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Presidential Documents

Title 3—

The President

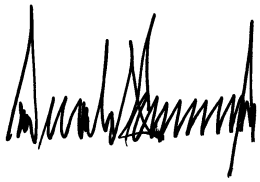
Memorandum of November 29, 2018

Delegation of Authority Under Section 614(a)(1) of the Foreign Assistance Act of 1961

Memorandum for the Secretary of State

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, and subject to fulfilling the requirements of section 614(a)(3) of the Foreign Assistance Act of 1961 (FAA), I hereby delegate to you the authority under section 614(a)(1) of the FAA to determine whether it is important to the security interests of the United States to use up to $1.3 million in International Military Education and Training (IMET) funds to furnish assistance to Thailand without regard to any other provision of law within the purview of section 614(a)(1) of the FAA.

You are authorized and directed to publish this memorandum in the *Federal Register.*



THE WHITE HOUSE,
Washington, November 29, 2018

[FR Doc. 2018–27694
Filed 12–19–18; 8:45 am]
Billing code 4710–10–P

Presidential Documents

Presidential Determination No. 2019–05 of November 29, 2018

Presidential Determination With Respect to the Efforts of Foreign Governments Regarding Trafficking in Persons

Memorandum for the Secretary of State

Consistent with section 110 of the Trafficking Victims Protection Act of 2000 (22 U.S.C. 7107) (the ''Act''), as amended, I hereby determine as follows:

As provided for in section 110(d)(1)(A)(i) of the Act, I determine that the United States will not provide nonhumanitarian, nontrade-related assistance to the Governments of Belarus, Belize, Bolivia, Burma, Burundi, China, Comoros, the Republic of the Congo (ROC), the Democratic Republic of the Congo (DRC), Equatorial Guinea, Gabon, Iran, Laos, Mauritania, Papua New Guinea (PNG), South Sudan, Turkmenistan, and Venezuela for Fiscal Year (FY) 2019 until such governments comply with the minimum standards or make significant efforts to bring themselves into compliance with the Act.

As provided for in section 110(d)(1)(A)(ii) of the Act, I determine that the United States will not provide nonhumanitarian, nontrade-related assistance to, or allow funding for participation in educational and cultural exchange programs by officials or employees of, the Governments of Eritrea, the Democratic People's Republic of Korea (DPRK), Russia, and Syria for FY 2019 until such governments comply with the Act's minimum standards or make significant efforts to bring themselves into compliance with the Act.

As provided for in section 110(d)(1)(B) of the Act, I hereby instruct the United States Executive Director of each multilateral development bank, as defined in the Act, and of the International Monetary Fund to vote against and use best efforts to deny any loan or other utilization of the funds of the respective institution (other than for humanitarian assistance; for trade-related assistance; or for development assistance that directly addresses basic human needs, is not administered by the government of such country, and confers no benefit to that government) for the Governments of Bolivia, Burma, Burundi, China, Comoros, ROC, DRC, DPRK, Equatorial Guinea, Gabon, Iran, Laos, Mauritania, Russia, South Sudan, Syria, and Venezuela for FY 2019 until such governments comply with the minimum standards or make significant efforts to bring themselves into compliance with the Act.

Consistent with section 110(d)(4) of the Act, I determine that a partial waiver to allow International Military Education and Training (IMET), Foreign Military Financing (FMF), and Foreign Military Sales (FMS) related to FMF with respect to Belize would promote the purposes of the Act or is otherwise in the national interest of the United States;

Consistent with section 110(d)(4) of the Act, I determine that a partial waiver to allow assistance described in section 110(d)(1)(A)(i) of the Act with respect to PNG—with the exception of Peacekeeping Operations (PKO), FMS not related to FMF, and Excess Defense Articles (EDA)—would promote the purposes of the Act or is otherwise in the national interest of the United States;

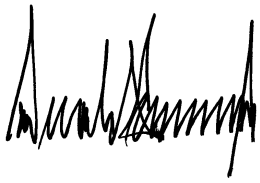
Consistent with section 110(d)(4) of the Act, I determine that a partial waiver with respect to Eritrea to allow funding for educational and cultural

exchange programs described in section 110(d)(1)(A)(ii) of the Act, and a partial waiver to allow assistance described in section 110(d)(1)(A)(ii) of the Act with respect to Eritrea—with the exception of FMF, FMS, IMET, EDA, and PKO—would promote the purposes of the Act or is otherwise in the national interest of the United States;

Consistent with section 110(d)(4) of the Act, I determine that the provision of all programs, projects, and activities described in section 110(d)(1)(A)(i) of the Act to the Governments of Belarus and Turkmenistan would promote the purposes of the Act or is otherwise in the national interest of the United States; and

Consistent with section 110(d)(4) of the Act, I determine that providing assistance described in section 110(d)(1)(B) of the Act to Belarus, Belize, Eritrea, PNG, and Turkmenistan would promote the purposes of the Act or is otherwise in the national interest of the United States.

You are authorized and directed to submit this determination, the certification required by section 110(e) of the Act, and the Department of State's Memorandum of Justification, on which I have relied, to the Congress, and to publish the determination in the *Federal Register.*



THE WHITE HOUSE,
Washington, November 29, 2018

[FR Doc. 2018–27696
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Rules and Regulations

Federal Register

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

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

NUCLEAR REGULATORY COMMISSION

[NRC–2018–0038]

10 CFR Chapter I

Clarification of the Requirements for Reactor Pressure Vessel Upper Head Bare Metal Visual Examinations

AGENCY: Nuclear Regulatory Commission.

ACTION: Regulatory issue summary; issuance.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is issuing Regulatory Issue Summary (RIS) 2018–06, ''Clarification of the Requirements for Reactor Pressure Vessel Upper Head Bare Metal Visual Examinations.'' This RIS is intended to clarify the requirements for bare-metal visual examination, which can be either a visual examination of the bare metal of the upper head or a visual testing (VT)–2 examination under the insulation to meet the requirements of notes 1 and 4 in Table 1 of American Society of Mechanical Engineers (ASME) Code Case N–729–4, ''Alternative Examination Requirements for PWR Reactor Vessel Upper Heads with Nozzles Having Pressure-Retaining Partial-Penetration Welds Section XI, Division 1.'' This RIS requires no action or written response on the part of an addressee.

DATES: The RIS is available as of December 20, 2018.

ADDRESSES: Please refer to Docket ID NRC–2018–0038 when contacting the NRC about the availability of information regarding this document. You may obtain publicly-available information related to this document using any of the following methods:

- *Federal Rulemaking Website:* Go to *http://www.regulations.gov* and search for Docket ID NRC–2018–0038. Address questions about Docket IDs in *Regulations.gov* to Krupskaya Castellon; telephone: 301–287–9221; email: *Krupskaya.Castellon@nrc.gov.* For technical questions, contact the individual(s) listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly-available documents online in the ADAMS Public Documents collection at *http://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''Begin Web-based ADAMS Search.'' For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to *pdr.resource@nrc.gov.* The Clarification of the Requirements for Reactor Pressure Vessel Upper Head Bare Metal Visual Examinations and Response to Public Comments on Draft Regulatory Issue Summary 2018–XX, ''Clarification of the Requirements for Reactor Pressure Vessel Upper Head Bare Metal Visual Examinations'' are available in ADAMS under Accession Nos. ML18178A137 and ML18178A140.
- *NRC's PDR:* You may examine and purchase copies of public documents at the NRC's PDR, Room O1–F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.
- This RIS is also available on the NRC's public website at *http://www.nrc.gov/reading-rm/doc-collections/gen-comm/reg-issues/* (select ''2018'' and then select ''RIS–18–06'').

FOR FURTHER INFORMATION CONTACT: Stephen Cumblidge, Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–2823, email: *Stephen.Cumblidge@nrc.gov.*

SUPPLEMENTARY INFORMATION: The NRC published notification of opportunity for public comment on this RIS in the **Federal Register** (83 FR 10407) on March 9, 2018. The agency received comments from four commenters. The staff considered all comments, which resulted in minor clarifications to the RIS. The evaluation of these comments and the resulting changes to the RIS are discussed in a publicly available memorandum which is in ADAMS under Accession No. ML18178A140.

As noted in 83 FR 20858 (May 8, 2018), this document is being published in the Rules section of the **Federal Register** to comply with publication requirements under 1 CFR chapter I.

Dated at Rockville, Maryland, this 17th day of December 2018.

For the Nuclear Regulatory Commission.

Brian J. Benney,

Senior Project Manager, ROP Support and Generic Communications Branch, Division of Inspection and Regional Support, Office of Nuclear Reactor Regulation.

[FR Doc. 2018–27517 Filed 12–19–18; 8:45 am]

BILLING CODE 7590–01–P

FEDERAL HOUSING FINANCE AGENCY

12 CFR Part 1231

RIN 2590–AA72

Golden Parachute and Indemnification Payments

AGENCY: Federal Housing Finance Agency.

ACTION: Final rule.

SUMMARY: The Federal Housing Finance Agency (FHFA) is amending its golden parachute payments regulation to better align it with areas of FHFA's supervisory concern and reduce administrative and compliance burdens. This final rule amends a requirement that FHFA review and consent before a regulated entity or the Office of Finance (OF) enters certain agreements to make, or makes, certain payments that are contingent on the termination of an affiliated party, if the regulated entity or the OF is in a troubled condition, in conservatorship or receivership, or insolvent. FHFA's experience implementing the regulation indicated that it required review of some agreements and payments where there was little risk of excess or abuse, and thus that it was too broad.

As amended, the rule will reduce the number of agreements and payments that are subject to FHFA prior review by focusing on those agreements and payments where there is greater risk of an excessive or abusive payment (in general, payments to and agreements with executive officers, broad-based plans covering large numbers of employees (such as severance plans), and payments made to non-executive-officer employees who may have engaged in certain types of wrongdoing). In addition, the rule as amended

clarifies the inquiry into possible employee wrongdoing that a regulated entity is required to undertake prior to entering into an agreement to make or making a golden parachute payment. Amendments also revise and clarify other rule procedures, definitions, and exemptions.

DATES: *Effective date:* January 22, 2019.

FOR FURTHER INFORMATION CONTACT: Alfred Pollard, General Counsel, (202) 649–3050, *Alfred.Pollard@fhfa.gov;* Lindsay Simmons, Assistant General Counsel, (202) 649–3066, *Lindsay.Simmons@fhfa.gov;* or Mary Pat Fox, Manager for Compensation, Division of Enterprise Regulation, (202) 649–3215, *MaryPat.Fox@fhfa.gov.* These are not toll-free numbers. The mailing address is: Federal Housing Finance Agency, 400 Seventh Street SW, Washington, DC 20219. The telephone number for the Telecommunications Device for the Hearing Impaired is (800) 877–8339.

SUPPLEMENTARY INFORMATION:

I. Background

FHFA has broad discretionary authority to prohibit or limit any ''golden parachute payment,'' generally defined as any payment, or any agreement to make a payment, in the nature of compensation by a regulated entity for the benefit of an ''affiliated party'' that is contingent on the party's termination, when the regulated entity is in troubled condition, in conservatorship or receivership, or insolvent (a ''troubled institution'').[1] This provision, at 12 U.S.C. 4518(e) (Section 4518(e)), was added to the Federal Housing Enterprises Financial Safety and Soundness Act (the Safety and Soundness Act) in 2008. Legislative history suggests Section 4518(e) is intended to permit FHFA to prevent payments to departing employees and other affiliated parties that are excessive or abusive, could threaten (or further threaten) the financial condition of the troubled institution, or are inappropriate based on wrongdoing by the recipient.

Section 4518(e) requires the Director to promulgate rules defining ''troubled condition'' and prescribing factors to be considered when prohibiting or limiting any ''golden parachute payment,'' and suggests some factors the Director may consider. To ensure that FHFA had an opportunity to review and, if necessary, prohibit or limit golden parachute payments and agreements before they are made, the golden parachute payments final rule published in January 2014 (''the 2014 rule'') prohibited all golden parachute payments and agreements that were not exempt from or permitted by operation of the rule. Prohibited agreements or payments could be permitted by the Director after review.

Because the 2014 rule applied equally to golden parachute payments and agreements, it required FHFA to determine the permissibility of prohibited agreements before they were entered into and of prohibited payments before they were made. In most cases, this meant that a troubled institution was required to request FHFA's prior review and consent to a payment that would be made in accordance with an agreement to which FHFA had already consented. This ''double approval'' requirement was recognized by FHFA and commenters when the rule was proposed in 2013 and finalized in 2014.[2] FHFA noted then that it was an appropriate supervisory approach because conditions could change after an agreement was approved but before a payment was made (for example, the condition of a troubled institution could further deteriorate, or an intended recipient could be found to have contributed to the deterioration or engaged in wrongdoing with a material adverse effect on the regulated entity). In practice, that approach resulted in FHFA's receiving numerous requests for review of golden parachute payments and agreements.

Narrowly drafted exemptions from the 2014 rule also gave rise to numerous requests for review. For example, because severance pay plans of the regulated entities do not meet an exemption for ''nondiscriminatory'' plans, troubled institutions were not permitted to make severance payments to any employees—even small payments to lower-level employees—without FHFA review and consent. Likewise, an exemption for payments pursuant to a ''bona fide deferred compensation plan or arrangement'' did not apply or was lost if the plan was established or amended after the date that was one year prior to the time the regulated entity became a troubled institution, meaning such plans and any plan payments required FHFA prior review.

Based on experience reviewing proposed agreements and payments, FHFA determined that the scope of the 2014 rule was too broad because it required a troubled institution to submit and FHFA to review agreements and payments where there was very little risk of an abusive or excessive payment or threat to the financial condition of the paying regulated entity, and little likelihood that the employee or other affiliated party receiving payment could have engaged in the type of wrongdoing that FHFA would consider as the basis for prohibiting or limiting an agreement or payment. Separately, FHFA also determined that the 2014 rule could be harmonized with other requirements related to the compensation of executive officers of the regulated entities, including termination payments, avoiding the need to request or engage in separate reviews.[3] On those bases, FHFA proposed amendments to the 2014 rule, which it fully described and on which it requested comments in an earlier **Federal Register** Notice.[4]

II. Comments

During a 45-day comment period that ended on October 12, 2018, FHFA received a joint letter from ten of the eleven Federal Home Loan Banks (Banks) and the OF (collectively, the Banks), and a letter from Freddie Mac. Commenters generally expressed support for the reduction of burdens embodied in the proposed amendments and requested changes to reduce burden further. Some comments also requested or suggested clarifications of rule provisions or topics not addressed by the rule, such as grandfathering. For organizational purposes, comments are addressed in the order of the rule provision to which they relate.

Section 1231.2, Definition of ''Golden Parachute Payment''

FHFA proposed to remove the phrase ''pursuant to an obligation of the regulated entity'' from the regulatory ''golden parachute payment'' definition, to clarify that the definition covers gifts and the process by which FHFA reviews gifts by a troubled institution to a terminating employee (or other affiliated party). FHFA has general authority to prohibit an improper gift, and interprets the statutory definition of ''golden parachute payment,'' which references ''an obligation,'' as clarifying that

[1] The ''regulated entities'' are the Federal National Mortgage Association (Fannie Mae) and any affiliate, the Federal Home Loan Mortgage Corporation (Freddie Mac) and any affiliate, (collectively, the Enterprises), and the Federal Home Loan Banks (the Banks). 12 U.S.C. 4502(20). The OF is a joint office of the Banks, to which FHFA extends the Golden Parachute Payments rule through its general regulatory authority. *See id.* sec. 4511(b)(2); *see also* 78 FR 28452, 28456 (May 14, 2013) and 79 FR 4394 (Jan. 28, 2014). In this notice, the terms ''regulated entity'' and ''troubled institution'' include the Enterprises, Banks, and the OF, unless the OF is otherwise expressly addressed.

[2] *See* 78 FR 28452, 28545 (May 14, 2013) (Notice of Proposed Rulemaking) and 79 FR 4394, 4396 (Jan. 28, 2014) (Final Rule).

[3] *See generally,* 12 U.S.C. 1452(h), 1723a(d)(3), and 4518(a); *see also* 12 CFR part 1230.

[4] 83 FR 43802 (Aug. 28, 2018).

FHFA's authority to prohibit or limit golden parachute payments *includes* those made pursuant to an obligation.[5] FHFA was concerned that including the phrase ''pursuant to an obligation'' within the regulatory definition could be read to imply that the rule does not extend to excessive or abusive payments that are made gratuitously, which would be inconsistent with the policy of Section 4518(e). FHFA also noted that it had applied the 2014 rule to gifts, and that troubled institutions had requested FHFA's review of and consent to proposed retirement gifts. Thus, the proposed change in regulatory text would align the rule with FHFA's interpretation and application of it.

Although the Banks agreed that FHFA has authority to prohibit an improper gift, they commented that the phrase ''pursuant to an obligation of the regulated entity'' should remain in the rule definition. In contrast to FHFA's interpretation, the Banks stated that they believe reference to ''an obligation'' in the statutory definition meant that Congress intended FHFA's authority to prohibit or limit golden parachute payments to extend only to payments that an institution is contractually obligated to make. The Banks opined that payments not pursuant to an obligation, such as improper voluntary gifts, should be regulated only to the extent that FHFA found such payments to be excessive or an unsafe and unsound practice, but not under its golden parachute payments authority.

The Banks and FHFA agree that FHFA has authority to prohibit or limit any improper voluntary gift, through its general supervisory authority.[6] FHFA believes it is important to review payments, including gifts, to terminating employees by a troubled institution, as it is more likely that a voluntary gift would be deemed improper (for example, excessive, abusive, or the result of an unsafe and unsound practice) when made by a troubled institution. By removing the phrase ''pursuant to an obligation of the regulated entity'' from the regulatory ''golden parachute payment'' definition, FHFA is clarifying the process for its review of voluntary payments to terminating employees by a troubled institution before such payments are made, to determine their propriety in accordance with transparent regulatory considerations.

FHFA also notes that other amendments should limit the number of gifts subject to its review, including rule provisions permitting a small value gift to an executive officer of a troubled institution on a significant life event such as retirement, permitting *de minimis* payments to other affiliated parties, and exempting payments provided through a ''nondiscriminatory benefit plan.'' [7] Together, these provisions are intended to balance FHFA's supervisory concern for gifts by troubled institutions with the burden of a prior review process. For these reasons, FHFA is amending the rule as proposed, by removing the phrase ''pursuant to an obligation of a regulated entity'' from the ''golden parachute payment'' definition.

Section 1231.3(a), Golden Parachute Payments and Agreements Requiring FHFA Consent

FHFA proposed to retain the general construct of the 2014 rule and will continue to prohibit all golden parachute payments and agreements that are not exempt from or permitted by the rule. Prohibited agreements or payments may still be permitted by the Director after review. The Banks commented that this approach can result in a ''double approval'' requirement, which ''creates uncertainty for executives that the compensation agreements they negotiated at the start of employment may not be honored.'' The Banks suggested that ''double approval'' be entirely removed from the rule.

The Banks made a similar comment in response to the 2013 Notice of Proposed Rulemaking that resulted in the 2014 rule.[8] As FHFA then responded, Section 4518(e) clearly permits FHFA to prohibit or limit golden parachute agreements and payments when a regulated entity is a troubled institution, and many policy reasons support the approach of reviewing both agreements (including plans) and associated payments (*e.g.,* a plan may be designed to cover a class of employees, where neither the regulated entity requesting review nor FHFA knows the specific employees who may, or will, ultimately receive a termination payment; or the financial condition of a troubled institution may deteriorate after FHFA consents to a plan as a golden parachute agreement, but before payments are made).[9]

It is also not clear that removing ''double approval'' would create the certainty desired: If an executive officer entered into a compensation arrangement prior to a Bank's becoming a troubled institution, but terminated employment when the Bank was troubled, even under a ''single approval'' approach, FHFA review of either the agreement (as entered into) or the payment (as proposed to be made) would be required. The Banks do not suggest that FHFA could not prohibit or limit either the agreement or the payment at that time, although such a prohibition or a limitation would clearly disrupt the agreement the executive officer reached with the Bank when hired. FHFA also notes that its approach is consistent with that taken by the FDIC and the other federal banking agencies, and thus may be familiar to prospective employees of FHFA's regulated entities.[10] For these reasons, FHFA is retaining the construct of the 2014 rule and will require a troubled institution to submit agreements and payments that are not exempt from or permitted by operation of the rule to FHFA for prior review and consent.

Section 1231.3(b), Exempt Golden Parachute Payments and Agreements

1. Qualified Pension or Retirement Plans

FHFA did not propose any change to an exemption in the 2014 rule for payments pursuant to any pension or

[5] Under this interpretation, including the phrase ''pursuant to an obligation of the regulated entity'' in federal law clarifies the primacy of the federal supervisor to prohibit or limit obligatory payments, despite state laws otherwise upholding the enforceability of contracts. In fact, recent court decisions have confirmed that a taking does not occur for purposes of the Tucker Act, 28 U.S.C. 1491, when FHFA prohibits a golden parachute payment, even one made pursuant to an agreement entered into before the enactment of Section 4518(e) in 2008.

In Piszel v. U.S., 833 F.3d 1366 (Fed. Cir. 2016), the Court of Appeals for the Federal Circuit held that no taking occurred because the affiliated party retained the ability to pursue a claim for damages from the regulated entity for breach of contract. FHFA agrees that there was no taking, but also observes that awarding damages for breach of contract would clearly defeat the purpose of Section 4518(e), which is to prevent the affiliated party from receiving such a payment. The Court of Federal Claims had held in that case that no taking occurred (see Piszel v. U.S., 121 Fed. Cl. 793 (2015)) because of an insufficiently cognizable property interest, considering the contract in the context of the regulatory and statutory scheme (''a heavily regulated environment;'' and statutory provisions expressly authorized FHFA's predecessor agency to prohibit compensation it deemed to be unreasonable at any time and did not ''guarantee [ ] that the government could not later change its mind'' after approving compensation as reasonable). That conclusion would be even stronger with respect to a payment made subject to an agreement entered into after Section 4518(e)'s enactment, a proposition with which the Federal Circuit may have agreed, *see* 833 F.3d at 1374.

[6] *See generally,* 12 U.S.C. 4511, 4513, and 4526, citations to which are included in the rule's ''authority'' provision.

[7] FHFA intends to interpret ''agreement,'' as defined in the rule, broadly where appropriate. For example, FHFA may consider a written policy governing a common practice to be an ''agreement'' for purposes of the rule.

[8] 79 FR at 4396.

[9] *Id.* at 4396–97.

[10] *See* 12 CFR 359.4(a)(1).

retirement plan that is ''qualified (or intended within a reasonable period of time to be qualified) under section 401 of the Internal Revenue Code of 1986 (26 U.S.C. 401).'' That language implements a statutory exemption and was derived from a similar rule adopted by the Federal Deposit Insurance Corporation in 1996.[11] Freddie Mac commented, however, that although employers previously were able to obtain periodic Section 401 qualification determinations from the Internal Revenue Service (IRS), the IRS has curtailed its issuance of such determinations. Now, certain plans may not receive an IRS determination for quite some time, if ever.[12] Consequently, the phrase ''within a reasonable period of time'' could limit application of the exemption in an unforeseen and unintended manner. Freddie Mac requested FHFA clarification that, in cases where a plan that is intended to be qualified does not have an associated IRS determination, it will nonetheless be exempt from the ''golden parachute payment'' definition.

The statutory exemption that the 2014 rule implements is not conditioned on an IRS determination of qualification, but applies to a plan that ''is qualified (or is intended to be qualified).'' [13] The statutory exemption does not include any timing constraint on any such determination. On that basis, FHFA believes ''is intended to be'' is best read as referring to the employer's intention regarding the plan's legal status, as opposed to the employer's intention to obtain an IRS determination about the plan's legal status. Thus, the statutory exemption covers both a plan that is qualified and has received an IRS determination and a plan that the employer intends to be qualified under section 401 (even without an IRS determination). To reflect that scope, FHFA has removed the phrase ''within a reasonable period of time'' from the rule, so that it now mirrors the statutory exemption.[14]

2. Nondiscriminatory Benefit Plans

Nondiscriminatory employee plans and programs. To implement a statutory exemption for ''other nondiscriminatory benefit plans,'' FHFA proposed to include an exemption for any benefit plan that is a ''nondiscriminatory employee plan or program'' in accordance with IRS rules and published guidance interpreting 26 U.S.C. 280G (Section 280G). Section 280G generally addresses the calculation of an ''excess'' parachute payment and exempts any ''nondiscriminatory employee plan or program'' from that calculation. In response to a question received, FHFA wishes to clarify that requirements necessary in order for a plan to qualify as ''nondiscriminatory'' for purposes of Section 280G must be met in order for the plan to be exempt from the ''golden parachute payment'' definition. In other words, it is not solely the type of plan (*e.g.,* a tuition assistance plan) that triggers the exemption, but the fact that the plan meets the IRS conditions and requirements to be considered ''nondiscriminatory.'' [15]

Severance pay plans. FHFA also proposed to remove an exemption for severance pay plans that met a rule definition of ''nondiscriminatory'' (and other conditions), based on its experience implementing the 2014 rule. Specifically, FHFA observed that the market-based severance pay plans of its regulated entities did not meet that regulatory standard, and the failure to meet it required FHFA to review all the severance pay plans and payments of its troubled institutions. Based on that review, FHFA determined as a matter of policy that severance pay plans and payments should be subject to prior review. FHFA also noted, however, that a regulated entity could request an exemption for any severance pay plan it believes is in fact nondiscriminatory, as Section 4518(e) provides a statutory exemption for ''nondiscriminatory benefit plans.'' Thus, removal of the regulatory ''nondiscriminatory'' definition would not eliminate the possibility of an exemption for a nondiscriminatory severance pay plan; rather, it would remove a regulatory definition that the plans reviewed by FHFA did not meet.

The Banks commented on the value of severance pay plans generally and opposed removal of the definition of ''nondiscriminatory.'' They suggested instead that FHFA retain a ''nondiscriminatory'' definition but amend it to include the types of severance plans currently used at the Banks or, as an alternative, exempt severance for ''rank-and-file'' employees. The Banks also requested that severance pay plans (among other types of plans and agreements) in effect as of the date the rule is amended be grandfathered, expressing the view that Section 4518(e) does not support ''retroactive'' review.

FHFA agrees with the Banks that severance plans are an important benefit for retaining employees, and that employee retention can be an appropriate consideration for a troubled institution.[16] FHFA considered amending the regulatory definition of ''nondiscriminatory'' when developing its proposed rule but was not able to design a definition that both plausibly expressed the ''nondiscriminatory'' requirement and would operate to exempt a current, market-based, severance pay plan. As a practical matter, these plans are intended to provide greater benefits to higher-ranking employees than to lower-ranking ones, and thus are intended to discriminate.[17] Thus, FHFA does not believe the Banks' suggestion (expanding the regulatory definition of ''nondiscriminatory'' to include the severance plans used by the regulated entities) is workable.

FHFA also considered exempting severance pay plans and payments as they relate to lower-ranking employees when developing the proposed rule. Based on a number of policy considerations (some of which are also set forth in the proposal), FHFA determined that a better approach would be to require FHFA review of severance pay plans and, if FHFA consents to the plan, permit payments to be made to employees other than executive officers without FHFA review, provided the regulated entity determines, after appropriate due diligence, that it is reasonably assured the employee has not engaged in the types of wrongdoing described in the

[11] *Compare* 12 U.S.C. 1828(k)(4)(C)(i) and 4518(e)(4)(C)(i); *see also* 61 FR 5,926, 5931 (Feb. 15, 1996).

[12] *See* IRS Rev. Proc. 2016–37 (July 18, 2016).

[13] 12 U.S.C. 4518(e)(4)(C)(i).

[14] In the case that a plan that is intended to be qualified is discovered to have failed to meet the requirements for qualification, such as by receiving such a determination from the IRS, then in order to keep the exemption under the rule, the employer would need to amend the plan to correct the error and meet the requirements for qualification as soon as reasonably practicable.

[15] For example, to be an exempt cafeteria plan under 26 CFR 280G–1, the plan must not increase benefits for officers or other highly compensated participants. *See* 26 U.S.C. 125. Generally, nondiscriminatory benefit plans would offer similar benefits to all participants. FHFA intends the exemption for any ''nondiscriminatory employee plan or program'' to be self-executing, meaning the regulated entities must determine whether their benefit plans meet any conditions imposed by the Internal Revenue Code or the IRS, in order for the exemption to apply.

[16] FHFA stated in the preamble to the proposal, for example, that ''an appropriately structured severance pay plan could have a retentive effect on employees that could be stabilizing as a troubled institution works to improve its financial condition.'' 83 FR at 43808.

[17] FHFA also observes that no regulated entity amended its severance plan to meet the 2014 rule's ''nondiscriminatory'' definition. That could demonstrate that even a troubled institution believed having a market-based severance pay plan was a more important business consideration than obtaining the regulatory exemption that would have applied.

rule. This approach will reduce burdens imposed on a troubled institution by the 2014 rule: It eliminates the requirement to make a certification about employee wrongdoing when submitting a plan for review and eliminates the requirement to submit a request for FHFA consent to payment provided the regulated entity meets the ''reasonably assured'' standard, following appropriate due diligence. FHFA also believes that amendments to the 2014 rule related to assessing possible wrongdoing by employees will further reduce burden. Specifically, FHFA is clarifying both the standard that must be met (''reasonably assured'') and the type of inquiry expected (appropriate due diligence, considering the level and responsibilities of the employee). FHFA recognizes that minimal due diligence may be appropriate in some cases, considering the types of wrongdoing set forth in the rule and the responsibilities of some employees who may be eligible for severance pay.

FHFA also clarifies that it does not object to the 2014 rule's definition of ''nondiscriminatory'' as a standard for nondiscrimination in a severance pay plan. If a severance pay plan of a troubled institution is structured to meet that definition—or any other plausible standard for ''nondiscriminatory''—that regulated entity may request an exemption for the plan based on its ''nondiscriminatory'' nature. Because there is a statutory exemption for ''nondiscriminatory benefit plans,'' the rule as amended acknowledges that a troubled institution may request an exemption for *any* benefit plan on the basis that it is ''nondiscriminatory.'' If FHFA agrees with the regulated entity's supported assertion that a benefit plan, including a severance pay plan, is ''nondiscriminatory,'' that plan, and payments pursuant to it, will be exempt.

Finally, FHFA does not agree that Section 4518(e) does not support review of plans and agreements in effect when a regulation is adopted or amended. The Banks made a similar comment in 2013, prior to FHFA's adoption of the 2014 rule, which FHFA addressed at that time.[18] FHFA's view on the statutory authority and responsibility it was given by Congress has not changed. Where a rule providing for FHFA review of and consent to golden parachute payments and agreements has been in place since early 2014, and FHFA is not now establishing a stricter standard for review of such plans or agreements, it is particularly difficult to see how a ''retroactive'' analysis would be applied. Consequently, plans and agreements in place as of the effective date of the rule amendments are not grandfathered and will be subject to the rule provisions.

Section 1231.3(c), Agreements for Which FHFA Consent Is Not Required

Plans directed by the Director. FHFA proposed to amend the 2014 rule to permit plans or agreements that provide for termination payments to affiliated parties of a troubled institution without FHFA review, when such arrangements are established or directed by FHFA acting as conservator or receiver or otherwise pursuant to authority conferred by 12 U.S.C. 4617. FHFA received a question about application of that provision, specifically, whether it was intended to permit *every* arrangement established after FHFA was appointed conservator or receiver. The questioner noted that any arrangement of the regulated entity established after FHFA was appointed conservator or receiver could be construed as ''established or directed by FHFA acting as conservator or receiver'' because, pursuant to 12 U.S.C. 4617, when appointed conservator or receiver, FHFA succeeds to all rights, titles, powers and privileges of the regulated entity, with all the powers of its shareholders, officers, and directors, and to all of the assets of the regulated entity. That construction was not intended (nor, FHFA believes, is it a fair interpretation of the rulemaking as a whole, since such a construction would result in the rule applying almost exclusively to a regulated entity in troubled condition but not to a regulated entity for which a conservator or receiver has been appointed, and would have been discussed in that context; nor is it a fully accurate interpretation of the relationship between the conservator and the Enterprises' boards and management.[19]) To avoid any future confusion, however, FHFA has added the word ''expressly,'' which it always viewed as implied, to provisions permitting the arrangements established or directed by the Director acting pursuant to authority conferred by 12 U.S.C. 4617, without FHFA prior review or consent.

De minimis amount. FHFA proposed to permit a troubled institution to enter into an agreement to make a golden parachute payment to an affiliated party other than an executive officer without FHFA review and consent, and without the due diligence otherwise required, where the amount of the payment, when aggregated with other golden parachute payments, does not exceed $2,500. FHFA also noted that a higher or lower amount than the proposal's cap of $2,500 could be supported. Freddie Mac and the Banks each commented on this proposal, generally supporting the concept of permitting *de minimis* payments while requesting that the *de minimis* amount be increased from $2,500 to $5,000.

As an alternative to increasing the *de minimis* amount, Freddie Mac suggested exempting all golden parachute payments paid to employees of a certain level and below. Freddie Mac suggested a level of employee, based on its employment structure, to whom it believed payments would not be subject to FHFA review, but also acknowledged that different regulated entities would have different employee structures. Freddie Mac suggested that FHFA could determine the appropriate level of employee for such an exemption at the time the regulated entity becomes a troubled institution.

When developing the proposed rule, FHFA staff considered a *de minimis* amount of $5,000, which is the amount of a *de minimis* exemption provided by the FDIC in guidance on application of its similar rule.[20] FHFA staff selected $2,500 because, should one of FHFA's regulated entities become troubled, FHFA does not have access to a privately funded, FHFA-administered insurance fund, in contrast to the FDIC with regard to insured depository institutions. On further consideration, however, FHFA believes that increasing the amount to $5,000 will not materially change the presumption stated in the preamble to the proposed rule, that a non-executive-officer affiliated party receiving such a *de minimis* amount upon separation either was not in a position to materially affect the financial condition of the regulated entity or engage in certain types of wrongdoing listed in the rule or, if the affiliated party was in such a position, the payment does not settle a claim involving such wrongdoing. For this reason, FHFA has increased the *de minimis* cap in the final rule to $5,000.

In contrast, FHFA believes Freddie Mac's suggestion to exempt all golden parachute payments to all employees below a certain level would not be appropriate. It would be difficult for FHFA to establish, by rule, a level of employee for which there is no value in reviewing golden parachute payments, regardless of the size of the payment. To do so would require reasonable

[18] 79 FR at 4395–6.

[19] *See Responsibilities of Boards of Directors, Corporate Practices and Corporate Governance Matters,* 80 FR 72328 n.2 (Nov. 19, 2015).

[20] *See* FDIC Guidance on Golden Parachute Applications, FIL Letter 66–2010 (Oct. 14, 2010).

confidence that, among other things, an employee at or below that level could not engage in the types of wrongdoing set forth in the rule. While as a general matter the level of an employee can be an indicator of the extent of the employee's ability to affect a company, due diligence to determine whether the types of wrongdoing listed in the rule have occurred can still be important. For example, lower-level employees still have the ability to cause material harm to a company (such as reputational harm and technological sabotage) and may still receive substantial settlement payments. For those reasons, FHFA believes that the amount of the payment, rather than the level of the employee, serves as a better proxy for identifying instances where the burden of review, including due diligence, is not warranted. FHFA believes that the proposed approach, which would reduce burden by permitting smaller value payments to employees (and other affiliated parties) who are not executive officers, strikes the appropriate balance of administrative and policy considerations.

Section 1231.3(d), Payments for Which FHFA Consent Is Not Required

FHFA proposed to permit some golden parachute payments to be made to an affiliated party other than an executive officer without FHFA prior review and consent. The Banks suggested a change to the proposed rule text for clarity and readability (to modify an introductory phrase to read ''To an affiliated party who is not an executive officer, where:''). FHFA agrees that this change improves clarity of the rule, and has changed the text as suggested.

Section 1231.3(e), Required Due Diligence Review and Standard

FHFA proposed to require a troubled institution that concludes, after appropriate due diligence, that it is not ''reasonably assured'' the affiliated party has not engaged in the listed types of wrongdoing to provide notice of its concerns to FHFA, even if the regulated entity does not enter into an agreement or make a payment to the affiliated party. The Banks objected to the proposed notice requirement as unnecessary, possibly jeopardizing the attorney-client privilege of the regulated entity, and possibly ''chilling'' the regulated entity's ability to enter into individually negotiated settlement agreements and other types of severance arrangements.

FHFA intends the notice to provide factual information about the possible wrongdoing in which the troubled institution believes the affiliated party may have engaged. FHFA did not intend the notice to include communications to or from lawyers, and thus does not believe it will implicate any attorney-client privilege. If FHFA has additional questions about a specific situation that may implicate any attorney-client privileged communications, FHFA expects to work with the troubled institution to avoid any possible waiver, based on the particular facts and circumstances of the matter at hand.

Section 1231.3(f), Factors for Director Consideration.

Based on the legislative history of Section 4518(e) and FHFA's experience administering the 2014 rule, FHFA proposed adding whether a golden parachute payment or agreement is ''excessive or abusive or threatens the financial condition of the troubled institution'' to listed factors for the Director's consideration. The Banks requested that FHFA clarify the terms ''excessive'' and ''abusive.''

What constitutes ''excessive'' or ''abusive'' will depend on the circumstances of the agreement or payment, considering the particular troubled institution, its condition, the affiliated party to whom payment would be made, the amount of any payment proposed to be made, and the circumstances surrounding any agreement or plan governing payment. For that reason, FHFA does not believe it is possible to define those terms by rule in a manner that would expand on or illuminate their plain meaning. FHFA notes that this is only one factor among others for the Director to consider when determining whether to prohibit or limit a golden parachute payment.

Impact of Rule Amendments on Existing Plans

FHFA also wishes to clarify that plans of a troubled institution to which FHFA consented under the 2014 rule do not need to be submitted again due to the amendment of the rule, provided the regulated entity is in the same condition that caused it to be a troubled institution when FHFA previously consented to the plan. For example, if one of the Enterprises is currently operating a benefit plan to which FHFA consented, or that FHFA has notified the Enterprise was otherwise able to continue in operation under the 2014 rule, that plan does not need to be resubmitted simply because the rule is being amended. The amendments adopted do not suggest that consent it has previously provided should now be reconsidered, and avoiding unnecessary resubmission of plans furthers FHFA's desire to reduce regulatory burden. On the other hand, payments to be made after the effective date of the rule amendments are subject to the rule as amended, and must be submitted for review if review is required by the rule.

III. Consideration of Differences Between the Banks and the Enterprises

Section 1313(f) of the Safety and Soundness Act (12 U.S.C. 4513(f)), as amended by section 1201 of HERA, requires the Director, when promulgating regulations relating to the Banks, to consider the differences between the Banks and the Enterprises with respect to the Banks' cooperative ownership structure, mission of providing liquidity to members, affordable housing and community development mission, capital structure, and joint and several liability. The Director may also consider any other differences that are deemed appropriate.

In preparing this final rule, the Director considered the differences between the Banks and the Enterprises as they relate to the above factors, and determined that the amendments in the final rule are neutral regarding the statutory factors. In the proposed rule, FHFA requested comments from the public regarding whether differences related to these factors should result in any revisions to the proposed rule. No significant relevant comments were received.

IV. Paperwork Reduction Act

The final rule does not contain any information collection requirement that requires the approval of the Office of Management and Budget (OMB) under the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*). Therefore, FHFA has not submitted any information to OMB for review.

V. Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires that a regulation that has a significant economic impact on a substantial number of small entities, small businesses, or small organizations must include an initial regulatory flexibility analysis describing the regulation's impact on small entities. Such an analysis need not be undertaken if the agency has certified that the regulation will not have a significant economic impact on a substantial number of small entities. 5 U.S.C. 605(b). FHFA has considered the impact of this final rule under the Regulatory Flexibility Act. The General Counsel of FHFA certifies that this final rule will not have a significant economic impact on a substantial number of small entities

because the regulation applies only to the regulated entities, which are not small entities for purposes of the Regulatory Flexibility Act.

VI. Congressional Review Act

In accordance with the Congressional Review Act,[21] FHFA has determined that this final rule is not a major rule and has verified this determination with the OMB. *See* 5 U.S.C. 504(2).

List of Subjects in 12 CFR Part 1231

Golden parachutes, Government sponsored enterprises, Indemnification payments.

Accordingly, for the reasons stated in the **SUPPLEMENTARY INFORMATION**, and under the authority of 12 U.S.C. 4511, 4513, 4517, 4518, 4518a, and 4526, FHFA amends part 1231 of subchapter B of chapter XII of Title 12 of the Code of Federal Regulations as follows:

PART 1231—GOLDEN PARACHUTE AND INDEMNIFICATION PAYMENTS

■ 1. The authority citation for part 1231 is revised to read as follows:

Authority: 12 U.S.C. 4511, 4513, 4517, 4518, 4518a, 4526, and 4617.

■ 2. Revise § 1231.1 to read as follows:

§ 1231.1 Purpose.

The purpose of this part is to implement section 1318(e) of the Safety and Soundness Act (12 U.S.C. 4518(e)) by setting forth the factors that the Director will take into consideration in determining whether to limit or prohibit golden parachute payments and agreements and by setting forth conditions for prohibited and permissible indemnification payments that regulated entities and the Office of Finance (OF) may make to affiliated parties.

■ 3. Revise § 1231.2 to read as follows:

§ 1231.2 Definitions.

The following definitions apply to the terms used in this part:

Affiliated party means:

(1) With respect to a golden parachute payment:

(i) Any director, officer, or employee of a regulated entity or the OF; and

(ii) Any other person as determined by the Director (by regulation or on a case-by-case basis) who participates or participated in the conduct of the affairs of the regulated entity or the OF, provided that a member of a Federal Home Loan Bank shall not be deemed to have participated in the affairs of that Federal Home Loan Bank solely by virtue of being a shareholder of, and obtaining advances from, that Federal Home Loan Bank; and

(2) With respect to an indemnification payment:

(i) By the OF, any director, officer, or manager of the OF; and

(ii) By a regulated entity:

(A) Any director, officer, employee, or controlling stockholder of, or agent for, a regulated entity;

(B) Any shareholder, affiliate, consultant, or joint venture partner of a regulated entity, and any other person as determined by the Director (by regulation or on a case-by-case basis) that participates in the conduct of the affairs of a regulated entity, provided that a member of a Federal Home Loan Bank shall not be deemed to have participated in the affairs of that Federal Home Loan Bank solely by virtue of being a shareholder of, and obtaining advances from, that Federal Home Loan Bank;

(C) Any independent contractor for a regulated entity (including any attorney, appraiser, or accountant) if:

(*1*) The independent contractor knowingly or recklessly participates in any violation of any law or regulation, any breach of fiduciary duty, or any unsafe or unsound practice; and

(*2*) Such violation, breach, or practice caused, or is likely to cause, more than a minimal financial loss to, or a significant adverse effect on, the regulated entity; or

(D) Any not-for-profit corporation that receives its principal funding, on an ongoing basis, from any regulated entity.

Agreement means, with respect to a golden parachute payment, any plan, contract, arrangement, or other statement setting forth conditions for any payment by a regulated entity or the OF to an affiliated party.

Bona fide deferred compensation plan or arrangement means any plan, contract, agreement, or other arrangement:

(1) Whereby an affiliated party voluntarily elects to defer all or a portion of the reasonable compensation, wages, or fees paid for services rendered which otherwise would have been paid to such party at the time the services were rendered (including a plan that provides for the crediting of a reasonable investment return on such elective deferrals); or

(2) That is established as a nonqualified deferred compensation or supplemental retirement plan, other than an elective deferral plan described in paragraph (1) of this definition:

(i) Primarily for the purpose of providing benefits for certain affiliated parties in excess of the limitations on contributions and benefits imposed by sections 401(a)(17), 402(g), 415, or any other applicable provision of the Internal Revenue Code of 1986 (26 U.S.C. 401(a)(17), 402(g), 415); or

(ii) Primarily for the purpose of providing supplemental retirement benefits or other deferred compensation for a select group of directors, management, or highly compensated employees; and

(3) In the case of any plans as described in paragraphs (1) and (2) of this definition, the following requirements shall apply:

(i) The affiliated party has a vested right, as defined under the applicable plan document, at the time of termination of employment to payments under such plan;

(ii) Benefits under such plan are accrued each period only for current or prior service rendered to the employer (except that an allowance may be made for service with a predecessor employer);

(iii) Any payment made pursuant to such plan is not based on any discretionary acceleration of vesting or accrual of benefits which occurs at any time later than one year prior to the regulated entity or the OF becoming a troubled institution;

(iv) The regulated entity or the OF has previously recognized compensation expense and accrued a liability for the benefit payments according to GAAP, or segregated or otherwise set aside assets in a trust which may only be used to pay plan benefits and related expenses, except that the assets of such trust may be available to satisfy claims of the troubled institution's creditors in the case of insolvency; and

(v) Payments pursuant to such plans shall not be in excess of the accrued liability computed in accordance with GAAP.

Executive officer means an ''executive officer'' as defined in 12 CFR 1230.2, and includes any director, officer, employee or other affiliated party whose participation in the conduct of the business of the regulated entity or the OF has been determined by the Director to be so substantial as to justify treatment as an ''executive officer.''

Golden parachute payment means any payment in the nature of compensation made by a troubled institution for the benefit of any current or former affiliated party that is contingent on or provided in connection with the termination of such party's primary employment or affiliation with the troubled institution.

Indemnification payment means any payment (or any agreement to make any payment) by any regulated entity or the OF for the benefit of any current or

[21] *See* 5 U.S.C. 804(2).

former affiliated party, to pay or reimburse such person for any liability or legal expense.

Individually negotiated settlement agreement means an agreement that settles a claim, or avoids a claim reasonably anticipated to be brought, against a troubled institution by an affiliated party and involves a payment in association with termination to, and a release of claims by, the affiliated party.

Liability or legal expense means—

(1) Any legal or other professional expense incurred in connection with any claim, proceeding, or action;

(2) The amount of, and any cost incurred in connection with, any settlement of any claim, proceeding, or action; and

(3) The amount of, and any cost incurred in connection with, any judgment or penalty imposed with respect to any claim, proceeding, or action.

Payment means:

(1) Any direct or indirect transfer of any funds or any asset;

(2) Any forgiveness of any debt or other obligation;

(3) The conferring of any benefit, including but not limited to stock options and stock appreciation rights; and

(4) Any segregation of any funds or assets, the establishment or funding of any trust or the purchase of or arrangement for any letter of credit or other instrument, for the purpose of making, or pursuant to any agreement to make, any payment on or after the date on which such funds or assets are segregated, or at the time of or after such trust is established or letter of credit or other instrument is made available, without regard to whether the obligation to make such payment is contingent on:

(i) The determination, after such date, of the liability for the payment of such amount; or

(ii) The liquidation, after such date, of the amount of such payment.

Permitted means, with regard to any agreement, that the agreement either does not require the Director's consent under this part or has received the Director's consent in accordance with this part.

Troubled institution means a regulated entity or the OF that is:

(1) Insolvent;

(2) In conservatorship or receivership;

(3) Subject to a cease-and-desist order or written agreement issued by FHFA that requires action to improve its financial condition or is subject to a proceeding initiated by the Director, which contemplates the issuance of an order that requires action to improve its financial condition, unless otherwise informed in writing by FHFA;

(4) Assigned a composite rating of 4 or 5 by FHFA under its CAMELSO examination rating system as it may be revised from time to time;

(5) Informed in writing by the Director that it is a troubled institution for purposes of the requirements of this part on the basis of the most recent report of examination or other information available to FHFA, on account of its financial condition, risk profile, or management deficiencies; or

(6) In contemplation of the occurrence of an event described in paragraphs (1) through (5) of this definition. A regulated entity or the OF is subject to a rebuttable presumption that it is in contemplation of the occurrence of such an event during the 90 day period preceding such occurrence.

■ 4. Revise § 1231.3 to read as follows:

§ 1231.3 Golden parachute payments and agreements.

(a) *In general, FHFA consent is required.* No troubled institution shall make or agree to make any golden parachute payment without the Director's consent, except as provided in this part.

(b) *Exempt agreements and payments.* The following agreements and payments, including payments associated with an agreement, are not golden parachute agreements or payments for purposes of this part and, for that reason, may be made without the Director's consent:

(1) Any pension or retirement plan that is qualified (or is intended to be qualified) under section 401 of the Internal Revenue Code of 1986 (26 U.S.C. 401);

(2) Any ''employee welfare benefit plan'' as that term is defined in section 3(1) of the Employee Retirement Income Security Act of 1974, as amended (29 U.S.C. 1002(1)), other than:

(i) Any deferred compensation plan or arrangement; and

(ii) Any severance pay plan or agreement;

(3) Any benefit plan that:

(i) Is a ''nondiscriminatory employee plan or program'' for the purposes of section 280G of the Internal Revenue Code of 1986 (26 U.S.C. 280G) and applicable regulations; or

(ii) Has been submitted to the Director for review in accordance with this part and that the Director has determined to be nondiscriminatory, unless such a plan is otherwise specifically addressed by this part;

(4) Any ''bona fide deferred compensation plan or arrangement'' as defined in this part provided that the plan:

(i) Was in effect for, and not materially amended to increase benefits payable thereunder (except for changes required by law) within, the one-year period prior to the regulated entity or the OF becoming a troubled institution; or

(ii) Has been determined to be permissible by the Director;

(5) Any payment made by reason of:

(i) Death; or

(ii) Termination caused by disability of the affiliated party; and

(6) Any severance or similar payment that is required to be made pursuant to a state statute that is applicable to all employers within the appropriate jurisdiction (with the exception of employers that are exempt due to their small number of employees or other similar criteria).

(c) *Golden parachute payment agreements for which FHFA consent is not required.* A troubled institution may enter into the following agreements to make a golden parachute payment without the Director's consent:

(1) With any affiliated party where the agreement is expressly directed or established by the Director exercising authority conferred by 12 U.S.C. 4617.

(2) With an affiliated party who is not an executive officer where the agreement:

(i) Is an individually negotiated settlement agreement, and the conditions of paragraph (e)(2) of this section are met; or

(ii) Provides for a golden parachute payment that, when aggregated with all other golden parachute payments to the affiliated party, does not exceed $5,000 (subject to any adjustment for inflation pursuant to paragraph (g) of this section).

(d) *Golden parachute payments for which FHFA consent is not required.* A troubled institution may make the following golden parachute payments without the Director's consent:

(1) To any affiliated party where:

(i) The payment is required to be made pursuant to a permitted individually negotiated settlement agreement; or

(ii) The Director previously consented to such payment in a written notice to the troubled institution (which may be included in the Director's consent to the agreement), the payment is made in accordance with a permitted agreement, and the troubled institution has met any conditions established by the Director for making the payment.

(2) To an executive officer where the payment recognizes a significant life event and does not exceed $500 in value

(subject to any adjustment for inflation pursuant to paragraph (g) of this section).

(3) To an affiliated party who is not an executive officer, where:

(i) The payment is made in accordance with a permitted agreement and the conditions of paragraph (e)(2) of this section are met; or

(ii) The payment when aggregated with other golden parachute payments to the affiliated party does not exceed $5,000 (subject to any adjustment for inflation pursuant to paragraph (g) of this section).

(e) *Required due diligence review; due diligence standard*—(1) *Agreements and payments where consent is requested.* A troubled institution making a request for consent to enter into a golden parachute payment agreement with, or to make a golden parachute payment to, an individual affiliated party shall conduct due diligence appropriate to the level and responsibility of the affiliated party covered by the agreement or to whom payment would be made, to determine whether there is information, evidence, documents, or other materials that indicate there is a reasonable basis to believe, at the time the request is submitted, that the affiliated party:

(i) Has committed any fraudulent act or omission, breach of trust or fiduciary duty, or insider abuse with regard to the regulated entity or the OF that is likely to have a material adverse effect on the regulated entity or the OF;

(ii) Is substantially responsible for the regulated entity or the OF being a troubled institution;

(iii) Has materially violated any applicable Federal or State law or regulation that has had or is likely to have a material effect on the regulated entity or the OF; or

(iv) Has violated or conspired to violate sections 215, 657, 1006, 1014, or 1344 of title 18 of the United States Code, or section 1341 or 1343 of such title affecting a ''financial institution'' as the term is defined in title 18 of the United States Code (18 U.S.C. 20).

(2) *Agreements and payments permitted without the Director's consent.* No troubled institution shall enter into an agreement pursuant to paragraph (c)(2)(i) of this section or make a payment pursuant to paragraph (d)(3)(i) of this section unless it is reasonably assured, following due diligence in accordance with paragraph (e)(1) of this section, that the affiliated party to whom payment would be made has not engaged in any of the actions listed in paragraphs (e)(1)(i) through (iv) of this section.

(3) *Required notice to FHFA.* If a troubled institution determines it is unable to enter into an agreement pursuant to paragraph (c)(2)(i) of this section or make a payment pursuant to (d)(3)(i) of this section without the Director's consent because it cannot meet the standard set forth in paragraph (e)(2) of this section, and thereafter does not request the Director's consent to make the payment, then the troubled institution shall provide notice to FHFA of each reason for which it cannot meet the standard set forth in paragraph (e)(2) of this section, within 15 business days of its determination.

(f) *Factors for Director consideration.* In making a determination under this section, the Director may consider:

(1) Whether, and to what degree, the affiliated party was in a position of managerial or fiduciary responsibility;

(2) The length of time the affiliated party was affiliated with the regulated entity or the OF, and the degree to which the proposed payment represents a reasonable payment for services rendered over the period of affiliation;

(3) Whether the golden parachute payment would be made pursuant to an employee benefit plan that is usual and customary;

(4) Whether the golden parachute payment or agreement is excessive or abusive or threatens the financial condition of the troubled institution; and

(5) Any other factor the Director determines relevant to the facts and circumstances surrounding the golden parachute payment or agreement, including any fraudulent act or omission, breach of fiduciary duty, violation of law, rule, regulation, order, or written agreement, and the level of willful misconduct, breach of fiduciary duty, and malfeasance on the part of the affiliated party.

(g) *Adjustment for inflation.* Monetary amounts set forth in this part may be adjusted for inflation by increasing the dollar amount set forth in this part by the percentage, if any, by which the Consumer Price Index for all-urban consumers published by the Department of Labor (''CPI–U'') for December of the calendar year preceding payment exceeds the CPI–U for the month of November 2018, with the resulting sum rounded up to the nearest whole dollar.

■ 5. Revise § 1231.5 to read as follows:

§ 1231.5 Applicability in the event of receivership.

The provisions of this part, or any consent or approval granted under the provisions of this part by FHFA, shall not in any way bind any receiver of a regulated entity. Any consent or approval granted under the provisions of this part by FHFA shall not in any way obligate FHFA as receiver to pay any claim or obligation pursuant to any golden parachute, severance, indemnification, or other agreement, or otherwise improve any claim of any affiliated party on or against FHFA as receiver. Nothing in this part may be construed to permit the payment of salary or any liability or legal expense of an affiliated party contrary to section 1318(e)(3) of the Safety and Soundness Act (12 U.S.C. 4518(e)(3)).

■ 6. Revise § 1231.6 to read as follows:

§ 1231.6 Filing instructions.

(a) *Scope.* This section contains procedures for requesting the consent of the Director and for filing any notice, where consent or notice is required by § 1231.3.

(b) *Where to file.* A troubled institution must submit any request for consent or notice required by § 1231.3 to the Manager, Executive Compensation Branch, or to such other person as FHFA may direct.

(c) *Content of a request for FHFA consent.* A request pursuant to § 1231.3 must:

(1) Be in writing;

(2) State the reasons why the troubled institution seeks to enter into the agreement or make the payment;

(3) Identify the affiliated party or describe of the class or group of affiliated parties who would receive or be eligible to receive payment;

(4) Include a copy of any agreement, including any plan document, contract, other agreement or policy regarding the subject matter of the request;

(5) State the cost of the proposed payment or payments, and the impact on the capital and earnings of the troubled institution;

(6) State the reasons why consent to the agreement or payment, or to both the agreement and payment, should be granted;

(7) For any plan that the troubled institution believes is a nondiscriminatory benefit plan, other than a plan covered by § 1231.3(b)(3)(i), state the basis for the conclusion that the plan is nondiscriminatory;

(8) For any bona fide deferred compensation plan or arrangement, state whether the plan would be exempt under this part but for the fact that it was either established or materially amended to increase benefits payable thereunder (except for changes required by law) within the one-year period prior to the regulated entity or the OF becoming a troubled institution;

(9) For any agreement with an individual affiliated party, or for any payment, either:

(i) State that the troubled institution is reasonably assured that the affiliated party has not engaged in any of the actions listed in § 1231.3(e)(1)(i) through (iv), or,

(ii) If the troubled institution is not reasonably assured that the affiliated party has not engaged in any of the actions listed in § 1231.3(e)(1)(i) through (iv) but nonetheless wishes to request consent, describe the results of its due diligence and, in light of those results, the reason why consent to the agreement or payment should be granted.

(d) *FHFA decision on a request.* FHFA shall provide the troubled institution with written notice of the decision on a request as soon as practicable after it is rendered.

(e) *Content of notice to FHFA.* A notice pursuant to § 1231.3(e)(3) must:

(1) Be in writing;

(2) Identify the affiliated party who would receive or be eligible to receive payment;

(3) Include a copy of any agreement or policy regarding the subject matter of the request; and

(4) State each reason why the troubled institution cannot meet the standard set forth in § 1231.3(e)(2).

(f) *Waiver of form or content requirements.* FHFA may waive or modify any requirement related to the form or content of a request or notice, in circumstances deemed appropriate by FHFA.

(g) *Additional information.* FHFA may request additional information at any time during the processing of the request or after receiving a notice.

Dated: December 14, 2018.

Melvin L. Watt,

Director, Federal Housing Finance Agency.

[FR Doc. 2018–27564 Filed 12–19–18; 8:45 am]

BILLING CODE 8070–01–P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

15 CFR Part 774

[Docket No. 180918851–8851–01]

RIN 0694–AH64

Control of Military Electronic Equipment and Other Items the President Determines No Longer Warrant Control Under the United States Munitions List (USML); Correction

AGENCY: Bureau of Industry and Security, Commerce.

ACTION: Final rule; correcting amendments.

SUMMARY: The Bureau of Industry and Security (BIS) is amending the Export Administration Regulations (EAR) by correcting two entries on the Commerce Control List (CCL) that control Global Navigation Satellite Systems (GNSS) receiving equipment. It was brought to BIS' attention that it did not implement controls over items that no longer warrant control under the United States Munitions List (USML) in a previous published rule. This rule corrects that error. BIS estimates that there will be 12 license applications submitted to BIS annually as a result of this rule.

DATES: *Effective date:* This rule is effective: December 20, 2018.

FOR FURTHER INFORMATION CONTACT: Dennis Krepp, Office of National Security and Technology Transfer Controls, (202) 482–1309, *dennis.krepp@bis.doc.gov.*

SUPPLEMENTARY INFORMATION:

Background

On October 12, 2016, the Bureau of Industry and Security (BIS) published a rule in the **Federal Register** entitled ''Revisions to the Export Administration Regulations (EAR): Control of Fire Control, Laser, Imaging, and Guidance Equipment the President Determines No Longer Warrant Control Under the United States Munitions List (USML)'' (81 FR 70320). This rule added to the Commerce Control List military electronics and related items the President determined no longer warrant control under the United States Munitions List (USML) of the International Traffic in Arms Regulations (ITAR) (22 CFR 120–130). BIS published the rule simultaneously with a Department of State rule that amended the list of articles controlled by USML Category XII (22 CFR 121.1) to control only those articles the President had determined warrant control in that category of the USML (81 FR 70340). The BIS rule was supposed to change the License Requirement section of Export Control Classification Number (ECCN) 7A005 to modify the CCL to cover 7A005.b, Global Navigation Satellite Systems (GNSS) receiving equipment employing 'adaptive antenna systems'. This equipment was removed from the USML. However, BIS inadvertently did not update the CCL as intended. The revisions described below provide that this equipment is covered by 7A005.b, and that items otherwise subject to 7A005.a are subject to the ITAR. In order to more clearly distinguish the national security controlled items from the missile technology controlled items in ECCN 7A005, BIS is fully listing the MTCR item 11.A.3 in the CCL under ECCN 7A105. Some of the items that this rule lists in ECCN 7A105 would be fully or partially subject to the ITAR were they not listed on the CCL. Therefore, it is very important for the public to employ the order of review principles found in Supplement No. 4 to part 774 of the EAR to classify their item correctly.

Revision to ECCN 7A005

This correction rule amends the License Requirements section of ECCN 7A005. The first amendment removes the text ''These items are ''subject to the ITAR'' (see 22 CFR parts 120 through 130).'' and adds in its place ''Reason for Control: NS, MT and AT''. The second amendment adds a License Requirements table to indicate a license requirement for national security (NS) reasons for the export or reexport of items listed in ECCN 7A005.b to all countries that have an ''X'' in NS Column 1 on the Commerce Country Chart (see Supplement No. 1 to part 738 of the EAR), *i.e.,* all countries, except Canada. The table also includes a license requirement for anti-terrorism (AT) reasons for the export or reexport of such items to countries that have an ''X'' in AT Column 1 of the Commerce Country Chart and for countries for which the EAR indicates a license requirement in a referenced section of the EAR on the Commerce Country Chart. Missile Technology (MT) controls are also added to the License Requirements table for ECCN 7A005.b items that meet or exceed the parameters of ECCN 7A105 when exported or reexported to countries that have an ''X'' in MT Column 1 of the Commerce Country Chart.

This rule also adds a License Exception section; however, no list based license exceptions will be available for this item. Transaction-based license exceptions or License Exception STA may be available if the transaction meets the criteria for any of those license exceptions in part 740 of the EAR.

The Related Control paragraph in ECCN 7A005 is also amended. This rule adds a reference to ECCN 7A611 in paragraph (1) and revises the sentence in paragraph (1) to improve readability. It also replaces the current text of paragraph (2) (''(2) See USML Category XII(d) for GNSS receiving equipment subject to the ITAR.'') with the following text: ''See USML Category XII(d) for GNSS receiving equipment subject to the ITAR and USML Category XI(c)(10) for antennae that are subject to the ITAR.'' Lastly, it adds paragraph (3) to read as follows, ''(3) 7A005.a is

''subject to the ITAR'' (see 22 CFR parts 120 through 130).''

Revisions to ECCN 7A105

This rule revises the Heading of ECCN 7A105 by moving the parameter to the Items paragraph in the List of Items Controlled section, and adding a reference to the List of Items Controlled section for the parameters. This rule replaces Related Control Note 2 with three more specific Related Control Notes. The MTCR Annex item 11.A.3 parameters are added to the Items paragraph of the List of Items Controlled section of ECCN 7A105. See the background section of the preamble for BIS's rationale.

Export Control Reform Act of 2018

On August 13, 2018, the President signed into law the John S. McCain National Defense Authorization Act for Fiscal Year 2019, which included the Export Control Reform Act of 2018 (ECRA) (Title XVII, Subtitle B of Pub. L. 115–232) that provides the legal basis for BIS's principal authorities and serves as the authority under which BIS issues this rule. As set forth in Section 1768 of ECRA, all delegations, rules, regulations, orders, determinations, licenses, or other forms of administrative action that have been made, issued, conducted, or allowed to become effective under the Export Administration Act of 1979 (50 U.S.C. 4601 *et seq.*) (as in effect prior to August 13, 2018 and as continued in effect pursuant to the International Emergency Economic Powers Act (50 U.S.C. 1701 *et seq.*) and Executive Order 13222 of August 17, 2001, 3 CFR, 2001 Comp., p. 783 (2002), as amended by Executive Order 13637 of March 8, 2013, 78 FR 16129 (March 13, 2013), and as extended by the Notice of August 8, 2018, 83 FR 39871 (August 13, 2018)), or the Export Administration Regulations, and are in effect as of August 13, 2018, shall continue in effect according to their terms until modified, superseded, set aside, or revoked under the authority of ECRA.

Rulemaking Requirements

1. Executive Orders 13563 and 12866 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rule has not been designated a ''significant regulatory action,'' under section 3(f) of Executive Order 12866. This rule is not an Executive Order 13771 regulatory action because this rule is not significant under Executive Order 12866.

2. Pursuant to Section 1762 of the Export Control Reform Act of 2018 (Title XVII, Subtitle B of Pub. L. 115–232), which was included in the John S. McCain National Defense Authorization Act for Fiscal Year 2019, this action is exempt from the Administrative Procedure Act (5 U.S.C. 553) requirements for notice of proposed rulemaking, opportunity for public participation and delay in effective date. The analytical requirements of the Regulatory Flexibility Act (5 U.S.C. 601 *et. seq.*) are not applicable because no general notice of proposed rulemaking was required for this action. Accordingly, no regulatory flexibility analysis is required, and none has been prepared.

3. Notwithstanding any other provision of law, no person is required to respond to, nor is subject to a penalty for failure to comply with, a collection of information, subject to the requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) (PRA), unless that collection of information displays a currently valid Office of Management and Budget (OMB) Control Number. This regulation involves collections previously approved by OMB under the following control numbers: 0694–0088, 0694–0122, 0694–0134, and 0694–0137.

4. This rule does not contain policies with Federalism implications as that term is defined in Executive Order 13132.

List of Subjects in 15 CFR Part 774

Exports, Reporting and recordkeeping requirements.

Accordingly, part 774 of the Export Administration Regulations (15 CFR parts 730 through 774) is amended as follows:

PART 774—[AMENDED]

■ 1. The authority citation for part 774 continues to read as follows:

Authority: Pub. L. 115–232, Title XVII, Subtitle B; 50 U.S.C. 4601 *et seq.;* 50 U.S.C. 1701 *et seq.;* 10 U.S.C. 7420; 10 U.S.C. 7430(e); 22 U.S.C. 287c, 22 U.S.C. 3201 *et seq.;* 22 U.S.C. 6004; 42 U.S.C. 2139a; 15 U.S.C. 1824a; 50 U.S.C. 4305; 22 U.S.C. 7201 *et seq.;* 22 U.S.C. 7210; E.O. 13026, 61 FR 58767, 3 CFR, 1996 Comp., p. 228; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783; Notice of August 8, 2018, 83 FR 39871 (August 13, 2018).

■ 2. In Supplement No. 1, Category 7, ECCN 7A005 is revised to read as follows:

Supplement No. 1 to Part 774—The Commerce Control List

* * * * *

7A005 Global Navigation Satellite Systems (GNSS) receiving equipment having any of the following (see List of Items Controlled) and ''specially designed'' ''components'' therefor.

License Requirements

Reason for Control: NS, MT and AT

Control(s)	*Country chart (See Supp. No. 1 to part 738)*
NS applies to 7A005.b.	NS Column 1
MT applies to commodities in 7A005.b that meet or exceed the parameters of 7A105.	MT Column 1
AT applies to 7A005.b.	AT Column 1

List Based License Exceptions (See Part 740 for a description of all license exceptions)

LVS: N/A
GBS: N/A
CIV: N/A

List of Items Controlled

Related Controls: (1) See also ECCNs 7A105, 7A611 and 7A994. Commercially available GNSS receivers do not typically employ decryption or adaptive antennae and are classified as 7A994. (2) See USML Category XII(d) for GNSS receiving equipment subject to the ITAR and USML Category XI(c)(10) for antennae that are subject to the ITAR. (3) Items that otherwise would be covered by ECCN 7A005.a are ''subject to the ITAR'' (see 22 CFR parts 120 through 130).

Related Definitions: N/A

Items:

a. Employing a decryption algorithm ''specially designed'' or modified for government use to access the ranging code for position and time; *or*

b. Employing 'adaptive antenna systems'.

Note: 7A005.b does not apply to GNSS receiving equipment that only uses ''components'' designed to filter, switch, or combine signals from multiple omni-directional antennas that do not implement adaptive antenna techniques.

Technical Note: For the purposes of 7A005.b 'adaptive antenna systems' dynamically generate one or more spatial nulls in an antenna array pattern by signal processing in the time domain or frequency domain.

■ 3. In Supplement No. 1, Category 7, ECCN 7A105 is revised to read as follows:

7A105 Receiving equipment for 'navigation satellite systems', having any of the following characteristics (see List of

Items Controlled), and ''specially designed'' ''parts'' and ''components'' therefor.

License Requirements

Reason for Control: MT, AT

Control(s)	*Country chart (See Supp. No. 1 to part 738)*
MT applies to entire entry.	MT Column 1
AT applies to entire entry.	AT Column 1

List Based License Exceptions (See Part 740 for a description of all license exceptions)

LVS: N/A
GBS: N/A
CIV: N/A

List of Items Controlled

Related Controls: (1) See also 7A005, 7A611 and 7A994. (2) See USML Category XII(d) for GNSS receiving equipment subject to the ITAR and USML Category XI(c)(10) for antennae that are subject to the ITAR. (3) Items that otherwise would be covered by ECCN 7A105.b.2 are ''subject to the ITAR'' (see 22 CFR parts 120 through 130). (4) See USML Category XII(d) for GPS receiving equipment in 7A105.a, b.1 and b.3 that are subject to the ITAR.

Related Definitions: 'Navigation satellite systems' include Global Navigation Satellite Systems (GNSS; *e.g.* GPS, GLONASS, Galileo or BeiDou) and Regional Navigation Satellite Systems (RNSS; *e.g.* NavIC, QZSS).

Items:

a. Designed or modified for use in ''missiles''; or

b. Designed or modified for airborne applications and having any of the following:

b.1. Capable of providing navigation information at speeds in excess of 600 m/s;

b.2. Employing decryption, designed or modified for military or governmental services, to gain access to a 'navigation satellite system' secure signal/data; or

b.3. Being ''specially designed'' to employ anti-jam features (*e.g.,* null steering antenna or electronically steerable antenna) to function in an environment of active or passive countermeasures.

Note: 7A105.b.2 and 7A105.b.3 do not control equipment designed for commercial, civil or Safety of Life (*e.g.,* data integrity, flight safety) 'navigation satellite system' services.

* * * * *

Dated: December 17, 2018.

Matthew S. Borman,

Deputy Assistant Secretary for Export Administration.

[FR Doc. 2018–27542 Filed 12–19–18; 8:45 am]

BILLING CODE 3510–33–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 101

[Docket No. FDA–2000–N–0011]

Uniform Compliance Date for Food Labeling Regulations

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA or we) is establishing January 1, 2022, as the uniform compliance date for food labeling regulations that are published on or after January 1, 2019, and on or before December 31, 2020. We periodically announce uniform compliance dates for new food labeling requirements to minimize the economic impact of label changes.

DATES: This rule is effective December 20, 2018. Submit electronic or written comments by February 19, 2019.

ADDRESSES: You may submit comments as follows:

Electronic Submissions

Submit electronic comments in the following way:

• *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *https://www.regulations.gov* will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on *https://www.regulations.gov.*

• If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see ''Written/Paper Submissions'' and ''Instructions'').

Written/Paper Submissions

Submit written/paper submissions as follows:

• *Mail/Hand Delivery/Courier (for written/paper submissions):* Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

• For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in ''Instructions.''

Instructions: All submissions received must include the Docket No. FDA–2000–N–0011 for ''Uniform Compliance Date for Food Labeling Regulations.'' Received comments, those filed in a timely manner (see **ADDRESSES**), will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *https://www.regulations.gov* or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday.

• Confidential Submissions—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' We will review this copy, including the claimed confidential information, in our consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *https://www.regulations.gov.* Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *https://www.gpo.gov/fdsys/pkg/FR-2015-09-18/pdf/2015-23389.pdf.*

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to *https://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Dockets Management

Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT: Philip L. Chao, Center for Food Safety and Applied Nutrition (HFS–24), Food and Drug Administration, 5001 Campus Dr., College Park, MD 20740, 240–402–2112.

SUPPLEMENTARY INFORMATION: We periodically issue regulations requiring changes in the labeling of food. If the effective dates of these labeling changes were not coordinated, the cumulative economic impact on the food industry of having to respond separately to each change would be substantial. Therefore, we periodically have announced uniform compliance dates for new food labeling requirements (see, *e.g.,* the **Federal Register** of October 19, 1984 (49 FR 41019); December 24, 1996 (61 FR 67710); December 27, 1996 (61 FR 68145); December 23, 1998 (63 FR 71015); November 20, 2000 (65 FR 69666); December 31, 2002 (67 FR 79851); December 21, 2006 (71 FR 76599); December 8, 2008 (73 FR 74349); December 15, 2010 (75 FR 78155); November 28, 2012 (77 FR 70885); December 10, 2014 (79 FR 73201); and November 25, 2016 (81 FR 85156)). Use of a uniform compliance date provides for an orderly and economical industry adjustment to new labeling requirements by allowing sufficient lead time to plan for the use of existing label inventories and the development of new labeling materials.

We have determined under 21 CFR 25.30(k) that this action is of a type that does not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

This final rule contains no collections of information. Therefore, clearance by the Office of Management and Budget under the Paperwork Reduction Act of 1995 is not required.

We have examined the impacts of the final rule under Executive Order 12866, Executive Order 13563, Executive Order 13771, the Regulatory Flexibility Act (5 U.S.C. 601–612), and the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4). Executive Orders 12866 and 13563 direct Agencies to assess all costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity). Executive Order 13771 requires that the costs associated with significant new regulations ''shall, to the extent permitted by law, be offset by the elimination of existing costs associated with at least two prior regulations.'' We believe that this final rule is not a significant regulatory action under Executive Order 12866.

The establishment of a uniform compliance date does not in itself lead to costs or benefits. We will assess the costs and benefits of the uniform compliance date in the regulatory impact analyses of the labeling rules that take effect at that date.

The Regulatory Flexibility Act requires Agencies to analyze regulatory options that would minimize any significant economic impact of a rule on small entities. Because the final rule does not impose compliance costs on small entities, we certify that the final rule will not have a significant economic impact on a substantial number of small entities.

Section 202(a) of the Unfunded Mandates Reform Act of 1995 requires that Agencies prepare a written statement, which includes an assessment of anticipated costs and benefits, before issuing ''any rule that includes any Federal mandate that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100,000,000 or more (adjusted annually for inflation) in any one year.'' The current threshold after adjustment for inflation is $150 million, using the most current (2017) Implicit Price Deflator for the Gross Domestic Product. We do not expect this final rule to result in any 1-year expenditure that would meet or exceed this amount.

We have analyzed this final rule in accordance with the principles set forth in Executive Order 13132. We have determined that the rule does not contain policies that 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. Accordingly, we have concluded that the rule does not contain policies that have federalism implications as defined in the Executive Order and, consequently, a federalism summary impact statement is not required.

This action is not intended to change existing requirements for compliance dates contained in final rules published before January 1, 2019. Therefore, all final rules published by FDA in the **Federal Register** before January 1, 2019, will still go into effect on the date stated in the respective final rule. We generally encourage industry to comply with new labeling regulations as quickly as feasible, however. Thus, when industry members voluntarily change their labels, it is appropriate that they incorporate any new requirements that have been published as final regulations up to that time.

In rulemaking that began with publication of a proposed rule on April 15, 1996 (61 FR 16422), and ended with a final rule on December 24, 1996 (61 FR 67710) (together ''the 1996 rulemaking''), we provided notice and an opportunity for comment on the practice of establishing uniform compliance dates by issuance of a final rule announcing the date. We received no comments objecting to this practice during the 1996 rulemaking, nor have we received comments objecting to this practice since we published a uniform compliance date on November 25, 2016 (81 FR 85156). Therefore, we find good cause to dispense with issuance of a proposed rule inviting comment on the practice of establishing the uniform compliance date because such prior notice and comment are unnecessary. Interested parties will have an opportunity to comment on the compliance date for each individual food labeling regulation as part of the rulemaking process for that regulation. Consequently, FDA finds any further advance notice and opportunity for comment unnecessary for establishment of the uniform compliance date. Nonetheless, under 21 CFR 10.40(e)(1), we are providing an opportunity for comment on whether the uniform compliance date established by this final rule should be modified or revoked.

In addition, we find good cause for this final rule to become effective on the date of publication of this action. A delayed effective date is unnecessary in this case because the establishment of a uniform compliance date does not impose any new regulatory requirements on affected parties. Instead, this final rule provides affected parties with notice of our policy to identify January 1, 2022, as the compliance date for final food labeling regulations that require changes in the labeling of food products and that publish on or after January 1, 2019, and on or before December 31, 2020, unless special circumstances justify a different compliance date. Thus, affected parties do not need time to prepare before the rule takes effect. Therefore, we find good cause for this final rule to become effective on the date of publication of this action.

The new uniform compliance date will apply only to final FDA food labeling regulations that require changes

in the labeling of food products and that publish on or after January 1, 2019, and on or before December 31, 2020. Those regulations will specifically identify January 1, 2022, as their compliance date. All food products subject to the January 1, 2022, compliance date must comply with the appropriate regulations when initially introduced into interstate commerce on or after January 1, 2022. If any food labeling regulation involves special circumstances that justify a compliance date other than January 1, 2022, we will determine for that regulation an appropriate compliance date, which will be specified when the final regulation is published.

Dated: December 13, 2018.

Scott Gottlieb,

Commissioner of Food and Drugs.

[FR Doc. 2018–27429 Filed 12–19–18; 8:45 am]

BILLING CODE 4164–01–P

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

29 CFR Part 1630

[EEOC–2018–0004]

RIN 3046–AB01

Removal of Final ADA Wellness Rule Vacated by Court

AGENCY: Equal Employment Opportunity Commission.

ACTION: Final rule.

SUMMARY: This final rule removes from the Code of Federal Regulations a section of the final rule published on May 17, 2016, entitled ''Regulations Under the Americans With Disabilities Act.'' This action responds to a decision of the U.S. District Court for the District of Columbia that vacated the incentive section of the ADA rule effective January 1, 2019.

DATES: The action is effective on January 1, 2019.

FOR FURTHER INFORMATION CONTACT: Christopher J. Kuczynski, (202) 663–4665 (voice), *christopher.kuczynski@eeoc.gov;* or Joyce Walker-Jones, (202) 663–7031 (voice); *joyce.walker-jones@eeoc.gov;* or (202) 663–7026 (TTY).

SUPPLEMENTARY INFORMATION: On May 17, 2016, the Equal Employment Opportunity Commission (EEOC) published a final rule entitled ''Regulations Under the Americans With Disabilities Act'' under the authority of Title I of the Americans with Disabilities Act (ADA), 42 U.S.C. 12101–12117. 81 **Federal Register** 31126. The rule ''provide[d] guidance on the extent to which employers may use incentives to encourage employees to participate in wellness programs that ask them to respond to disability-related inquiries and/or undergo medical examinations.''

On October 24, 2016, AARP filed a complaint in the U.S. District Court for the District of Columbia challenging the incentive section of the ADA rule. On August 22, 2017, the District Court concluded that the Commission did not provide sufficient reasoning to justify the incentive limit adopted in the ADA rule and remanded the rule to the EEOC for reconsideration without vacating it. Following a motion by AARP to alter or amend the court's summary judgment order, the court issued an order vacating the incentive section of the rule, 29 CFR 1630.14(d)(3), effective January 1, 2019. *AARP* v. *EEOC, D.D.C.,* No. 16–2113 (D.D.C. December 20, 2017). Consistent with that decision, this rule removes the incentive section of the ADA regulations at 29 CFR 1630.14(d)(3).

This rule is not subject to the requirement to provide public comment because it falls under the good cause exception at 5 U.S.C. 553(b)(B). The good cause exception is satisfied when notice and comment is ''impracticable, unnecessary, or contrary to the public interest.'' *Id.* This rule is an administrative step that implements the court's order vacating the incentive section of the ADA rule. Additionally, because this rule implements a court order already in effect, the Commission has good cause to waive the 30-day effective date under 5 U.S.C. 553(d)(3).

List of Subjects in 29 CFR Part 1630

Administrative practice and procedure, Equal employment opportunity.

For the reasons set forth in the preamble, under the authority of 42 U.S.C. 12101–12117, the Commission amends chapter XIV of title 29 of the Code of Federal Regulations as follows:

PART 1630—REGULATIONS TO IMPLEMENT THE EQUAL EMPLOYMENT PROVISIONS OF THE AMERICANS WITH DISABILITIES ACT

■ 1. The authority citation for part 1630 continues to read as follows:

Authority: 42 U.S.C. 12116 and 12205a of the Americans with Disabilities Act, as amended.

§ 1630.14 [Amended]

■ 2. Amend § 1630.14 by removing and reserving paragraph (d)(3).

Dated: December 14, 2018.

Victoria A. Lipnic,

Acting Chair, U.S. Equal Employment Opportunity Commission.

[FR Doc. 2018–27539 Filed 12–19–18; 8:45 am]

BILLING CODE 6570–01–P

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

29 CFR Part 1635

EEOC–2018–0005]

RIN 3046–AB02

Removal of Final GINA Wellness Rule Vacated by Court

AGENCY: Equal Employment Opportunity Commission.

ACTION: Final rule.

SUMMARY: This final rule removes from the Code of Federal Regulations a section of the final rule published on May 17, 2016, entitled, ''Genetic Information Nondiscrimination Act.'' This action responds to a decision of the U.S. District Court for the District of Columbia that vacated the incentive section of the GINA rule effective January 1, 2019.

DATES: The action is effective on January 1, 2019.

FOR FURTHER INFORMATION CONTACT: Christopher J. Kuczynski, (202) 663–4665 (voice), *christopher.kuczynski@eeoc.gov;* or Kerry E. Leibig, (202) 663–4516 (voice), *kerry.leibig@eeoc.gov;* or (202) 663–7026 (TTY).

SUPPLEMENTARY INFORMATION: On May 17, 2016, the Equal Employment Opportunity Commission (EEOC) published a final rule entitled, ''Genetic Information Nondiscrimination Act'' under the authority of Title II of the Genetic Information Nondiscrimination Act of 2008 (GINA), 42 U.S.C. 2000ff–2000ff–11. 81 **Federal Register** 31143. The rule ''addressed the extent to which an employer may offer an inducement to an employee for the employee's spouse to provide his or her current health status information as part of a health risk assessment (HRA) administered in connection with an employee-sponsored wellness program.'' Id.

On October 24, 2016, AARP filed a complaint in the U.S. District Court for the District of Columbia challenging the incentive section of the GINA rule. On August 22, 2017, the District Court concluded that the Commission did not provide sufficient reasoning to justify the incentive limit adopted in the GINA rule and remanded the rule to the EEOC for further consideration without vacating it. Following a motion by

AARP to alter or amend the court's summary judgment order, the court issued an order vacating the incentive section of the rule, 29 CFR 1635.8(b)(2)(iii), effective January 1, 2019. *AARP* v. *EEOC, D.D.C.,* No. 16–2113 (D.D.C. Dec. 20, 2017). Consistent with that decision, this rule removes the incentive section of the GINA regulations at 29 CFR 1635.8(b)(2)(iii).

This rule is not subject to the requirement to provide public comment because it falls under the good cause exception at 5 U.S.C. 553(b)(B). The good cause exception is satisfied when notice and comment is ''impracticable, unnecessary, or contrary to the public interest.'' *Id.* This rule is an administrative step that implements the court's order vacating the incentive section of the GINA rule. Additionally, because this rule implements a court order already in effect, the Commission has good cause to waive the 30-day effective date under 5 U.S.C. 553(d)(3).

List of Subjects in 29 CFR Part 1635

Administrative practice and procedure, Equal employment opportunity.

For the reasons set forth in the preamble, under the authority of 42 U.S.C. 2000ff–2000ff–11, the EEOC amends chapter XIV of title 29 of the Code of Federal Regulations as follows:

PART 1635—GENETIC INFORMATION NONDISCRIMINATION ACT OF 2008

■ 1. The authority citation for part 1635 continues to read as follows:

Authority: 29 U.S.C. 2000ff.

§ 1635.8 [Amended]

■ 2. Amend § 1635.8 by removing and reserving paragraph (b)(2)(iii).

Dated: December 14, 2018.

Victoria A. Lipnic,

Acting Chair, U.S. Equal Employment Opportunity Commission.

[FR Doc. 2018–27538 Filed 12–19–18; 8:45 am]

BILLING CODE 6570–01–P

DEPARTMENT OF THE TREASURY

Fiscal Service

31 CFR Part 270

Availability of Records

AGENCY: Bureau of the Fiscal Service, Fiscal Service, Treasury.

ACTION: Final rule.

SUMMARY: The United States Department of the Treasury (Treasury), Bureau of the Fiscal Service, is streamlining its regulations by removing regulations that are no longer necessary because they are duplicative of other existing regulations, and do not add any substantive requirements, limitations, or instructions to Treasury's regulations.

DATES: Effective December 20, 2018.

ADDRESSES: You can download this final rule at the following internet addresses: *http://www.regulations.gov*, *http://www.gpo.gov*, or *http://www.fiscal.treasury.gov.*

FOR FURTHER INFORMATION CONTACT: Thomas Kearns, Attorney-Advisor, Office of the Chief Counsel, (202) 874–7036.

SUPPLEMENTARY INFORMATION:

I. Background

On February 24, 2017, the President issued Executive Order 13777, Enforcing the Regulatory Reform Agenda (82 FR 12285). E.O. 13777 directed each agency to establish a Regulatory Reform Task Force. Each Regulatory Reform Task Force was directed to review existing regulations that: (i) Eliminate jobs, or inhibit job creation; (ii) are outdated, unnecessary, or ineffective; (iii) impose costs that exceed benefits; (iv) create a serious inconsistency or otherwise interfere with regulatory reform initiatives and policies; (v) are inconsistent with the requirements of the Information Quality Act (section 515 of the Treasury and General Government Appropriations Act of 2001) or OMB Information Quality Guidance issued pursuant to that provision; or (vi) derive from or implement Executive Orders or other Presidential directives that have been subsequently rescinded or substantially modified.

II. Explanation of Provisions

Treasury is eliminating Bureau of the Fiscal Service regulations that it has determined are duplicative and unnecessary. These regulations, published at 31 CFR part 270, govern the availability of records, materials and information to be made available to the public, in accordance with the Freedom of Information Act, 5 U.S.C. 552. These regulations operate in accordance with the definitions, procedures, and other provisions of the regulations regarding the Disclosure of Records of the Office of the Secretary and of other bureaus and offices of the Treasury Department, published as part 1 of title 31 of the Code of Federal Regulations. The rule found at 31 CFR part 270 is unnecessary because it does not add any substantive requirements, limitations, or instructions to the Treasury Department regulations and the appendices thereto. Accordingly, the regulations in 31 CFR part 270 are being removed.

III. Procedural Requirements

A. Administrative Procedure Act

The Administrative Procedure Act (APA) generally requires agencies to publish a notice of proposed rulemaking in the **Federal Register** and provide interested persons the opportunity to submit comments. 5 U.S.C. 553(b) and (c). The APA provides an exception to this prior notice and comment requirement for ''rules of agency organization, procedure, or practice.'' 5 U.S.C. 553(b)(A). This final rule is a procedural rule promulgated for agency efficiency purposes. Treasury is removing duplicative and unnecessary regulations, the removal of which will not affect the substantive rights or interests of the public.

The APA also provides an exception from notice and comment procedures when an agency finds for good cause that those procedures are ''impracticable, unnecessary, or contrary to the public interest.'' 5 U.S.C. 553(b)(B). Treasury finds good cause to issue this rule without prior notice or comment, because such procedures are unnecessary. The removal of these regulations will have no substantive effect on the public because the regulations are duplicative of other existing regulations, and their removal will not affect the substantive rights or interests of the public.

Further, the APA generally requires that substantive rules incorporate a 30-day delayed effective date. 5 U.S.C. 553(d). This final rule, however, is merely procedural and promulgated for agency efficiency purposes, and does not impose substantive requirements on, nor affect the interests of, the public. Therefore, pursuant to 5 U.S.C. 553(d)(3), Treasury finds for good cause that a delayed effective date is unnecessary.

B. Congressional Review Act (CRA)

This rule is not a major rule pursuant to the CRA, 5 U.S.C. 801 *et seq.* It is not expected to lead to any of the results listed in 5 U.S.C. 804(2). This rule may take immediate effect after we submit a copy of it to Congress and the Comptroller General.

C. Paperwork Reduction Act (PRA)

There is no new collection of information contained in this final rule that would be subject to the PRA, 44 U.S.C. 3501 *et seq.* Under the PRA, an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid OMB control number.

D. Regulatory Flexibility Act

The Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.,* does not apply to this rule because, pursuant to 5 U.S.C. 553(a)(2), issuance does not require notice and opportunity for public comment. Nonetheless, this rule will not have a significant economic impact on a substantial number of small entities.

E. Executive Order 12866

This rule is not a significant regulatory action pursuant to Executive Order 12866.

List of Subjects in 31 CFR Part 270

Records, availability of records and information, requests for records, Freedom of Information Act.

Amendments to the Regulations

PART 270—[REMOVED AND RESERVED]

■ Accordingly, under the authority of 5 U.S.C. 552, 31 CFR part 270 is removed and reserved.

David A. Lebryk,

Fiscal Assistant Secretary.

[FR Doc. 2018–27546 Filed 12–19–18; 8:45 am]

BILLING CODE 4810–AS–P

DEPARTMENT OF THE TREASURY

Fiscal Service

31 CFR Parts 317 and 358

Regulations Governing United States Securities

AGENCY: Bureau of the Fiscal Service, Fiscal Service, Treasury.

ACTION: Final rule.

SUMMARY: The United States Department of the Treasury, Bureau of the Fiscal Service, is streamlining its securities regulations by removing regulations that are no longer necessary because they do not have any current or future applicability.

DATES: Effective December 20, 2018.

ADDRESSES: You can download this final rule at the following internet addresses: *http://www.regulations.gov*, *http://www.gpo.gov*, or *http://www.fiscal.treasury.gov.*

FOR FURTHER INFORMATION CONTACT: Lisa Martin, Attorney-Advisor, Office of the Chief Counsel, (304) 480–8697.

SUPPLEMENTARY INFORMATION:

I. Background

On February 24, 2017, the President issued Executive Order 13777, Enforcing the Regulatory Reform Agenda (82 FR 12285). E.O. 13777 directed each agency to establish a Regulatory Reform Task Force. Each Regulatory Reform Task Force was directed to review existing regulations that: (i) Eliminate jobs, or inhibit job creation; (ii) are outdated, unnecessary, or ineffective; (iii) impose costs that exceed benefits; (iv) create a serious inconsistency or otherwise interfere with regulatory reform initiatives and policies; (v) are inconsistent with the requirements of the Information Quality Act (section 515 of the Treasury and General Government Appropriations Act of 2001) or OMB Information Quality Guidance issued pursuant to that provision; or (vi) derive from or implement Executive Orders or other Presidential directives that have been subsequently rescinded or substantially modified.

II. Explanation of Provisions

In this rulemaking, the Department of the Treasury (Treasury) is eliminating two categories of securities regulations that are no longer necessary. The first category, published at 31 CFR part 317, governs the manner in which an organization may qualify and act as an agent for the sale and issue of Series EE and Series I United States Savings Bonds. These regulations are unnecessary because Treasury stopped selling savings bonds at financial institutions in January 2012 and no longer issues savings bonds through issuing agents. The second category, published at 31 CFR part 358, governs the conversion of stripped bearer securities into book-entry securities that can be held in commercial book-entry accounts with brokers and financial institutions. These regulations are unnecessary because the last bearer security eligible for conversion was called in November 2006, and the conversion program has ended. Accordingly, the regulations in parts 317 and 358 are being removed.

III. Procedural Requirements

A. Administrative Procedure Act (APA)

Because this rule relates to United States securities, which are contracts between Treasury and the owner of the security, this rule falls within the contract exception to the APA at 5 U.S.C. 553(a)(2). Notice and comment rulemaking is not required.

B. Congressional Review Act (CRA)

This rule is not a major rule pursuant to the CRA, 5 U.S.C. 801 *et seq.* It is not expected to lead to any of the results listed in 5 U.S.C. 804(2). This rule may take immediate effect after we submit a copy of it to Congress and the Comptroller General.

C. Paperwork Reduction Act (PRA)

There is no new collection of information contained in this final rule that would be subject to the PRA, 44 U.S.C. 3501 *et seq.* Under the PRA, an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid OMB control number.

D. Regulatory Flexibility Act

The Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.,* does not apply to this rule because, pursuant to 5 U.S.C. 553(a)(2), issuance does not require notice and opportunity for public comment. Nonetheless, this rule will not have a significant economic impact on a substantial number of small entities.

E. Executive Order 12866

This rule is not a significant regulatory action pursuant to Executive Order 12866.

List of Subjects

31 CFR Part 317

Government securities, Savings bonds.

31 CFR Part 358

Government securities.

Amendments to the Regulations

Accordingly, under the authority of 31 U.S.C. 3121, 31 CFR chapter II is amended as follows:

PART 317—[REMOVED AND RESERVED]

■ 1. Part 317 is removed and reserved.

PART 358—[REMOVED AND RESERVED]

■ 2. Part 358 is removed and reserved.

David A. Lebryk,

Fiscal Assistant Secretary.

[FR Doc. 2018–27545 Filed 12–19–18; 8:45 am]

BILLING CODE 4810–AS–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

Docket No. USCG–2018–0128]

RIN 1625–AA09

Drawbridge Operation Regulation; Ebey Slough, Marysville, WA

AGENCY: Coast Guard, DHS.

ACTION: Final rule.

SUMMARY: The Coast Guard is modifying the operating schedule that governs the Burlington Northern Santa Fe Railroad (BNSF) Bridge 38.3 across Ebey Slough, mile 1.5, at Marysville, WA. The modified schedule removes the bridge operator at the subject drawbridge, and will change from on-demand opening to a four hour advance notice for opening.

DATES: This rule is effective January 22, 2019.

ADDRESSES: To view documents mentioned in this preamble as being available in the docket, go to *http://www.regulations.gov*. Type USCG–2018–0128 in the ''SEARCH'' box and click ''SEARCH.'' Click on Open Docket Folder on the line associated with this rulemaking.

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call or email Steven M. Fischer, Bridge Administrator, Thirteenth Coast Guard District Bridge Program Office, telephone 206–220–7282; email *d13-pf-d13bridges@uscg.mil*.

SUPPLEMENTARY INFORMATION:

I. Table of Abbreviations

CFR Code of Federal Regulations
DHS Department of Homeland Security
FR Federal Register
NPRM Notice of Proposed Rulemaking
§ Section
U.S.C. United States Code
BNSF Burlington Northern Santa Fe Railway

II. Background, Purpose and Legal Basis

On March 12, 2018, we published a NPRM entitled ''Drawbridge Operation Regulation; Ebey Slough, Marysville, WA,'' in the **Federal Register** (83 FR 12305). We received one comment on this rule. This comment was received May 8, 2018, and included several objections. BNSF submitted a rebuttal to us on June 1, 2018, addressing each objection. We have read both submittals from each party, and will discuss the material herein.

The Coast Guard is issuing this rule under authority in 33 U.S.C. 499. BNSF requested a change to the operating schedule of the BNSF Railroad Bridge 38.3 across Ebey Slough, mile 1.5, in order to save on operating costs for the bridge. The regulation will allow BNSF to operate without a bridge operator attending the bridge until an opening request has been received, and allow BNSF's bridge operator to open the swing span within four hours after receiving a request for an opening. Marine traffic on Ebey Slough consists of vessels ranging from small pleasure craft, small tribal fishing boats and occasionally medium size pleasure motor vessels.

III. Legal Authority and Need for Rule

The Coast Guard is issuing this rule under authority 33 U.S.C. 499. The BNSF Bridge 38.3 across Ebey Slough, mile 1.5, at Marysville, WA, currently operates in accordance with 33 CFR 117.5. This bridge provides a vertical clearance approximately 5 feet above mean high water and approximately 16 feet above mean low water when in the closed-to-navigation position. The Coast Guard will add the vertical clearances in the Coast Pilot. Vertical clearance in the open-to-navigation position is unlimited. During July 2017, a BNSF supervisor contacted the District Bridge Office via a phone call enquiring about a rule change for the subject bridge due to a low number of openings. In 2015, the number of bridge openings was 128, and each year afterward, the number of openings have progressively been less. The City of Maryville closed the only marina upriver from the swing bridge in 2016, and that year the bridge opened 48 times, and most of those openings were for relocating vessels leaving the marina. At the time BNSF submitted a rule change request in August 2017, only two vessel opening requests were received. However, after reviewing updated bridge logs for this rule change, we identified a total of five openings. This rule change to request at least a four hour notice to open the subject bridge will lower operating cost, and the waterway use supports this rule.

IV. Discussion of Comments, Changes and the Final Rule

Part of the comment submitted stated our NPRM was devoid of BNSF's written request. Our NPRMs do not include the bridge owner's written request, and anyone may request a rule change. The Coast Guard published the NPRM based on facts open to public comment, allowing ample opportunity for review. The comment continues with six objections, the following addresses these objections with BNSF's rebuttal and our determination:

A. The commenter objects to removal of the bridge tender on the basis that the bridge tender performs routine day-to-day maintenance and inspection, assuring that the bridge operates as intended. Without the bridge tender, there are increased chances for mechanical failure leading to a halt in maritime traffic. USCG disagrees. The bridge operator's responsibility and/or role to perform day-to-day routine maintenance, inspection, repairs and in ensuring the swing span will open is irrespective of the mariner notice time to open the bridge. In the event of a mechanical failure, multiple BNSF employees are available to respond, including BNSF maintenance crews, bridge and track inspectors, and supervisors. This response to execute repairs is not changed by this rule. The subject bridge is cycled open and closed on a periodic bases to ensure the operating status as required by 33 CFR 117.5. This rule will not impact the operation of the bridge or change BNSF's responsibility to maintain the bridge.

B. The commenter discusses the issue of trespassers who use the bridge for fishing, and freight trains depositing debris and trash on the bridge, both of which are removed and handled by the bridge tender. The commenter asserts that without the bridge tender's actions, there are significant safety concerns. USCG disagrees. Potential trespassing and debris scattered on the subject bridge are hypothetical situations that may or may not occur. Nevertheless, other unmanned bridges within the district clear debris and have trespassing issues with no impact to reasonable navigation. Furthermore, Federal no trespassing signage is installed at each bridge.

