adopt a policy and grievance procedures as described in this section apply only to exclusion from participation, denial of benefits, or discrimination on the basis of sex occurring against a person in the United States.

§ 106.9 [Removed and Reserved]

■ 5. Section 106.9 is removed and reserved.

■ 6. Section 106.12 is amended by revising paragraph (b) to read as follows:

§ 106.12 Educational institutions controlled by religious organizations.

* * * * *

(b) *Assurance of exemption.* An educational institution that seeks assurance of the exemption set forth in paragraph (a) of this section may do so by submitting in writing to the Assistant Secretary a statement by the highest ranking official of the institution, identifying the provisions of this part that conflict with a specific tenet of the religious organization. An institution is not required to seek assurance from the Assistant Secretary in order to assert such an exemption. In the event the Department notifies an institution that it is under investigation for noncompliance with this part and the institution wishes to assert an exemption set forth in paragraph (a) of this section, the institution may at that time raise its exemption by submitting in writing to the Assistant Secretary a statement by the highest ranking official of the institution, identifying the provisions of this part which conflict with a specific tenet of the religious organization, whether or not the institution had previously sought assurance of the exemption from the Assistant Secretary.

* * * * *

■ 7. Add § 106.30 to read as follows:

§ 106.30 Definitions.

As used in this subpart:

Actual knowledge means notice of sexual harassment or allegations of sexual harassment to a recipient's Title IX Coordinator or any official of the recipient who has authority to institute corrective measures on behalf of the recipient, or to a teacher in the elementary and secondary context with regard to student-on-student harassment. Imputation of knowledge based solely on respondeat superior or constructive notice is insufficient to constitute actual knowledge. This standard is not met when the only official of the recipient with actual knowledge is also the respondent. The mere ability or obligation to report sexual harassment does not qualify an employee, even if that employee is an official, as one who has authority to institute corrective measures on behalf of the recipient.

Complainant means an individual who has reported being the victim of conduct that could constitute sexual harassment, or on whose behalf the Title IX Coordinator has filed a formal complaint. For purposes of this definition, the person to whom the individual has reported must be the Title IX Coordinator or another person to whom notice of sexual harassment results in the recipient's actual knowledge under this section.

Formal complaint means a document signed by a complainant or by the Title IX Coordinator alleging sexual harassment against a respondent about conduct within its education program or activity and requesting initiation of the recipient's grievance procedures consistent with § 106.45.

Respondent means an individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment.

Sexual harassment means:

(1) An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct;

(2) Unwelcome conduct on the basis of sex that is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity; or

(3) Sexual assault, as defined in 34 CFR 668.46(a).

Supportive measures means non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the complainant or the respondent before or after the filing of a formal complaint or where no formal complaint has been filed. Such measures are designed to restore or preserve access to the recipient's education program or activity, without unreasonably burdening the other party; protect the safety of all parties and the recipient's educational environment; and deter sexual harassment. Supportive measures may include counseling, extensions of deadlines or other course-related adjustments, modifications of work or class schedules, campus escort services, mutual restrictions on contact between the parties, changes in work or housing locations, leaves of absence, increased security and monitoring of certain areas of the campus, and other similar measures. The recipient must maintain as confidential any supportive measures provided to the complainant or respondent, to the extent that maintaining such confidentiality would not impair the ability of the institution to provide the supportive measures. The Title IX Coordinator is responsible for coordinating the effective implementation of supportive measures.

■ 8. Add §§ 106.44 and 106.45 to read as follows:

§ 106.44 Recipient's response to sexual harassment.

(a) *General.* A recipient with actual knowledge of sexual harassment in an education program or activity of the recipient against a person in the United States must respond in a manner that is not deliberately indifferent. A recipient is deliberately indifferent only if its response to sexual harassment is clearly unreasonable in light of the known circumstances.

(b) *Specific circumstances.* (1) A recipient must follow procedures consistent with § 106.45 in response to a formal complaint. If the recipient follows procedures (including implementing any appropriate remedy as required) consistent with § 106.45 in response to a formal complaint, the recipient's response to the formal complaint is not deliberately indifferent and does not otherwise constitute discrimination under title IX.