C. The commenter raised the issue of the high number of pleasure crafts utilizing the waterway, and how those watercrafts may try and utilize the waterway without requesting an opening. The Coast Guard has determined that the use of Ebey Slough has progressively lessened over a few years, as stated in section III. We contacted local authorities asking what type of vessels have been seen using this waterway, and they answered kayaks and small outboard motor boats. These vessels have not or typically have not requested bridge openings. At high tide, 5 feet is enough vertical clearance for these types of vessels to transit under the swing span. In 2016 and 2017, only two vessels routinely requested an opening, and those opening request were given more than four hours prior to needing the swing span to open. Other pleasure vessels did request

openings in 2016, but after the marina was closed, those vessels no longer transit through Ebey Slough. The marina was the only small business on this part of Ebey Slough. We also stated in the NPRM that an alternate route is available via Steamboat Slough or Union Slough. Whether or not a vessel requests an opening on demand or four hours prior to arriving at the subject bridge, mariners are responsible for knowing and following the notification for bridge operating rules. All mariners are responsible for and encouraged to report bridge opening delays or non-opening issues.

D. The commenter states that the NPRM did not disclose how a mariner may contact BNSF for the subject bridge operations or emergencies. That omitted information was an error on our part. BNSF agrees to install signs at the subject bridge that will state, ''Call BNSF Bridge 37.0 at Snohomish River mile 3.5 at 425–304–6613, or use VHF CH 13 for bridge opening requests. In case of an emergency, call 800–832–5452''.

E. The commenter states that with just a four hour notice, without a tender on site for operation, a qualified tender may have to travel far to Ebey Slough. Furthermore, the commenter states that BNSF may lose availability of qualified bridge tenders due to this change in the regulation. The Coast Guard disagrees, as BNSF made the request of at least four hours of notification to open the swing span of the subject bridge. By the Coast Guard approving this rule, the burden falls on BNSF to follow the rule or will be in violation and subject to civil penalties. BNSF has stated they have qualified bridge operators within four hours of Ebey Slough residing near Marysville/Everett, WA. Moreover, BNSF has a demonstrated history of meeting this same time requirement at a nearby bridge across Steamboat Slough.

F. This rule will amend 33 CFR 117.1059 to provide specific requirements for the operation of BNSF Railroad Bridge 38.3. These specific requirements are in addition to or vary from the general requirements that apply to all drawbridges across the navigable waters of the United States. This rule reasonably accommodates waterway users while reducing BNSF's burden in operating the subject bridge, and supports the current usage of Ebey Slough. We have not identified any impacts on marine navigation with this rule. An alternate route is available into Steamboat Slough and/or via Union Slough at high tide.

V. Regulatory Analyses

We developed this final rule considering numerous statutes and Executive order(s) related to rulemaking. Below we summarize our analyses based on these statutes and Executive order (s), 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, it has not been reviewed by the Office of Management and Budget (OMB) and pursuant to OMB guidance it is exempt from the requirements of Executive Order 13771. This regulatory action determination is based on the ability for the bridge to open on signal after receiving at least four hours advanced notice, and not delay passage of any mariner. Vessels not requiring an opening may pass under the bridge at any time. Alternate routes are available, as stated herein.

B. Impact on Small Entities

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601–612, as amended, requires Federal agencies to consider the potential impact of regulations on small entities during rulemaking. The term ''small entities'' comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. The Coast Guard received no comments from the Small Business Administration on this rule. The Coast Guard certifies under 5 U.S.C. 605(b) that this rule would not have a significant economic impact on a substantial number of small entities.

While some owners or operators of vessels intending to transit the bridge may be small entities, for the reasons stated in section IV.C above, this rule will not have a significant economic impact on any vessel owner or operator. The only small entity that could have been impacted on this part of Ebey Slough, and used the BNSF Bridge 38.3, closed in 2016. No other entities are near the subject bridge, or use this part of the waterway. Ebey Waterfront Park has a public boat ramp less than 200 yards upriver from the subject bridge. Mariners and marine businesses were informed of the NPRM via publishing a notification in the Local Notice to Mariners from March 21, 2018 to May 22, 2018, and no comments were submitted by any small entities. The only comment received was from a union group representing the bridge operators, and that comment with objections were addressed in Section IV.

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 will affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact the person listed in the **FOR FURTHER INFORMATION CONTACT**, above.

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

C. Collection of Information

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

D. Federalism and Indian Tribal Government

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

Also, this rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it does not have a substantial direct effect on one or more Indian

tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes. No comment were received from the published NPRM in regards to this section.

E. Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of $100,000,000 (adjusted for inflation) or more in any one year. Though this rule will not result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble. No comment were received from the published NPRM in regards to this section.

F. Environment

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

G. Protest Activities

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

List of Subjects in 33 CFR Part 117

Bridges.

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

PART 117—DRAWBRIDGE OPERATION REGULATIONS

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

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

■ 2. In § 117.1059 add paragraph (g) to read as follows:

§ 117.1059 Snohomish River, Steamboat Slough, and Ebey Slough.

* * * * *

(g) The draw of the Burlington Northern Santa Fe Railroad Bridge across Ebey Slough, mile 1.5, near Marysville, WA, shall open on signal if at least four hours notice is given. The opening signal is one prolonged blast followed by one short blast. During freshets, a draw tender shall be in constant attendance, and the draw shall open on signal when so ordered by the District Commander.

David G. Throop,

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

[FR Doc. 2018–27525 Filed 12–19–18; 8:45 am]

BILLING CODE 9110–04–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R03–OAR–2018–0277; FRL–9988–14–Region 3]

Approval and Promulgation of Air Quality Implementation Plans; Pennsylvania; Removal of Department of Environmental Protection Gasoline Volatility Requirements for the Pittsburgh-Beaver Valley Area

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is taking final action approving a state implementation plan (SIP) revision submitted by the Commonwealth of Pennsylvania. The Pennsylvania Department of Environmental Protection (PADEP) submitted a SIP revision on May 2, 2018 seeking the removal from the Pennsylvania SIP of the requirement limiting summertime gasoline volatility to 7.8 pounds per square inch (psi) Reid Vapor Pressure (RVP) to address nonattainment under the 1-hour ozone national ambient air quality standard (NAAQS) in the Pittsburgh-Beaver Valley ozone nonattainment area (hereafter Pittsburgh-Beaver Valley Area). The submitted SIP revision includes a demonstration, pursuant to Clean Air Act (CAA), that amendment of the approved SIP will not interfere with the area's ability to attain or maintain any NAAQS. EPA is approving this revision to remove the PADEP requirement for use of 7.8 psi RVP gasoline in summer months from the Pennsylvania SIP, in accordance with the requirements of the Clean Air Act (CAA).

DATES: This final rule is effective on January 22, 2019.

ADDRESSES: EPA has established a docket for this action under Docket ID Number EPA–R03–OAR–2018–0277. 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: Brian Rehn, (215) 814–2176, or by email at *rehn.brian@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

On June 15, 2018 (83 FR 27901 and 82 FR 27937), EPA simultaneously published a notice of proposed rulemaking (NPRM) and a direct final rule (DFR) for the Commonwealth of Pennsylvania approving its revision to remove the PADEP's 7.8 psi summertime RVP requirement from the Pennsylvania SIP. In the NPRM, EPA proposed to approve Pennsylvania's request to remove the 7.8 psi RVP summertime gasoline requirement from the Pennsylvania SIP. However, EPA received adverse comments on the rulemaking and withdrew the DFR on August 6, 2018 (83 FR 38261) prior to its effective date of August 14, 2018. In this final rulemaking, EPA is responding to the comments submitted on the proposed revision to the Pennsylvania SIP and is approving Pennsylvania's demonstration that removal of the program does not interfere with the Pittsburgh-Beaver Valley Area's ability to attain or maintain any NAAQS under section 110(l) of the CAA. The formal SIP revision requesting this removal of the PADEP summertime low RVP

program for the Pittsburgh-Beaver Valley Area was submitted by Pennsylvania on May 2, 2018.

II. Summary of Pennsylvania's SIP Revision

A. Pennsylvania's Gasoline Volatility Requirements for the Pittsburgh-Beaver Valley Area

On November 6, 1991, EPA designated and classified the Pittsburgh-Beaver Valley Area as moderate nonattainment for the 1979 1-hour ozone NAAQS. As part of Pennsylvania's efforts to bring the Pittsburgh-Beaver Valley Area into attainment of the ozone standard, the Commonwealth adopted and implemented a range of ozone precursor emissions control measures for the area—including adoption of a state rule to limit summertime gasoline volatility to 7.8 psi RVP. Pennsylvania's RVP control rule applied to the entire Pittsburgh-Beaver Valley Area—Allegheny, Armstrong, Beaver, Butler, Fayette, Washington, and Westmoreland Counties. PADEP promulgated this rule in the November 1, 1997 *Pennsylvania Bulletin* (27 Pa.B. 5601, effective November 1, 1997), which is codified in Subchapter C of Chapter 126 of the Pennsylvania Code of Regulations (25 Pa. Code Chapter 126, Subchapter C). On April 17, 1998, Pennsylvania submitted its state-adopted rule to EPA as a formal revision to its SIP and EPA subsequently approved Pennsylvania's low RVP SIP requirements in a June 8, 1998 **Federal Register** (63 FR 31116) and codified in the *Code of Federal Regulations* at 40 CFR 52.2020(c)(1).[1]

B. Pennsylvania's Revision of Its Low RVP Gasoline Requirements

In the 2013–14 session, the Pennsylvania General Assembly passed and Governor Corbett signed into law Act 50 (Pub. L. 674, No. 50 of May 14, 2014). Act 50 amended the Pennsylvania Air Pollution Control Act, directing PADEP to initiate a process to obtain approval from EPA of a SIP revision that demonstrates continued compliance with the NAAQS, through utilization of substitute, commensurate emissions reductions to balance repeal of the Pittsburgh-Beaver Valley Area RVP limit. Upon approval of that demonstration, Act 50 directs PADEP to repeal the summertime gasoline RVP limit provisions of 25 Pa. Code Chapter 126, Subchapter C.

On May 2, 2018, PADEP submitted a SIP revision requesting that EPA remove from the Pennsylvania SIP Chapter 126, Subchapter C of the Pennsylvania Code (specifically requesting removal of 25 Pa. Code sections 126.301, 126.302, and 126.303), based upon a demonstration that the repeal of the RVP requirements rule (coupled with other ozone precursor emission reduction measures) would not interfere with the Pittsburgh-Beaver Valley Area's attainment of any NAAQS, per the requirements for noninterference set forth in section 110(l) of the CAA. Section 110(l) prohibits EPA from approving a SIP revision if the revision ''would interfere with any applicable requirement concerning attainment and reasonable further progress . . . or any other applicable requirement of [the Act.]'' Pennsylvania's SIP revision contains a noninterference demonstration, pursuant to CAA section 110(l). This demonstration is comprised of an analysis that the emissions impact from repeal of the 7.8 psi gasoline volatility requirement in Pittsburgh (to be replaced by the Federal 9.0 psi summertime gasoline requirement)[2] have been offset by means of substitution of commensurate emissions reductions from other measures enacted by Pennsylvania that were not previously credited in any SIP towards attainment or maintenance of any NAAQS. Pennsylvania's May 2, 2018 SIP revision references EPA's updated photochemical grid modeling results for the 2008 ozone NAAQS, which forecasts that the Pittsburgh-Beaver Valley Area will continue to attain the 2008 ozone NAAQS and maintain attainment of the 2015 ozone NAAQS by 2023. Additionally, the Commonwealth's SIP contains emission inventory projections prepared by the Mid-Atlantic Regional Air Management Administration (MARAMA) showing declining emissions of ozone and particulate matter (PM) precursor emissions in 2018 and 2023.

The May 2, 2018 SIP revision references the Commonwealth's regulatory amendment to Chapter 126, Subchapter C, as published in the April 7, 2018 *Pennsylvania Bulletin* (48 Pa. B. 1932, effective upon publication), which serves to repeal the PADEP requirement for 7.8 psi RVP summer gasoline by amending 25 Pa. Code Section 126.301 (relating to gasoline volatility requirements) to remove the RVP requirement for the Pittsburgh-Beaver Valley Area RVP upon the effective date of EPA's approval of Pennsylvania's May 2, 2018 SIP revision. As a result, both state and Federal repeal of the requirements for summertime RVP in the area will coincide with the effective date of EPA's final action to approve the Commonwealth's related SIP submittals.

III. EPA's Analysis of Pennsylvania's SIP Revision

A. Pennsylvania's Estimate of the Impacts of Removing the 7.8 psi RVP Requirement

As the Commonwealth's adoption of a 7.8 psi summertime limit for gasoline RVP in Pittsburgh is not a mandatory requirement of the CAA, EPA's primary consideration for determining the approvability of Pennsylvania's request to rescind the requirements for a gasoline volatility control program is whether this requested action complies with section 110 of the CAA, specifically section 110(l), governing removal of an EPA–SIP requirement.[3] Section 110(l) of the CAA requires that a revision to the SIP not interfere with any applicable requirement concerning attainment and reasonable further progress (as defined in section 171), or any other applicable requirement of the CAA. EPA evaluates each section 110(l) noninterference demonstration on a case-by-case basis considering the circumstances of each SIP revision. EPA interprets CAA section 110(l) as applying to all NAAQS that are in effect, including those that have been promulgated, but for which EPA has not yet made designations. In evaluating whether a given SIP revision would interfere with attainment or maintenance, as required by CAA section 110(l), the EPA generally considers whether the SIP revision will allow for an increase in actual emissions into the air over what is allowed under the existing EPA-approved SIP. States

[1] The Allegheny County Health Department (ACHD) later adopted a similar summertime gasoline low RVP rule (Allegheny County Order No. 16782, Article XXI, sections 2102.40, 2105.90, and 2107.15; effective May 15, 1998, amended August 12, 1999). On March 23, 2000, PADEP formally submitted a SIP revision to EPA (on behalf of ACHD) to incorporate ACHD's own gasoline RVP summertime requirements into the Pennsylvania SIP. EPA approved that SIP revision establishing an independent ACHD gasoline RVP limit on April 17, 2001 (66 FR 19724), effective June 18, 2001. This action does not address ACHD requirements that are in the SIP.

[2] Upon the effective date of EPA approval of this SIP revision, the 1.0 psi waiver for 10% ethanol blends will be allowed in the Pittsburgh area (with the exception of Allegheny County, which currently has a separate RVP summertime limit). If in the future EPA should approve a SIP revision removing the ACHD's RVP rule from the approved SIP, the 1.0 psi waiver for ethanol blends would no longer apply there as well.

[3] CAA section 193, with respect to removal of requirements in place prior to enactment of the 1990 CAA Amendments, is not relevant because Pennsylvania's RVP control requirements in the Pittsburgh-Beaver Valley Area were not included in the SIP prior to enactment of the 1990 CAA amendments.

do not necessarily need to produce a new complete attainment demonstration for each revision to the SIP, provided that the status quo air quality is preserved. In the absence of an attainment demonstration or maintenance plan that demonstrates removal of an emissions control measure will not interfere with any applicable NAAQS or requirement of the CAA under section 110(l), states may substitute equivalent emissions reductions to compensate for any change to a SIP-approved program. ''Equivalent'' emission reductions mean reductions which are equal to or greater than those reductions achieved by the control measure approved in the SIP. To show that compensating emission reductions are equivalent, modeling or other adequate justification must be provided. The compensating, equivalent reductions should represent real emissions reductions achieved in a contemporaneous time frame to the change of the existing SIP control measure, in order to preserve the status quo level of emissions in the air. In addition to being contemporaneous, the equivalent emissions reductions should also be permanent, enforceable, quantifiable, and surplus to be approved into the SIP.

Pennsylvania's May 2, 2018 SIP revision contains a section 110(l) demonstration that uses equivalent emission reductions to offset ''losses'' from emission reductions resulting from the removal of the SIP approved 7.8 psi RVP summertime gasoline requirement in the Pittsburgh-Beaver Valley Area of Pennsylvania. Specifically, PADEP demonstrates the emission reductions associated with the 7.8 psi RVP fuel requirement will be substituted with equivalent or greater emissions reductions from: (1) An adopted, implemented Pennsylvania regulation relating to the use and application of adhesives, sealants, primers, and solvents at 25 Pa. Code Section 129.77; and (2) permanent shutdown of a facility in the Pittsburgh-Beaver Valley Area. These substitute emissions are quantifiable, permanent, surplus, enforceable, and contemporaneous (*i.e.* occurring at approximately the same period of this demonstration and/or the anticipated cessation of the low RVP fuel program). With removal of the state 7.8 psi summertime RVP requirement, the Federal 9.0 psi RVP limit remains as the applicable requirement.

To determine the emissions impact of removing the 7.8 psi RVP program requirements in the Pittsburgh-Beaver Valley Area, PADEP considered first the pollutants that impact any NAAQS that are controlled through lowering of gasoline RVP: Volatile organic compounds (VOC), nitrogen oxides (NO_X), and direct emissions of fine particulate matter smaller than 2.5 microns in diameter ($PM_{2.5}$). PADEP's analysis focuses on VOC and NO_X emissions because low RVP requirements were adopted by the Commonwealth to address the ozone NAAQS and because VOCs and NO_X emissions are the primary precursors for ground-level ozone formation. NO_X, VOC, and direct $PM_{2.5}$ emissions also contribute to formation of $PM_{2.5}$ and therefore PADEP also analyzed the effect on the $PM_{2.5}$ NAAQS. PADEP limited its analysis of emissions increases from removal of the RVP requirements to affected portions of the total emissions inventory for the Pittsburgh-Beaver Valley Area such as the highway vehicle emissions sector, nonroad vehicle emissions sector, and gasoline storage and distribution emissions sources within the stationary point source sector. EPA finds the Commonwealth's analysis of the affected universe of emissions sources reasonable, as the 7.8 psi RVP gasoline requirement impacts only emission sources that store, distribute, or combust gasoline. PADEP studied the impacts of low RVP program removal on the emissions inventory at several points in time representing a period prior to removal of the low RVP program (*i.e.,* 2014), the year of cessation of the PADEP 7.8 psi low RVP program (*i.e.,* 2018), and a point five years in the future after program cessation (*i.e.,* 2023).

To generate these estimates, PADEP used the latest version of EPA's Motor Vehicle Emissions Simulator (MOVES), version MOVES2014a, to characterize motor vehicle emissions. EPA notes that PADEP's analysis showed that increasing gasoline RVP in the Pittsburgh area in and of itself no longer results in an increase in emissions of VOCs in the highway vehicle sector, as increases in VOCs from evaporative loss and permeation through porous materials are offset by improved exhaust emissions reductions from improvements in new motor vehicles (*e.g.,* improved engine control, air/fuel management, timing management, etc.). Thus, as newer vehicles replace older ones in the fleet, the VOC benefits from low RVP gasoline for the highway vehicle sector of the area's total emission inventory are reduced. PADEP modelled nonroad emissions using the MOVES model, version 2014a, which incorporates EPA's NONROAD 2008 model, coupled with the 2014 NEI version 1 emission inventory, to compile a base year scenario. PADEP assumed this portion of the inventory would see an increase of three percent of total VOC emissions from removal of the Commonwealth's 7.8 psi RVP gasoline program.

Changes in gasoline RVP produce emissions from not only vehicles and equipment that store and combust the fuel, but also from evaporation and permeation from movement, storage, and transportation of the fuel as part of the gasoline distribution system. These sources include gasoline refineries and terminals, pipelines, gasoline tanker trucks, storage tanks, service station tanks, and portable gas cans comprising a mix of large, point emissions sources and much smaller area emissions sources. Emissions from larger sources (*e.g.,* refineries and bulk gasoline terminals) can be estimated through direct measurement or calculated from energy input, and are listed as discrete sources in the periodic point source emission inventory, while smaller, areas sources can be estimated via look-up emission factors (*e.g.,* from EPA's AP–42 compendium of emission factors) and use of activity information (or surrogates for activity like population) or gasoline sales numbers. Table 1 summarizes combined highway mobile, nonroad, and point and area source emissions impacts from the removal of the Commonwealth's 7.8 psi low RVP program, for the 2018 and 2023 scenarios evaluated for this SIP revision.

TABLE 1—SUMMARY OF COMBINED EMISSION IMPACTS FROM REMOVAL OF THE 7.8 psi PROGRAM IN THE PITTSBURGH-BEAVER VALLEY AREA IN 2018 AND 2023

[Reductions (−) and increases (+), in tons per year (tpy) and tons per day (tpd)]

	VOC		NO_X		$PM_{2.5}$
	tpy	tpd	tpy	tpd	tpy
2018:					

TABLE 1—SUMMARY OF COMBINED EMISSION IMPACTS FROM REMOVAL OF THE 7.8 psi PROGRAM IN THE PITTSBURGH-BEAVER VALLEY AREA IN 2018 AND 2023—Continued

[Reductions (−) and increases (+), in tons per year (tpy) and tons per day (tpd)]

	VOC		NO_X		$PM_{2.5}$
	tpy	tpd	tpy	tpd	tpy
Highway	−41.4	−0.18	+43.5	+0.3	−2.0
Nonroad	+153	+1	0	0	0
Point/Area	+7	−0.02	0	0	0
Total Change in 2018 Emissions	+119	+0.84	+43.5	+0.3	−2.0
2023:					
Highway	−46.5	−0.24	+13.1	+0.09	−2.2
Nonroad	+155	+1.01	0	0	0
Point/Area	+7	+0.02	0	0	0
Total Change in 2023 Emissions	+116	+0.79	+13.1	+0.09	−2.2

Based on our review of the information provided, EPA finds that PADEP used reasonable methods and the appropriate tools (*e.g.,* emissions estimation models, emissions factors, and other methodologies) in estimating the effect on emissions from removing the 7.8 psi RVP summertime gasoline program for purposes demonstrating noninterference with any NAAQS under CAA 110(l). PADEP determined that in 2018 the emissions increase resulting from removal of the 7.8 psi RVP requirement (and replacement with the Federal 9.0 RVP gasoline program) would be 0.84 summertime tpd of VOC and 0.3 summertime tpd of NO_X in the Pittsburgh-Beaver Valley Area. PADEP's demonstration shows that direct emissions of $PM_{2.5}$ decrease by 2.0 tpy from removal of the 7.8 psi RVP requirement (and replacement with the Federal 9.0 RVP gasoline program). By 2023, the emissions impact of removal of the 7.8 psi RVP requirement would slightly increase emissions from 2018, to 0.79 tpd of VOCs and 0.09 tpd of NO_X, with direct $PM_{2.5}$ emissions decreasing slightly more than 2018 estimates.

B. Pennsylvania's Substitution of Alternative Emissions Reduction Measures for the 7.8 psi Low RVP Gasoline Program

PADEP estimated lost and compensating emission reductions for the year of removal of the Commonwealth's low RVP gasoline program (after considering the benefits from replacement with the Federal 9.0 RVP gasoline program). PADEP also estimated emissions impacts in the year 2023 to examine the future impacts of removal of the 7.8 psi state summertime RVP requirement. To compensate for the emissions impact of repeal of this requirement in the Pittsburgh-Beaver Valley Area, PADEP analyzed the emission benefits associated with two substitute measures previously implemented but not ''claimed'' in any prior SIP attainment plan (under CAA section 172) for the Commonwealth. These measures are: (1) Overcontrol of VOC emissions from Pennsylvania's adhesives rule (25 Pa. Code § 129.77); and (2) Unclaimed creditable emissions reductions associated with the permanent closure in 2015 of a glass manufacturing facility in Allegheny County, Guardian Industries Jefferson Hills facility.

A detailed description of these offsetting measures and the calculations prepared by PADEP are provided in EPA's DFR for this action, which was published in the June 15, 2018 **Federal Register** (83 FR 27901), which was subsequently withdrawn by EPA in the August 6, 2018 **Federal Register** (83 FR 38261). However, EPA's description of the Commonwealth's submittal and its overview of the CAA 110(l) noninterference demonstration are unchanged here from that presented by EPA in the June 15, 2018 DFR, and as such will not be restated here.

C. Comparison of Emissions Impacts From Removal of the Commonwealth's 7.8 psi RVP Gasoline Program and the Uncredited Emission Reductions From Substitute Measures

Pennsylvania relies upon NO_X, VOC, and $PM_{2.5}$ emission reductions from its adoption of the Ozone Transport Commission (OTC) model adhesives rule and from the shutdown of Guardian Industries Jefferson Hills glass manufacturing facility in Allegheny County to offset the emissions impact of removing the Commonwealth's summertime gasoline volatility control rule and to support its argument that removal of 7.8 psi RVP requirement from the SIP will not interfere with attainment of any NAAQS. To be conservative in its approach, Pennsylvania elected to adjust upward by 25 percent its estimates for the emission impact of the removal of the 7.8 psi RVP gasoline program to account for uncertainty in its calculation of the estimates for the emissions benefits from that program (see Table 2). Table 2 summarizes the Pittsburgh-Beaver Valley Area emissions increases from repeal of the low RVP gasoline program compared to the emissions benefits resulting from the alternative emission reduction measures.

TABLE 2—SUMMARY OF PITTSBURGH-BEAVER VALLEY IMPACTS FROM REMOVAL OF THE 7.8 psi GASOLINE VOLATILITY PROGRAM COMPARED TO EMISSIONS BENEFITS FROM ALTERNATIVE MEASURES

[In 2018 and 2023]

	VOC		NO_X		$PM_{2.5}$
	tpy	tpd	tpy	tpd	tpy
2018:					

TABLE 2—SUMMARY OF PITTSBURGH-BEAVER VALLEY IMPACTS FROM REMOVAL OF THE 7.8 psi GASOLINE VOLATILITY PROGRAM COMPARED TO EMISSIONS BENEFITS FROM ALTERNATIVE MEASURES—Continued

[In 2018 and 2023]

	VOC		NO_X		$PM_{2.5}$
	tpy	tpd	tpy	tpd	tpy
Change in Emissions from RVP Rule Repeal [4]	119	0.84	43.5	0.3	−2.0
Emission Adjustment to RVP Change Estimate (25% increase)	30	0.21	11	0.08	−2.0
Total Emissions Requiring Offset	149	1.05	54.5	0.38	
Adhesives Rule Reductions for Offset	1,163	3.2	0	0	0
Facility Shutdown Reductions for Offset	13.8	0.04	625	1.8	26.5
Total Available Offset Emissions	1,177	3.24	625	1.8	28.5
Remaining Reductions After Offsetting Removal of State RVP Program [*i.e.,* Total Emissions Requiring Offset—Total Available Offsets]	1,028	2.19	570.5	1.0	28.5
2023:					
Change in Emissions from RVP Rule Repeal [5]	116	0.79	13.1	0.09	−2.0
Emission Adjustment to RVP Change Estimate (25% increase)	29	0.20	3.3	0.02	
Total Emissions Requiring Offset	144	0.99	16.4	0.11	−2.0
Adhesives & Sealants Rule Reductions	1,159	3.19	0	0	0
Guardian Industries Facility Shutdown Reductions	13.8	0.04	625	1.8	26.5
Total Available Offset Emissions	1,173	3.23	625	1.8	28.5
Surplus Reductions After Offset [Total Emissions Requiring Offset—Total Available Offsets]	1,028	2.24	608.6	1.69	28.5

As indicated in Table 2, Pennsylvania has more VOC, NO_X, and $PM_{2.5}$ emission reductions from its alternative emission reduction measures than are necessary to offset fully the loss in emissions reductions resulting from repeal of the Commonwealth's low RVP gasoline program—in both 2018 (the year of repeal of the low RVP gasoline program) and in the 2023 future case. Reductions from the Guardian Industries facility shutdown in Allegheny County far exceed what is needed to offset NO_X from the removal of the low RVP requirement in the Pittsburgh-Beaver Valley Area. The Guardian facility owner did not request that potential creditable emissions reductions be preserved in the emission inventory, as required by 25 Pa. Code Chapter 127, Subchapter E (relating to new source review (NSR)) within one year of closure, thus forfeiting the ability to apply for transferable emission reduction credits (ERC) under Pennsylvania's NSR rules. However, PADEP reserved the right to potentially request consideration of these remaining reductions as part of a future SIP demonstration relating to NAAQS planning requirements. However, such future usage would be the subject of a future SIP revision developed by PADEP at a later time. Any remaining reductions from the offsetting measures listed here in support of the May 2, 2018 SIP revision are not being included in any inventory or memorialized for future use as part of this action. EPA believes they cannot be used by a new or modified facility as offsets for compliance to meet the NSR program in this nonattainment area. The reductions from the offsetting shutdown and adhesives and solvent rule have not been previously claimed for emissions reduction credit for any prior SIP-approved plan. These offsetting measures will help ensure that removal of the low RVP gasoline program will not interfere with any NAAQS for the Pittsburgh-Beaver Valley Area.

EPA believes that the removal of the 7.8 psi low RVP fuel program requirements in the Pittsburgh-Beaver Valley Area does not interfere with Pennsylvania's ability to demonstrate compliance with any of the ozone or $PM_{2.5}$ NAAQS, which could potentially have been impacted by the NAAQS pollutant precursors that are the subject of the SIP revision. EPA's analyses of the Commonwealth's SIP revision for CAA 110(l) impact is supported by its use of substitute emission reduction measures that ensure permanent, enforceable, contemporaneous, surplus emissions reductions are achieved within the Pittsburgh-Beaver Valley Area which far exceed the slight increase in NO_X and VOC pollutants from the removal of low RVP fuel especially as Pennsylvania is still subject to the Federal RVP fuel requirement of 9.0 psi. Based on Pennsylvania's CAA 110(l) analysis showing surplus emission reductions, EPA has no reason to believe that the removal of the low RVP fuel requirements in the Pittsburgh-Beaver Valley Area will negatively impact the area's ability to attain or maintain any NAAQS including specifically ozone and $PM_{2.5}$ or interfere with reasonable further progress. In addition, EPA believes that removing the 7.8 psi low RVP program requirements in the

[4] This increase (or decrease) in emissions is the net emission change when comparing the Commonwealth's 7.8 psi requirement for the Pittsburgh-Beaver Valley Area to the Federal 9.0 psi RVP program requirement that will remain upon removal of the Commonwealth's program.

[5] This increase (or decrease) in emissions is the net emission change when comparing the Commonwealth's 7.8 psi requirement for the Pittsburgh-Beaver Valley Area to the Federal 9.0 psi RVP program requirement that will remain upon removal of the Commonwealth's program.

Pittsburgh-Beaver Valley Area will not interfere with any other CAA requirement as the Area will remain subject to the Federal low RVP fuel requirements. Other specific requirements of EPA's action to approve the Commonwealth's CAA 110(l) noninterference demonstration and the rationale for EPA's action are explained in the EPA's DFR for this action published in the June 15, 2018 **Federal Register** (83 FR 27901), which was subsequently withdrawn by EPA in the August 6, 2018 **Federal Register** (83 FR 38261). These rationale and requirements from the June 2018 DFR will not be restated here.

IV. Response to Comments Received During the EPA Public Comment Period on the NPRM

EPA received comments from five separate commenters. Of these, comments from three anonymous commenters were not relevant to our proposed action, and as such, EPA will not address those non-relevant comments here. Based on the receipt of adverse public comments relevant to this action, EPA acted on August 6, 2018 to withdraw our June 15, 2018 DFR, based on the terms set forth in that action. EPA's response to comments received is as follows below:

Comment 1: Commenter contends that EPA can't rely on the undated ''clarification letter'' sent from Krishnan Ramamurthy, Director, Bureau of Air Quality, PADEP to Ms. Cristina Fernandez, Air Protection Division (3AP00) U.S. Environmental Protection Agency, Region III, as Mr. Ramamurthy is not authorized to formally submit SIPs to EPA, as only the state Governor or their designee can submit SIPs for approval. Further, the commenter states that Ms. Fernandez is also not able to receive SIP submissions, as EPA regulations require submission to be sent to the Regional Administrator.

Response 1: The clarification letter submitted electronically to EPA on May 23, 2018 (and received in hard copy by EPA on May 25, 2018) by Mr. Ramamurthy to Ms. Fernandez does not constitute a formal SIP revision or SIP transmittal letter. Pennsylvania formally submitted the SIP that is the subject of this rulemaking action on May 2, 2018, via a letter from Secretary Patrick McDonnell of PADEP to EPA Regional Administrator Cosmo Servidio. Secretary McDonnell is the duly delegated representative of Governor Wolf for submission of a Pennsylvania SIP revision and Regional Administrator Servidio is the delegated recipient at EPA for receiving SIP revisions. The May 23, 2018 clarification letter merely reiterates and clarifies what was already stated in the May 2, 2018 SIP submittal letter. The May 2, 2018 submittal letter makes clear PADEP's request that EPA remove 25 Pa. Code Chapter 126, Subchapter C (relating to gasoline volatility requirements) as a Federally enforceable control measure from the Commonwealth' SIP and that EPA not approve the final form state rulemaking amending Chapter 126, Subchapter C (as published in the April 7, 2018 *Pennsylvania Bulletin* (Vol. 48, No. 14). Mr. Ramamurthy's May 23, 2018 letter is not a formal SIP revision and did not need to follow EPA regulations for SIP submittals to be from a governor or governor's delegate. EPA posted the letter to the docket as a formal communication from the State after the formal SIP submittal and referenced it in our June 15, 2018 DFR action as such.

Comment 2: The commenter states that EPA can't approve Pennsylvania's SIP revision because PADEP has not submitted evidence that the rule has been repealed and that EPA regulations require SIP revisions to include a copy of the actual regulation submitted for approval, indicating the changes made to the prior version. The commenter argues that the SIP must include a copy of the official state regulation (signed, stamped, and dated by the appropriate state officials indicating it is state enforceable), with the effective date indicated in the regulation itself (or with a separate letter signed, stamped, and dated by the appropriate State official indicating the effective date). The commenter argues that PADEP's May 2, 2018 SIP submittal letter and May 23, 2018 clarification letter can be interpreted one of two ways, with the result being either: (1) That the May 2nd SIP submission lacks evidence that the amended Chapter 126, Subchapter C rule has been adopted by PADEP in final form; or (2) that the Commonwealth has submitted evidence of a final rule which revises rather than removes Subchapter C. Under the latter interpretation, the commenter argues that instead of removing the State rule, the amended rule adds subsection (d) to § 126.301 of the rule. The commenter contends that under either of these interpretations of the Commonwealth's intent of the SIP submittal or the subsequent clarification letter, EPA can't remove Chapter 126, Subchapter C from the SIP. The commenter contends that removal of a SIP-approved rule must contain evidence that the rule has been repealed by the state, citing prior EPA rulemaking examples where that was the case. These examples include: Wisconsin Stage II gasoline vapor recovery removal (EPA–R05–OAR–2017–0279); several examples of removal and addition of Reasonably Available Control Technology (RACT) determinations for Maryland (EPA–R03–OAR–2016–0309) and North Carolina (EPA–R04–OAR–2009–0140); and replacement of the clean air interstate rule (CAIR) with the cross-state air pollution rule (CSAPR) in Virginia (EPA–R03–OAR–2017–0215) and West Virginia (EPA–R03–OAR–2016–0574). The commenter argues that EPA should require evidence of state-effective regulatory repeal, prior to formal removal of a rule from the SIP, following past practice to avoid acting capriciously.

Response 2: EPA disagrees with the commenter. Removal of a state regulation from the Federally approved SIP does not require evidence that the state has repealed the regulation from state law. CAA section 110 addresses SIP revisions and 40 CFR part 51 addresses SIP submittal requirements, but no provisions in the CAA or regulations require a state to repeal a regulation before requesting removal of a regulation from the SIP. PADEP indicated in its May 2, 2018 SIP submittal letter that it sought removal of Subchapter C from the SIP upon EPA approval of its demonstration of noninterference as required by CAA section 110(l) for SIP revisions. PADEP provided a 110(l) demonstration which EPA finds meets requirements of the CAA. None of the cited examples preclude EPA from removing Subchapter C from the SIP at the State's request prior to the State's repeal of Subchapter C from state law.

Comment 3: A commenter contends that the Commonwealth's revision to its 25 Pa. Code Chapter 126, Subchapter C (which added a new paragraph (d) to § 126.301) can't be approved into the SIP as there is no enforceable effective date for repealing Subchapter C and the revised rule plainly states that Subchapter C will no longer be in effect upon EPA's removal of the Subchapter from the SIP. The commenter argues this is circular logic on the state's part if EPA can only approve the rule into the SIP when they are adopted and state-effective, but the State's rule only becomes effective once EPA removes the affected Subchapter C from the SIP. The commenter argues that the only options for EPA rulemaking are to approve the Commonwealth's non-interference demonstration or to add to the SIP the state-approved subsection (d) of § 126.301. The commenter believes that EPA is limited to action on the submitted non-interference demonstration, as the Commonwealth's

May 2 SIP submittal letter directs EPA not to approve the newly amended rule as an addition to the Pennsylvania SIP.

Response 3: EPA disagrees with the commenter. First, the Commonwealth in the May 2, 2018 SIP submission has not sought to include the revised version of Subchapter C (with newly added subsection (d)) to the Pennsylvania SIP. Second, EPA's decision in this rulemaking action is to approve the Commonwealth's noninterference demonstration and to simultaneously remove the low RVP regulatory requirements from the SIP. Thus, the commenter's concerns regarding the effective date of the revised version of Subchapter C are irrelevant, as the amended Chapter 126 is not in the SIP, nor has Pennsylvania sought to include it into the SIP.

Comment 4: Commenter argues that EPA can't remove Subchapter C from the SIP because Pennsylvania failed to follow the process set forth in state law related to removal of the state low RVP program (hereafter referred to as Act 50). The commenter contends that EPA can't approve this SIP because PADEP does not have the legal authority to request removal of Subchapter C from the SIP until EPA approves the Commonwealth's noninterference demonstration. The commenter indicates that Act 50 prohibits the PADEP from promulgating regulations to repeal Subchapter C until EPA approves a revision which demonstrates noninterference with the NAAQS. The commenter argues that since EPA has not yet approved a noninterference demonstration, PADEP has neither the authority to repeal 25 Pa. Code Chapter 126, Subchapter C, nor to request its removal from the SIP.

Response 4: EPA disagrees that PADEP has not acted in accordance with Pennsylvania's Act 50. On May 2, 2018, Pennsylvania submitted to EPA a request to remove Subchapter C from the SIP and a demonstration of noninterference with the NAAQS from removal of low RVP requirements from the SIP through use of emission reductions from alternate measures. In this rulemaking, EPA is approving the noninterference demonstration and removing the low RVP requirements from the SIP. Thus, PADEP has acted in accordance with Act 50 and may subsequently remove requirements from state law. PADEP addressed the issue of the order of events prescribed by Act 50 (with respect to timing of its submission to and approval by EPA of a noninterference demonstration SIP versus that of the state repeal of the low RVP requirements) in its state rulemaking. *See* April 2, 2018 Pennsylvania Bulletin, Vol. 48 No. 14 (responding to comments from Pennsylvania's independent regulatory review commission (IRRC) on the issue of the sequence of the events required by Act 50). EPA believes the Commonwealth addressed concerns with Act 50 during Pennsylvania's state regulatory adoption process. Pennsylvania has general authority to both enact and remove emission control measures and to request their inclusion as part of the Federal SIP or removal from the SIP. The provisions of Act 50 have not curtailed PADEP's authority and EPA believes PADEP acted in accordance with Act 50 by the May 2, 2018 SIP submission prior to removing the low RVP requirements from state law.

Comment 5: The commenter argues that EPA cannot fully approve this SIP revision because both EPA and PADEP failed to consider nonattainment of the 1971 Sulfur Dioxide (SO_2) NAAQS in Armstrong County as part of the noninterference demonstration required by section 110(l) of the CAA. Madison, Mahoning, Boggs, Washington, and Pine Townships in Armstrong County are still classified as nonattainment at 40 CFR part 81, so the 1971 standard remains in effect. Since PADEP never submitted an attainment plan for this area, the commenter argues it is not possible to determine whether the removal of the PADEP 7.8 psi gasoline RVP program will adversely impact the area and that EPA can therefore only partially approve the noninterference demonstration (as EPA's guidance requires a noninterference demonstration to consider the effect on all NAAQS in effect).

Response 5: The commenter is correct that portions of Armstrong County were designated by EPA as nonattainment for the 1971 SO_2 NAAQS, which was promulgated by EPA in April 1971 (36 FR 8186, April 30, 1971), and were never subsequently redesignated by EPA to attainment. EPA promulgated a revised NAAQS for SO_2 in June 2010 (75 FR 35520, June 22, 2010). EPA later designated portions of Allegheny and Beaver Counties as nonattainment under the 2010 SO_2 NAAQS in October 2013 (78 FR 47191, August 5, 2013). On October 3, 2017, PADEP submitted attainment demonstration plans to EPA for both the Allegheny and Beaver County areas for approval. These submitted plans purport to demonstrate attainment of the 2010 SO_2 NAAQS in 2018 based on air dispersion modelling. EPA has not yet taken final action to approve these plans. However, as PADEP indicated in its May 2, 2018 noninterference demonstration SIP, emissions of SO_2 from fuel combustion are directly related to the sulfur content of the fuel itself, with sulfur from the fuel bound to oxygen as a byproduct of combustion. Gasoline sulfur content is regulated by EPA via separate, Federal rules. Regulation of motor gasoline volatility has no direct impact on sulfur emissions, therefore Pennsylvania concluded that removal of PADEP's 7.8 low RVP requirements will not interfere with any portion of the affected Pittsburgh-Beaver Valley Area's ability to attain or maintain any SO_2 NAAQS. EPA concurs with Pennsylvania's conclusion as discussed in this rulemaking. Likewise, EPA expects no interference with Armstrong County's ability to attain the SO_2 NAAQS because regulation of motor gasoline volatility does not impact SO_2 tailpipe or evaporative emissions. The low RVP program was instead designed to reduce evaporative and combustion emissions of VOCs to reduce formation of ozone. Removal of the state RVP limit does not affect sulfur compound emissions or the secondary formation of SO_2 from motor vehicles or nonroad engines and equipment.

Comment 6: The commenter contends that although EPA designated the Pittsburgh-Beaver Valley Area attainment for 2015 ozone standard, recent air quality data from ACHD shows exceedances of the 2015 ozone standard this year and even potential violations of the NAAQS should current data be certified. PADEP's noninterference demonstration refers to EPA photochemical air quality modeling for 2023 as proof the area will remain in attainment of the ozone NAAQS, but EPA's modeling does not account for the sharp jump in exceedances from this summer, and the modeling is based on a scenario with low RVP gasoline in place. The commenter believes that recent air quality exceedances negate the PADEP noninterference demonstration premise that with no expected growth of NO_X and VOC emissions, there will be no future interference with attainment of the 2008 or 2015 ozone NAAQS. The commenter believes that additional emission reductions from this (and other) measures may be needed for future ozone NAAQS compliance.

Response 6: While several ozone monitors in the Pittsburgh-Beaver Valley Area have registered exceedances in the summer of 2018, this data is not considered valid until it has been determined to be complete, quality assured and quality controlled. On December 6, 2016 (81 FR 87819), EPA determined that the Pittsburgh-Beaver Valley Area attained the 2008 8-hour

ozone NAAQS by its July 20, 2016 attainment date, based on complete, certified, and quality assured ambient air quality monitoring data for the 2013–2015 monitoring period. Although the 2016 action did not constitute redesignation to attainment, it demonstrated that monitored air quality for the area met the 2008 ozone NAAQS. Further, on November 16, 2017 (82 FR 54232), EPA designated all counties in the Pittsburgh-Beaver Valley Area as attainment of the more stringent 0.070 parts per million (ppm) 2015 ozone NAAQS. This information forms the basis for the Commonwealth's statements that the Pittsburgh-Beaver Valley Area is currently attaining all ozone NAAQS, and more recent, preliminary data for the area does not negate this decision. While it is possible the area will violate at some future date, the currently available data does not support EPA disapproving the Commonwealth's removal of the low RVP program based on the data available at present.

With respect to the Commonwealth's reliance on future case photochemical grid modeling, prepared for MARAMA's use in assessing regional ozone modeling and for EPA use for interstate ozone transport modeling, the modelling referred to by the commenter does not include increased emissions from removal of the state low RVP program, but the small increases from removal of the state program are far outweighed by the much larger actual and future expected reductions in stationary point source and overall highway mobile emission reductions. For the MARAMA modeling, future 2023 VOC onroad emissions [6] are projected to decrease from 2014 levels [7] by 60 percent (over 8,550 tpy)—far outweighing any benefits from the state low RVP gasoline program (even without accounting for offsetting benefits from the substitution measures listed in the noninterference demonstration). During the same period, onroad NO_X emissions are expected to drop from 28,142 tpy to 8,147 tpy, due primarily to new Federal vehicle and fuel standards. Stationary point source NO_X emission reductions are even more dramatic in the same period, dropping from 54,711 tpy in 2014 to 33,813 tpy in 2023, primarily from shutdown and fuel switching of large electric generating units (EGUs). With respect to impact on the associated photochemical air modeling, these sector reductions far outweigh any reductions that would be provided from the retention of the PADEP low RVP measure. EPA agrees with the Commonwealth's contention in their noninterference demonstration that the photochemical grid modeling (*i.e.,* the results of the MARAMA regional modeling and EPA's interstate ozone transport modeling) constitutes additional supporting evidence that, with respect to future attainment and maintenance of the ozone NAAQS, the potential emissions benefit of retaining the PADEP low RVP program is greatly outweighed by other emissions reduction strategies that continue to impact this area.

Comment 7: The commenter contends that EPA should require PADEP to submit a SIP revision to account for the permanent shutdown of the Guardian Industries Jefferson Hills glass manufacturing facility in Allegheny County. The commenter states that PADEP stated its intent to retain the balance of the creditable emissions reductions from this source not being used as part of the noninterference demonstration (*i.e.,* any remaining available offsets after substitution for low RVP program, including a 25 percent emissions adjustment) for potential future use by PADEP or ACHD for future SIP planning purposes. The commenter requests that EPA require PADEP to submit ERCs for approval into the SIP to keep track of the remaining balance for future SIP purposes, as has been required for shutdown sources in the past. The commenter cites several past examples where ERCs have been memorialized in the SIP for this purpose, which added USX Corp/US Steel Group-Fairless Hills and Rockwell Heavy Vehicle Inc.–New Castle Forge Plant permanent shutdowns to the SIP (*See* 61 FR 15709 and 64 FR 18818).

Response 7: EPA disagrees with parts of the commenter's premise regarding what Pennsylvania has requested with respect to the shutdown of this Guardian Industries facility. PADEP indicates in its noninterference demonstration that Guardian Industries permanently ceased operation in August 2015 and that Guardian Industries did not request that potentially creditable reductions be preserved in the emission inventory within one year of closure, as required by Pennsylvania's rules governing NSR at 25 Pa. Code 127.207(2) for receipt of ERCs. As a result, PADEP states that Guardian Industries is ineligible to apply for ERCs.

Although PADEP characterizes the shutdown emissions reductions as permanent, surplus, enforceable, and quantifiable, PADEP does not characterize them as ERCs—the generation and registration of which is governed by specific application criteria under Pa. Code Chapter 127, Subchapter E. Because the permanent emission reductions from the shutdown are not an ERC, as defined at Chapter 127, Subchapter E, EPA believes that Chapter 127 of the PA Code thus does not require inclusion of these reductions in either a state plan approval or in the Pennsylvania SIP. Thus, EPA disagrees with the commenter's contention that PADEP should be required to submit a SIP revision to account for the permanent shutdown of the Guardian Industries Jefferson Hills glass manufacturing facility in Allegheny County. The facility's permits for Guardian Industries are no longer valid and the facility cannot be reactivated without undergoing NSR and being re-permitted. EPA believes that the Guardian Industries shutdown is permanent, enforceable, surplus, and verifiable based on the information provided by PADEP in the SIP submittal to remove low RVP from the SIP and that the source is no longer eligible to apply for ERCs given the governing regulations for ERCs. Because a SIP submittal is not required for PADEP to use the permanent emissions reductions from Guardian in its noninterference demonstration, EPA also disagrees with the commenter regarding the ability to use any remaining reductions from Guardian not relied upon in the noninterference demonstration for use in future SIP planning purposes.

Comment 8: The commenter cites EPA's statement in section IV.B.2 of its June 15, 2018 DFR that, ''PADEP asserts the reductions have not been used and cannot be used in the future by Pennsylvania to meet any other obligation, including attainment demonstration, facility emission limitation, reasonable further progress, or maintenance plan requirements for the area.'' The commenter disagrees with EPA, believing that PADEP states in its submission that they wish to retain the balance of the creditable emission reductions from the Guardian Industries shutdown emissions for use by PADEP or ACHD to offset future emission increases in the Pittsburgh-Beaver Valley Area. The commenter requests that EPA clarify this inconsistency between PADEP statements in its SIP submission and EPA 's statement in the June 15, 2018 DFR.

Response 8: The commenter is correct that PADEP states in the May 2, 2018 noninterference demonstration SIP its desire to retain the balance of the

[6] Based on MARAMA's 2023 gamma inventory, referenced in Table 9 of Pennsylvania's May 2, 2018 SIP revision.

[7] Based on EPA's 2014 National Emission Inventory (NEI) version 1 final, referenced in Table 9 of Pennsylvania's May 2, 2018 SIP revision.

creditable emission reductions not used in the demonstration (including a 25 percent PADEP allowance to the projected RVP removal emissions increase). PADEP estimates that the remaining available creditable emission reductions will total 1028 tpy (2.19 tpd) of VOCs, 571 tpy (or 1.0 tpd) of NO_X, and 28.5 tpy of $PM_{2.5}$ in 2018. By 2023, PADEP projects the remaining available emission credits will total 1028 tpy (or 2.24 tpd) of NO_X, 609 tpy (or 1.69 tpd) of VOC, and 28.5 tpy of $PM_{2.5}$. EPA inadvertently incorrectly stated in our DFR that we believed Pennsylvania could not use any remaining available creditable emission reductions for any other future purpose. EPA intended to state that Pennsylvania could not use the emission reductions from the Guardian closure, which it relies upon for the noninterference demonstration, in any future planning activities under the CAA. EPA did not intend to address the remaining available creditable emissions reductions and any future uses PADEP may have for those remaining reductions. EPA's intention in the June 15, 2018 DFR was to state that the shutdown reductions from Guardian Industries cannot be used as ERCs to offset future stationary source growth, as the facility did not apply for the creation of ERCs prior to the deadline in 25 Pa. Code Chapter 127. Use of any remaining surplus creditable emissions by the Commonwealth is not relevant to today's action, and in any case the use of the reductions would be part of a future SIP revision, which would require a separate determination of non-interference under section 110(l) that would be evaluated on its merits at that time. Any remaining emission reduction credit would need to be determined at that time to be surplus, enforceable, quantifiable, and contemporaneous (if being used in substitution for another measure) and shown to not be included in a base cases emissions inventory previously approved as part of the SIP.

Comment 9: PADEP's onroad analyses failed to perform winter weekday runs to determine winter time PM levels and whether reductions would be needed. PM typically increases during winter time as stated in EPA's MOVES guidance and so summer time PM or annual PM runs may not be representative of actual PM occurring during winter months. This is especially important since the PM NAAQS is a 24-hour standard and not an annual standard so only relying on annual or summer runs will not be representative of the worst-case scenario.

Response 9: The MOVES emissions modeling performed for this SIP revision was performed for purposes of demonstrating that PADEP's removal of the low RVP program would not interfere with any applicable requirement concerning attainment and reasonable further progress (RFP), or any other applicable requirement of the CAA. This noninterference requirement prohibits EPA from approving a SIP revision that revises a SIP without a demonstration that such removal or modification will not interfere with attainment of the NAAQS, reasonable further progress, or any other applicable requirement of the CAA. Pennsylvania's 110(l) noninterference demonstration focuses on showing that any emissions increases from removal of the PADEP low RVP summertime control program (for any pollutant that would affect any NAAQS applicable to the Pittsburgh area) are fully offset by other substitute emission control measures. Because the low RVP program being removed is a control measure only in effect from May through September, it is unnecessary to perform MOVES modeling of the program in winter months. While the PADEP low RVP program is a VOC control measure, originally adopted to reduce VOC emissions as ozone precursors, the program does slightly impact summertime NO_X and $PM_{2.5}$ emissions. Pennsylvania's noninterference demonstration does analyze these summertime impacts on those emissions that affect both the ozone and $PM_{2.5}$ NAAQS. $PM_{2.5}$ emissions are typically inventoried and analyzed on an annualized tonnage (expressed as tons per year) for purposes of SIP planning. However, there is no impact from removal of the summertime PADEP low RVP program requirements on wintertime emissions because EPA does not regulate gasoline RVP outside of the June 1st through September 15th period. During the remaining portion of the year, gasoline RVP is governed by standards established by the American Society for Testing and Materials for the purposes of ensuring drivability during colder weather. Generally, gasoline RVP is higher during the colder portion of the year.

Comment 10: The commenter requests that EPA explain how it reviewed the onroad and nonroad MOVES runs as it appears that PADEP did not include any input files used to compile the onroad and nonroad inventories or much information at all to be able to perform an independent analysis. EPA must be an independent reviewer of the state's demonstration—it can't simply approve anything and everything the state submits. The commenter argues that since the input and output files were not available in the public docket, the public was not able to verify whether PADEPs modeling was performed correctly, and therefore EPA should ask PADEP to supplement the docket to include these materials and EPA should reopen the comment period to provide the public time to review the supplementary information.

Response 10: PADEP prepared its emissions analysis for its noninterference demonstration using a methodology similar to that used in preparing highway emission inventories to satisfy the requirements of section 172(c)(3) of the CAA. For highway mobile source emissions, this entailed utilization of a regional mobile source highway emission inventory for the Pittsburgh-Beaver Valley Area. PADEP's contractor, Michael Baker, prepared a projection inventory of summer weekday and annual conditions for 2018 and 2023 analysis years. The Commonwealth's May 2, 2018 SIP revision contains a summary of the methodology used to generate highway mobile emissions estimates using MOVES2014a. Appendix D to the May 2, 2018 SIP includes attachments detailing the highway mobile analysis methodology, MOVES input assumptions and input parameters, and MOVES sample input files. The Commonwealth utilizes custom MOVES post-processing software to calculate hourly vehicle speeds and to prepare batch traffic input files to the MOVES model. This analysis methodology is consistent with past statewide inventory efforts, including state input to the 2014 NEI. While this inventory level analysis makes review of the MOVES input information more difficult, the Commonwealth has attempted to clearly document the input information used, the results generated, and to provide MOVES input file samples that underlie the analysis. This is not a new means of inventory level mobile source analysis for Pennsylvania, as Pennsylvania uses this method for all highway emissions inventory plans submitted to EPA. EPA therefore disagrees with the commenter that the analysis is unverifiable, or that the Commonwealth should be required to supplement its documentation for the docket for this action. EPA does not agree that the comment period should be reopened to allow for additional time to review Pennsylvania's analysis as sufficient information supporting PADEP's demonstration supporting the SIP revision was available for review.

Comment 11: PADEP assumes a three percent increase in emissions for stationary area and point sources but never explains where this three percent originated. PADEP says the assumption

comes from the similar increase seen in nonroad emissions but there's no reason to believe nonroad emissions would increase at the same rate as area or point sources. Nonroad vehicles are not the same as area or point sources, nonroad vehicles typically emit VOCs from combustion exhaust, leaking gas caps, or permeation through gas tanks but area and point sources emit VOCs from leaking tanks, expansion valves in tanks, bad connections, or spillage from transferring gas. EPA has never allowed cross-category (*i.e.* nonroad to area/point categories) emission factors to estimate expected emissions from sources, this has never been done before in emissions inventories. EPA should require PADEP to better explain the three percent assumption to ensure their assumptions are valid and reasonable.

Response 11: EPA agrees that PADEP has not presented supporting information to validate its assumption that affected point area sources would see the same increase in emissions as would affected nonroad mobile sources from removal of the state RVP rule, as VOC emissions from area point sources of gasoline transport and storage are mostly evaporative in nature and not necessarily consistent with those from nonroad mobile sources VOC emissions (which have tailpipe, evaporative permeation, and engine hot soak and evaporative emissions). However, it would have proven difficult for PADEP to specifically estimate emissions impact from the affected point area sources, as EPA no longer updates the TANKS emissions estimation model [8] and instead refers to the original AP–42 equations for use in determining emission factors for storage tanks. Use of AP–42 factors to determine the change in emissions on these sources from removal of the PADEP low RVP gasoline rule would require extensive tank and product specific information from each source that PADEP would need to calculate and project. EPA believes the change in emission factors would be small and that any error caused by use of this assumption would not dramatically impact the emissions impact on this sector from removal of the PADEP 7.8 RVP rule.

The VOC emissions from area point sources affected by removal of the PADEP low RVP requirement total 217 tpy in the 2014 NEI. Assuming three percent growth in emissions from removal of the rule results an increase of only seven tpy of VOCs (or 0.02 tpd). Because emissions from this sector are so small, even doubling PADEP's estimate would only lead to a negligible increase in 2018 or 2023 VOC emissions from this sector. EPA therefore finds that PADEP's assumption of a three percent growth in VOC emissions in the area point sector resulting from removal of the state RVP rule, while simplistic for emission inventory purposes, is reasonable for this CAA 110(l) analysis and even if it results in understatement of the increase in emissions from removal of the low RVP rule, as it is more than overcome by PADEP's conservative approach to the analysis, as PADEP buffers the overall results on all sectors by increasing by 25 percent the overall impact on all sectors for both NO_X and VOC emissions to account for uncertainty in their analysis. PADEP's simplistic three percent growth assumption for emissions from point area sources would translate to a very small overall emissions change for the sector and is reasonable for purposes of this CAA 110(l) analysis.

Comment 12: A commenter contends that EPA should disapprove PADEP's SIP submission because 25 Pa. Code 129.77 is not a ''surplus'' emission reduction, as Reasonably Available Control Technology (RACT) is required under section 184 of the CAA for the State to meet RACT requirements for states in the Northeast Ozone Transport Region (OTR), as this category of emissions is covered by an EPA-issued Control Techniques Guideline (CTG). As a result, the commenter argues that reductions from RACT can't be considered ''surplus'' because the reductions achieved are necessary to satisfy mandatory requirements separate from attainment or maintenance plans, since states in an OTR are required to enact RACT on a statewide basis.

Response 12: In evaluating whether a given SIP revision would interfere with attainment or maintenance, as required by CAA section 110(l), EPA generally considers whether the SIP revision will allow for an increase in actual emission into the air over what is allowed under the existing EPA-approved SIP. EPA has not required that a state produce a new complete attainment demonstration for every SIP revision, provided the status quo air quality is preserved. *See Kentucky Resources Council, Inc.* v. *EPA,* 467 F.3d 986 (6th Cir. 2006). EPA elaborated on compliance options for complying with the CAA noninterference clause in our ''Guidance on Removing Stage II Gasoline Vapor Control Programs from State Implementation Plans and Assessing Comparable Measures'' (EPA–457/B–12–001, dated August 7, 2012). In that guidance, EPA indicated that 110(l) noninterference could be demonstrated if an increase in emissions from removal of a measure would be offset by excess emission reductions not accounted for in the current SIP. Per this guidance, a state has wide latitude in selecting additional controls, including substitution of NO_X controls, as long as the offsetting emission controls are contemporaneous with a rule being phased-out. The guidance indicates that the offsetting measures can come from substitution of additional emission controls not already in the SIP, or alternatively through offset of emissions due to excess emission reductions not accounted for in the current SIP (*e.g.,* changes to an area's stationary or area source emission inventory resulting from changes in industrial population or activity, or from shutdown of a source.) EPA believes that Pennsylvania's use of the term ''surplus'' in reference to the RACT ''overcontrol'' from the adhesives source category is, for CAA 110(l) purposes, a reference to the fact that the PADEP adhesives rule adopts the OTC model rule that exceeds EPA requirements for CTG RACT in this category and also that the benefits of the rule have not been previously claimed in a prior EPA-approved control strategy SIP (*e.g.,* a reasonable further progress plan, maintenance plan, or attainment demonstration, etc.). Therefore, the adhesives and sealant rule generates emission reductions that could serve to offset the increases from removal of the low RVP requirement, in a contemporaneous timeframe to that removal. Given that the Pittsburgh-Beaver Valley Area has no requirements to demonstrate RFP of any ozone NAAQS, the focus of CAA 110(l) demonstration in this case is to show that removal of the provision will maintain the status quo of air quality in the area and thereby not interfere with attainment of any ozone NAAQS. While part of Pennsylvania's adhesives and sealants rule addresses the requirements of the adhesives CTG to demonstrate compliance with RACT, (and is a mandatory component of the SIP), part of Pennsylvania's adhesives and sealants rule addresses emissions and activities not covered by the CTG, and

[8] TANKS is a Windows-based, EPA-created computer software program used to estimate VOC and hazardous air pollutant (HAP) emissions from fixed- and floating-roof storage tanks. TANKS is based on the emission estimation procedures from Chapter 7 of EPA's Compilation Of Air Pollutant Emission Factors (AP–42). The TANKS model was developed using software that is now outdated, and therefore, the model is not reliably functional on computers using certain operating systems such as Windows Vista or Windows 7. EPA no longer supports TANKS and instead recommends use of AP–42 emission factors for this purpose.

are surplus to the requirement of the adhesives CTG. Also, since the Pittsburgh-Beaver Valley Area has no outstanding Reasonable Available Control Measure (RACM) requirement because they have no attainment plan requirement under CAA 172(c) and 182(b), the pertinent applicable requirement under CAA 110(l) is demonstrating that this action will not interfere with maintenance of ozone or any other NAAQS. EPA finds Pennsylvania has done that through its analysis.

Further, EPA disagrees with the commenter that reductions from a RACT measure (required for an OTR state) cannot be used to show noninterference under CAA 110(l). Nothing in CAA 110(l) prevents consideration of required RACT or CTG measures from being considered as offsetting reductions for noninterference purposes. Thus, the fact that the adhesives and sealant rule, relied upon by PADEP to assist in showing removal of low RVP requirements will not interfere with the NAAQS, is part of a RACT measure is not relevant to the inquiry. EPA discussed how removal of the low RVP requirement will not interfere with the NAAQS, RFP or any other CAA requirement in the DFR and herein relying upon Federal fuel requirements to minimize emission increases as well as reductions in pollutants from Guardian's closure and the adhesives and sealants rule. The status of the adhesives rule as a RACT requirement does not alter EPA's conclusion of non-interference with the ozone or any other NAAQS from the removal of the fuel requirement from the Pennsylvania SIP.

Comment 13: The commenter states as part of the noninterference demonstration required by CAA 110(l), EPA must consider the ozone forming potential of VOC reductions being used to offset the increased VOC stemming from the removal of the state gasoline RVP limit through photochemical grid modeling that considers temperature increased due to climate change.

Response 13: EPA reviews 110(l) on a case-by-case basis through individual SIP actions. EPA issued guidance in 2012 addressing removal of Stage II vapor recovery requirements from SIPs, which contains guidance that is relevant here.[9] Specifically, the EPA Stage II removal guidance discusses compliance with 110(l) as possible even with slight emission increases, in cases where those increases do not interfere with attainment, or are very small foregone, near-term emissions reductions that are expected to diminish rapidly over time that are assumed too small (or temporary in nature) to interfere with attainment or RFP towards attainment of a NAAQS. The guidance suggests this may be particularly evident in areas that are already attaining the NAAQS, or where emissions and/or air quality projections demonstrate the area is likely to maintain the NAAQS in the future. Although the Stage II program removal guidance recommends use of photochemical grid modeling as a means to demonstrate noninterference, it indicates that non-interference can be demonstrated through other means for purposes of CAA 110(l).[10] Pennsylvania's section 110(l) demonstration for RVP removal takes the approach that minor increases in emissions from removal of the PADEP low RVP program will be offset by other contemporaneous measures, that future modeling continues to show emissions of pollutants contributing to ozone will drop dramatically in the near term, and that EPA's preliminary ozone transport photochemical grid modeling for the 2015 ozone NAAQS shows future attainment.

Given the scale of emission reductions underlying that modeling as discussed in PADEP's SIP submittal, the relatively tiny emission increases from removal of the low RVP program are not expected to influence continued attainment of the NAAQS in the Pittsburgh-Beaver Valley Area in the near term. Nothing in CAA 110(l) requires an attainment demonstration or airshed modeling showing that the measure being removed would impact the NAAQS at any level to make a satisfactory showing of noninterference under CAA section 110(l). Pennsylvania refers to the modeling that shows future attainment of the ozone NAAQS as part of its noninterference demonstration to support removal of the 7.8 RVP program from the SIP. The commenter has not explained why photochemical grid modeling is necessary for section 110(l) purposes or why EPA must consider temperature increases attributed to climate change for these purposes. The commenter points to no specific statutory requirement regarding climate change with which this SIP revision to remove RVP requirements would interfere or which would affect our conclusion regarding PADEP's section 110(l) analysis. Further, the commenter provided no information to counter the modeling from MARAMA or from EPA which is referenced in the Commonwealth's submitted SIP revision. Thus, no further response is provided to this comment.

Comment 14: The commenter states that EPA must consider the consequences of increased gasoline consumption from removal of the PADEP low RVP requirement.

Response 14: The commenter did not indicate what linkage exists between gasoline consumption and gasoline RVP limit. PADEP did not analyze the impacts of additional gasoline usage directly related to any expected lower cost of gasoline attributed with removal of the state RVP summertime limit. While PADEP examined price impact from RVP limits using historical retail gasoline prices during its rulemaking process, the commenter did not provide sufficient information to justify that any such relationship exists between consumption and gasoline RVP limits.

Further, PADEP did consider impacts of RVP pricing on consumption in the state rulemaking process. PADEP's own historic price analysis indicates that retail prices for low RVP fuel in the Pittsburgh-Beaver Valley Area were 9 cents per gallon more on average than statewide average retail gasoline price during the 2014 state low RVP control season (May–Sept), ranging from 1.6 to 9.2 cents per gallon over statewide gasoline prices during the 2011–2015 5-year period. PADEP's regulatory calculations assumed that removal of the State RVP summertime requirement would save an average Pittsburgh driver between $1.60 to $9.20 per summer season, if they purchased 100 gallons of gasoline during the period of retail purchase applicability. PADEP's modeling analysis of the highway vehicle emissions impact from removal of the low RVP program used MOVES emissions modeling emission factors and an apportionment of statewide vehicle miles of travel (based on Pittsburgh's apportionment of statewide gasoline usage). However, PADEP's emissions modeling did not rely upon direct assumption of gasoline usage, as the MOVES model estimates emissions using a variety of inputs (*e.g.,* traffic volume, vehicle speeds, vehicle fleet composition, fuel characteristics, and other local emission control programs, etc.). However, gasoline consumption was not a direct input into the computer model.

EPA believes that due to the low expected per gallon gasoline cost savings attributed to removal of the PADEP low RVP program, the short duration of the program (*i.e.,* 4 months

[9] Guidance on Removing Stage II Gasoline Vapor Control Programs from State Implementation Plans and Assessing Comparable Measures, August 2012.

[10] Guidance on Removing Stage II Gasoline Vapor Control Programs from State Implementation Plans and Assessing Comparable Measures, August 2012, section 2.2.

of the year), and the relatively indirect nature of gasoline consumption on the modeled highway emission reductions, it is unlikely that vehicle miles traveled (VMT) will rise dramatically from removal of the program or that any slight rise in gasoline usage for part of the year would dramatically increase emissions compared to a scenario where the PADEP low RVP program is not removed. Therefore, EPA believes it unnecessary for PADEP to reflect a projection scenario in its emissions modeling for its noninterference demonstration where gasoline usage is increased beyond normal gasoline growth assumptions and thus PADEP's emissions analysis remains reasonable without such consideration. Furthermore, to account for uncertainty in their emissions impact estimates, PADEP added a 25% upwards adjustment to their estimate of total substitute emission reductions necessary to offset the loss in emissions reductions from removal of the state low RVP program. EPA believes this additional level of overcontrol more than makes up for the impact of potential additional fuel sales in the Pittsburgh-Beaver Valley area due to potential fuel price differences and fuel sales resulting from removal of the state summertime low RVP program.

V. Impacts on the Boutique Fuels List

Section 1541(b) of the Energy Policy Act of 2005 required EPA, in consultation with the U.S. Department of Energy, to determine the number of fuels programs approved into all SIPs as of September 1, 2004 and to publish a list of such fuels. On December 28, 2006 (71 FR 78192), EPA published the list of boutique fuels. EPA maintains the current list of boutique fuels on its website at: *https://www.epa.gov/gasoline-standards/state-fuels.* The final list of boutique fuels was based on a fuel type approach. CAA section 211(c)(4)(C)(v)(III) requires that EPA remove a fuel from the published list if it is either identical to a Federal fuel or is removed from the SIP in which it is approved. Under the adopted fuel type approach, EPA interpreted this requirement to mean that a fuel would have to be removed from all states' SIPs in which it was approved in order to remove the fuel type from the list. (71 FR 78195). The 7.8 psi RVP fuel program (as required by Pa. Code Chapter 126, Subchapter C), as approved into Pennsylvania's SIP, is a fuel type that is included in EPA's boutique fuel list (71 FR 78198–99; *https://www.epa.gov/gasoline-standards/state-fuels*). The specific counties in the Pittsburgh-Beaver Valley Area where summer low RVP gasoline is required are identified on EPA's Gasoline Reid Vapor Pressure web page (*https://www.epa.gov/gasoline-standards/gasoline-reid-vapor-pressure*). Subsequent to the final effective date of EPA's approval of Pennsylvania's May 2, 2018 SIP revision to remove Pennsylvania's Chapter 126, Subchapter C 7.8 psi RVP requirement from the SIP, EPA will update the State Fuels and Gasoline Reid Vapor Pressure web pages with the effective date of the SIP removal. However, the entry for Pennsylvania will not be completely deleted from the list of boutique fuels, as Allegheny County remains subject to a separate, SIP-approved 7.8 psi RVP gasoline requirement of ACHD's Rules and Regulations, Article XXI, pending future action by ACHD to repeal that rule and submit a formal SIP revision requesting its repeal from the Pennsylvania SIP. This deletion of Armstrong, Beaver, Butler, Fayette, Washington, and Westmoreland Counties from the list will not result in an opening on the boutique fuels list because the 7.8 psi RVP fuel type remains for one Pennsylvania County, and in other state SIPs.

VI. Final Action

EPA is approving Pennsylvania's May 2, 2018 SIP demonstration that removal of PADEP's low RVP summertime gasoline program does not interfere with the Commonwealth's ability to attain or maintain any NAAQS in the Pittsburgh-Beaver Valley Area, in compliance with the requirements of CAA section 110(l). With this action, EPA is also granting Pennsylvania's request to remove PADEP's low RVP summertime gasoline requirements at 25 Pa. Code Chapter 126, Subchapter C from the Pennsylvania SIP. Our approval of the May 2, 2018 SIP submittal is in accordance with CAA requirements in section 110, including section 110(l) specifically.

EPA's approval of the May 2, 2018 Pennsylvania SIP revision does not remove the separate SIP requirement applicable requiring use of 7.8 psi RVP gasoline during summertime months in Allegheny County, under requirements set forth in Article XXI, Rules and Regulations of the ACHD, which were approved by EPA as part of the Commonwealth's SIP on April 17, 2001 (66 FR 19724). PADEP will submit a SIP revision, at a later date, on behalf of ACHD to remove or otherwise amend the separate Allegheny County low RVP gasoline program rule. Neither ACHD's rule nor the related approved Pennsylvania SIP for Article XXI are the subject of this action or the Pennsylvania May 2, 2018 low RVP gasoline SIP revision.

VII. Statutory and Executive Order Reviews

A. General Requirements

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

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

In addition, this rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the state, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

B. Submission to Congress and the Comptroller General

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

C. Petitions for Judicial Review

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by February 19, 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 to approve Pennsylvania's request for removal of summertime low RVP gasoline requirements from the SIP may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

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

Dated: December 10, 2018.

Cosmo Servidio,

Regional Administrator, Region III.

40 CFR part 52 is amended as follows:

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

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

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

Subpart NN—Pennsylvania

§ 52.2020 [Amended]

■ 2. In § 52.2020, the table in paragraph (c)(1) is amended by removing the heading and entries for ''Subchapter C—Gasoline Volatility Requirements'' under Title 25, Chapter 126 Standard for Motor Fuels.

[FR Doc. 2018–27481 Filed 12–19–18; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 180807736–8999–02]

RIN 0648–BI41

Fisheries of the Northeastern United States; Framework Adjustment 12 to the Atlantic Mackerel, Squid, and Butterfish Fishery Management Plan

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

ACTION: Final rule.

SUMMARY: NMFS approves and implements Framework Adjustment 12 to the Atlantic Mackerel, Squid, and Butterfish Fishery Management Plan. This rule allows the possession of Atlantic mackerel after of the domestic annual harvest is projected to be caught instead of prohibiting the possession of Atlantic mackerel for the rest of the calendar year. This final rule implements this measure because it is necessary to prevent unintended negative economic impacts to other fisheries, such as Atlantic herring.

DATES: This rule is effective December 20, 2018.

ADDRESSES: The Mid-Atlantic Fishery Management Council (Council) prepared a supplemental environmental assessment (SEA) for Framework Adjustment 12 that describes the Council's preferred management measure and other alternatives considered and provides a thorough analysis of the impacts of the all alternatives considered. Copies of the Framework 12 SEA and the preliminary Regulatory Impact Review (RIR) analysis are available from: Christopher Moore, Executive Director, Mid-Atlantic Fishery Management Council, Suite 201, 800 State Street, Dover, DE 19901. The SEA/RIR is accessible via the internet at *http://www.greateratlantic.fisheries.noaa.gov/* or *http://www.mafmc.org.*

FOR FURTHER INFORMATION CONTACT: Alyson Pitts, Fishery Management Specialist, (978) 281–9352, *alyson.pitts@noaa.gov.*

SUPPLEMENTARY INFORMATION:

Background

On June 5, 2018, the Council adopted a final measure under Framework Adjustment 12 to the Atlantic Mackerel, Squid, and Butterfish (MSB) Fishery Management Plan (FMP). On August 17, 2018, the Council submitted the framework and draft SEA to NMFS for preliminary review, with final submission on October 18, 2018. NMFS published a proposed rule that included implementing regulations on October 3, 2018 (83 FR 50059). The public comment period for the proposed rule ended on October 19, 2018.

The Council developed Framework Adjustment 12 and the measure described in the proposed rule under the discretionary provision specified in section 303(b)(12) of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) (16 U.S.C. 1801, *et seq.*; 1853(b)(12)). The objective of this action is to change to possession limits when 100 percent of the domestic annual harvest (DAH) is landed, from zero possession to 5,000 lb (2,268 kg). The primary purpose of this action is to avoid adverse economic impacts to the commercial fishing industry once the DAH is projected to be harvested. Details concerning the development of these measures are contained in the SEA prepared for this action and summarized in the preamble of the proposed rule, therefore they are not repeated here.

Approved Measure

The approved measure will allow the possession of up to 5,000 lb (2,268 kg) of Atlantic mackerel after 100 percent of the DAH has been projected to be harvested for the remainder of the 2018 fishing year and moving forward. Current regulations prohibit the possession of Atlantic mackerel after 100 percent of the DAH is harvested.

Comments and Responses

NMFS received four comments on this action, one was unrelated to the

action, and is not addressed here. One was in favor of the proposed action and two were in opposition to this action.

Comment 1: One individual commented that quotas have been large and that there is no reason to increase the quota.

Response: Framework 12 does not increase the annual quota for Atlantic mackerel. This action allows for a small possession limit of Atlantic mackerel after the DAH has been caught. We do not expect this action will result in an overage of the ACL. Atlantic mackerel quotas have been greatly reduced since 2010. The Atlantic mackerel acceptable biological catch (ABC) was reduced by 70 percent from 2010 (156,000 mt) to 2011 (47,395 mt) and the 2016 ABC (19,898 mt) dropped by 87 percent compared to 2010 (156,000 mt).

Comment 2: One individual commented in support of this action because it would provide economic benefits for the industry. The commenter raised concern that over harvesting could result in a deduction of quota from the following fishing year, even though the 5,000 lb (2,268 kg) possession limit is smaller compared to the current possession limit of 20,000 lb (9.08 mt).

Response: NMFS agrees that approval of this action will provide economic opportunities for the commercial fishing industry in the region. While there is potential for an over harvest of the DAH, there are additional accountability measures that would deduct an overage from the DAH in the following year, as required under § 648.24(b)(2) and (3). There is also a 10-percent uncertainty buffer of 2.2 million lb (997 mt) in the current specifications. Council staff have projected that even if 100 percent of the DAH is harvested, only about 17 percent (374,000 lb, 169 mt) of the management uncertainty buffer would be landed with a 5,000 lb (2,268 kg) possession limit. This action is not expected to compromise conservation while maintaining economic opportunities for fishing communities.

Comment 3: One industry participant expressed opposition to Framework 12, as the current measure has been set to prohibit the possession of mackerel when 100 percent of the DAH is harvested in order not to exceed the management uncertainty buffer. The commenter said that the uncertainty buffer was meant for uncertainty in biomass and for food to be set aside for predators. The commenter also suggested that NMFS should shift quota from the Tier 1 and 2 permit category, if this measure is intended for smaller commercial fishing entities, in order to prevent further overfishing. The commenter also claimed that Atlantic mackerel, river herring, and shad are overfished, and Framework 12 does not improve chances for the fishery to rebuild.

Response: The 10-percent management uncertainty buffer was designed because of the high volume nature of the fishery. The management uncertainty buffer is utilized in the event that the Regional Administrator does not close the commercial mackerel fishery in time. Because of this, this action is not expected to compromise conservation or result in overfishing. If there is an over harvest of the DAH, there are additional accountability measures that would deduct an overage from the DAH in the following year, as required under § 648.24(b)(2) and (3). The 10 percent uncertainty buffer is 2.2 million lb (997 mt) and Council staff have projected that even if 100 percent of the DAH is harvested, only about 17 percent of the management uncertainty buffer would be landed.

The tiered permit system allows vessels to possess a certain amount of mackerel based on permit category, not quota allocation. There is no quota allocation in the Atlantic mackerel fishery. The stock is managed by an annual quota and monitored as a whole. Therefore, it is not possible to ''shift'' quota among permit categories. The implementation of Framework 12 may result in more mackerel catch and the potential for more river herring and shad catch. However, it does not address the catch caps that control bycatch of river herring and shad in the mackerel fishery. This action is not expected to compromise conservation of these species, as the caps will continue to limit bycatch.

Corrections

The proposed rule included a correction to § 648.14(g)(2)(ii)(D). However, the correction to that regulation has already been made in a final rule to implement Amendment 20 to the Atlantic Mackerel, Squid, and Butterfish FMP (December 14, 2018; 83 FR 64257). Therefore, this correction is no longer necessary as part of the current rulemaking.

Classification

Pursuant to section 304(b)(1)(A) of the Magnuson-Stevens Act, the Assistant Administrator has determined that this final rule is consistent with Framework Adjustment 12, other provisions of the Magnuson-Stevens Act, and other applicable laws.

This final rule has been determined to be not significant for purposes of Executive Order 12866.

Because this rule relieves a restriction by lifting the prohibition of the possession of Atlantic mackerel after the DAH has been caught, it is not subject to the 30-day delayed effectiveness provision of the APA pursuant to 5 U.S.C. 553(d)(1). Data and other information indicate that 100 percent of the 2018 DAH quota may be landed before the end of the fishing year. Landings data are updated on a weekly basis, and NMFS monitors catch data on a daily basis as catch increases toward the limit. The high-volume nature of this fishery, and other fisheries that cannot avoid mackerel, such as Atlantic herring, increase catch quickly relative to the quota. If implementation of this action is delayed, the quota for the 2018 fishing year may be exceeded, thereby prohibiting the possession on Atlantic mackerel, under the current regulations found at § 648.24(b)(1)(i), which would hinder the prosecution of fisheries unnecessarily in light of the current rulemaking.

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration during the proposed rule stage that this action would not have a significant economic impact on a substantial number of small entities. The factual basis for the certification was published in the proposed rule and is not repeated here. No comments were received that would change the certification that this action will not have a significant economic impact on a substantial number of small entities regarding this certification. As a result, a regulatory flexibility analysis was not required and none was prepared.

List of Subjects in 50 CFR Part 648

Fisheries, Fishing, Recordkeeping and reporting requirements.

Dated: December 14, 2018.

Alan D. Risenhoover,

Acting Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR part 648 is to be amended as follows:

PART 648—FISHERIES OF THE NORTHEASTERN UNITED STATES

■ 1. The authority citation for part 648 continues to read as follows:

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

§ 648.14 [Amended]

■ 2. In § 648.14, remove and reserve paragraph (g)(2)(ii)(F).

■ 3. In § 648.24, revise paragraph (b)(1)(i) to read as follows:

§ 648.24 Fishery closures and accountability measures.

* * * * *

(b) * * *

(1)(i) *Mackerel commercial sector EEZ closure.* NMFS will close the commercial Atlantic mackerel fishery in the EEZ when the Regional Administrator projects that 95 percent of the Atlantic mackerel DAH is harvested if such a closure is necessary to prevent the DAH from being exceeded. The closure of the commercial fishery shall be in effect for the remainder of that fishing year, with incidental catches allowed as specified in § 648.26. When the Regional Administrator projects that 100 percent of the Atlantic mackerel DAH will be landed, NMFS will reduce the possession of Atlantic mackerel in the EEZ for the remainder of the fishing year to the amount specified in § 648.26(a)(2)(ii).

* * * * *

■ 4. In § 648.26, revise paragraphs (a)(1) introductory text and (a)(2) to read as follows:

§ 648.26 Mackerel, squid, and butterfish possession restrictions.

(a) * * *

(1) *Initial possession limits.* A vessel must be issued a valid limited access mackerel permit to fish for, possess, or land more than 20,000 lb (9.08 mt) of Atlantic mackerel from or in the EEZ per trip, provided that the fishery has not been closed, as specified in § 648.24(b)(1).

* * * * *

(2) *Closure possession restrictions*—(i) *Limited access fishery.* During a closure of the commercial Atlantic mackerel fishery pursuant to § 648.24(b)(1)(i), when 95 percent of the DAH is harvested, vessels issued a limited access Atlantic mackerel permit may not take and retain, possess, or land more than 20,000 lb (9.08 mt) of Atlantic mackerel per trip at any time, and may only land Atlantic mackerel once on any calendar day, which is defined as the 24-hr period beginning at 0001 hours and ending at 2400 hours. Pursuant to § 648.24(b)(1)(ii), when 90 percent of the Tier 3 allocation is harvested, vessels issued a Tier 3 limited access Atlantic mackerel permit may not take and retain, possess, or land more than 20,000 lb (9.08 mt) of Atlantic mackerel per trip at any time, and may only land Atlantic mackerel once on any calendar day, which is defined as the 24-hr period beginning at 0001 hours and ending at 2400 hours

(ii) *Entire commercial fishery.* During a closure of the directed commercial Atlantic mackerel fishery pursuant to § 648.24(b)(1)(i), when 100 percent of the DAH is harvested, vessels issued an open or limited access Atlantic mackerel permit may not take and retain, possess, or land more than 5,000 lb (2.26 mt) of Atlantic mackerel per trip at any time, and may only land Atlantic mackerel once on any calendar day, which is defined as the 24-hr period beginning at 0001 hours and ending at 2400 hours.

* * * * *

[FR Doc. 2018–27520 Filed 12–19–18; 8:45 am]

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Proposed Rules

Federal Register

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Thursday, December 20, 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 61

[Docket No.: FAA–2018–1050; Notice No. 18–05]

RIN 2120–AL23

Removal of Training Requirements for an Airline Transport Pilot Certificate Issued Concurrently With a Single-Engine Airplane Type Rating

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking.

SUMMARY: This notice of proposed rulemaking (NPRM) would remove an unnecessary multiengine training requirement for pilots seeking to obtain an initial airline transport pilot (ATP) certificate concurrently with a single-engine airplane type rating. This action also proposes to revise several pilot certification regulations by removing the July 31, 2014 date, which served as the compliance date for the multiengine ATP training requirements, because the date is no longer necessary.

DATES: Send comments by February 19, 2019

ADDRESSES: Send comments identified by docket number 2018–1050 using any of the following methods:

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

Privacy: In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, including any personal information the commenter provides, to *www.regulations.gov,* as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *www.dot.gov/privacy.*

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

FOR FURTHER INFORMATION CONTACT: Barbara Adams, Air Transportation Division, Air Carrier Training Systems and Voluntary Safety Programs Branch, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591; telephone 202–267–8166; email: *Barbara.Adams@faa.gov.*

SUPPLEMENTARY INFORMATION:

Authority for This Rulemaking

The FAA's authority to issue rules on aviation safety is found in Title 49 of the United States Code (49 U.S.C.). Subtitle I, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority.

This rulemaking is promulgated under the authority described in 49 U.S.C. 106(f), which establishes the authority of the Administrator to promulgate regulations and rules; 49 U.S.C. 44701(a)(5), which requires the Administrator to promulgate regulations and minimum standards for other practices, methods, and procedures necessary for safety in air commerce and national security; and 49 U.S.C. 44703(a), which requires the Administrator to prescribe regulations for the issuance of airman certificates when the Administrator finds, after investigation, that an individual is qualified for, and physically able to perform the duties related to, the position authorized by the certificate. This rulemaking is within the scope of the FAA's authority because it amends the eligibility requirements for the issuance of a single-engine airplane ATP certificate.

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I. Overview of Proposed Rule

This NPRM would remove an unnecessary multiengine training requirement for pilots seeking to obtain an initial airline transport pilot (ATP) certificate concurrently with a single-engine airplane type rating. The FAA also proposes to revise several pilot certification regulations by removing the July 31, 2014 date, which served as the compliance date for the multiengine ATP training requirements, because the date is no longer necessary.

II. Background

A. Current Regulations

Current regulations require a pilot seeking an ATP certificate concurrently with an airplane type rating to complete training in an FAA-approved course from an authorized training provider, including ground training and flight simulation training device (FSTD) training in a device that represents a multiengine airplane. Therefore, this training requirement was intended for pilots seeking an ATP certificate in a multiengine airplane. However, because of the way the regulations are written,[1]

[1] 14 CFR 61.156 specifically states the training requirement applies to a pilot seeking a multiengine class rating on his or her ATP certificate or a pilot

the requirement for training in a multiengine airplane has the unintended effect of applying to a pilot seeking a type rating for a single-engine airplane concurrently with an ATP certificate. When the training requirement became effective in 2014, there were no single-engine airplanes that required the pilot to obtain a type rating prior to serving as pilot in command. However, with the certification of the Cirrus Vision Jet in 2016, there is now is a single-engine airplane that requires the pilot to obtain a type rating prior to serving as pilot in command. Under the current regulations, if a pilot seeks to obtain the type rating in the Cirrus Vision Jet concurrently with the initial issuance of the ATP certificate in the airplane category with a single-engine type rating, that pilot would be required to complete the multiengine training to be eligible for the practical test.

B. History

The Airline Safety and Federal Aviation Administration Extension Act of 2010 (Pub. L. 111–216) (the ''Act'') was signed into law in August 2010 and included provisions to improve airline safety and pilot certification and training. In response to the Act, FAA modified the eligibility requirements for an ATP certificate with an airplane category multiengine class rating with the publication of the Pilot Certification and Qualification Requirements for Air Carrier Operations Final Rule (78 FR 42324) in July 2013 (2013 Final Rule). Section 216 of the Act specifically required all pilots in part 121 to have an ATP certificate and an appropriate amount of multiengine time. Section 217 of the Act established minimum qualifications for an ATP certificate that were focused on air carrier pilots and multiengine airplane experience. The statutes did not address single-engine airplanes. Additionally, part 121 prohibits the use of single-engine airplanes.[2]

To address the ATP requirements set forth in the Act, the FAA established a requirement for a pilot to complete an FAA-approved ATP certification training program (ATP CTP) that includes ground training and flight training in a multiengine flight simulation training device (FSTD). Pilots must complete the ATP CTP to be eligible for the multiengine ATP knowledge test.[3] Upon review of the regulatory requirements for an ATP certificate, the FAA found that some of them, as written, do not distinguish between a pilot getting a single-engine airplane rating and a multiengine airplane rating. For example, as noted, pilots seeking an ''airline transport pilot certificate obtained concurrently with an airplane type rating'' are required to complete the ATP CTP specified in § 61.156 and receive a graduation certificate from an authorized training provider. With that express language, pilots seeking an ATP certificate concurrently with a single-engine airplane type rating must complete multiengine airplane training to obtain an ATP certificate in a single-engine airplane.

At the time the 2013 Final Rule published, there were no single-engine airplanes that required a type rating to serve as pilot in command (PIC); therefore, there were no comments indicating concern with completing multiengine training to be eligible for a type rating. However, since the 2013 Final Rule published, Cirrus Aircraft received type certification for its single-engine Vision Jet (SF50)[4] and a pilot is required to hold a type rating for that airplane to serve as PIC. The way that § 61.156 is written, a pilot cannot complete a practical test for an initial ATP certificate with the SF50 type rating unless the pilot completes multiengine training. Alternatively, to avoid the training requirement, a pilot could use a different single-engine airplane (*i.e.,* one that does not require a type rating) to obtain the initial ATP certificate and then complete a second practical test in the SF50 to add the type rating to the ATP certificate.[5] Or, a pilot could add the type rating to his or her commercial pilot certificate first and then complete an ATP practical test in a different single-engine airplane and the SF50 type rating would be carried forward to the ATP certificate. In either case the pilot would be taking an additional and unnecessary practical test to avoid completing the multiengine training in the ATP CTP.

III. Discussion of the Proposal

As previously mentioned, several sections in part 61 apply to a pilot seeking an ATP certificate with a multiengine airplane rating or an ATP certificate concurrently with an ''airplane type rating.'' While these regulations were intended to apply to pilots seeking an ATP certificate in a multiengine airplane, the regulations do not specify that they apply only to pilots seeking a ''multiengine'' airplane type rating. Therefore, the requirements apply to pilots seeking an ATP certificate concurrently with a multiengine type rating as well as pilots seeking an ATP certificate concurrently with a single-engine airplane type rating.

In this NPRM, the FAA is proposing to revise §§ 61.39(d), 61.153(e), 61.156, and 61.165(f) to reflect that the ground training and FSTD training in a multiengine airplane, which is specified in § 61.156, applies to pilots seeking an ATP certificate with a multiengine airplane rating or an ATP certificate obtained concurrently with a multiengine airplane type rating. Additionally, because §§ 61.39(b), 61.155(c)(14), and 61.160 contain the same problematic language that fails to specify ''multiengine'' airplane type rating, the FAA is proposing to make similar revisions to §§ 61.39(b), 61.155(c)(14), and 61.160 to reflect the FAA's original intent. These proposed amendments are necessary to ensure a pilot seeking an ATP certificate concurrently with a single-engine airplane type rating will not be required to comply with unnecessary training requirements that were intended for applicants seeking an ATP certificate in a multiengine airplane. Consistent with the Act's direction to enhance multiengine experience requirements, this NPRM does not propose any changes for what is currently required for a pilot seeking a multiengine airplane ATP certificate.

The FAA notes that while the burdensome multiengine training requirement of § 61.156 would be removed for a pilot seeking an ATP certificate concurrently with a single-engine airplane type rating, there would be no reduction in safety because a pilot would still be required to obtain specific training and testing that is appropriate to the single-engine airplane type rating the pilot is seeking. More specifically, to add a single-engine airplane type rating to an ATP certificate or obtain a single-engine type rating concurrently with an ATP certificate, a pilot must receive and log ground and flight training from an authorized instructor, receive an endorsement from an authorized instructor that the training was completed, and perform a practical test in accordance with the requirements in § 61.157(b).

In addition to the proposed amendments previously discussed, the

seeking an airplane type rating concurrent with an ATP certificate. The use of ''airplane type rating'' means it applies to both single-engine and multiengine airplane type ratings. In paragraph (b), however, the FSTD training is required to be in a device that represents a multiengine airplane.

[2] 14 CFR 121.159 prohibits use of a single-engine airplane in part 121 operations.

[3] These training requirements are found in 14 CFR 61.156.

[4] Cirrus Aircraft received type certification of the SF50 Vision Jet in October 2016.

[5] 14 CFR 61.157(b).

FAA is proposing to amend several sections in part 61 by removing the July 31, 2014 date, which served as the compliance date for the multiengine training requirement. Now that the date has passed, the FAA finds that the date is no longer necessary in the following regulations: §§ 61.35(a)(2) and (a)(3)(iii)(B),[6] 61.153(e), 61.155(c)(14), 61.156, 61.165(c)(2) and (f)(2). The FAA is also proposing to remove § 61.35(a)(3)(iii)(B) as unnecessary because it contained a prerequisite for applicants seeking issuance of an ATP certificate prior to August 1, 2014. As a result, § 61.35(a)(3)(iii)(C) is redesignated as § 61.35(a)(3)(iii)(B).

Furthermore, the FAA finds that § 61.155(d) is no longer necessary. This section required an applicant who successfully completed the ATP knowledge test prior to August 1, 2014, to successfully complete the practical test within 24 months from the month in which the knowledge test was successfully completed. Because more than 40 months has elapsed since August 1, 2014, it is impossible for an applicant to successfully complete an ATP practical test within 24 months of taking a knowledge test prior to that date. The FAA is therefore proposing to remove § 61.155(d) from part 61. For the same reasons, the FAA is proposing to remove the language from § 61.165(f)(2) that allows a pilot to present valid ATP knowledge test results from a test taken prior to August 1, 2014.

IV. Regulatory Notices and Analyses

A. Regulatory Evaluation

Changes to Federal regulations must undergo several economic analyses. First, Executive Order 12866 and Executive Order 13563 direct that each Federal agency shall propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs. Second, the Regulatory Flexibility Act of 1980 (Pub. L. 96–354) requires agencies to analyze the economic impact of regulatory changes on small entities. Third, the Trade Agreements Act (Pub. L. 96–39) prohibits agencies from setting standards that create unnecessary obstacles to the foreign commerce of the United States. In developing U.S. standards, this Trade Act requires agencies to consider international standards and, where appropriate, that they be the basis of U.S. standards. Fourth, the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4) requires agencies to prepare a written assessment of the costs, benefits, and other effects of proposed or NPRMs that include a Federal mandate likely to result in the expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of $100 million or more annually (adjusted for inflation with base year of 1995). This portion of the preamble summarizes the FAA's analysis of the economic impacts of this proposed rule.

In conducting these analyses, FAA has determined that this proposed rule: (1) Has cost savings with no additional costs; (2) is not an economically ''significant regulatory action'' as defined in section 3(f) of Executive Order 12866; (3) does not require an analysis under the Regulatory Flexibility Act; (4) would not create unnecessary obstacles to the foreign commerce of the United States; and (5) would not impose an unfunded mandate on state, local, or tribal governments, or on the private sector by exceeding the threshold identified above. These analyses are summarized below.

This proposed rule would not make any changes to the requirements for a pilot seeking a multiengine airplane ATP certificate. Rather, this proposed rule would simply remove an unintended and unnecessary training requirement in multiengine airplanes for a pilot seeking a single-engine airplane ATP certificate concurrently with a single-engine airplane type rating, with no reduction in safety because a pilot will still be required to obtain specific training and be tested to receive the single-engine airplane type rating.

This proposed rule would relieve costs for a pilot seeking both an ATP certificate concurrently with a single-engine airplane type rating. Current regulations require a person seeking both an ATP and a single-engine type rating to complete multiengine airplane training.

In order to estimate future cost savings of removing unnecessary multiengine training requirements for pilots seeking to obtain an initial Airline Transport Pilot (ATP) certificate concurrently with a single-engine airplane type rating, the regulatory evaluation of the final rule is based on the following key assumptions, factors and data.

- We use a five-year period of analysis based on the most current data available at the time.
- We use a seven and three percent discount rate for calculating present values of benefits and costs as prescribed by OMB in Circular A–4.
- Estimates are provided in constant dollars with 2017 as the base year.
- We estimate that costs of an airline transport pilot (ATP) certification training program (CTP) to an applicant to be $5,000.
- We estimate that the cost of renting a newer glass cockpit single-engine airplane to be $175 per hour wet. An airplane rented wet includes maintenance, insurance, fuel, airport fees, any other duties, and taxes.
- We estimate that for an ATP practical test, a single-engine airplane would have to be rented for three hours to practice for the test and two hours for the test.
- In addition to renting an airplane, a designee would be required. We estimate that the designee would cost the applicant $500.
- Based on data from the Airlines for America (A4A), we estimate that the average domestic round-trip fare and fees would be about $340.[7]
- Based on data from the General Services Administration (GSA) website, for 2017, the average cost of a hotel in the continental US would be $93 per day and the average cost of the per diem, including meals and incidental expenses, would be $51 per day.[8]

As previously discussed, there were no single-engine airplanes that required a type rating until the certification of the Cirrus Vision Jet in 2016.[9] From October 2016 through August 2018, 111 pilots received SF50 type ratings. Of these 111 pilots, the FAA estimates that 40 percent could have upgraded their certificate with an airline transport pilot (ATP) certification training program (CTP), but opted to just add the SF50 type rating to their commercial certificate to avoid completing the ATP CTP training costs. Since there are 23 months from October 2016 through August 2018, the FAA calculated that there would be an average of 5 pilots per month that would receive a single-engine type certificate (111 pilots divided by 23 months), or about 60 pilots per year (5 pilots times 12 months). The FAA then calculated that 40 percent of 60 pilots would be 24 pilots (0.4 times 60) per year that could incur costs savings by avoiding the costs of the ATP CTP.

In order to estimate the cost savings of an applicant obtaining an ATP CTP,

[6] The FAA notes that this NPRM redesignated § 61.35(a)(3)(iii)(C) as § 61.35(a)(3)(iii)(B).