(2) When a recipient has actual knowledge regarding reports by multiple complainants of conduct by the same respondent that could constitute sexual harassment, the Title IX Coordinator must file a formal complaint. If the Title IX Coordinator files a formal complaint in response to the reports, and the recipient follows procedures (including implementing any appropriate remedy as required) consistent with § 106.45 in response to the formal complaint, the recipient's response to the reports is not deliberately indifferent.

(3) For institutions of higher education, a recipient is not deliberately indifferent when in the absence of a formal complaint the recipient offers and implements supportive measures designed to effectively restore or preserve the complainant's access to the recipient's education program or activity. At the time supportive measures are offered, the recipient must in writing inform the complainant of the right to file a formal complaint at that time or a later date, consistent with other provisions of this part.

(4) If paragraphs (b)(1) through (3) of this section are not implicated, a recipient with actual knowledge of sexual harassment in an education program or activity of the recipient against a person in the United States must, consistent with paragraph (a) of this section, respond in a manner that is not deliberately indifferent. A recipient is deliberately indifferent only if its response to sexual harassment is clearly unreasonable in light of the known circumstances.

(5) The Assistant Secretary will not deem a recipient's determination regarding responsibility to be evidence of deliberate indifference by the recipient merely because the Assistant Secretary would have reached a different determination based on an independent weighing of the evidence.

(c) *Emergency removal.* Nothing in this section precludes a recipient from removing a respondent from the recipient's education program or activity on an emergency basis, provided that the recipient undertakes an individualized safety and risk analysis, determines that an immediate threat to the health or safety of students or employees justifies removal, and provides the respondent with notice and an opportunity to challenge the decision immediately following the removal. This provision shall not be construed to modify any rights under the Individuals with Disabilities Education Act, Section 504 of the Rehabilitation Act of 1973, or title II of the Americans with Disabilities Act.

(d) *Administrative leave.* Nothing in this section precludes a recipient from placing a non-student employee respondent on administrative leave during the pendency of an investigation.

§ 106.45 Grievance procedures for formal complaints of sexual harassment.

(a) *Discrimination on the basis of sex.* A recipient's treatment of a complainant in response to a formal complaint of sexual harassment may constitute discrimination on the basis of sex under title IX. A recipient's treatment of the respondent may also constitute discrimination on the basis of sex under title IX.

(b) *Grievance procedures.* For the purpose of addressing formal complaints of sexual harassment, grievance procedures must comply with the requirements of this section.

(1) *Basic requirements for grievance procedures.* Grievance procedures must—

(i) Treat complainants and respondents equitably. An equitable resolution for a complainant must include remedies where a finding of responsibility for sexual harassment has been made against the respondent; such remedies must be designed to restore or preserve access to the recipient's education program or activity. An equitable resolution for a respondent must include due process protections before any disciplinary sanctions are imposed;

(ii) Require an objective evaluation of all relevant evidence—including both inculpatory and exculpatory evidence—and provide that credibility determinations may not be based on a person's status as a complainant, respondent, or witness;

(iii) Require that any individual designated by a recipient as a coordinator, investigator, or decision-maker not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent. A recipient must ensure that coordinators, investigators, and decision-makers receive training on both the definition of sexual harassment and how to conduct an investigation and grievance process, including hearings, if applicable, that protect the safety of students, ensure due process protections for all parties, and promote accountability. Any materials used to train coordinators, investigators, or decision-makers may not rely on sex stereotypes and must promote impartial investigations and adjudications of sexual harassment;

(iv) Include a presumption that the respondent is not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process;

(v) Include reasonably prompt timeframes for conclusion of the grievance process, including reasonably prompt timeframes for filing and resolving appeals if the recipient offers an appeal, and a process that allows for the temporary delay of the grievance process or the limited extension of timeframes for good cause with written notice to the complainant and the respondent of the delay or extension and the reasons for the action. Good cause may include considerations such as the absence of the parties or witnesses, concurrent law enforcement activity, or the need for language assistance or accommodation of disabilities;

(vi) Describe the range of possible sanctions and remedies that the recipient may implement following any determination of responsibility;

(vii) Describe the standard of evidence to be used to determine responsibility;

(viii) Include the procedures and permissible bases for the complainant and respondent to appeal if the recipient offers an appeal; and

(ix) Describe the range of supportive measures available to complainants and respondents.