[7] *http://airlines.org/dataset/annual-round-trip-fares-and-fees-domestic/* Accessed October 2018.

[8] *https://www.gsa.gov/travel/plan-book/per-diem-rates/per-diem-files-archived.*

[9] Based on the FAA Aircraft Registry as of April 2018, there have been about 49 built, including prototypes (*http://registry.faa.gov/aircraftinquiry/AcftRef_Results.aspx?Mfrtxt=&Modeltxt=SF-50&PageNo=1*).

they would have two options. For the first option, the applicant would have to complete a five to seven day ATP CTP provided by an FAA-authorized training provider. The FAA calculates the course would take an average of six days ((5 + 7)/2). The applicant would also incur the expense to travel to a flight school to take the course, get a hotel for six days, and pay a per diem for meals. In the assumptions above, an ATP CTP would cost $5,000, round trip airfare would cost about $340, a hotel would cost $93 a day, and meals and incidental expenses would cost $51 a day. Using these costs, the FAA estimates that this proposal would save an applicant about $6,200 in 2017 dollars. The following table shows the cost saving results of the first option over the five-year period of analysis.

OPTION 1 COST SAVINGS

Year	Potential Savings in 2017$							Present value	
	Class	Fare	Hotel	Per diem	Avg days	# pilots	Total cost savings	7%	3%
	A	B	C	D	E	F	(A+B+((C+D)×E))×F		
1	$5,000	$340	$93	$51	$6	$24	$148,893	$139,152	$144,556
2	5,000	340	93	51	6	24	148,893	130,049	140,346
3	5,000	340	93	51	6	24	148,893	121,541	136,258
4	5,000	340	93	51	6	24	148,893	113,590	132,289
5	5,000	340	93	51	6	24	148,893	106,159	128,436
Total	.....	.....	.....	.....	.....	.....	744,464	610,490	681,886
Savings per pilot	.....	.....	.....	.....	.....	.....	6,204	5,087	5,682

Note: Numbers may not add due to rounding.

For the second option, the applicant would have to rent a single-engine airplane and hire a designee (check pilot) for the practical test. We estimate that for an ATP practical test, a single-engine airplane would have to be rented for three hours to practice for the test and two hours for the test. In the assumptions above, a single-engine airplane would cost $175 per hour. The FAA calculates the airplane rental would cost a total of $875 dollars to rent ($175 * (2 + 3 hours)). The applicant would also incur the expense to travel to a private plane rental company, hire a designee, get a hotel for one day, and pay a per diem for meals. In the assumptions above, round trip airfare would cost about $340, a designee would cost $500, a hotel would cost $93 a day, and meals and incidental expenses would cost $51 a day. Using these costs, the FAA estimates that this proposal would save an applicant about $1,900 in 2017 dollars. The following table shows the cost saving results of the second option over the five-year period of analysis.

OPTION 2 COST SAVINGS

Year	Potential Savings in 2017$							Present value	
	Fare	A/C rental	Designee	Hotel	Per diem	# pilots	Total cost	7%	3%
	A	B	C	D	E	F	(A+B+C+D+E)*F		
1	$340	$875	$500	$93	$51	$24	$44,613	$41,694	$43,313
2	340	875	500	93	51	24	44,613	38,967	42,052
3	340	875	500	93	51	24	44,613	36,417	40,827
4	340	875	500	93	51	24	44,613	34,035	39,638
5	340	875	500	93	51	24	44,613	31,808	38,483
Total	.....	.....	.....	.....	.....	.....	223,064	182,922	204,314
Savings per pilot	.....	.....	.....	.....	.....	.....	1,859	1,524	1,703

Note: Numbers may not add due to rounding.

The FAA estimates that this proposal would have costs savings between $223 thousand to $744 thousand over the five year period of analysis. The FAA considers this proposed rule would provide small cost savings with no additional costs.

Therefore, the FAA has determined that this proposed rule is not a ''significant regulatory action'' as defined in section 3(f) of Executive Order 12866, and is not ''significant'' as defined in DOT's Regulatory Policies and Procedures.

B. Regulatory Flexibility Determination

The Regulatory Flexibility Act of 1980 (Pub. L. 96–354) (RFA) establishes ''as a principle of regulatory issuance that agencies shall endeavor, consistent with the objectives of the rule and of applicable statutes, to fit regulatory and informational requirements to the scale of the businesses, organizations, and governmental jurisdictions subject to regulation.'' To achieve this principle, agencies are required to solicit and consider flexible regulatory proposals and to explain the rationale for their actions to assure that such proposals are given serious consideration. The RFA covers a wide-range of small entities, including small businesses, not-for-profit organizations, and small governmental jurisdictions.

Agencies must perform a review to determine whether a rulemaking would have a significant economic impact on a substantial number of small entities. If the agency determines that it will, the agency must prepare a regulatory flexibility analysis as described in the RFA. However, if an agency determines that a rule is not expected to have a

significant economic impact on a substantial number of small entities, section 605(b) of the RFA provides that the head of the agency may so certify and a regulatory flexibility analysis is not required. The certification must include a statement providing the factual basis for this determination, and the reasoning should be clear.

This proposed rule would not make any changes to the requirements for a pilot seeking a multiengine airplane ATP certificate. Rather, this proposed rule would simply remove an unintended and unnecessary training requirement in multiengine airplanes for a pilot seeking a single-engine airplane ATP certificate concurrently with a single-engine airplane type rating, with no reduction in safety because a pilot will still be required to obtain specific training and be tested to receive the single-engine airplane type rating. This proposed rule would relieve costs for a pilot seeking an ATP certificate concurrently with a single-engine airplane type rating.

Therefore, as provided in section 605(b), the head of the FAA certifies that this proposed rule would not result in a significant economic impact on a substantial number of small entities.

C. International Trade Impact Assessment

The Trade Agreements Act of 1979 (Pub. L. 96–39), as amended by the Uruguay Round Agreements Act (Pub. L. 103–465), prohibits Federal agencies from establishing standards or engaging in related activities that create unnecessary obstacles to the foreign commerce of the United States. Pursuant to these Acts, the establishment of standards is not considered an unnecessary obstacle to the foreign commerce of the United States, so long as the standard has a legitimate domestic objective, such as the protection of safety, and does not operate in a manner that excludes imports that meet this objective. The statute also requires consideration of international standards and, where appropriate, that they be the basis for U.S. standards.

The FAA has assessed the potential effect of this proposed rule and determined that it would have only a domestic impact and therefore no effect on international trade.

D. Unfunded Mandates Assessment

Title II of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4) requires each Federal agency to prepare a written statement assessing the effects of any Federal mandate in a proposed or final agency rule that may result in an expenditure of $100 million or more (in 1995 dollars) in any one year by State, local, and tribal governments, in the aggregate, or by the private sector; such a mandate is deemed to be a ''significant regulatory action.'' The FAA currently uses an inflation-adjusted value of $155.0 million in lieu of $100 million. This proposed rule does not contain such a mandate; therefore, the requirements of Title II of the Act do not apply.

E. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)) requires that the FAA consider the impact of paperwork and other information collection burdens imposed on the public. The FAA has determined that there would be no new requirement for information collection associated with this proposed rule. FAA has also determined it is not necessary to amend any existing collection. The current paperwork filing that established the ATP CTP imposes a requirement for a training provider to submit a training program to the FAA for approval. In the original filing it was determined there was no paperwork burden on a person taking the ATP CTP, therefore this proposed rule would have no impact on that filing. The FAA also evaluated the paperwork filing for the Airman Certificate and/or Rating Application. If an applicant is seeking a multiengine airplane ATP certificate, submitting the ATP CTP graduation certificate is required as part of that collection. This proposed rule does not change that requirement therefore no amendment is needed.

F. International Compatibility

In keeping with U.S. obligations under the Convention on International Civil Aviation, it is FAA policy to conform to International Civil Aviation Organization (ICAO) Standards and Recommended Practices to the maximum extent practicable. The FAA has determined that there are no ICAO Standards and Recommended Practices that correspond to these proposed regulations.

G. Environmental Analysis

FAA Order 1050.1F identifies FAA actions that are categorically excluded from preparation of an environmental assessment or environmental impact statement under the National Environmental Policy Act in the absence of extraordinary circumstances. The FAA has determined this proposed rulemaking action qualifies for the categorical exclusion identified in paragraph 5–6.6 and involves no extraordinary circumstances.

V. Executive Order Determinations

A. Executive Order 13132, Federalism

The FAA has analyzed this proposed rule under the principles and criteria of Executive Order 13132, Federalism. The agency has determined that this action would not have a substantial direct effect on the States, or the relationship between the Federal Government and the States, or on the distribution of power and responsibilities among the various levels of government, and, therefore, would not have Federalism implications.

B. Executive Order 13211, Regulations That Significantly Affect Energy Supply, Distribution, or Use

The FAA analyzed this proposed rule under Executive Order 13211, Actions Concerning Regulations that Significantly Affect Energy Supply, Distribution, or Use (May 18, 2001). The agency has determined that it would not be a ''significant energy action'' under the executive order and would not be likely to have a significant adverse effect on the supply, distribution, or use of energy.

C. Executive Order 13609, International Cooperation

Executive Order 13609, Promoting International Regulatory Cooperation, promotes international regulatory cooperation to meet shared challenges involving health, safety, labor, security, environmental, and other issues and to reduce, eliminate, or prevent unnecessary differences in regulatory requirements. The FAA has analyzed this action under the policies and agency responsibilities of Executive Order 13609, and has determined that this action would have no effect on international regulatory cooperation.

D. Executive Order 13771, Reducing Regulation and Controlling Regulatory Costs

This proposed rule is expected to be an E.O. 13771 deregulatory action. Details on the estimated cost savings of this proposed rule can be found in the rule's economic analysis.

VI. Additional Information

A. Comments Invited

The FAA invites interested persons to participate in this rulemaking by submitting written comments, data, or views. The agency also invites comments relating to the economic, environmental, energy, or federalism impacts that might result from adopting the rulemaking action in this document. The most helpful comments reference a specific portion of the rulemaking

action, explain the reason for any recommended change, and include supporting data. To ensure the docket does not contain duplicate comments, commenters should send only one copy of written comments, or if comments are filed electronically, commenters should submit only one time.

The FAA will file in the docket all comments it receives, as well as a report summarizing each substantive public contact with FAA personnel concerning this rulemaking. The FAA will consider all comments it receives on or before the closing date for comments. The FAA will consider comments filed after the comment period has closed if it is possible to do so without incurring expense or delay. The agency may change this rulemaking action in light of the comments it receives.

Proprietary or Confidential Business Information: Commenters should not file proprietary or confidential business information in the docket. Such information must be sent or delivered directly to the person identified in the **FOR FURTHER INFORMATION CONTACT** section of this document, and marked as proprietary or confidential. If submitting information on a disk or CD ROM, mark the outside of the disk or CD ROM, and identify electronically within the disk or CD ROM the specific information that is proprietary or confidential.

Under 14 CFR 11.35(b), if the FAA is aware of proprietary information filed with a comment, the agency does not place it in the docket. It is held in a separate file to which the public does not have access, and the FAA places a note in the docket that it has received it. If the FAA receives a request to examine or copy this information, it treats it as any other request under the Freedom of Information Act (5 U.S.C. 552). The FAA processes such a request under Department of Transportation procedures found in 49 CFR part 7.

B. Availability of Rulemaking Documents

An electronic copy of rulemaking documents may be obtained from the internet by—

1. Searching the Federal eRulemaking Portal (*http://www.regulations.gov*);
2. Visiting the FAA's Regulations and Policies web page at *http://www.faa.gov/regulations_policies* or
3. Accessing the Government Printing Office's web page at *http://www.gpo.gov/fdsys/.*

Copies may also be obtained by sending a request to the Federal Aviation Administration, Office of Rulemaking, ARM–1, 800 Independence Avenue SW, Washington, DC 20591, or by calling (202) 267–9680. Commenters must identify the docket or notice number of this rulemaking.

All documents the FAA considered in developing this proposed rule, including economic analyses and technical reports, may be accessed from the internet through the Federal eRulemaking Portal referenced in item (1) above.

C. Small Business Regulatory Enforcement Fairness Act

The Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA) requires FAA to comply with small entity requests for information or advice about compliance with statutes and regulations within its jurisdiction. A small entity with questions regarding this document may contact its local FAA official, or the person listed under the **FOR FURTHER INFORMATION CONTACT** heading at the beginning of the preamble. To find out more about SBREFA on the internet, visit *http://www.faa.gov/regulations_policies/rulemaking/sbre_act/.*

List of Subjects in 14 CFR Part 61

Aircraft, Airmen, Aviation safety.

The Proposed Amendment

In consideration of the foregoing, the Federal Aviation Administration proposes to amend chapter I of title 14, Code of Federal Regulations as follows:

PART 61—CERTIFICATION: PILOTS, FLIGHT INSTRUCTORS, AND GROUND INSTRUCTORS

■ 1. The authority citation for part 61 continues to read as follows:

Authority: 49 U.S.C. 106(f), 106(g), 40113, 44701–44703, 44707, 44709–44711, 44729, 44903, 45102–45103, 45301–45302, Sec. 2307 Pub. L. 114–190, 130 Stat. 615 (49 U.S.C. 44703 note).

■ 2. Amend § 61.35 by:
■ a. Revising paragraph (a)(2) and paragraph (a)(3)(iii)(A);
■ b. Removing paragraph (a)(3)(iii)(B);
■ c. Re-designating paragraph (a)(3)(iii)(C) as paragraph (a)(3)(iii)(B); and
■ d. Revising newly re-designated paragraph (a)(3)(iii)(B)

The revisions read as follows:

§ 61.35 Knowledge test: Prerequisites and passing grades.

(a) * * *

(2) For the knowledge test for an airline transport pilot certificate with an airplane category multiengine class rating, a graduation certificate for the airline transport pilot certification training program specified in § 61.156; and

(3) * * *

(iii) * * *

(A) For issuance of certificates other than the ATP certificate with an airplane category multiengine class rating, the applicant meets or will meet the age requirements of this part for the certificate sought before the expiration date of the airman knowledge test report; and

(B) For issuance of an ATP certificate with an airplane category multiengine class rating obtained under the aeronautical experience requirements of §§ 61.159 or 61.160, the applicant is at least 18 years of age at the time of the knowledge test;

* * * * *

■ 3. Amend § 61.39 by revising the introductory text of paragraph (b) and the introductory text of paragraph (d) to read as follows:

§ 61.39 Prerequisites for practical tests.

* * * * *

(b) An applicant for an airline transport pilot certificate with an airplane category multiengine class rating or an airline transport pilot certificate obtained concurrently with a multiengine airplane type rating may take the practical test with an expired knowledge test only if the applicant passed the knowledge test after July 31, 2014, and is employed:

* * * * *

(d) In addition to the requirements in paragraph (a) of this section, to be eligible for a practical test for an airline transport pilot certificate with an airplane category multiengine class rating or airline transport pilot certificate obtained concurrently with a multiengine airplane type rating, an applicant must:

* * * * *

■ 4. Amend § 61.153 by revising paragraph (e) to read as follows:

§ 61.153 Eligibility requirements: General.

* * * * *

(e) For an airline transport pilot certificate with an airplane category multiengine class rating or an airline transport pilot certificate obtained concurrently with a multiengine airplane type rating, receive a graduation certificate from an authorized training provider certifying completion of the airline transport pilot certification training program specified in § 61.156 before applying for the knowledge test required by paragraph (g) of this section;

* * * * *

■ 5. Amend § 61.155 by revising paragraph (c)(14) and removing paragraph (d) to read as follows:

§ 61.155 Aeronautical knowledge.

* * * * *

(c) * * *

(14) For an airplane category multiengine class rating, the content of the airline transport pilot certification training program in § 61.156.

■ 6. Amend § 61.156 by revising the heading and introductory text to read as follows:

§ 61.156 Training requirements: Airplane category—multiengine class or multiengine airplane type rating concurrently with an airline transport pilot certificate.

A person who applies for the knowledge test for an airline transport pilot certificate with an airplane category multiengine class rating must present a graduation certificate from an authorized training provider under part 121, 135, 141, or 142 of this chapter certifying the applicant has completed the following training in a course approved by the Administrator.

* * * * *

■ 7. Amend § 61.160 by revising the introductory text of paragraph (a), the introductory text of paragraph (b), the introductory text of paragraph (c), and paragraph (d) to read as follows:

§ 61.160 Aeronautical experience—airplane category restricted privileges.

(a) Except for a person who has been removed from flying status for lack of proficiency or because of a disciplinary action involving aircraft operations, a U.S. military pilot or former U.S. military pilot may apply for an airline transport pilot certificate with an airplane category multiengine class rating or an airline transport pilot certificate concurrently with a multiengine airplane type rating with a minimum of 750 hours of total time as a pilot if the pilot presents:

* * * * *

(b) A person may apply for an airline transport pilot certificate with an airplane category multiengine class rating or an airline transport pilot certificate concurrently with a multiengine airplane type rating with a minimum of 1,000 hours of total time as a pilot if the person:

* * * * *

(c) A person may apply for an airline transport pilot certificate with an airplane category multiengine class rating or an airline transport pilot certificate concurrently with a multiengine airplane type rating with a minimum of 1,250 hours of total time as a pilot if the person:

* * * * *

(d) A graduate of an institution of higher education who completes fewer than 60 semester credit hours but at least 30 credit hours and otherwise satisfies the requirements of paragraph (b) may apply for airline transport pilot certificate with an airplane category multiengine class rating or an airline transport pilot certificate concurrently with a multiengine airplane type rating with a minimum of 1,250 hours of total time as a pilot.

* * * * *

■ 8. Amend § 61.165 by revising paragraph (c)(2), the introductory text of paragraph (f), and paragraph (f)(2) to read as follows:

§ 61.165 Additional aircraft category and class ratings.

* * * * *

(c) * * *

(2) Successfully complete the airline transport pilot certification training program specified in § 61.156;

* * * * *

(f) *Adding a multiengine class rating to an airline transport pilot certificate with a single engine class rating.* A person applying to add a multiengine class rating, or a multiengine class rating concurrently with a multiengine airplane type rating, to an airline transport pilot certificate with an airplane category single engine class rating must—

* * *

(2) Pass a required knowledge test on the aeronautical knowledge areas of § 61.155(c), as applicable to multiengine airplanes;

* * * * *

Issued under authority provided by 49 U.S.C. 106(f), 44701(a)(5), and 44703(a) in Washington, DC, on December 13, 2018.

Rick Domingo,

Executive Director, Flight Standards Service.

[FR Doc. 2018–27402 Filed 12–19–18; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Parts 50, 312, and 812

[Docket No. FDA–2018–N–2727]

RIN 0910–AH52

Institutional Review Board Waiver or Alteration of Informed Consent for Minimal Risk Clinical Investigations; Extension of Comment Period

AGENCY: Food and Drug Administration, HHS.

ACTION: Proposed rule; extension of comment period.

SUMMARY: The Food and Drug Administration (FDA or the Agency) is extending the comment period for the proposed rule that appeared in the **Federal Register** of November 15, 2018. The Agency is taking this action in response to a request for an extension to allow interested persons additional time to submit comments.

DATES: FDA is extending the comment period on the proposed rule published November 15, 2018 (83 FR 57378). Submit either electronic or written comments by February 13, 2019.

ADDRESSES: You may submit comments as follows. Please note that late, untimely filed comments will not be considered. Electronic comments must be submitted on or before February 13, 2019. The *https://www.regulations.gov* electronic filing system will accept comments until 11:59 p.m. Eastern Time at the end of February 13, 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–2727 for ''Institutional Review Board Waiver or Alteration of Informed Consent for Minimal Risk Clinical Investigations.'' Received comments, those filed in a timely manner (see **ADDRESSES**), will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *https://www.regulations.gov* or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday.

• *Confidential Submissions*—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *https://www.regulations.gov.* Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *https://www.gpo.gov/fdsys/pkg/FR-2015-09-18/pdf/2015-23389.pdf.*

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to *https://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT: Janet Norden, Office of Good Clinical Practice, Food and Drug Administration, 10903 New Hampshire Ave., Silver Spring, MD 20993–0002, 301–796–1127.

SUPPLEMENTARY INFORMATION: In the **Federal Register** of November 15, 2018, FDA published a proposed rule with a 60-day comment period to implement the statutory changes made to the Federal Food, Drug, and Cosmetic Act by section 3024 of the 21st Century Cures Act (Pub. L. 114–255) to allow for a waiver or alteration of informed consent when a clinical investigation poses no more than minimal risk to the human subject and includes appropriate safeguards to protect the rights, safety, and welfare of human subjects. The proposed rule, if finalized, would permit an institutional review board (IRB) to waive or alter certain informed consent elements or to waive the requirement to obtain informed consent, under limited conditions, for certain minimal risk clinical investigations. Comments on the proposed rule will inform FDA's rulemaking to establish regulations for IRB waiver or alteration of informed consent for certain minimal risk clinical investigations.

The Agency has received a request for a 60-day extension of the comment period for the proposed rule. This request conveyed concern that the current 60-day comment period does not allow sufficient time to develop a meaningful or thoughtful response to the proposed rule.

FDA has considered the request and is extending the comment period for the proposed rule for 30 days, until February 13, 2019. The Agency believes that a 30-day extension allows adequate time for interested persons to submit comments without significantly delaying rulemaking on these important issues.

Dated: December 14, 2018.

Leslie Kux,

Associate Commissioner for Policy.

[FR Doc. 2018–27519 Filed 12–19–18; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF DEFENSE

Office of the Secretary

32 CFR Part 199

[DOD–2018–HA–0028]

RIN 0720–AB72

TRICARE; Addition of Physical Therapy Assistants and Occupational Therapy Assistants as TRICARE-Authorized Providers

AGENCY: Office of the Secretary, Department of Defense (DoD).

ACTION: Proposed rule.

SUMMARY: The Department of Defense is publishing this proposed rule to add certified or licensed physical therapy assistants (PTAs) and occupational therapy assistants (OTAs) as TRICARE-authorized providers to engage in physical therapy or occupational therapy under the supervision of a TRICARE-authorized physical therapist or occupational therapist in accordance with Medicare's rules for supervision and qualification when billed by under the supervising therapist's national provider identification number. This rule will align TRICARE with Medicare's policy, which permits PTAs or OTAs to provide physical or occupational therapy when supervised by and billed under a licensed or certified physical therapist or occupational therapist.

DATES: Written comments received at the address indicated in the **ADDRESSES** section by February 19, 2019 will be accepted.

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

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

• *Mail:* Department of Defense, Office of the Chief Management Officer, Directorate for Oversight and Compliance, Regulatory and Advisory Committee Division, 4800 Mark Center Drive, Mailbox #24, Suite 08D09, Alexandria, VA 22350–1700.

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

personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: Erica Ferron, Defense Health Agency, Medical Benefits and Reimbursement Division, 303–676–3626 or *erica.c.ferron.civ@mail.mil.*

SUPPLEMENTARY INFORMATION:

I. Executive Summary and Overview

A. Purpose of the Proposed Rule

This proposed rule implements section 721 of the National Defense Authorization Act for Fiscal Year 2018 (NDAA–18), and advances two of the components of the Military Health System's quadruple aim of improved readiness and better health. The TRICARE Basic benefit currently includes physical therapy (PT) and occupational therapy (OT) services rendered by TRICARE-authorized providers within the scope of their license when prescribed and monitored by a physician, certified physician assistant, or certified nurse practitioner. Allowing authorized physical therapists and occupational therapists to include as covered services those services of qualified assistants performing under their supervision may increase access to PT and OT services, and increase beneficiary choice in provider selection. Physical therapists and occupational therapists will be available to attend to more complex tasks for TRICARE beneficiaries, delegating to assistants simpler tasks for which they are licensed or certified to carry out. Adding coverage of services by authorized therapy assistants increases access at the same time the Agency anticipates that an active and aging beneficiary population will increasingly use these services.

B. Summary of the Major Provisions of the Proposed Rule

The major provisions of the proposed rule are:

➢ The addition of licensed or certified PTAs as TRICARE-authorized providers, operating under the same qualifications established by Medicare (42 Code of Federal Regulations (CFR) 484.4). Services must be furnished under the supervision of and billed by a licensed or certified TRICARE-authorized physical therapist.

➢ The addition of licensed or certified OTAs as TRICARE-authorized providers, operating under the same qualifications established by Medicare (42 CFR 484.4). Services must be furnished under the supervision of and billed by a licensed or certified TRICARE-authorized occupational therapist.

C. Costs and Benefits

PT and OT services are covered benefits of the TRICARE program, authorized at 32 CFR 199.4. We estimate that as a result of this rule, there will be a one-percent increase in the use of PT and OT services. The cost of increased utilization, along with first-year implementation costs of $350,000, is estimated at $20 million over five years.

The financial effect of this rule is not in the nature of economic costs or imposition of private expenditures to comply with Federal regulations. Rather, the rule involves fairly modest changes in federal health benefits payments. Consistent with OMB Circular A–4, such economic effects are considered ''transfer payments'' caused by Federal budget action, rather than regulatory benefits or costs that require additional analysis.

II. Discussion of Proposed Rule

A. Introduction and Background

Title 32 CFR 199.4(c)(3)(x) states that assessment and treatment services of a TRICARE authorized physical therapist or occupational therapist may be cost-shared under certain conditions when prescribed and monitored by a physician, certified physician assistant, or certified nurse practitioner. In addition, 32 CFR 199.6(c)(3)(iii)(K)(*2*) recognizes licensed registered physical therapists and licensed registered occupational therapists as TRICARE authorized providers when PT and OT services meet the conditions and are prescribed and monitored as described in the previous sentence. This rule proposes to extend coverage of PT and OT services, as required by NDAA–18, to include services provided by licensed or certified physical or occupational therapy assistants operating under the supervision of a TRICARE-authorized physical therapist or occupational therapist.

PTAs—Qualifications

PTAs typically hold an associate's degree in physical therapy and provide therapeutic interventions such as posture stabilization and therapeutic massage, but may not evaluate patients or create or alter treatment plans. This rule proposes to tie the qualifications of PTAs under the TRICARE program to Medicare's requirements as codified at 42 CFR 484.4.

PTAs—Supervision Requirements

Under this rule, TRICARE's supervision requirements match Medicare's. The DHA intends, in implementing instructions, to follow Medicare's requirements as found within Medicare's Benefit Policy Chapter 15.6 Part C and other issuances regarding supervision of PTAs. Direct supervision (*i.e.,* the supervising physical therapist is in the room with the PTA) will be required in a private practice setting, whereas general supervision (*i.e.,* the supervising physical therapist is not present but is available and remains responsible for the course of treatment) will be required in most other instances. In cases of general supervision, the supervising physical therapist will be required to make an onsite supervisory visit at least once every 30 days. In cases where state or local supervision laws are more stringent, the DHA will require physical therapists and the PTAs they supervise to follow state or local laws. Services provided by physical therapy aides or other personnel, even if under the supervision of a qualified physical therapist or physical therapy assistant, are not covered. Services provided by PTAs incident to services provided by physicians or other licensed or qualified providers other than physical therapists are not covered, as only physical therapists can supervise PTAs. If Medicare makes changes to its supervision requirements, the DHA will evaluate the changes and determine whether to make similar changes; any changes deemed appropriate shall be added to the implementing instructions.

PTAs—Reimbursement Requirements

This rule proposes to require services provided by the TRICARE-authorized PTA to be billed under the TRICARE-authorized supervising physical therapist's provider identification (ID). The DHA intends, in implementing instructions, to follow Medicare's requirements as found within Medicare's Benefit Policy Chapter 15.6 Part C and other issuances regarding reimbursement of services provided by PTAs. Services provided by a PTA above the skill-level of a PTA shall not be reimbursed. This includes, but is not limited to, evaluations and re-evaluations. Services provided by a PTA beyond the scope permitted by state or local law shall not be reimbursed.

OTAs—Qualifications

Occupational therapy assistants (OTAs) typically hold an associate's degree in occupational therapy and provide therapeutic interventions such as assisting in the development of motor skills in children with developmental disabilities or aiding adults in overcoming work-related injuries. OTAs may not evaluate patients or create or alter treatment plans. This rule proposes to tie the qualifications of OTAs under the TRICARE program to Medicare's

requirements as codified at 42 CFR 484.4.

OTAs—Supervision Requirements

Under this proposed rule, TRICARE's supervision requirements match Medicare's. The DHA intends, in implementing instructions, to follow Medicare's requirements as found within Medicare's Benefit Policy Chapter 15.6 Part C and other issuances regarding supervision of OTAs. Direct supervision (*i.e.,* the supervising occupational therapist is in the room with the OTA) will be required in a private practice setting, whereas general supervision (*i.e.,* the supervising occupational therapist is not present but is available and remains responsible for the course of treatment) will be required in most other instances. In cases of general supervision, the supervising occupational therapist will be required to make an onsite supervisory visit at least once every 30 days. In cases where state or local supervision laws are more stringent, the DHA will require occupational therapists and the OTAs they supervise to follow state or local laws. Services provided by occupational therapy aides or other personnel, even if under the supervision of a qualified occupational therapist or occupational therapy assistant, are not covered. Services provided by OTAs incident to services provided by physicians or other licensed or qualified providers other than occupational therapists are not covered, as only occupational therapists can supervise OTAs. If Medicare makes changes to its supervision requirements, the DHA will evaluate the changes and determine whether to make similar changes; any changes deemed appropriate shall be added to the implementing instructions.

OTAs—Reimbursement Requirements

This rule proposes to require services provided by a TRICARE-authorized OTA to be billed under the TRICARE-authorized supervising occupational therapist's provider ID. The DHA intends, in implementing instructions, to follow Medicare's requirements as found within Medicare's Benefit Policy Chapter 15.6 Part C and other issuances regarding reimbursement of services provided by OTAs. Services provided by an OTA above the skill-level of an OTA shall not be reimbursed. This includes, but is not limited to, evaluations and re-evaluations. Services provided by an OTA beyond the scope permitted by state or local law shall not be reimbursed.

Updated Referral Definition

In order to fully implement section 721 of the NDAA for 2018, DHA is updating the definition of referrals to remove the limitation that only physicians can make referrals and to distinguish between necessary referrals for general benefit coverage and referrals required under TRICARE Prime for Prime enrollee care. All referral requirements are provided in the regulations and in the implementing instructions.

III. Regulatory Procedures

Executive Order 12866, ''Regulatory Planning and Review'' and Executive Order 13563, ''Improving Regulation and Regulatory Review''

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. A regulatory impact analysis (RIA) must be prepared for major rules with economically significant effects ($100 million or more in any one year).

We estimate that the effects of the provisions that would be implemented by this proposed rule would have an impact of approximately $20 million over five years. As a result, this rule is not significant and is not a major rule under the Congressional Review Act.

Executive Order (E.O.) 13771, ''Reducing Regulation and Controlling Regulatory Costs''

E.O. 13771 seeks to control costs associated with the government imposition of private expenditures required to comply with Federal regulations and to reduce regulations that impose such costs. Consistent with the analysis of transfer payments under OMB Circular A–4, this proposed rule does not involve regulatory costs subject to E.O. 13771.

Public Law 104–4, Section 202, ''Unfunded Mandates Reform Act''

Section 202 of Public Law 104–4, ''Unfunded Mandates Reform Act,'' requires that an analysis be performed to determine whether any federal mandate 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. The current threshold is approximately $140 million. We do not expect this proposed rule to result in any one-year expenditure that would meet or exceed this amount.

Public Law 96–354, ''Regulatory Flexibility Act'' (RFA) (5 U.S.C. 601)

Public Law 96–354, ''Regulatory Flexibility Act'' (RFA) (5 U.S.C. 601), requires that each Federal agency prepare a regulatory flexibility analysis when the agency issues a regulation which would have a significant impact on a substantial number of small entities. This proposed rule is not an economically significant regulatory action, and it has been certified that it will not have a significant impact on a substantial number of small entities. Therefore, this proposed rule is not subject to the requirements of the RFA.

Public Law 96–511, ''Paperwork Reduction Act'' (44 U.S.C. Chapter 35)

This proposed rule does not contain a ''collection of information'' requirement, and does not impose additional information collection requirements on the public under Public Law 96–511, ''Paperwork Reduction Act'' (44 U.S.C. Chapter 35).

Executive Order 13132, ''Federalism''

E.O. 13132, ''Federalism,'' requires that an impact analysis be performed to determine whether the rule has federalism implications that would 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. It has been certified that this proposed rule does not have federalism implications, as set forth in E.O. 13132.

List of Subjects in 32 CFR Part 199

Administrative practice and procedure, Claims, Dental health, Fraud, Health care, Health insurance, Individuals with disabilities, Military personnel.

Accordingly, 32 CFR part 199 is amended as follows:

PART 199—[AMENDED]

■ 1. The authority citation for part 199 continues to read as follows:

Authority: 5 U.S.C. 301; 10 U.S.C. chapter 55.

■ 2. Section 199.2 is amended by revising the definition of ''referral.''

§ 199.2 Definitions.

* * * * *

Referral. The act or an instance of referring a TRICARE beneficiary to

another authorized provider to obtain necessary medical treatment. Generally, when a referral is required to qualify health care as a covered benefit, only a TRICARE-authorized physician may make such a referral unless this regulation specifically allows another category of TRICARE-authorized provider to make a referral as allowed within the scope of the provider's license. In addition to referrals which may be required for certain health care to be a covered TRICARE benefit, the TRICARE Prime program under § 199.17 generally requires Prime enrollees to obtain a referral for care through a primary care manager (PCM) or other authorized care coordinator to avoid paying higher deductible and cost-sharing for otherwise covered TRICARE benefits.

* * * * *

■ 3. Section 199.6 is amended by redesignating paragraph (c)(3)(iii)(K)(*2*)(*ii*) as paragraph (c)(3)(iii)(K)(*2*)(*iii*); revising paragraph (c)(3)(iii)(K)(*2*)(*i*); and adding a new paragraph (c)(3)(iii)(K)(*2*)(*ii*) to read as follows:

§ 199.6 TRICARE-authorized providers.

* * * * *

(c) * * *

(3) * * *

(iii) * * *

(K) * * *

(*2*) * * *

(*i*) Licensed registered physical therapist (PT), including a licensed or certified physical therapy assistant (PTA) performing under the supervision of a TRICARE-authorized PT. Services provided by a PTA shall be included in the fee of the supervising PT. PTAs shall meet the qualifications specified by Medicare (42 CFR 484.4) and the Director, DHA, shall issue policy adopting, to the extent practicable, Medicare's requirements for PTA supervision.

(*ii*) Licensed registered occupational therapist (OT), including a licensed or certified occupational therapy assistant (OTA) performing under the supervision of a TRICARE authorized OT. Services provided by an OTA shall be included in the fee of the supervising OT. OTAs shall meet the qualifications specified by Medicare (42 CFR 484.4) and the Director, DHA, shall issue policy adopting, to the extent practicable, Medicare's requirements for OTA supervision.

* * * * *

Dated: December 14, 2018.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2018–27508 Filed 12–19–18; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[Docket No. USCG–2018–0131]

RIN 1625–AA09

Drawbridge Operation Regulation; Youngs Bay and Lewis and Clark River, Astoria, OR

AGENCY: Coast Guard, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Coast Guard proposes to amend the operating schedule that governs three bridges in Astoria, OR: The US101 New Youngs Bay highway bridge (New Youngs Bay Bridge), mile 0.7 crossing Youngs Bay; the Oregon State Old Youngs Bay highway bridge (Old Youngs Bay Bridge), mile 2.4, crossing Youngs Bay; and the Oregon State Lewis and Clark River highway bridge (Lewis and Clark River Bridge), mile 1.0, crossing the Lewis and Clark River. This NPRM will allow the bridge to open during weekend hours after receiving a 2 hour advance notice. The proposed modification will remove the draw tender during weekend hours due to minimal usage.

DATES: Comments and related material must reach the Coast Guard on or before January 22, 2019.

ADDRESSES: You may submit comments identified by docket number USCG–2018–0131 using Federal eRulemaking Portal at *http://www.regulations.gov.*

See the ''Public Participation and Request for Comments'' portion of the **SUPPLEMENTARY INFORMATION** section below for instructions on submitting comments.

FOR FURTHER INFORMATION CONTACT: If you have questions on this proposed rule, call or email Steven M. Fischer, Bridge Administrator, Thirteenth Coast Guard District Bridge Program Office, telephone 206–220–7282; email *d13-pf-d13bridges@uscg.mil.*

SUPPLEMENTARY INFORMATION:

I. Table of Abbreviations

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

II. Background, Purpose and Legal Basis

The Coast Guard proposes revising the rule that governs three bridges at Astoria, OR, the New Youngs Bay Bridge, the Old Youngs Bay Bridge and the Lewis and Clark River Bridge. Due to infrequent drawbridge opening requests from Friday evenings through Monday early mornings, we propose opening the three highway bridges within Youngs Bay and Lewis and Clark River with a two-hour advance notice. The New Youngs Bay Bridge over five years had the most openings of 77 requests. We published a test deviation for six months in the **Federal Register** (83 FR 9430) on March 6, 2018, to collect data and comments for this proposed rule titled Drawbridge Operation Regulation; Youngs Bay and Lewis and Clark River. Only one comment was received, and that comment was not related to the schedule change for the test deviation. We did not receive any delay of opening complaints for the three subject bridges during the test deviation. The three bridges are operated by the Lewis and Clark River Bridge tender of the Oregon Department of Transportation (ODOT). Youngs Bay provides no alternate route to pass around the three subject bridges. The New Youngs Bay Bridge provides 39 feet of vertical clearance at mean high water, the Old Youngs Bay Bridge provides 24 feet of vertical clearance at mean high water, and the Lewis and Clark River Bridge provides 25 feet of vertical clearance at mean high water. The three subject bridges operate per 33 CFR 117.899 to open on signal if at least one half-hour notice is given to the draw tender at the Lewis and Clark River Bridge from 7 a.m. to 5 p.m. Monday through Friday, and from 8 a.m. to 4 p.m. on Saturday and Sunday. This proposed rule will allow the three subject bridges to open from Friday at 5 p.m. to Monday at 7 a.m. if at least a two-hour notice is given by telephone to the draw tender at the Lewis and Clark River Bridge. The purpose of this rulemaking is in regards to a request from ODOT to remove the bridge operator to reduce operating cost. The Coast Guard proposes this rulemaking under authority in 33 U.S.C. 1231.

III. Discussion of Proposed Rule

This proposed rule amends 33 CFR 117.899 to provide specific requirements for the operation of the

New Youngs Bay Bridge, the Old Youngs Bay Bridge and the Lewis and Clark River Bridge. These specific requirements are in addition to or vary from the general requirements that apply to all drawbridges across the navigable waters of the United States. This proposed rule reasonably accommodates waterway users while reducing ODOT's burden in operating the bridges. We have not identified any impacts on marine navigation with this proposed rule.

IV. Regulatory Analyses

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

A. Regulatory Planning and Review

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits. Executive Order 13771 directs agencies to control regulatory costs through a budgeting process. This NPRM has not been designated a ''significant regulatory action,'' under Executive Order 12866. Accordingly, the NPRM has not been reviewed by the Office of Management and Budget (OMB), and pursuant to OMB guidance, it is exempt from the requirements of Executive Order 13771. This regulatory action determination is based on the ability for the bridges to open on signal after receiving at least a two hour notice by telephone from Friday at 5 p.m. to Monday at 7 a.m. This proposed rule also applies to opening the three subject bridges for marine vessels needing an opening due to an emergency.

B. Impact on Small Entities

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

While some owners or operators of vessels intending to transit under the subject bridges may be small entities, for the reasons stated in section IV.A above, this proposed rule would not have a significant economic impact on any vessel owner or operator. Vessels operating on Youngs Bay and the Lewis and Clark River range from small recreational vessels, sailboats, tribal fishing boats and small commercial fishing vessels. Vessels able to pass through the subject bridges with the draw in the closed-to-navigation position may do so at any time.

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

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

C. Collection of Information

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

D. Federalism and Indian Tribal Government

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

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

F. Environment

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

A preliminary Record of Environmental Consideration and a Memorandum for the Record are not required for this proposed rule. We seek any comments or information that may lead to the discovery of a significant environmental impact from this proposed rule.

G. Protest Activities

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

V. Public Participation and Request for Comments

We view public participation as essential to effective rulemaking, and will consider all comments and material

received during the comment period. Your comment can help shape the outcome of this rulemaking. If you submit a comment, please include the docket number for this rulemaking, indicate the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation.

We encourage you to submit comments through the Federal eRulemaking Portal at *http://www.regulations.gov.* If your material cannot be submitted using *http://www.regulations.gov,* contact the person in the **FOR FURTHER INFORMATION CONTACT** section of this document for alternate instructions.

We accept anonymous comments. All comments received will be posted without change to *http://www.regulations.gov* and will include any personal information you have provided. For more about privacy and the docket, visit *http://www.regulations.gov/privacynotice.*

Documents mentioned in this NPRM as being available in this docket and all public comments, will be in our online docket at *http://www.regulations.gov* and can be viewed by following that website's instructions. Additionally, if you go to the online docket and sign up for email alerts, you will be notified when comments are posted or a final rule is published.

List of Subjects in 33 CFR Part 117

Bridges.

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

PART 117—DRAWBRIDGE OPERATION REGULATIONS

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

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

■ 2. Amend § 117.899 by revising paragraphs (a), (b) and (c) to read as follows:

§ 117.899 Youngs Bay and Lewis and Clark River.

(a) The draw of the US101 New Youngs Bay highway bridge, mile 0.7, across Youngs Bay at Smith Point, shall open on signal for the passage of vessels if at least one half-hour notice is given to the draw tender at the Lewis and Clark River Bridge by marine radio, telephone, or other suitable means from 7 a.m. to 5 p.m. Monday through Friday. During all other times, including weekends from 5 p.m. on Friday until 7 a.m. on Monday, and all Federal holidays but Columbus Day, the draw shall open on signal if at least a two-hour notice is given to the draw tender by telephone. The opening signal shall be two prolonged blasts followed by one short blast.

(b) The draw of the Oregon State Old Youngs Bay highway bridge, mile 2.4, across Youngs Bay foot of Fifth Street, shall open on signal for the passage of vessels if at least one half-hour notice is given to the draw tender at the Lewis and Clark River Bridge by marine radio, telephone, or other suitable means from 7 a.m. to 5 p.m. Monday through Friday. During all other times, including weekends from 5 p.m. on Friday until 7 a.m. on Monday and Federal holidays with the exception of Columbus Day, the draw shall open on signal if at least a two-hour notice is given to the draw tender by telephone. The opening signal shall be two prolonged blasts followed by one short blast.

(c) The draw of the Oregon State Lewis and Clark River highway bridge, mile 1.0, across the Lewis and Clark River, shall open on signal for the passage of vessels if at least one half-hour notice is given by marine radio, telephone, or other suitable means from 7 a.m. to 5 p.m. Monday through Friday. During all other times, including weekends from 5 p.m. on Friday until 7 a.m. on Monday and Federal holidays but Columbus Day, the draw shall open on signal if at least a two-hour notice is given to the draw tender by telephone. The opening signal shall be two prolonged blasts followed by one short blast.

David G. Throop,

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

[FR Doc. 2018–27526 Filed 12–19–18; 8:45 am]

BILLING CODE 9110–04–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 1552

[EPA–HQ–OARM–2018–0742; FRL 9987–89–OARM]

Environmental Protection Agency Acquisition Regulation (EPAAR) Clause Update for Submission of Invoices

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is revising its *Submission of Invoices* clause to add electronic invoicing requirements. In 2019 the EPA will begin using the Invoice Processing Platform (IPP), which is a secure web-based service provided by the U.S. Treasury that efficiently manages government invoicing.

DATES: Comments must be received on or before February 19, 2019.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–HQ–OARM–2018–0742, at *https://www.regulations.gov.* Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from *Regulations.gov.* The EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.* on the web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *https://www2.epa.gov/dockets/commenting-epa-dockets.*

FOR FURTHER INFORMATION CONTACT: Thomas Valentino, Policy, Training and Oversight Division, Acquisition Policy and Training Branch (3802R), Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460; telephone number: (202) 564–4522; email address: *valentino.thomas@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

1. *Submitting Classified Business Information.* Do not submit CBI to EPA website *https://www.regulations.gov* or email. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD–ROM that you mail to EPA, mark the outside of the disk or CD–ROM as CBI, and then identify electronically within the disk or CD–ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be

disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for Preparing Your Comments.* When submitting comments, remember to:

- Identify the rulemaking by docket number and other identifying information (subject heading, **Federal Register** date and page number).
- Follow directions—The Agency may ask you to respond to specific questions or organize comments by referencing a *Code of Federal Regulations* (CFR) Part or section number.
- Explain why you agree or disagree, suggest alternatives, and substitute language for your requested changes.
- Describe any assumptions and provide any technical information and/or data that you used.
- If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.
- Provide specific examples to illustrate your concerns, and suggest alternatives.
- Explain your views as clearly as possible, avoiding the use of profanity or personal threats.
- Make sure to submit your comments by the comment period deadline identified.

II. Background

The EPA is revising clause 1552.232–70, *Submission of Invoices,* to add electronic invoicing requirements. On September 13, 2018, the EPA issued a direct final rule in 83 FR 46418 that in part revised the subject clause to incorporate a 1996 class deviation and make minor administrative updates. This proposed rule revises the clause again since the EPA will begin using the Invoice Processing Platform (IPP) in 2019, which is a secure web-based service provided by the U.S. Treasury that efficiently manages government invoicing. Currently the EPA requires contractors and vendors to submit paper invoices, which are inefficient and costly. The EPA will also begin using IPP to satisfy the requirements of Office of Management and Budget (OMB) Memorandum M–15–19, *Improving Government Efficiency and Saving Taxpayer Dollars Through Electronic Invoicing.* By changing the subject clause to require electronic invoicing, the EPA will reap benefits of efficiency and cost that have become ubiquitous in modern commerce, and be in compliance with Memorandum M–15–19.

III. Proposed Rule

The proposed rule proposes to amend EPAAR Part 1552, *Solicitation Provisions and Contract Clauses,* by revising EPAAR § 1552.232–70, *Submission of Invoices.*

1. EPAAR § 1552.232–70, *Submission of Invoices* clause is revised to provide new electronic invoicing requirements as the EPA begins using the IPP electronic-invoicing program in 2019. The clause is revised by replacing the current preamble and paragraphs (a) and (b) with new paragraphs (a) and (b), that update the old paper invoicing instructions to electronic invoicing. Paragraph (g)(5) is being revised to remove references to suspended costs, which are not authorized under IPP. The ''Note to paragraph (i)'' and ''Note to paragraph (j)'' are also being revised to remove references to suspended costs. Finally, paragraph (k) and ''Note to paragraph (k)'' are being removed because suspended costs are not allowed under IPP, which re-letters the last three paragraphs redesignating paragraphs (l) through (n) as paragraphs (k) through (m), respectively.

IV. Statutory and Executive Orders Reviews

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

This action is not a ''significant regulatory action'' under the terms of Executive Order (E.O.) 12866 (58 FR 51735, October 4, 1993) and is therefore not subject to review under the E.O.

B. Paperwork Reduction Act

This action does not impose an information collection burden under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* Burden is defined at 5 CFR 1320.3(b).

C. Regulatory Flexibility Act (RFA), as Amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), 5 U.S.C. 601 et seq.

The Regulatory Flexibility Act generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute; unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions. For purposes of assessing the impact of this final rule on small entities, ''small entity'' is defined as: (1) A small business that meets the definition of a small business found in the Small Business Act and codified at 13 CFR 121.201; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; or (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field. After considering the economic impacts of this rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. In determining whether a rule has a significant economic impact on a substantial number of small entities, the impact of concern is any significant adverse economic impact on small entities, because the primary purpose of the regulatory flexibility analyses is to identify and address regulatory alternatives ''which minimize any significant economic impact of the proposed rule on small entities'' 5 U.S.C. 503 and 604. Thus, an agency may certify that a rule will not have a significant economic impact on a substantial number of small entities if the rule relieves regulatory burden, or otherwise has a positive economic effect on all of the small entities subject to the rule. This action revises an existing EPAAR clause that will not have a significant economic impact on a substantial number of small entities. We continue to be interested in the potential impacts of the rule on small entities and welcome comments on issues related to such impacts.

D. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA, Public Law 104–4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, Local, and Tribal governments and the private sector. This rule contains no Federal mandates (under the regulatory provisions of the Title II of the UMRA) for State, Local, and Tribal governments or the private sector. The rule imposes no enforceable duty on any State, Local or Tribal governments or the private sector. Thus, the rule is not subject to the requirements of sections 202 and 205 of the UMRA.

E. Executive Order 13132: Federalism

Executive Order 13132, entitled ''Federalism'' (64 FR 43255, August 10, 1999), requires EPA to develop an accountable process to ensure ''meaningful and timely input by State and Local officials in the development of regulatory policies that have

federalism implications. ''Policies that have federalism implications'' is defined in the Executive Order to include regulations that 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.'' This rule does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government as specified in Executive Order 13132.

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

Executive Order 13175, entitled ''Consultation and Coordination with Indian Tribal Governments'' (65 FR 67249, November 9, 2000), requires EPA to develop an accountable process to ensure ''meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.'' This rule does not have tribal implications as specified in Executive Order 13175.

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

Executive Order 13045, entitled ''Protection of Children from Environmental Health and Safety Risks'' (62 FR 19885, April 23, 1997), applies to any rule that: (1) Is determined to be economically significant as defined under E.O. 12886, and (2) concerns an environmental health or safety risk that may have a proportionate effect on children. This rule is not subject to E.O. 13045 because it is not an economically significant rule as defined by Executive Order 12866, and because it does not involve decisions on environment health or safety risks.

H. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution, or Use

This action is not subject to Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution or Use'' (66 FR 28335 (May 22, 2001), because it is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer and Advancement Act of 1995 (NTTAA)

Section 12(d) (15 U.S.C. 272 note) of the National Technology Transfer and Advancement Act of 1995, Public Law 104–113, directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.,* materials specifications, test methods, sampling procedures and business practices) that are developed or adopted by voluntary consensus standards bodies. The NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards. This action does not involve technical standards. Therefore, EPA is not considering the use of any voluntary consensus standards.

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

Executive Order 12898 (59 FR 7629 (February 16, 1994) establishes federal executive policy on environmental justice. Its main provision directs federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States. EPA has determined that this proposed rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it does not affect the level of protection provided to human health or the environment in the general public.

K. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.,* as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a major 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. Section 804(2) defines a ''major rule'' as any rule that the Administrator of the Office of Information and Regulatory Affairs of the Office of Management and Budget finds has resulted in or is likely to result in (1) an annual effect on the economy of $100,000,000 or more; (2) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or (3) 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. EPA is not required to submit a rule report regarding this action under section 801 as this is not a major rule by definition.

List of Subjects in 48 CFR Part 1552

Environmental protection, Solicitation provisions and contract clauses.

Dated: December 3, 2018.

Kimberly Y. Patrick,

Director, Office of Acquisition Solutions.

For the reasons set forth in the preamble, EPA proposes to amend 48 CFR part 1552 as follows:

PART 1552—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 1. Authority: The authority citation for part 1552 continues to read as follows:

Authority: 5 U.S.C. 301 and 41 U.S.C. 418b.

■ 2. Section 1552.232–70 is amended by:

■ a. Revising paragraphs (a), (b), and (g)(5);

■ b. Revising ''Note to paragraph (i)'' and ''Note to paragraph (j)'';

■ c. Removing paragraph (k) and ''Note to paragraph (k)''; and

■ d. Redesignating paragraphs (l) through (n) as paragraphs (k) through (m).

The revisions read as follows:

§ 1552.232–70 Submission of invoices.

* * * * *

(a) Electronic invoicing and the Invoice Processing Platform (IPP)—

(1) *Definitions.* As used in this clause—

''Contract financing payment'' and ''invoice payment'' are defined in Federal Acquisition Regulation (FAR) 32.001.

''Electronic form'' means an automated system that transmits information electronically from the initiating system to all affected systems. Facsimile, email, and scanned documents are not acceptable electronic forms for submission of payment requests. However, scanned documents are acceptable when they are part of a submission of a payment request made using Invoice Processing Platform or another electronic form authorized by the Contracting Officer.

''Payment request'' means any request for contract financing payment or

invoice payment submitted by the Contractor under this contract.

(2) (i) Except as provided in paragraph (c) of this clause, the Contractor shall submit invoices using the electronic invoicing program Invoice Processing Platform (IPP), which is a secure web-based service provided by the U.S. Treasury that more efficiently manages government invoicing.

(ii) Under this contract, the following documents are required to be submitted as an attachment to the IPP invoice: *(This is a fill-in for acceptable types of required documentation, such as an SF 1034 and 1035, or an invoice/self-designed form on company letterhead that contains the required information.)*

(iii) The Contractor's Government Business Point of Contact *(as listed in System for Award Management (*SAM*))* will receive enrollment instructions via email from the IPP. The Contractor must register within 3 to 5 days of receipt of such email from IPP.

(iv) Contractor assistance with enrollment can be obtained by contacting the IPP Production Helpdesk via email at *IPPCustomerSupport@fiscal.treasury.gov* or by telephone at (866) 973–3131.

(3) If the Contractor is unable to comply with the requirement to use IPP for submitting invoices for payment, the Contractor shall submit a waiver request in writing to the Contracting Officer. The Contractor may submit an invoice using other than IPP only when—

(i) The Contracting Officer administering the contract for payment has determined, in writing, that electronic submission would be unduly burdensome to the Contractor; and in such cases, the Contracting Officer shall modify the contract to include a copy of the Determination; or

(ii) When the Governmentwide commercial purchase card is used as the method of payment.

(4) The Contractor shall submit any non-electronic payment requests using the method or methods specified in Section G of the contract.

(5) In addition to the requirements of this clause, the Contractor shall meet the requirements of the appropriate payment clauses in this contract when submitting payment requests.

(6) Invoices submitted through IPP will be either rejected, or accepted and paid, in their entirety, and will not be paid on a partial basis.

(b) The Contractor shall prepare its invoice or request for contract financing payment in accordance with FAR 32.905 on the prescribed Government forms, or the Contractor may submit self-designed forms which contain the required information. Standard Form 1034, *Public Voucher for Purchases and Services other than Personal,* is prescribed for used by contractors to show the amount claimed for reimbursement. Standard Form 1035, *Public Voucher for Purchases and Services other than Personal—Continuation Sheet,* is prescribed for use to furnish the necessary supporting detail or additional information required by the Contracting Officer.

* * * * *

(g) * * *

(5) *Voucher Number*—Insert the appropriate serial number of the voucher. A separate series of consecutive numbers, beginning with Number 1, shall be used by the contractor for each new contract. For an adjustment invoice, write ''*[invoice number] #Adj*'' at the voucher number. For a final invoice, put invoice number F. For a completion invoice, put invoice number #C.

* * * * *

Note to paragraph (i)—Any costs requiring advance consent by the Contracting Officer will be considered improper and will be disallowed, if claimed prior to receipt of Contracting Officer consent. Include the total cost claimed for the current and cumulative-to-date periods. After the total amount claimed, provide summary dollar amounts disallowed on the contract as of the date of the invoice. Also include an explanation of the changes in cumulative costs disallowed by addressing each adjustment in terms of: Voucher number, date, dollar amount, source, and reason for the adjustment. Disallowed costs should be identified in unallowable accounts in the contractor's accounting system.

* * * * *

Note to paragraph (j)—Any costs requiring advance consent by the Contracting Officer will be considered improper and will be disallowed, if claimed prior to receipt of Contracting Officer consent. Include the total cost claimed for the current and cumulative-to-date periods. After the total amount claimed, provide summary dollar amounts disallowed on the contract as of the date of the invoice. Also include an explanation of the changes in cumulative costs disallowed by addressing each adjustment in terms of: Voucher number, date, dollar amount, source, and reason for the adjustment. Disallowed costs should be identified in unallowable accounts in the contractor's accounting system.

* * * * *

[FR Doc. 2018–27478 Filed 12–19–18; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

42 CFR Part 488

[CMS–3367–NC]

RIN 0938–AT84

Medicare Program: Accrediting Organizations Conflict of Interest and Consulting Services; Request for Information

AGENCY: Centers for Medicare & Medicaid Services (CMS), HHS.

ACTION: Request for information.

SUMMARY: This request for information (RFI) seeks public comment regarding the appropriateness of the practices of some Medicare-approved Accrediting Organizations (AOs) to provide fee-based consultative services for Medicare-participating providers and suppliers as part of their business model. We wish to determine whether AO practices of consulting with the same facilities which they accredit under their CMS approval could create actual or perceived conflicts of interest between the accreditation and consultative entities. We intend to consider information received in response to this RFI to assist in future rulemaking.

DATES:

Comments: To be assured consideration, comments must be received at one of the addresses provided below, no later than 5 p.m. on February 19, 2019.

ADDRESSES: In commenting, refer to file code CMS–3367–NC. Because of staff and resource limitations, we cannot accept comments by facsimile (FAX) transmission.

Comments, including mass comment submissions, must be submitted in one of the following three ways (please choose only one of the ways listed):

1. *Electronically.* You may submit electronic comments on this RFI to *http://www.regulations.gov.* Follow the ''Submit a comment'' instructions.

2. *By regular mail.* You may mail written comments to the following address ONLY: Centers for Medicare & Medicaid Services, Department of Health and Human Services, Attention: CMS–3367–NC, P.O. Box 8016, Baltimore, MD 21244–8010.

Please allow sufficient time for mailed comments to be received before the close of the comment period.

3. *By express or overnight mail.* You may send written comments to the

following address ONLY: Centers for Medicare & Medicaid Services, Department of Health and Human Services, Attention: CMS–3367–NC, Mail Stop C4–26–05, 7500 Security Boulevard, Baltimore, MD 21244–1850.

FOR FURTHER INFORMATION CONTACT: Monda Shaver, 410–786–3410 or Caroline Gallagher, 410–786–8705.

SUPPLEMENTARY INFORMATION:

Inspection of Public Comments: All comments received before the close of the comment period will be made available for viewing by the public, including any personally identifiable or confidential business information that is included in a comment. We will post all comments received before the close of the comment period on the following website as soon as possible after they have been received: *http://www.regulations.gov.* Follow the search instructions on that website to view public comments.

I. Background

To participate in the Medicare program, providers and suppliers of health care services must be in substantial compliance with specified statutory requirements of the Social Security Act (the Act), as well as any additional regulatory requirements related to the health and safety of patients specified by the Secretary of the Department of Health and Human Services (the Secretary). These health and safety requirements are generally called conditions of participation (CoPs) for most providers, requirements for skilled nursing facilities (SNFs), and conditions for coverage or certification (CfCs) for other suppliers. Medicare certified providers and suppliers participate in the Medicare program by entering into an agreement with Medicare in which, among other things, they agree to comply with the CoPs or other applicable health and safety requirements. The providers and suppliers subject to these requirements include hospitals, skilled nursing facilities, home health agencies, hospice programs, rural health clinics, critical access hospitals, comprehensive outpatient rehabilitation facilities, laboratories, clinics, rehabilitation agencies, public health agencies, and ambulatory surgical centers. A Medicare-certified provider or supplier that does not substantially comply with the applicable health and safety requirements risks having its participation in the Medicare program terminated.

In accordance with section 1864 of the Act, state health agencies or other appropriate local agencies, under an agreement with CMS, survey health care providers and suppliers for compliance with the applicable CoPs, CfCs, conditions of certification, or requirements. Based on these State Survey Agency (SA) certifications, CMS determines whether the provider or supplier qualifies, or continues to qualify, for participation in the Medicare program. Additionally, section 1865(a) of the Act allows most health care facilities to demonstrate compliance with Medicare CoPs, requirements, CfCs, or conditions for certification through accreditation by a CMS-approved program of a national accreditation organization (AO), in lieu of being surveyed by SAs for certification. Accreditation by an AO is generally voluntary and is not required for Medicare certification or participation in the Medicare Program. Section 1865(a)(1) of the Act provides that if the Secretary finds that accreditation of a provider entity (which includes a provider of services, supplier, facility, clinic, agency, or laboratory) by a national accreditation body demonstrates that all applicable conditions are met or exceeded, the Secretary may deem those requirements as being met by the provider entity. We are ultimately responsible for the review, approval and subsequent oversight of national AOs' Medicare accreditation programs, and for ensuring providers or suppliers accredited by the AO meet the quality and patient safety standards required by the Medicare CoPs, requirements, CfCs, and conditions for certification. Any national AO seeking approval of an accreditation program in accordance with section 1865(a) of the Act must apply for accreditation program approval in accordance with § 488.5 and may be approved by CMS for a period not to exceed 6 years.

In addition, section 353 of the Public Health Service Act (PHS Act), as amended by the Clinical Laboratory Improvement Amendments of 1988 (CLIA) (Pub. L. 100–578), requires any laboratory that performs testing on human specimens for health purposes to meet the requirements established by CLIA and regulations issued under its authority, and have in effect an applicable CLIA certificate. Pursuant to section 353(e) of the PHS Act, a laboratory covered by CLIA may receive a certificate if, among other things, it is accredited by a laboratory AO approved by CMS under paragraph 353(e)(2) of the PHS Act. Any proposed or future regulation made regarding AOs' practice of providing fee-based consulting services to Medicare-participating providers and suppliers would also apply to AOs that accredit laboratories pursuant to CLIA.

While accreditation by an AO is generally voluntary, suppliers of the technical component of Advanced Diagnostic Imaging (ADI) services (as described at 42 CFR 414.68); Diabetes Self-Management Training (DSMT) services (as described at 42 CFR 410.141); and Durable Medical Equipment (DME) (as described at 42 CFR 424.58) are subject to accreditation required in order to receive reimbursement from Medicare for the services they furnish to Medicare beneficiaries. We also recently finalized regulations, at 42 CFR part 488, subpart L, for the approval and oversight of AOs that accredit Home Infusion Therapy suppliers, because section 1834(u)(5) of the Act requires suppliers of Home Infusion Therapy services (HIT) to be accredited (CY 2019 Home Health Prospective Payment System Rate Update final rule, 83 FR 56406, November 13, 2018).

Pursuant to their respective authorizing statutes, these four supplier types cannot participate in Medicare using a state survey option. One AO provides accreditation for several provider and supplier types, some under accreditation that is required in order for the provider or supplier to receive payment from Medicare for services furnished to Medicare beneficiaries, and some under the voluntary accreditation programs authorized under section 1865 of the Act. Therefore, our RFI also seeks comment on potential conflicts of interest related to this category of AOs that certify the four supplier types subject to accreditation that is required for a provider or supplier to receive payment from Medicare for services furnished to Medicare beneficiaries as well as laboratories accredited by an AO under CLIA.

AOs charge fees to facilities that seek their accreditation and generally offer facilities at least two accreditation options: Accreditation alone, or accreditation under a CMS-approved program for the purpose of participating in Medicare. Accreditation alone may be provided for purposes other than participation in Medicare. Accreditation under a CMS-approved program is provided for the purpose of obtaining and maintaining a Medicare provider agreement. Existing regulations at § 488.4 sets forth the general provisions for CMS-approved accreditation programs for providers and suppliers and § 488.5 outlines the application and re-application procedures for national AOs that seek to obtain CMS approval

of their accreditation programs, often called ''deeming authority.'' Additionally, AO application and re-application procedures are set forth at § 414.68(c) for accreditors of ADI suppliers, § 410.142 for accreditors of DSMT suppliers, and § 424.57(c) for accreditors of DME suppliers. Pursuant to the above regulations CMS has responsibility for oversight and approval of AO accreditation programs used for Medicare participation purposes and for ensuring that providers and suppliers that are accredited under a CMS-approved AO accreditation program meet or exceed the quality and patient safety standards required by the Medicare regulations. A thorough review of each accreditation program voluntarily submitted by an AO seeking CMS approval is conducted by CMS, including a review of the equivalency to the Medicare standards of its accreditation requirements, survey processes and procedures, surveyor training, and oversight and enforcement of provider entities. In addition, we also review the qualifications of the surveyors, staff, and the AO's financial status.

Under the application and re-application requirement procedures in § 488.5 for ''voluntary'' accreditation programs, under § 488.5(a)(10), an AO submitting an application must include a copy of the AO's ''organization's policies and procedures to avoid conflicts of interest, including the appearance of conflicts of interest, involving individuals who conduct surveys or participate in accreditation decisions.'' This provision is implemented by CMS's review of submitted documentation to determine that no conflicts of interest exist.

Section 488.5(e) requires that we publish a notice in the **Federal Register** when we receive a complete application or reapplication from a national AO which is voluntarily seeking approval of its voluntary accreditation program. The notice identifies the organization and the type of providers or suppliers to be covered by the voluntary accreditation program and provides a 30-day public comment period. We have 210 days from the receipt of a complete application to publish notice of approval or denial of the application. Upon approval, any provider or supplier subsequently accredited by the AO's approved program(s) would be deemed by CMS to have met the applicable Medicare conditions and would be referred to as having ''deemed status.'' Similar rules regarding CMS's approval process also apply to the accreditation required to receive payment from Medicare for the services furnished by the provider or supplier to Medicare beneficiaries by ADI, DSMT, DME and HIT suppliers, as discussed above.

In addition to the general accreditation application process, we are also required by statute to submit an annual Report to Congress [1] on our oversight of the national AOs. This report contains information related to the AO activities in a given fiscal year and compares these activities to the previous years. Within this report, we also measure the ''disparity rate'', which is a comparison rate based on AO findings of non-compliance during an AO survey and the SA findings of non-compliance for the same facilities found during a state validation survey. When the state survey agency cites a condition-level deficiency for which the AO has not cited a comparable deficiency, the deficiency is considered by CMS to have been ''missed'' and is factored into the AO's disparity rate for each facility type. The identification of only one missed condition level finding in any survey results in the entire survey being counted as disparate. The number of disparate surveys is divided by the number of validation surveys to determine the AO's disparity rate. According to the most recently published Report to Congress, disparity rates for all CMS-approved AO programs for the following facility types for the most recent year in the report (FY 2017) are: Hospital rates (46 percent); Psychiatric hospitals (57 percent); Critical Access Hospitals (44 percent); Home Health Agencies (18 percent); Hospices (18 percent); Ambulatory Surgery Centers (35 percent).

As part of our ongoing efforts to enhance transparency and oversight of the AOs, in 2018 CMS began a pilot for integrated validation surveys for accredited hospitals. Rather than the SA performing a separate second survey of an accredited facility within 60-days of the AO having completed its survey (of the same facility), state survey teams accompanied the AO survey team to evaluate AO competency and effectiveness during the same survey. CMS plans to refine this process over the next several years in an effort to enhance AO oversight, and to ensure that facilities under deemed status are in compliance with CMS conditions. Additionally, to ensure transparency both in the performance of AOs with CMS-approved accreditation programs and the quality of care provided by those deemed facilities, we are also working to create a *CMS.gov* web page that will provide AO performance data, as well as the latest quality of care findings based on complaint surveys of facilities accredited by these organizations.

As we noted above, section 1865(a)(2) of the Act states that the Secretary shall consider, among other factors with respect to a national accreditation body, its requirements for accreditation, its survey procedures, its ability to provide adequate resources for conducting required surveys and supplying information for use in enforcement activities, its monitoring procedures for provider entities found out of compliance with the conditions or requirements, and its ability to provide the Secretary with necessary data for validation. CMS determines whether accreditation standards and procedures are comparable to those of CMS.

CMS has been aware for some time that some AOs with CMS-approved accreditation programs are also providing fee-based consultative services to Medicare-participating health care facilities. Typical consultative services include, but are not limited to the following:

- Assistance for clinical and non-clinical leaders, including administrators in understanding the AO and CMS standards for compliance;
- Review of facility standards and promised early intervention and action through simulation of a real survey, similar to a mock survey to include comprehensive written reports of findings;
- Review of a facility's processes, policies and functions;
- Identification of and technical assistance for changing and sustaining areas in need of improvement; and,
- Educational consultative services.

These activities are not prohibited by law or regulation, and the training provided by the AOs may be useful for entities to learn to comply with the requirements and identify gaps in compliance.

This RFI is in response to increasing concern about potential conflicts of interest created by the accreditation and consultative activities of the AOs. In September 2017, an article [2] in the Wall Street Journal raised concerns regarding the performance, transparency, and potential conflicts of interest between an AO's accreditation services and its

[1] Report to Congress: *https://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/SurveyCertificationGenInfo/Policy-and-Memos-to-States-and-Regions.htm.*

[2] The Wall Street Journal, ''Watchdog Awards Hospitals Seal of Approval Even After Problems Emerge'' Stephanie Armour (September 8, 2018) *https://www.wsj.com/articles/watchdog-awards-hospitals-seal-of-approval-even-after-problems-emerge-1504889146.*

consulting services, which brought heightened attention to this issue in the public and the Congress. This article also discussed CMS's oversight of the AOs. Members of Congress subsequently sent letters to CMS [3] regarding the agency's oversight of AOs, which encouraged CMS to consider whether the agency should continue to recognize or approve AOs that seek to provide consultative services to the entities they accredit for CMS participation in light of the potential for actual or perceived conflict of interest.

After consideration of these issues, we are seeking comment to determine whether offering consultative services to the same entities an AO accredits may create actual or perceived conflicts of interest between the AOs accreditation program and its consultative program. We have concerns that this dual function may undermine, or appear to undermine, the integrity of the accreditation programs and could erode the public trust in the safety of CMS-accredited providers and suppliers. We recognize and acknowledge that certain consulting services offered by some of the AOs, such as quality improvement work and training of facility staff, may be beneficial to some facilities and result in improvements in operations or the quality of care furnished and may be provided with the best of intentions. However, it has been brought to our attention that this dual role played by some AOs may create, a minimum, the perception of conflicts of interest or actual conflicts of interest, which are rooted in the intersection of the AO's accreditation program with the AO's consulting services. We are concerned that circumstances could arise where an AO has recommended deemed status through accreditation that a client facility was in compliance with the Medicare regulations, while the consultancy service of the AO was generating revenue assisting the same facility in passing the AO's own accreditation surveys. While the consultancy arm may or may not have used surveyors which were conducting the on-site AO accreditation surveys, the consultants are advertised as experts on compliance standards. Some AOs have indicated that they establish firewalls between the arms of their businesses, but we are concerned that these firewalls may not be sufficient to ensure that no conflicts of interest result from these activities.

We have promulgated regulations and other requirements for other programs to ensure public trust by, for example, taking steps to address potential conflicts of interest in the Quality Improvement Organizations (QIO) (42 CFR 475.102 and 475.103) and External Quality Review Organization (EQRO) (42 CFR 438.354 and 42 CFR 438.358) programs. For example, 42 CFR 475.105(c) prohibits QIOs from subcontracting with a healthcare facilities to perform any case review activities except for the review of the quality of care

Section 1932(c)(2) of the Act and § 438.350 and 438.354, respectively, specifies that EQRO programs must be independent from the State Medicaid agency and the managed care plans it reviews. Under these requirements, EQRO programs may not conduct certain ongoing Medicaid managed care program operations related to oversight of the quality of managed care plan services on the state's behalf. For example, these restrictions preclude an EQRO from reviewing any managed care plan for which it is conducting or has conducted an accreditation review within the previous 3 years, or having a present, or known future, direct or indirect financial relationship with a managed care plan that it will review as an EQRO. We believe that the prohibitions set forth at § 438.354 ensure the independence of the EQROs from the state Medicaid agency and other managed care organizations and provide an example for how to avoid any perceived conflict of interest between their consultative services and work to deliver healthcare services to Medicaid beneficiaries.

Our consideration of this issue and review of how conflicts of interest are handled in similar programs suggested a need to reexamine our current regulations regarding AO conflicts of interest. Prior to initiating the rulemaking process in this area, we are seeking information (for example, evidence, research and trends), including stakeholder and AO feedback, specific to the topics discussed in this request for information. We intend to consider any such comments when we draft proposals for future policy development, to better protect public health and the safety of patients, and ensure our process for approving and ongoing monitoring of AOs is meaningful and maintains the public trust.

II. Potential Alternatives for Addressing Conflicts of Interest

We believe that, similar to QIO and EQRO programs, any AO with a Medicare-approved accreditation program has assumed a position of public trust, and is responsible for acting on behalf of the public, because the AO is performing a function that assists in the federal government's enforcement programs. We also believe that AOs voluntarily take on this position and responsibility when they seek accreditation approval from CMS to accredit providers and suppliers on behalf of CMS for participation in Medicare. Because of the responsibility CMS has related to maintaining public trust and guarding public health, we are compelled to ensure that all entities and programs, including AOs and their accreditation programs, that require CMS approval, be held to the high standards of ethical conduct so that every citizen can have complete confidence in the integrity of the Federal Government. In our view, AO accreditation determinations must be made without regard to any additional services that a Medicare provider or supplier might obtain through the AO or its subsidiaries, in order to ensure and maintain public trust in the Medicare certification program.

While we are seeking public comment under this RFI to gather information which may be used for potential future rulemaking, we also believe that stakeholders may provide insight on other mechanisms to address this potential conflict of interest. These areas for which we are seeking insight from stakeholders are further discussed in Section III, ''Solicitation of Comments''. Section 488.5(a)(10) of our regulations states that the application information from the AO include the organization's policies and procedures to avoid conflicts of interest, including the appearance of conflicts of interest, involving individuals who conduct surveys or participate in accreditation decisions. We implement this by reviewing the AOs policies and procedures regarding conflict of interest to determine that no overt conflicts of interest exist regarding such individuals. AOs typically include provisions in their organization's policies that ban surveyors from conducting surveys in the following situations: If the surveyor has performed any previous consulting services for the facility; if the surveyor (or family member) has any financial interest in the facility; and, if the surveyor was previously employed by a facility.

We are seeking feedback to determine whether we should revise our review process to identify actual, potential or perceived AO conflicts of interest as part of the application and renewal process for all AOs, including the programs that require accreditation in order for the provider or supplier to

[3] *https://energycommerce.house.gov/news/press-release/ec-leaders-request-information-hospital-accreditation-processes/.*

receive payment from Medicare for services furnished to Medicare beneficiaries, as discussed above. We are interested in ways that we could potentially modify § 488.5(a), which lists the required information to be submitted with an application by an AO to CMS for review, to also include a provision which addresses this conflict of interest review process, for which we are seeking public comments. As noted, § 488.5(a)(10) of our regulations requires that the application information include the organization's policies and procedures to avoid conflicts of interest, including the appearance of conflicts of interest, involving individuals who conduct surveys or participate in accreditation decisions. Similarly, for HIT suppliers, under the CY 2019 Home Health final rule (83 FR 56406), at § 488.1010(a)(13), we require AOs for home infusion therapy suppliers to provide documentation of the AO's policies and procedures for avoiding and handling conflicts of interest, including the appearance of conflicts of interest, involving individuals who conduct surveys, audits or participate in accreditation decisions. We believe that potentially expanding § 488.5(a)(10) by adding additional provisions which would require the AOs to disclose information about any consultative services provided by the AO to facilities which the AO accredits would further enhance oversight of AOs with CMS-approved accreditation programs; this would allow CMS to identify consultative relationships that create real, potential and perceived conflicts of interest. We are also considering adding similar provisions to the requirements for accrediting organizations that provide accreditation to providers and suppliers that must be accredited in order to receive payment from Medicare for services they furnish to Medicare beneficiaries, including HIT suppliers, as set out in the CY 2019 Home Health final rule (83 FR 56406) at § 488.1010(a)(13).

III. Solicitation of Comments

This is a request for information only. Respondents are encouraged to provide complete but concise responses to the questions listed in the sections outlined below. Response to this RFI is completely voluntary. This RFI is issued solely for information and planning purposes; it does not constitute a Request for Proposal, applications, proposal abstracts, or quotations. This RFI does not commit the Government to contract for any supplies or services or make a grant award. Further, we are not seeking proposals through this RFI and will not accept unsolicited proposals. Responders are advised that the United States Government will not pay for any information or administrative costs incurred in response to this RFI; all costs associated with responding to this RFI will be solely at the interested party's expense. Not responding to this RFI does not preclude participation in any future procurement, if conducted. It is the responsibility of the potential responders to monitor this RFI announcement for additional information pertaining to this request. Also, we note that we will not respond to questions about the policy issues raised in this RFI. We may or may not choose to contact individual responders. Such communications would only serve to further clarify written responses. Contractor support personnel may be used to review RFI responses. Responses to this notice are not offers and cannot be accepted by the Government to form a binding contract or issue a grant. Information obtained as a result of this RFI may be used by the Government for program planning on a non-attribution basis. Respondents should not include any information that might be considered proprietary or confidential. This RFI should not be construed as a commitment or authorization to incur cost for which reimbursement would be required or sought. All submissions become Government property and will not be returned. We may publically post the comments received, or a summary thereof.

While we are soliciting general comments on CMS's oversight of AOs, we are specifically seeking input on the following areas:

A. Public/Stakeholder Feedback

- We are seeking comment on the type of fee-based consultative services provided by AOs to the facilities they accredit. How are these services provided and communicated to the facilities? Are potential conflicts of interest disclosed?
- Training providers and suppliers of services on the applicable requirements for Medicare certification is an important function to improve quality of care. Are there other entities that could provide this training besides the AOs?
- We are seeking public comment related to whether commenters perceive a conflict of interest in AOs providing fee-based consultative services to the facilities they accredit.
- We are seeking public comment related to some stakeholders' perception that the ability of an AO to collect fees for consultation services from entities they accredit could degrade the public trust inherent in an AO's CMS-approved accreditation programs.
- We are seeking public comment on what the appropriate consequences or impacts should be, if a conflict does exist.
- We are seeking public comment on what firewalls may exist within an AO between accreditation and consultation services, or what firewalls would be prudent, to avoid potential and actual conflicts of interest.
- We are soliciting examples of positive and negative effects which may be as a result of a conflict of interest.
- We are seeking public comment from existing AOs on what the potential impact, financially and overall would be if CMS were to finalize rulemaking which would restrict certain activities that might give rise to a real or perceived conflict of interest.
- We are seeking public comment, primarily from stakeholders, by requesting specific information on when and/or under what circumstances it would be appropriate for AOs to provide fee-based consultative services to the facilities which they accredit.
- We are seeking public and stakeholder feedback on whether, and if so, under what specific circumstances CMS should review a potential conflict of interest, and what factors CMS should look at to determine if a conflict of interest exists.
- Specifically, we are seeking comments in a list type format describing under what circumstances the AOs or stakeholders would believe there to be a conflict; and under which circumstances conflict does not exist.
- We seek comment on the type of information which would be considered necessary, useful and/or appropriate in proving or refuting our hypothesis of a connection between the use of consultative services and preferential treatment of accredited providers and suppliers.

We are seeking comment on alternatives for addressing any conflict of interest identified.

B. Financial Impact and Burden

- We are seeking public comment regarding how an AO's revenue and operations may be affected by a prohibition or limitation on AOs' marketing and provision of consultative services.
- We are specifically looking for cost impacts, detailed accounting, and potential business risks for AOs.

C. Adding a New CFR Subpart to Existing Regulation

- We are seeking stakeholder feedback on the most appropriate area

for this potential future rulemaking under the existing regulations for AOs and whether expanding § 488.5(a)(10) to include a provision addressing this matter would be the most sensible placement.

IV. Collection of Information Requirements

This document does not impose information collection requirements, that is, reporting, recordkeeping or third-party disclosure requirements. However, section II of this document does contain a general solicitation of comments in the form of a request for information. In accordance with the implementing regulations of the Paperwork Reduction Act of 1995 (PRA), specifically 5 CFR 1320.3(h)(4), this general solicitation is exempt from the PRA. Facts or opinions submitted in response to general solicitations of comments from the public, published in the **Federal Register** or other publications, regardless of the form or format thereof, provided that no person is required to supply specific information pertaining to the commenter, other than that necessary for self-identification, as a condition of the agency's full consideration, are not generally considered information collections and therefore not subject to the PRA. Consequently, there is no need for review by the Office of Management and Budget under the authority of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35).

V. Response to Comments

Because of the large number of public comments we normally receive on **Federal Register** documents, we are not able to acknowledge or respond to them individually. We will consider all comments we receive by the date and time specified in the **DATES** section of this preamble, and, when we proceed with a subsequent document, we will respond to the comments in the preamble to that document.

Dated: November 7, 2018.

Seema Verma,

Administrator, Centers for Medicare & Medicaid Services.

[FR Doc. 2018–27506 Filed 12–18–18; 4:15 pm]

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Notices

Federal Register

Vol. 83, No. 244

Thursday, December 20, 2018

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

[Docket No. APHIS–2018–0006]

General Conference Committee of the National Poultry Improvement Plan

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Notice of renewal.

SUMMARY: We are giving notice that the Secretary of Agriculture has renewed the charter of the General Conference Committee of the National Poultry Improvement Plan (Committee) for a 2-year period. The Secretary of Agriculture has determined that the Committee is necessary and in the public interest.

FOR FURTHER INFORMATION CONTACT: Dr. Denise L. Heard, Senior Coordinator, National Poultry Improvement Plan, VS, APHIS, USDA, 1506 Klondike Road, Suite 101, Conyers, GA 30094; (770) 922–3496.

SUPPLEMENTARY INFORMATION: The purpose of the General Conference Committee of the National Poultry Improvement Plan (Committee) is to maintain and ensure industry involvement in Federal administration of matters pertaining to poultry health.

The Committee Chairperson and the Vice Chairperson shall be elected by the Committee from among its members. There are seven members on the Committee. The poultry industry elects the members of the Committee. The members represent six geographic areas with one member-at-large.

Done in Washington, DC, this 14th day of December 2018.

Kevin Shea,

Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 2018–27480 Filed 12–19–18; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF AGRICULTURE

Food Safety and Inspection Service

[Docket Number FSIS–2018–0051]

2019 Rate Changes for the Basetime, Overtime, Holiday, and Laboratory Services Rates

AGENCY: Food Safety and Inspection Service, USDA.

ACTION: Notice.

SUMMARY: The Food Safety and Inspection Service (FSIS) is announcing the 2019 rates it will charge meat and poultry establishments, egg products plants, and importers and exporters for providing voluntary, overtime, and holiday inspection and identification, certification, and laboratory services. The 2019 basetime, overtime, holiday, and laboratory services rates will be applied on the first FSIS pay period approximately 30 days after the publication of this notice, which begins on January 20, 2019.

DATES: FSIS will charge the rates announced in this notice beginning January 20, 2019.

FOR FURTHER INFORMATION CONTACT: For further information contact Michael Toner, Director, Budget Division, Office of the Chief Financial Officer, FSIS, U.S. Department of Agriculture, Room 2159, South Building, 1400 Independence Avenue SW, Washington, DC 20250–3700; Telephone: (202) 690–8398, Fax: (202) 690–4155.

SUPPLEMENTARY INFORMATION:

Background

On April 12, 2011, FSIS published a final rule amending its regulations to establish formulas for calculating the rates it charges meat and poultry establishments, egg products plants, and importers and exporters for providing voluntary, overtime, and holiday inspection and identification, certification, and laboratory services (76 FR 20220).

In the final rule, FSIS stated that it would use the formulas to calculate the annual rates, publish the rates in **Federal Register** notices prior to the start of each calendar year, and apply the rates on the first FSIS pay period at the beginning of the calendar year.

This notice provides the 2019 rates, which will be applied starting on January 20, 2019.

2019 Rates and Calculations

The following table lists the 2019 Rates per hour, per employee, by type of service:

Service	2019 Rate (estimates rounded to reflect billable quarters)
Basetime	$59.96
Overtime	74.76
Holiday	89.56
Laboratory	75.56

The regulations state that FSIS will calculate the rates using formulas that include the Office of Field Operations (OFO) inspection program personnel's previous fiscal year's regular direct pay and regular hours (9 CFR 391.2, 391.3, 391.4, 590.126, 590.128, 592.510, 592.520, and 592.530). In 2013, an Agency reorganization eliminated the OIA program office and transferred all of its inspection program personnel to OFO. Therefore, inspection program personnel's pay and hours are identified in the calculations as ''OFO inspection program personnel's'' pay and hours.

FSIS determined the 2019 rates using the following calculations:

Basetime Rate = The quotient of dividing the Office of Field Operations (OFO) inspection program personnel's previous fiscal year's regular direct pay by the previous fiscal year's regular hours, plus the quotient multiplied by the calendar year's percentage of cost of living increase, plus the benefits rate, plus the travel and operating rate, plus the overhead rate, plus the allowance for bad debt rate.

The calculation for the 2019 basetime rate per hour per program employee is:

[FY 2018 OFO Regular Direct Pay divided by the previous fiscal year's Regular Hours ($461,873,361/15,909,552)] = $29.03 + ($29.03 * 1.9% (calendar year 2019 Cost of Living Increase)) = $29.58 + $10.36 (benefits rate) + $2.10 (travel and operating rate) + $17.92 (overhead rate) + $0.00 (bad debt allowance rate) = $59.96, which is already divisible by 4.

Overtime Rate = The quotient of dividing the Office of Field Operations (OFO) inspection program personnel's previous fiscal year's regular direct pay by the previous fiscal year's regular hours, plus that quotient multiplied by the calendar year's percentage of cost of

living increase, multiplied by 1.5 (for overtime), plus the benefits rate, plus the travel and operating rate, plus the overhead rate, plus the allowance for bad debt rate.

The calculation for the 2019 overtime rate per hour per program employee is:

[FY 2018 OFO Regular Direct Pay divided by previous fiscal year's Regular Hours ($461,873,361/15,909,552)] = $29.03 + ($29.03 * 1.9% (calendar year 2019 Cost of Living Increase)) = $29.58 * 1.5 = $44.37 + $10.36 (benefits rate) + $2.10 (travel and operating rate) + $17.92 (overhead rate) + $0.00 (bad debt allowance rate) = $74.75 rounded up to $74.76, so that it is divisible by 4.

Holiday Rate = The quotient of dividing the Office of Field Operations (OFO) inspection program personnel's previous fiscal year's regular direct pay by the previous fiscal year's regular hours, plus that quotient multiplied by the calendar year's percentage of cost of living increase, multiplied by 2 (for holiday pay), plus the benefits rate, plus the travel and operating rate, plus the overhead rate, plus the allowance for bad debt rate.

The calculation for the 2019 holiday rate per hour per program employee calculation is:

[FY 2018 OFO Regular Direct Pay divided by Regular Hours ($461,873,361/15,909,552)] = $29.03 + ($29.03 * 1.9% (calendar year 2019 Cost of Living Increase)) = $29.58 * 2 = $59.17 + $10.36 (benefits rate) + $2.10 (travel and operating rate) + $17.92 (overhead rate) + $0.00 (bad debt allowance rate) = $89.54, rounded up to $89.56, so that it is divisible by 4.

Laboratory Services Rate = The quotient of dividing the Office of Public Health Science (OPHS) previous fiscal year's regular direct pay by the OPHS previous fiscal year's regular hours, plus the quotient multiplied by the calendar year's percentage cost of living increase, plus the benefits rate, plus the travel and operating rate, plus the overhead rate, plus the allowance for bad debt rate.

The calculation for the 2019 laboratory services rate per hour per program employee is:

[FY 2018 OPHS Regular Direct Pay/ OPHS Regular hours ($24,480,845/ 552,168)] = $44.34 + ($44.34 * 1.9% (calendar year 2019 Cost of Living Increase)) = $45.18 + $10.36 (benefits rate) + $2.10 (travel and operating rate) + $17.92 (overhead rate) + $0.00 (bad debt allowance rate) = $75.56, which is already divisible by 4.

Calculations for the Benefits, Travel and Operating, Overhead, and Allowance for Bad Debt Rates

These rates are components of the basetime, overtime, holiday, and laboratory services rates formulas.

Benefits Rate: The quotient of dividing the previous fiscal year's direct benefits costs by the previous fiscal year's total hours (regular, overtime, and holiday), plus that quotient multiplied by the calendar year's percentage cost of living increase. Some examples of direct benefits are health insurance, retirement, life insurance, and Thrift Savings Plan basic and matching contributions.

The calculation for the 2019 benefits rate per hour per program employee is:

[FY 2018 Direct Benefits/(Total Regular hours + Total Overtime hours + Total Holiday hours) ($195,953,150/ 19,267,813)] = $10.17 + ($10.17* 1.9% (calendar year 2019 Cost of Living Increase)) = $10.36.

Travel and Operating Rate: The quotient of dividing the previous fiscal year's total direct travel and operating costs by the previous fiscal year's total hours (regular, overtime, and holiday), plus that quotient multiplied by the calendar year's percentage of inflation.

The calculation for the 2019 travel and operating rate per hour per program employee is:

[FY 2018 Total Direct Travel and Operating Costs/(Total Regular hours + Total Overtime hours + Total Holiday hours) ($39,709,179/19,267,813)] = $2.06 + ($2.06 * 1.9% (2019 Inflation) = $2.10.

Overhead Rate: The quotient of dividing the previous fiscal year's indirect costs plus the previous fiscal year's information technology (IT) costs in the Public Health Data Communication Infrastructure System Fund plus the provision for the operating balance less any Greenbook costs (*i.e.,* costs of USDA support services prorated to the service component for which fees are charged) that are not related to food inspection by the previous fiscal year's total hours (regular, overtime, and holiday) worked across all funds, plus the quotient multiplied by the calendar year's percentage of inflation.

The calculation for the 2019 overhead rate per hour per program employee is:

[FY 2018 Total Overhead/(Total Regular hours + Total Overtime hours + Total Holiday hours) ($ 338,760,688/ 19,267,813)] = $17.58 + ($17.58 * 1.9% (2019 Inflation) = $17.92.

Allowance for Bad Debt Rate = Previous fiscal year's total allowance for bad debt (for example, debt owed that is not paid in full by plants and establishments that declare bankruptcy) divided by previous fiscal year's total hours (regular, overtime, and holiday) worked.

The 2019 calculation for bad debt rate per hour per program employee is:

[FY 2018 Total Bad Debt/(Total Regular hours + Total Overtime hours + Total Holiday hours) = ($73,050/ 19,267,813)] = $0.00.

Additional Public Notification

Public awareness of all segments of rulemaking and policy development is important. Consequently, FSIS will announce this **Federal Register** publication on-line through the FSIS web page located at: *http://www.fsis.usda.gov/federal-register.*

FSIS also will make copies of this publication available through the FSIS Constituent Update, which is used to provide information regarding FSIS policies, procedures, regulations, **Federal Register** notices, FSIS public meetings, and other types of information that could affect or would be of interest to our constituents and stakeholders. The Update is available on the FSIS web page. Through the web page, FSIS is able to provide information to a much broader, more diverse audience. In addition, FSIS offers an email subscription service which provides automatic and customized access to selected food safety news and information. This service is available at: *http://www.fsis.usda.gov/subscribe.* Options range from recalls to export information, regulations, directives, and notices. Customers can add or delete subscriptions themselves, and have the option to password protect their accounts.

USDA Non-Discrimination Statement

No agency, officer, or employee of the USDA shall, on the grounds of race, color, national origin, religion, sex, gender identity, sexual orientation, disability, age, marital status, family/ parental status, income derived from a public assistance program, or political beliefs, exclude from participation in, deny the benefits of, or subject to discrimination any person in the United States under any program or activity conducted by the USDA.

How to File a Complaint of Discrimination

To file a complaint of discrimination, complete the USDA Program Discrimination Complaint Form, which may be accessed online at *http://www.ocio.usda.gov/sites/default/files/docs/2012/Complain_combined_6_8_12.pdf,* or write a letter signed by you

or your authorized representative.

Send your completed complaint form or letter to USDA by mail, fax, or email:

Mail: U.S. Department of Agriculture Director, Office of Adjudication, 1400 Independence Avenue SW, Washington, DC 20250–9410, Fax: (202) 690–7442, Email: *program.intake@usda.gov*

Persons with disabilities who require alternative means for communication (Braille, large print, audiotape, etc.), should contact USDA's TARGET Center at (202) 720–2600 (voice and TDD).

Done at Washington, DC.

Paul Kiecker,

Acting Administrator.

[FR Doc. 2018–27521 Filed 12–19–18; 8:45 am]

BILLING CODE 3410–DM–P

DEPARTMENT OF AGRICULTURE

Food and Nutrition Service

Agency Information Collection Activities: Proposed Collection; Comment Request—Generic Clearance To Conduct Formative Research or Development of Nutrition Education and Promotion Materials and Related Tools and Grants for FNS Population Groups

AGENCY: Food and Nutrition Service (FNS), USDA.

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice invites the general public and other interested parties to comment on a proposed information collection. This collection is an extension of a currently approved collection. This information collection will conduct research in support of FNS' goal of delivering science-based nutrition education to targeted audiences. This information collection will also conduct research that will assist FNS in identifying effective design and implementation approaches to use to develop and assess grants. From development through testing of materials and tools with the target audience, FNS plans to conduct data collections that involve formative research including focus groups, interviews (dyad, triad, telephone, *etc.*), surveys and Web-based collection tools.

DATES: Written comments must be received on or before February 19, 2019.

ADDRESSES: Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information has practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on those who are to respond, including use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Comments may be sent to Rachelle Ragland-Greene, Food and Nutrition Service, U.S. Department of Agriculture, 3101 Park Center Drive, Room 1014, Alexandria, VA 22302. Comments will also be accepted through the Federal eRulemaking Portal. Go to *http://www.regulations.gov* and follow the online instructions for submitting comments electronically. All written comments will be open for public inspection at the Office of the Food and Nutrition Service during regular business hours (8:30 a.m. to 5 p.m., Monday through Friday) at 3101 Park Center Drive, Alexandria, Virginia 22302, Room 1014.

All responses to this notice will be summarized and included in the request for Office of Management and Budget (OMB) approval. All comments will be a matter of public record.

FOR FURTHER INFORMATION CONTACT: Requests for additional information should be directed to Rachelle Ragland-Greene at 703–305–2586.

SUPPLEMENTARY INFORMATION:

Title: Generic Clearance to Conduct Formative Research for Development of Nutrition Education, Promotion Materials and Related Tools, and Grants for FNS Population Groups.

OMB Number: 0584–0524.

Expiration Date: September 30, 2019.

Type of Request: Extension of a currently approved information collection.

Abstract: This information collection is based on Section 19 of the Child Nutrition Act of 1966 (42 U.S.C. 1787), Section 5 of the Richard B. Russell National School Lunch Act (42 U.S.C. 1754) and Section 11(f) of the Food and Nutrition Act of 2008 (7 U.S.C. 2020). This request for approval of information collection is necessary to obtain input into the development of nutrition education interventions for population groups served by the U.S. Department of Agriculture, Food and Nutrition Service (USDA–FNS). FNS also uses this collection to obtain input that can be used to develop and assess grants. Interventions need to be designed so that they can be delivered through different types of media and in a variety of formats for diverse audiences.

FNS develops a variety of resources to support nutrition education and promotion activities. These resources are designed to convey science-based, behavior-focused nutrition messages about healthy eating and physical activity to children and adults eligible to participate in FNS nutrition assistance programs and to motivate them to consume more healthful foods as defined by the Dietary Guidelines for Americans (DGA). This includes education materials, messages, promotion tools and interventions for the diverse population served by the Federal nutrition programs as well as WIC, Team Nutrition, Food Distribution and other programs.

Obtaining formative input and feedback is fundamental to FNS' success in delivering science-based nutrition messages and reaching diverse segments of the population in ways that are meaningful and relevant. This includes conferring with the target audience, individuals who serve the target audience, and key stakeholders on the communication strategies and interventions that will be developed and on the delivery approaches that will be used to reach consumers. The formative research and testing activities described will help in the development of effective education and promotion tools and communication strategies. Collection of this information will increase FNS' ability to formulate nutrition education interventions that resonate with the intended target population, particularly low-income families.

FNS also uses formative input and feedback to determine how best to develop and assess grants so that grant recipients can successfully meet their goals under these grants. To do this, FNS confers with grant recipients to obtain input regarding their experiences, expectations, challenges, and lessons learned while implementing the grant.

Formative research methods and information collection will include focus groups, interviews (dyad, triad, telephone, *etc.*), surveys and Web-based data collection. The data obtained will provide input regarding the potential use of materials and products during both the developmental and testing stages, in addition to the development of grants. Key informant interviews will be conducted in order to determine future nutrition education and grant needs, tools and dissemination strategies. This task involves collecting a diverse array of information from a variety of groups including: People familiar with the target audiences; individuals delivering nutrition

education intervention materials and projects; program providers at State and local levels; program participants; grant recipients, and other relevant informants associated with FNS programs.

Findings from all data collection will be included in summary reports submitted to USDA–FNS. The reports will describe the data collection methods, findings, conclusions, implications, and recommendations for the development and effective dissemination of nutrition education materials and related tools for FNS population groups. There will be no specific quantitative analysis of data. No attempt will be made to generalize the findings to be nationally representative or statistically valid. There are no recordkeeping or third party disclosure burden requirements.

Reporting Burden

FNS estimates the total annual burden hours are 16,003 x 3 year approval for a total of 48,010 burden hours for 3 years. Additionally, the total annual responses are 34,166.66 x 3 year approval for a total of 102,500 total responses for 3 year approval. See the 3 year approval estimates below.

Affected Public: State, Local and Tribal Government; Individuals and Households; and Business or Other for Profit.

Estimated Number of Respondents: 102,500 respondents.

Estimated Number of Responses per Respondent: 1 response.

Estimated Total Annual Responses: 102,500.

Estimate of Time per Respondent: .46839024 hours.

Estimated Total Annual Reporting Burden Hours: 48,010 hours.

Collection instruments	Estimated number respondents	Responses annually per respondent	Total annual responses	Estimated average number of hours per response	Estimated total hours
Focus Group Screeners	10,000	1	10,000	0.167	1,670
Interview Screeners/Surveys	5,000	1	5,000	0.167	835
Focus Groups	5,500	1	5,500	2.00	11,000.00
Intercept Interviews	5,000	1	5,000	0.50	2,500.00
Dyad/Triad Interviews	2,000	1	2,000	1.00	2,000.00
Telephone Interviews	10,000	1	10,000	0.25	2,500.00
Surveys	10,000	1	10,000	0.50	5,000.00
Web-based Collections	40,000	1	40,000	0.50	20,000.00
Confidentiality Agreements	15,000	1	15,000	0.167	2,505.00
Total Reporting Burden	102,500	1	102,500	.468	48,010

Dated: December 11, 2018.