(2) *Notice of allegations*—(i) *Notice upon receipt of formal complaint.* Upon receipt of a formal complaint, a

recipient must provide the following written notice to the parties who are known:

(A) Notice of the recipient's grievance procedures.

(B) Notice of the allegations constituting a potential violation of the recipient's code of conduct, including sufficient details known at the time and with sufficient time to prepare a response before any initial interview. Sufficient details include the identities of the parties involved in the incident, if known, the specific section of the recipient's code of conduct allegedly violated, the conduct allegedly constituting sexual harassment under this part and under the recipient's code of conduct, and the date and location of the alleged incident, if known. The written notice must include a statement that the respondent is presumed not responsible for the alleged conduct and that a determination regarding responsibility is made at the conclusion of the grievance process. The written notice must also inform the parties that they may request to inspect and review evidence under paragraph (b)(3)(viii) of this section and inform the parties of any provision in the recipient's code of conduct that prohibits knowingly making false statements or knowingly submitting false information during the grievance process.

(ii) *Ongoing notice requirement.* If, in the course of an investigation, the recipient decides to investigate allegations not included in the notice provided pursuant to paragraph (b)(2)(i)(B) of this section, the recipient must provide notice of the additional allegations to the parties, if known.

(3) *Investigations of a formal complaint.* The recipient must investigate the allegations in a formal complaint. If the conduct alleged by the complainant would not constitute sexual harassment as defined in § 106.30 even if proved or did not occur within the recipient's program or activity, the recipient must dismiss the formal complaint with regard to that conduct. When investigating a formal complaint, a recipient must—

(i) Ensure that the burden of proof and the burden of gathering evidence sufficient to reach a determination regarding responsibility rest on the recipient and not on the parties;

(ii) Provide equal opportunity for the parties to present witnesses and other inculpatory and exculpatory evidence;

(iii) Not restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence;

(iv) Provide the parties with the same opportunities to have others present during any grievance proceeding, including the opportunity to be accompanied to any related meeting or proceeding by the advisor of their choice, and not limit the choice of advisor or presence for either the complainant or respondent in any meeting or grievance proceeding; however, the recipient may establish restrictions regarding the extent to which the advisor may participate in the proceedings, as long as the restrictions apply equally to both parties;

(v) Provide to the party whose participation is invited or expected written notice of the date, time, location, participants, and purpose of all hearings, investigative interviews, or other meetings with a party, with sufficient time for the party to prepare to participate;

(vi) For recipients that are elementary and secondary schools, the recipient's grievance procedure may require a live hearing. With or without a hearing, the decision-maker must, after the recipient has incorporated the parties' responses to the investigative report under paragraph (b)(3)(ix) of this section, ask each party and any witnesses any relevant questions and follow-up questions, including those challenging credibility, that a party wants asked of any party or witnesses. If no hearing is held, the decision-maker must afford each party the opportunity to submit written questions, provide each party with the answers, and allow for additional, limited follow-up questions from each party. With or without a hearing, all such questioning must exclude evidence of the complainant's sexual behavior or predisposition, unless such evidence about the complainant's sexual behavior is offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or if the evidence concerns specific incidents of the complainant's sexual behavior with respect to the respondent and is offered to prove consent. The decision-maker must explain to the party proposing the questions any decision to exclude questions as not relevant;

(vii) For institutions of higher education, the recipient's grievance procedure must provide for a live hearing. At the hearing, the decision-maker must permit each party to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility. Such cross-examination at a hearing must be conducted by the party's advisor of choice, notwithstanding the discretion of the recipient under paragraph (b)(3)(iv) of this section to otherwise restrict the extent to which advisors may participate in the proceedings. If a party does not have an advisor present at the hearing, the recipient must provide that party an advisor aligned with that party to conduct cross-examination. All cross-examination must exclude evidence of the complainant's sexual behavior or predisposition, unless such evidence about the complainant's sexual behavior is offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or if the evidence concerns specific incidents of the complainant's sexual behavior with respect to the respondent and is offered to prove consent. At the request of either party, the recipient must provide for cross-examination to occur with the parties located in separate rooms with technology enabling the decision-maker and parties to simultaneously see and hear the party answering questions. The decision-maker must explain to the party's advisor asking cross-examination questions any decision to exclude questions as not relevant. If a party or witness does not submit to cross-examination at the hearing, the decision-maker must not rely on any statement of that party or witness in reaching a determination regarding responsibility;