Brandon Lipps,

Administrator, Food and Nutrition Service.

[FR Doc. 2018–27443 Filed 12–19–18; 8:45 am]

BILLING CODE 3410–30–P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

Order Relating to Eric Baird

In the Matter of: Eric Baird, 647 Norsota Way Sarasota, FL 34242; Respondent; 16–BIS–0002.

The Bureau of Industry and Security, U.S. Department of Commerce (''BIS''), has notified Eric Baird, of Sarasota, Florida (''Baird''), that it has initiated an administrative proceeding against Baird pursuant to Section 766.3 of the Export Administration Regulations (the ''Regulations''),[1] through the issuance of an Amended Charging Letter to Baird that alleges that Baird committed one hundred sixty-six (166) violations of the Regulations.[2] Specifically, the charges are:

Charges 1–166 15 CFR 764.2(b)—Causing, Aiding or Abetting a Violation

1. On at least one hundred sixty-six (166) occasions beginning on or about August 1, 2011, and continuing through on or about January 7, 2013, Baird caused, aided, abetted, commanded, induced and/or permitted (''caused, aided or abetted'') the doing of an act prohibited by, or the omission of an act required by, the Regulations. As further alleged below, Baird caused, aided or abetted the filing of false or misleading export control documents, namely Shipper's Export Declarations and Automated Export System filings (''SED/AES filings''), and the failure to make required SED/AES filings, in connection with the export or attempted export of items subject to the Regulations. Baird also caused, aided or abetted the export and attempted export without the required BIS licenses of items subject to the Regulations and listed on the Commerce Control List (''CCL'').

2. At all times pertinent hereto, Baird was Chief Executive Officer (''CEO'') of Access USA Shipping, LLC, d/b/a *MyUS.com* and f/k/a Access USA Shipping, Inc. (''Access''), a company originally registered in Florida that he founded in 1997. Baird was directly or indirectly Access's primary shareholder until on or about August 28, 2012. After a partial sale of Access on or about August 28, 2012, Baird continued to serve as its CEO and maintained a minority equity stake in the company with the right to appoint two members of Access's board of directors. Baird was replaced as CEO of Access in or about September 2013. Baird's interests, however, were not fully divested until on or about March 22, 2016, at which time he no longer had an equity interest in Access or the right to appoint board members.

3. Access provided foreign customers with a U.S. physical address for items purchased from U.S. merchants for ultimate export from the United States. For a fee, Access provided

[1] The Regulations originally issued under the Export Administration Act of 1979, as amended, 50 U.S.C. 4601–4623 (Supp. III 2015) (''the EAA''), which lapsed on August 21, 2001. The President, through Executive Order 13,222 of August 17, 2001 (3 CFR, 2001 Comp. 783 (2002)), which has been extended by successive Presidential Notices, the most recent being that of August 8, 2018 (83 FR 39,871 (Aug. 13, 2018)), continued the Regulations in full force and effect under the International Emergency Economic Powers Act, 50 U.S.C. 1701, *et seq.* (2012) (''IEEPA''). On August 13, 2018, the President signed into law the John S. McCain National Defense Authorization Act for Fiscal Year 2019, which includes the Export Control Reform Act of 2018, Public Law 115–232, tit. 17, subtitle B, 132 Stat. 2208 (2018) (''ECRA''). While Section 1766 of ECRA repeals the EAA (except for three sections which are inapplicable here), Section 1768 of ECRA provides, in pertinent part, that all rules and regulations that were made or issued under the EAA, including as continued in effect pursuant to IEEPA, and were in effect as of ECRA's date of enactment (August 13, 2018), shall continue in effect according to their terms until modified, superseded, set aside, or revoked through action undertaken pursuant to the authority provided under ECRA.

[2] The Regulations are currently codified in the Code of Federal Regulations at 15 CFR parts 730–774 (2018). The charged violations occurred in 2011–2013. The Regulations governing the violations at issue are found in the 2011–2013 versions of the Code of Federal Regulations (15 CFR parts 730–774). The 2018 Regulations set forth the procedures that apply to this matter.

such customers a ''suite,'' which was a designated place or space at Access's warehouse facilities to which customers could have items delivered from U.S. merchants. When Access received items that a foreign customer had ordered from a U.S. merchant, Access employees entered into Access's order management system information regarding the name of the merchant, shipment tracking number, a detailed description of the item, and the value of the item. Before the shipment was exported from the United States, however, Access employees would revise the original item information, including the item's value and/or its description, to generate an invoice that contained false or misleading information for use in connection with the export of the items. At times, Access's order system included account notes that directed packaging or price tags be removed or that a shipment's declared value be kept below a certain dollar amount.

4. Baird established, directed, controlled, and/or authorized Access's policy and practice of falsifying the value and description of items being exported or intended for export, including items listed on the CCL. Baird also at times personally participated in the undervaluing and mis-description of such items.

5. Access routinely undervalued items using multiple different strategies or schemes, including, for example, by lowering values of items by 25%–50% depending on the country of destination. The extent of undervaluation reached or exceeded 75% on some occasions, and for some customers maximum declared values of no more than, for example, $50 or $100, were used, regardless of the true value of the items.

6. Similarly, on numerous occasions, descriptions of CCL items or other items subject to the Regulations were altered to help avoid export control scrutiny and detection by law enforcement, including on occasions when the items also were undervalued. For example, a night vision lens converter was described as ''camera lenses''; laser sights as ''tools and hardware''; and rifle scopes as ''sporting goods'' or ''tools, handtools.'' In one instance, rifle stocks and grips were described as ''toy accessories.'' Access's October 2010 and October 2012 Customer Service Training Manuals illustrate the pervasiveness of altering descriptions of items, in part, to avoid export control scrutiny and detection, including those related to firearms and related parts that were considered prohibited or restricted items.

7. Baird also established, directed, controlled, and/or authorized Access's ''personal shopper program'' or ''alternative program.'' Under this program, Access or an Access employee was presented to U.S. merchants as the purchaser and/or end-user of the items in situations where foreign customers were seeking products from U.S. merchants that did not accept foreign payment methods or had raised concerns that Access was not an end user and refused to sell or ship to Access because they wished to prevent the export of their goods, such as companies that sell weapons or weapon parts. Through this evasive program, Access purchased items for export to its foreign customers without informing the U.S. merchants that the items were intended for export. Foreign customers would email an Access employee their shopping list, and the Access employee would purchase the items using credit cards in Baird's name, or using a credit card account or other payment mechanisms opened in the name of the individual employee, whom Access would subsequently reimburse. At times, shipments were delivered to the homes of Access employees so that, in addition to being misled to believe that a domestic customer was involved, the U.S. merchant would be misled to believe that Access itself was not involved in the transaction.

8. As part of this ''personal shopper program,'' Baird directed or authorized Access employees to use his credit cards and driver's license information to make purchases of items for export. In addition, Baird personally asked Access employees to apply for credit card accounts and have customer deliveries sent to their personal addresses to make the shipments appear as if they were for domestic customers.

9. At all times relevant hereto, Baird knew of the Regulations and Access's export control compliance obligations, including the need for items to be accurately valued and described for purposes of SED/AES filing requirements and the need to determine licensing requirements. Baird received this information through, for example, outreach visits from and other communications with BIS special agents and other federal law enforcement agents, as well as at various occasions through other Access officials or personnel and through companies that regularly served as freight forwarders or carriers in connection with export transactions involving Access.

10. For example, on or about July 11, 2007, BIS's Office of Export Enforcement (''OEE'') conducted an outreach visit to Access, during which a BIS Special Agent provided detailed oral and written information regarding compliance with the EAR and other U.S. export control laws and regulations. As part of this outreach visit, the BIS Special Agent met with Baird, including explaining that items should be checked for export license requirements and that customers should be screened. In addition, Access documents indicate that by no later than January 2008, Baird knew that false or misleading statements on SED/AES filings could lead to penalties of up to $250,000 per violation,[3] and that by March 2008, Baird knew that a SED/AES filing must be made for each export when the value of the items under a single Schedule B number is more than $2,500.[4] Access subsequently received Shield America outreach visits from the Department of Homeland Security, Homeland Security Investigations (''HSI'') on March 27, 2009, June 9, 2010, and January 10, 2012, respectively, during which HSI special agents provided compliance information. Baird attended the January 10, 2012 outreach visit. In addition, the BIS Special Agent provided detailed information on properly valuing items on export control documents during a telephone discussion with CEO Eric Baird on January 18, 2012, and a related follow-up email with him.

11. Access documents also include correspondence among Baird and Access's then-Chief Technology Officer (''CTO'') and other company officials indicating that Baird remained fully aware at and around the time of the violations alleged herein of SED/AES filing requirements and the potential significant sanctions for false or misleading statements on SED/AES filings. In emails in September 2011 to Baird, the CTO, who is Baird's sister, provided information on a BIS enforcement case involving false or misleading reporting of declared value on export documents. In an email dated September 20, 2011, she included information describing BIS's imposition of civil penalties as part of the settlement of a case involving repeat undervaluing of exports on Shipper's Export Declarations and stated, inter alia: ''I will not be a party to [undervaluation]. I know we're doing it now. I know we have the means to avoid doing it. I know we are WILLINGLY AND INTENTIONALLY breaking the law.'' (Emphasis in original). In the same email chain later that day, Baird suggested that Access could undervalue by 25% and if Access was ''warned by [the U.S.] government,'' then it ''can stop ASAP.''

12. Baird, however, did not stop Access's undervaluing of exports or its or his related violations of the Regulations. Rather, almost immediately following this September 20, 2011 email exchange, Baird and the CTO discussed on September 21, 2011, how Access's order system would be modified to either automatically or manually undervalue where there was no merchant invoice. The order system would be and was in fact modified to enable undervaluing by a set percentage based on the country of destination for the export, if there was no U.S. merchant's invoice or no value listed on the U.S. merchant's invoice. Additionally, when a U.S. merchant's invoice was included in a package received from a U.S. merchant, Access would remove the invoice at its customer's request, both before and after the September 2011 modification of the order system.

13. While Access for a short time did reduce the extent it engaged in its unlawful undervaluing activities, it fully resumed and even expanded those activities in no later than January 2012, pursuant to Baird's direction and/or authorization. Beginning no later than on or about January 16, 2012, Baird directed or authorized that Access customers be notified that Access's order system was being modified to remove the recent limitation on undervaluing and that Access would work together with them so that false values could be declared and undervalued to the extent of the customers' choosing.

[3] The maximum penalty figure that currently applies in this case is $295,141 per violation. *See* 15 CFR 6.3(b); 83 FR 706 (Jan. 8, 2018). Since January 2008, the maximum penalties have been adjusted for inflation multiple times pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, Sec. 701 of Public Law 114–74, enacted on November 2, 2015. *See also* 15 CFR 6.5.

[4] A Schedule B number is a ten-digit number used in the United States to classify physical goods for export to another country.

14. In doing the foregoing, Baird caused, aided or abetted Access, as well as forwarders and carriers involved in export transactions with Access, to make false or misleading SED/AES filings with the U.S. Government. Such false or misleading filings violate Section 764.2(g) of the Regulations. Baird also caused, aided or abetted the failure by Access and its forwarders and carriers to make required SED/AES filings. The failure to make a required SED/AES filing violates Section 764.2(a) of the Regulations. Baird also caused, aided or abetted the export and attempted export of items classified under Export Control Classification Number (''ECCN'') 0A987 and controlled for Crime Control reasons without the BIS licenses required pursuant to Section 742.7 of the Regulations to export the items to Argentina, Austria, Hong Kong, Indonesia, Libya, Saudi Arabia, South Africa and Yemen. Such unlicensed exports and attempted exports violated Section 764.2(a) and 764.2(c), respectively, of the Regulations.

15. In so doing, Baird committed one hundred sixty-six violations of Section 764.2(b) of the Regulations.

Whereas, BIS and Baird have entered into a Settlement Agreement pursuant to Section 766.18(b) of the Regulations, whereby they agreed to settle this matter in accordance with the terms and conditions set forth therein;

Whereas, I have taken into consideration the admission of liability by Baird set forth in the Settlement Agreement with regard to the violations in the Amended Charging Letter;

Whereas, I have also taken into consideration the plea agreement that Baird has entered into with the U.S. Attorney's Office for the Middle District of Florida (''the plea agreement''); and

Whereas, I have approved of the terms of such Settlement Agreement;

It is therefore ordered:

First, Baird shall be assessed a civil penalty in the amount of $17,000,000. Baird shall pay the U.S. Department of Commerce $10,000,000 not later than 30 days from the date of this Order. Payment of the remaining $7,000,000 shall be suspended for a period of five (5) years from the date of this Order, and thereafter shall be waived, provided that during this five-year payment probationary period, Baird has made full and timely payment of $10,000,000 as set forth above and has otherwise complied with the provisions of the Settlement Agreement and this Order, has complied in full with the plea agreement and any sentence imposed upon him following his conviction, and has committed no violation of the Export Control Reform Act of 2018 (''ECRA'') [5] or the Regulations or any order, license, or authorization issued thereunder. If Baird fails to comply with the terms of the Settlement Agreement or of this Order, or the terms of the plea agreement or sentence, or commits a violation of ECRA or the Regulations or any order, license, or authorization issued thereunder, during the five-year payment probationary period under this Order, the suspension of the civil penalty may be modified or revoked by BIS and the remaining $7,000,000 may become due and owing immediately.

Second, pursuant to the Debt Collection Act of 1982, as amended (31 U.S.C. 3701–3720E (2012)), the civil penalty owed under this Order accrues interest as more fully described in the attached Notice, and if payment is not made by the due date specified herein, Baird will be assessed, in addition to the full amount of the civil penalty and interest, a penalty charge and an administrative charge, as more fully described in the attached Notice.

Third, for a period of five (5) years from the date of this Order, Eric Baird, with a last known address of 647 Norsota Way, Sarasota, FL 34242, and when acting for or on his behalf, his successors, assigns, representatives, agents, or employees (hereinafter collectively referred to as the ''Denied Person''), may not, directly or indirectly, participate in any way in any transaction involving any commodity, software or technology (hereinafter collectively referred to as ''item'') exported or to be exported from the United States that is subject to the Regulations, or in any other activity subject to the Regulations, including, but not limited to:

A. Applying for, obtaining, or using any license, license exception, or export control document;

B. Carrying on negotiations concerning, or ordering, buying, receiving, using, selling, delivering, storing, disposing of, forwarding, transporting, financing, or otherwise servicing in any way, any transaction involving any item exported or to be exported from the United States that is subject to the Regulations, or engaging in any other activity subject to the Regulations; or

C. Benefitting in any way from any transaction involving any item exported or to be exported from the United States that is subject to the Regulations, or from any other activity subject to the Regulations.

Fourth, no person may, directly or indirectly, do any of the following:

A. Export or reexport to or on behalf of the Denied Person any item subject to the Regulations;

B. Take any action that facilitates the acquisition or attempted acquisition by the Denied Person of the ownership, possession, or control of any item subject to the Regulations that has been or will be exported from the United States, including financing or other support activities related to a transaction whereby the Denied Person acquires or attempts to acquire such ownership, possession or control;

C. Take any action to acquire from or to facilitate the acquisition or attempted acquisition from the Denied Person of any item subject to the Regulations that has been exported from the United States;

D. Obtain from the Denied Person in the United States any item subject to the Regulations with knowledge or reason to know that the item will be, or is intended to be, exported from the United States; or

E. Engage in any transaction to service any item subject to the Regulations that has been or will be exported from the United States and which is owned, possessed or controlled by the Denied Person, or service any item, of whatever origin, that is owned, possessed or controlled by the Denied Person if such service involves the use of any item subject to the Regulations that has been or will be exported from the United States. For purposes of this paragraph, servicing means installation, maintenance, repair, modification or testing.

Fifth, after notice and opportunity for comment as provided in Section 766.23 of the Regulations, any person related to the Denied Person by ownership, control, position of responsibility, affiliation, or other connection in the conduct of trade or business may also be made subject to the provisions of this Order.

Sixth, the five-year denial period set forth above shall be active for a period of four (4) years from the date of this Order. As authorized by Section 766.18(c) of the Regulations, the remaining one (1) year of the denial period shall be suspended, and shall thereafter be waived five (5) years from the date of this Order, provided that Baird has made full and timely payment as set forth above, has otherwise complied with the provisions of the Settlement Agreement and this Order, has complied with the plea agreement and any sentence imposed upon or following the entry of his plea and conviction, and has committed no other violation of ECRA or the Regulations or any order, license, or authorization issued thereunder. If Baird does not make full and timely payment as set forth above or otherwise fails to comply with the Settlement Agreement or this Order, does not fully and timely comply with the plea agreement or sentence, or commits another violation of ECRA or the Regulations or any order, license, or authorization issued thereunder, the suspension of the remaining one year of the denial period may be modified or revoked by BIS. If Baird fails to comply with any of the above conditions after the four-year active portion of the denial period but before five years from the date of this Order, the full one year suspended portion of the denial order may be imposed from the date BIS determines such violation occurred, and any license issued pursuant to ECRA or the Regulations in which the Denied Person has an interest at that time will be revoked.

Seventh, Baird shall not take any action or make or permit to be made any public statement, directly or indirectly, denying the allegations in the Amended Charging Letter or this Order.

Eighth, the Amended Charging Letter, the Settlement Agreement, and this Order shall be made available to the public.

Ninth, this Order shall be served on Baird, and shall be published in the **Federal Register**.

This Order, which constitutes the final agency action in this matter, is effective immediately.

Issued on December 14, 2018.

Douglas Hassebrock,

Director, Office of Export Enforcement, performing the non-exclusive functions and duties of the Assistant Secretary of Commerce for Export Enforcement.

[FR Doc. 2018–27572 Filed 12–19–18; 8:45 am]

BILLING CODE P

[5] See note 1, *supra.*

DEPARTMENT OF COMMERCE

International Trade Administration

[A–201–845]

Agreement Suspending the Antidumping Duty Investigation on Sugar From Mexico (as Amended); Preliminary Results of 2017 Administrative Review

AGENCY: Enforcement & Compliance, International Trade Administration, Department of Commerce.

DATES: Applicable December 20, 2018.

SUMMARY: The Department of Commerce (Commerce) preliminarily determines that the respondents selected for individual examination, Ingenio El Higo S.A. de C.V., Ingenio Melchor Ocampo S.A. de C.V., and Zucarmex S.A. de C.V. (and its affiliates) (collectively, Grupo Zucarmex), and Ingenio San Miguel Del Naranjo S.A. de C.V (and its affiliates) (collectively, Grupo Beta San Miguel), are in compliance with the Agreement Suspending the Antidumping Duty Investigation on Sugar from Mexico (AD Agreement), as amended on June 30, 2017 (collectively, amended AD Agreement), for the period October 1, 2017, through November 30, 2017, and that the amended AD Agreement is meeting the statutory requirements under sections 734(c) and (d) of the Tariff Act of 1930, as amended. Interested parties are invited to comment on these preliminary results.

FOR FURTHER INFORMATION CONTACT: Sally C. Gannon or David Cordell, Enforcement & Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230, telephone: (202) 482–0162 or (202) 482–0408, respectively.

SUPPLEMENTARY INFORMATION:

Background

On December 19, 2014, Commerce signed an agreement under section 734(c) of the Tariff Act of 1930, as amended (the Act), with a representative of Mexican sugar producers/exporters accounting for substantially all imports of sugar from Mexico, suspending the antidumping duty (AD) investigation on sugar from Mexico.[1] On June 30, 2017, Commerce and a representative of Mexican sugar producers/exporters representing substantially all imports of sugar from Mexico signed an amendment to the AD Agreement.[2]

On December 29, 2017, the American Sugar Coalition and its Members [3] (petitioners) filed a request for an administrative review of the amended AD Agreement.[4] This review was initiated on February 23, 2018, for the December 1, 2016, through November 30, 2017,[5] period of review (POR), but Commerce amended the POR on April 19, 2018, to reflect the period from October 1, 2017 to November 30, 2017 (including sales prior to October 1, 2017 that resulted in such entries).[6] On May 23, 2018, Commerce selected mandatory respondents and issued its questionnaire to the four largest respondents in alphabetical order: Ingenio El Higo S.A. de C.V., Ingenio Melchor Ocampo S.A. de C.V, Ingenio San Miguel Del Naranjo S.A. de C.V, and Zucarmex S.A. de C.V.[7]

Scope of Review

Merchandise covered by this amended AD Agreement is typically imported under the following headings of the HTSUS: 1701.12.1000, 1701.12.5000, 1701.13.1000, 1701.13.5000, 1701.14.1000, 1701.14.5000, 1701.91.1000, 1701.91.3000, 1701.99.1010, 1701.99.1025, 1701.99.1050, 1701.99.5010, 1701.99.5025, 1701.99.5050, and 1702.90.4000. The tariff classification is provided for convenience and customs purposes; however, the written description of the scope of this amended AD Agreement is dispositive.[8]

Methodology and Preliminary Results

Commerce is conducting this review in accordance with section 751(a)(1)(C) of the Act, which specifies that Commerce shall ''review the current status of, and compliance with, any agreement by reason of which an investigation was suspended.'' In this case, Commerce and a representative of the Mexican sugar producers/exporters accounting for substantially all imports of sugar from Mexico signed the AD Agreement, which suspended the underlying antidumping duty investigation, on December 19, 2014. Further, on June 30, 2017, Commerce and a representative of the Mexican sugar producers/exporters accounting for substantially all imports of sugar from Mexico signed an amendment to the AD Agreement. Pursuant to the amended AD Agreement, the Mexican signatories agreed that the subject merchandise would be subject to minimum reference prices and that at least 85 percent of the dumping from the original investigation would be eliminated, as outlined in the amended AD Agreement.[9] The Mexican signatories also agreed to other conditions, including the reporting of the polarity testing of Other Sugar [10] and enhanced monitoring.[11]

After reviewing the information received from the respondent companies in their questionnaire and supplemental questionnaire responses, we preliminarily determine that the respondents have adhered to the terms of the amended AD Agreement and that the amended AD Agreement is functioning as intended. Further, we preliminarily determine that the amended AD Agreement is meeting the statutory requirements under sections 734(c) and (d) of the Act. For a full description of the methodology underlying our conclusions, see the Preliminary Decision Memorandum. Commerce notes that it is addressing one issue related to Grupo Zucarmex,

[1] *See Sugar from Mexico: Suspension of Antidumping Duty Investigation,* 79 FR 78039 (December 29, 2014).

[2] *See Sugar from Mexico: Amendment to the Agreement Suspending the Antidumping Duty Investigation,* 82 FR 31945 (July 11, 2017).

[3] The members of the American Sugar Coalition are as follows: American Sugar Cane League, American Sugarbeet Growers Association, American Sugar Refining, Inc., Florida Sugar Cane League, Rio Grande Valley Sugar Growers, Inc., Sugar Cane Growers Cooperative of Florida, and the United States Beet Sugar Association.

[4] *See* Letter from petitioners, entitled ''Sugar from Mexico: Request for Administrative Review'' (December 29, 2017).

[5] *See Initiation of Antidumping and Countervailing Duty Administrative Reviews,* 83 FR 8067 (February 23, 2018).

[6] *See* Memorandum to P. Lee Smith, entitled ''Administrative Review of the Agreement Suspending the Antidumping Duty Investigation on Sugar from Mexico, as Amended: Period of Review'' (April 19, 2018).

[7] *See* Memorandum to P. Lee Smith, entitled ''2017 Administrative Review of the Agreement Suspending the Antidumping Duty Investigation on Sugar from Mexico As Amended: Respondent Selection'' and ''Questionnaire Regarding the Agreement Suspending the Antidumping Duty Investigation on Sugar from Mexico for the October 1, 2017 through November 30, 2017 Period of Review,'' both dated May 23, 2018.

[8] For a complete description of the Scope of the Order, *see* Memorandum to Gary Taverman, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, performing the non-exclusive functions and duties of the Assistant Secretary for Enforcement and Compliance, from P. Lee Smith, Deputy Assistant Secretary for Policy and Negotiations, ''Decision Memorandum for Preliminary Results of Administrative Review of the Agreement Suspending the Antidumping Duty Investigation on Sugar from Mexico,'' dated concurrently with, and hereby adopted by, this notice (Preliminary Decision Memorandum).

[9] *See AD Agreement,* 79 FR 78041, 78042, and 78044, at Price Undertaking. *See also AD Amendment,* 82 FR 31945, 31946.

[10] *See AD Agreement,* 79 FR 78040, 78046–78047 at Definitions and Export Limits. *See also AD Amendment,* 82 FR 3193, 31944.

[11] *See AD Agreement,* 79 FR 78040, 78048 at Export Limits and Implementation. *See also AD Amendment,* 82 FR 31944.

which involves discussion of business proprietary information, in a separate memorandum.[12]

Public Comment

Pursuant to 19 CFR 351.309(c)(1)(ii), interested parties may submit case briefs not later than 30 days after the date of publication of this notice. Rebuttal briefs, limited to issues raised in the case briefs, may be filed not later than five days after the date for filing case briefs in accordance with 19 CFR 351.309(d)(1). Parties who submit case briefs or rebuttal briefs in this proceeding are encouraged to provide: (1) A statement of the issue; (2) a brief summary of the argument; and (3) a table of authorities.[13]

Pursuant to 19 CFR 351.310(c), interested parties who wish to request a hearing, or to participate if one is requested, must submit a written request filed electronically via ACCESS. An electronically filed document must be received successfully in its entirety by Commerce's electronic records system ACCESS, by 5:00 p.m. Eastern Standard Time within 30 days after the date of publication of this notice. Requests should contain: (1) The party's name, address and telephone number; (2) the number of participants; and (3) a list of issues to be discussed. Issues raised in the hearing will be limited to those raised in the respective case briefs. Commerce intends to issue the final results of this administrative review, including the results of its analysis of the issues raised in any written briefs, not later than 120 days after the date of publication of this notice, pursuant to section 751(a)(3)(A) of the Act.

We are issuing and publishing these results in accordance with sections 751(a)(1) and 777(i)(1) of the Act.

Dated: December 14, 2018.

Gary Taverman,

Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, performing the non-exclusive functions and duties of the Assistant Secretary for Enforcement and Compliance.

[FR Doc. 2018–27535 Filed 12–19–18; 8:45 am]

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[12] *See* Memorandum to Gary Taverman, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, performing the non-exclusive functions and duties of the Assistant Secretary for Enforcement and Compliance, from P. Lee Smith, Deputy Assistant Secretary for Policy and Negotiations, ''Memorandum with Respect to Sales Observations reported by Grupo Zucarmex'' (Zucarmex Memorandum) dated December 14, 2018.

[13] *See* 19 CFR 351.309(c)(2) and (d)(2).

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–979, C–570–980]

Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the People's Republic of China: Final Results of Changed Circumstances Reviews, and Revocation of the Antidumping and Countervailing Duty Orders, in Part

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (Commerce) is revoking, in part, the antidumping duty (AD) and countervailing duty (CVD) orders on crystalline silicon photovoltaic cells, whether or not assembled into modules, from the People's Republic of China (China) (*Orders*) with respect to certain off-grid solar panels based on a lack of interest in the relief provided by the *Orders* with respect to those products.

DATES: Applicable December 20, 2018.

FOR FURTHER INFORMATION CONTACT: Eli Lovely, AD/CVD Operations, Office IV, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–1593.

SUPPLEMENTARY INFORMATION

Background

On December 7, 2012, Commerce published AD and CVD orders on certain crystalline silicon photovoltaic cells, whether or not assembled into modules, from China.[1] On April 17, 2018, Goal Zero, LLC (Goal Zero), an importer of the subject merchandise, requested changed circumstances reviews (CCRs) and revocation, in part, of the *Orders,* pursuant to section 751(b)(1) of the Tariff Act of 1930, as amended (the Act) and 19 CFR 351.216(b), with respect to certain off-grid solar panels.[2]

On July 20, 2018, Commerce published the *Initiation Notice* for the requested CCRs in the **Federal Register**.[3] On August 20, 2018, Commerce published the preliminary results of these CCRs, in which it found that producers accounting for substantially all of the production of the domestic like product to which the *Orders* pertain lack interest in the relief afforded by the *Orders* with respect to certain off-grid solar panels.[4]

On September 4, 2018, Goal Zero and the petitioner[5] requested that partial revocation of the *Orders* be applied retroactively starting January 1, 2015 for purposes of the *CVD Order,* and December 1, 2015 for purposes of the *AD Order.*[6]

Final Results of Changed Circumstances Reviews, and Revocation of the *Orders,* In Part

Because no party submitted comments opposing the preliminary results of these CCRs, and the record contains no other information or evidence that calls into question the preliminary results, Commerce determines, pursuant to sections 751(d)(1) and 782(h) of the Act, and 19 CFR 351.222(g), that there are changed circumstances that warrant revocation of the *Orders,* in part. Specifically, because the producers accounting for substantially all of the production of the domestic like product to which the *Orders* pertain lack interest in the relief provided by the *Orders* with respect to certain off-grid solar panels as described below, we are revoking the *Orders,* in part, with respect to the following:

(1) Off grid CSPV panels in rigid form with a glass cover, with the following characteristics:

(A) A total power output of 100 watts or less per panel;

(B) a maximum surface area of 8,000 cm^2 per panel;

(C) do not include a built-in inverter;

[1] *See Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, from the People's Republic of China: Amended Final Determination of Sales at Less Than Fair Value, and Antidumping Duty Order,* 77 FR 73018 (December 7, 2012) (*AD Order*) and *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, from the People's Republic of China: Countervailing Duty Order,* 77 FR 73017 (December 7, 2012) (*CVD Order*) (collectively, *Orders*).

[2] *See* Goal Zero's Letter, ''Goal Zero LLC's Request for a Changed Circumstances Review,'' (Goal Zero's Request) dated April 17, 2018.

[3] *See Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People's Republic of China: Notice of Initiation of Changed Circumstances Reviews, and Consideration of Revocation of the Antidumping and Countervailing Duty Orders in Part,* 83 FR 34542 (July 20, 2018) (*Initiation Notice*).

[4] *See Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the People's Republic of China: Preliminary Results of Changed Circumstances Reviews, and Consideration of Revocation of the Antidumping and Countervailing Duty Orders, in Part,* 83 FR 42112, dated August 20, 2018.

[5] The petitioner is SolarWorld Americas, Inc.

[6] *See* Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the People's Republic of China; Goal Zero LLC's Comments on the Preliminary Results of the Changed Circumstances Review, dated September 4, 2018; *see also* SolarWorld's submission: ''Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, from the People's Republic of China: Comments on Preliminary Results of the Goal Zero LLC Changed Circumstances Reviews,'' dated September 4, 2018.

(D) must include a permanently connected wire that terminates in either an 8mm male barrel connector, or a two-port rectangular connector with two pins in square housings of different colors;

(E) must include visible parallel grid collector metallic wire lines every 1–4 millimeters across each solar cell; and

(F) must be in individual retail packaging (for purposes of this provision, retail packaging typically includes graphics, the product name, its description and/or features, and foam for transport); and

(2) Off grid CSPV panels without a glass cover, with the following characteristics:

(A) A total power output of 100 watts or less per panel;

(B) a maximum surface area of 8,000 cm^2 per panel;

(C) do not include a built-in inverter;

(D) must include visible parallel grid collector metallic wire lines every 1–4 millimeters across each solar cell; and

(E) each panel is

1. permanently integrated into a consumer good;

2. encased in a laminated material without stitching, or

3. has all of the following characteristics: (i) The panel is encased in sewn fabric with visible stitching, (ii) includes a mesh zippered storage pocket, and (iii) includes a permanently attached wire that terminates in a female USB–A connector.[7]

The scope description below includes this exclusion language.

Scope of the Antidumping and Countervailing Duty Orders on Certain Crystalline Silicon Photovoltaic Cells From the People's Republic of China

The merchandise covered by the *Orders* is crystalline silicon photovoltaic cells, and modules, laminates, and panels, consisting of crystalline silicon photovoltaic cells, whether or not partially or fully assembled into other products, including, but not limited to, modules, laminates, panels and building integrated materials.

The *Orders* cover crystalline silicon photovoltaic cells of thickness equal to or greater than 20 micrometers, having a p/n junction formed by any means, whether or not the cell has undergone other processing, including, but not limited to, cleaning, etching, coating, and/or addition of materials (including, but not limited to, metallization and conductor patterns) to collect and forward the electricity that is generated by the cell.

Merchandise under consideration may be described at the time of importation as parts for final finished products that are assembled after importation, including, but not limited to, modules, laminates, panels, building-integrated modules, building-integrated panels, or other finished goods kits. Such parts that otherwise meet the definition of merchandise under consideration are included in the scope of the *Orders.*

Excluded from the scope of the *Orders* are thin film photovoltaic products produced from amorphous silicon (a-Si), cadmium telluride (CdTe), or copper indium gallium selenide (CIGS).

Also excluded from the scope of the *Orders* are crystalline silicon photovoltaic cells, not exceeding 10,000mm^2 in surface area, that are permanently integrated into a consumer good whose function is other than power generation and that consumes the electricity generated by the integrated crystalline silicon photovoltaic cell. Where more than one cell is permanently integrated into a consumer good, the surface area for purposes of this exclusion shall be the total combined surface area of all cells that are integrated into the consumer good.

Additionally, excluded from the scope of the *Orders* are panels with surface area from 3,450 mm^2 to 33,782 mm^2 with one black wire and one red wire (each of type 22 AWG or 24 AWG not more than 206 mm in length when measured from panel extrusion), and not exceeding 2.9 volts, 1.1 amps, and 3.19 watts. For the purposes of this exclusion, no panel shall contain an internal battery or external computer peripheral ports.

Also excluded from the scope of the *Orders* are:

(1) Off grid CSPV panels in rigid form with a glass cover, with the following characteristics:

(A) A total power output of 100 watts or less per panel;

(B) a maximum surface area of 8,000 cm^2 per panel;

(C) do not include a built-in inverter;

(D) must include a permanently connected wire that terminates in either an 8mm male barrel connector, or a two-port rectangular connector with two pins in square housings of different colors;

(E) must include visible parallel grid collector metallic wire lines every 1–4 millimeters across each solar cell; and

(F) must be in individual retail packaging (for purposes of this provision, retail packaging typically includes graphics, the product name, its description and/or features, and foam for transport); and

(2) Off grid CSPV panels without a glass cover, with the following characteristics:

(A) A total power output of 100 watts or less per panel;

(B) a maximum surface area of 8,000 cm^2 per panel;

(C) do not include a built-in inverter;

(D) must include visible parallel grid collector metallic wire lines every 1–4 millimeters across each solar cell; and

(E) each panel is

1. permanently integrated into a consumer good;

2. encased in a laminated material without stitching, or

3. has all of the following characteristics: (i) the panel is encased in sewn fabric with visible stitching, (ii) includes a mesh zippered storage pocket, and (iii) includes a permanently attached wire that terminates in a female USB–A connector.[8]

Modules, laminates, and panels produced in a third-country from cells produced in the PRC are covered by the *Orders;* however, modules, laminates, and panels produced in the PRC from cells produced in a third-country are not covered by the *Orders.*

Merchandise covered by the *Orders* is currently classified in the Harmonized Tariff System of the United States (HTSUS) under subheadings 8501.61.0000, 8507.20.80, 8541.40.6020, 8541.40.6030, and 8501.31.8000. These HTSUS subheadings are provided for convenience and customs purposes; the written description of the scope of the *Orders* is dispositive.[9]

Application of the Final Results of These Reviews

Goal Zero and the petitioner have requested retroactive application of the final results of these reviews starting January 1, 2015 for purposes of the *CVD Order,* and December 1, 2015 for purposes of the *AD Order.*[10] Section 751(d)(3) of the Act provides that {a} determination under this section to revoke an order . . . shall apply with respect to unliquidated entries of the subject merchandise which are entered, or withdrawn from warehouse, for consumption on or after the date determined by the administering

[7] *See* Goal Zero's Letter, ''Goal Zero LLC's Comments Regarding the Proposed Scope of the Changed Circumstances Reviews,'' dated July 9, 2018 at 10–11.

[8] *See* Goal Zero's Letter, ''Goal Zero LLC's Comments Regarding the Proposed Scope of the Changed Circumstances Reviews,'' dated July 9, 2018 at 10–11.

[9] *See AD Order,* 77 FR at 73018–73019; *CVD Order,* 77 FR at 73017 (footnote omitted); *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the People's Republic of China: Final Results of Changed Circumstances Reviews, and Revocation of Antidumping and Countervailing Duty Orders, in Part,* 83 FR 2618 (excluding certain panels with surface area from 3,450 mm^2 to 33,782 mm^2).

[10] *See* Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the People's Republic of China; Goal Zero LLC's Comments on the Preliminary Results of the Changed Circumstances Review, dated September 4, 2018 (Goal Zero Comments); *see also* SolarWorld's submission: ''Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, from the People's Republic of China: Comments on Preliminary Results of the Goal Zero LLC Changed Circumstances Reviews,'' dated September 4, 2018.

authority.'' Consistently, Commerce's general practice is to instruct U.S. Customs and Border Protection (CBP) to liquidate without regard to antidumping and countervailing duties, and to refund any estimated antidumping and countervailing duties, on all unliquidated entries of the merchandise covered by a revocation that are not covered by the final results of an administrative review or automatic liquidation.[11]

Commerce has exercised its discretion and deviated from this general practice if the particular facts of a case have implications for the effective date of the partial revocation selected by Commerce.[12] Specifically, when selecting the effective date for partial revocation, Commerce has considered factors such as the effective date proposed by the petitioner (and/or the effective date agreed to by all parties),[13] the existence of unliquidated entries dating back to the requested effective date,[14] whether an interested party requested the effective date of the revocation,[15] and whether the requested effective date creates potential administrability issues (*e.g.,* the products covered by the partial revocation are in the sales database used in the dumping margin calculations for a completed administrative review with a period of review (POR) that overlaps with the date requested).[16]

On September 4, 2018, Goal Zero requested retroactive application of the final results of these reviews starting January 1, 2015 for purposes of the *CVD Order,* and December 1, 2015 for purposes of the *AD Order,* and the petitioner agreed to Goal Zero's request.[17] Goal Zero claims that there are unliquidated entries corresponding to the 2015–2016 reviews.[18] Goal Zero notes that the final results for the administrative review of the CVD *Order* covering the review period January 1 through December 31, 2015, and the final results for the administrative review of the AD *Order* covering the period December 1, 2015 through November 30, 2016, are being challenged by the petitioner before the Court of International Trade (CIT).[19] However, entries of subject merchandise overlapping with the AD administrative review covering the period December 1, 2015 through November 30, 2016, and which were not liquidated pursuant to automatic liquidation instructions,[20] are either encompassed by Commerce's August 21, 2018 liquidation instructions to CBP or enjoined from liquidation by statutory injunctions entered by the CIT.[21] Similarly, entries of subject merchandise overlapping with the CVD administrative review covering the period January 1, 2015 through December 31, 2015, and which were not liquidated pursuant to automatic liquidation instructions,[22] are enjoined from liquidation by statutory injunctions entered by the CIT.[23] Entries of merchandise enjoined from liquidation by the court may not be subject to Commerce's partial revocation of the order and subsequent instructions to CBP, and because their liquidation is enjoined, they are set to be liquidated in accordance with the final court decision.[24]

We find that legal and administrability issues are presented by using the effective dates suggested by the interested parties. Accordingly, we are exercising our discretion, based on the particular circumstances in these CCRs, to make the effective dates January 1, 2016, for purposes of the *CVD Order* and December 1, 2016, for purposes of the *AD Order.*

Instructions to U.S. Customs and Border Protection

Because we determine that there are changed circumstances that warrant the revocation of the *Orders,* in part, we will instruct CBP to liquidate without regard to antidumping and countervailing duties, and to refund any estimated antidumping and countervailing duties on, all unliquidated entries of the merchandise covered by this partial revocation on or after January 1, 2016, for purposes of the CVD *Order,* and on or after December 1, 2016, for purposes of the AD *Order.*

Notification to Interested Parties

This notice serves as a reminder to parties subject to an administrative protective order (APO) of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3). Timely written notification of the return/destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply

[11] *See e.g., Certain Pasta From Italy: Final Results of Countervailing Duty Changed Circumstances Review and Revocation, In Part,* 76 FR 27634 (May 12, 2011); *Stainless Steel Bar From the United Kingdom: Notice of Final Results of Changed Circumstances Review and Revocation of Order, in Part,* 72 FR 65706 (November 23, 2007); *Notice of Final Results of Antidumping Duty Changed Circumstances Review and Revocation of Order In Part: Certain Corrosion-Resistant Carbon Steel Flat Products from Germany,* 71 FR 66163 (November 13, 2006); *Notice of Final Results of Antidumping Duty Changed Circumstances Reviews and Revocation of Orders in Part: Certain Corrosion-Resistant Carbon Steel Flat Products From Canada and Germany,* 71 FR 14498 (March 22, 2006); *Notice of Final Results of Antidumping Duty Changed Circumstances Review, and Determination to Revoke Order in Part: Certain Cased Pencils from the People's Republic of China,* 68 FR 62428 (November 4, 2003).

[12] *See* section 751(d)(3) of the Act; *Itochu Building Products* v. *United States,* Court No. 11–00208, Slip Op. 14–37 (CIT 2014) *(Itochu Bldg. Prod)* (CIT April 8, 2014) at 12 (''The statutory provision, as discussed above, provides Commerce with discretion in the selection of the effective date for a partial revocation following a changed circumstances review, but that discretion may not be exercised arbitrarily so as to decide the question presented without considering the relevant and competing considerations.'').

[13] *See, e.g., Carbon and Certain Alloy Steel Wire Rod from Brazil, Canada, Indonesia, Mexico, Moldova, Trinidad and Tobago, and Ukraine: Final Results of Changed Circumstances Review,* 68 FR 64079 (November 12, 2003); *Stainless Steel Hollow Products from Sweden; Termination of Antidumping Duty Administrative Reviews, Final Results of Changed Circumstances Antidumping Duty Administrative Review, and Revocation In Part of Antidumping Duty Order,* 60 FR 42529 (August 16, 1995).

[14] *See Steel Wire Garment Hangers From the People's Republic of China: Final Results of Changed Circumstances Review, and Revocation in Part of Antidumping Duty Order (Steel Hangers),* 74 FR 50956 (October 2, 2009); *Notice of Final Results of Antidumping Duty Changed Circumstances Review, and Determination To Revoke Order in Part: Certain Cased Pencils from the People's Republic of China (Cased Pencils),* 71 FR 13352 (March 15, 2006); *Stainless Steel Sheet and Strip in Coils from Japan: Final Results of Changed Circumstance Antidumping Duty Review, and Determination To Revoke Order in Part (Stainless Sheet and Strip),* 65 FR 77578 (December 12, 2000).

[15] *See Large Newspaper Printing Presses and Components Thereof, Whether Assembled or Unassembled, from Japan: Final Results of Changed Circumstances Antidumping Duty Administrative Review and Intent To Revoke Antidumping Duty Order, In Part,* 64 FR 72315 (December 27, 1999).

[16] *See Itochu Bldg. Prod.,* Slip Op. 14–37 at 3.

[17] *See* Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the People's Republic of China; Goal Zero LLC's Comments on the Preliminary Results of the Changed Circumstances Review, dated September 4, 2018; see also SolarWorld's submission: ''Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, from the People's Republic of China: Comments on Preliminary Results of the Goal Zero LLC Changed Circumstances Reviews'', dated September 4, 2018.

[18] *See* Goal Zero Comments at 11.

[19] *Id.* at 12.

[20] *See* Message Numbers 7067302 and 7065306.

[21] *See* Message Number 8233301 instructing CBP to assess an antidumping liability for various exporters of subject merchandise, including ERA Solar Co., Ltd., for the period December 1, 2015 through November 30, 2016. *See also* Message Number 8269301 instructing CBP with regard to the statutory injunction issued in connection with court number 18–00189 and Message Numbers 8240315 and 8240316 instructing CBP with regard to the statutory injunction issued in connection with court number 18–00176.

[22] *See* Message Number 7058306.

[23] *See* Message Numbers 8269331, 8264303, and 8243306 instructing CBP with regard to the statutory injunctions issued in connection with court numbers 18–00184, 18–00185, 18–00186. On August 15, 2018, Commerce instructed CBP to liquidate modules produced in third countries from crystalline silicon photovoltaic cells produced in China. *See* Message Number 8227315.

[24] *See* sections 516A(c)(2) and (e) of the Act.

with the regulations and terms of an APO is a sanctionable violation.

We are issuing and publishing these final results and revocation, in part, and notice in accordance with sections 751(b) and 777(i) of the Act and 19 CFR 351.216, 19 CFR 351.221(c)(3), and 19 CFR 351.222.

Dated: December 13, 2018.

Christian Marsh,

Deputy Assistant Secretary for Enforcement and Compliance.

[FR Doc. 2018–27533 Filed 12–19–18; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[C–201–846]

Agreement Suspending the Countervailing Duty Investigation on Sugar From Mexico (as Amended); Preliminary Results of 2017 Administrative Review

AGENCY: Enforcement & Compliance, International Trade Administration, Department of Commerce.

DATES: Applicable December 20, 2018.

SUMMARY: The Department of Commerce (Commerce) preliminarily determines that the Government of Mexico (GOM) and selected respondents Ingenio El Higo S.A. de C.V., Central El Potrero S.A. de C.V., Ingenio Melchor Ocampo S.A. de C.V., and Zucarmex S.A. de C.V. (and their affiliates) are in compliance with the Agreement Suspending the Countervailing Duty Investigation of Sugar from Mexico (CVD Agreement), as amended on June 30, 2017 (collectively, amended CVD Agreement), for the period October 1, 2017, through December 31, 2017. Commerce also preliminary determines that the amended CVD Agreement is meeting the statutory requirements under sections 704(c) and (d) of the Tariff Act of 1930, as amended. Interested parties are invited to comment on these preliminary results.

FOR FURTHER INFORMATION CONTACT: Sally C. Gannon or David Cordell, Enforcement & Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230, telephone: (202) 482–0162 or (202) 482–0408, respectively.

SUPPLEMENTARY INFORMATION:

Background

On December 19, 2014, Commerce signed an agreement under section 704(c) of the Tariff Act of 1930, as amended (the Act), with the GOM, suspending the CVD investigation on sugar from Mexico.[1] On June 30, 2017, Commerce and the GOM signed an amendment to the CVD Agreement.[2]

On December 29, 2017, the American Sugar Coalition and its Members [3] (petitioners) filed a request for an administrative review of the amended CVD Agreement.[4] The review was initiated on February 13, 2018, covering the January 1, 2017 through December 31, 2017,[5] period of review (POR). Commerce amended the POR on April 19, 2018, to reflect the period from October 1, 2017 to December 31, 2017 (including sales prior to October 1, 2017 that resulted in entries during the fourth quarter of 2017).[6] On May 23, 2018, Commerce selected the four largest producers/exporters by volume as mandatory respondents,[7] and issued its questionnaire to the GOM, the signatory to the CVD Agreement, and asked the GOM to send full questionnaires at attachment 1 to the four selected companies (and their affiliates). These were: Central El Potrero S.A. de C.V., Ingenio El Higo S.A. de C.V., Ingenio Melchor Ocampo S.A. de C.V, and Zucarmex S.A. de C.V. Commerce also asked that the GOM respond to its own questionnaire.

Scope of Review

Merchandise covered by this amended CVD Agreement is typically imported under the following headings of the HTSUS: 1701.12.1000, 1701.12.5000, 1701.13.1000, 1701.13.5000, 1701.14.1000, 1701.14.5000, 1701.91.1000, 1701.91.3000, 1701.99.1010, 1701.99.1025, 1701.99.1050, 1701.99.5010, 1701.99.5025, 1701.99.5050, and 1702.90.4000. The tariff classification is provided for convenience and customs purposes; however, the written description of the scope of this amended CVD Agreement is dispositive.[8]

Methodology and Preliminary Results

Commerce is conducting this review in accordance with section 751(a)(1)(C) of the Act. After reviewing the information received to date from the respondent companies and the GOM in their questionnaire and supplemental questionnaire responses, we preliminarily find that the information indicates that the GOM has adhered to the terms of the amended CVD Agreement and that the amended CVD Agreement is functioning as intended. Further, we preliminarily determine that the amended CVD Agreement is meeting the statutory requirements under sections 704(c) and (d) of the Act. For a full description of the methodology underlying our conclusions, see the Preliminary Decision Memorandum.

Public Comment

Pursuant to 19 CFR 351.309(c)(1)(ii), interested parties may submit case briefs not later than 30 days after the date of publication of this notice. Rebuttal briefs, limited to issues raised in the case briefs, may be filed not later than five days after the date for filing case briefs in accordance with 19 CFR 351.309(d)(1). Parties who submit case briefs or rebuttal briefs in this proceeding are encouraged to provide: (1) A statement of the issue; (2) a brief summary of the argument; and (3) a table of authorities. *See* 19 CFR 351.309(c)(2) and (d)(2).

Pursuant to 19 CFR 351.310(c), interested parties who wish to request a hearing, or to participate if one is requested, must submit a written request to the Assistant Secretary for Enforcement and Compliance filed electronically via ACCESS. An

[1] *See Agreement Suspending the Countervailing Duty Investigation of Sugar from Mexico,* 79 FR 78044 (December 29, 2014) (*CVD Agreement*).

[2] *See Sugar from Mexico: Amendment to the Agreement Suspending the Countervailing Duty Investigation,* 82 FR 31942 (July 11, 2017) (*CVD Amendment*).

[3] The members of the American Sugar Coalition are as follows: American Sugar Cane League, American Sugarbeet Growers Association, American Sugar Refining, Inc., Florida Sugar Cane League, Rio Grande Valley Sugar Growers, Inc., Sugar Cane Growers Cooperative of Florida, and the United States Beet Sugar Association.

[4] *See* Letter from petitioners, entitled ''Sugar from Mexico: Request for Administrative Review'' (December 29, 2017).

[5] The original initiation notice had incorrectly stated that the POR ended on December 30, 2017, and this was corrected in the initiation notice published on March 16, 2018.

[6] *See* Memorandum to P. Lee Smith, entitled ''Administrative Review of the Agreement Suspending the Countervailing Duty Investigation on Sugar from Mexico, as Amended: Period of Review'' (April 19, 2018).

[7] *See* Memorandum to P. Lee Smith, entitled ''2017 Administrative Review of the Agreement Suspending the Countervailing Duty Investigation on Sugar from Mexico As Amended: Respondent Selection'' and ''Questionnaire Regarding the Agreement Suspending the Countervailing Duty Investigation on Sugar from Mexico for the October 1, 2017 through December 31, 2017 Period of Review'', both dated May 23, 2018.

[8] For a complete description of the Scope of the Order, *see* Memorandum to Gary Taverman, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, performing the non-exclusive functions and duties of the Assistant Secretary for Enforcement and Compliance, from P. Lee Smith, Deputy Assistant Secretary for Policy and Negotiations, ''Decision Memorandum for Preliminary Results of Administrative Review of the Agreement Suspending the Antidumping Duty Investigation on Sugar from Mexico,'' dated concurrently with this notice (Preliminary Decision Memorandum).

electronically filed document must be received successfully in its entirety by Commerce's electronic records system, ACCESS, by 5:00 p.m. Eastern Standard Time within 30 days after the date of publication of this notice. Requests should contain: (1) The party's name, address and telephone number; (2) the number of participants; and (3) a list of issues to be discussed. Issues raised in the hearing will be limited to those raised in the respective case briefs. Commerce intends to issue the final results of this administrative review, including the results of its analysis of the issues raised in any written briefs, not later than 120 days after the date of publication of this notice, pursuant to section 751(a)(3)(A) of the Act.

We are issuing and publishing these results in accordance with sections 751(a)(1) and 777(i)(1) of the Act.

Dated: December 14, 2018.

Gary Taverman,

Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, performing the non-exclusive functions and duties of the Assistant Secretary for Enforcement and Compliance.

[FR Doc. 2018–27537 Filed 12–19–18; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–580–836]

Certain Cut-to-Length Carbon-Quality Steel Plate Products From the Republic of Korea: Preliminary Results of Antidumping Duty Administrative Review; 2017–2018

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (Commerce) preliminarily determines that producers and/or exporters subject to this administrative review made sales of subject merchandise at less than normal value. Interested parties are invited to comment on these preliminary results of review.

DATES: Applicable December 20, 2018.

FOR FURTHER INFORMATION CONTACT: Yang Jin Chun or Thomas Schauer, AD/CVD Operations, Office I, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone (202) 482–5760 or (202) 482–0410, respectively.

SUPPLEMENTARY INFORMATION:

Background

On April 16, 2018, Commerce initiated the administrative review of the antidumping duty order on certain cut-to-length carbon-quality steel plate products (CTL plate) from the Republic of Korea (Korea).[1] The period of review is February 1, 2017, through January 31, 2018.

Scope of the Order

The products covered by the antidumping duty order are certain CTL plate. Imports of CTL plate are currently classified in the Harmonized Tariff Schedule of the United States (HTSUS) under subheadings 7208.40.3030, 7208.40.3060, 7208.51.0030, 7208.51.0045, 7208.51.0060, 7208.52.0000, 7208.53.0000, 7208.90.0000, 7210.70.3000, 7210.90.9000, 7211.13.0000, 7211.14.0030, 7211.14.0045, 7211.90.0000, 7212.40.1000, 7212.40.5000, 7212.50.0000, 7225.40.3050, 7225.40.7000, 7225.50.6000, 7225.99.0090, 7226.91.5000, 7226.91.7000, 7226.91.8000, and 7226.99.0000. While the HTSUS subheadings are provided for convenience and customs purposes, the written description is dispositive. A full description of the scope of the order is contained in the Preliminary Decision Memorandum.[2]

Methodology

Commerce is conducting this review in accordance with section 751 of the Tariff Act of 1930, as amended (the Act). Export price and constructed export price are calculated in accordance with section 772 of the Act. Normal value is calculated in accordance with section 773 of the Act.

For a full description of the methodology underlying our conclusions, *see* the Preliminary Decision Memorandum. A list of the topics included in the Preliminary Decision Memorandum is included in the Appendix to this notice. The Preliminary Decision Memorandum is a public document and is made available to the public *via* Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *http://access.trade.gov* and to all parties in Commerce's Central Records Unit, located at room B8024 of the main Commerce building. In addition, a complete version of the Preliminary Decision Memorandum can be found at *http://enforcement.trade.gov/frn/index.html.*

Adverse Facts Available

Pursuant to section 776(a) of the Act, Commerce is preliminarily relying upon facts otherwise available to calculate certain expenses with respect to Hyundai Steel in this review because Hyundai Steel withheld necessary information that was requested by Commerce and failed to provide verifiable information. Further, Commerce preliminarily determines that Hyundai Steel failed to cooperate by not acting to the best of its ability to comply with requests for information and, thus, Commerce is applying adverse facts available (AFA) to Hyundai Steel, in accordance with section 776(b) of the Act. For a full description of the methodology underlying our conclusions regarding the application of AFA, *see* the Preliminary Decision Memorandum.

Preliminary Results of the Administrative Review

We preliminarily determine that the following weighted-average dumping margins exist for the respondents for the period February 1, 2017, through January 31, 2018.

Producer/exporter	Weighted-average dumping margin (percent)
Dongkuk Steel Mill Co., Ltd ..	1.43
Hyundai Steel Company	4.19

Disclosure and Public Comment

We intend to disclose the calculations performed for these preliminary results to the parties within five days after public announcement of the preliminary results in accordance with 19 CFR 351.224(b). Pursuant to 19 CFR 351.309(c), interested parties may submit case briefs not later than 30 days after the date of publication of this notice. Rebuttal briefs, limited to issues raised in the case briefs, may be filed not later than five days after the date for filing case briefs.[3] Parties who submit case briefs or rebuttal briefs in this proceeding are encouraged to submit with each argument: (1) A statement of

[1] *See Initiation of Antidumping and Countervailing Duty Administrative Reviews,* 83 FR 16298, 16304 (April 16, 2018).

[2] *See* the Memorandum, ''Certain Cut-to-Length Carbon-Quality Steel Plate Products from the Republic of Korea: Decision Memorandum for Preliminary Results of Antidumping Duty Administrative Review; 2017–2018,'' dated concurrently with and hereby adopted by this notice (Preliminary Decision Memorandum).

[3] *See* 19 CFR 351.309(d).

the issue, (2) a brief summary of the argument, and (3) a table of authorities.[4]

Pursuant to 19 CFR 351.310(c), interested parties who wish to request a hearing, must submit a written request to the Assistant Secretary for Enforcement and Compliance, filed electronically *via* ACCESS. An electronically filed document must be received successfully in its entirety by Commerce's electronic records system, ACCESS, by 5:00 p.m. Eastern Time within 30 days after the date of publication of this notice.[5] Requests should contain: (1) The party's name, address and telephone number; (2) the number of participants; and (3) a list of issues to be discussed. Issues raised in the hearing will be limited to those raised in the respective case briefs. Commerce intends to issue the final results of this administrative review, including the results of its analysis of the issues raised in any written briefs, not later than 120 days after the date of publication of this notice, pursuant to section 751(a)(3)(A) of the Act.

Assessment Rates

If a respondent's weighted-average dumping margin is above *de minimis* in the final results of this review, we will calculate an importer-specific assessment rate based on the ratio of the total amount of dumping calculated for each importer's examined sales and the total entered value of the sales in accordance with 19 CFR 351.212(b)(1).[6] If a respondent's weighted-average dumping margin or an importer-specific assessment rate is zero or *de minimis* in the final results of review, we will instruct U.S. Customs and Border Protection (CBP) to liquidate the appropriate entries without regard to antidumping duties in accordance with the *Final Modification for Reviews*.[7] The final results of this administrative review shall be the basis for the assessment of antidumping duties on entries of merchandise under review and for future deposits of estimated duties, where applicable.

For entries of subject merchandise during the period of review produced by Dongkuk Steel Mill Co., Ltd. or Hyundai Steel Company for which they did not know their merchandise was destined for the United States, we will instruct CBP to liquidate unreviewed entries at the all-others rate if there is no rate for the intermediate company(ies) involved in the transaction.

We intend to issue liquidation instructions to CBP 15 days after publication of the final results of this review.

Cash Deposit Requirements

The following cash deposit requirements for estimated antidumping duties will be effective upon publication of the notice of final results of this review for all shipments of CTL plate from Korea entered, or withdrawn from warehouse, for consumption on or after the date of publication as provided by section 751(a)(2) of the Act: (1) The cash deposit rate for companies subject to this review will be equal to the weighted-average dumping margins established in the final results of the review; (2) for merchandise exported by companies not covered in this review but covered in a prior segment of this proceeding, the cash deposit rate will continue to be the company-specific rate published for the most recent period; (3) if the exporter is not a firm covered in this review, a prior review, or the original investigation but the producer is, the cash deposit rate will be the rate established for the most recently completed segment for the producer of the merchandise; (4) the cash deposit rate for all other producers or exporters will continue to be 0.98 percent,[8] the all-others rate established in the less-than-fair-value investigation, adjusted for the export-subsidy rate in the companion countervailing duty investigation.

These cash deposit requirements, when imposed, shall remain in effect until further notice.

Notification to Importers

This notice serves as a preliminary reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this period of review. Failure to comply with this requirement could result in Commerce's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

Notification to Interested Parties

Commerce is issuing and publishing these results in accordance with sections 751(a)(1) and 777(i) of the Act and 19 CFR 351.221(b)(4).

Dated: December 14, 2018.

Gary Taverman,

Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, performing the non-exclusive functions and duties of the Assistant Secretary for Enforcement and Compliance.

Appendix

List of Topics Discussed in the Preliminary Decision Memorandum

I. Summary
II. Background
III. Scope of the Order
IV. Discussion of the Methodology
  A. Comparisons to Normal Value
  1. Determination of Comparison Method
  2. Results of the Differential Pricing Analysis
  B. Product Comparisons
  C. Date of Sale
  D. Level of Trade/CEP Offset
  E. Affiliated Service Providers
  F. Export Price and Constructed Export Price
  1. Dongkuk
  2. Hyundai Steel
  G. Normal Value
  1. Overrun Sales
  2. Selection of Comparison Market
  3. Affiliated Parties
  4. Affiliated Party Transactions and Arm's-Length Test
  5. Cost of Production
  6. Calculation of Normal Value Based on Comparison Market Prices
V. Currency Conversion
VI. Recommendation

[FR Doc. 2018–27536 Filed 12–19–18; 8:45 am]

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[4] *See* 19 CFR 351.309(c)(2) and (d)(2).

[5] *See* 19 CFR 351.310(c).

[6] In these preliminary results, Commerce applied the assessment rate calculation method adopted in *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings; Final Modification,* 77 FR 8101 (February 14, 2012) (*Final Modification for Reviews*).

[7] *See Final Modification for Reviews,* 77 FR at 8103. *See also* 19 CFR 351.106(c)(2).

[8] *See, e.g., Certain Cut-to-Length Carbon-Quality Steel Plate Products From the Republic of Korea: Final Results of Antidumping Duty Administrative Review; 2016–2017,* 83 FR 32629, 32630 (July 13, 2018).

DEPARTMENT OF COMMERCE

International Trade Administration

Limitation of Duty-Free Imports of Apparel Articles Assembled in Haiti Under the Caribbean Basin Economic Recovery Act (CBERA), as Amended by the Haitian Hemispheric Opportunity Through Partnership Encouragement Act (HOPE)

AGENCY: International Trade Administration, Department of Commerce.

ACTION: Notification of Annual Quantitative Limit on Imports of Certain Apparel from Haiti.

SUMMARY: CBERA, as amended, provides duty-free treatment for certain apparel articles imported directly from Haiti. One of the preferences is known as the ''value-added'' provision, which requires that apparel meet a minimum

threshold percentage of value added in Haiti, the United States, and/or certain beneficiary countries. The provision is subject to a quantitative limitation, which is calculated as a percentage of total apparel imports into the United States for each 12-month annual period. For the annual period from December 20, 2018 through December 19, 2019, the quantity of imports eligible for preferential treatment under the value-added provision is 372,889,066 square meters equivalent.

DATES: *Applicable Date:* December 20, 2018.

FOR FURTHER INFORMATION CONTACT: Laurie Mease, International Trade Specialist, Office of Textiles and Apparel, U.S. Department of Commerce, (202) 482–2043.

SUPPLEMENTARY INFORMATION:

Authority: Section 213A of the Caribbean Basin Economic Recovery Act (19 U.S.C. 2703a) (''CBERA''), as amended; and as implemented by Presidential Proc. No. 8114, 72 FR 13655 (March 22, 2007), and No. 8596, 75 FR 68153 (November 4, 2010).

Background: Section 213A(b)(1)(B) of CBERA, as amended (19 U.S.C. 2703a(b)(1)(B)), outlines the requirements for certain apparel articles imported directly from Haiti to qualify for duty-free treatment under a ''value-added'' provision. In order to qualify for duty-free treatment, apparel articles must be wholly assembled, or knit-to-shape, in Haiti from any combination of fabrics, fabric components, components knit-to-shape, and yarns, as long as the sum of the cost or value of materials produced in Haiti or one or more beneficiary countries, as described in CBERA, as amended, or any combination thereof, plus the direct costs of processing operations performed in Haiti or one or more beneficiary countries, as described in CBERA, as amended, or any combination thereof, is not less than an applicable percentage of the declared customs value of such apparel articles. Pursuant to CBERA, as amended, the applicable percentage for the period December 20, 2018 through December 19, 2019, is 60 percent.

For every twelve-month period following the effective date of CBERA, as amended, duty-free treatment under the value-added provision is subject to a quantitative limitation. CBERA, as amended, provides that the quantitative limitation will be recalculated for each subsequent 12-month period. Section 213A (b)(1)(C) of CBERA, as amended (19 U.S.C. 2703a(b)(1)(C)), requires that, for the twelve-month period beginning on December 20, 2018, the quantitative limitation for qualifying apparel imported from Haiti under the value-added provision will be an amount equivalent to 1.25 percent of the aggregate square meter equivalent of all apparel articles imported into the United States in the most recent 12-month period for which data are available. The aggregate square meters equivalent of all apparel articles imported into the United States is derived from the set of Harmonized System lines listed in the Annex to the World Trade Organization Agreement on Textiles and Clothing (''ATC''), and the conversion factors for units of measure into square meter equivalents used by the United States in implementing the ATC. For purposes of this notice, the most recent 12-month period for which data are available as of December 20, 2018 is the 12-month period ending on October 31, 2018.

Therefore, for the one-year period beginning on December 20, 2018 and extending through December 19, 2019, the quantity of imports eligible for preferential treatment under the value-added provision is 372,889,066 square meters equivalent. Apparel articles entered in excess of these quantities will be subject to otherwise applicable tariffs.

Terry K. Labat,

Senior Advisor, performing the Non-Exclusive Duties of the Deputy Assistant Secretary for Textiles, Consumer Goods and Materials.

[FR Doc. 2018–27494 Filed 12–19–18; 8:45 am]

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DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID: DOD–2018–HA–0102]

Proposed Collection; Comment Request

AGENCY: Office of the Assistant Secretary of Defense for Health Affairs, DoD.

ACTION: Information collection notice.

SUMMARY: In compliance with the *Paperwork Reduction Act of 1995,* the Uniformed Services University of the Health Sciences announces a proposed public information collection and seeks public comment on the provisions thereof. Comments are invited on: Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; the accuracy of the agency's estimate of the burden of the proposed information collection; ways to enhance the quality, utility, and clarity of the information to be collected; and ways to minimize the burden of the information collection on respondents, including through the use of automated collection techniques or other forms of information technology.

DATES: Consideration will be given to all comments received by February 19, 2019.

ADDRESSES: You may submit comments, identified by docket number and title, by any of the following methods:

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

Mail: Department of Defense, Office of the Chief Management Officer, Directorate for Oversight and Compliance, 4800 Mark Center Drive, Mailbox #24 Suite 08D09, Alexandria, VA 22350–1700.

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

FOR FURTHER INFORMATION CONTACT: To request more information on this proposed information collection or to obtain a copy of the proposal and associated collection instruments, please write to the Office of Regulatory Affairs and Research Compliance, Henry M. Jackson Foundation for the Advancement of Military Medicine (HJF), ATTN: Sandra Samayoa-Kozlowsky, Regulatory Affairs Assistant, 6720A Rockledge Drive, Suite 100, Bethesda, MD 20817 or call the HJF Office of Regulatory Affairs at (240) 694–2121.

SUPPLEMENTARY INFORMATION:

Title; Associated Form; and OMB Number: Comparing Hospital Hand Hygiene in Liberia: Soap, Alcohol, and Hypochlorite; OMB Control Number 0720–XXXX.

Needs and Uses: This information collection is necessary to conduct research as part of a U.S.-Liberia collaboration funded by the U.S. Department of Defense Center for Global Health Engagement. The study objectives are to determine the most appropriate cleansing material (soap, alcohol, or hypochlorite/chlorine solution) for routine hand hygiene in Liberian healthcare facilities and to determine how best to implement hand

hygiene programs in these facilities. Results of this study may inform Liberian Government strategies to expand and implement best hospital hand hygiene intervention(s) across the nation, and also help shape hand hygiene program implementation in the U.S. DoD global humanitarian assistance, disaster relief, and health system strengthening.

Affected Public: Individuals or households.

Phase 1 Interview:
Annual Burden Hours: 84.
Number of Respondents: 84.
Responses per Respondent: 1.
Annual Responses: 84.
Average Burden per Response: 1 hour.
Frequency: As required.

Phase 2 Interview:
Annual Burden Hours: 90.
Number of Respondents: 36.
Responses per Respondent: 2.5 [1]
Annual Responses: 90.
Average Burden per Response: 1 hour.
Frequency: As required.

Phase 3 Interview:
Annual Burden Hours: 36.
Number of Respondents: 36.
Responses per Respondent: 1.
Annual Responses: 36.
Average Burden per Response: 1 hour.
Frequency: As required.

Phase 4 Interview:
Annual Burden Hours: 48.
Number of Respondents: 48.
Responses per Respondent: 1.
Annual Responses: 48.
Average Burden per Response: 1 hour.
Frequency: As required.
Total Annual Burden Hours: 258 [2]
Total Number of Respondents: 84 total.
Total Average Burden per Response: 1 hour.
Total Annual Responses: 258.

During the 2014–2015 Ebola epidemic, dilute hypochlorite solutions were widely used for hand hygiene in hospitals, Ebola Treatment Units (ETUs), and community spaces throughout West Africa. The World Health Organization has recommended that health facilities use soap or alcohol instead of hypochlorite for hand hygiene. However, there are knowledge gaps about whether hypochlorite could be used for routine hand hygiene and about how best to implement hand hygiene changes in health facilities. Hypochlorite could be safe, effective, and easier to implement for routine hand hygiene, especially after the Ebola epidemic catalyzed institutional and individual behavior change. Respondents will include Liberian hospital administrators, healthcare workers, family caregivers, and patients in four study hospitals in Liberia. The research as planned cannot be completed without the survey data. The scientific merit and utility to DoD of this research were evaluated in a formal peer review process adjudicated in October 2016.

[1] Respondents may complete a follow up to their original response during Phase 2, via a focus group.

[2] Some respondents are the same throughout the collection's phases.

Dated: December 14, 2018.

Shelly E. Finke,

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

[FR Doc. 2018–27523 Filed 12–19–18; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF EDUCATION

Applications for New Awards; Expanding Opportunity Through Quality Charter Schools Program (CSP)—Grants to Charter Management Organizations for the Replication and Expansion of High-Quality Charter Schools

AGENCY: Office of Innovation and Improvement, Department of Education.

ACTION: Notice; correction.

SUMMARY: On November 30, 2018, we published in the **Federal Register** a notice inviting applications (NIA) for new awards for fiscal year (FY) 2019 for CSP—Grants to Charter Management Organizations for the Replication and Expansion of High-Quality Charter Schools (Grants to Charter Management Organizations), Catalog of Federal Domestic Assistance (CFDA) number 84.282M. This notice corrects the instructions for responding to the application requirements listed in the NIA to state that an applicant must respond to requirement (d) in a stand-alone section of the application or in an appendix.

DATES: December 20, 2018.

FOR FURTHER INFORMATION CONTACT: Eddie Moat, U.S. Department of Education, 400 Maryland Avenue SW, Room 4W259, Washington, DC 20202–5970. Telephone: (202) 401–2266. Email: *eddie.moat@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: On November 30, 2018, we published in the **Federal Register** (83 FR 61610) a notice inviting applications for new awards for FY 2019 for CSP Grants to Charter Management Organizations. This notice corrects the instructions for responding to the application requirements included in the NIA to state that an applicant must respond to requirement (d) in a stand-alone section of the application or in an appendix.

All other requirements and conditions stated in the NIA remain the same.

Correction

In FR Doc. 2018–26094, on page 61614, in the third column, at the bottom of the page, in the fourth sentence of the section entitled ''Application Requirements'', we replace ''requirement (a)'' with ''requirement (d)''.

Program Authority: Title IV, part C of the Elementary and Secondary Education Act of 1965, as amended by the Every Student Succeeds Act (20 U.S.C. 7221–7221j).

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

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 at *www.govinfo.gov.* At this site you can view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Portable Document Format (PDF). To use PDF you must have Adobe Acrobat Reader, which is available free at this site.

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

Dated: November 17, 2018.

James C. Blew,

Acting Deputy Assistant Secretary for Innovation and Improvement.

[FR Doc. 2018–27554 Filed 12–19–18; 8:45 am]

BILLING CODE 4000–01–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–9987–90–OA]

Meetings of the Local Government Advisory Committee and the Small Communities Advisory Subcommittee

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The Local Government Advisory Committee (LGAC) will meet in Washington, DC, on Thursday, January 10, 2019, 9:30 a.m.–5:35 p.m. (EDT), and Friday, January 11, 2019, 10:00 a.m.–12:30 p.m. (EDT). The focus of the Committee meeting will be on issues pertaining to water and water infrastructure; emerging contaminants; superfund and brownfields; risk communication and other issues in EPA's Strategic Plan. The Small Communities Advisory Subcommittee (SCAS) will meet in Washington, DC, on Friday, January 11, 2019, 8:00 a.m.–9:00 a.m. (EDT). The Subcommittee will discuss water infrastructure, community revitalization, agricultural issues, and other issues and recommendations to the Administrator regarding environmental issues affecting small communities.

These are open meetings, and all interested persons are invited to participate. The LGAC will hear comments from the public between and 11:20 a.m. and 11:30 a.m. on Thursday, January 10, 2019. The SCAS will hear comments from the public between 8:40 a.m. and 8:50 a.m. on Friday, January 11, 2019. Individuals or organizations wishing to address the Subcommittee or the Committee will be allowed a maximum of five minutes to present their point of view. Also, written comments may be submitted electronically to *eargle.frances@epa.gov* for the LGAC and to *mercurio.cristina@epa.gov* for the SCAS. Please contact the Designated Federal Officers (DFO) at the numbers listed below to schedule a time on the agenda. Time will be allotted on a first-come first-serve basis, and the total period for comments may be extended if the number of requests for appearances requires it.

ADDRESSES: The Local Government Advisory Committee meetings will be held at the U.S. Environmental Protection Agency, Conference Room 1153, William Jefferson Clinton EPA East Building, 1201 Constitution Avenue NW, Washington, DC 20460. The Small Communities Advisory Subcommittee meeting will be held at the U.S. Environmental Protection Agency, Conference Room 1153, William Jefferson Clinton EPA East Building, 1201 Constitution Avenue NW, Washington, DC 20460. Meeting summaries will be available after the meeting online at *www.epa.gov/ocir/scas_lgac/lgac_index.htm* and can be obtained by written request to the DFO. In the event of cancellation for unforeseen circumstances, please contact the the designated federal officer(s) for reschedule information.

FOR FURTHER INFORMATION CONTACT: Local Government Advisory Committee (LGAC) contact Frances Eargle, Designated Federal Officer, at (202) 564–3115 or email at *eargle.frances@epa.gov.* and Small Communities Advisory Subcommittee (SCAS), contact Cristina Mercurio, Designated Federal Officer, at (202) 564–6481 or email at *mercurio.cristina@epa.gov.*

Information on Services for those with Disabilities: For information on access or services for individuals with disabilities, please contact Frances Eargle at (202) 564–3115 or email at *eargle.frances@epa.gov* . To request accommodation of a disability, please request it 10 days prior to the meeting, to give EPA as much time as possible to process your request.

Dated: December 3, 2018.

Jack Bowles,

Director, State and Local Relations, EPA's Office of Congressional and Intergovernmental Relations.

[FR Doc. 2018–27608 Filed 12–19–18; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL DEPOSIT INSURANCE CORPORATION

Sunshine Act Meeting

Pursuant to the provisions of the ''Government in the Sunshine Act'' (5 U.S.C. 552b), notice is hereby given that the Federal Deposit Insurance Corporation's Board of Directors met in open session at 10:00 a.m. on Tuesday, December 18, 2018, to consider the following matters:

SUMMARY AGENDA

Disposition of Minutes of a Board of Directors' Meeting Previously Distributed.

Memorandum and resolution re: Notice of Proposed Rulemaking: Revisions to Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships With, Hedge Funds and Private Equity Funds.

Memorandum and resolution re: Final Rule: Regulatory Capital Rule: Implementation and Transition of the Current Expected Credit Losses Methodology for Allowances and Related Adjustments to the Regulatory Capital Rule and Conforming Amendments to Other Regulations.

Memorandum and resolution re: Notice of Proposed Rulemaking to (1) Rescind Regulations Transferred from the Former Office of Thrift Supervision, Part 390, Subpart P—Lending and Investment; (2) Amend Part 365, Subpart A—Real Estate Lending Standards; and (3) Rescind Part 365, Subpart B—Registration of Residential Mortgage Loan Originators.

Memorandum and resolution re: Notice of Proposed Rulemaking to Increase the Major Assets Threshold Under the Depository Institutions Management Interlocks Act.

Memorandum and resolution re: Final Rule: Technical Amendments to Depository Institutions Management Interlocks Act (DIMIA) Regulations.

Memorandum and resolution re: Final Rule: Expanded Exam Cycle for Certain Small Insured Depository Institutions and U.S. Branches and Agencies of Foreign Banks.

Memorandum and resolution re: Final Rule: Limited Exception for a Capped Amount of Reciprocal Deposits from Treatment as Brokered Deposits.

Memorandum and resolution re: Advanced Notice of Proposed Rulemaking Relating to Brokered Deposits.

Memorandum and resolution re: Notice of Proposed Rulemaking: Company-Run Stress Testing Requirements for FDIC-supervised State Nonmember Banks and State Savings Associations.

Memorandum and resolution re: Notice of Proposed Rulemaking: Revisions to the Deposit Insurance Assessment System.

Memorandum and resolution re: Designated Reserve Ratio for 2019.

Summary reports, status reports, and reports of actions taken pursuant to authority delegated by the Board of Directors.

Discussion Agenda

Memorandum and resolution re: Proposed 2019 Operating Budget.

Briefing: Update of Projected Deposit Insurance Fund Losses, Income, and Reserve Ratios for the Restoration Plan.

In calling the meeting, the Board determined, on motion of Director Martin J. Gruenberg, seconded by Director Kathleen L. Kraninger (Director, Consumer Financial Protection Bureau), concurred in by Director Joseph Otting (Comptroller of the Currency), and Chairman Jelena

McWilliams, that Corporation business required its consideration of the matters on less than seven days' notice to the public; and that no earlier notice of the meeting than that previously provided on December 12, 2018, was practicable.

The meeting was held in the Board Room located on the sixth floor of the FDIC Building located at 550 17th Street NW, Washington, DC.

Dated: December 18, 2018.

Federal Deposit Insurance Corporation.

Robert E. Feldman,

Executive Secretary.

[FR Doc. 2018–27740 Filed 12–18–18; 4:15 pm]

BILLING CODE P

FEDERAL DEPOSIT INSURANCE CORPORATION

Sunshine Act Meeting

Pursuant to the provisions of the ''Government in the Sunshine Act'' (5 U.S.C. 552b), notice is hereby given that at 10:52 a.m. on Tuesday, December 18, 2018, the Board of Directors of the Federal Deposit Insurance Corporation met in closed session to consider matters related to the Corporation's supervision, corporate, and resolution activities.

In calling the meeting, the Board determined, on motion of Director Martin J. Gruenberg, seconded by Director Kathleen L. Kraninger (Director, Consumer Financial Protection Bureau), and concurred in by Director Joseph M. Otting (Comptroller of the Currency), and Chairman Jelena McWilliams, that Corporation business required its consideration of the matters which were to be the subject of this meeting on less than seven days' notice to the public; that no earlier notice of the meeting was practicable; that the public interest did not require consideration of the matters in a meeting open to public observation; and that the matters could be considered in a closed meeting by authority of subsections (c)(2), (c)(4), (c)(6), (c)(8), (c)(9)(A)(ii), and (c)(9)(B) of the ''Government in the Sunshine Act'' (5 U.S.C. 552b(c)(2), (c)(4), (c)(6), (c)(8), (c)(9)(A)(ii), and (c)(9)(B).

Dated: December 18, 2018.

Federal Deposit Insurance Corporation.

Robert E. Feldman,

Executive Secretary.

[FR Doc. 2018–27736 Filed 12–18–18; 4:15 pm]

BILLING CODE P

FEDERAL RESERVE SYSTEM

Notice of Proposals To Engage in or To Acquire Companies Engaged in Permissible Nonbanking Activities

The companies listed in this notice have given notice under section 4 of the Bank Holding Company Act (12 U.S.C. 1843) (BHC Act) and Regulation Y, (12 CFR part 225) to engage *de novo,* or to acquire or control voting securities or assets of a company, including the companies listed below, that engages either directly or through a subsidiary or other company, in a nonbanking activity that is listed in § 225.28 of Regulation Y (12 CFR 225.28) or that the Board has determined by Order to be closely related to banking and permissible for bank holding companies. Unless otherwise noted, these activities will be conducted throughout the United States.

Each notice is available for inspection at the Federal Reserve Bank indicated. The notice also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the question whether the proposal complies with the standards of section 4 of the BHC Act.

Unless otherwise noted, comments regarding the applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than January 10, 2019.

A. Federal Reserve Bank of Richmond (Adam M. Drimer, Assistant Vice President) 701 East Byrd Street, Richmond, Virginia 23219. Comments can also be sent electronically to *Comments.applications@rich.frb.org:*

1. *Community Heritage Financial, Inc., Middletown, Maryland;* to engage in residential mortgage lending through the acquisition of 100 percent of the voting shares of Millennium Financial Group, Inc., Middletown, Maryland, pursuant to section 225.28(b)(1) of Regulation Y.

Board of Governors of the Federal Reserve System, December 17, 2018.

Yao-Chin Chao,

Assistant Secretary of the Board.

[FR Doc. 2018–27573 Filed 12–19–18; 8:45 am]

BILLING CODE P

FEDERAL RESERVE SYSTEM

Formations of, Acquisitions by, and Mergers of Savings and Loan Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Home Owners' Loan Act (12 U.S.C. 1461 *et seq.*) (HOLA), Regulation LL (12 CFR part 238), and Regulation MM (12 CFR part 239), and all other applicable statutes and regulations to become a savings and loan holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a savings association and nonbanking companies owned by the savings and loan holding company, including the companies listed below.

The applications listed below, as well as other related filings required by the Board, are available for immediate inspection at the Federal Reserve Bank indicated. The application also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the standards enumerated in the HOLA (12 U.S.C. 1467a(e)). If the proposal also involves the acquisition of a nonbanking company, the review also includes whether the acquisition of the nonbanking company complies with the standards in section 10(c)(4)(B) of the HOLA (12 U.S.C. 1467a(c)(4)(B)). Unless otherwise noted, nonbanking activities will be conducted throughout the United States.

Unless otherwise noted, comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than January 22, 2019.

A. Federal Reserve Bank of Minneapolis (Mark A. Rauzi, Vice President), 90 Hennepin Avenue, Minneapolis, Minnesota 55480–0291:

1. *The Farrar Beresford Bancorporation Inc. Irrevocable Trust and Beresford Bancorporation (''Applicants''), both of Britton, South Dakota;* to acquire Western Bancshares of Alamogordo, Inc., Carlsbad, New Mexico, and thereby acquire Western Bank, Alamogordo, New Mexico. Applicants will retain their ownership of First Savings Bank, Beresford, South Dakota, and continue to operate a savings and loan association. Applicants will convert back to a savings and loan holding company after the merger of Western Bank into First Savings Bank.

Board of Governors of the Federal Reserve System, December 17, 2018.

Yao-Chin Chao,

Assistant Secretary of the Board.

[FR Doc. 2018–27574 Filed 12–19–18; 8:45 am]

BILLING CODE P

FEDERAL RESERVE SYSTEM

Change in Bank Control Notices; Acquisitions of Shares of a Bank or Bank Holding Company

The notificants listed below have applied under the Change in Bank Control Act (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire shares of a bank or bank holding company. The factors that are considered in acting on the notices are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The notices are available for immediate inspection at the Federal Reserve Bank indicated. The notices also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank indicated for that notice or to the offices of the Board of Governors. Comments must be received not later than January 7, 2019.

A. Federal Reserve Bank of Chicago (Colette A. Fried, Assistant Vice President) 230 South LaSalle Street, Chicago, Illinois 60690–1414:

1. *Edward J. Madden, Evanston, Illinois, individually and as trustee of the Edward J. Madden Declaration of Trust 3/6/2008;* to join the Madden Family Group and to acquire voting shares of Schaumburg Bancshares, Inc., and thereby indirectly acquire shares of Heritage Bank of Schaumburg, both of Schaumburg, Illinois.

Board of Governors of the Federal Reserve System, December 17, 2018.

Yao-Chin Chao,

Assistant Secretary of the Board.

[FR Doc. 2018–27575 Filed 12–19–18; 8:45 am]

BILLING CODE P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Proposed Information Collection Activity; ACF's Generic Clearance for Grant Reviewer Recruitment Forms (OMB #0970–0477)

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

ACTION: Request for public comment.

SUMMARY: The Administration for Children and Families (ACF), Office of Planning, Research, and Evaluation (OPRE) is proposing an extension of a currently approved generic clearance (OMB no. 0970–0477) for Grant Reviewer Recruitment (GRR) forms. The GRR forms will be used to select reviewers who will participate in the grant review process for the purpose of selecting successful applications.

DATES: *Comments due within 60 days of publication.* In compliance with the requirements of Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Administration for Children and Families is soliciting public comment on the specific aspects of the information collection described above.

ADDRESSES: Copies of the proposed collection of information can be obtained and comments may be forwarded by writing to the Administration for Children and Families, Office of Planning, Research, and Evaluation, 330 C Street SW, Washington, DC 20201, Attn: OPRE Reports Clearance Officer. Email address: *OPREinfocollection@acf.hhs.gov.* All requests should be identified by the title of the information collection.

SUPPLEMENTARY INFORMATION:

Description: Under this generic approval, ACF conducts and proposes to continue to conduct more than one information collection that is very similar, voluntary, low-burden and uncontroversial. The purpose is to select qualified reviewers for the grant peer review process based on professional qualifications using data entered by candidates and the uploaded writing sample and/or curriculum vitae and/or resume. The grant review process is in accordance with the U.S. Department of Health and Human Services' (DHHS) Grants Policy Directive (GPD) 2.04 ''Awarding Grants'', the DHHS Awarding Agency Grants Administration Manual (AAGAM), Chapter 2.04.104C ''Objective Review of Grant Applications'', and the Public Health Service (PHS) Act, Sections 799(f) and 806(e).

Respondents: Individuals who may apply to review ACF grant applications.

ANNUAL BURDEN ESTIMATES

Instrument	Total number of respondents	Number of responses per respondent	Average burden hours per response	Annual burden hours
Grant Reviewer Recruitment Form	3000	1	.5	1500

Estimated Total Annual Burden Hours: 1500.

Comments: The Department specifically requests comments on (a) whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted within 60 days of this publication.

Mary B. Jones,

ACF/OPRE Certifying Officer.

[FR Doc. 2018–27551 Filed 12–19–18; 8:45 am]

BILLING CODE 4184–79–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Solicitation of Nominations for Organizational Representatives to the Advisory Committee on Heritable Disorders in Newborns and Children

AGENCY: Health Resources and Services Administration (HRSA), Department of Health and Human Services (HHS).

ACTION: Request for nominations.

SUMMARY: HRSA is seeking nominations from organizations to send a representative to be a liaison to the

Advisory Committee on Heritable Disorders in Newborns and Children (Committee). Selections will be based on a review of the organization's subject area of expertise, mission, relevancy, and benefit provided relative to the Committee's purpose. The organizational representatives are non-voting liaisons. The Committee provides advice, recommendations, and technical information about aspects of heritable disorders and newborn and childhood screening to the Secretary of HHS. HRSA is seeking nominations of qualified organizations to fill up to three positions.

Authority: Section 1111 of the Public Health Service (PHS) Act, as amended by the Newborn Screening Saves Lives Reauthorization Act of 2014 (42 U.S.C. 300b–10). The Committee is governed by the Federal Advisory Committee Act (FACA), as amended (5 U.S.C. App.), and 41 CFR part 102–3, which set forth standards for the formation and use of advisory committees.

DATES: Written nominations for organization representatives on the Committee must be received on or before January 17, 2019.

ADDRESSES: Nomination packages must be submitted electronically as email attachments to Catharine Riley, Ph.D., MPH, Genetic Services Branch, Maternal and Child Health Bureau, HRSA, *criley@hrsa.gov.*

FOR FURTHER INFORMATION CONTACT: Designated Federal Official (DFO) Catharine Riley, Ph.D., MPH. Address: MCHB, HRSA 5600 Fishers Lane, Room 18–W–68, Rockville, MD 20857; phone number: 301–443–1291; email: *criley@hrsa.gov.* A copy of the Committee Charter and list of the current membership can be obtained by accessing the Advisory Committee website at: *www.hrsa.gov/advisory-committees/heritable-disorders.*

SUPPLEMENTARY INFORMATION: The Committee is chartered under section 1111 of the PHS Act, as amended by the Newborn Screening Saves Lives Reauthorization Act of 2014 (42 U.S.C. 300b–10). The Committee was established in 2003 to advise the Secretary of HHS regarding newborn screening tests, technologies, policies, guidelines, and programs for effectively reducing morbidity and mortality in newborns and children having or at risk for heritable disorders. In addition, the Committee provides advice and recommendations to the Secretary concerning the grants and projects authorized under section 1109 of the PHS Act and technical information to develop policies and priorities for grants, including those that will enhance the ability of the state and local health agencies to provide for newborn and child screening, counseling and health care services for newborns, and children having or at risk for heritable disorders. The Committee also is governed by the provisions of FACA, as amended (5 U.S.C. App. 2), and 41 CFR part 102–3, which set forth standards for the formation and use of advisory committees.

The Committee reviews and reports regularly on newborn and childhood screening practices for heritable disorders, recommends improvements in the national newborn and childhood heritable screening programs, and recommends conditions for inclusion in the Recommended Uniform Screening Panel (RUSP). The Committee's recommendations regarding additional conditions/inherited disorders for screening that have been adopted by the Secretary of HHS are included in the RUSP and constitute part of the comprehensive guidelines supported by HRSA pursuant to section 2713 of the PHS Act, codified at 42 U.S.C. 300gg–13. Under this provision, non-grandfathered health plans and group and individual health insurance issuers are required to cover screenings included in the HRSA-supported comprehensive guidelines without charging a co-payment, co-insurance, or deductible for plan years (*i.e.,* in the individual market, policy years) beginning on or after the date that is 1 year from the Secretary's adoption of the condition for screening.

Nominations: The Committee may invite up to 15 organizations to designate individuals to serve as non-voting liaisons. Organizations should demonstrate wide-ranging newborn screening and heritable disorders interests. In addition, the organization's work should inform the activities of the Committee. Eligible organizations must represent national public health constituencies, medical professional societies, or organizations with large, broad constituencies and broad interest or involvement in newborn screening. Organizations which represent narrow interests (*e.g.,* interest in a single disease or treatment) or smaller constituencies are not eligible. Organizational representatives attend Committee meetings to provide relevant expertise and perspectives to Committee members during their deliberations and discussions, but they do not vote and are not considered official members of the Committee.

Applications must contain a cover letter and statement. The cover letter should include: Organization name and mission statement; contact information for the designated representative, including point of contact name, address, email, telephone number; and website of the organization. The statement should include: Perspective and expertise provided by the organization and its relevance to the Committee; a description of how the Committee's work affects and impacts the organization and its constituency; a list of organizational projects, programs, and products that are of relevance to the Committee's work; an affirmation of the organization's commitment to identify a representative with expertise who can attend Committee meetings in person and provide input to the Committee, at the discretion of the Chairperson; an affirmation of the organization's commitment to financially support (*e.g.,* cover travel expenses) a representative to attend committee meetings held in Rockville, MD; an affirmation of the organization's commitment to ensure active contribution to and dissemination of Committee activities and recommendations to its constituencies; affirmation the designated representative is able to serve as the liaison; and an affirmation that the organization has no conflict of interest that would preclude informing the Committee in a fair and balanced manner. If there are potential conflicts of interest, please detail the information concerning any possible conflicts of interest relative to both the organization and the proposed organizational representative (*e.g.,* current or anticipated employment, consultancies, research grants, or contracts), as well as how the organization proposes to address the potential conflict.

Organizations are eligible to send a representative as long as the organization's subject area of expertise and mission is relevant to the Committee's purpose, objective, scope of activities and duties, and as long as the organization actively participates on Committee activities. Every three years, the Chair and DFO will re-assess the organization's mission, relevancy, and benefit as it relates to the Committee's purpose, objective, scope of activities, and duties. Every three years current organizations will be asked to reaffirm their commitment to send an organizational representative.

The selection of eligible organizations is based on a review of the organization's subject area of expertise, mission, relevancy, and benefit as it relates to the Committee's purpose. The Committee Charter, legislation, and list of current voting membership may be obtained by accessing the Committee website at *http://www.hrsa.gov/advisory-committees/heritable-*

disorders. Final selection of organizational representatives will be made by the Committee Chair and HRSA.

Amy P. McNulty,

Acting Director, Division of the Executive Secretariat.

[FR Doc. 2018–27518 Filed 12–19–18; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–7003–N–01]

60-Day Notice of Proposed Information Collection: Comment Request; Housing Discrimination Information Form; HUD–903.1, HUD–903.1A, HUD–903.1B, HUD–903.1C, HUD–903.1F, HUD–903.1CAM, HUD–903.1KOR, HUD–903.1RUS, HUD–903–1_Somali

AGENCY: Office of the Assistant Secretary for Fair Housing and Equal Opportunity, HUD.

ACTION: Notice.

SUMMARY: The proposed reinstatement, without change, of a previously approved information collection for Housing Discrimination Information Form HUD–903.1, HUD–903.1A, HUD–903.1B, HUD–903.1C, HUD–903.1F, HUD–903.1CAM, HUD–903.1KOR, HUD–903.1RUS, and HUD–903–1_Somali will be submitted to the Office of Management and Budget (OMB) for review, in accordance with the Paperwork Reduction Act of 1995. HUD is soliciting comments from all interested parties on the proposed extension of this information collection.

DATES: *Comment Due Date:* February 19, 2019.

ADDRESSES: Interested persons are invited to submit comments regarding this proposed information collection. Comments should refer to the proposal by name and/or OMB Control Number, and should be sent to Inez C. Downs, Departmental Paperwork Reduction Act Officer, QMAC, U.S. Department of Housing and Urban Development, 451 7th Street SW, Room 4186, Washington, DC 20410–2000; telephone number (202) 402–8046 (this is not a toll-free number), or email at *Inez.C.Downs@hud.gov* for a copy of the proposed forms or other available information; or to Colette Pollard, Departmental Paperwork Reduction Officer, QMAC, U.S. Department of Housing and Urban Development, 451 7th Street SW, Room 4186, Washington, DC 20410–2000; telephone number (202) 402–3400 (this is not a toll-free number), or email at *Colette.Pollard@hud.gov* for a copy of the proposed forms or other available information. Hearing or speech impaired individuals may access both numbers via TTY by calling the toll-free Federal Relay Service at: 1–(800) 877–8339;

FOR FURTHER INFORMATION CONTACT: Gordon F. Patterson, Department of Housing and Urban Development, 451 7th Street SW, Room 5214, Washington, DC 20410–2000; telephone number (202) 402–3264 (this is not a toll-free number). Hearing or speech impaired individuals may access this number via TTY by calling the toll-free Federal Relay Service at: 1–(800) 877–8339.

SUPPLEMENTARY INFORMATION: HUD is submitting this proposed extension of a currently approved information collection to the OMB for review, as required by the Paperwork Reduction Act of 1995 [44 U.S.C. Chapter 35, as amended].

A. Overview of Information Collection

This Notice is soliciting comments from members of the public and affected agencies concerning the proposed reinstatement, without change, of a previously approved collection of information regarding alleged discriminatory housing practices under the Fair Housing Act [42 U.S.C. 3601 *et seq.*]. The Fair Housing Act prohibits discrimination in the sale, rental, occupancy, advertising, and insuring of residential dwellings; and in residential real estate-related transactions; and in the provision of brokerage services, based on race, color, religion, sex, handicap [disability], familial status, or national origin.

Any person who claims to have been injured by a discriminatory housing practice, or who believes that he or she will be injured by a discriminatory housing practice that is about to occur, may file a complaint with HUD not later than one year after the alleged discriminatory housing practice occurred or terminated. HUD has designed Housing Discrimination Information Form HUD–903.1 to promote consistency in the documents that, by statute, must be provided to persons against whom complaints are filed, and for the convenience of the general public. Section 103.25 of HUD's Fair Housing Act regulation describes the information that must be included in each complaint filed with HUD. For purposes of meeting the Act's one-year time limitation for filing complaints with HUD, complaints need not be initially submitted on the Form that HUD provides. Housing Discrimination Information Form HUD–903.1 (English language), HUD–903.1A (Spanish language), HUD–903.1B (Chinese language), HUD–903.1C (Arabic language), HUD–903.1F (Vietnamese language), HUD–903.1CAM (Cambodian language), HUD–903.1KOR (Korean language), HUD–903.1RUS (Russian language), and HUD–903–1_(Somali language) may be submitted to HUD by mail, in person, by facsimile, by email, or via the internet to HUD's Office of Fair Housing and Equal Opportunity (FHEO). FHEO staff uses the information provided on the Form to verify HUD's authority to investigate the aggrieved person's allegations under the Fair Housing Act.

Title of Information Collection: Housing Discrimination Information Form.

OMB Control Number: 2529–0011.

Type of Request: Proposed reinstatement, without change, of a previously approved information collection.

Form Number: HUD–903.1.

Description of the need for the information and proposed use: HUD uses the Housing Discrimination Information Form HUD–903.1 (Form) to collect pertinent information from persons wishing to file housing discrimination complaints with HUD under the Fair Housing Act. The Fair Housing Act makes it unlawful to discriminate in the sale, rental, occupancy, advertising, or insuring of residential dwellings; or to discriminate in residential real estate-related transactions; or in the provision of brokerage services, based on race, color, religion, sex, handicap [disability], familial status, or national origin.

Any person who claims to have been injured by a discriminatory housing practice, or any person who believes that he or she will be injured by a discriminatory housing practice that is about to occur, may file a complaint with HUD not later than one year after the alleged discriminatory housing practice occurs or terminates. The Form promotes consistency in the collection of information necessary to contact persons who file housing discrimination complaints with HUD. It also aids in the collection of information necessary for initial assessments of HUD's authority to investigate alleged discriminatory housing practices under the Fair Housing Act. This information may subsequently be provided to persons against whom complaints are filed [''respondents''], as required under section 810(a)(1)(B)(ii) of the Fair Housing Act.