(viii) Provide both parties an equal opportunity to inspect and review any evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint, including the evidence upon which the recipient does not intend to rely in reaching a determination regarding responsibility, so that each party can meaningfully respond to the evidence prior to conclusion of the investigation. Prior to completion of the investigative report, the recipient must send to each party and the party's advisor, if any, the evidence subject to inspection and review in an electronic format, such as a file sharing platform, that restricts the parties and advisors from downloading or copying the evidence, and the parties shall have at least ten days to submit a written response, which the investigator will consider prior to completion of the investigative report. The recipient must make all such evidence subject herein to the parties' inspection and review available at any hearing to give each party equal opportunity to refer to such evidence during the hearing, including for purposes of cross-examination; and

(ix) Create an investigative report that fairly summarizes relevant evidence and, at least ten days prior to a hearing (if a hearing is required under this section) or other time of determination regarding responsibility, provide a copy of the report to the parties for their review and written response.

(4) *Determination regarding responsibility.* (i) The decision-maker(s), who cannot be the same person(s) as the Title IX Coordinator or the investigator(s), must issue a written determination regarding responsibility. To reach this determination, the recipient must apply either the preponderance of the evidence standard or the clear and convincing evidence standard, although the recipient may employ the preponderance of the evidence standard only if the recipient uses that standard for conduct code violations that do not involve sexual harassment but carry the same maximum disciplinary sanction. The recipient must also apply the same standard of evidence for complaints against students as it does for complaints against employees, including faculty.

(ii) The written determination must include—

(A) Identification of the section(s) of the recipient's code of conduct alleged to have been violated;

(B) A description of the procedural steps taken from the receipt of the complaint through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held;

(C) Findings of fact supporting the determination;

(D) Conclusions regarding the application of the recipient's code of conduct to the facts;

(E) A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility, any sanctions the recipient imposes on the respondent, and any remedies provided by the recipient to the complainant designed to restore or preserve access to the recipient's education program or activity; and

(F) The recipient's procedures and permissible bases for the complainant and respondent to appeal, if the recipient offers an appeal.

(iii) The recipient must provide the written determination to the parties simultaneously. If the recipient does not offer an appeal, the determination regarding responsibility becomes final on the date that the recipient provides the parties with the written determination. If the recipient offers an appeal, the determination regarding responsibility becomes final at either the conclusion of the appeal process, if an appeal is filed, or, if an appeal is not filed, the date on which an appeal would no longer be considered timely.

(5) *Appeals.* A recipient may choose to offer an appeal. If a recipient offers an appeal, it must allow both parties to appeal. In cases where there has been a finding of responsibility, although a complainant may appeal on the ground that the remedies are not designed to restore or preserve the complainant's access to the recipient's education program or activity, a complainant is not entitled to a particular sanction against the respondent. As to all appeals, the recipient must:

(i) Notify the other party in writing when an appeal is filed and implement appeal procedures equally for both parties;

(ii) Ensure that the appeal decision-maker is not the same person as any investigator(s) or decision-maker(s) that reached the determination of responsibility;

(iii) Ensure that the appeal decision-maker complies with the standards set forth in paragraph (b)(1)(iii) of this section;

(iv) Give both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome;

(v) Issue a written decision describing the result of the appeal and the rationale for the result; and

(vi) Provide the written decision simultaneously to both parties.

(6) *Informal resolution.* At any time prior to reaching a determination regarding responsibility the recipient may facilitate an informal resolution process, such as mediation, that does not involve a full investigation and adjudication, provided that the recipient—

(i) Provides to the parties a written notice disclosing—

(A) The allegations;

(B) The requirements of the informal resolution process including the circumstances under which it precludes the parties from resuming a formal complaint arising from the same allegations, if any; and

(C) Any consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared; and

(ii) Obtains the parties' voluntary, written consent to the informal resolution process.

(7) *Recordkeeping.* (i) A recipient must create, make available to the complainant and respondent, and maintain for a period of three years records of—

(A) Each sexual harassment investigation including any determination regarding responsibility, any disciplinary sanctions imposed on the respondent, and any remedies provided to the complainant designed to restore or preserve access to the recipient's education program or activity;

(B) Any appeal and the result therefrom;

(C) Informal resolution, if any; and

(D) All materials used to train coordinators, investigators, and decision-makers with regard to sexual harassment.