Agency form numbers, if applicable: Form HUD–903.1 (English), Form HUD–903.1A (Spanish), Form HUD–903.1B

(Chinese), Form HUD–903.1C (Arabic), Form HUD–903.1F (Vietnamese), Form HUD–903.1CAM (Cambodian), Form HUD–903.1KOR (Korean), Form HUD–903.1RUS (Russian), and Form HUD–903–1_(Somali).

Members of Affected Public: Individuals or households; businesses or other for-profit, not-for-profit institutions; State, Local, or Tribal Governments.

Estimation of the total number of hours needed to prepare the information collection, including the number of respondents, frequency of response, and hours of responses: During FY 2018, HUD staff received approximately 16,943 information submissions from persons wishing to file housing discrimination complaints with HUD. Of this total, HUD received 1,052 complaint submissions by telephone. The remaining 15,891 complaint submissions were transmitted to HUD by mail, in-person, by email, and via the internet. HUD estimates that an aggrieved person requires approximately 45 minutes in which to complete this Form. The Form is completed once by each aggrieved person. Therefore, the total number of annual burden hours for this Form is 11,918 hours.

15,891 × 1 (frequency) × .45 minutes (.75 hours) = 11,918 hours.

Annualized cost burden to complainants: HUD does not provide postage-paid mailers for this information collection. Accordingly, persons choosing to submit this Form to HUD by mail must pay the prevailing First Class Postage. As of the date of this Notice, the annualized cost burden per person, based on a one-time submission of this Form to HUD via First Class Postage, is Fifty Cents ($0.50) per person. During FY 2018, FHEO staff received approximately 2,620 submissions of potential complaint information by mail. Based on this number, HUD estimates that the total annualized cost burden for aggrieved persons who submit this Form to HUD by mail is $1,310.00. Aggrieved persons also may submit this Form to HUD in person, by facsimile, by email, or electronically via the internet.

Status of the proposed information collection: Proposed reinstatement, without change, of a previously approved collection of pertinent information from persons wishing to file Fair Housing Act complaints with HUD.

B. Solicitation of Public Comments

This Notice is soliciting comments from members of the public and affected parties concerning the collection of information described in Section A on the following:

(1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) The accuracy of the agency's estimate of the burden of the proposed collection of information;

(3) Ways to enhance the quality, utility, and clarity of the information to be collected; and

(4) Ways to minimize the burden of the collection of information on those who are to respond; including the use of appropriate automated collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

HUD encourages interested parties to submit comments in response to these questions.

Authority: Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35, as amended.

Dated: November 30, 2018.

Lynn M. Grosso,

Director, Office of Enforcement, FHEO.

[FR Doc. 2018–27549 Filed 12–19–18; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–7004–N–03]

60-Day Notice of Proposed Information; Record of Employee Interview

AGENCY: Office of Davis Bacon Labor Standards and Enforcement, FPM, HUD.

ACTION: Notice.

SUMMARY: HUD is seeking approval for the proposed information collection requirement described below and will be submitting to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

DATES: *Comments Due Date:* February 19, 2019.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB Control Number and should be sent to: Saundra A. Green, Administrative Officer, Office of Field Policy and Management, Department of Housing and Urban Development, 451 7th Street SW, Washington, DC 20410, Room 7108 or the number (202–402–5537) this is not a toll free number or email at *Saundra.A.Green@hud.gov* or a copy of the proposed forms or other available information. Persons with hearing or speech impairments may access this number though TTY by calling the toll-free Federal Relay Service at (800) 877–8339.

FOR FURTHER INFORMATION CONTACT: Colette Pollards, Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 7th Street SW, Washington, DC 20410, telephone (202) 402–3400 (this is not a toll free number) or email Colette Pollard at *Colette.Pollard@hud.gov* for copies of the proposed forms and other available information. Persons with hearing or speech impairments may access this number though TTY by calling the toll-free Federal Relay Service at (800) 877–8339.

SUPPLEMENTARY INFORMATION: The Department is submitting the proposed information collection to OMB for review, as required by the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35, as amended).

This Notice is soliciting comments from members of the public and affected agencies concerning the proposed collection of information to: (1) Evaluate whether the proposed collection is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond; including the use of appropriate automated collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

This Notice also lists the following information:

Title of Proposal: Record of Employee Interview.

OMB Control Number, if applicable: 2501–0009.

Description of the need for the information and proposed use: The information is used by HUD and agencies administering HUD programs to collect information from laborers and mechanics employed on projects subjected to the Federal Labor Standards provisions. The information collected is compared to information submitted by the respective employer on certified payroll reports. The comparison tests the accuracy of the employer's payroll data and may disclose violations.

Generally, these activities are geared to the respondent's benefit that is to

determine whether the respondent was underpaid and to ensure the payment of wage restitution to the respondent.

Agency form numbers, if applicable: HUD–11.

Estimation of the total numbers of hours needed to prepare the information collection including number of respondents, frequency of response, and hours of response:

Information collection	Estimated number of respondents	Frequency of response	Total number of responses	Total burden hours per response	Total burden hour ann	Hourly cost per response	Total cost
HUD–11 Record of Employee Interview OR HUD–11SP	20,000	1	20,000	.25	5,000	$36.24	$181,200
HUD–11 Record of Employee Interview OR HUD–11SP	20,000	1	20,000	.16	3,200	36.24	115,968
Total	20,000	1	20,000	.41	8,200	36.24	297,168

Authority: The Paperwork Reduction Act of 1995, 44 U.S.C., Chapter 35, as amended.

Dated: December 4, 2018.

Pamela Glekas Spring,

National Director, Office of Davis-Bacon Labor Standards and Enforcement.

[FR Doc. 2018–27550 Filed 12–19–18; 8:45 am]

BILLING CODE 4201–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–7006–N–18]

60-Day Notice of Proposed Information Collection: Public/Private Partnerships for the Mixed-Finance Development of Public Housing Units

AGENCY: Office of the Assistant Secretary for Public and Indian Housing.

ACTION: Notice.

SUMMARY: HUD is seeking approval from the Office of Management and Budget (OMB) for the information collection described below. In accordance with the Paperwork Reduction Act, HUD is requesting comment from all interested parties on the proposed collection of information. The purpose of this notice is to allow for 60 days of public comment.

DATES: *Comments Due Date:* February 19, 2019.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB Control Number and should be sent to: Colette Pollard, Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 7th Street SW, Room 4176, Washington, DC 20410–5000; telephone 202–402–3400 (this is not a toll-free number) or email at *Colette.Pollard@hud.gov* for a copy of the proposed forms or other available information. Persons with hearing or speech impairments may access this number through TTY by calling the toll-free Federal Relay Service at (800) 877–8339.

FOR FURTHER INFORMATION CONTACT: Arlette Mussington, Office of Policy, Programs and Legislative Initiatives, PIH, Department of Housing and Urban Development, 451 7th Street SW, Room 3178, Washington, DC 20410; telephone (202) 402–4109, (this is not a toll-free number). Persons with hearing or speech impairments may access this number via TTY by calling the Federal Information Relay Service at (800) 877–8339. Copies of available documents submitted to OMB may be obtained from Ms. Mussington.

SUPPLEMENTARY INFORMATION: This notice informs the public that HUD is seeking approval from OMB for the information collection described in Section A.

A. Overview of Information Collection

Title of Proposal: Public/Private Partnerships for the Mixed-Finance Development of Public Housing Units.

OMB Control Number: 2577–0275.

Type of Request: Reinstatement without Change.

Form Number: HUD–50156; HUD–50157, HUD–50158, HUD–50159, HUD–50160, HUD–50161.

Description of the need for the information and proposed use: The Quality Housing and Work Responsibility Act of 1998 (P.L. 195–276, approved October 21, 1998), also known as the Public Housing Reform Act, created Section 35 of the U.S. Housing Act of 1937, 42 U.S.C. 1437. Section 35 allows PHAs to own, operate, assist or otherwise participate in the development and operation of mixed-finance projects. Mixed-finance development refers to the development or rehabilitation of public housing, where the public housing units are owned in whole or in part by an entity other than a PHA. Prior to this, all public housing had to be developed and owned by a Public Housing Authority (PHA). However, Section 35 allowed PHAs to provide Section 9 capital and operating assistance to mixed-finance projects, which are also financially assisted by private and other resources. Private and other resources include tax credit equity, private mortgages and other federal, state or local funds. Section 35 also allows non-PHA owner entities to own and operate mixed-finance projects that contain both public housing and non-public housing units, or only public housing units. Along with public housing unit development, mixed-finance real estate development or rehabilitation transactions are used to extend public housing appropriations in housing development and to develop mixed-income housing, where public housing residents are anonymously mixed in with affordable and market rate housing residents.

In order to approve the development of mixed-finance projects, HUD collects certain information from each PHA/Ownership Entity. Under current regulations, HUD collects and reviews the essential documents included in this ICR in order to determine whether or not approval should be given. After approval is given and the documents are recorded by the associated county, HUD collects the recorded versions of the documents in this ICR, along with all financing and legal agreements that the PHA/owner entity has with HUD and with third-parties in connection with that mixed-finance project. This includes unique legal documents along with standardized forms and ''Certifications and Assurances,'' which are not exempted under PRA. Regulations for the processing of mixed-finance public housing projects are at 24 CFR part 905 subpart F (§ 905). This information is collected to ensure that the mixed-finance development effort has sufficient funds to reach completion, remain financially viable,

and follow HUD legal and programmatic guidelines for housing project development or rehabilitation, ownership and use restrictions, as well as preserving HUD's rights to the project.

PHAs must provide information to HUD before a proposal can be approved for mixed-finance development. Information on HUD-prescribed forms and in HUD-prescribed contracts and agreements provides HUD with sufficient information to enable a determination that funds should or should not be reserved or a contractual commitment made. Regulations at 24 CFR part 905.606, ''Development Proposal'' states that a Mixed-finance Development Proposal (Proposal) must be submitted to HUD in order to facilitate approval of the development of public housing. The subpart also lists the information that is required in the Proposal. The documentation required is submitted using the collection documents (ICs) in this ICR.

Members of affected public: Public Housing Agencies, Developers

Estimation of the total number of hours needed to prepare the information collection including number of respondents, frequency of response, and hours of response:

Form/document	Number of respondents	Frequency	Total responses	Hours per response	Total hours	Cost per hour	Total cost
1. HUD–50157 Mixed-Finance Development Proposal	60	1	60	16	960	$50	$48,000
2. Supplementary Document: Unique Legal Document. Mixed-Finance Amendment to the Annual Contributions Contract	60	1	60	24	1,440	50	72,000
3. Supplementary Document: Unique Legal Document. Mixed-Finance Declaration of Restrictive Covenants	60	1	60	0.25	15	250	3,750
4. Supplementary Document: Unique Legal Document. Mixed-Finance Final Title Policy	60	1	60	16	960	250	240,000
5. Supplementary Document: Unique Legal Document. Mixed-Finance Legal Opinion	60	1	60	1	60	250	15,000
6. Supplementary Document: Unique Legal Documents. Mixed-Finance Evidentiaries	60	1	60	116	6,960	250	1,740,000
7. Supplementary Document: Unique Legal Document. Regulatory and Operating Agreement	60	1	60	8	480	250	120,000
8. Supplementary Document: Unique Legal Document. Transition Plan	60	1	60	8	480	250	120,000
9. HUD–50161 Mixed-Finance Certifications and Assurances	60	1	60	0.25	15	50	750
10. Supplementary Document: Unique Legal Document. Site Acquisition Proposal	110	1	110	8	880	50	44,000
11. Supplementary Document: Unique Legal Document. Development Proposal	50	1	50	80	4,000	50	200,000
12. HUD–50156 Mixed-Finance Development Proposal Calculator	60	1	60	1	60	50	3,000
13. HUD–50059 Mixed-Finance Homeownership Term Sheet	20	1	20	16	320	50	16,000
14. Supplementary Document: Unique Legal Document. Mixed-Finance Homeownership Addendum	20	1	20	16	320	250	80,000
15. HUD–50158 Mixed-Finance Homeownership Certifications and Assurances	20	1	20	0.25	5	50	250
16. HUD–50160 Mixed-Finance and Homeownership Pre-Funding Certifications and Assurances	80	1	80	0.25	20	50	1,000
17. Supplementary Document: Unique Legal Document. Mixed-Finance Homeownership Declaration of Restrictive Covenants	20	1	20	0.25	5	50	250
Totals	920	.....	920	.....	16,980	.....	2,704,000

B. Solicitation of Public Comment

This notice is soliciting comments from members of the public and affected parties concerning the collection of information described in Section A on the following:

(1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) The accuracy of the agency's estimate of the burden of the proposed collection of information;

(3) Ways to enhance the quality, utility, and clarity of the information to be collected; and

(4) Ways to minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

HUD encourages interested parties to submit comment in response to these questions.

C. Authority: Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35.

Dated: November 29, 2018.

Merrie Nichols-Dixon,

Deputy Director, Office of Policy, Programs and Legislative Initiatives.

[FR Doc. 2018–27548 Filed 12–19–18; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE INTERIOR

[FWS–R4–ES–2018–N153; FVHC98220410150–XXX–FF04H00000]

Deepwater Horizon Oil Spill Draft Restoration Plan #1.1 and Environmental Assessment; Louisiana Trustee Implementation Group

AGENCY: Department of the Interior.

ACTION: Notice of availability; request for public comments.

SUMMARY: In accordance with the Oil Pollution Act of 1990, the National Environmental Policy Act, the Final Programmatic Damage Assessment Restoration Plan and Final Programmatic Environmental Impact Statement (Final PDARP/PEIS), and the Consent Decree, the Federal and State natural resource trustee agencies for the Louisiana Trustee Implementation Group (Louisiana TIG) have prepared *Draft Restoration Plan and Environmental Assessment #1.1: Restoration of Queen Bess Island* (Draft RP/EA #1.1), describing and proposing construction activities for the restoration of Queen Bess Island. The Queen Bess Island Restoration Project was approved for engineering and design in a 2016 restoration plan entitled *Louisiana Trustee Implementation Group Draft Restoration Plan #1: Restoration of Wetlands, Coastal, and Nearshore Habitats; Habitat Projects on Federally Managed Lands; and Birds* (RP 1). The Queen Bess Island Restoration Project would continue the process of restoring birds injured as a result of the *Deepwater Horizon* oil spill, which occurred on or about April 20, 2010, in the Gulf of Mexico.

DATES:

Submitting Comments: We will consider public comments received on or before January 22, 2019.

Public Meeting: The Trustees will host a public meeting on January 3, 2019, in association with the Louisiana Wildlife and Fisheries Commission meeting at the Wildlife and Fisheries Headquarters Building, 2000 Quail Drive, Baton Rouge, LA 70808. The exact meeting time will be posted on the Trustees' website (see **ADDRESSES**).

ADDRESSES:

Obtaining Documents: You may download the Draft RP/EA #1.1 from any of the following websites:

- *http://www.gulfspillrestoration.noaa.gov;*
- *https://www.doi.gov/deepwaterhorizon/adminrecord;* or
- *http://www.la-dwh.com.*

Alternatively, you may request a CD of the Draft RP/EA #1.1 (see **FOR FURTHER INFORMATION CONTACT**).

Submitting Comments: You may submit comments on the Draft RP/EA #1.1 by one of the following methods:

- *Via the Web: http://www.gulfspillrestoration.noaa.gov/restoration-areas/louisiana.*
- *Via U.S. Mail:* U.S. Fish and Wildlife Service, P.O. Box 49567, Atlanta, GA 30345. In order to be considered, mailed comments must be postmarked on or before the comment deadline given in **DATES**.
- *In Person:* Verbal comments may be provided at the public meeting on January 3, 2019.

FOR FURTHER INFORMATION CONTACT: Nanciann Regalado, via email at nanciann_regalado@fws.gov, via telephone at 678–296–6805, or via the Federal Relay Service at 800–877–8339.

SUPPLEMENTARY INFORMATION:

Introduction

On April 20, 2010, the mobile offshore drilling unit *Deepwater Horizon,* which was being used to drill a well for BP Exploration and Production, Inc. (BP), in the Macondo prospect (Mississippi Canyon 252—MC252), experienced a significant explosion, fire, and subsequent sinking in the Gulf of Mexico, resulting in an unprecedented volume of oil and other discharges from the rig and from the wellhead on the seabed. The *Deepwater Horizon* oil spill is the largest oil spill in U.S. history, discharging millions of barrels of oil over a period of 87 days. In addition, well over one million gallons of dispersants were applied to the waters of the spill area in an attempt to disperse the spilled oil. An undetermined amount of natural gas was also released into the environment as a result of the spill.

The Trustees conducted the natural resource damage assessment (NRDA) for the *Deepwater Horizon* oil spill under the Oil Pollution Act 1990 (OPA; 33 U.S.C. 2701 *et seq.*). Pursuant to OPA, Federal and State agencies act as trustees on behalf of the public to assess natural resource injuries and losses and to determine the actions required to compensate the public for those injuries and losses. The OPA further instructs the designated trustees to develop and implement a plan for the restoration, rehabilitation, replacement, or acquisition of the equivalent of the injured natural resources under their trusteeship, including the loss of use and services from those resources from the time of injury until the time of restoration to baseline (the resource quality and conditions that would exist if the spill had not occurred) is complete.

The *Deepwater Horizon* Trustees are:

- U.S. Department of the Interior (DOI), as represented by the National Park Service, U.S. Fish and Wildlife Service, and Bureau of Land Management;
- National Oceanic and Atmospheric Administration (NOAA), on behalf of the U.S. Department of Commerce;
- U.S. Department of Agriculture (USDA);
- U.S. Environmental Protection Agency (EPA);
- State of Louisiana Coastal Protection and Restoration Authority, Oil Spill Coordinator's Office, Department of Environmental Quality, Department of Wildlife and Fisheries, and Department of Natural Resources;
- State of Mississippi Department of Environmental Quality;
- State of Alabama Department of Conservation and Natural Resources and Geological Survey of Alabama;
- State of Florida Department of Environmental Protection and Fish and Wildlife Conservation Commission; and
- State of Texas: Texas Parks and Wildlife Department, Texas General Land Office, and Texas Commission on Environmental Quality.

The Trustees reached and finalized a settlement of their natural resource damage claims with BP in an April 4, 2016, Consent Decree approved by the U.S. District Court for the Eastern District of Louisiana. Pursuant to that Consent Decree, restoration projects in Louisiana are now selected and implemented by the Louisiana Trustee Implementation Group (TIG). The Louisiana TIG is composed of the following Trustees:

- U.S. Department of the Interior (DOI), as represented by the National Park Service, U.S. Fish and Wildlife Service, and Bureau of Land Management;

- National Oceanic and Atmospheric Administration (NOAA), on behalf of the U.S. Department of Commerce;
- U.S. Department of Agriculture (USDA);
- U.S. Environmental Protection Agency (EPA);
- State of Louisiana Coastal Protection and Restoration Authority, Oil Spill Coordinator's Office, Department of Environmental Quality, Department of Wildlife and Fisheries, and Department of Natural Resources.

Background

The Final Programmatic Damage Assessment Restoration Plan and Final Programmatic Environmental Impact Statement (Final PDARP/PEIS) provides for TIGs to propose phasing restoration projects across multiple restoration plans. A TIG may propose funding a planning phase (*e.g.,* initial engineering, design, and compliance) in one plan for a conceptual project. This would allow the TIG to develop information needed to fully consider a subsequent implementation phase of that project in a future restoration plan. In 2016, the LA TIG included the Queen Bess Island Restoration Project as a preferred alternative to fund engineering and design (E&D) in RP #1. After approval, the Queen Bess Island Restoration Project began E&D. It is currently at a stage of E&D where National Environmental Policy Act (NEPA) analyses can be conducted on the design alternatives. Therefore, the Louisiana TIG is proposing in RP/EA #1.1 the implementation phase for the Queen Bess Island Restoration Project.

Overview of the Louisiana TIG Draft RP/EA #1.1

The Draft RP/EA #1.1 is being released in accordance with OPA, NRDA regulations found in the Code of Federal Regulations (CFR) at 15 CFR part 990, NEPA, the Consent Decree, and Final PDARP/PEIS.

In the Draft RP/EA #1.1, the Louisiana TIG proposes a preferred design alternative for the Queen Bess Island Restoration Project, which was approved for E&D in a 2016 Louisiana TIG final restoration plan, under the bird restoration type. After screening six design alternatives, the Louisiana TIG analyzed in detail in the Draft RP/EA #1.1 one other design alternative and a no action alternative.

The proposed design alternative is intended to continue the process of using *Deepwater Horizon* restoration funding to restore natural resources injured or lost as a result of the *Deepwater Horizon* oil spill. The total estimated cost for construction of the proposed Queen Bess Island Restoration Project is $16,710,000. Details are provided in the Draft RP/EA #1.1. Additional restoration planning for the Louisiana Restoration Area will continue.

Next Steps

As described above, the Trustees will hold a public meeting to facilitate the public review and comment process. After the public comment period ends, the Trustees will consider and address the comments received before issuing a Final RP/EA #1.1.

Public Availability of Comments

Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Administrative Record

The documents comprising the Administrative Record for this Draft RP/EA #1.1 can be viewed electronically at *https://www.doi.gov/deepwaterhorizon/adminrecord.*

Authority

The authority of this action is the Oil Pollution Act of 1990 (33 U.S.C. 2701 *et seq.*), its implementing Natural Resource Damage Assessment regulations found at 15 CFR part 990, and the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*).

Mary Josie Blanchard,

Department of the Interior, Director of Gulf of Mexico Restoration.

[FR Doc. 2018–27530 Filed 12–19–18; 8:45 am]

BILLING CODE 4333–15–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 731–TA–919 (Third Review)]

Certain Welded Large Diameter Line Pipe From Japan; Notice of Commission Determination To Conduct a Full Five-Year Review

AGENCY: United States International Trade Commission.

ACTION: Notice.

SUMMARY: The Commission hereby gives notice that it will proceed with a full review pursuant to the Tariff Act of 1930 to determine whether revocation of the antidumping duty order on certain welded large diameter line pipe from Japan would be likely to lead to continuation or recurrence of material injury within a reasonably foreseeable time. A schedule for the review will be established and announced at a later date.

DATES: December 10, 2018.

FOR FURTHER INFORMATION CONTACT: Abu B. Kanu (202–205–2597), Office of Investigations, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436. Hearing-impaired persons can obtain information on this matter by contacting the Commission's TDD terminal on 202–205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000. General information concerning the Commission may also be obtained by accessing its internet server (*https://www.usitc.gov*) . The public record for this review may be viewed on the Commission's electronic docket (EDIS) at *https://edis.usitc.gov.*

For further information concerning the conduct of this review and rules of general application, consult the Commission's Rules of Practice and Procedure, part 201, subparts A through E (19 CFR part 201), and part 207, subparts A, D, E, and F (19 CFR part 207).

SUPPLEMENTARY INFORMATION: On December 10, 2018, the Commission determined that it should proceed to a full review in the subject five-year review pursuant to section 751(c) of the Tariff Act of 1930 (19 U.S.C. 1675(c)). The Commission found that both the domestic and respondent interested party group responses to its notice of institution (83 FR 44900, September 4, 2018) were adequate. A record of the Commissioners' votes, the Commission's statement on adequacy, and any individual Commissioner's statements will be available from the Office of the Secretary and at the Commission's website.

Authority: This review is being conducted under authority of title VII of the Tariff Act of 1930; this notice is published pursuant to section 207.62 of the Commission's rules.

By order of the Commission.

Issued: December 17, 2018.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2018–27567 Filed 12–19–18; 8:45 am]

BILLING CODE 7020–02–P

JUDICIAL CONFERENCE OF THE UNITED STATES

Hearing of the Judicial Conference Advisory Committee on the Federal Rules of Bankruptcy Procedure

AGENCY: The Advisory Committee on the Federal Rules of Bankruptcy Procedure, Judicial Conference of the United States.

ACTION: Notice of cancellation of public hearing.

SUMMARY: The January 10, 2019 public hearing in Washington, DC, on proposed amendments to the Bankruptcy Rules has been canceled.

FOR FURTHER INFORMATION CONTACT: Rebecca A. Womeldorf, Rules Committee Secretary, Rules Committee Staff, Administrative Office of the United States Courts, Washington, DC 20544, telephone (202) 502–1820.

SUPPLEMENTARY INFORMATION: Announcements for this hearing were previously published in 83 FR 39463 and 83 FR44305.

Dated: December 12, 2018.

Rebecca A. Womeldorf,

Rules Committee Secretary.

[FR Doc. 2018–27527 Filed 12–19–18; 8:45 am]

BILLING CODE 2210–55–P

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—Integrated Photonics Institute for Manufacturing Innovation Operating Under the Name of the American Institute for Manufacturing Integrated Photonics

Notice is hereby given that, on November 13, 2018, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), Integrated Photonics Institute for Manufacturing Innovation operating under the name of the American Institute for Manufacturing Integrated Photonics (''AIM Photonics'') has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, Phase Sensitive Innovations, Inc., Newark, DE; Synopsys, Inc., Mountain View, CA; Service Support Specialties, Inc., Montville, NJ; SRICO, Inc., Columbus, OH; The State University of New York at Binghamton, Binghamton, NY; Rockwell Collins, Inc., Cedar Rapids, IA; The Cornell Center for Materials Research of Cornell University, Ithaca, NY; CPS Recruitment, Inc., Liverpool, NY; Eastman Kodak Company, Rochester, NY; VPIphotonics, Inc., Norwood, MA; Princeton Instruments, Trenton, NJ; COTSWORKS LLC, Highland Heights, OH; Freedom Photonics, Santa Barbara, CA; Physical Sciences, Inc., Andover, MA; Syntec Technologies, Inc., Rochester, NY; The Optical Society, Washington, DC; and Optiwave Systems, Inc., Ontario, CANADA, have been added as parties to this venture.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and AIM Photonics intends to file additional written notifications disclosing all changes in membership.

On June 16, 2016, AIM Photonics filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to Section 6(b) of the Act on July 25, 2016 (81 FR 48450).

The last notification was filed with the Department on July 23, 2018. A notice was published in the **Federal Register** pursuant to Section 6(b) of the Act on August 6, 2018 (83 FR 38324).

Suzanne Morris,

Chief, Premerger and Division Statistics Unit, Antitrust Division.

[FR Doc. 2018–27491 Filed 12–19–18; 8:45 am]

BILLING CODE 4410–11–P

DEPARTMENT OF JUSTICE

[OMB Number 1121–NEW]

Agency Information Collection Activities; Proposed eCollection eComments Requested; New Collection; National Criminal Justice Reference Service (NCJRS) Online Subscription Center

AGENCY: Office of Communications, Office of Justice Programs, Department of Justice.

ACTION: 60-day notice.

SUMMARY: The Department of Justice (DOJ), Office of Justice Programs (OJP), Office of Communications (OCOM) will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995.

DATES: Comments are encouraged and will be accepted for 60 days until February 19, 2019.

FOR FURTHER INFORMATION CONTACT: If you have additional comments especially on the estimated public burden or associated response time, suggestions, or need a copy of the proposed information collection instrument with instructions or additional information, please contact Sharon Williams, NCJRS COR/Senior Program Specialist, Office of Communications, 810 Seventh Street NW, Washington, DC 20531 (email: *sharon.j.williams@ojp.usdoj.gov;* telephone: 202–353–8726).

SUPPLEMENTARY INFORMATION: Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

—Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the Office of Communications, including whether the information will have practical utility;

—Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

—Evaluate whether and if so how the quality, utility, and clarity of the information to be collected can be enhanced; 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.

Overview of this information collection:

1. *Type of Information Collection:* Revision of a currently approved collection.

2. *The Title of the Form/Collection:* National Criminal Justice Reference Service (NCJRS) online subscription center: *https://www.ncjrs.gov/App/Secure/Registration/Register.aspx/*

3. *The agency form number, if any, and the applicable component of the Department sponsoring the collection:* There is no form number.

4. *Affected public who will be asked or required to respond, as well as a brief abstract:* Currently, constituents can sign-up for communications, such as new publications, funding

opportunities, events, and other news and announcements from NCJRS and the NCJRS federal sponsors, place online orders, and track their order status by creating a detailed profile on *NCJRS.gov.* End Users can also subscribe to specific Bureau, Program Office, and shared email notification lists and newsletters when creating an NCJRS account. This action can also be accomplished on various Bureau, Program Office, or *GovDelivery* webpages.

However, the NCJRS online subscription center is more than 14 years old and subscription form selections have remained relatively unchanged for more than 20 years. Moreover, the subscription process includes 19 required fields and 7 different screens, creating an undue burden for End Users.

An evaluation of the current use of the information collected through the form and its impact to End Users was conducted to see where updates can be made to make for a better user experience while enabling customer segmentation strategies for targeted outreach. The goals for revising the subscription process are to increase subscriptions by making the sign-up process less cumbersome for users and collect meaningful customer information to assist segmentation strategies for targeted outreach and upselling of Bureau and program office products and services.

5. *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* On a monthly basis, an estimated 75 End Users use the NCJRS online subscription center to subscribe. Based on pilot testing, an average of 2–4 minutes per respondent is needed to complete form. The estimated range of burden for respondents is expected to be between 2 minutes to 4 minutes for completion.

6. *An estimate of the total public burden (in hours) associated with the collection:* It is estimated that respondents will take 2–4 minutes to complete their profile. The estimated public burden hours associated for End Users to subscribe is 5 hours per month (75 respondents × 4 minutes = 300 minutes/60 minutes = 5 hours) or 60 hours per year (5 hours × 12 months = 60 hours).

If additional information is required contact: Melody Braswell, Department Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Two Constitution Square, 145 N Street NE, 3E.405A, Washington, DC 20530.

Dated: December 14, 2018.

Melody Braswell,

Department Clearance Officer for PRA, U.S. Department of Justice.

[FR Doc. 2018–27490 Filed 12–19–18; 8:45 am]

BILLING CODE 4410–18–P

DEPARTMENT OF JUSTICE

Notice of Lodging of Proposed Consent Decree Under The Clean Air Act

On December 14, 2018, the Department of Justice lodged a proposed Consent Decree with the United States District Court for the Western District of Arkansas in the lawsuit entitled *United States, et al.* v. *Georgia Pacific Chemicals LLC, Georgia Pacific Consumer Operations LLC, Case No. 1:18-cv-01076–SOH.*

The proposed Consent Decree resolves the claims of the United States and the Arkansas Department of Environmental Quality (''ADEQ'') under Sections 113(b)(2) and 112(r) of the Clean Air Act (''CAA''), 42 U.S.C. 7413(b)(2) and 7412(r), as well as Arkansas Code Annotated §§ 8–4–103 *et seq.,* that Settling Defendants violated the New Source Performance Standards, National Emission Standards for Hazardous Air Pollutants and the Chemical and Accident Prevention Provisions for Air Programs at their chemical and paper/pulp plants located in Crossett, Arkansas. Under the proposed Consent Decree, Settling Defendants have agreed to pay civil penalties of $600,000, half to be paid to the United States and half to the State, implement three supplemental environmental projects valued at $1.8 million and implement a mitigation project valued at $2.9 million to resolve the governments' claims.

The publication of this notice opens a period for public comment on the Consent Decree. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, and should refer to *Georgia Pacific Chemicals LLC, Georgia Pacific Consumer Operations LLC, Case No. 1:18-cv-01076–SOH,* D.J. Ref. No. 90–5–2–1–11705. All comments must be submitted no later than thirty (30) days after the publication date of this notice. Comments may be submitted either by email or by mail:

To submit comments:	*Send them to:*
By email	*pubcomment-ees.enrd@usdoj.gov.*
By mail	Assistant Attorney General, U.S. DOJ—ENRD, P.O. Box 7611, Washington, DC 20044–7611.

During the public comment period, the Consent Decree may be examined and downloaded at this Justice Department website: *http://www.usdoj.gov/enrd/Consent_Decrees.html.* We will provide a paper copy of the Consent Decree upon written request and payment of reproduction costs. Please mail your request and payment to: Consent Decree Library U.S. DOJ—ENRD P.O. Box 7611 Washington, DC 20044–7611.

Please enclose a check or money order for $13.75 (25 cents per page reproduction cost) payable to the United States Treasury.

Thomas Carroll,

Assistant Section Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 2018–27504 Filed 12–19–18; 8:45 am]

BILLING CODE 4410–15–P

MILLENNIUM CHALLENGE CORPORATION

[MCC FR 18–14]

Report on the Selection of Eligible Countries for Fiscal Year 2019

AGENCY: Millennium Challenge Corporation.

ACTION: Notice.

SUMMARY: This report is provided in accordance with section 608(d)(2) of the Millennium Challenge Act of 2003.

Dated: December 14, 2018.

Jeanne M. Hauch,

VP/General Counsel and Corporate Secretary.

Report on the Selection of Eligible Countries for Fiscal Year 2019

Summary

This report is provided in accordance with section 608(d)(1) of the Millennium Challenge Act of 2003, as amended (the ''Act'') (22 U.S.C. 7707(d)(1)).

The Act authorizes the provision of assistance under section 605 of the Act (22 U.S.C. 7704) to countries that enter into compacts with the United States to support policies and programs that advance the progress of such countries in achieving lasting economic growth and poverty reduction, and are in

furtherance of the Act. The Act requires the Millennium Challenge Corporation (''MCC'') to determine the countries that will be eligible to receive assistance for the fiscal year, based on their demonstrated commitment to just and democratic governance, economic freedom, and investing in their people, as well as on the opportunity to reduce poverty and generate economic growth in the country. The Act also requires the submission of reports to appropriate congressional committees and the publication of notices in the **Federal Register** that identify, among other things:

1. The countries that are ''candidate countries'' for assistance for fiscal year (''FY'') 2019 based on their per-capita income levels and their eligibility to receive assistance under U.S. law, and countries that would be candidate countries but for specified legal prohibitions on assistance (section 608(a) of the Act (22 U.S.C. 7707(a)));

2. The criteria and methodology that the Board of Directors of MCC (the ''Board'') will use to measure and evaluate the policy performance of the ''candidate countries'' consistent with the requirements of section 607 of the Act in order to determine ''eligible countries'' from among the ''candidate countries'' (section 608(b) of the Act (22 U.S.C. 7707(b))); and

3. The list of countries determined by the Board to be ''eligible countries'' for FY 2019, with justification for eligibility determination and selection for compact negotiation, including with which of the eligible countries the Board will seek to enter into compacts (section 608(d) of the Act (22 U.S.C. 7707(d))).

This is the third of the above-described reports by MCC for FY 2019. It identifies countries determined by the Board to be eligible under section 607 of the Act (22 U.S.C. 7706) for FY 2019 with which the MCC will seek to enter into compacts under section 609 of the Act (22 U.S.C. 7708), as well as the justification for such decisions. The report also identifies countries selected by the Board to receive assistance under MCC's threshold program pursuant to section 616 of the Act (22 U.S.C. 7715).

Eligible Countries

The Board met on December 11, 2018, to select those eligible countries with which the United States, through MCC, will seek to enter into a Millennium Challenge Compact pursuant to section 607 of the Act (22 U.S.C. 7706). The Board selected the following eligible countries for such assistance for FY 2019: Indonesia, Malawi, Kosovo, Benin, Burkina Faso, Côte d'Ivoire, Ghana and Niger. The Board also selected the following previously-selected countries for compact assistance for FY 2019: Burkina Faso, Lesotho, Timor-Leste and Tunisia.

Criteria

In accordance with the Act and with the ''Report on the Criteria and Methodology for Determining the Eligibility of Candidate Countries for Millennium Challenge Account Assistance in Fiscal Year 2019'' formally submitted to Congress on September 13, 2018, selection was based primarily on a country's overall performance in three broad policy categories: *Ruling Justly, Encouraging Economic Freedom,* and *Investing in People.* The Board relied, to the fullest extent possible, upon transparent and independent indicators to assess countries' policy performance and demonstrated commitment in these three broad policy areas. The Board compared countries' performance on the indicators relative to their income-level peers, evaluating them in comparison to either the group of countries with a GNI per capita equal to or less than $1,875, or the group with a GNI per capita between $1,876 and $3,895.

The criteria and methodology used to assess countries on the annual scorecards are outlined in the ''Report on the Criteria and Methodology for Determining the Eligibility of Candidate Countries for Millennium Challenge Account Assistance in Fiscal Year 2019.'' [1] Scorecards reflecting each country's performance on the indicators are available on MCC's website at *www.mcc.gov/scorecards.*

The Board also considered whether any adjustments should be made for data gaps, data lags, or recent events since the indicators were published, as well as strengths or weaknesses in particular indicators. Where appropriate, the Board took into account additional quantitative and qualitative information, such as evidence of a country's commitment to fighting corruption, investments in human development outcomes, or poverty rates. In keeping with legislative directives, the Board also considered the opportunity to reduce poverty and promote economic growth in a country, in light of the overall information available, as well as the availability of appropriated funds.

The Board sees the selection decision as an annual opportunity to determine where MCC funds can be most effectively used to support poverty reduction through economic growth in relatively well-governed, poor countries. The Board carefully considers the appropriate nature of each country partnership—on a case-by-case basis—based on factors related to economic growth and poverty reduction, the sustainability of MCC's programs, and the country's ability to attract and leverage public and private resources in support of development.

This was the first year the Board considered the eligibility of countries for concurrent compacts, as permitted under the African Growth and Opportunity Act and MCA Modernization Act, Public Law 115–167, signed by President Trump in April 2018, which authorizes MCC to enter into one additional concurrent compact with a country if one or both of the compacts with the country are for the purpose of regional economic integration, increased regional trade, or cross-border collaborations. In addition to the considerations for compact eligibility detailed above, the Board considered whether a country being considered for a concurrent compact is making considerable and demonstrable progress in implementing the terms of its existing Compact.

This was the tenth year the Board considered the eligibility of countries for subsequent compacts, as permitted under section 609(k) of the Act. MCC's engagement with partner countries is not open-ended, and the Board is very deliberate when selecting countries for follow-on partnerships, particularly regarding the higher bar applicable to subsequent compact countries. In making these selection decisions, the Board considered—in addition to the criteria outlined above—the country's performance implementing its first compact, including the nature of the country's partnership with MCC, the degree to which the country has demonstrated a commitment and capacity to achieve program results, and the degree to which the country has implemented the compact in accordance with MCC's core policies and standards. To the greatest extent possible, these factors were assessed using pre-existing monitoring and evaluation targets and regular quarterly reporting. This information was supplemented with direct surveys and consultation with MCC staff responsible for compact implementation, monitoring, and evaluation. MCC published a Guide to Supplemental Information [2] and a Guide to the Compact Survey Summary [3] in

[1] Available at *https://www.mcc.gov/resources/doc/report-selection-criteria-and-methodology-fy19.*

[2] Available at *https://www.mcc.gov/resources/doc/guide-to-supplemental-information-fy19.*

[3] Available at *https://www.mcc.gov/resources/doc/guide-to-the-compact-survey-summary-fy19.*

order to increase transparency about the type of supplemental information the Board uses to assess a country's policy performance and compact implementation performance. The Board also considered a country's commitment to further sector reform, as well as evidence of improved scorecard policy performance.

In addition, this is the third year where the Board considered an explicit higher bar for those countries close to the upper end of the candidate pool, looking closely in such cases at a country's access to development financing, the nature of poverty in the country, and its policy performance.

Countries Newly Selected for Compact Assistance

Countries selected for a first or subsequent compact: Using the criteria described above, three candidate countries under section 606(a) of the Act (22 U.S.C. 7705(a)) were newly selected for assistance under section 607 of the Act (22 U.S.C. 7706): Indonesia, Malawi and Kosovo.

Indonesia: Indonesia has demonstrated impressive gains on its scorecard, now passing 15 of 20 indicators overall in the higher income category. In particular, Indonesia's Control of Corruption score has risen every year for eight straight years, while its Political Rights and Civil Liberties scores remain strong. Key metrics were achieved in two projects in the first compact and both have been adopted as models for implementation across the government. While the third project ran into delays that led to the deobligation of funds, MCC has learned from the experience of partnering with the Government of Indonesia and will work with it to focus a subsequent compact and leverage the lessons learned from the first compact to maximize the impact and effectiveness of U.S. assistance.

Kosovo: Kosovo has been an engaged and committed partner in the threshold program, demonstrating a willingness to commit to governance reforms. The country passes the scorecard for the second year in a row, passing 13 of 20 indicators overall, including Control of Corruption. At the same time, it remains one of the poorest countries in Europe, suffering from chronically high unemployment, low educational outcomes, and poor employment security. By selecting Kosovo for a compact, MCC will accelerate the government's efforts to strengthen economic growth to reduce poverty.

Malawi: Malawi is one of the strongest scorecard performers in MCC's entire candidate pool, passing 18 of 20 indicators, including high Democratic Rights scores, despite being the third-poorest country in the world and MCC's poorest partner country. The country demonstrated commitment in the first compact. In addition to finishing all planned construction works, Malawi achieved important milestones under the compact, including approving and implementing an electricity tariff that is partially cost-reflective, and signing the first power-purchasing agreement with an independent power producer, moving the energy sector closer to long-term sustainability.

Countries selected for a concurrent compact: In accordance with section 609(k) of the Act, five candidate countries were newly selected to explore development of a concurrent compact under section 607 of the Act (22 U.S.C. 7706): Benin, Burkina Faso, Côte d'Ivoire, Ghana, and Niger.

Benin: Benin continues its strong scorecard performance in FY 2019, passing 13 of 20 indicators, with particularly high scores on Democratic Rights and Control of Corruption. MCC's partnership with the government has remained strong throughout the current compact, despite politically challenging reforms required under the program and the arrival of a new government in 2016. A strong scorecard performer and current partner, Benin presents substantial regional potential.

Burkina Faso: In FY 2019, Burkina Faso maintains its stronger scorecard performance compared to its first partnership with MCC, passing 13 of 20 indicators with strong performance on Control of Corruption (92nd percentile) and both Democratic Rights indicators. Selected to develop a subsequent compact in December 2016, Burkina Faso has a long track record of engagement with MCC and has been an effective partner throughout compact development. Burkina Faso has demonstrated strong scorecard performance, robust engagement as a compact partner, and presents potentially rich opportunities to strengthen regional integration efforts.

Côte d'Ivoire: Passing 14 of 20 scorecard indicators in FY 2019, Côte d'Ivoire is a positive ''MCC effect'' story, with clear scorecard improvement over multiple years through intensive engagement with indicator institutions and implementing policy reforms. Côte d'Ivoire's current compact focuses on urban transport and planning and training skilled workers. Compact development and early implementation have benefited from high-level government support. Côte d'Ivoire is a model partner that has strongly engaged MCC throughout compact development and early implementation and presents substantial regional opportunities.

Ghana: A strong scorecard performer, passing 17 of 20 indicators, Ghana registers some of the highest Democratic Rights scores among MCC partners, while also scoring in the 90th percentile on Control of Corruption. Ghana's current compact entered into force in September 2016 and is expected to close in September 2021. Significant progress has already been made toward the goal of the current power sector compact to transform the country's power sector through private sector participation in its electricity utilities and key sector reforms. Ghana has demonstrated strong scorecard performance, built a successful compact partnership with MCC, and has significant regional potential.

Niger: Niger has been a solid scorecard performer, passing 12 of 20 indicators in FY 2019. Niger's current compact is focused on large-scale irrigation systems, road rehabilitation, and activities to ensure infrastructure sustainability. The compact entered into force in January 2018 and is expected to close in January 2023. Niger has been a committed partner, with high-level participation and strong engagement, and is a country with significant regional potential.

Countries Selected To Continue Compact Development

Four of the countries selected for compact assistance for FY 2019 were previously selected for FY 2018. These countries are Burkina Faso, Lesotho, Timor-Leste, and Tunisia, whose selection for FY 2019 was based on their continued or improved policy performance since their prior selection.

Countries Selected To Receive Threshold Program Assistance

The Board selected Ethiopia and the Solomon Islands to receive threshold program assistance.

Ethiopia: Ethiopia offers MCC the opportunity to recognize the Government of Ethiopia's important reform efforts following the arrival of a new Prime Minister, Abiy Ahmed, in April. Since he took office, the Government of Ethiopia has embarked on a series of significant reforms, including releasing thousands of political prisoners, apologizing for past state-led human rights abuses, and easing restrictions on media outlets. Ethiopia also renewed relations with neighboring Eritrea and signed a 20-year old peace treaty. Despite historically low Democratic Rights scores, the remarkable initial pace of change presents an opportunity for MCC to

partner with Ethiopia as it seeks to accelerate its reform agenda.

Solomon Islands: In FY 2019 the Solomon Islands graduated from the lower income scorecard category to the higher income scorecard category, and as a result of the stiffer competition now fails the scorecard, passing only 9 of 20 indicators, while still passing Control of Corruption and Democratic Rights. The Solomon Islands represents an opportunity to engage a historically strong scorecard performer in the Indo-Pacific, a region of increasing interest.

Ongoing Review of Partner Countries' Policy Performance

The Board emphasized the need for all partner countries to maintain or improve their policy performance. If it is determined during compact implementation that a country has demonstrated a significant policy reversal, MCC can hold it accountable by applying MCC's Suspension and Termination Policy.

[FR Doc. 2018–27571 Filed 12–19–18; 8:45 a.m.]

BILLING CODE 9211–03–P

MILLENNIUM CHALLENGE CORPORATION

[MCC FR 18–15]

Notice of Entering Into a Compact With the Senegal

AGENCY: Millennium Challenge Corporation.

ACTION: Notice.

SUMMARY: In accordance with Section 610(b)(3) of the Millennium Challenge Act of 2003, as amended, and the heading ''Millennium Challenge Corporation'' of the Department of State, Foreign Operations, and Related Programs Appropriations Act, 2018, as carried forward by the Continuing Appropriations Act, 2019, the Millennium Challenge Corporation (MCC) is publishing a summary of the Millennium Challenge Compact between the United States of America, acting through MCC, and the Republic of Senegal, acting through the Ministry of Economy, Finance and Planning. Representatives of MCC and Senegal signed the compact on December 10, 2018. The complete text of the compact has been posted at: *https://www.mcc.gov/resourcesdoc/compact-senegal-power.*

Dated: December 17, 2018.

Jeanne M. Hauch,

VP/General Counsel and Corporate Secretary.

Summary of Senegal Compact

Overview of MCC Senegal Compact

MCC's five-year, $550,000,000 Compact with the Government of Senegal (the ''Government'') is aimed at addressing one of Senegal's main binding constraints to economic growth: The high cost of energy and low access to electricity. The Compact will address these constraints through three primary projects: (i) Improving the transmission network to meet the growing demand on the interconnected network in Senegal, (ii) increasing electricity access in rural and peri-urban areas of the south and central regions, and (iii) improving the overall governance and financial viability of the sector.

Senegal is an important partner of the United States in promoting peace and security in Africa. The country shares many fundamental values and international goals with the United States, and it has set an example of democratic rule in the region as well as of ethnic and religious tolerance. It is a stable democracy in a challenging West Africa region, a strong security partner, and a rising economy that is attracting global investment. MCC's singular focus on growth and poverty reduction—along with its ability to combine major infrastructure works with policy change—allows the agency and the Compact to play a key role in catalyzing transformation in Senegal.

Project Summaries

The Compact is comprised of three projects designed to secure quality electricity supply for growing demand in Senegal and address binding constraints to growth.

- The Modernizing and Strengthening Senelec's Transmission Network Project aims to strengthen and increase the reliability of Senegal's high-voltage transmission network in and around greater Dakar and improve electricity service delivery throughout the country. This support for a robust transmission network is needed for Senegal to effectively capitalize on private sector-led investment in generation and to ensure that electricity is delivered reliably to consumers. This is particularly important since much of the private sector interest is in new, lower-cost generation projects including wind, solar, and natural gas that rely heavily upon a reliable, stable transmission network.
- The Increasing Access to Electricity in Rural and Peri-Urban Areas Project aims to extend the electrical grid in selected areas in Senegal's south and center regions that have high economic potential but low connection rates. Through a blend of supply-side and demand-side interventions, this project also aims to increase rates of adoption and consumption of electricity, facilitate opportunities for income-generating activities in these regions, and improve the understanding of energy efficiency at a national level. This project offers several opportunities for collaboration with related United States Government initiatives, including Feed the Future and Power Africa, and with other donors that are providing complementary support to agricultural value chains in MCC's areas of assistance, thereby increasing the potential value of the MCC assistance.
- The Power Sector Enabling Environment and Capacity Development Project aims to strengthen laws, policies and regulations governing the electricity sector, as well as the institutions responsible for implementing them, especially the utility, the regulator, and the ministry responsible for energy. In particular, the project aims to support improved management of the transmission network and increased access to electricity, reinforcing the foundations for the provision of a less costly and more reliable supply of electricity nationwide. The project builds on a participatory electricity sector planning process that MCC funded during compact development to help the Government articulate and select an appropriate long-term vision for the sector that favors more private sector participation and enhances the financial sustainability of the sector and its key stakeholders.

Compact Budget

Table I presents the Compact budget and sets forth both the MCC funding allocation by Compact components and the Government's expected $50 million contribution toward the objectives of the Compact.

TABLE 1—SENEGAL COMPACT BUDGET

Component	Amount
1. Modernizing and Strengthening Senelec's Transmission Network Project	
1.1 Transmission Network Build Out Activity	$327,900,000
1.2 Transformer Replacement Program Activity	$26,000,000
1.3 Grid Stabilization Activity	$22,900,000
Subtotal	$376,800,000

TABLE 1—SENEGAL COMPACT BUDGET—Continued

Component	Amount
2. Increasing Access to Electricity in Rural and Peri-Urban Areas Project	
2.1 Supply-Side Activity	$33,000,000
2.2 Consumer Demand Support Activity	$13,400,000
2.3 Distribution Network Reinforcement Activity	$10,900,000
Subtotal	$57,300,000
3. Power Sector Enabling Environment and Capacity Development Project	
3.1 Sector Governance Activity	$14,000,000
3.2 Regulatory Strengthening Activity	$11,900,000
3.3 Utility Strengthening Activity	$17,600,000
Subtotal	$43,500,000
4. Monitoring and Evaluation	$11,800,000
5. Program Administration and Oversight	$60,600,000
Total MCC Funding	$550,000,000
Total Program Budget	Amount
Total MCC Funding	$550,000,000
Total Government Contribution	$50,000,000
Total Program Budget	$600,000,000

[FR Doc. 2018–27570 Filed 12–19–18; 8:45 am]

BILLING CODE 9211–03–P

NUCLEAR REGULATORY COMMISSION

[Docket Nos. 50–280 and 50–281; NRC–2018–0280]

Virginia Electric and Power Company; Dominion Energy Virginia: Surry Power Station, Unit Nos. 1 and 2

AGENCY: Nuclear Regulatory Commission.

ACTION: Intent to conduct scoping process and prepare environmental impact statement; public meeting and request for comment.

SUMMARY: The U.S. Nuclear Regulatory Commission will conduct a scoping process to gather information necessary to prepare an environmental impact statement (EIS) to evaluate the environmental impacts for the subsequent license renewal of the operating licenses for Surry Power Station, Unit Nos. 1 and 2 (Surry). The NRC is seeking stakeholder input on this action and has scheduled a public meeting.

DATES: Submit comments by January 22, 2019. Comments received after this date will be considered if it is practical to do so, but assurance of consideration cannot be given to comments received after this date.

ADDRESSES: You may submit comments by any of the following methods (unless this document describes a different method for submitting comments on a specific subject):

- *Federal Rulemaking website:* Go to *http://www.regulations.gov* and search for Docket ID NRC–2018–0280. Address questions about *regulations.gov* docket IDs to Krupskaya Castellon; telephone: 301–287–9221; email: *Krupskaya.Castellon@nrc.gov.* For technical questions, contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.
- *Mail comments to:* May Ma, Office of Administration, Mail Stop TWFN–7–A60M, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001. For additional direction on obtaining information and submitting comments, see ''Obtaining Information and Submitting Comments'' in the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: Tam Tran, Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–3617, email: *tam.tran@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Obtaining Information and Submitting Comments

A. Obtaining Information

Please refer to Docket ID NRC–2018–0280 when contacting the NRC about the availability of information regarding this document. You may obtain publicly-available information related to this document by any of the following methods:

- *Federal Rulemaking website:* Go to *http://www.regulations.gov* and search for Docket ID NRC–2018–0280.
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly-available documents online in the NRC Library at *http://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''Begin Web-based ADAMS Search.'' For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to *pdr.resource@nrc.gov.* The ADAMS accession number for each document referenced in this document (if that document is available in ADAMS) is provided the first time that a document is referenced. Dominion Energy Virginia's application for subsequent renewal of the Surry licenses can be found in ADAMS under Package Accession No. ML18291A842.
- *NRC's PDR:* You may examine and purchase copies of public documents at the NRC's PDR, Room O1–F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.

B. Submitting Comments

Please include Docket ID NRC–2018–0280 in the subject line of your comment submission in order to ensure that the NRC is able to make your comment submission available to the public in this docket.

The NRC cautions you not to include identifying or contact information that you do not want to be publicly disclosed in your comment submission. The NRC will post all comment submissions at *http://www.regulations.gov* as well as enter the comment submissions into ADAMS. The NRC does not routinely edit comment submissions to remove identifying or contact information.

If you are requesting or aggregating comments from other persons for submission to the NRC, then you should inform those persons not to include identifying or contact information that they do not want to be publicly disclosed in their comment submission. Your request should state that the NRC does not routinely edit comment submissions to remove such information before making the comment submissions available to the public or entering the comment submissions into ADAMS.

II. Discussion

By letter dated October 15, 2018 (ADAMS Package Accession No. ML18291A842), Dominion Energy Virginia submitted to the NRC an application for subsequent license renewal of Facility Operating License Nos. DPR–32 and DPR–37 for an additional 20 years of operation at Surry Power Station, Unit Nos. 1 and 2. The Surry units are pressurized water reactors designed by Westinghouse and are located in Surry County, Virginia (17 miles NW of Newport News, VA). The current renewed operating license for Unit 1 expires at midnight on May 25, 2032, and the current renewed operating license for Unit 2 expires at midnight on January 29, 2033. The application for subsequent license renewal was submitted pursuant to part 54 of title 10 of the *Code of Federal Regulations* (10 CFR) and included an environmental report (ER). A notice of receipt and availability of the application was published in the **Federal Register** on November 1, 2018 (83 FR 54948). A

notice of acceptance for docketing of the application and opportunity for hearing regarding subsequent license renewal of the facility operating license was published in the **Federal Register** on December 10, 2018 (83 FR 63541), corrected on December 17, 2018 (83 FR 64606), and is available in *Regulations.gov* by searching for docket ID NRC–2018–0247.

III. Request for Comments

This notice informs the public of the NRC's intention to conduct scoping and prepare an EIS related to the subsequent license renewal application, and to provide the public an opportunity to participate in the environmental scoping process, as defined in 10 CFR 51.29.

The regulations in 36 CFR 800.8, ''Coordination with the National Environmental Policy Act,'' allow agencies to use their National Environmental Policy Act of 1969 (NEPA) process to fulfill the requirements of Section 106 of the National Historic Preservation Act (NHPA). Therefore, pursuant to 36 CFR 800.8(c), the NRC intends to use its process and documentation for the preparation of the EIS on the proposed action to comply with Section 106 of the NHPA in lieu of the procedures set forth at 36 CFR 800.3 through 800.6.

In accordance with 10 CFR 51.53(c) and 10 CFR 54.23, Dominion Energy Virginia submitted the ER as part of the subsequent license renewal application. The ER was prepared pursuant to 10 CFR part 51 and is publicly available in ADAMS under Accession No. ML18291A842. The ER may also be viewed on the internet at *https://www.nrc.gov/reactors/operating/licensing/renewal/subsequent-license-renewal.html.* In addition, a paper copy of the SLR application including the ER are available for public review near the site at the Williamsburg Regional Library, 515 Scotland St., Williamsburg, VA 23185.

The NRC intends to gather the information necessary to prepare a plant-specific supplement to the NRC's ''Generic Environmental Impact Statement (GEIS) for License Renewal of Nuclear Plants'' (NUREG–1437), related to the application for subsequent license renewal of the Surry operating licenses for an additional 20 years beyond the period specified in each of the current renewed licenses.

Possible alternatives to the proposed action include the no action alternative and reasonable alternative energy sources. The NRC is required by 10 CFR 51.95 to prepare a supplement to the GEIS in connection with the renewal of an operating license. This notice is being published in accordance with NEPA and the NRC's regulations found at 10 CFR part 51.

The NRC will first conduct scoping for the supplement to the GEIS and, as soon as practicable thereafter, will prepare a draft supplement to the GEIS for public comment. Participation in the scoping process by members of the public and local, State, Tribal, and Federal government agencies is encouraged. The scoping process for the supplement to the GEIS will be used to accomplish the following:

a. Define the proposed action, which is to be the subject of the supplement to the GEIS;

b. Determine the scope of the supplement to the GEIS and identify the significant issues to be analyzed in depth;

c. Identify and eliminate from detailed study those issues that are peripheral or are not significant; or were covered by a prior environmental review;

d. Identify any environmental assessments and other ElSs that are being or will be prepared that are related to, but are not part of, the scope of the supplement to the GEIS being considered;

e. Identify other environmental review and consultation requirements related to the proposed action;

f. Indicate the relationship between the timing of the preparation of the environmental analyses and the Commission's tentative planning and decision-making schedule;

g. Identify any cooperating agencies and, as appropriate, allocate assignments for preparation and schedules for completing the supplement to the GEIS to the NRC and any cooperating agencies; and

h. Describe how the supplement to the GEIS will be prepared, including any contractor assistance to be used.

The NRC invites the following entities to participate in scoping:

a. The applicant, Dominion Energy Virginia;

b. Any Federal agency that has jurisdiction by law or special expertise with respect to any environmental impact involved or that is authorized to develop and enforce relevant environmental standards;

c. Affected State and local government agencies, including those authorized to develop and enforce relevant environmental standards;

d. Any affected Indian tribe;

e. Any person who requests or has requested an opportunity to participate in the scoping process; and

f. Any person who has petitioned or intends to petition for leave to intervene under 10 CFR 2.309.

IV. Public Scoping Meeting

In accordance with 10 CFR 51.26, the scoping process for an EIS may include a public scoping meeting to help identify significant issues related to a proposed activity and to determine the scope of issues to be addressed in an EIS. The NRC will hold a public meeting for the Surry subsequent license renewal supplement to the GEIS. The scoping meeting will be held on January 8, 2019. The meeting will be held from 6:00 p.m. to 8:00 p.m. at the Surry Administrator's Office at the Surry Government Center, 45 School Street, Surry VA 23883. There will be an open house 1 hour before the meeting for members of the public to meet with NRC staff and sign in to speak at the meeting. Should the public scoping meeting of January 8, 2019, be canceled due to inclement weather, it will be rescheduled for the same hour and location on January 15, 2019.

The meeting will be transcribed and will include: (1) An overview by the NRC staff of the NEPA environmental and Safety review process, the proposed scope of the supplement to the GEIS, and the proposed review schedule; and (2) the opportunity for interested government agencies, organizations, and individuals to submit comments or suggestions on the environmental issues or the proposed scope of the Surry subsequent license renewal supplement to the GEIS. To be considered, comments must be provided either at the transcribed public meeting or in writing, as discussed in the **ADDRESSES** section of this notice.

Persons may register to attend or present oral comments at the meeting on the scope of the NEPA review by contacting the NRC Project Manager, Mr. Tam Tran, by telephone at 301–415–3617, or by email at *tam.tran@nrc.gov* no later than January 3, 2019. Members of the public may also register to speak during the registration period prior to the start of the meeting. Individual oral comments may be limited by the time available, depending on the number of persons who register. Members of the public who have not registered may also have an opportunity to speak if time permits. Public comments will be considered in the scoping process for the Surry subsequent license renewal supplement to the GEIS. Please contact Mr. Tam Tran no later than January 3, 2019, if accommodations or special equipment is needed to attend or present information at the public meeting, so

that the NRC staff can determine whether the request can be accommodated.

Participation in the scoping process for the Surry subsequent license renewal supplement to the GEIS does not entitle participants to become parties to the proceeding to which the supplement to the GEIS relates. Matters related to participation in any hearing are outside the scope of matters to be discussed at this public meeting.

Dated at Rockville, Maryland, on December 17, 2018.

For the Nuclear Regulatory Commission.

Eric R. Oesterle,

Chief, License Renewal Projects Branch, Division of Materials and License Renewal, Office of Nuclear Reactor Regulation.

[FR Doc. 2018–27547 Filed 12–19–18; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 55–63784–SP; ASLBP No. 19–961–01–SP–BD01]

Establishment of Atomic Safety and Licensing Board: Andres Paez

Pursuant to delegation by the Commission, *see* 37 FR 28,710; December 29, 1972, and the Commission's regulations, *see, e.g.,* 10 CFR 2.104, 2.105, 2.300, 2.309, 2.313, 2.318, 2.321, notice is hereby given that an Atomic Safety and Licensing Board (Board) is being established to preside over the following proceeding:

Andres Paez

(Denial of Senior Reactor Operator License)

This proceeding concerns a hearing request from Andres Paez, dated December 5, 2018, in response to an examination appeal resolution letter from the Office of Nuclear Reactor Regulation notifying him that, following administrative review, the NRC is in agreement with the decision of Region II to deny a senior reactor operator license for the St. Lucie Station.

The Board is comprised of the following Administrative Judges:

- William J. Froehlich, Chairman, Atomic Safety and Licensing Board Panel, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001
- Ronald M. Spritzer, Atomic Safety and Licensing Board Panel, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001
- Dr. Anthony J. Baratta, Atomic Safety and Licensing Board Panel, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001

All correspondence, documents, and other materials shall be filed in accordance with the NRC E-Filing rule. *See* 10 CFR 2.302.

Dated: December 14, 2018, in Rockville, Maryland.

Edward R. Hawkens,

Chief Administrative Judge, Atomic Safety and Licensing Board Panel.

[FR Doc. 2018–27529 Filed 12–19–18; 8:45 am]

BILLING CODE 7590–01–P

PENSION BENEFIT GUARANTY CORPORATION

Approval of Special Withdrawal Liability Rules: The United Food and Commercial Workers International Union—Industry Pension Fund

AGENCY: Pension Benefit Guaranty Corporation.

ACTION: Notice of approval.

SUMMARY: The Pension Benefit Guaranty Corporation (PBGC) received a request from the United Food and Commercial Workers International Union—Industry Pension Fund for approval of a plan amendment providing for special withdrawal liability rules. PBGC published a Notice of Pendency of the Request for Approval of the amendment. PBGC is now advising the public that the agency has approved the requested amendment.

FOR FURTHER INFORMATION CONTACT: Bruce Perlin (*Perlin.Bruce@PBGC.gov*), 202–326–4020, ext. 6818 or Elizabeth Coleman (*Coleman.Elizabeth@PBGC.gov*), ext. 3661, Office of the General Counsel, Suite 340, 1200 K Street NW, Washington, DC 20005–4026; (TTY users may call the Federal relay service toll-free at 1–800–877–8339 and ask to be connected to 202–326–4020.)

SUPPLEMENTARY INFORMATION:

Background

Section 4203(a) of the Employee Retirement Income Security Act of 1974, as amended by the Multiemployer Pension Plan Amendments Act of 1980 (ERISA), provides that a complete withdrawal from a multiemployer plan generally occurs when an employer permanently ceases to have an obligation to contribute under the plan or permanently ceases all covered operations under the plan. Under section 4205 of ERISA, a partial withdrawal generally occurs when an employer: (1) Reduces its contribution base units by seventy percent in each of three consecutive years; or (2) permanently ceases to have an obligation under one or more but fewer than all collective bargaining agreements under which the employer has been obligated to contribute under the plan, while continuing to perform work in the jurisdiction of the collective bargaining agreement of the type for which contributions were previously required or transfers such work to another location or to an entity or entities owned or controlled by the employer; or (3) permanently ceases to have an obligation to contribute under the plan for work performed at one or more but fewer than all of its facilities, while continuing to perform work at the facility of the type for which the obligation to contribute ceased.

Although the general rules on complete and partial withdrawal identify events that normally result in a diminution of the plan's contribution base, Congress recognized that, in certain industries and under certain circumstances, a complete or partial cessation of the obligation to contribute normally does not weaken the plan's contribution base. For that reason, Congress established special withdrawal rules for the construction and entertainment industries.

For construction industry plans and employers, section 4203(b)(2) of ERISA provides that a complete withdrawal occurs only if an employer ceases to have an obligation to contribute under a plan and the employer either continues to perform previously covered work in the jurisdiction of the collective bargaining agreement or resumes such work within 5 years without renewing the obligation to contribute at the time of resumption. In the case of a plan terminated by mass withdrawal (within the meaning of section 4041(A)(2) of ERISA), section 4203(b)(3) provides that the 5-year restriction on an employer's resuming covered work is reduced to 3 years. Section 4203(c)(1) of ERISA applies the same special definition of complete withdrawal to the entertainment industry, except that the pertinent jurisdiction is the jurisdiction of the plan rather than the jurisdiction of the collective bargaining agreement. In contrast, the general definition of complete withdrawal in section 4203(a) of ERISA includes the permanent cessation of the obligation to contribute regardless of the continued activities of the withdrawn employer.

Congress also established special partial withdrawal liability rules for the construction and entertainment industries. Under section 4208(d)(1) of ERISA, ''[a]n employer to whom section 4203(b) (relating to the building and

construction industry) applies is liable for a partial withdrawal only if the employer's obligation to contribute under the plan is continued for no more than an insubstantial portion of its work in the craft and area jurisdiction of the collective bargaining agreement of the type for which contributions are required.'' Under section 4208(d)(2) of ERISA, ''[a]n employer to whom section 4203(c) (relating to the entertainment industry) applies shall have no liability for a partial withdrawal except under the conditions and to the extent prescribed by [PBGC] by regulation.''

Section 4203(f)(1) of ERISA provides that PBGC may prescribe regulations under which plans in other industries may be amended to provide for special withdrawal liability rules similar to the rules prescribed in section 4203(b) and (c) of ERISA. Section 4203(f)(2) of ERISA provides that such regulations shall permit the use of special withdrawal liability rules only in industries (or portions thereof) in which PBGC determines that the characteristics that would make use of such rules appropriate are clearly shown, and that the use of such rules will not pose a significant risk to the insurance system under title IV of ERISA. Section 4208(e)(3) of ERISA provides that PBGC shall prescribe by regulation a procedure by which plans may be amended to adopt special partial withdrawal liability rules upon a finding by PBGC that the adoption of such rules is consistent with the purposes of title IV of ERISA.

PBGC's regulations on Extension of Special Withdrawal Liability Rules (29 CFR part 4203) prescribe procedures for a multiemployer plan to ask PBGC to approve a plan amendment that establishes special complete or partial withdrawal liability rules. The regulation may be accessed on PBGC's website (*http://www.pbgc.gov*). Section 4203.5(b) of the regulation requires PBGC to publish a notice of the pendency of a request for approval of special withdrawal liability rules in the **Federal Register**, and to provide interested parties with an opportunity to comment on the request.

The Request

PBGC received a request from the United Food and Commercial Workers International Union—Industry Pension Fund (the ''Plan'') for approval of a plan amendment providing for special withdrawal liability rules. The Plan provided supplemental information in response to a request from PBGC. PBGC published a Notice of Pendency of the Request for Approval of the amendment October 9, 2018. PBGC's summary of the actuarial reports provided by the Plan may be accessed on PBGC's website (*http://www.pbgc.gov/prac/pg/other/guidance/multiemployer-notices.html*). PBGC did not receive any comments from interested parties.

In summary, the Plan is a multiemployer pension plan jointly maintained by Local Unions affiliated with the United Food and Commercial Workers International Union (''UFCW'') and employers signatory to collective bargaining agreements with the UFCW. The Plan covers unionized employees who work predominantly in the retail food industry. The Plan's proposed amendment would be effective for withdrawals occurring under ERISA section 4205(a)(1) during the three-year testing period ending June 30, 2014, or any subsequent plan year and for any withdrawals occurring under sections 4203 and 4205(a)(2) of ERISA on or after July 1, 2013. Thus, the proposed amendment is intended to apply to cessations of the obligation to contribute that have already occurred. Plans may adopt this retroactive relief as a discretionary provision under section 4203.3(b)(2) of ERISA. There are two employers that may be eligible for relief from withdrawal liability under the proposed amendment if it is approved.

The proposed amendment would create special withdrawal liability rules for employers contributing to the Plan for work performed under a contract or subcontract for services to federal government agencies (''Employer''). The Plan's submission represents that the industry for which the rule is requested has characteristics similar to those of the construction industry. According to the Plan, the principal similarity is that when an Employer loses a government contract, or subcontract, it usually does so through the competitive bidding process, and the applicable federal government agency typically contracts with a successor Employer that is obligated to contribute to the Plan at the same or substantially the same rate for the same employees. The Plan believes the proposed amendment may induce potential new employers to bid on work at a government facility and agree to continue making contributions to the Plan when they otherwise may avoid seeking a contribution obligation to the Plan to avoid potential withdrawal liability.

Under the proposed amendment, the special withdrawal liability rules would apply to an Employer that ceases to have a contribution obligation to the Plan because it loses a governmental contract to a successor Employer (''Successor Employer''), if all the following conditions are met for the 5 plan years immediately following the year the Employer lost the contract.

A complete withdrawal will *not* occur if an Employer loses all its governmental contracts to a Successor Employer, so long as: (1) Substantially all the employees for which the Employer was obligated to contribute to the Plan continue to perform covered work with a Successor Employer; (2) for each of the next 5 plan years the Successor Employer has an obligation to contribute at the same or a higher contribution rate to the Plan; (3) for each of the next 5 plan years the Successor Employer contributes substantially the same contribution base units as did the initial Employer in the plan year immediately before the year it lost the contract; and (4) the Employer posts a bond or establishes an escrow account equal to the lesser of the present value of its withdrawal liability or 5 years of installment payments of its withdrawal liability. The Employer *will* have experienced a complete withdrawal if within the 5 plan years following the year the Employer lost the contract, the Successor Employer's contract terminates, and no subsequent Successor Employer assumes the contribution obligations and conditions, or if the Successor Employer fails to meet the contribution conditions.

A partial withdrawal will *not* occur if an Employer loses one or more, but less than all, of its governmental contracts to a Successor Employer, or if it loses all its governmental contracts but continues to have a contribution obligation to the Plan under a collective bargaining agreement, so long as: (1) For each of the next 5 plan years the Successor Employer has an obligation to contribute at the same or a higher contribution rate to the Plan; (2) for each of the next 5 plan years the Successor Employer contributes substantially the same contribution base units as did the initial Employer in the plan year immediately before the year it lost the contract; and (3) the Employer posts a bond or establishes an escrow account equal to the lesser of the present value of its partial withdrawal liability or 5 years of installment payments of its withdrawal liability. The Employer *will* have experienced a partial withdrawal if within the 5 plan years following the year the Employer lost the contract, the Successor Employer's contract terminates, and no subsequent Successor Employer assumes the contribution obligations and conditions, or if the Successor Employer fails to meet the contribution conditions.

Alternatively, the proposed amendment provides that an Employer that loses a governmental contract to a

Successor Employer will not experience a complete or partial withdrawal if the Successor Employer assumes the Employer's contribution history under the affected contract(s) for the plan year in which the contract is lost and the 5 immediately preceding plan years. Lastly, the Plan's trustees may waive or reduce the bond or escrow requirement if the Employer demonstrates that doing so would not significantly increase the risk of financial loss to the Plan. The Plan's request includes the actuarial data on which the Plan relies to support its contention that the amendment will not pose a significant risk to the insurance system under Title IV of ERISA.

Decision on the Proposed Amendment

The statute and the implementing regulation state that PBGC must make two factual determinations before it approves a request for an amendment that adopts a special withdrawal liability rule. ERISA section 4203(f); 29 CFR 4203.5(a). First, based on a showing by the plan, PBGC must determine that the amendment will apply to an industry that has characteristics that would make use of the special rules appropriate. Second, PBGC must determine that the plan amendment will not pose a significant risk to the insurance system. PBGC's discussions on each of those issues follows. After review of the record submitted by the Plan, and having received no public comments, PBGC has made the following determinations.

1. What is the nature of the industry?

In determining whether an industry has the characteristics that would make adoption of special withdrawal liability rules appropriate, an important consideration is the extent to which the Plan's contribution base resembles that found in the construction industry. This threshold question requires consideration of the effect of Employer withdrawals on the Plan's contribution base. The Plan asserts that historically when governmental contracts have changed hands, the Plan has not experienced reduced contributions. Similar to construction industry employers, most Employers that have ceased to contribute have been replaced by a Successor Employer that begins contributing for the same work. Therefore, we conclude the proposed amendment will apply only to an industry that has characteristics that would make use of the special withdrawal rules appropriate.

2. What is the exposure and risk of loss to PBGC?

Exposure. The Plan is in a strong funded position. The Plan is a Green zone plan with steady contributions and a solid base of active participants and as of July 1, 2016, was 104.5% funded.

Risk of loss. The record shows that the proposed amendment presents a low risk of loss to PBGC's multiemployer insurance program. The industry covered by the amendment has unique characteristics that indicate the contribution base is likely to remain stable because the withdrawal of an Employer typically does not have an adverse effect on the plan's contribution base. In addition, the Employers constitute a very small part of the total number of employers obligated to contribute to the Plan, accounting for only 640 of the Plan's over 87,593 active participants (0.73% of the Plan's total active participants). Accordingly, the data substantiates the Plan's assertion that the Employers' contribution base is secure and the amendment will not pose a significant risk to the insurance system.

Conclusion

Based on the Plan's submissions and the representations and statements made in connection with the request for approval, PBGC has determined that the plan amendment adopting the special withdrawal liability rules: (1) Will apply only to an industry that has characteristics that would make the use of the special rule appropriate; and (2) will not pose a significant risk to the insurance system. Therefore, PBGC hereby grants the Plan's request for approval of a plan amendment providing special withdrawal liability rules, as set forth herein. Should the Plan wish the amend these rules at any time, PBGC's approval of the amendment will be required.

Issued in Washington, DC by,

William Reeder,

Director, Pension Benefit Guaranty Corporation.

[FR Doc. 2018–27502 Filed 12–19–18; 8:45 am]

BILLING CODE 7709–02–P

POSTAL SERVICE

Product Change—Priority Mail Express and Priority Mail Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* December 20, 2018.

FOR FURTHER INFORMATION CONTACT: Elizabeth Reed, 202–268–3179.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on December 14, 2018, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Express & Priority Mail Contract 79 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2019–49, CP2019–53.

Elizabeth Reed,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2018–27495 Filed 12–19–18; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* December 20, 2018.

FOR FURTHER INFORMATION CONTACT: Elizabeth Reed, 202–268–3179.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on December 14, 2018, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Contract 495 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2019–47, CP2019–51.

Elizabeth Reed,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2018–27496 Filed 12–19–18; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail Express and Priority Mail Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* December 20, 2018.

FOR FURTHER INFORMATION CONTACT: Elizabeth Reed, 202–268–3179.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on December 14, 2018, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Express & Priority Mail Contract 80 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2019–50, CP2019–54.

Elizabeth Reed,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2018–27497 Filed 12–19–18; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail and First-Class Package Service Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* December 20, 2018.

FOR FURTHER INFORMATION CONTACT: Elizabeth Reed, 202–268–3179.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on December 14, 2018, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail & First-Class Package Service Contract 92 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2019–51, CP2019–55.

Elizabeth Reed,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2018–27498 Filed 12–19–18; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail and First-Class Package Service Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* December 20, 2018.

FOR FURTHER INFORMATION CONTACT: Elizabeth Reed, 202–268–3179.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on December 14, 2018, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail & First-Class Package Service Contract 93 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2019–52, CP2019–56.

Elizabeth Reed,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2018–27500 Filed 12–19–18; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail Express and Priority Mail Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* December 20, 2018.

FOR FURTHER INFORMATION CONTACT: Elizabeth Reed, 202–268–3179.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on December 14, 2018, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Express & Priority Mail Contract 78 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2019–48, CP2019–52.

Elizabeth Reed,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2018–27499 Filed 12–19–18; 8:45 am]

BILLING CODE 7710–12–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–84822; File No. SR–NASDAQ–2018–101]

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend the Exchange's Transaction Fees at Options 7, Section 2(1)

December 14, 2018.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 3, 2018, The Nasdaq Stock Market LLC (''Nasdaq'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend the Exchange's transaction fees at Options 7, Section 2(1), which governs the pricing for Nasdaq participants using The Nasdaq Options Market (''NOM''), Nasdaq's facility for executing and routing standardized equity and index options. The proposed changes are described further below.

The text of the proposed rule change is available on the Exchange's website at *http://nasdaq.cchwallstreet.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to amend NOM pricing at Options 7, Section 2(1) to modify the Rebates to Add Liquidity in Penny Pilot Options for Customers,[3] Professionals,[4] and NOM Market Makers.[5] Each change is discussed below.

Customer and Professional Rebate To Add Liquidity in Penny Pilot Options

Today, the Exchange offers Customer and Professional Rebates to Add Liquidity in Penny Pilot Options. These rebates are structured as a six tier program ranging from $0.20 to $0.48 per contract, with increasing volume requirements for each tier. Participants that qualify for the $0.48 per contract Tier 6 rebate are also eligible for a supplemental rebate, provided they meet the requisite qualifications in note ''c'' of Section 2(1). In particular, paragraphs (1), (2), and (3) of note ''c'' provide three additional incentives of $0.02, $0.05, and $0.05 per contract, respectively, each with corresponding qualifications to achieve the rebate, as follows: ''Participants that: (1) Add Customer, Professional, Firm, Non-NOM Market Maker and/or Broker-Dealer liquidity in Penny Pilot Options and/or Non- Penny Pilot Options of 1.15% or more of total industry customer equity and ETF option ADV contracts per day in a month will receive an additional $0.02 per contract Penny Pilot Options Customer and/or Professional Rebate to Add Liquidity for each transaction which adds liquidity in Penny Pilot Options in that month; or (2) add Customer, Professional, Firm, Non-NOM Market Maker and/or Broker-Dealer liquidity in Penny Pilot Options and/or Non-Penny Pilot Options of 1.30% or more of total industry customer equity and ETF option ADV contracts per day in a month will receive an additional $0.05 per contract Penny Pilot Options Customer and/or Professional Rebate to Add Liquidity for each transaction which adds liquidity in Penny Pilot Options in that month; or (3) (a) add Customer, Professional, Firm, Non-NOM Market Maker and/or Broker-Dealer liquidity in Penny Pilot Options and/or Non-Penny Pilot Options above 0.80% of total industry customer equity and ETF option ADV contracts per day in a month, (b) add Customer, Professional, Firm, Non-NOM Market Maker and/or Broker-Dealer liquidity in Non-Penny Pilot Options above 0.15% of total industry customer equity and ETF option ADV contracts per day in a month, and (c) execute greater than 0.04% of Consolidated Volume (''CV'') via Market-on-Close/Limit-on-Close (''MOC/LOC'') volume within The Nasdaq Stock Market Closing Cross within a month will receive an additional $0.05 per contract Penny Pilot Options Customer and/or Professional Rebate to Add Liquidity for each transaction which adds liquidity in Penny Pilot Options in a month. Consolidated Volume shall mean the total consolidated volume reported to all consolidated transaction reporting plans by all exchanges and trade reporting facilities during a month in equity securities, excluding executed orders with a size of less than one round lot. For purposes of calculating Consolidated Volume and the extent of an equity member's trading activity, expressed as a percentage of or ratio to Consolidated Volume, the date of the annual reconstitution of the Russell Investments Indexes shall be excluded from both total Consolidated Volume and the member's trading activity.''

The Exchange now proposes to amend the criteria in paragraph (3)(b) to decrease the percentage of total industry customer equity and ETF option ADV contracts per day in a month from 0.15% to 0.12%. As proposed, Participants will receive an additional $0.05 per contract rebate if they add Customer, Professional, Firm, Non-NOM Market Maker and/or Broker-Dealer liquidity in Non-Penny Pilot Options above 0.12% of total industry customer equity and ETF option ADV contracts per day in a month, and also meet the other qualifications in paragraphs (3)(a) and (3)(c). The Exchange believes that this will offer Participants an increased opportunity to qualify for the additional paragraph (3) incentive and receive the $0.05 per contract rebate, in addition to the $0.48 per contract Tier 6 rebate, by amending one of the qualifications to require less volume. The Exchange is not amending any other criteria in note ''c'' other than the proposed change in paragraph (3)(b). Participants that qualify for Tier 6 and the supplemental rebate in paragraph (3) will continue to receive a total rebate of $0.53 per contract.

NOM Market Maker Rebate To Add Liquidity in Penny Pilot Options

Today, the Exchange offers NOM Market Maker Rebates to Add Liquidity in Penny Pilot Options. These rebates are structured as a six tier program as follows:

Monthly volume		Rebate to add liquidity
Tier 1	Participant adds NOM Market Maker liquidity in Penny Pilot Options and/or Non-Penny Pilot Options of up to 0.10% of total industry customer equity and ETF option average daily volume (''ADV'') contracts per day in a month.	$0.20.
Tier 2	Participant adds NOM Market Maker liquidity in Penny Pilot Options and/or Non-Penny Pilot Options above 0.10% to 0.25% of total industry customer equity and ETF option ADV contracts per day in a month.	$0.25.
Tier 3	Participant adds NOM Market Maker liquidity in Penny Pilot Options and/or Non-Penny Pilot Options above 0.25% to 0.60% of total industry customer equity and ETF option ADV contracts per day in a month.	$0.30 or $0.40 in the following symbols AAPL, QQQ, IWM, SPY and VXX.

[3] The term ''Customer'' or (''C'') applies to any transaction that is identified by a Participant for clearing in the Customer range at The Options Clearing Corporation (''OCC'') which is not for the account of broker or dealer or for the account of a ''Professional'' (as that term is defined in Chapter I, Section 1(a)(48)).

[4] The term ''Professional'' or (''P'') means any person or entity that (i) is not a broker or dealer in securities, and (ii) places more than 390 orders in listed options per day on average during a calendar month for its own beneficial account(s) pursuant to Chapter I, Section 1(a)(48). All Professional orders shall be appropriately marked by Participants.

[5] The term ''NOM Market Maker'' or (''M'') is a Participant that has registered as a Market Maker on NOM pursuant to Chapter VII, Section 2, and must also remain in good standing pursuant to Chapter VII, Section 4. In order to receive NOM Market Maker pricing in all securities, the Participant must be registered as a NOM Market Maker in at least one security.

Monthly volume		Rebate to add liquidity
Tier 4	Participant adds NOM Market Maker liquidity in Penny Pilot Options and/or Non-Penny Pilot Options of above 0.60% to 0.90% of total industry customer equity and ETF option ADV contracts per day in a month.	$0.32 or $0.40 in the following symbols AAPL, QQQ, IWM, VXX and SPY.
Tier 5	Participant adds NOM Market Maker liquidity in Penny Pilot Options and/or Non-Penny Pilot Options of above 0.30% of total industry customer equity and ETF option ADV contracts per day in a month and qualifies for the Tier 6 Customer and/or Professional Rebate to Add Liquidity in Penny Pilot Options.	$0.40.
Tier 6	Participant (1) adds NOM Market Maker liquidity in Penny Pilot Options and/or Non-Penny Pilot Options above 0.95% of total industry customer equity and ETF option ADV contracts per day in a month, (2) executes Total Volume of 250,000 or more contracts per day in a month, of which 30,000 or more contracts per day in a month must be removing liquidity, and (3) adds Firm, Broker-Dealer and Non-NOM Market Maker liquidity in Non-Penny Pilot Options of 10,000 or more contracts per day in a month.	$0.48.

* ''Total Volume'' shall be defined as Customer, Professional, Firm, Broker-Dealer, Non-NOM Market Maker and NOM Market Maker volume in Penny Pilot Options and/or Non-Penny Pilot Options which either adds or removes liquidity on NOM.

The Exchange first proposes to amend the criteria in Tier 2 to decrease the percentage of total industry customer equity and ETF option ADV contract per day in a month from 0.25% to 0.20%, and make a corresponding change in Tier 3 to decrease the percentage from 0.25% to 0.20%. As proposed, Participants will receive a $0.25 per contract Tier 2 rebate for adding NOM Market Maker liquidity in Penny Pilot Options and/or Non-Penny Pilot Options above 0.10% to 0.20% of total industry customer equity and ETF option ADV contracts per day in a month. In addition, Participants will receive a $0.30 per contract (or $0.40 per contract in the symbols AAPL, QQQ, IWM, SPY and VXX) Tier 3 rebate for adding NOM Market Maker liquidity in Penny Pilot Options and/or Non-Penny Pilot Options above 0.20% to 0.60% of total industry customer equity and ETF option ADV contracts per day in a month.

The Exchange also proposes to create an alternative way for Participants to earn the Tier 6 rebate. Specifically, Participants will also be eligible to receive the $0.48 per contract Tier 6 rebate for: (1) adding NOM Market Maker liquidity in Penny Pilot Options and/or Non-Penny Pilot Options above 1.50% of total industry customer equity and ETF option ADV contracts per day in a month, and (2) executing Total Volume of 250,000 or more contracts per day in a month, of which 15,000 or more contracts per day in a month must be removing liquidity. The Exchange also proposes to make related clean-up changes by renumbering the existing three-prong method to qualify for Tier 6 as paragraph (a) and the proposed alternative method as paragraph (b).

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,[6] in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,[7] in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility, and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

Customer and Professional Rebate To Add Liquidity in Penny Pilot Options

The Exchange believes that its proposal to amend note ''c'' at paragraph (3)(b) to decrease the percentage of total industry customer equity and ETF option ADV contracts per day in a month from 0.15% to 0.12% to qualify for the additional $0.05 per contract incentive in paragraph (3) is reasonable. As discussed above, the Exchange believes that this will offer Participants an increased opportunity to qualify for the paragraph (3) incentive and receive a $0.05 per contract rebate by amending one of the qualifications to require less volume. The Exchange also believes that this incentive will continue to encourage Participants to add more liquidity on NOM to earn a higher Tier 8 rebate in addition to the incentives in note ''c.'' Participants that qualify for this incentive would be paid the Tier 8 rebate of $0.48 per contract plus the additional note ''c,'' paragraph (3) rebate of $0.05 per contract for a total rebate of $0.53 per contract.

The Exchange's proposal to amend note ''c'' at paragraph (3)(b) is equitable and not unfairly discriminatory because all similarly situated Participants are equally capable of qualifying for the paragraph (3) incentive, and the same rebates will be paid to all qualifying Participants. Further, the Exchange believes that it is equitable and not unfairly discriminatory to offer this rebate to NOM Participants that transact as Customers or Professionals, and not to other market participants. Customer liquidity offers unique benefits to the market by providing more trading opportunities, which attracts specialists and market makers. An increase in the activity of these market participants in turn facilitates tighter spreads, which may cause an additional corresponding increase in order flow from other market participants. The Exchange believes that encouraging Participants to add Professional liquidity is similarly beneficial, as the rebates may cause market participants to select NOM as a venue to send Professional order flow, which benefits all market participants by attracting valuable liquidity to the market and thereby enhancing the trading quality and efficiency of all.

NOM Market Maker Rebate To Add Liquidity in Penny Pilot Options

The Exchange believes that its proposal to amend the NOM Market Maker Rebate to Add Liquidity in Penny Pilot Options by modifying the criteria in Tier 2 to decrease the percentage of total industry customer equity and ETF option ADV contract per day in a month from 0.25% to 0.20%, and making a corresponding change in Tier 3 to decrease the percentage from 0.25% to 0.20% is reasonable. The Exchange believes that the amended qualifications will provide an increased opportunity for Participants to qualify for the rebates in Tiers 2 and 3 by amending the corresponding criteria to require less volume. The Exchange also believes that this incentive will continue to encourage Participants to add more liquidity on NOM to earn the Tier 2 and Tier 3 rebates.

The Exchange believes that its proposal to create an additional opportunity for Participants to earn the Tier 6 NOM Market Maker Rebate to

[6] 15 U.S.C. 78f(b).

[7] 15 U.S.C. 78f(b)(4) and (5).

Add Liquidity in Penny Pilot Options is reasonable because it will encourage Participants to send additional order flow to NOM to earn a higher rebate, which will benefit all market participants by providing opportunities for increased order interaction. As proposed, in addition to the current method to qualify for the $0.48 per contract Tier 6 rebate,[8] Participants will also be eligible to receive the Tier 6 rebate for: (1) Adding NOM Market Maker liquidity in Penny Pilot Options and/or Non-Penny Pilot Options above 1.50% of total industry customer equity and ETF option ADV contracts per day in a month, and (2) executing Total Volume of 250,000 or more contracts per day in a month, of which 15,000 or more contracts per day in a month must be removing liquidity. The proposed alternative is similar to the existing method for achieving the same $0.48 per contract Tier 6 rebate except the proposed will have two components as opposed to three for the existing.[9]

The Exchange believes that the proposed first prong (*i.e.,* add NOM Market Maker liquidity in Penny Pilot Options and/or Non-Penny Pilot Options above 1.50% of total industry customer equity and ETF option ADV contracts per day in a month) is reasonable because the Exchange already offers rebates based on percentages of total industry customer equity and ETF option ADV contracts, including within the first prong of the existing Tier 6 rebate qualifications as described above. While the first prong of the current Tier 6 qualifications also has a comparable percentage threshold (0.95%) that is lower than the 1.50% threshold in the proposed alternative to achieve the same $0.48 per contract rebate, the proposed alternative has fewer components than the existing method as described above, which offsets the higher percentage threshold.

Furthermore, the proposed second prong (*i.e.,* execute Total Volume of 250,000 or more contracts per day in a month, of which 15,000 or more contracts per day in a month must be removing liquidity) is reasonable because it is comparable to the second prong of the existing method (*i.e.,* execute Total Volume of 250,000 or more contracts per day in a month, of which 30,000 or more contracts per day in a month must be removing liquidity). As is true of the existing qualifications, the proposed criteria will attract both liquidity providers and removers to NOM, thereby providing opportunities for increased order interaction from additional order flow.

The Exchange's proposed changes to Tiers 2, 3, and 6 of the NOM Market Maker Rebate to Add Liquidity in Penny Pilot Options as described above are equitable and not unfairly discriminatory because all eligible Participants that qualify for these incentives will uniformly receive the rebate. Further, the Exchange believes that it is equitable and not unfairly discriminatory to offer this rebate to NOM Participants that transact as NOM Market Makers because unlike other market participants, NOM Market Makers add value through continuous quoting and the commitment of capital.[10] Because NOM Market Makers have these obligations to the market and regulatory requirements that normally do not apply to other market participants, the Exchange believes that offering these rebates to only NOM Market Makers is equitable and not unfairly discriminatory in light of their obligations. Finally, encouraging NOM Market Makers to add greater liquidity benefits all market participants in the quality of order interaction.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. All of the proposed changes to the Customer, Professional, and NOM Market Maker Rebates to Add Liquidity in Penny Pilot Options are designed to attract additional order flow to NOM, which strengthens NOM's competitive position. Greater liquidity benefits all market participants by providing more trading opportunities and attracting greater participation by market makers. An increase in the activity of these market participants in turn facilitates tighter spreads.

The Exchange operates in a highly competitive market in which market participants can readily favor competing venues if they deem fee levels at a particular venue to be excessive, or rebate opportunities available at other venues to be more favorable. In such an environment, the Exchange must continually adjust its fees and rebates to remain competitive. Because competitors are free to modify their own fees and rebates in response, the Exchange believes that the degree to which pricing changes in this market may impose any burden on competition is extremely limited.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act.[11]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is: (i) Necessary or appropriate in the public interest; (ii) for the protection of investors; or (iii) otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NASDAQ–2018–101 on the subject line.

[8] Today, a Participant is eligible to receive the Tier 6 rebate for (1) adding NOM Market Maker liquidity in Penny Pilot Options and/or Non-Penny Pilot Options above 0.95% of total industry customer equity and ETF option ADV contracts per day in a month, (2) executing Total Volume of 250,000 or more contracts per day in a month, of which 30,000 or more contracts per day in a month must be removing liquidity, and (3) adding Firm, Broker-Dealer and Non-NOM Market Maker liquidity in Non-Penny Pilot Options of 10,000 or more contracts per day in a month.

[9] Specifically, the proposed alternative will not have a requirement similar to the third prong of the existing criteria (*i.e.,* add Firm, Broker-Dealer and Non-NOM Market Maker liquidity in Non-Penny Pilot Options of 10,000 or more contracts per day in a month).

[10] Pursuant to Chapter VII (Market Participants), Section 5 (Obligations of Market Makers), in registering as a market maker, an Options Participant commits himself to various obligations. Transactions of a Market Maker in its market making capacity must constitute a course of dealings reasonably calculated to contribute to the maintenance of a fair and orderly market, and Market Makers should not make bids or offers or enter into transactions that are inconsistent with such course of dealings. Further, all Market Makers are designated as specialists on NOM for all purposes under the Act or rules thereunder. *See* Chapter VII, Section 5.

[11] 15 U.S.C. 78s(b)(3)(A)(ii).

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–NASDAQ–2018–101. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NASDAQ–2018–101 and should be submitted on or before January 10, 2019.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[12]

Eduardo A. Aleman,

Deputy Secretary.

[FR Doc. 2018–27511 Filed 12–19–18; 8:45 am]

BILLING CODE 8011–01–P

[12] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

Investment Company Act Release No. 33325; 812–14969

Hoya Capital Real Estate, LLC, et al.

December 17, 2018.

AGENCY: Securities and Exchange Commission (''Commission'').

ACTION: Notice.

Notice of an application for an order under section 6(c) of the Investment Company Act of 1940 (the ''Act'') for an exemption from sections 2(a)(32), 5(a)(1), 22(d), and 22(e) of the Act and rule 22c–1 under the Act, under sections 6(c) and 17(b) of the Act for an exemption from sections 17(a)(1) and 17(a)(2) of the Act, and under section 12(d)(1)(J) for an exemption from sections 12(d)(1)(A) and 12(d)(1)(B) of the Act. The requested order would permit (a) index-based series of certain open-end management investment companies (''Funds'') to issue shares redeemable in large aggregations only (''Creation Units''); (b) secondary market transactions in Fund shares to occur at negotiated market prices rather than at net asset value (''NAV''); (c) certain Funds to pay redemption proceeds, under certain circumstances, more than seven days after the tender of shares for redemption; (d) certain affiliated persons of a Fund to deposit securities into, and receive securities from, the Fund in connection with the purchase and redemption of Creation Units; and (e) certain registered management investment companies and unit investment trusts outside of the same group of investment companies as the Funds (''Funds of Funds'') to acquire shares of the Funds.

APPLICANTS: Hoya Capital Real Estate, LLC (the ''Initial Adviser''), a Connecticut limited liability company that is registered as an investment adviser under the Investment Advisers Act of 1940, ETF Series Solutions (the ''Trust''), a Delaware statutory trust registered under the Act as an open-end management investment company with multiple series, and Quasar Distributors, LLC, (the ''Distributor''), a Delaware limited liability company and broker-dealer registered under the Securities Exchange Act of 1934 (''Exchange Act'').

FILING DATES: The application was filed on October 29, 2018.

HEARING OR NOTIFICATION OF HEARING: An order granting the requested relief will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the Commission's Secretary and serving applicants with a copy of the request, personally or by mail. Hearing requests should be received by the Commission by 5:30 p.m. on January 11, 2019, and should be accompanied by proof of service on applicants, in the form of an affidavit, or for lawyers, a certificate of service. Pursuant to rule 0–5 under the Act, hearing requests should state the nature of the writer's interest, any facts bearing upon the desirability of a hearing on the matter, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the Commission's Secretary.

ADDRESSES: Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090; *Applicants:* Hoya Capital Real Estate, LLC, 137 Rowayton Avenue, Suite 430, Rowayton, Connecticut 06853; ETF Series Solutions, 615 East Michigan Street, Milwaukee, Wisconsin 53202; Quasar Distributors, LLC, 777 East Wisconsin Avenue, 6th Floor, Milwaukee, Wisconsin 53202.

FOR FURTHER INFORMATION CONTACT: Deepak T. Pai, Senior Counsel, at (202) 551–6876, or Andrea Ottomanelli Magovern, Branch Chief, at (202) 551–6821 (Division of Investment Management, Chief Counsel's Office).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained via the Commission's website by searching for the file number, or for an applicant using the Company name box, at *http://www.sec.gov/search/search.htm* or by calling (202) 551–8090.

Summary of the Application

1. Applicants request an order that would allow Funds to operate as index exchange traded funds (''ETFs'').[1] Fund shares will be purchased and redeemed at their NAV in Creation Units only. All orders to purchase Creation Units and all redemption requests will be placed by or through an ''Authorized Participant,'' which will have signed a participant agreement with the Distributor. Shares will be listed and traded individually on a national securities exchange, where share prices will be based on the current bid/offer market. Any order granting the requested relief would be subject to the

[1] Applicants request that the order apply to the Hoya Capital Housing 100 Index ETF and any additional series of the Trust and any other open-end management investment company or series thereof (each, included in the term ''Fund''), each of which will operate as an ETF and will track a specified index comprised of domestic and/or foreign equity securities and/or domestic and/or foreign fixed income securities (each, an ''Underlying Index''). Each Fund will (a) be advised by the Initial Adviser or an entity controlling, controlled by, or under common control with the Initial Adviser (each such entity and any successor thereto, an ''Adviser'') and (b) comply with the terms and conditions of the application. For purposes of the requested order, the term ''successor'' is limited to an entity or entities that result from a reorganization into another jurisdiction or a change in the type of business organization.

terms and conditions stated in the application.