(ii) A recipient must create and maintain for a period of three years records of any actions, including any supportive measures, taken in response to a report or formal complaint of sexual harassment. In each instance, the recipient must document the basis for its conclusion that its response was not clearly unreasonable, and document that it has taken measures designed to restore or preserve access to the recipient's educational program or activity. The documentation of certain bases or measures does not limit the recipient in the future from providing additional explanations or detailing additional measures taken.

[FR Doc. 2018–25314 Filed 11–28–18; 8:45 am]

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FEDERAL REGISTER

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Part IV

The President

Memorandum of November 26, 2018—Delegation of Authorities Under Section 1757 of the National Defense Authorization Act for Fiscal Year 2019

Executive Order 13851—Blocking Territory of Certain Persons Contributing to the Situation in Nicaragua

Federal Register

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Presidential Documents

Title 3—

The President

Memorandum of November 26, 2018

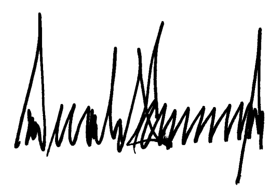
Delegation of Authorities Under Section 1757 of the National Defense Authorization Act for Fiscal Year 2019

Memorandum for the Secretary of Commerce

By the authority vested in me as President by the Constitution and the laws of the United States of America, including section 301 of title 3, United States Code, I hereby delegate to the Secretary of Commerce the functions and authorities vested in the President by section 1757 of the National Defense Authorization Act for Fiscal Year 2019 (Public Law 115–232).

The delegation in this memorandum shall apply to any provision of any future public law that is the same or substantially the same as the provision referenced in this memorandum.

You are authorized and directed to publish this memorandum in the *Federal Register.*



THE WHITE HOUSE,
Washington, November 26, 2018

[FR Doc. 2018–26153
Filed 11–28–18; 11:15 am]
Billing code 3510–07–P

Presidential Documents

Executive Order 13851 of November 27, 2018

Blocking Property of Certain Persons Contributing to the Situation in Nicaragua

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the International Emergency Economic Powers Act (50 U.S.C. 1701 *et seq.*) (IEEPA), the National Emergencies Act (50 U.S.C. 1601 *et seq.*) (NEA), section 212(f) of the Immigration and Nationality Act of 1952 (8 U.S.C. 1182(f)), and section 301 of title 3, United States Code,

I, DONALD J. TRUMP, President of the United States of America, find that the situation in Nicaragua, including the violent response by the Government of Nicaragua to the protests that began on April 18, 2018, and the Ortega regime's systematic dismantling and undermining of democratic institutions and the rule of law, its use of indiscriminate violence and repressive tactics against civilians, as well as its corruption leading to the destabilization of Nicaragua's economy, constitutes an unusual and extraordinary threat to the national security and foreign policy of the United States, and I hereby declare a national emergency to deal with that threat. I hereby determine and order:

Section 1. (a) All property and interests in property that are in the United States, that hereafter come within the United States, or that are or hereafter come within the possession or control of any United States person of the following persons are blocked and may not be transferred, paid, exported, withdrawn, or otherwise dealt in: any person determined by the Secretary of the Treasury, in consultation with the Secretary of State:

(i) to be responsible for or complicit in, or to have directly or indirectly engaged or attempted to engage in, any of the following:

(A) serious human rights abuse in Nicaragua;

(B) actions or policies that undermine democratic processes or institutions in Nicaragua;

(C) actions or policies that threaten the peace, security, or stability of Nicaragua;

(D) any transaction or series of transactions involving deceptive practices or corruption by, on behalf of, or otherwise related to the Government of Nicaragua or a current or former official of the Government of Nicaragua, such as the misappropriation of public assets or expropriation of private assets for personal gain or political purposes, corruption related to government contracts, or bribery;

(ii) to be a leader or official of an entity that has, or whose members have, engaged in any activity described in subsection (a)(i) of this section or of an entity whose property and interests in property are blocked pursuant to this order;

(iii) to be an official of the Government of Nicaragua or to have served as an official of the Government of Nicaragua at any time on or after January 10, 2007;

(iv) to have materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services in support of:

(A) any activities described in subsection (a)(i) of this section; or

(B) any person whose property and interests in property are blocked pursuant to this order; or

(v) to be owned or controlled by, or to have acted or purported to act for or on behalf of, directly or indirectly, any person whose property and interests in property are blocked pursuant to this order.