2. Each Fund will hold investment positions selected to correspond generally to the performance of an Underlying Index. In the case of Self-Indexing Funds, an affiliated person, as defined in section 2(a)(3) of the Act (''Affiliated Person''), or an affiliated person of an Affiliated Person (''Second-Tier Affiliate''), of the Trust or a Fund, of the Adviser, of any sub-adviser to or promoter of a Fund, or of the Distributor will compile, create, sponsor or maintain the Underlying Index.[2]

3. Shares will be purchased and redeemed in Creation Units and generally on an in-kind basis. Except where the purchase or redemption will include cash under the limited circumstances specified in the application, purchasers will be required to purchase Creation Units by depositing specified instruments (''Deposit Instruments''), and shareholders redeeming their shares will receive specified instruments (''Redemption Instruments''). The Deposit Instruments and the Redemption Instruments will each correspond pro rata to the positions in the Fund's portfolio (including cash positions) except as specified in the application.

4. Because shares will not be individually redeemable, applicants request an exemption from section 5(a)(1) and section 2(a)(32) of the Act that would permit the Funds to register as open-end management investment companies and issue shares that are redeemable in Creation Units only.

5. Applicants also request an exemption from section 22(d) of the Act and rule 22c–1 under the Act as secondary market trading in shares will take place at negotiated prices, not at a current offering price described in a Fund's prospectus, and not at a price based on NAV. Applicants state that (a) secondary market trading in shares does not involve a Fund as a party and will not result in dilution of an investment in shares, and (b) to the extent different prices exist during a given trading day, or from day to day, such variances occur as a result of third-party market forces, such as supply and demand. Therefore, applicants assert that secondary market transactions in shares will not lead to discrimination or preferential treatment among purchasers. Finally, applicants represent that share market prices will be disciplined by arbitrage opportunities, which should prevent shares from trading at a material discount or premium from NAV.

6. With respect to Funds that effect creations and redemptions of Creation Units in kind and that are based on certain Underlying Indexes that include foreign securities, applicants request relief from the requirement imposed by section 22(e) in order to allow such Funds to pay redemption proceeds within fifteen calendar days following the tender of Creation Units for redemption. Applicants assert that the requested relief would not be inconsistent with the spirit and intent of section 22(e) to prevent unreasonable, undisclosed or unforeseen delays in the actual payment of redemption proceeds.

7. Applicants request an exemption to permit Funds of Funds to acquire Fund shares beyond the limits of section 12(d)(1)(A) of the Act; and the Funds, and any principal underwriter for the Funds, and/or any broker or dealer registered under the Exchange Act, to sell shares to Funds of Funds beyond the limits of section 12(d)(1)(B) of the Act. The application's terms and conditions are designed to, among other things, help prevent any potential (i) undue influence over a Fund through control or voting power, or in connection with certain services, transactions, and underwritings, (ii) excessive layering of fees, and (iii) overly complex fund structures, which are the concerns underlying the limits in sections 12(d)(1)(A) and (B) of the Act.

8. Applicants request an exemption from sections 17(a)(1) and 17(a)(2) of the Act to permit persons that are Affiliated Persons, or Second-Tier Affiliates, of the Funds, solely by virtue of certain ownership interests, to effectuate purchases and redemptions in-kind. The deposit procedures for in-kind purchases of Creation Units and the redemption procedures for in-kind redemptions of Creation Units will be the same for all purchases and redemptions, and Deposit Instruments and Redemption Instruments will be valued in the same manner as those investment positions currently held by the Funds. Applicants also seek relief from the prohibitions on affiliated transactions in section 17(a) to permit a Fund to sell its shares to and redeem its shares from a Fund of Funds, and to engage in the accompanying in-kind transactions with the Fund of Funds.[3] The purchase of Creation Units by a Fund of Funds directly from a Fund will be accomplished in accordance with the policies of the Fund of Funds and will be based on the NAVs of the Funds.

9. Section 6(c) of the Act permits the Commission to exempt any persons or transactions from any provision of the Act if such exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act. Section 12(d)(1)(J) of the Act provides that the Commission may exempt any person, security, or transaction, or any class or classes of persons, securities, or transactions, from any provision of section 12(d)(1) if the exemption is consistent with the public interest and the protection of investors. Section 17(b) of the Act authorizes the Commission to grant an order permitting a transaction otherwise prohibited by section 17(a) if it finds that (a) the terms of the proposed transaction are fair and reasonable and do not involve overreaching on the part of any person concerned; (b) the proposed transaction is consistent with the policies of each registered investment company involved; and (c) the proposed transaction is consistent with the general purposes of the Act.

For the Commission, by the Division of Investment Management, under delegated authority.

Eduardo A. Aleman,

Deputy Secretary.

[FR Doc. 2018–27576 Filed 12–19–18; 8:45 am]

BILLING CODE 8011–01–P

[2] Each Self-Indexing Fund will post on its website the identities and quantities of the investment positions that will form the basis for the Fund's calculation of its NAV at the end of the day. Applicants believe that requiring Self-Indexing Funds to maintain full portfolio transparency will help address, together with other protections, conflicts of interest with respect to such Funds.

[3] The requested relief would apply to direct sales of shares in Creation Units by a Fund to a Fund of Funds and redemptions of those shares. Applicants are not seeking relief from section 17(a) for, and the requested relief will not apply to, transactions where a Fund could be deemed an Affiliated Person, or a Second-Tier Affiliate, of a Fund of Funds because an Adviser or an entity controlling, controlled by or under common control with an Adviser provides investment advisory services to that Fund of Funds.

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–84821; File No. SR–NYSE–2018–54]

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing of Proposed Rule Change Amending Sections 312.03 and 312.04 of the Listed Company Manual To Amend the Price Requirements for Certain Exceptions From the Shareholder Approval Rules

December 14, 2018.

Pursuant to Section 19(b)(1) [1] of the Securities Exchange Act of 1934 (''Act'') [2] and Rule 19b–4 thereunder,[3] notice is hereby given that on December 3, 2018, New York Stock Exchange LLC (''NYSE'' or the ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Sections 312.03 and 312.04 of the Listed Company Manual (the ''Manual'') to amend the price requirements companies must meet in order to avail themselves of certain exceptions from the shareholder approval requirements set forth in Section 312.03. The proposed rule change is available on the Exchange's website at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend Sections 312.03 and 312.04 of the Manual to modify the circumstances in which listed companies are exempt from obtaining shareholder approval for share issuances subject to those rules. The Exchange notes that the proposed amendments are substantially similar to amendments NASDAQ recently made to its own shareholder approval requirements.[4]

Section 312.03(b) of the Manual provides that shareholder approval is required prior to the issuance of common stock, or of securities convertible into or exercisable for common stock, in any transaction or series of related transactions, to:

(1) A director, officer or substantial security holder of the company (each a ''Related Party'');

(2) a subsidiary, affiliate or other closely-related person of a Related Party; or

(3) any company or entity in which a Related Party has a substantial direct or indirect interest;

if the number of shares of common stock to be issued, or if the number of shares of common stock into which the securities may be convertible or exercisable, exceeds either one percent of the number of shares of common stock or one percent of the voting power outstanding before the issuance. However, Section 312.03(b) sets forth exceptions to this shareholder approval requirement. One of these exceptions is applicable where the Related Party involved in the transaction is classified as such solely because such person is a substantial security holder and the issuance relates to a sale of stock for cash at a price at least as great as each of the book and market value of the issuer's common stock. Where these conditions are met, shareholder approval will not be required unless the number of shares of common stock to be issued, or unless the number of shares of common stock into which the securities may be convertible or exercisable, exceeds either five percent of the number of shares of common stock or five percent of the voting power outstanding before the issuance.

Section 312.03(c) generally requires shareholder approval prior to the issuance of common stock, or of securities convertible into or exercisable for common stock, in any transaction or series of related transactions if:

(1) The common stock has, or will have upon issuance, voting power equal to or in excess of 20 percent of the voting power outstanding before the issuance of such stock or of securities convertible into or exercisable for common stock; or

(2) the number of shares of common stock to be issued is, or will be upon issuance, equal to or in excess of 20 percent of the number of shares of common stock outstanding before the issuance of the common stock or of securities convertible into or exercisable for common stock.

Among the exceptions to the shareholder approval requirements of Section 312.03(c) is one applicable to ''bona fide private financings,'' as such term is defined in Section 312.04(g). A bona fide private financing is exempt from the shareholder approval requirements of Section 312.03(c), if such financing involves a sale of:

- Common stock, for cash, at a price at least as great as each of the book and market value of the issuer's common stock; or
- securities convertible into or exercisable for common stock, for cash, if the conversion or exercise price is at least as great as each of the book and market value of the issuer's common stock.

Section 312.04(g) defines a bona fide private financing as a sale in which either:

- A registered broker-dealer purchases the securities from the issuer with a view to the private sale of such securities to one or more purchasers; or
- the issuer sells the securities to multiple purchasers, and no one such purchaser, or group of related purchasers, acquires, or has the right to acquire upon exercise or conversion of the securities, more than five percent of the shares of the issuer's common stock or more than five percent of the issuer's voting power before the sale.

For purposes of the exceptions from the shareholder approval requirements of Sections 312.03(b) and (c) set forth above, the Exchange utilizes for the pricing test the definition of ''market value'' set forth in Section 312.04(i). Section 312.04(i) defines the ''market value'' of an issuer's common stock as the official closing price on the Exchange as reported to the Consolidated Tape immediately preceding the entering into of a binding agreement to issue the securities.

The Exchange proposes to replace the definition of market value in Section 312.04(i) with a new definition to be

[4] *See* footnote 4 [sic] *infra.*

known as the ''Minimum Price,'' which will be used as the pricing test for the exceptions in Sections 312.03(b) and (c) for which the market value definition in Section 312.04(i) is currently used. This proposed amendment is substantially similar to an amendment NASDAQ recently made to its own shareholder approval requirements.[5] Minimum Price will be defined as a price that is the lower of: (i) The Official Closing Price immediately preceding the signing of the binding agreement; or (ii) the average Official Closing Price for the five trading days immediately preceding the signing of the binding agreement. ''Official Closing Price'' of an issuer's common stock will be defined in Section 312.04 as meaning the official closing price on the Exchange as reported to the Consolidated Tape immediately preceding the signing of a binding agreement to issue the securities.[6] Section 312.04(i) in its current form has a provision stating that ''[f]or example, if the transaction is entered into after the close of the regular session at 4:00 p.m. Eastern Standard Time on a Tuesday, then Tuesday's official closing price is used. If the transaction is entered into at any time between the close of the regular session on Monday and the close if the regular session on Tuesday, then Monday's official closing price is used.'' The Exchange proposes to retain this clarifying text as part of the proposed definition of the ''Official Closing Price.'' In addition, all references to ''entering into'' agreements in this text and elsewhere in the proposed definition will be replaced by references to ''signing'' agreements.[7] The Exchange also proposes to delete text from the current form of Section 312.04(i) which notes that an average price over a period of time is not acceptable as ''market value'' for purposes of Section 312.03, as it will no longer be accurate if the proposed amendment is approved.

It is a widespread practice in commercial transactions involving the issuance of securities to use a five day average in determining the market price for purposes of calculating pricing provisions of agreements, as the use of a single day's closing price can result in unanticipated and inequitable results due to unexpected price volatility. There are also potential negative consequences to using a five-day average as the sole measure of whether shareholder approval is required. For example, in a declining market, the five day average price will always be above the current market price, thus making it difficult for companies to close transactions because investors could buy shares in the market at a price below the five-day average price rather than by buying shares from the company at the agreed-upon price. Conversely, in a rising market, the five day average price will be lower than the closing price. In addition, if material news is announced during the five-day period, the average could be significantly different from the market value of the securities as reflected by the closing price after the news is disclosed. Nonetheless, the Exchange believes that these risks are already accepted in the market, as evidenced by the use of an average price in transactions that do not require shareholder approval under the Exchange's rules, such as where less than 20% of the outstanding shares are issuable in the transaction, notwithstanding the risk of possible unfavorable price movements borne by both the issuer and the purchaser of the securities during the time between when the agreement is executed and the closing of the transaction. The Exchange believes these concerns about the appropriateness of using a five-day average are justified and as such, the Exchange's proposed Minimum Price definition utilizes the lower of the most recent closing price or the average of closing prices on the five most recent trading days.

The Exchange also proposes to eliminate from Sections 312.03(b) and (c) the requirement that the price paid in any transaction qualifying for the exemptions under those rules must not be less than book value. Book value is an accounting measure and its calculation is based on the historic cost of assets, not their current value. As such, listed companies have argued to the Exchange on many occasions, and the Exchange agrees, that book value is not a meaningful measure to be used in determining whether a transaction is dilutive or should otherwise require shareholder approval. The Exchange has also observed that when the market price is below the book value, issuers are often extremely surprised when confronted with the effect it has on their proposed transactions. In that regard, the existing book value test can have anomalous effects in transactions that appear to be clearly commercially reasonable for the issuer and have a disproportionate impact on companies in certain industries and at certain times. For example, during the financial crisis in 2008 and 2009, many banks and finance-related companies temporarily traded below book value. Similarly, companies that make large investments in infrastructure may have a market capitalization that is significantly less than the accounting carrying value of those assets. In these situations, companies are precluded for purely technical accounting reasons from quickly raising capital on terms that are clearly at or above the market price. Furthermore, the Exchange is not aware of any evidence that shareholders consider book value to be a material factor when they are asked to vote to approve a proposed transaction.

The Exchange notes that the existence of any exception from the shareholder approval requirements of any subsection of Section 312.03 does not relieve listed companies of their obligation to comply with any separate shareholder approval requirement under Section 303A.08[8] or under other applicable subsections of Section 312.03.[9] Section 303A.08 provides that any issuance of common stock to any employee, director or other service provider of a listed company as compensation for services is generally treated as equity compensation for purposes of that rule and must either be approved by the shareholders or be drawn from a shareholder-approved equity compensation plan. Section 303A.08 provides an exception from this requirement for plans that merely allow employees, directors or other service providers to elect to buy shares on the open market or from the listed company for their current fair market value. For purposes of that exception, the Exchange has always interpreted fair market value as identical to the Official Closing Price definition proposed to be adopted in Section 312.04. To avoid any potential confusion, the Exchange intends to submit a separate rule filing to amend Section 303A.08 to include

[5] *See* Exchange Act Release No. 34–84287 (September 26, 2018) (SR–NASDAQ–2018–008); 83 FR 49599 (October 2, 2018). NASDAQ does not have a provision in its rules which is comparable to the limitations on cash sales to related parties under Section 312.03(b) and the related exception available to related parties which have that status solely because they are substantial securityholders. However, the rationale NASDAQ applied in adjusting its pricing test where applicable is relevant to the application of the pricing test in Section 312.03(b).

[6] The manner in which the official closing price as reported to the Consolidated Tape is determined is set forth in NYSE Rule 123C(1)(e). The proposed definition of ''Official Closing Price'' will be numbered as 312.04(j) and the current text of Sections 312.04(j) and (k) will be redesignated as Sections 312.04(k) and (l) respectively.

[7] This proposed change is solely for the purpose of conforming the language used throughout the rule and does not have any substantive effect.

[8] This is stated in Section 312.03(a).

[9] Section 312.04(a) states that ''[s]hareholder approval is required if any of the subparagraphs of Section 312.03 require such approval, notwithstanding the fact that the transaction does not require approval under one or more of the other subparagraphs.''

the definition of Official Closing Price in that rule solely for purposes of qualifying for the exemption under Section 303A.08 for cash sales for fair market value described above.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Exchange Act,[10] in general, and furthers the objectives of Section 6(b)(5) of the Exchange Act,[11] in particular in that it is designed to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

Definition of Market Value

The proposed rule change will modify the minimum price for the relevant exceptions to the shareholder approval requirements of Sections 312.03(b) and (c) to the lower of: (i) The Official Closing Price immediately preceding the signing of the binding agreement; or (ii) the average Official Closing Price for the five trading days immediately preceding the signing of the binding agreement. Allowing share issuances to be priced at the five-day average of the closing price will better align the Exchange's requirements with how many transactions that are not designed to comply with the applicable exceptions in Sections 312.03(b) and (c) are structured, such as transactions not subject to Sections 312.03(b) and (c) because the issuance is for less than 20% of the common stock and the parties rely on the five day average for pricing to smooth out unusual fluctuations in price. In so doing, the proposed rule change will perfect the mechanism of a free and open market. Further, allowing a five day average price continues to protect investors and the public interest because it will allow companies and investors to price transactions in a manner designed to eliminate aberrant pricing resulting from unusual transactions on the day of a transaction. Limiting the allowable average to a five-day period also protects investors by ensuring the period is not too long, thereby avoiding any distortion of the average price by the inclusion in the average historical pricing data that reflects market factors that are no longer relevant. In a market that rises each day of the period, the five-day average will be less than the price at the end of the period, but would still be higher than the price at the start of such period. This protects investors by ensuring that the average price will at least partially reflect the benefits of the more favorable recent market price. Further, aside from Exchange requirements, when selecting the appropriate price for a transaction company officers and directors have to consider their state law requirements, including fiduciary responsibilities intended to protect shareholder interests.

The Exchange believes that where two alternative measures of value exist that both reasonably approximate the value of listed securities, defining the Minimum Price as the lower of those values allows issuers the flexibility to use either measure because they can also sell securities at a price greater than the Minimum Price without needing shareholder approval. This flexibility, and the certainty that a transaction can be structured at either value in a manner that will not require shareholder approval, further perfects the mechanism of a free and open market without diminishing the existing investor protections of Sections 312.03(b) and (c).

Book Value

The Exchange also believes that eliminating the requirement for shareholder approval of issuances at a price less than book value but greater than market value does not diminish the existing investor protections of Sections 312.03(b) and (c). Book value is primarily an accounting measure calculated based on historic cost and is generally perceived as not being a meaningful measure to use in analyzing the current value of a stock. The Exchange has also observed that the existing book value test can appear arbitrary and have a disproportionate impact on companies in certain industries and at certain times. For example, during the financial crisis in 2008 and 2009, many banks and finance-related companies traded below book value. Similarly, companies that make large investments in infrastructure may have a market capitalization that is significantly less than the accounting carrying value of those assets. Because book value is not a meaningful measure of the current value of a stock, the elimination of the requirement for shareholder approval of issuances at a price less than book value but greater than market value will remove an impediment to, and perfect the mechanism of, a free and open market, which currently unfairly burdens companies in certain industries, without meaningfully diminishing investor protections of Sections 312.03(b) and (c).

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed rule change would revise requirements that burden issuers by unnecessarily limiting the circumstances where they can sell securities without shareholder approval. All listed companies would be affected in the same manner by these changes. As such, these changes are neither intended to, nor expected to, impose any burden on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve or disapprove the proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include File Number SR–NYSE–2018–54 on the subject line.

[10] 15 U.S.C. 78f(b).

[11] 15 U.S.C. 78f(b)(5).

Paper Comments

• Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSE–2018–54. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSE–2018–54, and should be submitted on or before January 10, 2019.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[12]

Eduardo A. Aleman,

Deputy Secretary.

[FR Doc. 2018–27510 Filed 12–19–18; 8:45 am]

BILLING CODE 8011–01–P

[12] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–84823; File No. SR–BOX–2018–37]

Self-Regulatory Organizations; BOX Exchange LLC; Notice of Filing of a Proposed Rule Change To Amend the Fee Schedule on the BOX Market LLC ("BOX") Options Facility To Establish BOX Connectivity Fees for Participants and Non-Participants Who Connect to the BOX Network; Suspension of and Order Instituting Proceedings To Determine Whether To Approve or Disapprove the Proposed Rule Change

December 14, 2018.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on November 30, 2018, BOX Exchange LLC (''Exchange'') filed with the Securities and Exchange Commission (''Commission'') a proposed rule change as described in Item II below, which Item has been prepared by the Exchange. The Exchange filed the proposed rule change pursuant to Section 19(b)(3)(A)(ii) of the Act,[3] and Rule 19b–4(f)(2) thereunder.[4] The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons and is, pursuant to Section 19(b)(3)(C) of the Act, hereby: (i) Temporarily suspending the proposed rule change; and (ii) instituting proceedings to determine whether to approve or disapprove the proposed rule change.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is filing with the Securities and Exchange Commission (''Commission'') a proposed rule change to amend the Fee Schedule on the BOX Market LLC (''BOX'') options facility. The fees became operative on December 1, 2018. The text of the proposed rule change is available from the principal office of the Exchange, at the Commission's Public Reference Room and also on the Exchange's internet website at *http://boxexchange.com.*

II. Self-Regulatory Organization's Description of the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend Section VI. (Technology Fees) of the BOX Fee Schedule to establish BOX Connectivity Fees for Participants and non-Participants who connect to the BOX network. Connectivity fees will be based upon the amount of bandwidth that will be used by the Participant or non-Participant. Further, BOX Participants or non-Participants connected as of the last trading day of each calendar month will be charged the applicable Connectivity Fee for that month. The Connectivity Fees will be as follows:

Connection type	Monthly fees
Non-10 Gb Connection.	$1,000 per connection
10 Gb Connection	$5,000 per connection

The Exchange also proposes to amend certain language and numbering in Section VI.A to reflect the changes discussed above. Specifically, BOX proposes to add the title ''Third Party Connectivity Fees'' under Section VI.A. Further, the Exchange proposes to add Section VI.A.2, which details the proposed BOX Connectivity Fees discussed above.

Participants and non-Participants with ten (10) Gigabit (''Gb'') connections will be charged a monthly fee of $5,000 per connection. Participants and non-Participants with non-10 Gb connections will be charged a monthly fee of $1,000 per connection. The Exchange notes that another exchange in the industry has similar connectivity fees[5] and that several other exchanges

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(ii).

[4] 17 CFR 240.19b–4(f)(2).

[5] *See* Miami International Securities Exchange LLC (''MIAX'') Fee Schedule. MIAX charges its Members and non-Members a monthly fee of $1,100 for each 1 Gigabit connection and $5,500 for each 10 Gigabit connection to MIAX's Primary/Secondary Facility. The Exchange notes a minor difference between MIAX's connectivity fees and BOX's proposal. MIAX prorates their connectivity fees when a Member makes a change to their connectivity (by adding or deleting connections). BOX notes that, like the Exchange's Port Fees and

Continued

charge higher connectivity fees.[6] The Exchange also notes that certain fees will continue to be assessed by the datacenters and will be billed directly to the market participant.

Next, the Exchange is amending Section VI.C. High Speed Vendor Feed (''HSVF'') of the Fee Schedule. Specifically, BOX is proposing to delete Section VI.C. and reclassify the HSVF Connection as a Port Fee. The Exchange believes this reclassification is more accurate, as HSVF subscription is not dependent on a physical connection to the Exchange. Instead, subscribers must be credentialed by BOX to receive the HSVF. The HSVF Fee will remain unchanged; BOX will assess a HSVF Port Fee of $1,500 per month [7] for each month a Participant or non-Participant is credentialed to use the HSVF Port. The Exchange notes that another exchange has a similar classification and charges similar fees.[8]

The Exchange initially filed the proposed fees on July 19, 2018, designating the proposed fees effective July 1, 2018 [sic]. The proposed rule change was published for comment in the **Federal Register** on August 2, 2018.[9] The Commission received one comment letter on the proposal.[10] The proposed fees remained in effect until they were temporarily suspended pursuant to a suspension order (the ''Suspension Order'') issued by the Division of Trading and Markets, which also instituted proceedings to determine whether to approve or disapprove the proposed rule change.[11] The Commission subsequently received one further comment letter on the proposed rule change, supporting the decision to suspend and institute proceedings on the proposed fee change.[12]

In response to the Suspension Order, the Exchange timely filed a Notice of Intention to Petition for Review [13] and Petition for Review to vacate the Division's Order,[14] which stayed the Division's suspension of the filing. On November 16, 2018 the Commission granted the Exchange's Petition for Review but discontinued the automatic stay.[15]

The Healthy Markets and SIFMA Comment Letters (collectively, the ''Comment Letters'') argued that the Exchange did not provide sufficient information in its filing to support a finding that the proposal is consistent with the Act. Specifically, the Comment Letters objected to the Exchange's reliance on the fees of other exchanges to demonstrate that its fee increases are consistent with the Act. In addition, the Comment Letters argued that the Exchange did not offer any details to support its basis for asserting that the proposed fees are consistent with the Act. The Exchange is now re-filing the proposed fees and is also providing additional detail regarding the basis for the proposed fees. The proposed rule change is immediately effective upon filing with the Commission pursuant to Section 19(b)(3)(A) of the Act.

The Exchange has always offered various bandwidth choices for physical connectivity to the Exchange for Participants and non-Participants to access the Exchange's trading platforms, market data, test systems and disaster recovery facilities. These physical connections consist of 10Gb and non-10Gb connections, where the 10Gb connection provides for faster processing of messages sent to it in comparison to the non-10Gb connection. While the Exchange has not charged for physical connectivity before, the Exchange believes that it is reasonable and appropriate to begin charging for this physical connectivity to partially offset the costs associated with maintaining and enhancing a state-of-the-art exchange network infrastructure in the U.S. options industry. There are significant costs associated with various projects and initiatives to improve overall network performance and stability, as well as costs paid to the third-party data center for space rental, power used, etc. The Exchange notes that unlike other options exchanges, the Exchange does not own and operate its own data center and therefore cannot control data center costs.

The Exchange also notes that all other options exchanges charge for similar physical connectivity,[16] and by

HSVF Fees, Participants or non-Participants connected as of the last trading day of each calendar month will be charged the applicable Connectivity Fee for that month.

[6] *See infra* note 12.

[7] The Exchange notes that with the proposed change discussed herein, Participants and non-Participants credentialed to use the HSVF Port who also have physical connections to the BOX system will be charged for both the HSVF monthly fee and the applicable amount for their physical connections to BOX. For example, if non-Participant X is credentialed to use the HSVF Port and has three (3) physical non-10Gb connections to BOX, non-Participant X will be charged $1500 for the monthly HSVF Port Fee and $3000 for the three non-10Gb physical connections to BOX.

[8] *See* Cboe Data Services, LLC. (''Cboe CDS'') Fee Schedule. Cboe CDS charges its Customers that receive data through a direct connection to CDS or through a connection to CDS provided by an extranet provider $500 per port per month. Cboe CDS's port fee applies to receipt of any Cboe Options data feed but is only assessed once per data port. In addition to the data port fee, Cboe Exchange Inc. (''Cboe'') charges connectivity fees based on the bandwidth used to connect to the Exchange to receive such data. *See* Cboe Fee Schedule.

[9] *See* Securities Exchange Act Release No. 83728 (July 27, 2018), 83 FR 37853 (August 2, 2018) (SR–BOX–2018–24).

[10] *See* Letter from Tyler Gellasch, Executive Director, The Healthy Markets Association, to Brent J. Fields, Secretary, Commission, dated August 23, 2018 (''Healthy Markets Letter'').

[11] *See* Securities Exchange Act Release No. 34–84168 (September 17, 2018).

[12] *See* Letter from Theodore R. Lazo, Managing Director and Associate General Counsel, and Ellen Greene, Managing Director, Financial Services Operations, Securities Industry and Financial Markets Association, dated October 15, 2018.

[13] *See* Letter from Amir Tayrani, Partner, Gibson, Dunn & Crutcher LLP, dated September 19, 2018.

[14] *See* Petition for Review of Order Temporarily Suspending BOX Exchange LLC's Proposal to Amend the Fee Schedule on BOX Market LLC, dated September 26, 2018.

[15] *See* Securities Exchange Act Release No. 84614. Order Granting Petition for Review and Scheduling Filing of Statements, dated November 16, 2018. Separately, the Securities Industry and Financial Markets Association filed an application under Section 19(d) of the Exchange Act challenging the Exchange's proposed fees as alleged prohibitions or limitations on access. *See In re Securities Industry and Financial Markets Association,* Admin. Proc. File No. 3–18680 (Aug. 24, 2018). The Commission thereafter remanded that denial-of-access proceeding to the Exchange while ''express[ing] no view regarding the merits'' and emphasizing that it was ''not set[ting] aside the challenged rule change[ ].'' *In re Applications of SIFMA & Bloomberg,* Exchange Act Rel. No. 84433, at 2 (Oct. 16, 2018) (''Remand Order''), *available at https://www.sec.gov/litigation/opinions/2018/34-84433.pdf.* The Division's Suspension Order is inconsistent with the Commission's intent in the Remand Order to leave the challenged fees in place during the pendency of the remand proceedings and singles out the Exchange for disparate treatment because it means that the Exchange—unlike every other exchange whose rule changes were the subject of the Remand Order—is not permitted to continue charging the challenged fees during the remand proceedings.

[16] In addition to the MIAX connectivity fees cited above, Nasdaq PHLX LLC (''Phlx''), The Nasdaq Stock Market LLC (''Nasdaq''), NYSE Arca, Inc. (''Arca''), NYSE American LLC (''NYSE American''), Nasdaq ISE, LLC (''ISE''), Cboe Exchange, Inc. (''Cboe''), Cboe BZX Exchange, Inc. (''CboeBZX''), Cboe EDGX Exchange, Inc. (''CboeEDGX'') and Cboe C2 Exchange, Inc. (''C2'') all offer a type of 10Gb and non-10Gb connectivity alternative to their participants. See Phlx, and ISE Rules, General Equity and Options Rules, General 8, Section 1(b). Phlx and ISE each charge a monthly fee of $2,500 for each 1Gb connection, $10,000 for each 10Gb connection and $15,000 for each 10Gb Ultra connection, which is the equivalent of the Exchange's 10Gb ULL connection. See also Nasdaq Price List—Trading Connectivity. Nasdaq charges a monthly fee of $7,500 for each 10Gb direct connection to Nasdaq and $2,500 for each direct connection that supports up to 1Gb. See also NYSE American Fee Schedule, Section V.B, and Arca Fees and Charges, Co-Location Fees. NYSE American and Arca each charge a monthly fee of $5,000 for each 1Gb circuit, $14,000 for each 10Gb circuit and $22,000 for each 10Gb LX circuit, which is the equivalent of the Exchange's 10Gb ULL connection. See also Cboe, CboeBZX, CboeEDGX and C2 Fee Schedules. Cboe charges monthly quoting and order entry bandwidth packet fees. Specifically, Cboe charges $1,600 for the 1st through 5th packet, $800 for the 6th through 8th packet, $400 for the 9th through 13th packet and $200 for the 14th packet and each additional packet. CboeBZX, CboeEDGX and C2 each charge a monthly fee of $2,500 for each 1Gb connection and $7,500 for each 10Gb connection.

suspending the Exchange's initial fee filing the Division has placed the Exchange at a competitive disadvantage within the U.S. options industry. Without these fees to partially offset the costs associated with maintaining and enhancing a state-of-the-art exchange network infrastructure in the US options industry, the Exchange may not be able to make the planned enhancements to its infrastructure.

2. Statutory Basis

The Exchange believes that the proposal is consistent with the requirements of Section 6(b) of the Act, in general, and Section 6(b)(4) and 6(b)(5) of the Act,[17] in particular, in that it provides for the equitable allocation of reasonable dues, fees, and other charges among BOX Participants and other persons using its facilities and does not unfairly discriminate between customers, issuers, brokers or dealers.

The Exchange believes that the proposed Connectivity Fees in general constitute an equitable allocation of fees, and are not unfairly discriminatory, because they allow the Exchange to recover costs associated with offering access through the network connections. The proposed Connectivity Fees are also expected to offset the costs both the Exchange and BOX incur in maintaining and implementing ongoing improvements to the trading systems, including connectivity costs, costs incurred on software and hardware enhancements and resources dedicated to software development, quality assurance, and technology support. The Exchange believes that its proposed fees are reasonable in that they are comparable to those charged by another exchange and lower than those charged by several other exchanges. Further, the Exchange believes that the proposed Connectivity Fees are not unfairly discriminatory as they are assessed to all market participants who wish to connect to the BOX network.

The Exchange believes that the proposed HSVF Port Fee is reasonable as it is similar to fees assessed at another exchange in the industry.[18] Further, the Exchange believes that charging Participants and non-Participants for both the HSVF monthly fee and applicable physical connection fees as outlined in the example above is reasonable as it is in line with another exchange in the industry.[19] Further, the Exchange believes that the proposed change is equitable and not unfairly discriminatory because it allows the Exchange to recoup ongoing expenditures made by the Exchange in order to offer such services to Participants and non-Participants.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. Unilateral action by the Exchange in establishing fees for services provided to its Participants and others using its facilities will not have an impact on competition. As a small exchange in the already highly competitive environment for options trading, the Exchange does not have the market power necessary to set prices for services that are unreasonable or unfairly discriminatory in violation of the Exchange Act. The Exchange's proposed fees, as described herein, are comparable to and generally lower than fees charged by other options exchanges for the same or similar services. Lastly, the Exchange believes the proposed change will not impose a burden on intramarket competition as the proposed fees are applicable to all Participants and others using its facilities that connect to BOX.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Suspension of the Proposed Rule Change

Pursuant to Section 19(b)(3)(C) of the Act,[20] at any time within 60 days of the date of filing of a proposed rule change pursuant to Section 19(b)(1) of the Act,[21] the Commission summarily may temporarily suspend the change in the rules of a self-regulatory organization (''SRO'') if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. As discussed below, the Commission believes a temporary suspension of the proposed rule change is necessary and appropriate to allow for additional analysis of the proposed rule change's consistency with the Act and the rules thereunder.

Identical fee changes to those proposed herein were originally filed on July 19, 2018. That proposal, BOX–2018–24, was published for comment in the **Federal Register** on August 2, 2018.[22] The Commission received one comment letter on that proposal.[23] On September 17, 2018, pursuant to Section 19(b)(3)(C) of the Act, the Commission: (1) Temporarily suspended the proposed rule change; and (2) instituted proceedings to determine whether to approve or disapprove the proposal.[24] The Commission received one additional comment letter on that proposal in response to the Order Instituting Proceedings.[25] On September 19, 2018, pursuant to Rule 430 of the Commission's Rules of Practice,[26] the Exchange filed a notice of intention to petition for review of the Order Instituting Proceedings and, on September 26, 2018, the Exchange filed a petition for review of the Order Instituting Proceedings.[27] On November 16, 2018, the Commission granted the Exchange's Petition and discontinued the automatic stay of delegated action.[28] In addition, the Commission ordered that any party or other person could file a statement in support or in opposition to the action made by delegated authority provided such statement was filed on or before December 10, 2018.[29] The Commission received two such statements from the Exchange.[30] The instant filing proposes identical fees and raises similar concerns as to whether they are consistent with the Act.[31]

When exchanges file their proposed rule changes with the Commission, including fee filings like the Exchange's present proposal, they are required to provide a statement supporting the proposal's basis under the Act and the rules and regulations thereunder applicable to the exchange.[32] The

[17] 15 U.S.C. 78f(b)(4) and (5).

[18] *See supra* note 8.

[19] *Id.*

[20] 15 U.S.C. 78s(b)(3)(C).

[21] 15 U.S.C. 78s(b)(1).

[22] *See supra* note 9, and accompanying text.

[23] *See supra* note 10.

[24] *See* Securities Exchange Act Release No. 84168 (September 17, 2018), 83 FR 47947 (September 21, 2018) (''Order Instituting Proceedings'').

[25] *See supra* note 12.

[26] 17 CFR 201.430.

[27] *See supra* notes 13–14, and accompanying text. Pursuant to Rule 431(e) of the Commission's Rules of Practice, a notice of intention to petition for review results in an automatic stay of the action by delegated authority. 17 CFR 201.431(e).

[28] *See supra* note 15, and accompanying text.

[29] *See* Securities Exchange Act Release No. 84614 (November 16, 2018), 83 FR 59432 (November 23, 2018).

[30] *See* letters to Brent J. Fields, Secretary, Commission, from Lisa J. Fall, President, BOX, dated December 7, 2018, and Amir C. Tayrani, Gibson, Dunn & Crutcher LLP, dated December 10, 2018.

[31] *See* Order Instituting Proceedings, *supra* note 24.

[32] *See* 17 CFR 240.19b–4 (Item 3 entitled ''Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change'').

instructions to Form 19b–4, on which exchanges file their proposed rule changes, specify that such statement ''should be sufficiently detailed and specific to support a finding that the proposed rule change is consistent with [those] requirements.'' [33]

Among other things, exchange proposed rule changes are subject to Section 6 of the Act, including Sections 6(b)(4), (5), and (8), which requires the rules of an exchange to (1) provide for the equitable allocation of reasonable fees among members, issuers, and other persons using the exchange's facilities; [34] (2) perfect the mechanism of a free and open market and a national market system, protect investors and the public interest, and not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers; [35] and (3) not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.[36]

In temporarily suspending the Exchange's fee change, the Commission intends to further consider whether the proposed fees to connect to the Exchange are consistent with the statutory requirements applicable to a national securities exchange under the Act. In particular, the Commission will consider whether the proposed rule change satisfies the standards under the Act and the rules thereunder requiring, among other things, that an exchange's rules provide for the equitable allocation of reasonable fees among members, issuers, and other persons using its facilities; not permit unfair discrimination between customers, issuers, brokers or dealers; and do not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.[37]

Therefore, the Commission finds that it is appropriate in the public interest, for the protection of investors, and otherwise in furtherance of the purposes of the Act, to temporarily suspend the proposed rule change.[38]

IV. Proceedings To Determine Whether To Approve or Disapprove the Proposed Rule Change

The Commission is instituting proceedings pursuant to Sections 19(b)(3)(C) [39] and 19(b)(2)(B) of the Act [40] to determine whether the proposed rule change should be approved or disapproved. Institution of proceedings does not indicate that the Commission has reached any conclusions with respect to any of the issues involved. Rather, the Commission seeks and encourages interested persons to provide additional comment on the proposed rule change to inform the Commission's analysis of whether to disapprove the proposed rule change.

Pursuant to Section 19(b)(2)(B) of the Act,[41] the Commission is providing notice of the grounds for possible disapproval under consideration:

- Section 6(b)(4) of the Act, which requires that the rules of a national securities exchange ''provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities,'' [42]
- Section 6(b)(5) of the Act, which requires, among other things, that the rules of a national securities exchange be designed to ''perfect the mechanism of a free and open market and a national market system'' and ''protect investors and the public interest,'' and not be ''designed to permit unfair discrimination between customers, issuers, brokers, or dealers,'' [43] and
- Section 6(b)(8) of the Act, which requires that the rules of a national securities exchange ''not impose any burden on competition not necessary or appropriate in furtherance of the purposes of [the Act].'' [44]

As noted above, the proposal imposes new fees for physical connections to the Exchange. The Exchange states that these fees would partially offset costs associated with maintaining and enhancing this technology.[45] In the instant filing the Exchange states that its associated costs relate to costs paid to the Exchange's third-party data center and costs associated with projects and initiatives designed to improve overall network performance and stability.[46] The Exchange also states that these fees are expected to offset costs of maintaining and implementing ongoing improvements to BOX's trading systems, including connectivity costs, costs incurred on software and hardware enhancements, and resources dedicated to software development, quality assurance, and technology support.[47]

Under the Commission's Rules of Practice, the ''burden to demonstrate that a proposed rule change is consistent with the [Act] and the rules and regulations issued thereunder . . . is on the [SRO] that proposed the rule change.'' [48] The description of a proposed rule change, its purpose and operation, its effect, and a legal analysis of its consistency with applicable requirements must all be sufficiently detailed and specific to support an affirmative Commission finding,[49] and any failure of an SRO to provide this information may result in the Commission not having a sufficient basis to make an affirmative finding that a proposed rule change is consistent with the Act and the applicable rules and regulations.[50]

The Commission is instituting proceedings to allow for additional consideration and comment on the issues raised herein, including as to whether the proposed fees are consistent with the Act, and specifically, with its requirements that exchange fees be reasonable and equitably allocated; be designed to perfect the mechanism of a free and open market and the national market system, protect investors and the public interest, and not be unfairly discriminatory; or not impose an unnecessary or inappropriate burden on competition.[51]

V. Commission's Solicitation of Comments

The Commission requests written views, data, and arguments with respect to the concerns identified above as well as any other relevant concerns. Such comments should be submitted by January 10, 2019. Rebuttal comments should be submitted by January 24, 2019. Although there do not appear to be any issues relevant to approval or disapproval which would be facilitated by an oral presentation of views, data, and arguments, the Commission will consider, pursuant to Rule 19b–4, any request for an opportunity to make an oral presentation.[52]

[33] *Id.*

[34] 15 U.S.C. 78f(b)(4).

[35] 15 U.S.C. 78f(b)(5).

[36] 15 U.S.C. 78f(b)(8).

[37] *See* 15 U.S.C. 78f(b)(4), (5), and (8), respectively.

[38] For purposes of temporarily suspending the proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[39] 15 U.S.C. 78s(b)(3)(C). Once the Commission temporarily suspends a proposed rule change, Section 19(b)(3)(C) of the Act requires that the Commission institute proceedings under Section 19(b)(2)(B) to determine whether a proposed rule change should be approved or disapproved.

[40] 15 U.S.C. 78s(b)(2)(B).

[41] 15 U.S.C. 78s(b)(2)(B).

[42] 15 U.S.C. 78f(b)(4).

[43] 15 U.S.C. 78f(b)(5).

[44] 15 U.S.C. 78f(b)(8).

[45] *See supra* Section II.A.1.

[46] *See id.*

[47] *See supra* Section II.A.2.

[48] Rule 700(b)(3), Commission Rules of Practice, 17 CFR 201.700(b)(3).

[49] *See id.*

[50] *See id.*

[51] *See* 15 U.S.C. 78f(b)(4), (5), and (8).

[52] 15 U.S.C. 78s(b)(2). Section 19(b)(2) of the Act grants the Commission flexibility to determine what type of proceeding—either oral or notice and opportunity for written comments—is appropriate

The Commission asks that commenters address the sufficiency and merit of the Exchange's statements in support of the proposal, in addition to any other comments they may wish to submit about the proposed rule change. Interested persons are invited to submit written data, views, and arguments concerning the proposed rule change, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–BOX–2018–37 on the subject line.

Paper Comments

- Send paper comments in triplicate to Brent J. Fields, Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–BOX–2018–37. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–BOX–2018–37 and should be submitted on or before January 10, 2019. Rebuttal comments should be submitted by January 24, 2019.

VI. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(3)(C) of the Act,[53] that File

Number SR–BOX–2018–37 be and hereby is, temporarily suspended. In addition, the Commission is instituting proceedings to determine whether the proposed rule change should be approved or disapproved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[54]

Eduardo A. Aleman,

Deputy Secretary.

[FR Doc. 2018–27512 Filed 12–19–18; 8:45 am]

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for consideration of a particular proposal by an SRO. *See* Securities Acts Amendments of 1975, Report of the Senate Committee on Banking, Housing and Urban Affairs to Accompany S. 249, S. Rep. No. 75, 94th Cong., 1st Sess. 30 (1975).

[53] 15 U.S.C. 78s(b)(3)(C).

[54] 17 CFR 200.30–3(a)(12), (57), and (58).

SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 33323; 812–14893]

Investment Managers Series Trust and 361 Capital, LLC

December 14, 2018.

AGENCY: Securities and Exchange Commission (''Commission'').

ACTION: Notice.

Notice of an application under section 6(c) of the Investment Company Act of 1940 (''Act'') for an exemption from section 15(a) of the Act and rule 18f–2 under the Act, as well as from certain disclosure requirements in rule 20a–1 under the Act, Item 19(a)(3) of Form N–1A, Items 22(c)(1)(ii), 22(c)(1)(iii), 22(c)(8) and 22(c)(9) of Schedule 14A under the Securities Exchange Act of 1934, and sections 6–07(2)(a), (b), and (c) of Regulation S–X (''Disclosure Requirements''). The requested exemption would permit an investment adviser to hire and replace certain sub-advisers without shareholder approval and grant relief from the Disclosure Requirements as they relate to fees paid to the sub-advisers.

APPLICANTS: Investment Managers Series Trust (the ''Trust''), a Delaware statutory trust registered under the Act as an open-end management investment company, and 361 Capital, LLC (the ''Adviser''), a Delaware limited liability company registered as an investment adviser under the Investment Advisers Act of 1940 (together with the Trust, the ''Applicants'').

FILING DATES: The application was filed on April 5, 2018 and amended on August 16, 2018.

HEARING OR NOTIFICATION OF HEARING: An order granting the application will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the Commission's Secretary and serving applicants with a copy of the request, personally or by mail. Hearing requests should be received by the Commission by 5:30 p.m. on January 8, 2019, and should be accompanied by proof of service on the applicants, in the form of an affidavit or, for lawyers, a certificate of service. Pursuant to rule 0–5 under the Act, hearing requests should state the nature of the writer's interest, any facts bearing upon the desirability of a hearing on the matter, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the Commission's Secretary.

ADDRESSES: Secretary, U.S. Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090. Applicants: 235 West Galena Street, Milwaukee, WI 53212 and 4600 South Syracuse Street, Suite 500, Denver, Colorado 80237.

FOR FURTHER INFORMATION CONTACT: Deepak T. Pai, Senior Counsel, at (202) 551–6876, or Andrea Ottomanelli Magovern, Branch Chief, at (202) 551–6821 (Division of Investment Management, Chief Counsel's Office).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained via the Commission's website by searching for the file number, or an applicant using the Company name box, at *http://www.sec.gov/search/search.htm* or by calling (202) 551–8090.

Summary of the Application:

1. The Adviser will serve as the investment adviser to the Subadvised Series pursuant to an investment advisory agreement with the Trust (each, an ''Investment Management Agreement'' and, collectively, the ''Investment Management Agreements'').[1] The Adviser will

[1] Applicants request relief with respect to any existing or future series of the Trust and any other existing or future registered open-end management company or series thereof that intends to rely on the requested order and that: (a) Is advised by the Adviser, or any person controlling, controlled by or under common control with the Adviser or its successors; (b) uses the multi-manager structure described in the application; and (c) complies with the terms and conditions of the application (each,

Continued

provide the Subadvised Series with continuous and comprehensive investment management services, subject to the supervision of, and policies established by, the Trust's board of trustees (the ''Board''). The Investment Management Agreement permits the Adviser, subject to the approval of the Board, to delegate to one or more Sub-Advisers the responsibility to provide the day-to-day portfolio investment management of each Subadvised Series, subject to the supervision and direction of the Adviser.[2] The primary responsibility for managing the Subadvised Series will remain vested in the Adviser. The Adviser will hire, evaluate, allocate assets to and oversee the Sub-Advisers, including determining whether a Sub-Adviser should be terminated, at all times subject to the authority of the Board.

2. Applicants request an exemption to permit the Adviser, subject to Board approval, to hire a Non-Affiliated Sub-Adviser, pursuant to Sub-Advisory Agreements and materially amend Sub-Advisory Agreements with Non-Affiliated Sub-Advisers without obtaining the shareholder approval required under section 15(a) of the Act and rule 18f–2 under the Act.[3] Applicants also seek an exemption from the Disclosure Requirements to permit a Subadvised Series to disclose (as both a dollar amount and a percentage of the Subadvised Series' net assets): (a) The aggregate fees paid to the Adviser; (b) the aggregate fees paid to Non-Affiliated Sub-Advisers; and (c) the fee paid to each Affiliated Sub-Adviser.

3. Applicants agree that any order granting the requested relief will be subject to the terms and conditions stated in the application. Such terms and conditions provide for, among other safeguards, appropriate disclosure to Subadvised Series' shareholders and notification about sub-advisory changes and enhanced Board oversight to protect the interests of the Subadvised Series' shareholders.

4. Section 6(c) of the Act provides that the Commission may exempt any person, security, or transaction or any class or classes of persons, securities, or transactions from any provisions of the Act, or any rule thereunder, if such relief is necessary or appropriate in the public interest and consistent with the protection of investors and purposes fairly intended by the policy and provisions of the Act. Applicants believe that the requested relief meets this standard because, as further explained in the application, the Investment Management Agreements will remain subject to shareholder approval while the role of the Sub-Advisers is substantially equivalent to that of individual portfolio managers, so that requiring shareholder approval of Sub-Advisory Agreements would impose unnecessary delays and expenses on the Subadvised Series. Applicants believe that the requested relief from the Disclosure Requirements meets this standard because it will improve the Adviser's ability to negotiate fees paid to the Sub-Advisers that are more advantageous for the Subadvised Series.

For the Commission, by the Division of Investment Management, under delegated authority.

Eduardo A. Aleman,

Deputy Secretary.

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a ''Subadvised Series''). For purposes of the requested order, ''successor'' is limited to an entity that results from a reorganization into another jurisdiction or a change in the type of business organization.

[2] A ''Sub-Adviser'' for a Subadvised Series is an investment sub-adviser for that Series that is not an ''affiliated person'' (as such term is defined in Section 2(a)(3) of the Act) of the Subadvised Series or the Adviser, except to the extent that an affiliation arises solely because the Sub-Adviser serves as a sub-adviser to one or more Subadvised Series (each a ''Non-Affiliated Sub-Adviser'' and collectively, the ''Non-Affiliated Sub-Advisers'').

[3] The requested relief will not extend to any sub-adviser which is an affiliated person, as defined in section 2(a)(3) of the Act, of the Subadvised Series or of its Adviser, other than by reason of serving as a sub-adviser to one or more of the Subadvised Series (''Affiliated Sub-Adviser'').

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–84826; File No. SR–NYSEArca–2018–25]

Self-Regulatory Organizations; NYSE Arca, Inc.; Order Approving a Proposed Rule Change, as Modified by Amendment No. 2, Regarding the Continued Listing and Trading of Shares of the Natixis Loomis Sayles Short Duration Income ETF

December 14, 2018.

I. Introduction

On April 16, 2018, NYSE Arca, Inc. (''Exchange'' or ''NYSE Arca'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) [1] of the Securities Exchange Act of 1934 (''Act'') [2] and Rule 19b–4 thereunder,[3] a proposed rule change to amend the listing requirements applicable to the shares (''Shares'') of the Natixis Loomis Sayles Short Duration Income ETF (''Fund''). The proposed rule change was published for comment in the **Federal Register** on May 3, 2018.[4] On June 5, 2018, the Commission extended the time period within which to approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to approve or disapprove the proposed rule change to August 1, 2018.[5] On June 6, 2018, the Exchange filed Amendment No. 1 to the proposed rule change, which replaced and superseded the proposed rule change as originally filed. On July 27, 2018, the Commission noticed filing of Amendment No. 1 and instituted proceedings to determine whether to approve or disapprove the proposed rule change.[6] On July 27, 2018, pursuant to Section 19(b)(2) of the Act,[7] the Commission designated a longer period within which to issue an order approving or disapproving the proposed rule change.[8] On December 6, 2018, the Exchange filed Amendment No. 2 to the proposed rule change, which replaced and superseded the proposed rule change as modified by Amendment No. 1.[9] On October 22,

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

[4] *See* Securities Exchange Act Release No. 83122 (April 27, 2018), 83 FR 19578.

[5] *See* Securities Exchange Act Release No. 83385, 83 FR 27034 (June 11, 2018).

[6] *See* Securities Exchange Act Release No. 83733, 83 FR 37831 (August 2, 2018).

[7] 15 U.S.C. 78s(b)(2).

[8] *See* Securities Exchange Act Release No. 84462, 83 FR 54153 (October 26, 2018). The Commission designated December 29, 2018, as the date by which the Commission shall either approve or disapprove the proposed rule change.

[9] In Amendment No. 2, the Exchange: (1) Clarified the scope of asset-backed securities (''ABSs'') in which the Fund may invest; (2) limited the junior loans in which the Fund may invest to those that satisfy all of the criteria in Commentary .01(b) to Rule 8.600–E; (3) clarified the scope of mortgage-backed securities (''MBSs'') in which the Fund may invest; (4) eliminated as permitted investments of the Fund publicly or privately issued interests in investment pools whose underlying assets are credit default, credit-linked, interest rate, currency exchange, equity-linked or other types of swap contracts and related underlying securities or securities loan agreements; (5) established and provided support for the following diversification requirements with respect to the Fund's investments in non-agency ABS and MBS, which collectively may comprise up to 30% of the weight of the Fund's ''Fixed Income Securities'' (defined below): (a) Up to 25% of such weight may be in ABS, provided that up to 5% of the weight of its Fixed Income Securities investments may be in CBOs, CLOs and CDOs, in the aggregate; (b) up to 15% of its Fixed Income Securities investments may be in MBS, including CMOs but excluding CMBS; and (c) up to 15% of its Fixed Income Securities investments may be in CMBS; and (6) made other technical, non-substantive, and conforming changes. Because Amendment No. 2 makes clarifying modifications, provides additional representations, and eliminates a permitted category of investments, it is not subject to notice

2018, the Commission extended the time period for Commission action to December 29, 2018.[10] The Commission received no comments on the proposed rule change. This order approves the proposed rule change, as modified by Amendment No. 2.

II. Description of the Proposal [11]

Pursuant to Commentary .01 to NYSE Arca Rule 8.600–E,[12] the Exchange listed and began trading the Shares on December 28, 2017. The Shares are offered by Natixis ETF Trust (''Trust''), which is registered as an open-end management investment company under the Investment Company Act of 1940 (''1940 Act'').[13] Natixis Advisors, L.P. (''Adviser'') is the investment adviser for the Fund. Loomis, Sayles & Company, L.P. is the Fund's sub-adviser (''Sub-Adviser''). The Fund's investment objective is current income consistent with preservation of capital. The Exchange filed this proposed rule change because the Fund would like to invest in assets that may not satisfy all of the requirements of Commentary .01 to NYSE Arca Rule 8.600–E, as discussed further below.

A. The Fund's Contemplated Investments

While the Fund may hold any portion of its assets in cash (U.S. dollars, foreign currencies or multinational currency units) and/or cash equivalents, under normal market conditions,[14] the Fund will invest at least 80% of its net assets in the following:

- U.S. Government Securities, including U.S. Treasury Bills, U.S. Treasury Notes and Bonds, U.S. Treasury Floating Rate Notes, Treasury Inflation-Protected Securities, and obligations of U.S. agencies or instrumentalities (*e.g.,* ''Ginnie Maes'', ''Fannie Maes'' and ''Freddie Macs'');
- agency and non-agency asset-backed securities (''ABS'');[15]
- U.S. dollar-denominated foreign securities, including emerging market securities;
- Adjustable-Rate Mortgage Securities;
- junior and senior loans;[16]
- bank loans, loan participations and assignments;
- agency and non-agency mortgage-backed securities (''MBS'');[17]
- zero coupon and pay-in-kind securities;
- corporate bonds;
- Non-US government securities, supranational entities obligations issued by foreign governments, or international agencies and instrumentalities;
- inflation-linked and inflation-indexed securities;
- money market instruments;[18]
- mortgage-related securities (such as Government National Mortgage Association or Federal National Mortgage Association certificates);
- mortgage dollar rolls;
- variable and floating rate securities;
- Rule 144A securities;
- taxable municipal securities;
- step-coupon securities; and
- stripped securities (collectively, ''Fixed Income Securities'').

Additionally, under normal market conditions,[19] the Fund may invest its remaining assets in the following:

- short sales of Fixed Income Securities;
- exchange-traded funds (''ETFs'')[20] and exchange-traded notes (''ETNs'');[21]
- the following swaps: Interest rate, credit default, credit default swaps index (''CDX''), commodity, equity-linked, fixed income, credit default, credit-linked and currency exchange swaps or an index or indexes of the foregoing;
- swaptions;
- the following options: U.S. exchange-traded and over-the-counter (''OTC'') options on Fixed Income Securities, domestic and foreign equity and fixed income indices, CDX, U.S. Treasury futures contracts, interest rates and currencies;
- futures on Fixed Income Securities, domestic and foreign equity and fixed income indices, interest rates and CDX; and
- shares of non-exchange-traded open-end investment company securities.

B. The Contemplated Investments' Possible Non-Compliance With the Generic Listing Requirements

The Exchange filed this proposed rule change to allow the Fund's portfolio to not satisfy the two ''generic'' listing criteria of Commentary .01 to NYSE Arca Rule 8.600–E going forward.

First, as noted above, the Fund desires to invest in non-exchange traded investment company securities (*e.g.,* mutual fund shares). Such shares, which could comprise at most up to 20% of the Fund's net assets, would not satisfy the requirements of Commentary .01(a)(1) to Rule 8.600–E.[22] According to

and comment. All of the amendments to the proposed rule change are available at: *https://www.sec.gov/comments/sr-nysearca-2018-25/nysearca201825.htm.*

[10] *See* Securities Exchange Act Release No. 84462, 83 FR 54153 (October 26, 2018).

[11] Additional information regarding the Fund, the Trust (defined *infra*), and the Shares can be found in Amendment No. 2, *supra* note 9, and the Registration Statement, *infra* note 13.

[12] NYSE Arca Rule 8.600–E governs the listing and trading of Managed Fund Shares on the Exchange. A ''Managed Fund Share'' is a security that (1) represents an interest in a registered investment company (''Investment Company'') organized as an open-end management investment company or similar entity, that invests in a portfolio of securities selected by the Investment Company's investment adviser consistent with the Investment Company's investment objectives and policies; (2) is issued in a specified aggregate minimum number in return for a deposit of a specified portfolio of securities and/or a cash amount with a value equal to the next determined net asset value (''NAV''); and (3) when aggregated in the same specified minimum number, may be redeemed at a holder's request, which holder will be paid a specified portfolio of securities and/or cash with a value equal to the next determined NAV. *See* NYSE Arca Rule 8.600–E(c)(1). Pursuant to Commentary .01 to NYSE Arca Rule 8.600–E, the Exchange may approve Managed Fund Shares for listing and trading pursuant to Rule 19b–4(e) under the Act provided that components the actively managed fund's portfolio comply with specified criteria upon initial listing and on a continual basis.

[13] On December 26, 2017, the Trust filed with the Commission its registration statement on Form N–1A under the Securities Act of 1933 (15 U.S.C. 77a), and under the 1940 Act relating to the Fund (File Nos. 333–210156 and 811–23146) (''Registration Statement''). In addition, the Commission has issued an order granting certain exemptive relief to the Trust under the 1940 Act. *See* Investment Company Act Release No. 30654 (August 20, 2013) (File No. 812–13942–02).

[14] The term ''normal market conditions'' is defined in NYSE Arca Rule 8.600–E(c)(5).

[15] ABSs may include collateralized bond obligations (''CBOs''), collateralized loan obligations (''CLOs''), and other collateralized debt obligations (''CDOs'').

[16] The Fund's investment in junior loans is subject to all criteria in Commentary .01(b) to Rule 8.600–E, including the criteria relating to minimum original principal amount outstanding (Commentary .01(b)(1), portfolio weighting (Commentary .01(b)(2), and the numerical and other criteria in Commentary .01(b)(4). *See* Amendment No. 2, *supra* note 9, at 6, n.7.

[17] MBS may include collateralized mortgage obligations (''CMOs'') and commercial mortgage-backed securities (''CMBS'').

[18] Money market instruments are short-term instruments referenced in Commentary .01(c) to NYSE Arca Rule 8.600–E.

[19] *See supra* note 14.

[20] All ETFs will be listed and traded in the U.S. on a national securities exchange. While the Fund may invest in inverse ETFs, the Fund will not invest in leveraged (*e.g.,* 2X, –2X, 3X or –3X) ETFs. *See* Amendment No. 2, *supra* note 9, at 7, n.11.

[21] ETNs are Index-Linked Securities as described in NYSE Arca Rule 5.2–E(j)(6). *See id.* at 7, n.12.

[22] Commentary .01(a)(1) to Rule 8.600–E requires that the component stocks of the equity portion of a portfolio that are U.S. Component Stocks shall meet certain criteria initially and on a continuing basis. Specifically: Commentary .01(a)(1)(A) requires that component stocks (excluding Derivative Securities Products and Index-Linked Securities) that in the aggregate account for at least 90% of the equity weight of the portfolio (excluding such Derivative Securities Products and Index-Linked Securities) each shall have a minimum market value of at least $75 million; Commentary .01(a)(1)(B) requires that component stocks (excluding Derivative Securities Products and Index-Linked Securities) that in the aggregate account for at least 70% of the equity weight of the portfolio (excluding such Derivative Securities Products and Index-Linked Securities) each shall

Continued

the Exchange, the Fund would utilize such investments to help the Fund meet its investment objective and to equitize cash in the short term.[23]

Second, the Fund seeks to modify the limit on non-agency, non-government-sponsored entity (''GSE'') and privately-issued mortgage-related and other asset-backed securities. Instead, of the 20% limit in Commentary .01(b)(5),[24] the Exchange proposes that up to 30% of the weight of the Fixed Income Securities portion of the Fund's portfolio consist of non-agency, non-GSE and privately-issued mortgage-related and other asset-backed securities, provided that: (1) Up to 25% of such weight may be in ABS, provided that up to 5% of the weight of its Fixed Income Securities investments may be in CBOs, CLOs and CDOs, in the aggregate; (2) up to 15% of its Fixed Income Securities investments may be in MBS, including CMOs but excluding CMBS; and (3) up to 15% of its Fixed Income Securities investments may be in CMBS. The Exchange asserts that these limits would provide additional diversification to the Fund's ABS and MBS investments and reduce concerns that the Fund's investment in such securities would be readily susceptible to market manipulation. According to the Adviser, permitting such investments: (1) Would be in the best interest of the Fund's shareholders because such investments have the potential to reduce the overall risk profile of the Fund's portfolio through diversification; and (2) would afford the Fund greater flexibility to invest in the most liquid available Fixed Income Securities issues.[25]

The Exchange would require the Shares to satisfy all the other requirements of Rule 8.600–E.[26]

III. Discussion and Commission Findings

After careful review, the Commission finds that the Exchange's proposal to amend the listing requirements applicable to the Shares is consistent with the Act and the rules and regulations thereunder applicable to a national securities exchange.[27] In particular, the Commission finds that the proposed rule change, as modified by Amendment No. 2, is consistent with Section 6(b)(5) of the Act,[28] which requires, among other things, that the Exchange's rules be designed to prevent fraudulent and manipulative acts and practices, promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

As mentioned above, the Shares would continue to satisfy all of the generic listing criteria except for the requirements of Commentary .01(b)(5) to NYSE Arca Rule 8.600–E,[29] and Commentary .01(a)(1)(A) through (E) to Rule 8.600–E.

The Commission believes that permitting the Fund to invest up to 20% of its net assets in non-exchange traded investment company securities would not render the Shares susceptible to manipulation. The Commission has previously approved listing rules for other series of Managed Fund Shares that permit investments in such securities.[30]

With respect to the proposed 30% limit on non-agency, non-GSE and privately-issued mortgage-related and other asset-backed securities, the Commission believes that the proposed sub-limits described above, are sufficient to diversify the Fund's portfolio of such securities and mitigate manipulation concerns. The Commission notes that it recently approved a similar limit for an issue of Managed Fund Shares permitted to invest in fixed income securities.[31]

In support of this proposal, the Exchange has also made the following representations:

(1) The Fund will only purchase U.S. dollar denominated non-agency ABS and MBS that are settled through DTC.[32]

(2) All statements and representations made in this filing regarding (a) the description of the portfolio, (b) limitations on portfolio holdings or reference assets, or (c) the applicability of Exchange listing rules specified in this rule filing shall constitute continued listing requirements for listing the Shares on the Exchange.[33]

(3) The issuer will advise the Exchange of any failure by the Fund to comply with the continued listing requirements, and, pursuant to its obligations under Section 19(g)(1) of the Act, the Exchange will monitor for compliance with the continued listing requirements. If the Fund is not in compliance with the applicable listing requirements, the Exchange will commence delisting procedures under NYSE Arca Rule 5.5(m)–E.[34]

(4) The Exchange has appropriate rules to facilitate transactions in the Shares during all trading sessions.[35]

(5) The Exchange has in place surveillance procedures that are adequate to properly monitor trading in the Shares in all trading sessions and to deter and detect violations of Exchange rules and federal securities laws applicable to trading on the Exchange.[36]

(6) For continued listing, the Fund will be in compliance with Rule 10A–3 under the Act, as provided by NYSE Arca Rule 5.3–E.[37]

This approval order is based on all of the Exchange's representations, including those set forth above and in the Amendment No. 2.

For the foregoing reasons, the Commission finds that the proposed

have a minimum monthly trading volume of 250,000 shares, or minimum notional volume traded per month of $25,000,000, averaged over the last six months; Commentary .01(a)(1)(C) requires that the most heavily weighted component stock (excluding Derivative Securities Products and Index-Linked Securities) shall not exceed 30% of the equity weight of the portfolio, and, to the extent applicable, the five most heavily weighted component stocks (excluding Derivative Securities Products and Index-Linked Securities) shall not exceed 65% of the equity weight of the portfolio; Commentary .01(a)(1)(D) requires that, where the equity portion of the portfolio does not include Non-U.S. Component Stocks, the equity portion of the portfolio shall include a minimum of 13 component stocks, provided that there shall be no minimum number of component stocks if (i) one or more series of Derivative Securities Products or Index-Linked Securities constitute, at least in part, components underlying a series of Managed Fund Shares, or (ii) one or more series of Derivative Securities Products or Index-Linked Securities account for 100% of the equity weight of the portfolio of a series of Managed Fund Shares; and Commentary .01(a)(1)(E) requires that, except as provided herein, equity securities in the portfolio shall be U.S. Component Stocks listed on a national securities exchange and shall be NMS Stocks as defined in Rule 600 of Regulation NMS under the Securities Exchange Act of 1934.

[23] *See id.*

[24] Commentary .01(b)(5) to Rule 8.600–E prohibits non-agency, non-GSE and privately-issued mortgage-related and other asset-backed securities components of a portfolio from accounting (in the aggregate) for more than 20% of the weight of the fixed income portion of the portfolio.

[25] *See id.*

[26] *See id.* at 15.

[27] In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[28] 15 U.S.C. 78f(b)(5).

[29] Commentary .01(b)(5) to NYSE Arca Rule 8.600–E provides that non-agency, non-government sponsored entity and privately issued mortgage-related and other asset-backed securities components of a portfolio may not account, in the aggregate, for more than 20% of the weight of the fixed income portion of the portfolio.

[30] *See, e.g.,* Securities Exchange Act Release No. 78414 (July 26, 2016), 81 FR 50576 (August 1, 2016) (SR–NYSEArca–2016–79) (approving the listing and trading of shares of the Virtus Japan Alpha ETF under NYSE Arca Equities Rule 8.600).

[31] *See* Securities Exchange Act Release No. 84047 (September 6, 2018), 83 FR 46200 (September 12, 2018) (SR–Nasdaq–2017–128) (approving the listing and trading of shares of the Western Asset Total Return ETF).

[32] *See* Amendment No. 2, *supra* note 9, at 12.

[33] *See id.* at 19.

[34] *See id.*

[35] *See id.* at 17.

[36] *See id.* at *18.*

[37] *See id.* at 18. *See also* 17 CFR 240.10A–3.

rule change, as modified by Amendment No. 2, is consistent with Section 6(b)(5) of the Act [38] and the rules and regulations thereunder applicable to a national securities exchange.

IV. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[39] that the proposed rule change (SR–NYSEArca–2018–25), as modified by Amendment No. 2, be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[40]

Eduardo A. Aleman,

Deputy Secretary.

[FR Doc. 2018–27509 Filed 12–19–18; 8:45 am]

BILLING CODE 8011–01–P

[38] 15 U.S.C. 78f(b)(5).

[39] 15 U.S.C. 78s(b)(2).

[40] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

Sunshine Act Meetings

FEDERAL REGISTER CITATION OF PREVIOUS ANNOUNCEMENT: 83 FR 64630, 17 December 2018.

PREVIOUSLY ANNOUNCED TIME AND DATE OF THE MEETING: Wednesday, December 19, 2018 at 10:00 a.m.

CHANGES IN THE MEETING: The following item will not be considered during the Open Meeting on Wednesday, July 18, 2018:

- Whether to issue a Request for Comment on nature and content of quarterly reports and earnings releases issued by reporting companies.

CONTACT PERSON FOR MORE INFORMATION: For further information and to ascertain what, if any, matters have been added, deleted or postponed, please contact the Office of the Secretary at (202) 551–5400.

Dated: December 18, 2018.

Brent J. Fields,

Secretary.

[FR Doc. 2018–27753 Filed 12–18–18; 4:15 pm]

BILLING CODE 8011–01–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #15838 and #15839; CALIFORNIA Disaster Number CA–00296]

Presidential Declaration of a Major Disaster for Public Assistance Only for the State of California

AGENCY: U.S. Small Business Administration.

ACTION: Notice.

SUMMARY: This is a Notice of the Presidential declaration of a major disaster for Public Assistance Only for the State of California (FEMA–4407–DR), dated 12/11/2018.

Incident: Wildfires.

Incident Period: 11/08/2018 through 11/25/2018.

DATES: Issued on 12/11/2018.

Physical Loan Application Deadline Date: 02/11/2019.

Economic Injury (EIDL) Loan Application Deadline Date: 09/11/2019.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street SW, Suite 6050, Washington, DC 20416, (202) 205–6734.

SUPPLEMENTARY INFORMATION: Notice is hereby given that as a result of the President's major disaster declaration on 12/11/2018, Private Non-Profit organizations that provide essential services of a governmental nature may file disaster loan applications at the address listed above or other locally announced locations.

The following areas have been determined to be adversely affected by the disaster:

Primary Counties: Butte, Los Angeles, Ventura.

The Interest Rates are:

	Percent
For Physical Damage:	
Non-Profit Organizations with Credit Available Elsewhere ...	2.750
Non-Profit Organizations without Credit Available Elsewhere	2.750
For Economic Injury:	
Non-Profit Organizations without Credit Available Elsewhere	2.750

The number assigned to this disaster for physical damage is 158385 and for economic injury is 158390.

(Catalog of Federal Domestic Assistance Number 59008)

James Rivera,

Associate Administrator for Disaster Assistance.

[FR Doc. 2018–27553 Filed 12–19–18; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #15696 and #15697; North Carolina Disaster Number NC–00099]

Presidential Declaration Amendment of a Major Disaster for the State of North Carolina

AGENCY: U.S. Small Business Administration.

ACTION: Amendment 8.

SUMMARY: This is an amendment of the Presidential declaration of a major disaster for the State of North Carolina (FEMA–4393–DR), dated 09/14/2018.

Incident: Hurricane Florence.

Incident Period: 09/07/2018 through 09/29/2018.

DATES: Issued on 12/13/2018.

Physical Loan Application Deadline Date: 12/19/2018.

Economic Injury (EIDL) Loan Application Deadline Date: 06/14/2019.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street SW, Suite 6050, Washington, DC 20416, (202) 205–6734.

SUPPLEMENTARY INFORMATION: The notice of the President's major disaster declaration for the State of North Carolina, dated 09/14/2018, is hereby amended to extend the deadline for filing applications for physical damages as a result of this disaster to 12/19/2018.

All other information in the original declaration remains unchanged.

(Catalog of Federal Domestic Assistance Number 59008)

James Rivera,

Associate Administrator for Disaster Assistance.

[FR Doc. 2018–27552 Filed 12–19–18; 8:45 am]

BILLING CODE 8025–01–P

SURFACE TRANSPORTATION BOARD

[Docket No. FD 36258]

Dover and Delaware River Railroad, LLC—Lease with Interchange Commitment and Trackage Rights Exemption—Norfolk Southern Railway Company and New Jersey Transit Corporation

Dover and Delaware River Railroad, LLC (DDRR), a noncarrier, has filed a verified notice of exemption under 49 CFR 1150.31 to (1) lease from Norfolk Southern Railway Company (NS) and

operate 27.2 miles of rail lines (the Leased Lines),[1] and (2) operate pursuant to a trackage rights agreement among DDRR, NS, and New Jersey Transit Corporation (NJT) over 80.7 miles of rail lines (the Trackage Lines), all in the State of New Jersey.

The Leased Lines run (i) between milepost WD 58.0 at Hackettstown and milepost WD 80.3 at Phillipsburg; (ii) between milepost 66.5 TG at Washington and milepost 67.6 TG at Washington; (iii) between milepost PQ 21.4 at Mountain View and milepost PQ 22.2 at Wayne; and (iv) between milepost TO 18.0 at Totowa and milepost 21.0 at Wayne.

The Trackage Lines run (i) between milepost 7.8 at Newark Broad Street and milepost 48.1 at Netcong; (ii) between milepost 48.1 at Netcong and milepost 58.0 at Hackettstown; (iii) between milepost 20.1 at Summit and milepost 25.7 at Berkeley Heights; and (iv) between milepost 9.0 at Newark Roseville Avenue and milepost 33.9 at Denville.

This transaction is related to a concurrently filed verified petition for exemption in *Kean Burenga & Chesapeake & Delaware, LLC—Continuance in Control Exemption—Dover & Delaware River Railroad, LLC,* Docket No. FD 36259, in which Kean Burenga and Chesapeake and Delaware, LLC seek the Board's approval to continue in control of DDRR upon DDRR's becoming a Class III rail carrier.

DDRR states that NS currently provides freight service on the Lines. DDRR further states that NS owns the Leased Lines, and NJT owns the Trackage Lines, over which NS holds a residual freight easement and trackage rights. DDRR represents that, upon consummation of the transaction, it will become the freight operator on the Lines.

DDRR certifies that its projected annual revenues from this transaction will not result in the creation of a Class I or Class II rail carrier and will not exceed $5 million. As is required under 49 CFR 1150.33(h)(1), DDRR discloses in its verified notice that its lease agreement with NS for the Leased Lines contains an interchange commitment that will affect interchange with carriers other than NS on the Leased Lines. DDRR has provided additional information regarding the interchange commitment as required under 49 CFR 1150.33(h). DDRR represents that the trackage rights agreement among it, NS, and NJT for the Trackage Lines does not contain an interchange commitment.

DDRR states that it will not commence operations on the Lines until the Board issues a decision on the concurrently filed verified petition for exemption in Docket No. FD 36259. The effective date of this lease and operation exemption will be held in abeyance pending review of the petition for exemption.

If the verified notice contains false or misleading information, the exemption is void ab initio. Petitions to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the effectiveness of the exemption. Petitions for stay must be filed no later than seven days before the exemption becomes effective; a deadline for filing petitions for stay will be established in a future decision that establishes an effective date for this exemption.

An original and 10 copies of all pleadings, referring to Docket No. FD 36258, must be filed with the Surface Transportation Board, 395 E Street, SW, Washington, DC 20423–0001. In addition, a copy of each pleading must be served on DDRR's representative, Eric. M. Hocky, Clark Hill PLC, One Commerce Square, 2005 Market Street, Suite 1000, Philadelphia, PA 19103.

According to DDRR, this action is categorically excluded from environmental review under 49 CFR 1105.6(c) and from historic reporting under 49 CFR 1105.8(b).

Board decisions and notices are available on our website at *www.stb.gov.*

Decided: December 14, 2018.

By the Board, Scott M. Zimmerman, Acting Director, Office of Proceedings.

Kenyatta Clay,

Clearance Clerk.

[FR Doc. 2018–27501 Filed 12–19–18; 8:45 am]

BILLING CODE 4915–01–P

[1] Attached to its notice, DDRR included a Confidential Appendix containing an unexecuted copy of its lease with NS. On December 14, 2018, DDRR filed a supplement to its Confidential Appendix with an executed copy of the lease.

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Solicitation of Nominations for Appointment to the Drone Advisory Committee (DAC)

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

ACTION: Solicitation of nominations for appointment to the DAC.

SUMMARY: The FAA is issuing this notice to solicit nominations for qualified candidates to serve on the DAC. This notice seeks to fill vacancies on the DAC and does not affect the status of current DAC members. The DAC is an advisory committee established under DOT's authority, in accordance with the provisions of the Federal Advisory Committee Act (FACA) as amended. The objective of the DAC is to provide independent advice and recommendations to the FAA and to respond to specific taskings received directly from the FAA. The advice, recommendations, and taskings relate to improving the efficiency and safety of integrating Unmanned Aircraft Systems (UAS) into the National Airspace System. In response to FAA requests, the DAC may provide the FAA with information that may be used for tactical and strategic planning purposes.

DATES: Nomination materials to submit (see below) must be received no later than 6:00 a.m. Eastern Time on January 9, 2019.

ADDRESSES: All nominations shall be emailed to Chris Harm, the FAA's UAS Stakeholder and Committee Liaison, at *chris.harm@faa.gov* (subject line ''2019 DAC Nomination''). A return email confirmation will be sent upon receipt.

FOR FURTHER INFORMATION CONTACT: For questions about this process or general questions about the DAC, please visit *https://www.faa.gov/uas/programs_partnerships/dac/* or contact Chris Harm at *chris.harm@faa.gov* or 202–267–5401.

SUPPLEMENTARY INFORMATION: Pursuant to the FACA (Pub. L. 92–463, 5 U.S.C., App. 2), notice is hereby given of the solicitation of nominations for appointment to the DAC.

Description of Duties: The DAC acts solely in an advisory capacity and does not exercise program management responsibilities. Decisions directly affecting implementation of transportation policy will remain with the FAA Administrator and the Secretary of Transportation. The DAC:

a. Undertakes only tasks assigned by the FAA.

b. Deliberates on and approves recommendations for assigned tasks in meetings that are open to the public.

c. Responds to ad hoc informational requests from the FAA and/or provides input to the FAA on the overall DAC structure (including structure of the subcommittees and or task groups).

Members of the DAC will be engaged in the above-referenced activities.

Membership: The FAA will submit recommendations for membership to the Secretary of Transportation, who will appoint members to the DAC. The membership is fairly balanced in terms of points of view represented and the functions performed. All DAC members serve at the pleasure of the Secretary of

Transportation. Other membership criteria include:

a. The DAC will have no more than 35 members.

b. Members will serve for an appointment of up to two years.

c. Members will serve without charge and without government compensation. The employing organization bears all costs related to its participation. Members must represent a particular interest of employment, education, experience, or affiliation with a specific aviation related organization.

d. Members must attend all DAC meetings (estimated three meetings per year).

Qualifications: Candidates must be in good public standing and currently serve as a member of their organization's core senior leadership team with the ability to make UAS-related decisions. In rare circumstances, membership will be granted to uniquely qualified individuals who do not meet this latter requirement.

Materials to Submit: Candidates are required to submit, in full, the following materials to be considered for DAC membership. Failure to submit the required information may disqualify a candidate from the review process.

a. A short biography of nominee, including professional and academic credentials.

b. A résumé or curriculum vitae, which must include relevant job experience, qualifications, as well as contact information.

c. Up to three letters of recommendation may be submitted, but are not required. Each letter may be no longer than one page.

d. A one-page statement describing how the candidate will benefit the DAC, taking into account current membership and the candidate's unique perspective that will advance the conversation. This statement must also identify a primary and secondary interest to which the candidate's expertise best aligns. The stakeholder groups represented on the DAC include the following:

i. Airports and Airport Communities
ii. Labor (controllers, pilots)
iii. Local Government
iv. Navigation, Communication, Surveillance, and Air Traffic Management Capability Providers
v. Research, Development, and Academia
vi. Traditional Manned Aviation Operators
vii. UAS Hardware Component Manufacturers
viii. UAS Manufacturers
ix. UAS Operators
x. UAS Software Application Manufacturers
xi. Other

Finally, candidates should state their previous experience on a Federal Advisory Committee and/or Aviation Rulemaking Committee (if any), their level of knowledge in their above stakeholder groups, and the size of their constituency they represent or are able to reach.

Evaluations will be based on the materials submitted by the prospective candidates and will include consideration for membership balancing to ensure each of the above stakeholder groups has adequate representation.

Issued in Washington, DC on December 14, 2018.

Christopher W. Harm,

UAS Stakeholder and Committee Liaison, AUS–10, UAS Integration Office, FAA.

[FR Doc. 2018–27507 Filed 12–19–18; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Agency Information Collection Activities: Requests for Comments; Clearance of Renewed Approval of Information Collection: Air Carrier Contract Maintenance Requirements

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, FAA invites public comments about our intention to request the Office of Management and Budget (OMB) approval to renew an information collection. This information collection requires air carriers to report monthly to the FAA, all maintenance providers with whom they have contracted with to perform maintenance on their aircraft. This is necessary to ensure that maintenance provider data is current, and in a format readily accessible to the FAA. This will enable the FAA to adequately target its inspection resources for surveillance, and make accurate risk assessments.

DATES: Written comments should be submitted by February 19, 2019.

ADDRESSES: Send comments to the FAA at the following address: Barbara Hall, Federal Aviation Administration, ASP–110, 10101 Hillwood Parkway, Fort Worth, TX 76177.

Public Comments Invited: You are asked to comment on any aspect of this information collection, including (a) Whether the proposed collection of information is necessary for FAA's performance; (b) the accuracy of the estimated burden; (c) ways for FAA to enhance the quality, utility and clarity of the information collection; and (d) ways that the burden could be minimized without reducing the quality of the collected information. The agency will summarize and/or include your comments in the request for OMB's clearance of this information collection.

FOR FURTHER INFORMATION CONTACT: Barbara Hall by email at: *Barbara.L.Hall@faa.gov;* phone: 940–594–5913.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 2120–0766.

Title: Air Carrier Contract Maintenance Requirements.

Form Numbers: There are no forms associated with this collection.

Type of Review: This is a renewal of an information collection.

Background: Air carrier maintenance has evolved from mostly an ''in-house'' operation to an extended network of maintenance providers that fulfill contracts with air carriers to perform their aircraft maintenance. Any person performing maintenance for an air carrier must follow the air carrier's maintenance manual.

The FAA has found that, although an air carrier is required to list its maintenance providers and a general description of the work to be done in its maintenance manual, these lists are not always kept up to date, are not always complete, and are not always in a format that is readily useful for FAA oversight and analysis purposes. Without accurate and complete information on the work being performed for air carriers, the FAA cannot adequately target its inspection resources for surveillance and make accurate risk assessments.

This collection of information supports regulatory requirements necessary under 14 CFR part 121 and part 135 to ensure safety of flight by requiring air carriers to provide a list to the FAA of all persons with whom they contract their maintenance. The list must be updated with any changes, including additions or deletions, and the updated list provided to the FAA in a format acceptable to the FAA by the last day of each calendar month. The FAA uses its oversight tool, the Safety Assurance System (SAS), to generate and electronically provide a standardized template to air carriers. Air carriers document maintenance provider changes on this template and return it via email to their Flight Standards District Office or Certificate management Office.

This collection also supports the FAA's strategic goal to provide to the

next level of safety, by achieving the lowest possible accident rate and always improving safety, so all users of our aviation system can arrive safely at their destinations.

Respondents: 312 air carriers (110 large air carriers and 202 small air carriers).

Frequency: Monthly.

Estimated Average Burden per Response: Estimated average burden per response is 6 hours.

Estimated Total Annual Burden: 1688 hours.

Issued in Washington, DC on December 14, 2018.

Barbara L. Hall,

FAA Information Collection Clearance Officer, Performance, Policy, and Records Management Branch, ASP–110.

[FR Doc. 2018–27489 Filed 12–19–18; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

Sunshine Act Meetings; Unified Carrier Registration Plan Board of Directors

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of Unified Carrier Registration Plan Board of Directors and Subcommittee Meetings.

TIME AND DATE: The meetings will occur on the following schedule and will take place in the Eastern (Standard) Time Zone:

Monday, January 28, 2019

9:00 a.m.–9:50 a.m. Procedures Subcommittee
9:50 a.m.–10:45 a.m. Audit Subcommittee
11:00 a.m.–12:00 Noon Finance Subcommittee
1:30 p.m.–3:00 p.m. Registration System Subcommittee
3:15 p.m.–4:15 p.m. Industry Advisory Subcommittee
4:15 p.m.–5:00 p.m. Dispute Resolution Subcommittee

Tuesday, January 29, 2019

The Unified Carrier Registration Plan Board of Directors meeting will be held from 8:30 a.m. until noon.

PLACE: These meetings will be open to the public at the Embassy Suites, Tampa Downtown Convention Center, 513 South Florida Ave., Tampa, FL 33602, and via conference call. Those not attending the meetings in person may call toll-free; 1–866–210–1669, passcode 5253902#, to listen and participate in the meetings.

STATUS: Open to the public.

MATTERS TO BE CONSIDERED: The Unified Carrier Registration Plan Board of Directors will continue its work in developing and implementing the Unified Carrier Registration Plan and Agreement and to that end, may consider matters properly before the Board. An agenda for these meetings will be available no later than 5:00 p.m. Eastern Standard Time, January 18, 2019 at: *https://ucrplan.org.*

FOR FURTHER INFORMATION CONTACT: Mr. Avelino Gutierrez, Chair, Unified Carrier Registration Board of Directors at (505) 827–4565.

Issued on: December 11, 2018.

Larry W. Minor,

Associate Administrator, Office of Policy, Federal Motor Carrier Safety Administration.

[FR Doc. 2018–27775 Filed 12–18–18; 4:15 pm]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

[Docket Number FRA–2018–0112]

Petition for Waiver of Compliance

Under part 211 of Title 49 Code of Federal Regulations (CFR), this document provides the public notice that on December 4, 2018, the Indiana Harbor Belt Railroad (IHBR) and RJ Corman Railpower petitioned the Federal Railroad Administration (FRA) for approval of modifications and substantive changes to an FRA-approved locomotive crashworthiness design standard as required under 49 CFR 229.207(c). FRA assigned the petition Docket Number FRA–2018–0112.

Specifically, Petitioners seek FRA's approval and concurrence with substantive changes to an FRA-approved locomotive crashworthiness design standard for the IHBR SW 1500 fleet. The SW fleet was originally manufactured from 1966 to 1968 and is undergoing modification to operate on both diesel and compressed natural gas in a ''dual-fuel'' configuration. Once modified and approved, these locomotives would operate in switching service at IHBR. Because the locomotive modifications include a lengthening of the frame and the replacement of the operator cab, these changes require FRA's approval and concurrence with 49 CFR 229.207(c) to be considered crashworthy.

A copy of the petition, as well as any written communications concerning the petition, is available for review online at *www.regulations.gov* and in person at the U.S. Department of Transportation's (DOT) Docket Operations Facility, 1200 New Jersey Avenue SE, W12–140, Washington, DC 20590. The Docket Operations Facility is open from 9 a.m. to 5 p.m., Monday through Friday, except Federal Holidays.

Interested parties are invited to participate in these proceedings by submitting written views, data, or comments. FRA does not anticipate scheduling a public hearing in connection with these proceedings since the facts do not appear to warrant a hearing. If any interested parties desire an opportunity for oral comment and a public hearing, they should notify FRA, in writing, before the end of the comment period and specify the basis for their request.

All communications concerning these proceedings should identify the appropriate docket number and may be submitted by any of the following methods:

- *Website: http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* Docket Operations Facility, U.S. Department of Transportation, 1200 New Jersey Avenue SE, W12–140, Washington, DC 20590.
- *Hand Delivery:* 1200 New Jersey Avenue SE, Room W12–140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.

Communications received by February 4, 2019 will be considered by FRA before final action is taken. Comments received after that date will be considered if practicable.

Anyone can search the electronic form of any written communications and comments received into any of our dockets by the name of the individual submitting the comment (or signing the document, if submitted on behalf of an association, business, labor union, etc.). Under 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its processes. DOT posts these comments, without edit, including any personal information the commenter provides, to *www.regulations.gov,* as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *https://www.transportation.gov/privacy.* See also *https://www.regulations.gov/privacyNotice* for the privacy notice of regulations.gov.

Issued in Washington, DC.

Robert C. Lauby,

Associate Administrator for Railroad Safety, Chief Safety Officer.

[FR Doc. 2018–27514 Filed 12–19–18; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF TRANSPORTATION

[Docket No. DOT–OST–2010–0054]

Notice of Submission of Proposed Information Collections to OMB; Agency Request for Renewal of Previously Approved Information Collections: Nondiscrimination on the Basis of Disability in Air Travel: Reporting Requirements for Disability-Related Complaints

AGENCY: Office of the Secretary (OST), Department of Transportation (Department or DOT).

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice announces the Department of Transportation's intention to renew an Office of Management and Budget (OMB) control number for information collection request (ICR) OMB No. 2105–0551, ''Reporting Requirements for Disability-Related Complaints.'' This collection is related to a requirement in the Code of Federal Regulations (CFR) for carriers to report annually to the Department the number of disability-related complaints they receive.

DATES: Written comments on this notice should be submitted by February 19, 2019.

ADDRESSES: You may submit comments (identified by Docket No. DOT–OST–2010–0054) through one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Fax:* 1–202–493–2251.
- *Mail or Hand Delivery:* Docket Management Facility, U.S. Department of Transportation, West Building, Ground Floor, Rm. W–12–140, 1200 New Jersey Avenue SE, Washington, DC 20590, between 9:00 a.m. and 5:00 p.m. EST, Monday through Friday, except on Federal Holidays.

FOR FURTHER INFORMATION CONTACT: Maegan Johnson, Office of the General Counsel, Office of the Secretary, U.S. Department of Transportation, 1200 New Jersey Avenue SE, Washington, DC 20590, 202–366–9342 (Voice), 202–366–7152 (Fax), or *maegan.johnson@dot.gov* (Email). Arrangements to receive this document in an alternative format may be made by contacting the above-named individuals.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 2105–0551.

Title: Reporting Requirements for Disability-Related Complaints.

Type of Request: Renewal of information collections.

Background: On July 8, 2003, the Office of the Secretary published a final rule that requires most certificated U.S. and foreign air carriers operating to, from and within the U.S. that conduct passenger-carrying service utilizing at least one large aircraft to record complaints that they receive alleging inadequate accessibility or discrimination on the basis of disability. The carriers must also categorize these complaints according to the type of disability and nature of complaint, prepare a summary report annually of the complaints received during the preceding calendar year, submit the report to the Department's Aviation Consumer Protection Division, and retain copies of correspondence and records of action taken on the reported complaints for three years. The rule requires carriers to submit their annual report via the World Wide Web except if the carrier can demonstrate an undue burden by doing so and receives permission from the Department to submit it in an alternative manner. The first required report covered disability-related complaints received by carriers during calendar year 2004, was due to the Department on January 31, 2005. Carriers have since submitted subsequent reports by the last Monday in January for the prior calendar year.

The title, a description of the information collection and respondents, and the periodic reporting burden are set forth below for each of the information collected.

(1) Requirement to record and categorize complaints received.

Respondents: Certificated U.S. air carriers and foreign air carriers operating to and from the United States that conduct passenger-carrying service with at least one large aircraft.

Number of Respondents: 177 (an average of the total number of respondents that reported over the past three years).

Estimated Annual Burden on Respondents: 0–1,611 hours (96,660 minutes) a year for each respondent (estimated time to record and categorize each complaint (15 minutes) multiplied by the lowest number of complaints and the average of the highest number of complaints received per respondent over the past three years (0–6,444 complaints).

Estimated Total Annual Burden: 8,148 hours (488,880 minutes) for all respondents (time to record and categorize each complaint (15 minutes) multiplied by the average total number of complaints received over the past three years (32,591) for all respondents).

Frequency: 0–6,444 complaints (a range of the lowest number of complaints and an average of the highest number of complaints received over the past three years).

(2) Requirement to prepare and submit annual report.

Respondents: Certificated U.S. air carriers and foreign air carriers operating to and from the United States that conduct passenger-carrying service with at least one large aircraft.

Number of Respondents: 177 (an average of the total number of respondents that reported over the past three years).

Estimated Annual Burden on Respondents: 30 minutes a year per each respondent.

Estimated Total Annual Burden: 88.5 hours (5,310 minutes) for all respondents (estimated annual burden [30 minutes] multiplied by the total number of respondents).

Frequency: 1 report to DOT per year for each respondent.

(3) Requirement to retain correspondences and records of action taken on all disability-related complaints.

Respondents: Certificated U.S. air carriers and foreign air carriers operating to and from the United States that conduct passenger-carrying service with at least one large aircraft.

Number of Respondents: 177 (an average of the total number of respondents that reported over the past three years).

Estimated Annual Burden on Respondents: 0–537 hours (0–32,220 minutes) for each respondent (the estimated time it will take for each respondent to retain or save the correspondences and records of action taken on disability-related complaints (5 minutes) multiplied by the lowest number of complaints and the average highest number of complaints received per respondent over the past three years (0–6,444)).

Estimated Total Annual Burden: 2,716 hours (162,955 minutes) for all respondents (the estimated time it will take for each respondent to retain or save the correspondences and records of action taken on disability-related complaints (5 minutes) multiplied by the average total number of complaints received over the past three years (32,591) for all respondents).

Frequency: 0–6,444 complaints per year for each respondent (A range of the lowest number of complaints and an average of the highest number of complaints received over the past three years).

Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the Department's functions, including whether the information will have practical utility; (b) the accuracy of the Department's estimate of the burden of the proposed information collection; (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 the use of automated collection techniques or other forms of information technology. All responses to this notice will be summarized and included in the request for OMB approval. All comments will also become a matter of public record.

Authority: The Paperwork Reduction Act of 1995; 44 U.S.C. Chapter 35, as amended; and 49 CFR part 1.

Issued in Washington, DC, on December 14, 2018.

Blane A. Workie,

Assistant General Counsel for Aviation Enforcement and Proceedings.

[FR Doc. 2018–27532 Filed 12–19–18; 8:45 am]

BILLING CODE 4910–9X–P

DEPARTMENT OF THE TREASURY

Financial Crimes Enforcement Network

Agency Information Collection Activities; Proposed Renewal; Comment Request; Reports of Foreign Financial Accounts Regulations and FinCEN Form 114, Report of Foreign Bank and Financial Accounts

AGENCY: Financial Crimes Enforcement Network (''FinCEN''), Treasury.

ACTION: Notice and request for comments.

SUMMARY: FinCEN invites comment on a renewal, without change, of existing information collection requirements concerning reports of foreign financial accounts and FinCEN Form 114, Report of Foreign Bank and Financial Accounts (''FBAR''). This request for comments is being made pursuant to the Paperwork Reduction Act (''PRA'') of 1995.

DATES: Written comments are welcome and must be received on or before February 19, 2019 to be assured of consideration.

ADDRESSES: Comments may be submitted by any of the following methods:

- *Federal E-rulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments. Refer to Docket Number FINCEN–2018–0018 and the Office of Management and Budget (''OMB'') control number 1506–0009.
- *Mail:* Policy Division, Financial Crimes Enforcement Network, P.O. Box 39, Vienna, VA 22183. Refer to Docket Number FINCEN–2018–0018 and OMB control number 1506–0009.

Please submit comments by one method only. Comments will also be incorporated to FinCEN's retrospective regulatory review process, as mandated by E.O. 12866 and 13563. All comments submitted in response to this notice will become a matter of public record. Therefore, you should submit only information that you wish to make publicly available.

FOR FURTHER INFORMATION CONTACT: The FinCEN Resource Center at 800–767–2825 or electronically at *frc@fincen.gov.*

SUPPLEMENTARY INFORMATION: The Bank Secrecy Act (''BSA''), Titles I and II of Public Law 91–508, as amended, codified at 12 U.S.C. 1829(b), 12 U.S.C. 1951–1959, and 31 U.S.C. 5311–5314 and 5316–5332, authorizes the Secretary of the Treasury, among other things, to require financial institutions to keep records and file reports that are determined to have a high degree of usefulness in criminal, tax, and regulatory matters or in the conduct of intelligence or counter-intelligence activities to protect against international terrorism, and to implement counter-money laundering programs and compliance procedures.[1] Title III of the USA PATRIOT Act of 2001, Pub. L. 107–56, included certain amendments to the anti-money laundering provisions of Title II of the BSA, 31 U.S.C. 5311 *et seq.,* which are intended to aid in the prevention, detection, and prosecution of international money laundering and terrorist financing.

Regulations implementing Title II of the BSA appear at 31 CFR Chapter X. The authority of the Secretary of the Treasury to administer Title II of the BSA has been delegated to the Director of FinCEN. The information collected and retained under the regulation addressed in this notice assist Federal, state, and local law enforcement as well as regulatory authorities in the identification, investigation, and prosecution of money laundering and other matters.

Under 31 U.S.C. 5314, the Secretary is authorized to require any ''resident or citizen of the United States or a person in, and doing business in, the United States, to . . . keep records and file reports, when the resident, citizen, or person makes a transaction or maintains a relation for any person with a foreign financial agency.'' The term ''foreign financial agency'' encompasses the activities found in the statutory definition of ''financial agency,''[2] which means, in pertinent part, ''a person acting for a person as a financial institution, bailee, depository trustee, or agent, or acting in a similar way related to money, credit, securities, gold, or a transaction in money, credit, securities, or gold.''[3] The Secretary is also authorized to prescribe exemptions to the reporting requirement and to prescribe other matters the Secretary considers necessary to carry out section 5314.

Pursuant to the authority in section 5314, 31 CFR 1010.350 generally requires each U.S. person having a financial interest in, or signature or other authority over, a bank, securities, or other financial account in a foreign country to report such relationship to the Commissioner of Internal Revenue for each year in which such relationship exists, and to provide and report such information specified in a reporting form prescribed under 31 U.S.C. 5314. Section 1010.350 provides certain exceptions from reporting. FinCEN Form 114 (the FBAR) is the form used to file the required information. The recordkeeping requirements associated with foreign financial accounts required to be reported under section 1010.350 are set forth in 31 CFR 1010.420. Specifically, filers must retain records of such accounts for a period of 5 years and make the records available for inspection as authorized by law.[4]

In accordance with the requirements of the PRA and its implementing regulations, the following information is presented concerning the information collection below.

Title: Reports of foreign financial accounts and records to be made and retained by persons having financial

[1] Language expanding the scope of the BSA to intelligence or counter-intelligence activities to protect against international terrorism was added by Section 358 of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, P.L. 107–56 (''USA PATRIOT Act'').

[2] 31 U.S.C. 5312(b)(2).

[3] *See* 31 U.S.C. 5312(a)(1), which exempts from the definition of financial agency a person acting for a country, a monetary or financial authority acting as a monetary or financial authority or an international financial institution of which the United States government is a member.

[4] The penalties provided in the BSA apply to both the FBAR reporting and recordkeeping requirement.

interests in foreign financial accounts (31 CFR 1010.350, 1010.420) and FinCEN Form 114, Report of Foreign Bank and Financial Accounts.

OMB Control Number: 1506–0009.

Form Number: FinCEN Form 114.

Abstract: Each U.S. person having a financial interest in, or signature or other authority over, a bank, securities, or other financial account in a foreign country shall report such relationship to the Commissioner of Internal Revenue for each year in which such relationship exists and shall provide such information as shall be specified in a reporting form prescribed under 31 U.S.C. 5314 to be filed by such persons. This information will be provided on the FinCEN Form 114. Records of accounts required by § 1010.350 to be reported shall be retained by each person having a financial interest in or signature or other authority over any such account. Such records shall be retained for a period of 5 years and shall be kept at all times available for inspection as authorized by law.

Type of Review: Renewal without change to a currently approved information collection.

Affected Public: Individuals, businesses or other for-profit institutions, and non-profit institutions.

Burden:

- *Estimated Number of Respondents:* 1,090,774.[5]
- *Estimated Number of Responses:* 1,090,774.
- *Estimated Average Annual Burden Per Response:* The estimated average burden associated with the recordkeeping requirements in the rules will vary depending on the number of reportable accounts. We estimate that the recordkeeping burden will range from five minutes to sixty minutes, and that the average burden will be 30 minutes. The estimated average burden associated with the reporting requirement (*i.e.,* FBAR form completion) will also vary depending on the number of reportable accounts and whether the filer will be able to take advantage of the exceptions provided in the rule. We estimate that the average reporting burden will range from approximately 15 minutes to 50 minutes and that the average reporting burden will be approximately 30 minutes. The estimated total annual recordkeeping and reporting burden per response will be 1 hour.
- *Estimated Total Annual Respondent Burden:* 1,090,774 hours (one hour per report).

[5] The total number of FBARs reported for foreign financial accounts reported for calendar year 2016 is 1,090,774.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Records required to be retained under the BSA must be retained for five years. Generally, information collected pursuant to the BSA is confidential but may be shared as provided by law with regulatory and law enforcement authorities.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance and purchase of services to provide information.

Dated: December 11, 2018.

Jamal El-Hindi,

Deputy Director, Financial Crimes Enforcement Network.

[FR Doc. 2018–27513 Filed 12–19–18; 8:45 am]

BILLING CODE 4810–02–P

DEPARTMENT OF THE TREASURY

Office of Foreign Assets Control

Notice of OFAC Sanctions Actions

AGENCY: Office of Foreign Assets Control, Treasury.

ACTION: Notice.

SUMMARY: The Department of the Treasury's Office of Foreign Assets Control (OFAC) is publishing the names of one or more persons that have been placed on OFAC's Specially Designated Nationals and Blocked Persons List based on OFAC's determination that one or more applicable legal criteria were satisfied. All property and interests in property subject to U.S. jurisdiction of these persons are blocked, and U.S. persons are generally prohibited from engaging in transactions with them.

DATES: See **SUPPLEMENTARY INFORMATION** section.

FOR FURTHER INFORMATION CONTACT: OFAC: Associate Director for Global Targeting, tel.: 202–622–2420; Assistant Director for Sanctions Compliance & Evaluation, tel.: 202–622–2490; Assistant Director for Licensing, tel.: 202–622–2480; Assistant Director for Regulatory Affairs, tel. 202–622–4855; or the Department of the Treasury's Office of the General Counsel: Office of the Chief Counsel (Foreign Assets Control), tel.: 202–622–2410.

SUPPLEMENTARY INFORMATION:

Electronic Availability

The Specially Designated Nationals and Blocked Persons List and additional information concerning OFAC sanctions programs are available on OFAC's website (*www.treasury.gov/ofac*).

Notice of OFAC Action(s)

On December 14, 2018, OFAC determined that the property and interests in property subject to U.S. jurisdiction of the following persons are blocked under the relevant sanctions authorities listed below.

Individuals

1. DIMITRY, Gregory Vasili (a.k.a. ADUOL, Gregory Deng Kuac; a.k.a. KUAC, Gregory Deng; a.k.a. KUACH, Gregory Deng; a.k.a. YALOURIS, Gregory Vasilis Dimitry), Juba, South Sudan; DOB 01 Jan 1961; POB Ajogo, South Sudan; nationality South Sudan; Gender Male (individual) [SOUTH SUDAN].

Designated pursuant to Section 1(a)(i)(A) of Executive Order 13664 of April 3, 2014, ''Blocking Property of Certain Persons With Respect to South Sudan'' (E.O. 13664) for being responsible for or complicit in, or having engaged in, directly or indirectly, in or in relation to South Sudan, actions or policies that threaten the peace, security, or stability of South Sudan.

2. ZIV, Israel (a.k.a. ZILBERSTEIN, Israel Baruch; a.k.a. ZIV, Israel Baruch; a.k.a. ZIV, Yisrael), Haela 16, Har Hadar, Israel; Haela 40, Har Adar, Israel; DOB 06 Jul 1957; nationality Israel; Gender Male; Passport 29037166 (Israel); National ID No. 5490537 (individual) [SOUTH SUDAN].

Designated pursuant to Section 1(a)(ii) of E.O. 13664 for being a leader of an entity that has, or whose members have, engaged in actions or policies that have the purpose or effect of expanding or extending the conflict in South Sudan or obstructing reconciliation or peace talks or processes.

3. OLAWO, Obac William (a.k.a. OLAH, Ubac William; a.k.a. OLAU, Obaj William), South Sudan; DOB 01 Jan 1962; POB Malakal, South Sudan; Gender Male; Passport M6200000021304 (South Sudan) (individual) [SOUTH SUDAN].

Designated pursuant to Section 1(a)(ii) of E.O. 13664 for being a leader of an entity that has, or whose members have, engaged in actions or policies that have the purpose or effect of expanding or extending the conflict in South Sudan or obstructing reconciliation or peace talks or processes.

Entities

4. GLOBAL IZ GROUP LTD (a.k.a. ZIV HG LTD), 7 Metzada, Bnei Brak 5126112, Israel; Business Registration Number 514033703 (Israel) [SOUTH SUDAN] (Linked To: ZIV, Israel).

Designated pursuant to Section 1(a)(iv) of E.O. 13664 for being owned or controlled by, or having acted or purported to act for or on behalf of, directly or indirectly, Israel Ziv, a person whose property and interests in property are blocked pursuant to E.O. 13664.

5. GLOBAL LAW ENFORCEMENT AND SECURITY LTD (a.k.a. ''GLS''), 2 Granit, Petah Tikva 4951446, Israel; Business Registration Number 514151331 (Israel) [SOUTH SUDAN] (Linked To: GLOBAL N.T.M LTD).

Designated pursuant to Section 1(a)(iv) of E.O. 13664 for being owned or controlled by, or having acted or purported to act for or on behalf of, directly or indirectly, GLOBAL N.T.M LTD, a person whose property and interests in property are blocked pursuant to E.O. 13664.

6. GLOBAL N.T.M LTD (a.k.a. CST GLOBAL; a.k.a. GLOBAL CST; a.k.a. ''GLOBAL GROUP''; a.k.a. ''GREEN HORIZON''), 11 Granit Street, P.O. Box 3111, Petach-Tikva 49514, Israel; 2 Granit, Petah Tikva 4951446, Israel; Business Registration Number 513884569 (Israel) [SOUTH SUDAN] (Linked To: ZIV, Israel).

Designated pursuant to Section 1(a)(iv) of E.O. 13664 for being owned or controlled by, or having acted or purported to act for or on behalf of, directly or indirectly, Israel Ziv, a person whose property and interests in property are blocked pursuant to E.O. 13664.

7. AFRICANA GENERAL TRADING LTD, Plot No. 297, Block BYVI, 3rd Floor Office No. 33, Juba, South Sudan [SOUTH SUDAN] (Linked To: OLAWO, Obac William).

Designated pursuant to Section 1(a)(iv) of E.O. 13664 for being owned or controlled by, Obac William Olawo, a person whose property and interests in property are blocked pursuant to E.O. 13664.

8. CROWN AUTO TRADE (a.k.a. CROWN AUTO TRADING; a.k.a. CROWN AUTOMOBILES), Havana Street, Juba, South Sudan [SOUTH SUDAN] (Linked To: OLAWO, Obac William).

Designated pursuant to Section 1(a)(iv) of E.O. 13664 for being owned or controlled by, Obac William Olawo, a person whose property and interests in property are blocked pursuant to E.O. 13664.

9. GOLDEN WINGS AVIATION, Juba, South Sudan; Wau, South Sudan; Regency Hotel, Ground Floor, Khartoum, Sudan; Rumbek, South Sudan; Awel Grand Market, Awel, South Sudan; Yida Grand Market, Yida, South Sudan; Asmara, Eritrea [SOUTH SUDAN] (Linked To: OLAWO, Obac William).

Designated pursuant to Section 1(a)(iv) of E.O. 13664 for being owned or controlled by, Obac William Olawo, a person whose property and interests in property are blocked pursuant to E.O. 13664.

Dated: December 14, 2018.

Andrea Gacki,

Director, Office of Foreign Assets Control.

[FR Doc. 2018–27534 Filed 12–19–18; 8:45 am]

BILLING CODE 4810–AL–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–NEW]

Agency Information Collection Activity: Application for Veteran Employment through Technology Education Courses High Technology Program

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: Veterans Benefits Administration, Department of Veterans Affairs (VA), is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act (PRA) of 1995, Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed new collection of information, and allow 60 days for public comment in response to the notice.

DATES: Written comments and recommendations on the proposed collection of information should be received on or before February 19, 2019.

ADDRESSES: Submit written comments on the collection of information through Federal Docket Management System (FDMS) at *www.Regulations.gov* or to Nancy J. Kessinger, Veterans Benefits Administration (20M33), Department of Veterans Affairs, 810 Vermont Avenue NW, Washington, DC 20420 or email to *nancy.kessinger@va.gov*. Please refer to ''OMB Control No. 2900–NEW in any correspondence. During the comment period, comments may be viewed online through the FDMS.

FOR FURTHER INFORMATION CONTACT: Danny S. Green, Quality, Privacy and Risk, at (202) 421–1354.

SUPPLEMENTARY INFORMATION:

Under the PRA of 1995, Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. This request for comment is being made pursuant to Section 3506(c)(2)(A) of the PRA.

With respect to the following collection of information, VBA invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of VBA's functions, including whether the information will have practical utility; (2) the accuracy of VBA's estimate of the burden of the proposed collection of information; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or the use of other forms of information technology.

Authority: P.L. 115–48, section 116; 44 U.S.C. 3501–3521.

Title: Application for Veteran Employment through Technology Education Courses (VET TEC) High Technology Program. VA Form 22–0994.

OMB Control Number: 2900–NEW.

Type of Review: New Information Collection.

Abstract: On August 16, 2017, the President signed into law the Harry W. Colmery Veterans Educational Assistance Act of 2017 (''Forever GI Bill''), Public Law 115–48, which amends Title 38, United States Code to make certain improvements in the laws administered by the Secretary of Veterans Affairs (VA), and for other purposes. Section 116 of the law authorizes VA to establish a 5-year high technology pilot program for veterans as an educational program provided by leading technology employers. This program allows veterans to enroll in courses outside the traditional definition of higher education to obtain skillsets highly desired by employers.

VA claims examiners use the information from this collection to help determine whether an applying individual qualifies for the Veteran Employment through Technology Education Courses (VET TEC) High Technology Program. The information on the form can be obtained only from the claimant, and a determination cannot be made without the information.

Affected Public: Providers of High Technology Programs.

Estimated Annual Burden: 550 hours.

Estimated Average Burden: 10 minutes.

Frequency of Response: Once Annually.

Estimated Number of Respondents: 3,000.

By direction of the Secretary.

Danny S. Green,

Interim Department Clearance Officer, Office of Quality, Privacy and Risk, Department of Veterans Affairs.

[FR Doc. 2018–27503 Filed 12–19–18; 8:45 am]

BILLING CODE 8320–01–P

FEDERAL REGISTER

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No. 244 December 20, 2018

Part II

United States Sentencing Commission

Sentencing Guidelines for United States Courts; Notices

UNITED STATES SENTENCING COMMISSION

Sentencing Guidelines for United States Courts

AGENCY: United States Sentencing Commission

ACTION: Notice of proposed amendments to sentencing guidelines, policy statements, and commentary. Request for public comment, including public comment regarding retroactive application of any of the proposed amendments. Notice of public hearing.

SUMMARY: Pursuant to section 994(a), (o), and (p) of title 28, United States Code, the United States Sentencing Commission is considering promulgating amendments to the sentencing guidelines, policy statements, and commentary. This notice sets forth the proposed amendments and, for each proposed amendment, a synopsis of the issues addressed by that amendment. This notice also sets forth several issues for comment, some of which are set forth together with the proposed amendments, and one of which (regarding retroactive application of proposed amendments) is set forth in the Supplementary Information section of this notice.

DATES:

(1) *Written Public Comment.*—Written public comment regarding the proposed amendments and issues for comment set forth in this notice, including public comment regarding retroactive application of any of the proposed amendments, should be received by the Commission not later than February 19, 2019. Written reply comments, which may only respond to issues raised during the original comment period, should be received by the Commission not later than March 15, 2019. Public comment regarding a proposed amendment received after the close of the comment period, and reply comment received on issues not raised during the original comment period, may not be considered.

(2) *Public Hearing.*—The Commission may hold a public hearing regarding the proposed amendments and issues for comment set forth in this notice. Further information regarding any public hearing that may be scheduled, including requirements for testifying and providing written testimony, as well as the date, time, location, and scope of the hearing, will be provided by the Commission on its website at *www.ussc.gov.*

ADDRESSES: All written comment should be sent to the Commission by electronic mail or regular mail. The email address for public comment is *Public_Comment@ussc.gov.* The regular mail address for public comment is United States Sentencing Commission, One Columbus Circle NE, Suite 2–500, Washington, DC 200002–8002, Attention: Public Affairs—Proposed Amendments.

FOR FURTHER INFORMATION CONTACT: Christine Leonard, Director, Office of Legislative and Public Affairs, (202) 502–4500, *pubaffairs@ussc.gov.*

SUPPLEMENTARY INFORMATION: The United States Sentencing Commission is an independent agency in the judicial branch of the United States Government. The Commission promulgates sentencing guidelines and policy statements for federal courts pursuant to 28 U.S.C. § 994(a). The Commission also periodically reviews and revises previously promulgated guidelines pursuant to 28 U.S.C. § 994(o) and submits guideline amendments to the Congress not later than the first day of May each year pursuant to 28 U.S.C. § 994(p).

Publication of a proposed amendment requires the affirmative vote of at least three voting members of the Commission and is deemed to be a request for public comment on the proposed amendment. *See* USSC Rules of Practice and Procedure 2.2, 4.4. In contrast, the affirmative vote of at least four voting members is required to promulgate an amendment and submit it to Congress. *See id.* 2.2; 28 U.S.C. § 994(p).

The proposed amendments in this notice are presented in one of two formats. First, some of the amendments are proposed as specific revisions to a guideline, policy statement, or commentary. Bracketed text within a proposed amendment indicates a heightened interest on the Commission's part in comment and suggestions regarding alternative policy choices; for example, a proposed enhancement of [2][4][6] levels indicates that the Commission is considering, and invites comment on, alternative policy choices regarding the appropriate level of enhancement. Similarly, bracketed text within a specific offense characteristic or application note means that the Commission specifically invites comment on whether the proposed provision is appropriate. Second, the Commission has highlighted certain issues for comment and invites suggestions on how the Commission should respond to those issues.

In summary, the proposed amendments and issues for comment set forth in this notice are as follows:

(1) A two-part proposed amendment to § 1B1.10 (Reduction in Term of Imprisonment as a Result of Amended Guideline Range (Policy Statement)), including (A) three options for amending the policy statement and commentary in light of *Koons* v. *United States,* 138 S. Ct. 1783 (2018); and (B) two options for amending the commentary to resolve a circuit conflict concerning the application of § 1B1.10(b)(2)(B), and a related issue for comment;

(2) a multi-part proposed amendment to § 4B1.2 (Definitions of Terms Used in Section 4B1.1), including (A) amendments establishing that the categorical approach and modified categorical approach do not apply in determining whether a conviction is a ''crime of violence'' or a ''controlled substance offense'' by (i) providing that, in making that determination, a court shall consider any element or alternative means for meeting an element of the offense committed by the defendant, as well as the conduct that formed the basis of the offense of conviction, (ii) allowing courts to look at a wider range of sources from the judicial record, beyond the statute of conviction, in determining the conduct that formed the basis of the offense of conviction, and (iii) making similar revisions to § 2L1.2 (Unlawfully Entering or Remaining in the United States), as well as conforming changes to the guidelines that use the terms ''crime of violence'' and ''controlled substance offense'' and define these terms by making specific reference to § 4B1.2, and related issues for comment; (B) three options to address the concern that certain robbery offenses, such as Hobbs Act robbery, no longer constitute a ''crime of violence'' under § 4B1.2, as amended in 2016, because these offenses do not meet either the generic definition of ''robbery'' or the new guidelines definition of ''extortion,'' and related issues for comment; (C) three options to address certain issues regarding the commentary provision stating that the terms ''crime of violence'' and ''controlled substance offense'' include the offenses of aiding and abetting, conspiring to commit, and attempting to commit a ''crime of violence'' and a ''controlled substance offense,'' and related issues for comment; and (D) revisions to the definition of ''controlled substance offense'' in § 4B1.2(b) to include: (i) Offenses involving an offer to sell a controlled substance, and (ii) offenses described in 46 U.S.C. § 70503(a) and § 70506(b), and a related issue for comment;

(3) a multi-part proposed amendment addressing recently enacted legislation and miscellaneous guideline issues, including (A) amendments to Appendix A (Statutory Index) and the Commentary to § 2N2.1 (Violations of Statutes and Regulations Dealing with Any Food, Drug, Biological Product, Device, Cosmetic, Agricultural Product, or Consumer Product) in response to the FDA Reauthorization Act of 2017, Public Law 115–52 (Aug. 18, 2017), a technical correction to the Commentary to § 2N1.1 (Tampering or Attempting to Tamper Involving Risk of Death or Bodily Injury), and a related issue for comment; (B) amendments to Appendix A, § 2A5.2 (Interference with Flight Crew Member or Flight Attendant; Interference with Dispatch, Navigation, Operation, or Maintenance of Mass Transportation Vehicle), as well as the commentaries to § 2A2.4 (Obstructing or Impeding Officers) and § 2X5.2 (Class A Misdemeanors (Not Covered by Another Specific Offense Guideline)), in response to the FAA Reauthorization Act of 2018, Public Law 115–254 (Oct. 8, 2018), and a related issue for comment; (C) amendments to Appendix A, § 2G1.1 (Promoting a Commercial Sex Act or Prohibited Sexual Conduct with an Individual Other than a Minor), and § 2G1.3 (Promoting a Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Transportation of Minors to Engage in a Commercial Sex Act or Prohibited Sexual Conduct; Travel to Engage in Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Sex Trafficking of Children; Use of Interstate Facilities to Transport Information about a Minor), in response to the Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Public Law 115–164 (Apr. 11, 2018), and related issues for comment; (D) an amendment to subsection (d) of § 3D1.2 (Grouping of Closely Related Counts) to provide that offenses covered by § 2G1.3 are not grouped under that subsection; and (E) an amendment to the Commentary to § 5F1.7 (Shock Incarceration Program (Policy Statement)) to reflect the fact that the Bureau of Prisons no longer operates a shock incarceration program; and

(4) a proposed amendment to make various technical changes to the *Guidelines Manual,* including (A) technical changes to reflect the editorial reclassification of certain provisions previously contained in the Appendix to Title 50, to new chapters 49 to 57 of Title 50 and to other titles of the Code; (B) technical changes throughout the Commentary to § 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy), to, among other things, reorganize in alphabetical order the controlled substances contained in the tables therein to make them more user-friendly; (C) technical changes to the commentaries to § 2A4.2 (Demanding or Receiving Ransom Money), § 2A6.1 (Threatening or Harassing Communications; Hoaxes; False Liens), and § 2B3.2 (Extortion by Force or Threat of Injury or Serious Damage), and to Appendix A, to provide references to the specific applicable provisions of 18 U.S.C. § 876; and (D) clerical changes to the background commentaries to § 1B1.11 (Use of Guidelines Manual in Effect on Date of Sentencing (Policy Statement)), § 3D1.1 (Procedure for Determining Offense Level on Multiple Counts), and § 5G1.3 (Imposition of a Sentence on a Defendant Subject to an Undischarged Term of Imprisonment or Anticipated State Term of Imprisonment).

In addition, the Commission requests public comment regarding whether, pursuant to 18 U.S.C. § 3582(c)(2) and 28 U.S.C. § 994(u), any proposed amendment published in this notice should be included in subsection (d) of § 1B1.10 as an amendment that may be applied retroactively to previously sentenced defendants. The Commission lists in § 1B1.10(d) the specific guideline amendments that the court may apply retroactively under 18 U.S.C. § 3582(c)(2). The Background Commentary to § 1B1.10 lists the purpose of the amendment, the magnitude of the change in the guideline range made by the amendment, and the difficulty of applying the amendment retroactively to determine an amended guideline range under § 1B1.10(b) as among the factors the Commission considers in selecting the amendments included in § 1B1.10(d). To the extent practicable, public comment should address each of these factors.

The text of the proposed amendments and related issues for comment are set forth below. Additional information pertaining to the proposed amendments and issues for comment described in this notice may be accessed through the Commission's website at *www.ussc.gov.*

Authority: 28 U.S.C. § 994(a), (o), (p), (x); USSC Rules of Practice and Procedure 2.2, 4.3, 4.4.

William H. Pryor Jr.,
Acting Chair.

PROPOSED AMENDMENTS TO THE SENTENCING GUIDELINES, POLICY STATEMENTS, AND OFFICIAL COMMENTARY

1. § 1B1.10

Synopsis of Proposed Amendment: This proposed amendment contains two parts (Part A and Part B). The Commission is considering whether to promulgate either or both of these parts, as they are not mutually exclusive.

Part A of the proposed amendment is the result of the Commission's consideration of miscellaneous issues, including possible amendments to § 1B1.10 (Reduction in Term of Imprisonment as a Result of Amended Guideline Range (Policy Statement)) in light of *Koons* v. *United States,* 138 S. Ct. 1783 (2018). *See* U.S. Sentencing Comm'n, ''Notice of Final Priorities,'' 83 FR 43956 (Aug. 28, 2018). Part A would revise § 1B1.10 in light of *Koons.*

Part B of the proposed amendment would resolve a circuit conflict concerning the application of § 1B1.10, pursuant to the Commission's authority under 28 U.S.C. § 991(b)(1)(B) and *Braxton* v. *United States,* 500 U.S. 344 (1991). *See* U.S. Sentencing Comm'n, ''Notice of Final Priorities,'' 83 FR 43956 (Aug. 28, 2018) (identifying resolution of circuit conflicts as a priority). An issue for comment is also provided.

(A) Possible Amendments in Light of *Koons* v. *United States*

Synopsis of Proposed Amendment: Pursuant to 18 U.S.C. § 3582(c), a court may modify a term of imprisonment if the defendant was initially sentenced based on a sentencing range that was subsequently lowered by a guideline amendment that the Commission has made retroactive. Section 3582(c)(2) provides:

in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. 994(o), upon motion of the defendant or the Director of the Bureau of Prisons, or on its own motion, the court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.

18 U.S.C. § 3582(c)(2).

A provision of the Sentencing Reform Act, 28 U.S.C. § 994(u), in turn, directs the Commission to determine when and to what extent such modifications are appropriate. Section 994(a)(2)(C) of Title 28 also directs the Commission to promulgate ''general policy statements regarding application of the guidelines or any other aspect of sentencing or sentence implementation . . . including the appropriate use of . . . the sentence modification provisions set forth in section . . . 3582(c) of title 18.''

The policy statement at § 1B1.10 (Reduction in Term of Imprisonment as a Result of Amended Guideline Range (Policy Statement)) implements the Commission's authority and responsibilities under these statutory provisions. Section 1B1.10(a) sets forth the eligibility requirements for a reduction in the defendant's term of imprisonment under 18 U.S.C. § 3582(c)(2) and the policy statement. Specifically, a defendant is eligible for a sentence reduction under the policy statement only if an amendment listed in § 1B1.10(d) ''lower[ed] the defendant's applicable guideline range.'' The ''applicable guideline range'' is the range ''that corresponds to the offense level and criminal history category determined pursuant to § 1B1.1(a), which is determined before consideration of any departure provision in the Guidelines Manual or any variance.'' USSG § 1B1.10, comment. (n.1(A)).

Section 1B1.10(b)(1) instructs that in determining whether, and to what extent, a reduction is warranted, the court shall determine the ''amended guideline range'' that would have applied if the amendments listed in § 1B1.10(d) had been in effect when the defendant was sentenced. In making that determination, the court shall substitute only the amendments listed in subsection (d) for the corresponding guideline provisions that were in effect at the original sentencing, ''leav[ing] all other guideline application decisions unaffected.'' Subsection (b)(2)(A) further instructs that the court cannot reduce the defendant's term of imprisonment below the bottom of the amended guideline range. However, subsection (b)(2)(B) provides an exception to this limitation: if the term of imprisonment originally imposed was less than the term provided by the then applicable guideline range ''pursuant to a government motion to reflect the defendant's substantial assistance to authorities, a reduction comparably less than the amended guideline range determined under [§ 1B1.10(b)(1)] may be appropriate.''

Section 1B1.10(c) provides a special rule for determining the amended guideline range if the defendant was subject to a statutory mandatory minimum penalty when originally sentenced but was relieved of that mandatory minimum because the defendant provided substantial assistance to the government. Under the special rule, the amended guideline range ''shall be determined without regard to the operation of'' § 5G1.1 (Sentencing on a Single Count of Conviction) and § 5G1.2 (Sentencing on Multiple Counts of Conviction), the guidelines providing that a statutory mandatory minimum penalty trumps the otherwise applicable guideline range.

Recently, the Supreme Court decided *Koons* v. *United States,* 138 S. Ct. 1783 (June 4, 2018), which held that certain defendants are statutorily ineligible for a sentence reduction under 18 U.S.C. § 3582(c)(2). Specifically, *Koons* held that defendants whose initial guideline ranges fell entirely below a statutory mandatory minimum penalty, but who were originally sentenced below that penalty pursuant to a government motion for substantial assistance (''*below* defendants''), are ineligible for sentence reductions under section 3582(c)(2). *See Koons,* 138 S. Ct. at 1786–87. The Court reasoned that these *below* defendants' original sentences were not ''based on'' their guideline ranges but were instead ''based on'' their statutory minimum penalties and the substantial assistance they provided to the government. *Id.* (quoting 18 U.S.C. § 3582(c)(2)). As a result, *below* defendants do not satisfy the threshold requirement in section 3582(c)(2) that they be ''initially sentenced 'based on a sentencing range' that was later lowered by the [Commission].'' *Id.*

Koons rested on the defendants' statutory ineligibility for a sentence reduction under 18 U.S.C. § 3582(c)(2) and did not analyze the policy statement at § 1B1.10 or the correct application of the guidelines in sentence reduction proceedings. In addition, *Koons* did not address whether two other categories of defendants whose cases involve mandatory minimum sentences are eligible for relief: (1) those with guideline ranges that straddle the mandatory minimum penalty (''*straddle* defendants'') and (2) those with guideline ranges completely above the mandatory minimum penalty (''*above* defendants'').

Part A of the proposed amendment would revise § 1B1.10 in light of the Supreme Court decision in *Koons.*

First, Part A would revise subsection (a) and its corresponding commentary to clarify that a defendant is eligible for a reduction under the policy statement only if the defendant was ''sentenced based on a guideline range.'' Subsection (a)(1) would be revised to closely track section 3582(c)'s requirement that the defendant must be ''sentenced based on a guideline range.'' The proposed amendment would revise subsection (a)(2) to affirmatively state the requirements for eligibility rather than exclusions from eligibility. It would also add as a requirement for eligibility that the defendant was ''sentenced based on a guideline range.''

Second, Part A would revise subsection (b)(1) to clarify that the eligibility requirement in renumbered subsection (a)(2)(c)—that the amendment has the effect of lowering the defendant's applicable guideline range—is determined by comparing the defendant's applicable guideline range at original sentencing to the amended guideline range, as calculated in the manner described in subsection (b)(1).

Finally, Part A provides three options for revising subsection (c), each of which would result in a different sentencing outcome for the defendants who remain eligible for a sentence reduction following *Koons.*

Option 1 would make no change to subsection (c). As a result, for statutorily eligible defendants (*straddle* and *above* defendants) who received relief from a statutory mandatory minimum penalty because they provided substantial assistance, the amended guideline range would continue to be determined without regard to the operation of §§ 5G1.1 and 5G1.2. This option would permit courts to give statutorily eligible defendants the largest possible sentence reductions for their substantial assistance. It would, however, treat *straddle* and *above* defendants more favorably than *below* defendants, who are statutorily ineligible for any reduction. It would also treat *straddle* and *above* defendants more favorably than similarly situated defendants who are being sentenced for the first time, because §§ 5G1.1 and 5G1.2 would apply to defendants facing initial sentencing.

Option 2 would provide that the amended guideline range is determined *after* operation of §§ 5G1.1 and 5G1.2. As a result, *straddle* defendants would not receive any reduction and *above* defendants would receive smaller reductions than they do under current subsection (c). This option would treat *straddle* and *above* defendants the same as *below* defendants. It would also treat all three categories of defendants the

same as similarly situated defendants facing initial sentencing.

Option 3 would provide that the amended guideline range is restricted by §§ 5G1.1 and 5G1.2 only if it was so restricted at the time the defendant was originally sentenced. As a result, *straddle* defendants would not receive any reduction. *Above* defendants would be eligible for the largest possible reduction, as they are under current subsection (c). This option would, however, treat *above* defendants more favorably than *straddle* and *below* defendants, and more favorably than similarly situated defendants facing initial sentencing.

Part A of the proposed amendment also makes conforming changes to the commentary.

Proposed Amendment:

Section 1B1.10 is amended—

in subsection (a)(1) by striking ''is serving a term of imprisonment, and the guideline range applicable to that defendant has subsequently been lowered'' and inserting ''was sentenced to a term of imprisonment based on a guideline range that has subsequently been lowered'';

in subsection (a)(2) by striking the following:

''*Exclusions.*—A reduction in the defendant's term of imprisonment is not consistent with this policy statement and therefore is not authorized under 18 U.S.C. § 3582(c)(2) if—

(A) none of the amendments listed in subsection (d) is applicable to the defendant; or

(B) an amendment listed in subsection (d) does not have the effect of lowering the defendant's applicable guideline range.'',

and inserting the following:

''*Eligibility.*—A defendant is eligible for a reduction in the defendant's term of imprisonment under 18 U.S.C. § 3582(c) and this policy statement only if—

(A) the defendant was sentenced based on a guideline range;

(B) an amendment listed in subsection (d) is applicable to the defendant; and

(C) that amendment has the effect of lowering the defendant's applicable guideline range.'';

[Option 1 (which also includes changes to commentary):

and in subsection (b)(1), by striking ''In determining whether, and to what extent, a reduction in the defendant's term of imprisonment under 18 U.S.C. § 3582(c)(2) and this policy statement is warranted,'' and inserting ''To determine whether the defendant is eligible under subsection (a)(2)(C) and the extent of any permissible reduction in the defendant's term of imprisonment,'', and by striking ''leave all other guideline application decisions unaffected'' and inserting ''leave all other guideline application decisions unaffected, except as provided in subsection (c) below''.**]**

[Option 2 (which also includes changes to commentary):

in subsection (b)(1), by striking ''In determining whether, and to what extent, a reduction in the defendant's term of imprisonment under 18 U.S.C. § 3582(c)(2) and this policy statement is warranted,'' and inserting ''To determine whether the defendant is eligible under subsection (a)(2)(C) and the extent of any permissible reduction in the defendant's term of imprisonment,'', and by striking ''leave all other guideline application decisions unaffected'' and inserting ''leave all other guideline application decisions unaffected, except as provided in subsection (c) below'';

and in subsection (c) by striking ''without regard to the operation of § 5G1.1 (Sentencing on a Single Count of Conviction)'' and inserting ''after operation of § 5G1.1 (Sentencing on a Single Count of Conviction)''.**]**

[Option 3 (which also includes changes to commentary):

in subsection (b)(1) by striking ''In determining whether, and to what extent, a reduction in the defendant's term of imprisonment under 18 U.S.C. § 3582(c)(2) and this policy statement is warranted,'' and inserting ''To determine whether the defendant is eligible under subsection (a)(2)(C) and the extent of any permissible reduction in the defendant's term of imprisonment,'';

and in subsection (c) by striking ''the amended guideline range shall be determined without regard to the operation of § 5G1.1 (Sentencing on a Single Count of Conviction) and § 5G1.2 (Sentencing on Multiple Counts of Conviction)'' and inserting ''the court shall not apply § 5G1.1 (Sentencing on a Single Count of Conviction) or § 5G1.2 (Sentencing on Multiple Counts of Conviction) to replace or restrict the amended guideline range unless § 5G1.1 or § 5G1.2 operated to restrict the guideline range at the time the defendant was sentenced''.**]**

The Commentary to § 1B1.10 captioned ''Application Notes'' is amended—

in Note 1 in paragraph (A) by striking the following:

''*Eligibility.*—Eligibility for consideration under 18 U.S.C. § 3582(c)(2) is triggered only by an amendment listed in subsection (d) that lowers the applicable guideline range (*i.e.,* the guideline range that corresponds to the offense level and criminal history category determined pursuant to § 1B1.1(a), which is determined before consideration of any departure provision in the Guidelines Manual or any variance). Accordingly, a reduction in the defendant's term of imprisonment is not authorized under 18 U.S.C. § 3582(c)(2) and is not consistent with this policy statement if: (i) none of the amendments listed in subsection (d) is applicable to the defendant; or (ii) an amendment listed in subsection (d) is applicable to the defendant but the amendment does not have the effect of lowering the defendant's applicable guideline range because of the operation of another guideline or statutory provision (*e.g.,* a statutory mandatory minimum term of imprisonment).'',

and inserting the following:

''*Eligibility.*—Under 18 U.S.C. § 3582(c)(2), a defendant may obtain a reduction in his term of imprisonment only if the defendant was originally sentenced 'based on a sentencing range that has subsequently lowered by the Sentencing Commission.' Subsection (a)(2)(A) therefore provides that a defendant is eligible for a reduction under the statute and this policy statement only if 'the defendant was sentenced based on a guideline range.' For purposes of 18 U.S.C. § 3582(c)(2), a defendant was sentenced 'based on a guideline range' only if that range played a relevant part in the framework that the sentencing court used in imposing the sentence. *See Hughes* v. *United States,* 138 S. Ct. 1765 (2018). Accordingly, a defendant is not sentenced 'based on a guideline range' if, pursuant to § 5G1.1(b), the guideline range that would otherwise have applied was superseded, and the statutorily required minimum sentence became the defendant's guideline sentence. *See Koons* v. *United States,* 138 S. Ct. 1783 (2018). If a defendant is ineligible for a reduction under subsection (a)(2)(A), the court shall not apply any other provisions of this policy statement and may not order a reduction in the defendant's term of imprisonment.

Subsection (a)(2)(C) further provides that a defendant is eligible for a reduction in his term of imprisonment only if an amendment listed in subsection (d) has the effect of lowering the defendant's applicable guideline range. The 'applicable guideline range' is the guideline range that corresponds to the offense level and criminal history category determined pursuant to § 1B1.1(a), which is determined before consideration of any departure provision in the Guidelines Manual or

any variance. Accordingly, a defendant is not eligible for a reduction if an amendment listed in subsection (d) is applicable to the defendant but the amendment does not have the effect of lowering the defendant's applicable guideline range because of the operation of another guideline or statutory provision (*e.g.,* a statutory mandatory minimum term of imprisonment). To determine whether a defendant is eligible for a reduction under subsection (a)(2)(C), and the permissible amount of the reduction, if any, the court must first determine the defendant's amended guideline range, as provided in subsection (b)(1).'';

[Option 1 and Option 2 would also include the following changes to Notes 2 and 3:

in Note 2 by striking ''All other guideline application decisions remain unaffected'' and inserting ''All other guideline application decisions remain unaffected, except as provided in subsection (c)'';

in Note 3 by striking ''limit the extent to which the court may reduce the defendant's term of imprisonment'' and inserting ''limit the extent to which the court may reduce an otherwise eligible defendant's term of imprisonment'';**]**

[Option 1 continued:

and in Note 4(B)—

by striking ''Ordinarily, § 5G1.1 would operate to restrict the amended guideline range to precisely 120 months'' and inserting ''Ordinarily, § 5G1.1 would operate to replace the amended guideline range with a guideline sentence of precisely 120 months'';

and by striking ''the amended guideline range is considered to be 87 to 108 months (*i.e.,* unrestricted by operation of § 5G1.1 and the statutory minimum of 120 months)'' and inserting ''the amended guideline range is considered to be 87 to 108 months (*i.e.,* not replaced by operation of § 5G1.1 with the statutory minimum of 120 months)''.**]**

[Option 2 continued:

and in Note 4 by striking the following:

''*Application of Subsection (c).*—As stated in subsection (c), if the case involves a statutorily required minimum sentence and the court had the authority to impose a sentence below the statutorily required minimum sentence pursuant to a government motion to reflect the defendant's substantial assistance to authorities, then for purposes of this policy statement the amended guideline range shall be determined without regard to the operation of § 5G1.1 (Sentencing on a Single Count of Conviction) and § 5G1.2 (Sentencing on Multiple Counts of Conviction). For example:

(A) Defendant A is subject to a mandatory minimum term of imprisonment of 120 months. The original guideline range at the time of sentencing was 135 to 168 months, which is entirely above the mandatory minimum, and the court imposed a sentence of 101 months pursuant to a government motion to reflect the defendant's substantial assistance to authorities. The court determines that the amended guideline range as calculated on the Sentencing Table is 108 to 135 months. Ordinarily, § 5G1.1 would operate to restrict the amended guideline range to 120 to 135 months, to reflect the mandatory minimum term of imprisonment. For purposes of this policy statement, however, the amended guideline range remains 108 to 135 months.

To the extent the court considers it appropriate to provide a reduction comparably less than the amended guideline range pursuant to subsection (b)(2)(B), Defendant A's original sentence of 101 months amounted to a reduction of approximately 25 percent below the minimum of the original guideline range of 135 months. Therefore, an amended sentence of 81 months (representing a reduction of approximately 25 percent below the minimum of the amended guideline range of 108 months) would amount to a comparable reduction and may be appropriate.

(B) Defendant B is subject to a mandatory minimum term of imprisonment of 120 months. The original guideline range at the time of sentencing (as calculated on the Sentencing Table) was 108 to 135 months, which was restricted by operation of § 5G1.1 to a range of 120 to 135 months. *See* § 5G1.1(c)(2). The court imposed a sentence of 90 months pursuant to a government motion to reflect the defendant's substantial assistance to authorities. The court determines that the amended guideline range as calculated on the Sentencing Table is 87 to 108 months. Ordinarily, § 5G1.1 would operate to restrict the amended guideline range to precisely 120 months, to reflect the mandatory minimum term of imprisonment. *See* § 5G1.1(b). For purposes of this policy statement, however, the amended guideline range is considered to be 87 to 108 months (*i.e.,* unrestricted by operation of § 5G1.1 and the statutory minimum of 120 months).

To the extent the court considers it appropriate to provide a reduction comparably less than the amended guideline range pursuant to subsection (b)(2)(B), Defendant B's original sentence of 90 months amounted to a reduction of approximately 25 percent below the original guideline range of 120 months. Therefore, an amended sentence of 65 months (representing a reduction of approximately 25 percent below the minimum of the amended guideline range of 87 months) would amount to a comparable reduction and may be appropriate.'',

and inserting the following:

''*Application of Subsection (c).*—As stated in subsection (c), if the case involves a statutorily required minimum sentence and the court had the authority to impose a sentence below the statutorily required minimum sentence pursuant to a government motion to reflect the defendant's substantial assistance to authorities, then for purposes of this policy statement the amended guideline range shall be determined after operation of § 5G1.1 (Sentencing on a Single Count of Conviction) and § 5G1.2 (Sentencing on Multiple Counts of Conviction). For example:

(A) Defendant A is subject to a mandatory minimum term of imprisonment of 120 months. The original guideline range at the time of sentencing was 135 to 168 months, which is entirely above the mandatory minimum, and the court imposed a sentence of 101 months pursuant to a government motion to reflect the defendant's substantial assistance to authorities. The court determines that the amended guideline range as calculated on the Sentencing Table is 108 to 135 months. For purposes of this policy statement, the amended guideline range is considered to be 120 to 135 months (*i.e.,* restricted by operation of § 5G1.1(c)(2) to reflect the statutory minimum of 120 months).

To the extent the court considers it appropriate to provide a reduction comparably less than the amended guideline range pursuant to subsection (b)(2)(B), Defendant A's original sentence of 101 months amounted to a reduction of approximately 25 percent below the minimum of the original guideline range of 135 months. Therefore, an amended sentence of 90 months (representing a reduction of approximately 25 percent below the minimum of the amended guideline range of 120 months) would amount to a comparable reduction and may be appropriate.

(B) Defendant B is subject to a mandatory minimum term of imprisonment of 120 months. The original guideline range at the time of sentencing (as calculated on the Sentencing Table) was 108 to 135

months, which was restricted by operation of § 5G1.1 to a range of 120 to 135 months. *See* § 5G1.1(c)(2). The court imposed a sentence of 90 months pursuant to a government motion to reflect the defendant's substantial assistance to authorities. The court determines that the amended guideline range as calculated on the Sentencing Table is 87 to 108 months. For purposes of this policy statement, § 5G1.1 would replace the amended guideline range as calculated on the Sentencing Table with a guideline sentence of precisely 120 months, to reflect the mandatory minimum term of imprisonment. *See* § 5G1.1(b).

To the extent the court considers it appropriate to provide a reduction comparably less than the amended guideline range pursuant to subsection (b)(2)(B), Defendant B's original sentence of 90 months amounted to a reduction of approximately 25 percent below the original guideline range of 120 months. However, subsection (b)(2)(B) precludes this defendant from receiving any further reduction, because the point from which any comparable reduction would be determined has not changed; the minimum of the original guideline range (120 months) and the amended guideline range (120 months) are the same, so any comparable reduction that may be appropriate under subsection (b)(2)(B) would be equivalent to the reduction Defendant B already received in the original sentence of 90 months.''.**]**

[Option 3 continued:

and in Note 4 by striking the following:

''*Application of Subsection (c).*—As stated in subsection (c), if the case involves a statutorily required minimum sentence and the court had the authority to impose a sentence below the statutorily required minimum sentence pursuant to a government motion to reflect the defendant's substantial assistance to authorities, then for purposes of this policy statement the amended guideline range shall be determined without regard to the operation of § 5G1.1 (Sentencing on a Single Count of Conviction) and § 5G1.2 (Sentencing on Multiple Counts of Conviction). For example:

(A) Defendant A is subject to a mandatory minimum term of imprisonment of 120 months. The original guideline range at the time of sentencing was 135 to 168 months, which is entirely above the mandatory minimum, and the court imposed a sentence of 101 months pursuant to a government motion to reflect the defendant's substantial assistance to authorities. The court determines that the amended guideline range as calculated on the Sentencing Table is 108 to 135 months. Ordinarily, § 5G1.1 would operate to restrict the amended guideline range to 120 to 135 months, to reflect the mandatory minimum term of imprisonment. For purposes of this policy statement, however, the amended guideline range remains 108 to 135 months.

To the extent the court considers it appropriate to provide a reduction comparably less than the amended guideline range pursuant to subsection (b)(2)(B), Defendant A's original sentence of 101 months amounted to a reduction of approximately 25 percent below the minimum of the original guideline range of 135 months. Therefore, an amended sentence of 81 months (representing a reduction of approximately 25 percent below the minimum of the amended guideline range of 108 months) would amount to a comparable reduction and may be appropriate.

(B) Defendant B is subject to a mandatory minimum term of imprisonment of 120 months. The original guideline range at the time of sentencing (as calculated on the Sentencing Table) was 108 to 135 months, which was restricted by operation of § 5G1.1 to a range of 120 to 135 months. *See* § 5G1.1(c)(2). The court imposed a sentence of 90 months pursuant to a government motion to reflect the defendant's substantial assistance to authorities. The court determines that the amended guideline range as calculated on the Sentencing Table is 87 to 108 months. Ordinarily, § 5G1.1 would operate to restrict the amended guideline range to precisely 120 months, to reflect the mandatory minimum term of imprisonment. *See* § 5G1.1(b). For purposes of this policy statement, however, the amended guideline range is considered to be 87 to 108 months (*i.e.,* unrestricted by operation of § 5G1.1 and the statutory minimum of 120 months).

To the extent the court considers it appropriate to provide a reduction comparably less than the amended guideline range pursuant to subsection (b)(2)(B), Defendant B's original sentence of 90 months amounted to a reduction of approximately 25 percent below the original guideline range of 120 months. Therefore, an amended sentence of 65 months (representing a reduction of approximately 25 percent below the minimum of the amended guideline range of 87 months) would amount to a comparable reduction and may be appropriate.'',

and inserting the following:

''*Application of Subsection (c).*—As stated in subsection (c), if the case involves a statutorily required minimum sentence and the court had the authority to impose a sentence below the statutorily required minimum sentence pursuant to a government motion to reflect the defendant's substantial assistance to authorities, then for purposes of this policy statement the court shall not apply § 5G1.1 (Sentencing on a Single Count of Conviction) or § 5G1.2 (Sentencing on Multiple Counts of Conviction) to replace or restrict the amended guideline range unless § 5G1.1 or § 5G1.2 operated to restrict the guideline range at the time the defendant was sentenced. For example:

(A) Defendant A is subject to a mandatory minimum term of imprisonment of 120 months. The original guideline range at the time of sentencing was 135 to 168 months, which is entirely above the mandatory minimum, and the court imposed a sentence of 101 months pursuant to a government motion to reflect the defendant's substantial assistance to authorities. The original range of 135 to 168 months was entirely above the mandatory minimum, so § 5G1.1 did not operate to replace or restrict that range. The court determines that the amended guideline range as calculated on the Sentencing Table is 108 to 135 months. Ordinarily, § 5G1.1 would operate to restrict the amended guideline range to 120 to 135 months, to reflect the mandatory minimum term of imprisonment. For purposes of this policy statement, however, the amended guideline range remains 108 to 135 months. The court does not apply § 5G1.1 to the amended guideline range because § 5G1.1 was not applied when the defendant was originally sentenced.

To the extent the court considers it appropriate to provide a reduction comparably less than the amended guideline range pursuant to subsection (b)(2)(B), Defendant A's original sentence of 101 months amounted to a reduction of approximately 25 percent below the minimum of the original guideline range of 135 months. Therefore, an amended sentence of 81 months (representing a reduction of approximately 25 percent below the minimum of the amended guideline range of 108 months) would amount to a comparable reduction and may be appropriate.

(B) Defendant B is subject to a mandatory minimum term of imprisonment of 120 months. The original guideline range at the time of sentencing (as calculated on the Sentencing Table) was 108 to 135

months, which was restricted by operation of § 5G1.1 to a range of 120 to 135 months. *See* § 5G1.1(c)(2). The court imposed a sentence of 90 months pursuant to a government motion to reflect the defendant's substantial assistance to authorities. The court determines that the amended guideline range as calculated on the Sentencing Table is 87 to 108 months. Section 5G1.1 would operate to replace the amended guideline range as calculated on the Sentencing Table with a guideline sentence of precisely 120 months, to reflect the mandatory minimum term of imprisonment. *See* § 5G1.1(b). The court should apply § 5G1.1 to the amended guideline range because § 5G1.1 was applied when the defendant was originally sentenced.

To the extent the court considers it appropriate to provide a reduction comparably less than the amended guideline range pursuant to subsection (b)(2)(B), Defendant B's original sentence of 90 months amounted to a reduction of approximately 25 percent below the original guideline range of 120 months. However, subsection (b)(2)(B) precludes this defendant from receiving any further reduction, because the point from which any comparable reduction would be determined has not changed; the minimum of the original guideline range (120 months) and the minimum of the amended range (120 months) are the same, so any comparable reduction that may be appropriate under subsection (b)(2)(B) would be equivalent to the reduction Defendant B already received in the original sentence of 90 months.''.**]**

(B) Resolution of Circuit Conflict

Synopsis of Proposed Amendment: In addition to the issues raised by *Koons* v. *United States,* 138 S. Ct. 1783 (2018), a circuit conflict has emerged regarding the application of § 1B1.10(b)(2)(B). Section 1B1.10(b)(2)(A) instructs that, in acting on a motion under 18 U.S.C. § 3582(c)(2), a court cannot reduce a defendant's term of imprisonment to a term that is less than the amended guideline minimum, as calculated under § 1B1.10(b)(1). However, § 1B1.10(b)(2)(B) provides an exception to this limitation: if the term of imprisonment originally imposed was less than the applicable guideline range at the time of sentencing ''pursuant to a government motion to reflect the defendant's substantial assistance to authorities, a reduction comparably less than the amended guideline range determined under [§ 1B1.10(b)(1)] may be appropriate.''

Circuit courts have disagreed about whether § 1B1.10(b)(2)(B) allows a court to reduce a sentence below the amended guideline range to reflect departures other than substantial assistance that the defendant received at his original sentencing or whether any sentence reduction may reflect only the departure amount attributable to substantial assistance. The Sixth and Eleventh Circuits have held that a court may reduce a sentence below the amended guideline range by an amount attributable only to the substantial assistance departure. *See United States* v. *Taylor,* 815 F.3d 248 (6th Cir. 2016); *United States* v. *Marroquin-Medina,* 817 F.3d 1285 (11th Cir. 2016); *see also United States* v. *Wright,* 562 F. App'x 885 (11th Cir. 2014). The Seventh and Ninth Circuits have held that, if a defendant received a substantial assistance departure, a court may reduce the defendant's sentence further below the amended guideline minimum to reflect other departures or variances the defendant received, in addition to the substantial assistance departure. *See United States* v. *Phelps,* 823 F.3d 1084 (7th Cir. 2016); *United States* v. *D.M.,* 869 F.3d 1133 (9th Cir. 2017).

Part B of the proposed amendment would revise Application Note 3 of the Commentary to § 1B1.10 (Reduction in Term of Imprisonment as a Result of Amended Guideline Range (Policy Statement)) to resolve this circuit conflict. Part B provides two options for resolving the conflict.

Option 1 would adopt the approach of the Sixth and Eleventh Circuits. It would revise Application Note 3 to state that in a case in which the exception provided by subsection (b)(2)(B) applies and the defendant received both a substantial assistance departure and at least one other departure or variance, a reduction ''comparably less'' than the defendant's amended guideline range may take into account only the substantial assistance departure.

Option 2 would adopt the approach of the Seventh and Ninth Circuits. It would revise Application Note 3 to state that in a case in which the exception provided by subsection (b)(2)(B) applies and the defendant received both a substantial assistance departure and at least one other departure or variance, a reduction ''comparably less'' than the amended guideline range may take into account all the departures and variances that the defendant received.

An issue for comment is also provided.

Proposed Amendment:

The Commentary to § 1B1.10 captioned ''Application Notes'' is amended in Note 3 by striking the following:

''Subsection (b)(2)(B) provides an exception to this limitation, which applies if the term of imprisonment imposed was less than the term of imprisonment provided by the guideline range applicable to the defendant at the time of sentencing pursuant to a government motion to reflect the defendant's substantial assistance to authorities. In such a case, the court may reduce the defendant's term, but the reduction is not limited by subsection (b)(2)(A) to the minimum of the amended guideline range. Instead, as provided in subsection (b)(2)(B), the court may, if appropriate, provide a reduction comparably less than the amended guideline range. Thus, if the term of imprisonment imposed in the example provided above was 56 months pursuant to a government motion to reflect the defendant's substantial assistance to authorities (representing a downward departure of 20 percent below the minimum term of imprisonment provided by the guideline range applicable to the defendant at the time of sentencing), a reduction to a term of imprisonment of 41 months (representing a reduction of approximately 20 percent below the minimum term of imprisonment provided by the amended guideline range) would amount to a comparable reduction and may be appropriate.

The provisions authorizing such a government motion are § 5K1.1 (Substantial Assistance to Authorities) (authorizing, upon government motion, a downward departure based on the defendant's substantial assistance); 18 U.S.C. § 3553(e) (authorizing the court, upon government motion, to impose a sentence below a statutory minimum to reflect the defendant's substantial assistance); and Fed. R. Crim. P. 35(b) (authorizing the court, upon government motion, to reduce a sentence to reflect the defendant's substantial assistance).'',

and inserting the following:

''Subsection (b)(2)(B) provides an exception to this limitation, which applies if the term of imprisonment imposed was less than the term of imprisonment provided by the guideline range applicable to the defendant at the time of sentencing pursuant to a government motion to reflect the defendant's substantial assistance to authorities. The provisions authorizing such a government motion are § 5K1.1 (Substantial Assistance to Authorities) (authorizing, upon government motion, a downward departure based on the defendant's substantial assistance); 18 U.S.C. § 3553(e) (authorizing the court, upon government motion, to impose a sentence below a statutory minimum to reflect the defendant's substantial

assistance); and Fed. R. Crim. P. 35(b) (authorizing the court, upon government motion, to reduce a sentence to reflect the defendant's substantial assistance).

In a case in which the exception provided by subsection (b)(2)(B) applies, the court may reduce the defendant's term, but the reduction is not limited by subsection (b)(2)(A) to the minimum of the amended guideline range. Instead, as provided in subsection (b)(2)(B), the court may, if appropriate, provide a reduction comparably less than the amended guideline range.

[Option 1:

If the term of imprisonment imposed was less than the term of imprisonment provided by the guideline range applicable to the defendant at the time of sentencing pursuant to one or more departures or variances in addition to a substantial assistance departure, the reduction under subsection (b)(2)(B) may take into account only the substantial assistance departure. Thus, if the term of imprisonment imposed in the example above was 56 months (representing a downward departure of 20 percent below the minimum of the guideline range applicable to the defendant at the time of sentencing), and that departure was solely pursuant to a government motion to reflect the defendant's substantial assistance, then a reduction of approximately 20 percent below the minimum of the amended guideline range, to a term of imprisonment of 41 months, would be a comparable reduction and may be appropriate. If, however, the 56-month term of imprisonment reflected both a departure of 10 percent below the minimum of the applicable guideline range pursuant to a substantial-assistance motion and a variance of an additional 10 percent below the applicable range because of the history and characteristics of the defendant, then only a reduction of approximately 10 percent (representing solely the departure for substantial assistance), to a term of imprisonment of 46 months, would be a comparable reduction and may be appropriate.**]**

[Option 2:

If the term of imprisonment imposed was less than the term of imprisonment provided by the guideline range applicable to the defendant at the time of sentencing pursuant to one or more departures or variances in addition to a substantial assistance departure, the reduction under subsection (b)(2)(B) may take into account all the departures and variances that the defendant received. Thus, if the term of imprisonment imposed in the example above was 56 months (representing downward departures or variances totaling 20 percent below the minimum term of the guideline range applicable to the defendant at the time of sentencing), and at least part of that below-guideline sentence was pursuant to a government motion to reflect the defendant's substantial assistance, then a reduction of approximately 20 percent below the minimum of the amended guideline range, to a term of imprisonment of 41 months, would be a comparable reduction and may be appropriate.**]**''.

Issue for Comment:

1. Option 2 of Part B of the proposed amendment would revise Application Note 3 of the Commentary to § 1B1.10 (Reduction in Term of Imprisonment as a Result of Amended Guideline Range (Policy Statement)) to state that where the exception provided by § 1B1.10(b)(2)(B) applies and the defendant received both a substantial assistance departure and at least one other departure or variance, a reduction ''comparably less'' than the defendant's amended guideline range may take into account not only the substantial assistance departure but also any other departure or variance that the defendant received. If the Commission adopts this approach, should the Commission limit the departures and variances that may be considered? For example, should the Commission provide that a comparable reduction may take into account only departures and not variances? Should the Commission provide that a comparable reduction may take into account only certain, specified types of departures or variances? If so, which ones? Or should the Commission provide that a comparable reduction generally may take into account departures and variances other than substantial assistance, but one or more particular types of departures or variances may not be considered? If so, which ones?

2. Career Offender

Synopsis of Proposed Amendment: This proposed amendment is a result of the Commission's consideration of possible amendments to § 4B1.2 (Definitions of Terms Used in Section 4B1.1) to (A) allow courts to consider the actual conduct of the defendant, rather than only the elements of the offense (*i.e.,* ''categorical approach''), in determining whether an offense is a crime of violence or a controlled substance offense; and (B) address various application issues, including the meaning of ''robbery'' and ''extortion,'' and the treatment of inchoate offenses and offenses involving an offer to sell a controlled substance. *See* U.S. Sentencing Comm'n, ''Notice of Final Priorities,'' 83 FR 43956 (Aug. 28, 2018). The proposed amendment contains four parts (Parts A through D). The Commission is considering whether to promulgate any or all of these parts, as they are not mutually exclusive.

Part A of the proposed amendment would amend § 4B1.2 to establish that the categorical approach and modified categorical approach do not apply in determining whether a conviction is a ''crime of violence'' or a ''controlled substance offense.'' Specifically, it would provide that, in making that determination, a court shall consider any element or alternative means for meeting an element of the offense committed by the defendant, as well as the conduct that formed the basis of the offense of conviction. In addition, Part A would allow courts to look at a wider range of sources from the judicial record, beyond the statute of conviction, in determining the conduct that formed the basis of the offense of conviction. Part A would also make similar revisions to § 2L1.2 (Unlawfully Entering or Remaining in the United States), as well as conforming changes to the guidelines that use the terms ''crime of violence'' and ''controlled substance offense'' and define these terms by making specific reference to § 4B1.2. Issues for comment are also provided.

Part B of the proposed amendment would address the concern that certain robbery offenses, such as Hobbs Act robbery, no longer constitute a ''crime of violence'' under § 4B1.2, as amended in 2016, because these offenses do not meet either the generic definition of ''robbery'' or the new guidelines definition of ''extortion.'' Three options are presented. Issues for comment are also provided.

Part C of the proposed amendment would amend § 4B1.2 to address certain issues regarding the commentary provision stating that the terms ''crime of violence'' and ''controlled substance offense'' include the offenses of aiding and abetting, conspiring to commit, and attempting to commit a ''crime of violence'' and a ''controlled substance offense.'' Three options are presented. Issues for comment are also provided.

Part D of the proposed amendment would amend the definition of ''controlled substance offense'' in § 4B1.2(b) to include offenses involving an offer to sell a controlled substance and offenses described in 46 U.S.C. § 70503(a) and § 70506(b). An issue for comment is also provided.

(A) Categorical Approach

Synopsis of Proposed Amendment: A number of statutes and guidelines provide enhanced penalties for defendants convicted of offenses that fit within a particular category of crimes. Courts typically determine whether a conviction fits within a particular category of crimes through the application of the ''categorical approach'' set forth by the Supreme Court. The Supreme Court cases adopting and applying the categorical approach have involved statutory provisions (*e.g.,* 18 U.S.C. § 924(e)) rather than guidelines. However, courts have applied the categorical approach to guideline provisions, even though the guidelines do not expressly require such an analysis. Specifically, courts have used the categorical approach to determine if a conviction is a ''crime of violence'' or a ''controlled substance offense'' for purposes of applying the career offender guideline at § 4B1.1 (Career Offender). This form of analysis limits the range of information a sentencing court may consider in making such determination to the statute under which the defendant sustained the conviction (and, in certain cases, judicial documents surrounding that conviction).

In *Taylor* v. *United States,* 495 U.S. 575 (1990), the Supreme Court held that to determine whether a prior conviction qualifies as an enumerated ''violent felony'' under the Armed Career Criminal Act (ACCA), courts must use ''a formal categorical approach, looking only to the statutory definitions of the prior offenses, and not to the particular facts underlying those convictions.'' *Taylor,* 495 U.S. at 600. If the statutory definition of the prior offense corresponds in substance to the generic version of the enumerated offense, or is narrower than that generic offense, the prior conviction can serve as a predicate offense. *Id.* at 599. If the statutory definition of the prior offense is broader than the generic offense, the prior conviction generally cannot count as a predicate offense. *Id.* In making such a determination, a sentencing court generally may ''look only to the fact of conviction and the statutory definition of the prior offense.'' *Id.* at 602. However, this approach ''may permit the sentencing court to go beyond the mere fact of conviction in a narrow range of cases where a jury was actually required to find all the elements'' of the generic offense. *Id.* Thus, a prior conviction fits within the particular category of crimes ''if either its statutory definition substantially corresponds to [the generic definition of the crime], or the charging paper and jury instructions actually required the jury to find all the elements of [the generic crime] in order to convict the defendant.'' *Id.*

In *Shepard* v. *United States,* 544 U.S. 13 (2005), the Supreme Court reaffirmed the use of this modified version of the categorical approach in the ''narrow range of cases'' recognized in *Taylor* in which the statute of conviction defines an offense that is broader than the elements of the generic offense. *Shepard,* 544 U.S. at 17–18. In such a case, the Court held, the sentencing court may look to a limited list of documents to determine the class of offense. In cases resolved by a guilty plea, such as in *Shepard,* the court may look to ''the terms of the charging document, the terms of the plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or to some comparable judicial record of this information.'' *Id.* at 26. This analysis is called the ''modified categorical approach.'' Under this approach, the court may consider only those sources of information approved by *Taylor* and *Shepard*—the charging document, the jury instructions or judge's formal rulings of law and findings of fact, any plea agreement or plea statement, or ''some comparable judicial record of this information.''

More recent cases make clear that a court may use the modified categorical approach described in *Shepard* only when the statute that the defendant was convicted of violating is ''divisible.'' The Supreme Court held in *Descamps* v. *United States,* 570 U.S. 254 (2013), that a statute is ''divisible'' only when it contains multiple crimes defined by multiple alternative elements. If the statute is not divisible (*i.e.,* it describes a single crime defined by a single set of elements, even if it may also list alternative means of satisfying one or more elements), then the modified categorical approach is not permitted. When a statute is divisible, and the modified categorical approach is applied, only the documents approved in *Taylor* and *Shepard* may be used to determine which of the alternative specified ways of committing the offense formed the basis of conviction. The modified categorical approach acts in such cases not as an exception to the categorical approach, but as a tool of that approach, while retaining its central feature: ''a focus on the elements, rather than the facts of a crime.'' *Id.* at 263. Consequently, courts cannot use the documents to investigate the underlying conduct of the prior offense.

In *Mathis* v. *United States,* 136 S. Ct. 2243 (2016), the Supreme Court elaborated further on the elements-means distinction, holding that a sentencing court may look only to the elements of the statute of conviction, even if the statute specifies alternative ways of committing the offense. The Court instructed that the first task for sentencing courts faced with alternatively phrased statutes is to ''determine whether its listed items are elements or means.'' *Id.* at 2256. If the listed items are elements of the offense, the modified categorical approach is available for courts to determine under what section of the statute the defendant was convicted. However, if the listed items are means of satisfying one of the offense elements, the court cannot apply the modified categorical approach to determine which of the statutory alternatives was at issue in prosecuting the prior conviction. *Id.*

The Commission has received significant comment over the years regarding the categorical approach, most of which has been negative. Courts and stakeholders have criticized the categorical approach as being an overly complex, time consuming, resource-intensive analysis that often leads to litigation and uncertainty. Commenters have also indicated that the categorical approach creates serious and unjust inconsistencies that make the guidelines more cumbersome, complex, and less effective at addressing dangerous repeat offenders. As a result, commenters argue, some federal and state offenses that would otherwise qualify as a ''crime of violence'' or a ''controlled substance offense'' no longer qualify as such in several federal circuits.

Part A of the proposed amendment would amend § 4B1.2 (Definitions of Terms Used in Section 4B1.1) to provide that the categorical approach and modified categorical approach do not apply in determining whether a conviction is a ''crime of violence'' or a ''controlled substance offense.'' Specifically, Part A would provide that, in making that determination, a court shall consider any element or alternative means for meeting an element of the offense committed by the defendant, as well as the conduct that formed the basis of the offense of conviction.

In addition, Part A would allow courts to look at a wider range of sources from the judicial record, beyond the statute of conviction, in determining the conduct that formed the basis of the offense of conviction. Specifically, it would permit courts to look to the types of sources identified in *Taylor* and *Shepard:* (1) the charging document; (2)

the jury instructions, in a case tried to a jury; the judge's formal rulings of law or findings of fact, in a case tried to a judge alone; or, in a case resolved by a guilty plea, the plea agreement or transcript of colloquy between judge and defendant in which the factual basis of the plea was confirmed by the defendant; (3) any explicit factual finding by the trial judge to which the defendant assented; and (4) any comparable judicial record of the information described above.

Part A of the proposed amendment would also make corresponding changes to the Commentary to § 2L1.2 (Unlawfully Entering or Remaining in the United States), which contains definitions for the terms ''crime of violence'' and ''drug trafficking offense'' that closely track the definitions of ''crime of violence'' and ''controlled substance offense,'' respectively, in § 4B1.2. It would add a new application note that mirrors the new provisions proposed for § 4B1.2.

Finally, Part A of the proposed amendment makes conforming changes to the guidelines that use the terms ''crime of violence'' and ''controlled substance offense'' and define these terms by making specific reference to § 4B1.2. Accordingly, the proposed amendment would amend the commentaries to §§ 2K1.3 (Unlawful Receipt, Possession, or Transportation of Explosive Materials; Prohibited Transactions Involving Explosive Materials), 2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms and Ammunitions), 2S1.1 (Laundering of Monetary Instruments; Engaging in Monetary Transactions in Property Derived from Unlawful Activity), 4A1.2 (Definitions and Instructions for Computing Criminal History), 4B1.4 (Armed Career Criminal), and 7B1.1 (Classification of Violations (Policy Statement)).

Issues for comment are also provided.

Proposed Amendment:

Section 4B1.2 is amended—

in subsection (a)(1) by striking ''has as an element'' and inserting ''has an element or alternative means for meeting an element'';

in subsection (a)(2) by striking ''is murder,'' and inserting ''constituted murder,'';

and in subsection (b) by striking ''that prohibits'' and inserting ''that has as an element or alternative means for meeting an element''.

The Commentary to § 4B1.2 captioned ''Application Notes'' is amended in Note 2 by striking the following:

''*Offense of Conviction as Focus of Inquiry.*—Section 4B1.1 (Career Offender) expressly provides that the instant and prior offenses must be crimes of violence or controlled substance offenses of which the defendant was convicted. Therefore, in determining whether an offense is a crime of violence or controlled substance for the purposes of § 4B1.1 (Career Offender), the offense of conviction (*i.e.,* the conduct of which the defendant was convicted) is the focus of inquiry.'',

and inserting the following:

''*Procedure for Determining Whether an Offense is a 'Crime of Violence' or a 'Controlled Substance Offense'.*—The 'categorical approach' and 'modified categorical approach' adopted by the Supreme Court in the context of certain statutory provisions (*e.g.,* 18 U.S.C. § 924(e)) do not apply in the determination of whether a conviction is a 'crime of violence' or a 'controlled substance offense,' as set forth below. *See* Background Commentary.

(A) *Conduct-Based Inquiry.*—Section 4B1.1 (Career Offender) expressly provides that the instant and prior offenses must be crimes of violence or controlled substance offenses of which the defendant was convicted. In determining whether the defendant was convicted of a 'crime of violence' or a 'controlled substance offense,' the court shall consider the conduct that formed the basis of the conviction, *i.e.,* only the conduct that met one or more elements of the offense of conviction or that was an alternative means of meeting any such element.

(B) *Sources to be Considered.*—In determining the conduct that formed the basis of the conviction, the court shall look only to the statute of conviction and the following sources—

(i) The charging document.

(ii) The jury instructions, in a case tried to a jury; the judge's formal rulings of law or findings of fact, in a case tried to a judge alone; or, in a case resolved by a guilty plea, the plea agreement or transcript of colloquy between judge and defendant in which the factual basis of the guilty plea was confirmed by the defendant.

(iii) Any explicit factual finding by the trial judge to which the defendant assented.

(iv) Any comparable judicial record of the information described in subparagraphs (i) through (iii).

(C) *Definitions of Enumerated Offenses.*—In determining whether the conduct that formed the basis of the conviction constitutes one of the enumerated offenses in subsection (a)(2), use the definition of the enumerated offense provided in Application Note 1. If no definition is provided, use the contemporary, generic definition of the enumerated offense.''.

The Commentary to § 4B1.2 is amended by adding at the end the following:

''*Background:* Section 4B1.2 provides the definitions for the terms 'crime of violence,' 'controlled substance offense,' and 'two prior felony convictions' used in § 4B1.1 (Career Offender). To determine if a conviction meets the definitions of 'crime of violence' and 'controlled substance offense' in § 4B1.2, courts have typically used the categorical approach and the modified categorical approach, as set forth in Supreme Court jurisprudence. *See, e.g., Taylor* v. *United States,* 495 U.S. 575 (1990); *Shepard* v. *United States,* 544 U.S. 13 (2005); *Descamps* v. *United States,* 570 U.S. 254 (2013); *Mathis* v. *United States,* 136 S. Ct. 2243 (2016). These Supreme Court cases, however, involved statutory provisions (*e.g.,* 18 U.S.C. § 924(e)) rather than guideline provisions. Even though courts have applied the categorical approach and the modified categorical approach to guideline provisions, neither 28 U.S.C. § 994(h) nor the guidelines require such a limited analysis for determining whether an offense is a 'crime of violence' or a 'controlled substance offense' for purposes of § 4B1.1. Section 4B1.2 and Application Note 2 make clear that the categorical approach and modified categorical approach do not apply when a court determines whether a defendant's conviction qualifies as a 'crime of violence' or a 'controlled substance offense' under the career offender guideline. In addition, the court is permitted to consider a wider range of sources from the judicial record in determining whether a prior conviction qualifies as a 'crime of violence' or a 'controlled substance offense.'''.

The Commentary to § 2L1.2 captioned ''Application Notes'' is amended—

in Note 2—

in the paragraph that begins '''Crime of violence' means'' by striking ''any of the following offenses under federal, state, or local law:'' and inserting ''an offense under federal, state, or local law that constituted'', and by striking '', or any other offense under federal, state, or local law that has as an element'' and inserting ''; or any other offense under federal, state, or local law that has as an element or alternative means for meeting an element'';

and in the paragraph that begins '''Drug trafficking offense' means'' by striking ''an offense under federal, state, or local law that prohibits'' and

inserting ''an offense under federal, state, or local law that has as an element or alternative means for meeting an element'';

by redesignating Notes 6, 7, and 8 as Notes 7, 8, and 9, respectively;

and by inserting the following new Note 6:

''6. *Procedure for Determining Whether a Prior Conviction is a 'Crime of Violence' or a 'Drug Trafficking Offense'.*—The 'categorical approach' and 'modified categorical approach' adopted by the Supreme Court in the context of certain statutory provisions (*e.g.,* 18 U.S.C. § 924(e)) do not apply in the determination of whether a conviction is a 'crime of violence' or a 'drug trafficking offense,' as set forth below. *See* Background Commentary to § 4B1.2 (Definitions of Terms Used in Section 4B1.1).

(A) *Conduct-Based Inquiry.*—In determining whether the defendant was convicted of a 'crime of violence' or a 'drug trafficking offense' for the purposes of subsections (b)(2)(E) and (b)(3)(E), the court shall take into account the conduct that formed the basis of the conviction, *i.e.,* only the conduct that met one or more elements of the offense of conviction or that was an alternative means of meeting any such element.

(B) *Sources to be Considered.*—In determining the conduct that formed the basis of the conviction, the court shall look only to the statute of conviction and the following sources—

(i) The charging document.

(ii) The jury instructions, in a case tried to a jury; the judge's formal rulings of law or findings of fact, in a case tried to a judge alone; or, in a case resolved by a guilty plea, the plea agreement or transcript of colloquy between judge and defendant in which the factual basis of the guilty plea was confirmed by the defendant.

(iii) Any explicit factual finding by the trial judge to which the defendant assented.

(iv) Any comparable judicial record of the information described in subparagraphs (i) through (iii).

(C) *Definitions of Enumerated Offenses.*—In determining whether the conduct that formed the basis of the conviction constituted one of the enumerated offenses in the definition of 'crime of violence,' use the definition of the enumerated offense provided. If no definition is provided, use the contemporary, generic definition of the enumerated offense.''.

The Commentary to § 2K1.3 captioned ''Application Notes'' is amended in Note 2—

in the paragraph that begins '' 'Controlled substance offense' has the meaning'' by striking ''has the meaning given that term in § 4B1.2(b) and Application Note 1 of the Commentary to § 4B1.2 (Definitions of Terms Used in Section 4B1.1)'' and inserting ''means a 'controlled substance offense' as defined and determined in accordance with § 4B1.2 (Definitions of Terms Used in Section 4B1.1)'';

and in the paragraph that begins '' 'crime of violence' has the meaning'' by striking ''has the meaning given that term in § 4B1.2(a) and Application Note 1 of the Commentary to § 4B1.2'' and inserting ''means a 'crime of violence' as defined and determined in accordance with § 4B1.2 (Definitions of Terms Used in Section 4B1.1)''.

The Commentary to § 2K2.1 captioned ''Application Notes'' is amended—

in Note 1—

in the paragraph that begins '' 'Controlled substance offense' has the meaning'' by striking ''has the meaning given that term in § 4B1.2(b) and Application Note 1 of the Commentary to § 4B1.2 (Definitions of Terms Used in Section 4B1.1)'' and inserting ''means a 'controlled substance offense' as defined and determined in accordance with § 4B1.2 (Definitions of Terms Used in Section 4B1.1)'';

and in the paragraph that begins '' 'Crime of violence' has the meaning'' by striking ''has the meaning given that term in § 4B1.2(a) and Application Note 1 of the Commentary to § 4B1.2'' and inserting ''means a 'crime of violence' as defined and determined in accordance with § 4B1.2 (Definitions of Terms Used in Section 4B1.1)'';

and in Note 13(B) by striking ''have the meaning given those terms in § 4B1.2 (Definitions of Terms Used in Section 4B1.1)'' and inserting ''mean a 'crime of violence' and a 'controlled substance offense' as defined and determined in accordance with § 4B1.2 (Definitions of Terms Used in Section 4B1.1)''.

The Commentary to § 2S1.1 captioned ''Application Notes'' is amended in Note 1, in the paragraph that begins '' 'Crime of violence' has the meaning'', by striking ''has the meaning given that term in subsection (a)(1) of § 4B1.2 (Definitions of Terms Used in Section 4B1.1)'' and inserting ''means a 'crime of violence' as defined in subsection (a)(1) of § 4B1.2 (Definitions of Terms Used in Section 4B1.1), regardless of whether such offense resulted in a conviction''.

The Commentary to § 4A1.1 captioned ''Application Notes'' is amended in Note 5 by striking ''has the meaning given that term in § 4B1.2(a)'' and inserting ''means a 'crime of violence' as defined and determined in accordance with § 4B1.2 (Definitions of Terms Used in Section 4B1.1)''.

Section 4A1.2(p) is amended by striking ''the definition of 'crime of violence' is that set forth in § 4B1.2(a)'' and inserting '''crime of violence' means a 'crime of violence' as defined and determined in accordance with § 4B1.2 (Definitions of Terms Used in Section 4B1.1)''.

Section 4B1.4 is amended—

in subsection (b)(3)(A) by striking ''in connection with either a crime of violence, as defined in § 4B1.2(a), or a controlled substance offense, as defined in § 4B1.2(b)'' and inserting ''in connection with either a crime of violence, as defined in § 4B1.2(a) (regardless of whether such offense resulted in a conviction), or a controlled substance offense, as defined in § 4B1.2(b) (regardless of whether such offense resulted in a conviction)'';

and in subsection (c)(2) by striking ''in connection with either a crime of violence, as defined in § 4B1.2(a), or a controlled substance offense, as defined in § 4B1.2(b)'' and inserting ''in connection with either a crime of violence, as defined in § 4B1.2(a) (regardless of whether such offense resulted in a conviction), or a controlled substance offense, as defined in § 4B1.2(b) (regardless of whether such offense resulted in a conviction)''.

The Commentary to § 5K2.17 captioned ''Application Notes'' is amended in Note 1 by striking ''are defined in § 4B1.2 (Definitions of Terms Used in Section 4B1.1)'' and inserting ''mean a 'crime of violence' and a 'controlled substance offense' as defined in subsections (a) and (b) of § 4B1.2 (Definitions of Terms Used in Section 4B1.1), regardless of whether such offense resulted in a conviction''.

The Commentary to § 7B1.1 captioned ''Application Notes'' is amended—

in Note 2 by striking ''is defined in § 4B1.2 (Definitions of Terms Used in Section 4B1.1). *See* § 4B1.2(a) and Application Note 1 of the Commentary to § 4B1.2'' and inserting ''means a 'crime of violence' as defined in subsection (a) of § 4B1.2 (Definitions of Terms Used in Section 4B1.1), regardless of whether such conduct resulted in a conviction'';

and in Note 3 by striking ''is defined in § 4B1.2 (Definitions of Terms Used in Section 4B1.1). *See* § 4B1.2(b) and Application Note 1 of the Commentary to § 4B1.2'' and inserting ''means a 'controlled substance offense' as defined in subsection (b) of § 4B1.2 (Definitions of Terms Used in Section 4B1.1),

regardless of whether such conduct resulted in a conviction''.

Issues for Comment:

1. Part A of the proposed amendment would amend § 4B1.2 (Definitions of Terms Used in Section 4B1.1) to provide that the ''categorical approach'' and ''modified categorical approach,'' as set forth in Supreme Court jurisprudence for certain statutory provisions, do not apply in determining whether a conviction is a ''crime of violence'' or a ''controlled substance offense'' for purposes of the guidelines. As indicated above, courts have applied the categorical approach and the modified categorical approach to guideline provisions, even though the guidelines do not expressly require such an analysis. The Commission invites comment on whether Part A of the proposed amendment is consistent with the Commission's authority under 28 U.S.C. § 994(a)–(f), (h).

2. Part A of the proposed amendment would allow courts to look to the documents expressly approved in *Taylor* v. *United States,* 495 U.S. 575 (1990), and *Shepard* v. *United States,* 544 U.S. 13 (2005), in determining the conduct that formed the basis of the offense of conviction.

The Commission seeks comment on whether additional or different guidance should be provided. If so, what additional or different guidance should the Commission provide? For example, should the Commission provide a specific set of factors to assess the reliability of a source of information, such as whether the document came out of the adversarial process, was accepted by both parties, or was made by an impartial third party? If so, what factors should the Commission provide? Should the Commission list specific sources or types of sources that courts may consider, in addition to the sources expressly approved in *Taylor* and *Shepard* (*i.e.,* the *Shepard* documents)? If so, what documents or types of information should be included in this list? Are there any documents or types of information that should be expressly excluded? If so, what documents or types of information should be excluded? Should the Commission broaden the range of sources courts may look at, in addition to the *Shepard* documents, by providing that courts may also consider any uncontradicted, internally consistent parts of the judicial record from the prior conviction?

3. Currently, § 4B1.2 provides definitions for only two of the enumerated offenses contained in the ''crime of violence'' definition (*i.e.,* ''forcible sex offense'' and ''extortion''). For the other enumerated offenses, the proposed amendment provides that courts should use the contemporary, generic definition of the enumerated offense. Should the Commission instead set forth specific definitions for all enumerated offenses covered by the guideline? If so, what definitions would be appropriate for purposes of the career offender guideline? For example, should the Commission provide definitions derived from broad contemporary, generic definitions of the enumerated offenses? What offenses should be covered by any potential definition of the enumerated offenses? What offenses should be excluded from any potential definition?

(B) Meaning of ''Robbery''

Synopsis of Proposed Amendment: In 2016, the Commission amended § 4B1.2 (Definitions of Terms Used in Section 4B1.1) to, among other things, delete the ''residual clause'' and revise the ''enumerated offenses clause'' by moving enumerated offenses that were previously listed in the commentary to the guideline itself. *See* USSG, App. C, Amendment 798 (effective Aug. 1, 2016). The ''enumerated offenses clause'' identifies specific offenses that qualify as crimes of violence. Although the guideline relies on existing case law for purposes of defining most enumerated offenses, the amendment added to the Commentary to § 4B1.2 definitions for two of the enumerated offenses: ''forcible sex offense'' and ''extortion.''

''Extortion'' is defined as ''obtaining something of value from another by the wrongful use of (A) force, (B) fear of physical injury, or (C) threat of physical injury.'' Under case law existing at the time of the amendment, courts generally defined extortion as ''obtaining something of value from another with his consent induced by the wrongful use of force, fear, or threats,'' based on the Supreme Court's holding in *United States* v. *Nardello,* 393 U.S. 286, 290 (1969) (defining ''extortion'' for purposes of 18 U.S.C. § 1952). However, consistent with the Commission's goal of focusing the career offender and related enhancements on the most dangerous offenders, the amendment narrowed the generic definition of extortion by limiting it to offenses having an element of force or an element of fear or threats ''of physical injury,'' as opposed to non-violent threats such as injury to reputation.

In its annual letter to the Commission, the Department of Justice expressed concern that courts have held that certain robbery offenses, such as Hobbs Act robbery, no longer constitute a ''crime of violence'' under the guideline as amended in 2016 because the statute of conviction does not fit either the generic definition of ''robbery'' or the new guideline definition of ''extortion.'' *See* Annual Letter from the Department of Justice to the Commission (Aug. 10, 2018), at *https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20180810/DOJ.pdf.* The Hobbs Act defines the term ''robbery'' as ''the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person *or property* . . . .'' 18 U.S.C. § 1951(b)(1) (emphasis added). At least two circuits—the Ninth and Tenth Circuits—have found ambiguity as to whether the guideline definition of extortion includes injury to property, and (under the rule of lenity) both circuits have interpreted the new definition as excluding prior convictions where the statute encompasses injury to property offenses, such as Hobbs Act robbery. *See, e.g., United States* v. *O'Connor,* 874 F.3d 1147 (10th Cir. 2017) (Hobbs Act robbery); *United States* v. *Edling,* 895 F.3d 1153 (9th Cir. 2018) (Nevada robbery).

Part B of the proposed amendment would amend § 4B1.2 to address this issue. Three options are provided.

Option 1 would amend the enumerated offenses clause at § 4B1.2(a)(2) to add a parenthetical annotation that robbery, as listed, is ''robbery (as described in 18 U.S.C. § 1951(b)(1)).'' Section 1951(b)(1) provides the Hobbs Act definition of ''robbery.''

Option 2 would amend the Commentary to § 4B1.2 to add a definition of ''robbery'' for purposes of the career offender guideline. The definition would mirror the ''robbery'' definition at 18 U.S.C. § 1951(b)(1). Specifically, it would provide that ''robbery'' is ''the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.'' Option 2 also brackets a provision defining the phrase ''actual or threatened force,'' for purposes of the ''robbery'' definition, as ''minimal force that is sufficient to compel a person to part with personal property.''

Option 3, similar to Option 2, would amend the Commentary to § 4B1.2 to add a definition of ''robbery'' that mirrors the ''robbery'' definition at 18 U.S.C. § 1951(b)(1). However, Option 3 brackets a different alternative for defining the phrase ''actual or threatened force.'' It would provide that such phrase refers to ''force that is sufficient to overcome a person's physical resistance or physical power of resistance.''

In addition, Part B of the proposed amendment includes conforming changes to the definition of ''crime of violence'' in the Commentary to § 2L1.2 (Unlawfully Entering or Remaining in the United States). The changes are presented in accordance with the options described above.

Issues for comment are also provided.

Proposed Amendment:

[Option 1:

Section 4B1.2(a)(2) is amended by striking ''robbery'' and inserting ''robbery (as described in 18 U.S.C. § 1951(b)(1))''.**]**

[Option 2:

The Commentary to § 4B1.2 captioned ''Application Notes'' is amended in Note 1 by inserting after the paragraph that begins '' 'Forcible sex offense' includes'' the following new paragraph:

'' 'Robbery' is the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining. [The phrase ''actual or threatened force'' refers to minimal force that is sufficient to compel a person to part with personal property.**]**''.**]**

[Option 3:

The Commentary to § 4B1.2 captioned ''Application Notes'' is amended in Note 1 by inserting after the paragraph that begins '' 'Forcible sex offense' includes'' the following new paragraph:

'' 'Robbery' is the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining. [The phrase ''actual or threatened force'' refers to force that is sufficient to overcome a person's physical resistance or physical power of resistance.**]**''.**]**

The Commentary to § 2L1.2 captioned ''Application Notes'' is amended in Note 2, in the paragraph that begins '''Crime of violence' means''—

[Option 1:

by striking ''robbery'' and inserting ''robbery (as described in 18 U.S.C. § 1951(b)(1))''.**]**

[Option 2:

by inserting after ''territorial jurisdiction of the United States.'' the following: '' 'Robbery' is the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining. [The phrase ''actual or threatened force'' refers to minimal force that is sufficient to compel a person to part with personal property.**]**''.**]**

[Option 3:

by inserting after ''territorial jurisdiction of the United States.'' the following: '' 'Robbery' is the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining. **[**The phrase ''actual or threatened force'' refers to force that is sufficient to overcome a person's physical resistance or physical power of resistance.**]**''.**]**

Issues for Comment:

1. Options 1, 2, and 3 in Part B of the proposed amendment would have ''robbery,'' as listed in subsection (a)(2) of § 4B1.2 (Definitions of Terms Used in Section 4B1.1) and § 2L1.2 (Unlawfully Entering or Remaining in the United States), either reference or mirror the Hobbs Act definition of ''robbery'' at 18 U.S.C. § 1951(b)(1). The Commission seeks comment generally on whether the proposed definition of ''robbery'' is appropriate. Are there robbery offenses that are covered by the proposed definition but should not be? Are there robbery offenses that are not covered by the proposed definition but should be?

2. The Hobbs Act definition of ''robbery'' at 18 U.S.C. § 1951(b)(1) includes the phrase ''actual or threated force'' as part of the elements of the offense. The Commission seeks comment on how the phrase ''actual or threatened force'' has been defined by case law for purposes of the Hobbs Act definition of ''robbery'' at 18 U.S.C. § 1951(b)(1). What level of force have courts determined is required for purposes of Hobbs Act robbery cases? Have courts interpreted the level of force required in such cases to be ''violent force,'' as defined in *Johnson* v. *United States,* 559 U.S. 133, 140 (2010)? Have courts determined that Hobbs Act robbery could encompass conduct that falls below the level of ''violent force''? If so, what level of force have courts specified?

Options 2 and 3 of the proposed amendment bracket two alternatives for defining the phrase ''actual or threatened force,'' for purposes of the proposed ''robbery'' definition. Option 2 would provide that the phrase ''actual or threatened force'' refers to ''minimal force that is sufficient to compel a person to part with personal property.'' Option 3 would provide that such phrase refers to ''force that is sufficient to overcome a person's physical resistance or physical power of resistance.'' The Commission seeks comment on whether either of these two alternatives is appropriate for purposes of the proposed ''robbery'' definition. Are there robbery offenses that would be covered by defining ''actual or threatened force'' in any such way but should not be? Are there robbery offenses that would not be covered but should be? If none of the bracketed alternatives is appropriate for purposes of the proposed ''robbery'' definition, how should the Commission define the phrase ''actual or threatened force''? What level of force should the Commission specify as part of the proposed ''robbery'' definition?

(C) Inchoate Offenses

Synopsis of Proposed Amendment: The career offender guideline includes convictions for inchoate offenses and offenses arising from accomplice liability, such as aiding and abetting, conspiring to commit, and attempting to commit a ''crime of violence'' and a ''controlled substance offense.'' *See* USSG § 4B1.2, comment. (n.1). In the original 1987 *Guidelines Manual,* these offenses were included only in the definition of ''controlled substance offense.'' *See* USSG § 4B1.2, comment. (n.2) (effective Nov. 1, 1987). In 1989, the Commission amended the guideline to provide that both definitions—''crime of violence'' and ''controlled substance offense''—include the offenses of aiding and abetting, conspiracy, and attempt to commit such crimes. *See* USSG App. C, Amendment 268 (effective Nov. 1, 1989).

In its annual letter to the Commission, the Department of Justice has suggested

that application issues have arisen regarding whether certain conspiracy offenses qualify under the career offender guideline as a ''crime of violence'' or a ''controlled substance offense.'' *See* Annual Letter from the Department of Justice to the Commission (Aug. 10, 2018), at *https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20180810/DOJ.pdf.* In making this determination, some courts have employed a two-step analysis, first comparing the substantive offense to its generic definition, and then separately comparing the inchoate offense involving that substantive offense to the generic definition of the specific inchoate offense. In comparing conspiracy to commit an offense to the generic definition of ''conspiracy,'' some courts have concluded that because the generic definition of conspiracy requires an overt act, federal and state conspiracy statutes that do not require an overt act categorically do not qualify as a ''crime of violence'' or a ''controlled substance offense.'' *See, e.g., United States* v. *McCollum,* 885 F.3d 300, 303 (4th Cir. 2018).

In addition, another issue has been brought to the Commission's attention. Case law has long held that ''commentary in the Guidelines Manual that interprets or explains a guideline is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline.'' *Stinson* v. *United States,* 508 U.S. 36, 38 (1993); *see also* USSG § 1B1.7. Most circuits have held that the definitions of ''crime of violence'' and ''controlled substance offense'' at § 4B1.2 include the offenses of aiding and abetting, conspiracy to commit, and attempt to commit such crimes, in accordance with the commentary to the guideline. *See, e.g., United States* v. *Nieves-Borrero,* 856 F.3d 5 (1st Cir. 2017); *United States* v. *Jackson,* 60 F.3d 128 (2d Cir. 1995); *United States* v. *Dozier,* 848 F.3d 180 (4th Cir. 2017); *United States* v. *Guerra,* 962 F.2d 484 (5th Cir. 1992); *United States* v. *Evans,* 699 F.3d 858 (6th Cir. 2012); *United States* v. *Tate,* 822 F.3d 370 (7th Cir. 2016); *United States* v. *Mendoza-Figueroa,* 65 F.3d 691 (8th Cir. 1995); *United States* v. *Sarbia,* 367 F.3d 1079 (9th Cir. 2004); *United States* v. *McKibbon,* 878 F.3d 967 (10th Cir. 2017); *United States* v. *Lange,* 862 F.3d 1290 (11th Cir. 2017). However, a recent decision from the D.C. Circuit concluded otherwise for purposes of the ''controlled substance offense'' definition. *See United States* v. *Winstead,* 890 F.3d 1082, 1091 (D.C. Cir. May 25, 2018) (''Section 4B1.2(b) presents a very detailed 'definition' of controlled substance offense that clearly excludes inchoate offenses.'').

Part C of the proposed amendment would address these issues by amending § 4B1.2 (Definitions of Terms Used in Section 4B1.1) and its commentary. As indicated above, the commentary that accompanies the guidelines is authoritative and failure to follow the commentary would constitute an incorrect application of the guidelines, subjecting the sentence imposed to possible reversal on appeal. *See* 18 U.S.C. § 3742. However, the Commission proposes to move the inchoate offenses provision from the Commentary to § 4B1.2 to the guideline itself as a new subsection (c) to alleviate any confusion and uncertainty resulting from the D.C. Circuit's decision.

In addition to moving the inchoate offenses provision from the Commentary to the guideline, Part C of the proposed amendment would revise the provision to provide that the terms ''crime of violence'' and ''controlled substance offense'' include the offenses of aiding and abetting, attempting to commit, [soliciting to commit,] or conspiring to commit any such offense, or any other inchoate offense or offense arising from accomplice liability involving a ''crime of violence'' or a ''controlled substance offense.'' Three options are provided to address the other issues brought by the Department of Justice in different ways.

Option 1 would address the conspiracy issue in a comprehensive manner that would be applicable to all other inchoate offenses and offenses arising from accomplice liability. It would eliminate the need for the two-step analysis discussed above by adding the following to the new subsection (c): ''To determine whether any offense described above qualifies as a 'crime of violence' or 'controlled substance offense,' the court shall only determine whether the underlying substantive offense is a 'crime of violence' or a 'controlled substance offense,' and shall not consider the elements of the inchoate offense or offense arising from accomplice liability.''

Option 2, similar to Option 1, would eliminate the need for the two-step analysis generally by providing that to determine whether an inchoate offense or an offense arising from accomplice liability qualifies as a ''crime of violence'' or ''controlled substance offense,'' the court shall only determine whether the underlying substantive offense is a ''crime of violence'' or a ''controlled substance offense,'' and shall not consider the elements of the inchoate offense or offense arising from accomplice liability. However, Option 2 sets forth two suboptions to address conspiracy offenses. Suboption 2A would provide that an offense of conspiring to commit a ''crime of violence'' or a ''controlled substance offense'' qualifies as a ''crime of violence'' or a ''controlled substance offense'' only if the underlying substantive offense is a ''crime of violence'' or a ''controlled substance offense'' and an overt act must be proved as an element of the conspiracy offense. Suboption 2B treats ''crime of violence'' and ''controlled substance offense'' differently with respect to conspiracy offenses. It would eliminate the need for the two-step analysis for an offense of conspiring to commit a ''crime of violence,'' but it would provide that an offense of conspiring to commit a ''controlled substance offense'' qualifies as a ''controlled substance offense'' only if the underlying substantive offense is a ''controlled substance offense'' and an overt act must be proved as an element of the conspiracy offense.

Option 3 would take a narrower approach, addressing only the conspiracy issue, and not adding language to subsection (c) eliminating the two-step analysis described above. Option 3 would amend the commentary to add an application note relating to offenses of conspiring to commit a ''crime of violence'' or a ''controlled substance offense.'' It sets forth two suboptions. Suboption 3A treats offenses of conspiring to commit a ''crime of violence'' or a ''controlled substance offense'' the same way but brackets two possible alternatives for the overt-act issue. It provides that an offense of conspiring to commit a ''crime of violence'' or a ''controlled substance offense'' qualifies as a ''crime of violence'' or a ''controlled substance offense,'' **[**regardless of whether**]** **[**only if**]** an overt act must be proved as an element of the conspiracy offense. Suboption 3B treats ''crime of violence'' and ''controlled substance offense'' differently with respect to conspiracy offenses. It provides that an offense of conspiring to commit a ''crime of violence'' qualifies as a ''crime of violence,'' regardless of whether an overt act must be proved as an element of the conspiracy offense; however, an offense of conspiring to commit a ''controlled substance offense'' qualifies as a ''controlled substance offense'' only if an overt act must be proved as an element of the conspiracy offense.

Issues for comment are also provided.

Proposed Amendment:

Section 4B1.2 is amended by redesignating subsection (c) as subsection (d), and inserting the following new subsection (c):

[Option 1 (which also includes changes to the commentary):

''(c) The terms 'crime of violence' and 'controlled substance offense' include the offenses of aiding and abetting, attempting to commit, **[**soliciting to commit,**]** or conspiring to commit any such offense, or any other inchoate offense or offense arising from accomplice liability involving a 'crime of violence' or a 'controlled substance offense.' To determine whether any offense described above qualifies as a 'crime of violence' or 'controlled substance offense,' the court shall only determine whether the underlying substantive offense is a 'crime of violence' or a 'controlled substance offense,' and shall not consider the elements of the inchoate offense or offense arising from accomplice liability.''.**]**

[Option 2 (which also includes changes to the commentary):

[Suboption 2A:

''(c) The terms 'crime of violence' and 'controlled substance offense' include the offenses of aiding and abetting, attempting to commit, **[**soliciting to commit,**]** or conspiring to commit any such offense, or any other inchoate offense or offense arising from accomplice liability involving a 'crime of violence' or a 'controlled substance offense.' To determine whether any offense described above qualifies as a 'crime of violence' or 'controlled substance offense,' except for an offense of conspiring to commit a 'crime of violence' or 'controlled substance offense,' the court shall only determine whether the underlying substantive offense is a 'crime of violence' or a 'controlled substance offense,' and shall not consider the elements of the inchoate offense or offense arising from accomplice liability.

An offense of conspiring to commit a 'crime of violence' or a 'controlled substance offense,' however, qualifies as a 'crime of violence' or a 'controlled substance offense' only if the underlying substantive offense is a 'crime of violence' or a 'controlled substance offense' and an overt act must be proved as an element of the conspiracy offense.''.**]**

[Suboption 2B:

''(c) The terms 'crime of violence' and 'controlled substance offense' include the offenses of aiding and abetting, attempting to commit, **[**soliciting to commit,**]** or conspiring to commit any such offense, or any other inchoate offense or offense arising from accomplice liability involving a 'crime of violence' or a 'controlled substance offense.' To determine whether any offense described above qualifies as a 'crime of violence' or 'controlled substance offense,' except for an offense of conspiring to commit a 'controlled substance offense,' the court shall only determine whether the underlying substantive offense is a 'crime of violence' or a 'controlled substance offense,' and shall not consider the elements of the inchoate offense or offense arising from accomplice liability.