(b) The prohibitions in subsection (a) of this section apply except to the extent provided by statutes, or in regulations, orders, directives, or licenses that may be issued pursuant to this order, and notwithstanding any contract entered into or any license or permit granted prior to the date of this order.

Sec. 2. The unrestricted immigrant and nonimmigrant entry into the United States of aliens determined to meet one or more of the criteria in section 1 of this order would be detrimental to the interests of the United States, and the entry of such persons into the United States, as immigrants or nonimmigrants, is hereby suspended, except where the Secretary of State determines that the person's entry is in the national interest of the United States. Such persons shall be treated as persons covered by section 1 of Proclamation 8693 of July 24, 2011 (Suspension of Entry of Aliens Subject to United Nations Security Council Travel Bans and International Emergency Economic Powers Act Sanctions).

Sec. 3. I hereby determine that the making of donations of the type of articles specified in section 203(b)(2) of IEEPA (50 U.S.C. 1702(b)(2)) by, to, or for the benefit of any person whose property and interests in property are blocked pursuant to section 1 of this order would seriously impair my ability to deal with the national emergency declared in this order, and I hereby prohibit such donations as provided by section 1 of this order.

Sec. 4. The prohibitions in section 1 of this order include:

(a) the making of any contribution or provision of funds, goods, or services by, to, or for the benefit of any person whose property and interests in property are blocked pursuant to this order; and

(b) the receipt of any contribution or provision of funds, goods, or services from any such person.

Sec. 5. (a) Any transaction that evades or avoids, has the purpose of evading or avoiding, causes a violation of, or attempts to violate any of the prohibitions set forth in this order is prohibited.

(b) Any conspiracy formed to violate any of the prohibitions set forth in this order is prohibited.

Sec. 6. For the purposes of this order:

(a) the term ''person'' means an individual or entity;

(b) the term ''entity'' means a partnership, association, trust, joint venture, corporation, group, subgroup, or other organization;

(c) the term ''United States person'' means any United States citizen, permanent resident alien, entity organized under the laws of the United States or any jurisdiction within the United States (including foreign branches), or any person in the United States; and

(d) the term ''Government of Nicaragua'' means the Government of Nicaragua, any political subdivision, agency, or instrumentality thereof, including the Central Bank of Nicaragua, and any person owned or controlled by, or acting for or on behalf of, the Government of Nicaragua.

Sec. 7. For those persons whose property and interests in property are blocked pursuant to this order who might have a constitutional presence in the United States, I find that because of the ability to transfer funds or other assets instantaneously, prior notice to such persons of measures to be taken pursuant to this order would render those measures ineffectual. I therefore determine that for these measures to be effective in addressing the national emergency declared in this order, there need be no prior notice of a listing or determination made pursuant to section 1 of this order.

Sec. 8. The Secretary of the Treasury, in consultation with the Secretary of State, is hereby authorized to take such actions, including promulgating rules and regulations, and to employ all powers granted to the President by IEEPA as may be necessary to implement this order. The Secretary of the Treasury may, consistent with applicable law, redelegate any of these functions within the Department of the Treasury. All agencies of the United States Government shall take all appropriate measures within their authority to carry out the provisions of this order.

Sec. 9. The Secretary of the Treasury, in consultation with the Secretary of State, is hereby authorized to submit the recurring and final reports to the Congress on the national emergency declared in this order, consistent with section 401(c) of the NEA (50 U.S.C. 1641(c)) and section 204(c) of IEEPA (50 U.S.C. 1703(c)).

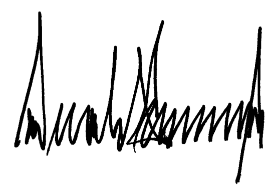
Sec. 10. (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.



THE WHITE HOUSE,
November 27, 2018.

[FR Doc. 2018–26156
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Federal Register

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LIST OF PUBLIC LAWS

Note: No public bills which have become law were received by the Office of the Federal Register for inclusion in today's **List of Public Laws**.

Last List November 28, 2018

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