An offense of conspiring to commit a 'controlled substance offense,' however, qualifies as a 'controlled substance offense' only if the underlying substantive offense is a 'controlled substance offense' and an overt act must be proved as an element of the conspiracy offense.''.**]]**

[Option 3 (which also includes changes to the commentary):

''(c) The terms 'crime of violence' and 'controlled substance offense' include the offenses of aiding and abetting, attempting to commit, **[**soliciting to commit,**]** or conspiring to commit any such offense, or any other inchoate offense or offense arising from accomplice liability involving a 'crime of violence' or a 'controlled substance offense.' ''.**]**

[Options 1, 2, and 3 (continued):

The Commentary to § 4B1.2 captioned ''Application Notes'' is amended in Note 1 by striking the following '' 'Crime of violence' and 'controlled substance offense' include the offenses of aiding and abetting, conspiring, and attempting to commit such offenses.''; and in the paragraph that begins ''A violation of 18 U.S.C.§ 924 (c) or § 929(a)'' by striking ''was a 'crime of violence' or a 'controlled substance offense'.'' and inserting ''was a 'crime of violence' or a 'controlled substance offense.' ''.**]**

[Option 3 (continued):

The Commentary to § 4B1.2 captioned ''Application Notes'' is further amended by redesignating Notes 3 and 4 as Notes 4 and 5, respectively, and inserting the following new Note 3:

[Suboption 3A:

''3. *Application of Subsection (c).*—For purposes of subsection (c), an offense of conspiring to commit a 'crime of violence' or a 'controlled substance offense' qualifies as a 'crime of violence' or a 'controlled substance offense,' **[**regardless of whether**][**only if**]** an overt act must be proved as an element of the conspiracy offense.''.**]**

[Suboption 3B:

''3. *Application of Subsection (c).*—For purposes of subsection (c), an offense of conspiring to commit a 'crime of violence' qualifies as a 'crime of violence,' regardless of whether an overt act must be proved as an element of the conspiracy offense. An offense of conspiring to commit a 'controlled substance offense,' however, qualifies as a 'controlled substance offense' only if an overt act must be proved as an element of the conspiracy offense.''.**]]**

Issues for Comment:

1. As indicated above, in determining whether an inchoate offense is a ''crime of violence'' or a ''controlled substance offense,'' some courts have employed a two-step analysis. First, courts compare the substantive offense to its generic definition to determine whether it is ''crime of violence'' or a ''controlled substance offense.'' Then, these courts make a second and separate analysis comparing the inchoate offense involving that substantive offense to the generic definition of the specific inchoate offense. To promote clarity and consistency in the application of the career offender guideline, Option 1 of Part C of the proposed amendment would amend § 4B1.2 (Definitions of Terms Used in Section 4B1.1) to clarify that the offenses of aiding and abetting, attempting to commit, [soliciting to commit,] or conspiring to commit a ''crime of violence'' or a ''controlled substance offense,'' or any other inchoate offense or offense arising from accomplice liability involving a ''crime of violence'' or a ''controlled substance offense'' are a ''crime of violence'' or a ''controlled substance offense'' if the substantive offense is a ''crime of violence'' or a ''controlled substance offense.''

The Commission seeks comment on whether the guidelines should be amended to make this clarification. Should the guidelines adopt a different approach for these types of offenses? If so, what should that different approach be? For example, should the Commission require the courts to use a two-step analysis in determining whether an inchoate offense is a ''crime of violence'' or a ''controlled substance offense''? Should the Commission require courts to use a two-step analysis for an inchoate offense involving a ''controlled substance offense'' but provide that an inchoate offense involving a ''crime of violence'' is always a ''crime of violence'' if the substantive offense is a ''crime of violence''?

2. The Commission seeks comment on how the guidelines definitions of ''crime of violence'' and ''controlled substance offense'' should address the offenses of aiding and abetting, attempting to commit, soliciting to commit, or conspiring to commit a ''crime of

violence'' or a ''controlled substance offense,'' or any other inchoate offense or offense arising from accomplice liability involving a ''crime of violence'' or a ''controlled substance offense.'' Specifically, should the Commission promulgate any of the options provided above? Should the Commission provide additional requirements or guidance to address these types of offenses? What additional requirements or guidance, if any, should the Commission provide?

(D) Definition of ''Controlled Substance Offense''

Synopsis of Proposed Amendment: Subsection (b) of § 4B1.2 (Definitions of Terms Used in Section 4B1.1) defines a ''controlled substance offense'' as an offense that prohibits ''the manufacture, import, export, distribution, or dispensing of a controlled substance (or counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.''

In its annual letter to the Commission, the Department of Justice has raised a concern that courts have held that state drug statutes that include an offense involving an ''offer to sell'' a controlled substance do not qualify as a ''controlled substance offense'' under § 4B1.2(b) because such statutes encompass conduct that is broader than § 4B1.2(b)'s definition of a ''controlled substance offense.'' *See* Annual Letter from the Department of Justice to the Commission (Aug. 10, 2018), at *https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20180810/DOJ.pdf.* The Commission previously addressed a similar issue regarding the definition of a ''drug trafficking offense'' in the illegal reentry guideline at § 2L1.2 (Unlawfully Entering or Remaining in the United States). In 2008, the Commission amended the Commentary to § 2L1.2 to clarify that an offer to sell a controlled substance is a ''drug trafficking offense'' for purposes of that guideline, by adding ''offer to sell'' to the conduct listed in the definition of ''drug trafficking offense.'' *See* USSG App. C, Amendment 722 (effective Nov. 1, 2008). In 2016, the Commission comprehensively revised § 2L1.2. Among the changes made, the Commission amended the definition of ''crime of violence'' in the Commentary to § 2L1.2 to conform it to the definition in § 4B1.2, but the Commission did not make changes to the ''drug trafficking offense'' definition in the Commentary to § 2L1.2.

The career offender directive at 28 U.S.C. § 994(h) directed the Commission to assure that ''the guidelines specify a term of imprisonment at or near the maximum term authorized'' for offenders who are 18 years or older and have been convicted of a felony that is, and also have previously been convicted of two or more felonies that are, a ''crime of violence'' or ''an offense described in section 401 of the Controlled Substances Act (21 U.S.C. 841), sections 1002(a), 1005, and 1009 of the Controlled Substances Import and Export Act (21 U.S.C. 952(a), 955, and 959), and chapter 705 of title 46.'' Until 2016, the only substantive criminal offense included in ''chapter 705 of title 46'' was codified in section 70503(a) and read as follows:

An individual may not knowingly or intentionally manufacture or distribute, or possess with intent to manufacture or distribute, a controlled substance on board—

(1) a vessel of the United States or a vessel subject to the jurisdiction of the United States; or

(2) any vessel if the individual is a citizen of the United States or a resident alien of the United States.

46 U.S.C. § 70503(a) (2012). Section 70506(b) provided that a person attempting or conspiring to violate section 70503 was subject to the same penalties as provided for violating section 70503.

In 2016, Congress enacted the Coast Guard Authorization Act of 2015, Pub. L. 114–120 (2016), amending, among other things, Chapter 705 of Title 46. Specifically, Congress revised section 70503(a) as follows:

While on board a covered vessel, an individual may not knowingly or intentionally—

(1) manufacture or distribute, or possess with intent to manufacture or distribute, a controlled substance;

(2) destroy (including jettisoning any item or scuttling, burning, or hastily cleaning a vessel), or attempt or conspire to destroy, property that is subject to forfeiture under section 511(a) of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 881(a)); or

(3) conceal, or attempt or conspire to conceal, more than $100,000 in currency or other monetary instruments on the person of such individual or in any conveyance, article of luggage, merchandise, or other container, or compartment of or aboard the covered vessel if that vessel is outfitted for smuggling.

46 U.S.C. § 70503(a). Section 70506(b) remained unchanged. The Act added two new offenses to section 70503(a), in subparagraphs (2) and (3). Accordingly, ''chapter 705 of title 46,'' as referenced in 28 U.S.C. § 994(h), was also amended. However, these two new offenses may not be covered by the current definition of ''controlled substance offense'' in § 4B1.2.

Part D of the proposed amendment would amend the definition of ''controlled substance offense'' in § 4B1.2(b) to address these issues. First, it would amend the definition to include offenses involving an offer to sell a controlled substance, which would align it with the current definition of ''drug trafficking offense'' in the Commentary to § 2L1.2. Second, it would revise the ''controlled substance offense'' definition to also include ''an offense described in 46 U.S.C. § 70503(a) or § 70506(b).''

An issue for comment is also provided.

Proposed Amendment:

Section 4B1.2(b) is amended by striking the following:

''The term 'controlled substance offense' means an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.'',

and inserting the following:

''The term 'controlled substance offense' means an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that—

(1) prohibits the manufacture, import, export, distribution, or dispensing of, or offer to sell a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense; or

(2) is an offense described in 46 U.S.C. § 70503(a) or § 70506(b).''.

Issue for Comment:

1. Part D of the proposed amendment would amend the definition of ''controlled substance offense'' in subsection (b) of § 4B1.2 (Definitions of Terms Used in Section 4B1.1) to include offenses involving an offer to sell a controlled substance. The Commission seeks comment on the extent to which such offenses should be included as ''controlled substance offenses'' for purposes of the career offender guideline. Are there other drug offenses that are not included under this definition, but should be? For example, should the Commission expressly include as part of the definition offenses

involving the transportation of controlled substances?

If the Commission were to amend the definition of ''controlled substance offense'' in § 4B1.2(b) to include other drug offenses, in addition to offenses involving an offer to sell a controlled substance, should the Commission revise the definition of ''controlled substance offense'' at § 2L1.2 (Unlawfully Entering or Remaining in the United States) to conform it to the revised definition set forth in § 4B1.2(b)?

3. Miscellaneous

Synopsis of Proposed Amendment: This proposed amendment responds to recently enacted legislation and miscellaneous guideline issues. *See* U.S. Sentencing Comm'n, ''Notice of Final Priorities,'' 83 FR 43956 (Aug. 28, 2018) (identifying as priorities ''[i]mplementation of any legislation warranting Commission action'' and ''[c]onsideration of other miscellaneous issues[ ]'').

The proposed amendment contains five parts (Parts A through E). The Commission is considering whether to promulgate any or all these parts, as they are not mutually exclusive.

Part A responds to the FDA Reauthorization Act of 2017, Pub. L. 115–52 (Aug. 18, 2017), by amending Appendix A (Statutory Index) and the Commentary to § 2N2.1 (Violations of Statutes and Regulations Dealing with Any Food, Drug, Biological Product, Device, Cosmetic, Agricultural Product, or Consumer Product). It also makes a technical correction to the Commentary to § 2N1.1 (Tampering or Attempting to Tamper Involving Risk of Death or Bodily Injury). An issue for comment is also provided.

Part B responds to the FAA Reauthorization Act of 2018, Pub. L. 115–254 (Oct. 8, 2018), by amending Appendix A and § 2A5.2 (Interference with Flight Crew Member or Flight Attendant; Interference with Dispatch, Navigation, Operation, or Maintenance of Mass Transportation Vehicle), as well as the commentaries to § 2A2.4 (Obstructing or Impeding Officers) and § 2X5.2 (Class A Misdemeanors (Not Covered by Another Specific Offense Guideline)). An issue for comment is also provided.

Part C responds to the Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. 115–164 (Apr. 11, 2018), by amending Appendix A, § 2G1.1 (Promoting a Commercial Sex Act or Prohibited Sexual Conduct with an Individual Other than a Minor), and § 2G1.3 (Promoting a Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Transportation of Minors to Engage in a Commercial Sex Act or Prohibited Sexual Conduct; Travel to Engage in Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Sex Trafficking of Children; Use of Interstate Facilities to Transport Information about a Minor). Issues for comment are also provided.

Part D responds to a guideline application issue concerning the interaction of § 2G1.3 and § 3D1.2 (Grouping of Closely Related Counts). Although subsection (d) of § 3D1.2 specifies that offenses covered by § 2G1.1 are not grouped under the subsection, it does not specify whether or not offenses covered by § 2G1.3 are so grouped. Part D amends § 3D1.2(d) to provide that offenses covered by § 2G1.3, like offenses covered by § 2G1.1, are not grouped under subsection (d).

Part E revises the guidelines to address the fact that the Bureau of Prisons (''BOP'') no longer operates a shock incarceration program as described in § 5F1.7 (Shock Incarceration Program (Policy Statement)). Part E amends the Commentary to § 5F1.7 to reflect the fact that BOP no longer operates the program.

(A) FDA Reauthorization Act of 2017

Synopsis of Proposed Amendment: Part A of the proposed amendment responds to the FDA Reauthorization Act of 2017, Pub. L. 115–52 (Aug. 18, 2017).

That act amended 21 U.S.C. § 333 (Penalties [for certain violations of the Federal Food, Drug, and Cosmetic Act]) to add a new criminal offense for the manufacture or distribution of a counterfeit drug. The new offense states that

any person who violates [21 U.S.C. § 331(i)(3)] by knowingly making, selling, or dispensing, or holding for sale or dispensing, a counterfeit drug shall be imprisoned for not more than 10 years or fined in accordance with title 18, United States Code, or both.

21 U.S.C. § 333(b)(8). Section 331(i)(3) prohibits any action which causes a drug to be a counterfeit drug, or the sale or dispensing, or the holding for sale or dispensing, of a counterfeit drug.

Currently, subsections (b)(1) through (b)(6) of 21 U.S.C. § 333 are referenced in Appendix A (Statutory Index) to § 2N2.1 (Violations of Statutes and Regulations Dealing With Any Food, Drug, Biological Product, Device, Cosmetic, Agricultural Product, or Consumer Product), and subsection (b)(7) is referenced to § 2N1.1 (Tampering or Attempting to Tamper Involving Risk of Death or Bodily Injury). Newly-enacted subsection (b)(8) is not referenced to any guideline.

Part A of the proposed amendment would amend Appendix A to reference 21 U.S.C. § 333(b)(8) to § 2N2.1. Part A would also amend the Commentary to § 2N2.1 to reflect that subsection (b)(8), as well as subsections (b)(1) through (b)(6), of 21 U.S.C. § 333 are all referenced to § 2N2.1. Finally, Part A also makes a technical change to the Commentary to § 2N1.1, adding 21 U.S.C. § 333(b)(7) to the list of statutory provisions referenced to that guideline.

An issue for comment is also provided.

Proposed Amendment:

Appendix A (Statutory Index) is amended by inserting before the line referenced to 21 U.S.C. § 458 the following new line reference:

''21 U.S.C. § 333(b)(8).	2N2.1''.

The Commentary to § 2N2.1 captioned ''Statutory Provisions'' is amended by striking ''333(a)(1), (a)(2), (b)'' and inserting ''333(a)(1), (a)(2), (b)(1)–(6), (b)(8)''.

The Commentary to § 2N1.1 captioned ''Statutory Provisions'' is amended by striking ''18 U.S.C. § 1365(a), (e)'' and inserting ''18 U.S.C. § 1365(a), (e); 21 U.S.C. § 333(b)(7). For additional statutory provision(s), *see* Appendix A (Statutory Index)''.

Issue for Comment:

1. Part A of the proposed amendment references newly-enacted 21 U.S.C. § 333(b)(8) to § 2N2.1 (Violations of Statutes and Regulations Dealing With Any Food, Drug, Biological Product, Device, Cosmetic, Agricultural Product, or Consumer Product). The Commission seeks comment on whether any additional changes to the guidelines are required to account for section 333(b)(8)'s offense conduct. Specifically, should the Commission amend § 2N2.1 to provide a higher or lower base offense level if 21 U.S.C. § 333(b)(8) is the offense of conviction? If so, what should that base offense level be and why? Should the Commission add a specific offense characteristic to § 2N2.1 in response to section 333(b)(8)? If so, what should that specific offense characteristic provide and why?

(B) FAA Reauthorization Act of 2018

Synopsis of Proposed Amendment: Part B of the Proposed Amendment responds to the FAA Reauthorization Act of 2018, Pub. L. 115–254 (Oct. 8, 2018). That act created two new criminal offenses concerning the operation of unmanned aircraft, commonly known as ''drones,'' and

added a new provision to an existing criminal statute that also concerns drones.

The first new criminal offense, codified at 18 U.S.C. § 39B (Unsafe operation of unmanned aircraft), prohibits the unsafe operation of drones. Specifically, section 39B(a)(1) prohibits any person from operating an unmanned aircraft and knowingly interfering with the operation of an aircraft carrying one or more persons in a manner that poses an imminent safety hazard to the aircraft's occupants. Section 39B(a)(2) prohibits any person from operating an unmanned aircraft and recklessly interfering with the operation of an aircraft carrying one or more persons in a manner that poses an imminent safety hazard to the aircraft's occupants. Section 39B(b) prohibits any person from knowingly operating an unmanned aircraft near an airport runway without authorization. A violation of any of these prohibitions is punishable by a fine, not more than one year in prison, or both. A violation of subsection (a)(2) that causes serious bodily injury or death is punishable by a fine, not more than 10 years of imprisonment, or both. A violation of subsection (a)(1) or subsection (b) that causes serious bodily injury or death is punishable by a fine, imprisonment for any term of years or for life, or both.

The second new criminal offense, codified at 18 U.S.C. § 40A (Operation of unauthorized unmanned aircraft over wildfires), generally prohibits any individual from operating an unmanned aircraft and knowingly or recklessly interfering with a wildfire suppression or with law enforcement or emergency response efforts related to a wildfire suppression. A violation of this offense is punishable by a fine, imprisonment for not more than two years, or both.

The act also adds a new subsection (a)(5) to 18 U.S.C. § 1752 (Restricted building or grounds). The new subsection prohibits anyone from knowingly and willfully operating an unmanned aircraft system with the intent to knowingly and willfully direct or otherwise cause the system to enter or operate within or above a restricted building or grounds. A violation of section 1752 is punishable by a fine, imprisonment for not more than one year, or both. If the violator used or carried a deadly or dangerous weapon or firearm or if the offense results in significant bodily injury, the maximum term of imprisonment increases to ten years.

Part B of the proposed amendment would amend Appendix A (Statutory Index) to reference 18 U.S.C. § 39B to § 2A5.2 (Interference with Flight Crew Member or Flight Attendant; Interference with Dispatch, Navigation, Operation, or Maintenance of Mass Transportation Vehicle) and § 2X5.2 (Class A Misdemeanors (Not Covered by Another Specific Offense Guideline)). Accordingly, courts would use § 2A5.2 for felony violations of section 39B and § 2X5.2 for misdemeanor violations. Part B would also make conforming changes to § 2A5.2 and its commentary and to the Commentary to § 2X5.2.

In addition, Part B would amend Appendix A to reference 18 U.S.C. § 40A to § 2A2.4 (Obstructing or Impeding Officers). Part B would also make conforming changes to the Commentary to § 2A2.4.

Section 1752 is currently referenced in Appendix A to § 2A2.4 and § 2B2.3 (Trespass). Accordingly, courts would use those guidelines for felony violations of newly-enacted 18 U.S.C. § 1752(a)(5). Part B would make no changes to the guidelines to account for that provision.

An issue for comment is also provided.

Proposed Amendment:

Appendix A (Statutory Index) is amended by inserting before the line referenced to 18 U.S.C. § 43'' the following new line references:

''18 U.S.C. § 39B 2A5.2, 2X5.2
18 U.S.C. § 40A ..... 2A2.4''.

Section 2A5.2 is amended in the heading by striking ''Vehicle'' and inserting ''Vehicle; Unsafe Operation of Unmanned Aircraft''.

The Commentary to § 2A5.2 captioned ''Statutory Provisions'' is amended by striking ''18 U.S.C. § 1992(a)(1)'' and inserting ''18 U.S.C. §§ 39B, 1992(a)(1)''.

The Commentary to § 2X5.2 captioned ''Statutory Provisions'' is amended by striking ''18 U.S.C. §§ 1365(f)'' and inserting ''18 U.S.C. §§ 39B, 1365(f)'', and by striking ''49 U.S.C. § 31310'' and inserting ''49 U.S.C. § 31310. For additional statutory provision(s), *see* Appendix A (Statutory Index)''.

The Commentary to § 2A2.4 captioned ''Statutory Provisions'' is amended by striking ''18 U.S.C. §§ 111'' and inserting ''18 U.S.C. §§ 40A, 111''.

Issue for Comment:

1. In response to the FAA Reauthorization Act of 2018, Pub. L. 115–254 (Oct. 8, 2018), Part B of the proposed amendment references newly-enacted 18 U.S.C. § 39B to § 2A5.2 (Interference with Flight Crew Member or Flight Attendant; Interference with Dispatch, Navigation, Operation, or Maintenance of Mass Transportation Vehicle) and § 2X5.2 (Class A Misdemeanors (Not Covered by Another Specific Offense Guideline)). Part B also references newly-enacted 18 U.S.C. § 40A to § 2A2.4 (Obstructing or Impeding Officers). The Commission seeks comment on whether these proposed references are appropriate and whether any additional changes to the guidelines are required to account for the new criminal offenses created by the FAA Reauthorization Act.

(C) Allow States and Victims to Fight Online Sex Trafficking Act of 2017

Synopsis of Proposed Amendment: Part C of the proposed amendment responds to the Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. 115–164 (Apr. 11, 2018).

That act created two new criminal offenses codified at 18 U.S.C. § 2421A (Promotion or facilitation of prostitution and reckless disregard of sex trafficking). The first new offense, codified at 18 U.S.C. § 2421A(a), provides that [w]hoever, using a facility or means of interstate or foreign commerce or in or affecting interstate or foreign commerce, owns, manages, or operates an interactive computer service . . . , or conspires or attempts to do so, with the intent to promote or facilitate the prostitution of another person shall be fined under this title, imprisoned for not more than 10 years, or both.

The second new offense, codified at 18 U.S.C. § 2421A(b), is an aggravated form of the first. It provides an enhanced statutory maximum penalty of 25 years for anyone who commits the first offense and either ''(1) promotes or facilitates the prostitution of 5 or more persons'' or ''(2) acts in reckless disregard of the fact that such conduct contributed to sex trafficking, in violation of [18 U.S.C. §] 1591(a).'' Section 1591(a) criminalizes sex trafficking of a minor or sex trafficking of anyone by force, threats of force, fraud, or coercion.

Part C of the proposed amendment would amend Appendix A (Statutory Index) to reference 18 U.S.C. § 2421A to § 2G1.1 (Promoting a Commercial Sex Act or Prohibited Sexual Conduct with an Individual Other than a Minor) and § 2G1.3 (Promoting a Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Transportation of Minors to Engage in a Commercial Sex Act or Prohibited Sexual Conduct; Travel to Engage in Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Sex Trafficking of Children; Use of Interstate Facilities to Transport Information about a Minor). Offenses involving the promotion or facilitation of commercial sex acts are generally referenced to these guidelines.

If the offense did not involve a minor, § 2G1.1 would be the applicable guideline. For a defendant convicted under 18 U.S.C. § 2421A, subsection (a)(2) would apply, and the defendant's base offense level would be level 14. Part C would amend § 2G1.1(b)(1) so that the four-level increase in the defendant's offense level provided by that specific offense characteristic would also apply if subsection (a)(2) applies and [the offense of conviction is] [the offense involved conduct described in] 18 U.S.C. § 2421A(b)(2). Section 2421A(b)(2) is the version of the new aggravated offense under which the defendant has acted in reckless disregard of the fact that his or her conduct contributed to sex trafficking in violation of 18 U.S.C. § 1591(a).

If the offense involved a minor, § 2G1.3 would be the applicable guideline. For a defendant convicted under 18 U.S.C. § 2421A, subsection (a)(4) would apply, and the defendant's base offense level would be level 24. Part C would amend § 2G1.3(b)(4) to renumber the existing specific offense characteristic as § 2G1.3(b)(4)(A) and to add a new § 2G1.3(b)(4)(B), which provides for a [4]-level increase in the defendant's offense level if (i) subsection (a)(4) applies; and (ii) [the offense of conviction is] [the offense involved conduct described in] 18 U.S.C. § 2421A(b)(2). Only the greater of § 2G1.3(b)(4)(A) or § 2G1.3(b)(4)(B) would apply.

Part C also would amend the Commentary to § 2G1.3 to add a new application note instructing that if 18 U.S.C. § 2421A is the offense of conviction, the specific offense characteristic at § 2G1.3(b)(3)(B) does not apply. That special offense characteristic provides for a two-level increase in the defendant's offense level if the offense involved the use of a computer or an interactive computer service to entice, encourage, offer, or solicit a person to engage in prohibited sexual conduct with a minor.

Finally, Part C would make conforming changes to §§ 2G1.1 and 2G1.3 and their commentaries.

Issues for comment are also provided.

Proposed Amendment:

Appendix A (Statutory Index) is amended by inserting before the line referenced to 18 U.S.C. § 2422 the following new line reference:

''18 U.S.C. § 2421A .. 2G1.1, 2G1.3''.

Section 2G1.1(b)(1)(B) is amended by striking ''the offense involved fraud or coercion'' and inserting ''(i) the offense involved fraud or coercion, or (ii) [the offense of conviction is] [the offense involved conduct described in] 18 U.S.C. § 2421(A)(b)(2)''.

The Commentary to § 2G1.1 captioned ''Statutory Provisions'' is amended by striking ''2422(a) (only if the offense involved a victim other than a minor)'' and inserting ''2421A (only if the offense involved a victim other than a minor), 2422(a) (only if the offense involved a victim other than a minor). For additional statutory provision(s), *see* Appendix A (Statutory Index)''.

Section 2G1.3(b) is amended in paragraph (4) by striking the following:

''If (A) the offense involved the commission of a sex act or sexual contact; or (B) subsection (a)(3) or (a)(4) applies and the offense involved a commercial sex act, increase by 2 levels.'',

and inserting the following:

''(Apply the greater):

(A) If (i) the offense involved the commission of a sex act or sexual contact; or (ii) subsection (a)(3) or (a)(4) applies and the offense involved a commercial sex act, increase by 2 levels.

(B) If (i) subsection (a)(4) applies; and (ii) [the offense of conviction is][the offense involved conduct described in] 18 U.S.C. § 2421A(b)(2), increase by [4] levels.''.

The Commentary to § 2G1.3 captioned ''Statutory Provisions'' is amended by striking ''2422 (only if the offense involved a minor), 2423, 2425'' and inserting ''2421A (only if the offense involved a minor), 2422 (only if the offense involved a minor), 2423, 2425. For additional statutory provision(s), *see* Appendix A (Statutory Index)''.

The Commentary to § 2G1.3 captioned ''Application Notes'' is amended by redesignating Notes 5, 6, and 7 as Notes 6, 7, and 8, respectively, and inserting the following new Note 5:

''5. *Application of Subsection (b)(3)(B) when the Offense of Conviction is 18 U.S.C. § 2421A.*—If the offense of conviction is 18 U.S.C. § 2421A, do not apply subsection (b)(3)(B).''.

Issues for Comment:

1. Part C of the proposed amendment would reference newly-enacted 18 U.S.C. § 2421A to § 2G1.1 (Promoting a Commercial Sex Act or Prohibited Sexual Conduct with an Individual Other than a Minor) and § 2G1.3 (Promoting a Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Transportation of Minors to Engage in a Commercial Sex Act or Prohibited Sexual Conduct; Travel to Engage in Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Sex Trafficking of Children; Use of Interstate Facilities to Transport Information about a Minor), and would make various revisions to those guidelines to account for the new statute's offense conduct. The Commission seeks comment on whether the proposed revisions are appropriate and on whether the Commission should make other changes to the guidelines to account for section 2421A's offense conduct.

In particular, Part C would rely on the specific offense characteristics and special instructions in §§ 2G1.1 and 2G1.3 to produce the appropriate offense levels for the aggravated offense at 18 U.S.C. § 2421A(b). Should the Commission account for the aggravated offense in a different way, for example, by providing a higher base offense level if a defendant is convicted of that offense? If so, should the Commission use one of the base offense levels currently provided for convictions under other offenses, such as level 28, provided by § 2G1.3 for a conviction under 18 U.S.C. § 2422(b) or 2423(a), or level 34, provided by §§ 2G1.1 and 2G1.3 for a conviction under 18 U.S.C. § 1591(b)(1)?

2. Newly-enacted 18 U.S.C. § 2421A is codified in chapter 117 (Transportation for Illegal Sexual Activity and Related Crimes) of title 18 of the United States Code, which contains statutes that generally prohibit conduct intended to promote or facilitate prostitution. Various guidelines refer to chapter 117, including § 4B1.5 (Repeat and Dangerous Sex Offender Against Minors) and § 5D1.2 (Term of Supervised Release). The Commission seeks comment on whether it should amend those guidelines to account for 18 U.S.C. § 2421A.

Specifically, § 4B1.5 provides for increases in the defendant's offense level if the offense of conviction is a ''covered sex crime.'' Application Note 2 of the Commentary to § 4B1.5 states that a ''covered sex crime'' generally includes offenses under chapter 117 but excludes from coverage the offenses of ''transmitting information about a minor or filing a factual statement about an alien individual.'' Should the Commission also exclude 18 U.S.C. § 2421A from the definition of a ''covered sex crime''? If so, why? If not, why not?

Section 5D1.2 includes a policy statement recommending that the court impose the statutory maximum term of supervised release if the instant offense of conviction is a ''sex offense.'' Application Note 1 of the Commentary to § 5D1.2 defines ''sex offense'' to mean, among other things, an offense, perpetrated against a minor, under chapter 117, ''not including transmitting information about a minor or filing a factual statement about an alien

individual.'' Should the Commission also exclude offenses under 18 U.S.C. § 2421A from the definition of ''sex offense'' in Application Note 1? If so, why? If not, why not?

(D) Grouping of Offenses Covered by § 2G1.3

Synopsis of Proposed Amendment: Part D of the proposed amendment revises § 3D1.2 (Grouping of Closely Related Counts) to provide that offenses covered by § 2G1.3 (Promoting a Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Transportation of Minors to Engage in a Commercial Sex Act or Prohibited Sexual Conduct; Travel to Engage in Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Sex Trafficking of Children; Use of Interstate Facilities to Transport Information about a Minor) are not grouped under § 3D1.2(d).

Section 3D1.2 addresses the grouping of closely related counts for purposes of determining the offense level when a defendant has been convicted on multiple counts. Subsection (d) states that counts are grouped together ''[w]hen the offense level is determined largely on the basis of the total amount of harm or loss, the quantity of a substance involved, or some other measure of aggregate harm, or if the offense behavior is ongoing or continuous in nature and the offense guideline is written to cover such behavior.'' Subsection (d) also contains lists of (1) guidelines for which the offenses covered by the guideline are to be grouped under the subsection and (2) guidelines for which the covered offenses are specifically excluded from grouping under the subsection.

Section 2G1.1 (Promoting a Commercial Sex Act or Prohibited Sexual Conduct with an Individual Other than a Minor) is included in the list of guidelines for which the covered offenses are excluded from grouping under § 3D1.2(d). Section 2G1.3 is, however, not included on that list, even though several offenses that are referenced to § 2G1.3 when the offense involves a minor are referenced to § 2G1.1 when the offense involves an individual other than a minor. In addition, several offenses that were referenced to § 2G1.1 before § 2G1.3 was promulgated are now referenced to § 2G1.3. *See* USSG App. C, Amendment 664 (effective Nov. 1, 2004). Furthermore, Application Note 6 of the Commentary to § 2G1.3 states that multiple counts under § 2G1.3 are not to be grouped.

Section 2G1.3 is also not included on the list of guidelines for which the covered offenses are to be grouped under § 3D1.2(d). Because § 2G1.3 is included on neither list, § 3D.1(d) provides that ''grouping under [the] subsection may or may not be appropriate and a ''case-by-case determination must be made based upon the facts of the case and the applicable guideline (including specific offense characteristics and other adjustments) used to determine the offense level.''

Part D of the proposed amendment would amend § 3D1.2(d) to add § 2G1.3 to the list of guidelines for which the covered offenses are specifically excluded from grouping.

Proposed Amendment:

Section 3D1.2(d) is amended by striking ''§§ 2G1.1, 2G2.1'' and inserting ''§§ 2G1.1, 2G1.3, 2G2.1''.

(E) Policy Statement on Shock Incarceration Programs

Synopsis of Proposed Amendment: Part E of the proposed amendment revises the guidelines to address the fact that the Bureau of Prisons (''BOP'') no longer operates a shock incarceration program as described in § 5F1.7 (Shock Incarceration Program (Policy Statement)) and the corresponding commentary.

Section 4046 of title 18, United States Code, authorizes BOP to place any person who has been sentenced to a term of imprisonment of more than 12 but not more than 30 months in a shock incarceration program if the person consents to that placement. Sections 3582(a) and 3621(b)(4) of title 18 authorize a court, in imposing sentence, to make a recommendation regarding the type of prison facility that would be appropriate for the defendant. In making such a recommendation, the court ''shall consider any pertinent policy statements issued by the Sentencing Commission.'' 18 U.S.C. § 3582(a).

Section 5F1.7 provides that, pursuant to sections 3582(a) and 3621(b)(4), a sentencing court may recommend that a defendant who meets the criteria set forth in section 4046 participate in a shock incarceration program. The Commentary to § 5F1.7 describes the authority for BOP to operate a shock incarceration program and the procedures that the BOP established in 1990 regarding operation of such a program.

In 2008, BOP terminated its shock incarceration program and removed the rules governing its operation. Part E would amend the Commentary to § 5F1.7 to reflect those developments. Part E also would correct two typographical errors in the commentary.

Proposed Amendment:

The Commentary to § 5F1.7 captioned ''Background'' is amended by—

striking ''six months'' and inserting ''6 months'';

striking ''as the Bureau deems appropriate. 18 U.S.C. § 4046.' '' and inserting ''as the Bureau deems appropriate.' 18 U.S.C. § 4046.'';

and by striking the final paragraph as follows:

''The Bureau of Prisons has issued an operations memorandum (174–90 (5390), November 20, 1990) that outlines eligibility criteria and procedures for the implementation of this program (which the Bureau of Prisons has titled ''intensive confinement program''). Under these procedures, the Bureau will not place a defendant in an intensive confinement program unless the sentencing court has approved, either at the time of sentencing or upon consultation after the Bureau has determined that the defendant is otherwise eligible. In return for the successful completion of the ''intensive confinement'' portion of the program, the defendant is eligible to serve the remainder of his term of imprisonment in a graduated release program comprised of community corrections center and home confinement phases.'',

and inserting the following:

''In 1990, the Bureau of Prisons ('BOP') issued an operations memorandum (174–90 (5390), November 20, 1990) that outlined eligibility criteria and procedures for the implementation of a shock incarceration program (which the Bureau of Prisons titled the ''intensive confinement program''). In 2008, however, BOP terminated the program and removed the rules governing its operation. *See* 73 Fed. Reg. 39863 (July 11, 2008).''.

4. Technical Amendment

Synopsis of Proposed Amendment: This proposed amendment makes various technical changes to the *Guidelines Manual.*

Part A of the proposed amendment makes technical changes to reflect the editorial reclassification of certain sections in the United States Code. Effective December 1, 2015, the Office of Law Revision Counsel eliminated the Appendix to Title 50 of the United States Code and transferred the non-obsolete provisions to new chapters 49 to 57 of Title 50 and to other titles of the Code. To reflect the new section numbers of the reclassified provisions, Part A of the proposed amendment makes changes to § 2M4.1 (Failure to Register and Evasion of Military Service), § 2M5.1 (Evasion of Export Controls; Financial Transactions with

Countries Supporting International Terrorism), and Appendix A (Statutory Index). Similarly, effective September 1, 2016, the Office of Law Revision Counsel also transferred certain provisions from Chapter 14 of Title 25 to four new chapters in Title 25 in order to improve the organization of the title. To reflect these changes, Part A of the proposed amendment makes further changes to Appendix A.

Part B of the proposed amendment makes certain technical changes to the Commentary to § 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy). First, Part B of the proposed amendment amends the Drug Conversion Tables at Application Note 8(D) and the Typical Weight Per Unit Table at Application Note 9, to reorganize the controlled substances contained therein in alphabetical order to make the tables more user-friendly. It also makes minor changes to the controlled substance references to promote consistency in the use of capitalization, commas, parentheticals, and slash symbols throughout the Drug Conversion Tables. For example, the proposed amendment would change the reference to ''Phencyclidine (actual)/PCP (actual)'' to ''Phencyclidine (PCP) (actual).'' Second, Part B of the proposed amendment makes clerical changes throughout the Commentary to correct some typographical errors. Finally, Part B of the proposed amendment amends the Background Commentary to add a specific reference to amendment 808, which replaced the term ''marihuana equivalency'' with the new term ''converted drug weight'' and changed the title of the ''Drug Equivalency Tables'' to ''Drug Conversion Tables.''

Part C of the proposed amendment makes technical changes to the commentaries to § 2A4.2 (Demanding or Receiving Ransom Money), § 2A6.1 (Threatening or Harassing Communications; Hoaxes; False Liens), and § 2B3.2 (Extortion by Force or Threat of Injury or Serious Damage), and to Appendix A, to provide references to the specific applicable provisions of 18 U.S.C. § 876.

Part D of the proposed amendment makes clerical changes to—

(1) the Background Commentary to § 1B1.11 (Use of Guidelines Manual in Effect on Date of Sentencing (Policy Statement)), to update the citation of a Supreme Court case;

(2) the Background Commentary to § 3D1.1 (Procedure for Determining Offense Level on Multiple Counts), to correct references to certain chapters of the *Guidelines Manual;* and

(3) the Background Commentary to § 5G1.3 (Imposition of a Sentence on a Defendant Subject to an Undischarged Term of Imprisonment or Anticipated State Term of Imprisonment), to update the citation of a Supreme Court case.

Proposed Amendment:

(A) Reclassification of Sections of United States Code

The Commentary to § 2M4.1 captioned ''Statutory Provisions'' is amended by striking ''50 U.S.C. App. § 462'' and inserting ''50 U.S.C. § 3811''.

The Commentary to § 2M5.1 captioned ''Statutory Provisions'' is amended by striking ''50 U.S.C. App. §§ 2401–2420'' and inserting ''50 U.S.C. §§ 4601–4623. For additional statutory provision(s), *see* Appendix A (Statutory Index)''.

The Commentary to § 2M5.1 captioned ''Application Notes'' is amended—

in Note 3 by striking ''50 U.S.C. App. § 2410'' and inserting ''50 U.S.C. § 4610'';

and in Note 4 by striking ''50 U.S.C. App. 2405'' and inserting ''50 U.S.C. § 4605''.

Appendix A (Statutory Index) is amended—

in the line referenced to 25 U.S.C. § 450d by striking ''§ 450d'' and inserting ''§ 5306'';

and by striking the lines referenced to 50 U.S.C. App. § 462, 50 U.S.C. App. § 527(e), and 50 U.S.C. App. § 2410, and inserting before the line referenced to 52 U.S.C. § 10307(c) the following new line references:

''50 U.S.C. § 3811 .. 2M4.1
50 U.S.C. § 3937 .... 2X5.2
50 U.S.C. § 4610 .... 2M5.1''.

(B) Technical Changes to Commentary to § 2D1.1

The Commentary to § 2D1.1 captioned ''Application Notes'' is amended—

in Note 8(A) by striking ''the statute (21 U.S.C. § 841(b)(1)), as the primary basis'' and inserting ''the statute (21 U.S.C. § 841(b)(1)) as the primary basis'', and by striking ''fentanyl, LSD and marihuana'' and inserting ''fentanyl, LSD, and marihuana'';

in Note 8(D)—

under the heading relating to Schedule I or II Opiates, by striking the following:

''1 gm of Heroin = 1 kg
1 gm of Dextromoramide = 670 gm
1 gm of Dipipanone = 250 gm
1 gm of 1-Methyl-4-phenyl-4-propionoxypiperidine/MPPP = 700 gm
1 gm of 1-(2-Phenylethyl)-4-phenyl-4-acetyloxypiperidine/PEPAP = 700 gm
1 gm of Alphaprodine = 100 gm
1 gm of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide) = 2.5 kg
1 gm of a Fentanyl Analogue = 10 kg
1 gm of Hydromorphone/Dihydromorphinone = 2.5 kg
1 gm of Levorphanol = 2.5 kg
1 gm of Meperidine/Pethidine = 50 gm
1 gm of Methadone = 500 gm
1 gm of 6-Monoacetylmorphine = 1 kg
1 gm of Morphine = 500 gm
1 gm of Oxycodone (actual) = 6700 gm
1 gm of Oxymorphone = 5 kg
1 gm of Racemorphan = 800 gm
1 gm of Codeine = 80 gm
1 gm of Dextropropoxyphene/Propoxyphene-Bulk = 50 gm
1 gm of Ethylmorphine = 165 gm
1 gm of Hydrocodone (actual) = 6700 gm
1 gm of Mixed Alkaloids of Opium/Papaveretum = 250 gm
1 gm of Opium = 50 gm
1 gm of Levo-alpha-acetylmethadol (LAAM) = 3 kg'',

and inserting the following:

''1 gm of 1-(2-Phenylethyl)-4-phenyl-4-acetyloxypiperidine (PEPAP) = 700 gm
1 gm of 1-Methyl-4-phenyl-4-propionoxypiperidine (MPPP) = 700 gm
1 gm of 6-Monoacetylmorphine = 1 kg
1 gm of Alphaprodine = 100 gm
1 gm of Codeine = 80 gm
1 gm of Dextromoramide = 670 gm
1 gm of Dextropropoxyphene/Propoxyphene-Bulk = 50 gm
1 gm of Dipipanone = 250 gm
1 gm of Ethylmorphine = 165 gm
1 gm of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide) = 2.5 kg
1 gm of a Fentanyl Analogue = 10 kg
1 gm of Heroin = 1 kg
1 gm of Hydrocodone (actual) = 6,700 gm
1 gm of Hydromorphone/Dihydromorphinone = 2.5 kg
1 gm of Levo-alpha-acetylmethadol (LAAM) = 3 kg
1 gm of Levorphanol = 2.5 kg
1 gm of Meperidine/Pethidine = 50 gm
1 gm of Methadone = 500 gm
1 gm of Mixed Alkaloids of Opium/Papaveretum = 250 gm
1 gm of Morphine = 500 gm
1 gm of Opium = 50 gm
1 gm of Oxycodone (actual) = 6,700 gm
1 gm of Oxymorphone = 5 kg
1 gm of Racemorphan = 800 gm'';

under the heading relating to Cocaine and Other Schedule I and II Stimulants (and their immediate precursors), by striking the following:

''1 gm of Cocaine = 200 gm
1 gm of N-Ethylamphetamine = 80 gm
1 gm of Fenethylline = 40 gm
1 gm of Amphetamine = 2 kg
1 gm of Amphetamine (Actual) = 20 kg
1 gm of Methamphetamine = 2 kg
1 gm of Methamphetamine (Actual) = 20 kg
1 gm of ''Ice'' = 20 kg
1 gm of Khat = .01 gm
1 gm of 4-Methylaminorex (''Euphoria'') = 100 gm
1 gm of Methylphenidate (Ritalin) = 100 gm
1 gm of Phenmetrazine = 80 gm

1 gm Phenylacetone/P_2P (when possessed for the purpose of manufacturing methamphetamine) = 416 gm
1 gm Phenylacetone/P_2P (in any other case) = 75 gm
1 gm Cocaine Base (''Crack'') = 3,571 gm
1 gm of Aminorex = 100 gm
1 gm of N-N-Dimethylamphetamine = 40 gm
1 gm of N-Benzylpiperazine = 100 gm'',

and inserting the following:

''1 gm of 4-Methylaminorex (''Euphoria'') = 100 gm
1 gm of Aminorex = 100 gm
1 gm of Amphetamine = 2 kg
1 gm of Amphetamine (actual) = 20 kg
1 gm of Cocaine = 200 gm
1 gm of Cocaine Base (''Crack'') = 3,571 gm
1 gm of Fenethylline = 40 gm
1 gm of ''Ice'' = 20 kg
1 gm of Khat = .01 gm
1 gm of Methamphetamine = 2 kg
1 gm of Methamphetamine (actual) = 20 kg
1 gm of Methylphenidate (Ritalin) = 100 gm
1 gm of N-Benzylpiperazine = 100 gm
1 gm of N-Ethylamphetamine = 80 gm
1 gm of N-N-Dimethylamphetamine = 40 gm
1 gm of Phenmetrazine = 80 gm
1 gm of Phenylacetone (P_2P) (when possessed for the purpose of manufacturing methamphetamine) = 416 gm
1 gm of Phenylacetone (P_2P) (in any other case) = 75 gm'';

Under the heading relating to Synthetic Cathinones (except Schedule III, IV, and V Substances), by striking ''a synthetic cathinone'' and inserting ''a Synthetic Cathinone'';

Under the heading relating to LSD, PCP, and Other Schedule I and II Hallucinogens (and their immediate precursors), by striking the following:

''1 gm of Bufotenine = 70 gm
1 gm of D-Lysergic Acid Diethylamide/Lysergide/LSD = 100 kg
1 gm of Diethyltryptamine/DET = 80 gm
1 gm of Dimethyltryptamine/DM = 100 gm
1 gm of Mescaline = 10 gm
1 gm of Mushrooms containing Psilocin and/or Psilocybin (Dry) = 1 gm
1 gm of Mushrooms containing Psilocin and/or Psilocybin (Wet) = 0.1 gm
1 gm of Peyote (Dry) = 0.5 gm
1 gm of Peyote (Wet) = 0.05 gm
1 gm of Phencyclidine/PCP = 1 kg
1 gm of Phencyclidine (actual)/PCP (actual) = 10 kg
1 gm of Psilocin = 500 gm
1 gm of Psilocybin = 500 gm
1 gm of Pyrrolidine Analog of Phencyclidine/PHP = 1 kg
1 gm of Thiophene Analog of Phencyclidine/TCP = 1 kg
1 gm of 4-Bromo-2,5-Dimethoxyamphetamine/DOB = 2.5 kg
1 gm of 2,5-Dimethoxy-4-methylamphetamine/DOM = 1.67 kg
1 gm of 3,4-Methylenedioxyamphetamine/MDA = 500 gm
1 gm of 3,4-Methylenedioxymethamphetamine/MDMA = 500 gm
1 gm of 3,4-Methylenedioxy-N-ethylamphetamine/MDEA = 500 gm
1 gm of Paramethoxymethamphetamine/PMA = 500 gm
''1 gm of 1-Piperidinocyclohexanecarbonitrile/PCC = 680 gm
1 gm of N-ethyl-1-phenylcyclohexylamine (PCE) = 1 kg'',

and inserting the following:

''1 gm of 1-Piperidinocyclohexanecarbonitrile (PCC) = 680 gm
1 gm of 4-Bromo-2,5-Dimethoxyamphetamine (DOB) = 2.5 kg
1 gm of 2,5-Dimethoxy-4-methylamphetamine (DOM) = 1.67 kg
1 gm of 3,4-Methylenedioxyamphetamine (MDA) = 500 gm
1 gm of 3,4-Methylenedioxymethamphetamine (MDMA) = 500 gm
1 gm of 3,4-Methylenedioxy-N-ethylamphetamine (MDEA) = 500 gm
1 gm of Bufotenine = 70 gm
1 gm of D-Lysergic Acid Diethylamide/Lysergide (LSD) = 100 kg
1 gm of Diethyltryptamine (DET) = 80 gm
1 gm of Dimethyltryptamine (DM) = 100 gm
1 gm of Mescaline = 10 gm
1 gm of Mushrooms containing Psilocin and/or Psilocybin (dry) = 1 gm
1 gm of Mushrooms containing Psilocin and/or Psilocybin (wet) = 0.1 gm
1 gm of N-ethyl-1-phenylcyclohexylamine (PCE) = 1 kg
1 gm of Paramethoxymethamphetamine (PMA) = 500 gm
1 gm of Peyote (dry) = 0.5 gm
1 gm of Peyote (wet) = 0.05 gm
1 gm of Phencyclidine (PCP) = 1 kg
1 gm of Phencyclidine (PCP) (actual) = 10 kg
1 gm of Psilocin = 500 gm
1 gm of Psilocybin = 500 gm
1 gm of Pyrrolidine Analog of Phencyclidine (PHP) = 1 kg
1 gm of Thiophene Analog of Phencyclidine (TCP) = 1 kg'';

under the heading relating to Schedule I Marihuana, by striking the following:

''1 gm of Marihuana/Cannabis, granulated, powdered, etc. = 1 gm
1 gm of Hashish Oil = 50 gm
1 gm of Cannabis Resin or Hashish = 5 gm
1 gm of Tetrahydrocannabinol, Organic = 167 gm
1 gm of Tetrahydrocannabinol, Synthetic = 167 gm'',

and inserting the following:

''1 gm of Cannabis Resin or Hashish = 5 gm
1 gm of Hashish Oil = 50 gm
1 gm of Marihuana/Cannabis (granulated, powdered, etc.) = 1 gm
1 gm of Tetrahydrocannabinol (organic) = 167 gm
1 gm of Tetrahydrocannabinol (synthetic) = 167 gm'';

under the heading relating to Synthetic Cannabinoids (except Schedule III, IV, and V Substances), by striking ''a synthetic cannabinoid'' and inserting ''a Synthetic Cannabinoid'', and by striking '''Synthetic cannabinoid,' for purposes of this guideline'' and inserting '''Synthetic Cannabinoid,' for purposes of this guideline'';

under the heading relating to Schedule I or II Depressants (except gamma-hydroxybutyric acid), by striking ''except gamma-hydroxybutyric acid'' both places such term appears and inserting ''except Gamma-hydroxybutyric Acid'';

under the heading relating to Gamma-hydroxybutyric Acid, by striking ''of gamma-hydroxybutyric acid'' and inserting ''of Gamma-hydroxybutyric Acid'';

under the heading relating to Schedule III Substances (except ketamine), by striking ''except ketamine'' in the heading and inserting ''except Ketamine'';

under the heading relating to Ketamine, by striking ''of ketamine'' and inserting ''of Ketamine'';

under the heading relating to Schedule IV (except flunitrazepam), by striking ''except flunitrazepam'' in the heading and inserting ''except Flunitrazepam'';

under the heading relating to List I Chemicals (relating to the manufacture of amphetamine or methamphetamine), by striking ''of amphetamine or methamphetamine'' and inserting ''of Amphetamine or Methamphetamine'';

under the heading relating to Date Rape Drugs (except flunitrazepam, GHB, or ketamine), by striking ''except flunitrazepam, GHB, or ketamine'' and inserting ''except Flunitrazepam, GHB, or Ketamine'', by striking ''of 1,4-butanediol'' and inserting ''of 1,4-Butanediol'', and by striking ''of gamma butyrolactone'' and inserting ''of Gamma Butyrolactone'';

in Note 9, under the heading relating to Hallucinogens, by striking the following:

''MDA	250 mg
MDMA	250 mg
Mescaline	500 mg
PCP *	5 mg
Peyote (dry)	12 gm
Peyote (wet)	120 gm
Psilocin *	10 mg
Psilocybe mushrooms (dry).	5 gm
Psilocybe mushrooms (wet).	50 gm
Psilocybin *	10 mg
2,5-Dimethoxy-4-methylamphetamine (STP, DOM) *.	3 mg'',

and inserting the following:

''2,5-Dimethoxy-4-methylamphetamine (STP, DOM) *.	3 mg
MDA	250 mg
MDMA	250 mg
Mescaline	500 mg

PCP *	5 mg
Peyote (dry)	12 gm
Peyote (wet)	120 gm
Psilocin *	10 mg
Psilocybe mushrooms (dry).	5 gm
Psilocybe mushrooms (wet).	50 gm
Psilocybin *	10 mg'';

and in Note 21, by striking ''Section § 5C1.2(b)'' and inserting ''Section 5C1.2(b)''.

The Commentary to § 2D1.1 captioned ''Background'' is amended by striking ''Public Law 103–237'' and inserting ''Public Law 104–237'', and by inserting after ''to change the title of the Drug Equivalency Tables to the 'Drug Conversion Tables.''' the following: ''*See* USSG App. C, Amendment 808 (effective November 1, 2018).''.

(C) References to 18 U.S.C. § 876

The Commentary to § 2A4.2 captioned ''Statutory Provisions'' is amended by striking ''§§ 876,'' and inserting ''§§ 876(a),''.

The Commentary to § 2A6.1 captioned ''Statutory Provisions'' is amended by striking ''876,'' and inserting ''876(c),''.

The Commentary to § 2B3.2 captioned ''Statutory Provisions'' is amended by striking ''§§ 875(b), 876,'' and inserting ''§§ 875(b), (d), 876(b), (d),''.

Appendix A (Statutory Index) is amended by striking the line referenced to 18 U.S.C. § 876 and inserting before the line referenced to 18 U.S.C. § 877 the following new line references:

''18 U.S.C. § 876(a)	2A4.2, 2B3.2
18 U.S.C. § 876(b)	2B3.2
18 U.S.C. § 876(c)	2A6.1
18 U.S.C. § 876(d)	2B3.2, 2B3.3''.

(D) Clerical Changes

The Commentary to § 1B1.11 captioned ''Background'' is amended by striking ''133 S. Ct. 2072, 2078'' and inserting ''569 U.S. 530, 533''.

The Commentary to § 3D1.1 captioned ''Background'' is amended by striking ''Chapter 3, Part E (Acceptance of Responsibility) and Chapter 4, Part B (Career Offenders and Criminal Livelihood)'' and inserting ''Chapter Three, Part E (Acceptance of Responsibility) and Chapter Four, Part B (Career Offenders and Criminal Livelihood)''.

The Commentary to § 5G1.3 captioned ''Background'' is amended by striking ''122 S. Ct. 1463, 1468'' and inserting ''566 U.S. 231, 236'', and by striking ''132 S. Ct. at 1468'' and inserting ''566 U.S. at 236''.

[FR Doc. 2018–27505 Filed 12–19–18; 8:45 am]

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Part III

Environmental Protection Agency

40 CFR Part 60

Review of Standards of Performance for Greenhouse Gas Emissions From New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units; Proposed Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 60

[EPA–HQ–OAR–2013–0495; FRL–9987–85–OAR]

RIN 2060–AT56

Review of Standards of Performance for Greenhouse Gas Emissions From New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing amendments to the rulemaking titled ''Standards of Performance for Greenhouse Gas Emissions from New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units (EGUs),'' which the EPA promulgated by notice dated October 23, 2015 (*i.e.,* the 2015 Rule). Specifically, the EPA proposes to amend its previous determination that the best system of emission reduction (BSER) for newly constructed coal-fired steam generating units (*i.e.,* EGUs) is partial carbon capture and storage (CCS). Instead, the EPA proposes to find that the BSER for this source category is the most efficient demonstrated steam cycle (*e.g.,* supercritical steam conditions for large units and subcritical steam conditions for small units) in combination with the best operating practices. The EPA proposes to revise the standard of performance for newly constructed steam generating units as separate standards of performance for large and small steam generating units that reflect the Agency's amended BSER determination. In addition, the EPA proposes to revise the standard of performance for reconstructed steam generating units to be separate standards of performance for reconstructed large and small steam generating units, consistent with the proposed revised standards for newly constructed steam generating units. The EPA also proposes separate standards of performance for newly constructed and reconstructed coal refuse-fired EGUs. In addition, the EPA proposes to revise the maximally stringent standards for large modifications of steam generating units to be consistent with the standards for reconstructed large and small steam generating units. The EPA is not proposing to amend and is not reopening the standards of performance for newly constructed or reconstructed stationary combustion turbines. The EPA is also proposing to make other miscellaneous technical changes in the regulatory requirements.

DATES: *Comments.* Comments must be received on or before February 19, 2019.

Public Hearing. The EPA is planning to hold at least one public hearing in response to this proposed action. Information about the hearing, including location, date, and time, along with instructions on how to register to speak at the hearing, will be published in a second **Federal Register** notice.

ADDRESSES: *Comments.* Submit your comments, identified by Docket ID No. EPA–HQ–OAR–2013–0495, at *https://www.regulations.gov.* Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from *Regulations.gov*. See **SUPPLEMENTARY INFORMATION** for detail about how the EPA treats submitted comments. *Regulations.gov* is our preferred method of receiving comments. However, other submission methods are accepted:

- *Email: a-and-r-docket@epa.gov.* Include Docket ID No. EPA–HQ–OAR–2013–0495 in the subject line of the message.
- *Fax:* (202) 566–9744. Attention Docket ID No. EPA–HQ–OAR–2013–0495.
- *Mail:* To ship or send mail via the United States Postal Service, use the following address: U.S. Environmental Protection Agency, EPA Docket Center, Docket ID No. EPA–HQ–OAR–2013–0495, Mail Code 28221T, 1200 Pennsylvania Avenue NW, Washington, DC 20460.
- *Hand/Courier Delivery:* Use the following Docket Center address if you are using express mail, commercial delivery, hand delivery, or courier: EPA Docket Center, EPA WJC West Building, Room 3334, 1301 Constitution Avenue NW, Washington, DC 20004. Delivery verification signatures will be available only during regular business hours.

FOR FURTHER INFORMATION CONTACT: For questions about this proposed action, contact Mr. Christian Fellner, Sector Policies and Programs Division (Mail Code D205–01), Office of Air Quality Planning and Standards, U.S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711; telephone number: (919) 541–4003; fax number: (919) 541–4991; and email address: *fellner.christian@epa.gov.*

For information about the applicability of the new source performance standards (NSPS) to a particular entity, contact Sara Ayres, U.S. Environmental Protection Agency, Region 5, 77 West Jackson Boulevard (Mail Code E–19J), Chicago, Illinois 60604–3507; telephone number (312) 353–6266; and email address: *ayres.sara@epa.gov.*

SUPPLEMENTARY INFORMATION:

Docket. The EPA has established a docket for this rulemaking under Docket ID No. EPA–HQ–OAR–2013–0495. All documents in the docket are listed in *Regulations.gov.* Although listed, 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. Publicly available docket materials are available either electronically in *Regulations.gov* or in hard copy at the EPA Docket Center, Room 3334, EPA WJC West Building, 1301 Constitution Avenue NW, Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the EPA Docket Center is (202) 566–1742.

Instructions. Direct your comments to Docket ID No. EPA–HQ–OAR–2013–0495. The EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *https://www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be CBI or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *https://www.regulations.gov* or email. This type of information should be submitted by mail as discussed below.

The EPA may publish any comment received to its public docket. Multimedia submissions (audio, video, *etc.*) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.,* on the Web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *https://www.epa.gov/dockets/commenting-epa-dockets.*

The *https://www.regulations.gov* website allows you to submit your comments anonymously, which means the EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to the EPA without going through *https://www.regulations.gov,* your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the internet. If you submit an electronic comment, the EPA recommends that you include your name and other contact information in the body of your comment and with any digital storage media you submit. If the EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, the EPA may not be able to consider your comment. Electronic files should not include special characters or any form of encryption and be free of any defects or viruses. For additional information about the EPA's public docket, visit the EPA Docket Center homepage at *https://www.epa.gov/dockets.*

The EPA is soliciting comment on numerous aspects of the proposed rule. The EPA has indexed each comment solicitation with an alpha-numeric identifier (*e.g.,* ''C–1,'' ''C–2,'' ''C–3,'' . . .) to provide a consistent framework for effective and efficient provision of comments. Accordingly, the EPA asks that commenters include the corresponding identifier when providing comments relevant to that comment solicitation. The EPA asks that commenters include the identifier in either a heading, or within the text of each comment (*e.g.,* ''In response to solicitation of comment C–1, . . .'') to make clear which comment solicitation is being addressed. The EPA emphasizes that the Agency is not limiting comment to these identified areas and encourage provision of any other comments relevant to this proposal.[1]

Submitting CBI. Do not submit information containing CBI to the EPA through *https://www.regulations.gov* or email. Clearly mark the information that you claim to be CBI. For CBI information on any digital storage media that you mail to the EPA, mark the outside of the digital storage media as CBI and then identify electronically within the digital storage media the specific information that is claimed as CBI. In addition to one complete version of the comments that includes information claimed as CBI, you must submit a copy of the comments that does not contain the information claimed as CBI directly to the public docket through the procedures outlined in *Instructions* above. If you submit any digital storage media that does not contain CBI, mark the outside of the digital storage media clearly that it does not contain CBI. Information not marked as CBI will be included in the public docket and the EPA's electronic public docket without prior notice. Information marked as CBI will not be disclosed except in accordance with procedures set forth in 40 Code of Federal Regulations (CFR) part 2. Send or deliver information identified as CBI only to the following address: OAQPS Document Control Officer (C404–02), OAQPS, U.S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711, Attention Docket ID No. EPA–HQ–OAR–2013–0495.

Preamble Acronyms and Abbreviations. The EPA uses multiple acronyms and terms in this preamble. While this list may not be exhaustive, to ease the reading of this preamble and for reference purposes, the EPA defines the following terms and acronyms here:

AEO Annual Energy Outlook
BACT best available control technology
BSER best system of emission reduction
Btu/kWh British thermal units per kilowatt-hour
Btu/lb British thermal units per pound
°C degrees Celsius
CAA Clean Air Act
CAAA Clean Air Act Amendments
CAMD Clean Air Markets Division
CBI confidential business information
CBO Congressional Budget Office
CCS carbon capture and storage (or sequestration)
CEMS continuous emissions monitoring system
CFB circulating fluidized bed
CFR Code of Federal Regulations
CH_4 methane
CHP combined heat and power
CO carbon monoxide
CO_2 carbon dioxide
CSP concentrated solar power
DC District of Columbia
D.C. Circuit United States Court of Appeals for the District of Columbia Circuit
DOE Department of Energy
ECMPS emissions collection and monitoring plan system
EGU electric utility generating unit
EIA U.S. Energy Information Administration
EOR enhanced oil recovery
EPA Environmental Protection Agency
°F degrees Fahrenheit
FB fluidized bed
FGD flue gas desulfurization
FLGR™ fuel lean gas reburning
GHG greenhouse gas
GHGRP Greenhouse Gas Reporting Program
GJ/h gigajoules per hour
GPM gallons per minute
GS geologic sequestration
GW gigawatts
H_2 hydrogen gas
HAP hazardous air pollutant(s)
HFC hydrofluorocarbon
Hg mercury
HRSG heat recovery steam generator
ICR information collection request
IGCC integrated gasification combined cycle
IRPs Integrated Resource Plans
km kilometers
lb CO_2/MMBtu pounds of CO_2 per million British thermal units
lb CO_2/MWh pounds of CO_2 per megawatt-hour
lb CO_2/MWh-gross pounds of CO_2 per megawatt-hour on a gross output basis
lb CO_2/MWh-net pounds of CO_2 per megawatt-hour on a net output basis
LCOE levelized cost of electricity
M million
MMBtu/h million British thermal units per hour
MPa megapascals
MW megawatts
MWh megawatt-hours
MW_{net} megawatts-net
N_2 molecular nitrogen
N_2O nitrous oxide
NAAQS national ambient air quality standards
NAICS North American Industry Classification System
NETL National Energy Technology Laboratory
NGCC natural gas combined cycle
NGR natural gas reburning
NO_X nitrogen oxides
NSPS new source performance standards
NTTAA National Technology Transfer and Advancement Act
O&M operation and maintenance
OAQPS Office of Air Quality Planning and Standards
OFA overfire air
OMB Office of Management and Budget
PC pulverized coal
PFC perfluorocarbon
PM particulate matter
PRA Paperwork Reduction Act
PSD Prevention of Significant Deterioration
psi pounds per square inch
psig pounds per square inch gauge
QA quality assurance
RCRA Resource Conservation and Recovery Act
RFA Regulatory Flexibility Act
SBA Small Business Administration
SCCFB supercritical circulating fluidized bed
SCE&G South Carolina Electric and Gas
SCPC supercritical pulverized coal
SCR selective catalytic reduction
SF_6 sulfur hexafluoride
SO_2 sulfur dioxide
SSM startup, shutdown, and malfunction
T&S transmission and storage
TSD technical support document
UAMPS Utah Associated Municipal Power Systems
$\mu g/m^3$ micrograms per cubic meter
UMRA Unfunded Mandates Reform Act of 1995

[1] In this proposal, in some instances, the EPA identifies an issue that the Agency has previously addressed, and states that the Agency is not re-opening that issue in this proposal. The EPA will not consider such an issue as relevant to this proposal.

U.S. United States
U.S.C. United States Code
VCS voluntary consensus standard

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I. General Information

A. Executive Summary

1. Proposed Revisions to the 2015 Rulemaking

The EPA is revisiting several portions of the Standards of Performance for Greenhouse Gas Emissions from New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units (EGUs), which was promulgated on October 23, 2015 (80 FR 64510). First, for newly constructed fossil fuel-fired electric utility steam generating units that are either utility boilers or integrated gasification combined cycle (IGCC) units, the EPA proposes to revise the BSER to be the most efficient demonstrated steam cycle (*i.e.,* supercritical steam conditions for large EGUs and best available subcritical steam conditions for small EGUs) [2] in combination with the best operating practices, instead of partial CCS. The primary reason for this proposed revision is the high costs and limited geographic availability of CCS. Based on the proposed revisions to the BSER, the EPA is proposing to establish revised (*i.e.,* higher) emission rates as the standards of performance for large and small EGUs (*See* Table 1). Further, for EGUs that undertake a reconstruction, because the standards for reconstructed EGUs are also based on best available efficiency technology, the EPA is proposing to revise those standards to consist of higher emission rates for large and small EGUs to be consistent with the standards for newly constructed EGUs (*See* Table 1). The EPA also proposes separate standards of performance for newly constructed and reconstructed coal refuse-fired EGUs (*See* Table 1). In addition, while the EPA is not proposing to revise the BSER identified in the 2015 Rule (which is based on the individual EGU's best demonstrated performance) for fossil fuel-fired electric utility steam generating units that undertake large modifications [3] (*i.e.,* modifications that result in an increase in hourly emissions of more than 10 percent), the EPA proposes to revise the maximally stringent standards [4] (that is, the level that is the most stringent that the standard can be) to be consistent with the proposed revised standards for new and reconstructed EGUs (*See* Table 1). Additionally, the EPA proposes minor amendments to the applicability criteria for combined heat and power (CHP) and non-fossil EGUs to reflect the original intended coverage. Finally, with respect to EGUs that undertake small modifications (*i.e.,* modifications that result in an increase in hourly emissions of 10 percent or less) for which standards were not included in the 2015 Rule, the EPA is soliciting comment on standards of performance based on a unit's historical performance and how to best account for emissions variability due to changes in the mode of operation (Comment C–1). Table 1 shows the proposed emission standards for newly constructed and reconstructed EGUs, as well as modified EGUs.

[2] A subcritical EGU operates at pressures where water first boils and is then converted to superheated steam. A supercritical steam generator EGU operates at pressures in excess of the critical pressure of water and heats water to produce superheated steam without boiling. While often referred to as a supercritical boiler, no boiling actually occurs in the device and the term ''boiler'' should technically not be used for a supercritical pressure steam generator. *Note:* the term ''EGU'' is intended to refer to the affected facility (also referred to as the affected ''source'' or ''unit'').

[3] Under 40 CFR 60.14(h), a modification of an existing electric utility steam generating unit is defined as a physical change or change in the method of operation of the unit that increases the maximum hourly emissions of any regulated pollutant above the maximum hourly emissions achievable at that unit during the 5 years prior to the change.

[4] The maximally stringent standard for modified EGUs is the numeric standard for reconstructed EGUs, even if the emission rate based on best annual performance is lower than that numeric standard.

TABLE 1—SUMMARY OF BSER AND PROPOSED STANDARDS FOR AFFECTED SOURCES

Affected source	BSER	Emissions standard
New and Reconstructed Steam Generating Units and IGCC Units.	Most efficient generating technology in combination with best operating practices.	1. 1,900 lb CO_2/MWh-gross for sources with heat input >2,000 MMBtu/h. 2. 2,000 lb CO_2/MWh-gross for sources with heat input ≤2,000 MMBtu/h *OR* 3. 2,200 lb CO_2/MWh-gross for coal refuse-fired sources.
Modified Steam Generating Units and IGCC Units.	Best demonstrated performance ..	A unit-specific emission limit determined by the unit's best historical annual CO_2 emission rate (from 2002 to the date of the modification); the emission limit will be no more stringent than: 1. 1,900 lb CO_2/MWh-gross for sources with heat input >2,000 MMBtu/h. 2. 2,000 lb CO_2/MWh-gross for sources with heat input ≤2,000 MMBtu/h *OR* 3. 2,200 lb CO_2/MWh-gross for coal refuse-fired sources.

The EPA is not proposing to amend and is not reopening the standards of performance for newly constructed or reconstructed stationary combustion turbines. The EPA is also proposing to make other miscellaneous technical changes to the regulations.

2. Costs and Benefits

When the EPA promulgated the 2015 Rule, it took note of both utility announcements and U.S. Energy Information Administration (EIA) modeling and, based on that information, concluded that ''even in the absence of this rule, (i) existing and anticipated economic conditions are such that few, if any, fossil-fuel-fired steam-generating EGUs will be built in the foreseeable future,'' and that ''(ii) utilities and project developers are expected to choose new generation technologies (primarily NGCC) that would meet the final standards'' and also ''renewable generating sources that are not affected by these final standards.'' *See* 80 FR 64515. The EPA, therefore, projected that the 2015 Rule would ''result in negligible CO_2 emission changes, quantified benefits, and costs by 2022 as a result of the performance standards for newly constructed EGUs.'' *Id.* The Agency went on to say that it had been ''notified of few power sector NSPS modifications or reconstructions.'' Based on that additional information, the EPA said it ''expects that few EGUs will trigger either the modification or the reconstruction provisions'' of the 2015 Rule. *Id.* at 64516.

The EPA believes that the projections it made in conjunction with its promulgation of the 2015 Rule remain generally correct, in that, as explained in the economic impact analysis for this proposed rule, in the period of analysis, recent EPA and EIA analyses project there to be, at most, few new, reconstructed, or modified sources that will trigger the provisions the EPA is proposing. Consequently, the EPA has conducted an illustrative analysis of the costs for a representative new unit. Based on this analysis, which is presented in the economic impact analysis, the EPA projects this proposed rule will not result in any significant carbon dioxide (CO_2) emission changes or costs. This analysis reflects the best data available to the EPA at the time the modeling was conducted. As with any modeling of future projections, many of the inputs are uncertain. In this context, notable uncertainties, in the future, include the cost of fuels, the cost to operate existing power plants, the cost to construct and operate new power plants, infrastructure, demand, and policies affecting the electric power sector. The modeling conducted for this economic impact analysis is based on estimates of these variables, which were derived from the data currently available to the EPA. However, future realizations could deviate from these expectations as a result of changes in wholesale electricity markets, federal policy intervention, including mechanisms to incorporate value for onsite fuel storage, or substantial shifts in energy prices. The results presented in this economic impact analysis are not a prediction of what will happen, but rather a projection describing how this proposed regulatory action may affect electricity sector outcomes in the absence of unexpected shocks. The results of this economic impact analysis should be viewed in that context.

B. Types of Sources

Fossil fuel-fired EGUs take two forms that are relevant for present purposes: Those that are steam generating units and those that use gasification technology.[5] Fossil fuel-fired steam generating units can burn natural gas, oil, or coal. However, coal is the dominant fuel for electric utility steam generating units. Coal-fired steam generating units are primarily either pulverized coal (PC) or fluidized bed (FB) steam generating units.[6] At a PC steam generating unit, the coal is crushed (pulverized) into a powder to increase its surface area. The coal powder is then blown into a steam generating unit and burned. In a fossil fuel-fired steam generating unit using FB combustion, the solid fuel is burned in a layer of heated particles suspended in flowing air. Power can also be generated from coal or other fuels using gasification technology. An IGCC unit gasifies coal or petroleum coke to form a synthetic gas (or syngas) composed of carbon monoxide (CO) and hydrogen (H_2), which can be combusted in a combined cycle system to generate power.

Natural gas-fired EGUs typically use one of two technologies: Natural gas combined cycle (NGCC) or simple cycle combustion turbines. NGCC units first generate power from a combustion turbine engine (the combustion cycle).[7] The unused heat from the combustion turbine engine is then routed to a heat recovery steam generator (HRSG) that generates steam, which is then used to produce power using a steam turbine (the steam cycle). Combining these generation cycles increases the overall efficiency of the system. Simple cycle combustion turbines only use a combustion turbine engine to produce

[5] Fossil fuel-fired EGUs also include combustion turbines, but the EPA is not proposing any changes to standards for those types of sources in this rulemaking.

[6] Fossil fuel-fired utility steam generating units (*i.e.,* boilers) are most often operated using coal as the primary fuel. However, some utility boilers use natural gas and/or fuel oil as the primary fuel.

[7] Note that natural gas can also be used as a fuel in a steam generating EGU (boiler) and many existing coal- and oil-fired utility boilers have repowered as natural gas-fired units. However, a natural gas-fired utility boiler is not currently an economically or technologically viable choice for construction of a new steam generating unit EGU (80 FR 64515).

electricity (*i.e.,* there is no heat recovery or steam cycle).

C. The 2015 Rulemaking, Reconsideration, and Litigation

On April 13, 2012, the EPA first proposed a NSPS for greenhouse gas (GHG) emissions from fossil fuel-fired EGUs (77 FR 22392). That proposal identified as the BSER for a coal-fired power plant building a natural gas-fired power plant (*Id.* at 22394). On January 8, 2014, the EPA rescinded that proposal and replaced it with a supplemental proposal that identified partial CCS as the BSER for coal-fired power plants [8] (79 FR 1430). On October 23, 2015, the EPA finalized the Standards of Performance for Greenhouse Gas Emissions from New, Modified, and Reconstructed Stationary Sources: Electric Generating Units (80 FR 64510). In that action, the EPA issued final standards of performance to limit emissions of GHG pollution manifested as CO_2 [9] from newly constructed, modified, and reconstructed fossil fuel-fired electric utility steam generating units (*i.e.,* utility boilers and IGCC EGUs) and newly constructed and reconstructed stationary combustion turbine EGUs. These final standards are codified in 40 CFR part 60, subpart TTTT.

The 2015 standards of performance for newly constructed fossil fuel-fired steam generating units [10] were based on the performance of a new, highly efficient, supercritical pulverized coal (SCPC) EGU, implementing post-combustion partial CCS technology, which the EPA determined to be the BSER under Clean Air Act (CAA) section 111(b) for these sources. The EPA concluded that CCS was adequately demonstrated (including being technically feasible) and widely available, and could be implemented at reasonable cost. The EPA did not determine natural gas co-firing or IGCC technology (either with natural gas co-firing or implementing partial CCS) to be BSER. However, the Agency did identify them as alternative methods of compliance.

The EPA also issued final standards for steam generating units that implement ''large modifications,'' (*i.e.,* modifications resulting in an increase in hourly CO_2 emissions of more than 10 percent). The standards of performance for modified steam generating units that make large modifications are based on each affected unit's own best historical performance as the BSER. The EPA did not issue final standards for steam generating units that implement ''small modifications'' (*i.e.,* modifications resulting in an increase in hourly CO_2 emissions of less than or equal to 10 percent).

For steam generating units that undergo a ''reconstruction'' (*i.e.,* the replacement of components of an existing EGU to an extent that both: (1) The fixed capital cost of the new components exceeds 50 percent of the fixed capital cost that would be required to construct a comparable entirely new EGU, and (2) it is technologically and economically feasible to meet the applicable standards),[11] the EPA finalized standards based on the performance of the most efficient generating technology for these types of units as the BSER (*i.e.,* reconstructing the boiler as necessary to use steam with higher temperature and pressure, even if the boiler was not originally designed to do so).[12] The 2015 emission standard for large EGUs (greater than approximately 200 megawatts (MW)) was based on the performance of a well-operated PC EGU using supercritical steam conditions. The emission standard for small EGUs (less than approximately 200 MW) was based on the performance of a well-operated PC using the best available subcritical steam conditions. The difference in the standards for larger and smaller EGUs was based on the commercial availability of higher pressure/temperature steam turbines (*e.g.,* supercritical steam turbines) for large EGUs. While it is technically possible to design smaller supercritical steam turbines, due to the lack of commercial availability, the EPA was not able to access sufficient information regarding the cost of developing a specially designed steam turbine to determine that this was appropriate for inclusion as BSER.

The EPA has historically been notified of only a limited number of NSPS modifications involving fossil fuel-fired steam generating units. *See* Standards of Performance for Greenhouse Gas Emissions for New Stationary Sources: Electric Utility Generating Units—Proposed Rule, 77 FR 22392, 22400 (April 13, 2012). Given the limited information, the Agency concluded during the 2015 rulemaking that it lacked sufficient information to establish standards of performance for all types of modifications at steam generating units. Instead, the EPA determined that it was appropriate to establish standards of performance only for affected modified steam generating units that undergo modifications resulting in an hourly increase in CO_2 emissions (mass per hour) of more than 10 percent (''large'' modifications) as compared to the source's highest hourly emission during the previous 5 years. The Agency determined that it had adequate information regarding the types of large, capital-intensive projects [13] that could result in large increases in hourly CO_2 emissions. Additionally, the Agency determined that it had adequate information regarding the types of measures available to control emissions from sources that undergo such modifications, and on the costs and effectiveness of such control measures. The EPA determined that the BSER for steam generating units that trigger the large modification provision is each affected unit's own best historic annual CO_2 emission rate (from 2002 to the date of the modification).

With respect to affected steam generating units that undergo modifications that result in smaller increases in CO_2 emissions (specifically, steam generating units that conduct modifications resulting in an increase in hourly CO_2 emissions (mass per hour) of 10 percent or less (''small'' modifications) compared to the source's highest hourly emission during the previous 5 years), the EPA concluded it did not have sufficient information and did not finalize any standard of performance or other requirements. The EPA continues to review whether it has sufficient information to establish appropriate standards for small modifications and is soliciting comment on options for determining appropriate standards in this action (Comment C–2).

[8] The applicability includes all fossil fuel-fired steam generating units (*e.g.,* natural gas and oil-fired EGUs), but the BSER determination focused on coal-fired EGUs.

[9] Greenhouse gas pollution is the aggregate group of the following gases: CO_2, methane (CH_4), nitrous oxide (N_2O), sulfur hexafluoride (SF_6), hydrofluorocarbons (HFCs), and perfluorocarbons (PFCs).

[10] The EPA also refers to fossil fuel-fired steam generating units as ''steam generating units'' or as ''utility boilers and IGCC units.'' These are units whose emission of criteria pollutants are covered under 40 CFR part 60, subpart Da. Criteria pollutants are those for which the EPA issues health criteria pursuant to CAA section 108, issues national ambient air quality standards (NAAQS) pursuant to CAA section 109, promulgates area designations of attainment, nonattainment, or unclassifiable pursuant to CAA section 107, and reviews and approves or disapproves state implementation plan (SIP) submissions and issues federal implementation plans (FIPs) pursuant to CAA section 110. GHG are not criteria pollutants.

[11] 40 CFR 60.15.

[12] Steam with higher temperature and pressure has more thermal energy that can be more efficiently converted to electrical energy.

[13] Major facility upgrades involving the refurbishment or replacement of steam turbines or other equipment upgrades that could significantly increase an EGU's capacity to burn more fossil fuel, thereby resulting in a large emissions increase.

The 2015 Rule also finalized standards of performance for newly constructed and reconstructed stationary combustion turbine EGUs. For newly constructed and reconstructed base load natural gas-fired stationary combustion turbines, the EPA finalized a standard based on efficient NGCC technology as the BSER. For newly constructed and reconstructed non-base load natural gas-fired and multi-fuel-fired (both base load and non-base load) stationary combustion turbines, the EPA finalized a heat input-based clean fuels standard. The EPA did not promulgate final standards of performance for modified stationary combustion turbines due to lack of information.

The EPA received six petitions for reconsideration of the 2015 final CAA section 111(b) GHG NSPS rule. The EPA denied five of the petitions on the basis they did not satisfy one or both of the statutory conditions for reconsideration under CAA section 307(d)(7)(B), and deferred action on a petition that raised the issue of the treatment of biomass on May 6, 2016 (81 FR 27442). Multiple parties also filed petitions for judicial review of the 2015 Rule. These petitions were consolidated into a single case and the petitioners filed opening written briefs in October 2016. The EPA and supporting intervenors filed opening written briefs in December 2016. Next, petitioners submitted written reply briefs in January 2017. On April 28, 2017, the United States Court of Appeals for the District of Columbia granted the EPA's motion to hold the cases in abeyance while the Agency reviews the 2015 Rule and considers whether to propose revisions to it.

D. The Purpose of This Regulatory Action

Executive Order 13783 (Promoting Energy Independence and Economic Growth) directs all executive departments and agencies, including the EPA, to ''immediately review existing regulations that potentially burden the development or use of domestically produced energy resources and appropriately suspend, revise, or rescind those that unduly burden the development of domestic energy resources beyond the degree necessary to protect the public interest or otherwise comply with the law.'' [14] Moreover, the Executive Order directs the EPA to undertake this process of review with regard to the New Source Rule issued under CAA section 111(b).

In a document signed the same day as Executive Order 13783 and published in the **Federal Register** at 82 FR 16330 (April 4, 2017), the EPA announced that, consistent with the Executive Order, it was initiating its review of the Standards of Performance for Greenhouse Gas Emissions from New, Modified, and Reconstructed Stationary Sources: Electric Generating Units, and providing notice of forthcoming proposed rulemakings consistent with the Executive Order. As explained below, that review has led the EPA to propose to revise the BSER determinations for new, reconstructed, and modified coal-fired EGUs, including reconsideration issues previously denied by the Agency.

E. Does this action apply to me?

Table 2 of this preamble lists the regulated industrial source categories that are the subject of this proposal. Table 2 is not intended to be exhaustive, but rather provides a guide for readers regarding the entities that this proposed action is likely to affect. The proposed standards, once promulgated, will be directly applicable to the affected sources. To determine whether your facility, company, business, organization, *etc.,* would be regulated by this proposed action, you should examine the applicability criteria in 40 CFR 60.1. If you have questions regarding the applicability of this action to a particular entity, consult either the air permitting authority for the entity or your EPA Regional representative as listed in 40 CFR 60.4 (General Provisions).

TABLE 2—INDUSTRIAL SOURCE CATEGORIES AFFECTED BY THIS PROPOSED ACTION

Category	NAICS code [1 2]	Examples of regulated entities
Industry	221112	Fossil fuel electric power generating units.
Federal government	[3] 221112	Fossil fuel electric power generating units owned by the federal government.
State/local government	[3] 221112	Fossil fuel electric power generating units owned by municipalities.
Tribal government	921150	Fossil fuel electric power generating units in Indian Country.

[1] North American Industry Classification System.
[2] Includes NAICS codes for source categories that own and operate electric power generating units (including boilers and stationary combined cycle combustion turbines).
[3] Federal, state, or local government-owned and operated establishments are classified according to the activity in which they are engaged.

F. Where can I get a copy of this document and other related information?

In addition to being available in the docket, an electronic copy of this action is available on the internet. Following signature by the Administrator, the EPA will post a copy of this proposed action at *https://www.epa.gov/stationary-sources-air-pollution/proposal-nsps-ghg-emissions-new-modified-and-reconstructed-egus.* Following publication in the **Federal Register**, the EPA will post the **Federal Register** version of the proposal and key technical documents at this same website.

A version of the regulatory language that incorporates the proposed changes in this action in track changes (*i.e.,* redline) is available in the docket for this action (Docket ID No. EPA–HQ–OAR–2013–0495).

II. Proposed Requirements for New, Reconstructed, and Modified Sources

A. Applicability Requirements

The EPA identified the applicability requirements for the 40 CFR part 60, subpart TTTT standards in the 2015 rulemaking, and the Agency is not proposing to revise or reopening those requirements, except as noted below. Those requirements are as follows: In general, the EPA refers to fossil fuel-fired electric generating units that would be subject to a CAA section 111 emission standard as ''affected'' EGUs or units. An EGU is any fossil fuel-fired electric utility steam generating unit (*i.e.,* a utility boiler or IGCC unit) or combustion turbine (in either simple cycle or combined cycle configuration). To be considered an affected EGU under 40 CFR part 60, subpart TTTT, the unit must meet the following applicability criteria: The unit must both: (i) Be

[14] *Id.,* Section 1(c).

capable of combusting more than 250 million British thermal units per hour (MMBtu/h) (260 gigajoules per hourA (GJ/h)) of heat input of fossil fuel (either alone or in combination with any other fuel); [15] and (ii) serve a generator capable of supplying more than 25 MW net to a utility distribution system (*i.e.,* for sale to the grid).[16] However, 40 CFR part 60, subpart TTTT includes applicability exemptions for certain EGUs, including: (1) Non-fossil fuel units subject to a federally enforceable permit that limits the use of fossil fuels to 10 percent or less of their heat input capacity on an annual basis; (2) CHP units that are subject to a federally enforceable permit limiting annual net electric sales to no more than either the unit's design efficiency multiplied by its potential electric output, or 219,000 megawatt-hours (MWh), whichever is greater; (3) stationary combustion turbines that are not physically capable of combusting natural gas (*e.g.,* those that are not connected to a natural gas pipeline); (4) utility boilers and IGCC units that have always been subject to a federally enforceable permit limiting annual net electric sales to one-third or less of their potential electric output (*e.g.,* limiting hours of operation to less than 2,920 hours annually) or limiting annual electric sales to 219,000 MWh or less; (5) municipal waste combustors that are subject to 40 CFR part 60, subpart Eb; (6) commercial or industrial solid waste incineration units subject to 40 CFR part 60, subpart CCCC; and (7) certain projects under development, as discussed below.

The CAA defines a new or modified source for purposes of a given regulation as any stationary source that commences construction or modification after the publication of the proposed regulation. Thus, any standards of performance the Agency finalizes as part of this rulemaking will apply to EGUs that commence construction, reconstruction, or modification after the date of this proposal. (EGUs that commenced construction after the date of the proposal for the 2015 Rule and before the date of this proposal will remain subject to the standards of performance promulgated in that Rule.) A modification is any physical change in, or change in the method of operation of an existing source that increases the amount of any air pollutant emitted to which a standard applies.[17] The NSPS General Provisions (40 CFR part 60 subpart A) provide that an existing source is considered a new source if it undertakes a reconstruction.[18]

The EPA is proposing several changes to the applicability requirements. First, the EPA is proposing to change the exemption from applicability for EGUs (item 1 on the list above) on the grounds that they are considered non-fossil-fuel EGUs by revising the definition of non-fossil fuel EGUs from EGUs capable of ''combusting 50 percent or more non-fossil fuel'' to EGUs capable of ''*deriving* 50 percent or more *of the heat input* from non-fossil fuel *at the base load rating.*'' (emphasis added). This amendment is consistent with the original intent to cover only fossil fuel EGUs and would assure that solar thermal EGUs with natural gas backup burners, which are similar to other types of non-fossil fuel units in that most of their energy is derived from non-fossil fuel sources, are not subject to the requirements of 40 CFR part 60, subpart TTTT. The definition of base load rating would also be amended to include the heat input from non-combustion sources (*e.g.,* solar thermal). Next, the design efficiency of an EGU is used to determine the electric sales applicability threshold. 40 CFR part 60, subpart TTTT currently allows the use of three methods for determining the design efficiency.[19] To reduce compliance burden, the EPA is proposing to allow alternative methods as approved by the Administrator on a case-by-case basis.[20] The EPA is also proposing to change the applicability of paragraph 60.8(b) in Table 3 of subpart TTTT from no to yes. This amendment would allow the Administrator to approve alternatives to the test methods specified in subpart TTTT. Finally, to avoid potential double counting of electric sales, the EPA is proposing that for CHP units determining net electric sales, purchased power of the host facility would be determined based on the percentage of thermal power provided to the host facility by the specific CHP facility. If any of these amendments are not finalized, EGUs that would be exempted by the proposed amendments would remain subject to 40 CFR part 60, subpart TTTT.

B. Emission Standards

In this action, the EPA proposes revisions to the 2015 Rule's provisions for newly constructed coal-fired electric utility steam generating units (both utility boilers and IGCC units). The EPA proposes to revise its previous determination that the BSER for such newly constructed EGUs is partial CCS. The EPA bases this revision on (1) an updated analysis of what represents reasonable costs and (2) an updated analysis of the geographic availability of CCS. In addition, the EPA solicits comment on the technical feasibility of carbon capture technologies. Instead, the EPA proposes to create three subcategories of steam generating units: Large units, defined as units with heat input greater than 2,000 MMBtu/h; small units, defined as units with heat input less than or equal to 2,000 MMBtu/h; and units of any size (that meet the applicability criteria) and that are fired with coal refuse. The EPA proposes to find that for each of these subcategories, the BSER is the most efficient demonstrated steam cycle (*i.e.,* supercritical steam conditions for large units and best available subcritical steam conditions for small and coal refuse-fired units) in combination with the best operating practices. Unless stated otherwise, the EPA's use of the term supercritical steam conditions, or, more simply, supercritical, encompasses both ultra-supercritical and advanced ultra-supercritical steam conditions. There is no thermodynamic definition of ultra-supercritical or advanced ultra-supercritical steam conditions; rather, they are terms used to define subsets of supercritical steam conditions with higher temperatures and pressures.[21] The EPA is proposing revised standards of performance for newly constructed steam units in the three subcategories that reflect the Agency's proposed BSER determinations: 1,900 pounds of CO_2 per MWh of gross output (lb CO_2/MWh-gross) for large EGUs; 2,000 lb CO_2/MWh-gross for small EGUs, and 2,200 lb CO_2/MWh-gross for coal refuse-fired units.[22] The EPA is not proposing to

[15] The EPA refers to the capability to combust 250 MMBtu/h of fossil fuel as the ''base load rating criterion.'' Note that 250 MMBtu/h is equivalent to 73 MW or 260 GJ/h heat input.

[16] The EPA refers to the capability to supply 25 MW net to the grid as the ''total electric sales criterion.''

[17] 40 CFR 60.2.

[18] 40 CFR 60.15(a).

[19] Subpart TTTT currently lists ASME PTC 22 Gas Turbines, ASME PTC 46 Overall Plant Performance, and ISO 2314 Gas turbines—acceptance tests as approved methods to determine the design efficiency.

[20] Owners/operators of EGUs would petition the Administrator is writing to use an alternate method to determine the design efficiency. Administrator discretion is intentionally left broad and could include other ASME or ISO methods as well as data to demonstrate the design efficiency of the EGU.

[21] Supercritical, ultra-supercritical, and advanced ultra-supercritical steam generators operate at pressures greater than 22 megapascals (MPa) (3,205 pounds per square inch (psi)), temperatures greater than 550 degrees Celsius (°C) (1,022 degrees Fahrenheit (°F)), and use the same general steam generating unit design. The primary difference is that different materials are required to withstand the higher temperatures of ultra-supercritical and advanced ultra-supercritical steam conditions.

[22] In contrast, in the 2015 Rule, the EPA did not create any subcategories for new steam generating units.

revise its view in the 2015 Rule that natural gas co-firing and IGCC are alternate control technologies, but as described in section V.B of this preamble, not the BSER. The EPA invites the public to identify any additional information not considered by the Agency in the BSER analysis. (Comment C–3)

In addition, in this action, the EPA proposes to revise the 2015 Rule's standard of performance for reconstructed EGUs to be consistent with the numeric standards for new EGUs. By the same token, with respect to modified EGUs, the EPA proposes to revise the 2015 Rule's maximally stringent emissions rate for large modifications to be the same as the standards for newly constructed and reconstructed units in the same three subcategories (*e.g.,* while the standard would continue to be based on looking at average historical data, the EPA is proposing that the standard can be no lower than the new source standard). While the EPA is proposing revisions to the maximally stringent emission standards, the Agency is not proposing to revise or reopening the 2015 Rule's BSER determination, which was the use of the most efficient generation available in combination with best operating practices, based on historical emissions, or the associated standard of performance. The EPA is soliciting comment on standards of performance for ''small'' modifications based on a unit's best demonstrated historical performance and the most appropriate approach to account for emissions variability due to changes in the mode of operation and other factors (Comment C–4).

The EPA is not proposing to revise or reopening the 2015 Rule's requirement that the emission standards applicable to any type of EGU (however they may be revised in a final action on this proposal) apply at all times, including during periods of startup, shutdown, and malfunction (SSM). In addition, in this action, the EPA is not proposing to revise or reopening the air pollutants covered by the 2015 Rule or any of the Rule's continuous monitoring requirements; emissions performance testing requirements; continuous compliance requirements; or notification, recordkeeping, and reporting requirements. Furthermore, the EPA is not proposing to amend or reopening the 2015 Rule's BSER determination or standards of performance for new or reconstructed stationary combustion turbines.

Table 3 below summarizes the proposed standards of performance for three proposed subcategories of newly constructed and reconstructed EGUs as well as the proposed maximally stringent standards for modified EGUs. Consistent with the 2015 rulemaking, these emission standards would apply on a 12-operating month rolling average.

TABLE 3—SUMMARY OF BSER AND PROPOSED STANDARDS FOR AFFECTED SOURCES

Affected source	BSER	Emissions standard
New and Reconstructed Steam Generating Units and IGCC Units.	Most efficient generating technology in combination with best operating practices.	1. 1,900 lb CO_2/MWh-gross for sources with heat input >2,000 MMBtu/h. 2. 2,000 lb CO_2/MWh-gross for sources with heat input ≤2,000 MMBtu/h *OR* 3. 2,200 lb CO_2/MWh-gross for coal refuse-fired sources.
Modified Steam Generating Units and IGCC Units.	Best demonstrated performance ..	A unit-specific emission limit determined by the unit's best historical annual CO_2 emission rate (from 2002 to the date of the modification); the emission limit will be no more stringent than 1. 1,900 lb CO_2/MWh-gross for sources with heat input >2,000 MMBtu/h. 2. 2,000 lb CO_2/MWh-gross for sources with heat input ≤2,000 MMBtu/h *OR* 3. 2,200 lb CO_2/MWh-gross for coal refuse-fired sources.

The EPA is proposing that the amended emission standards apply to any EGUs that commence construction, reconstruction, or modification after December 20, 2018. The EPA is not aware of any coal fuel-fired EGUs that have commenced construction, reconstruction, or modification since January 8, 2014 (the applicability date of 40 CFR part 60, subpart TTTT). Therefore, no existing units would be impacted by the proposed revised BSER determination.

III. Legal Authority

A. Statutory Background

This action is governed by CAA section 111, which authorizes and directs the EPA to prescribe NSPS applicable to certain new stationary sources (including newly constructed, modified, and reconstructed sources).[23] As a preliminary step to regulation, the EPA lists categories of stationary sources that the Administrator, in his or her judgment, finds ''cause, or contribute significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare.'' the EPA has listed and regulated more than 60 stationary source categories under CAA section 111.[24]

The EPA's authority for this proposed rule is CAA section 111(b)(1). In both the 2015 Rule and the 2014 proposed rule, the EPA discussed the requirements of that provision and why the Rule met them. *See* 80 FR 64510, 64529–31 (2015 Rule), 79 FR 1430, 1455 (January 8, 2014) (2014 proposed rule). In summary, CAA section 111(b)(1)(A) requires the Administrator to establish a list of source categories to be regulated under CAA section 111. A category of sources is to be included on the list ''if in [the Administrator's] judgment it causes, or contributes significantly to, air pollution which may reasonably be anticipated to endanger public health and welfare.'' This determination is commonly referred to as an ''endangerment finding'' and that phrase encompasses both the ''causes or contributes significantly'' component and the ''endanger public health and welfare'' component of the determination. Once the Administrator lists a source category under CAA section 111(b)(1)(A), he or she then promulgates, under CAA section 111(b)(1)(B), ''standards of performance for new sources within such category.''

In the 2015 Rule, the EPA promulgated standards for CO_2 emissions from sources in two source categories, fossil fuel-fired electric utility steam generating units and combustion turbines. In the 2015 Rule,

[23] CAA section 111(b)(1)(A).

[24] *See* generally 40 CFR part 60, subparts D–MMMM.

the EPA explained that the Agency interprets the statute to require an endangerment finding to be made at the time the EPA lists the source category and to broadly concern emissions from the source category, and not to concern emissions of any particular pollutant that may be made subject to a revised or newly issued standard for a source category that has already been listed. The EPA further explained that CAA section 111(b) does not specify what pollutants the EPA should regulate once it lists a source category, so that the EPA may exercise its discretion to regulate particular pollutants as long as the EPA provides a rational basis for doing so. *See National Lime Ass'n* v. *EPA,* 627 F.2d 416, 431–32 n.48 (D.C. Cir. 1980).

In the 2015 Rule, the EPA described its rational basis for regulating CO_2 emissions from fossil fuel-fired EGUs, including that the CO_2 emissions from fossil fuel-fired EGUs are almost three times as much as the emissions from the next 10 source categories combined, and that the CO_2 emissions from even a single new coal-fired power plant may amount to millions of tons each year. The EPA added that even if it were required to make an endangerment finding for those emissions in order to regulate them, the same facts that provided the rational basis would qualify as an endangerment finding.[25]

A ''new source'' is ''any stationary source, the construction or modification of which is commenced after,'' in general, final standards applicable to that source are promulgated or, if earlier, proposed.[26] A modification is ''any physical change . . . or change in the method of operation . . . which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted'' to which the standard applies.[27] The EPA, through regulations, has determined that certain types of changes are exempt from consideration as a modification.[28] The EPA ''may distinguish among classes, types and sizes within categories of new sources for the purpose of establishing such standards.'' *See* CAA section 111(b)(2).

The NSPS General Provisions (40 CFR part 60, subpart A) provides that an existing source is considered to be a new source if it undertakes a ''reconstruction,'' which is the replacement of components of an existing EGU to an extent that both (1) the fixed capital cost of the new components exceeds 50 percent of the fixed capital cost that would be required to construct a comparable entirely new EGU, and (2) it is technologically and economically feasible to meet the applicable standards.[29]

Congress first enacted the definition of ''standard of performance'' as part of CAA section 111 in the 1970 Clean Air Act Amendments (CAAA), amended it in the 1977 CAAA, and amended it again in the 1990 CAAA to largely restore the original definition as it read in the 1970 CAAA. It is in the legislative history for the 1970 and 1977 CAAAs that Congress primarily addressed the definition as it read in those two versions of the statute, and that legislative history provides guidance in interpreting this provision.[30] In addition, the U.S. Court of Appeals for the D.C. Circuit has reviewed rulemakings under CAA section 111 on numerous occasions during the past 40 years, issuing decisions dated from 1973 to 2011,[31] through which the Court has developed a body of case law that interprets the term ''standard of performance.''

Section 111(b) of the CAA authorizes the EPA to set ''standards of performance'' for new, reconstructed, and modified stationary sources from listed source categories to minimize emissions of air pollutants to the environment. Under CAA section 111(a)(1), the EPA must set these standards at the level that reflects the ''best system of emission reduction . . . adequately demonstrated'' taking into account technical feasibility, costs, and non-air quality health and environmental impacts and energy requirements.[32] The text and legislative

[25] The EPA is proposing to retain the statutory interpretations and record determinations described in this paragraph. Nonetheless, the EPA is aware that various stakeholders have in the past made arguments opposing our views on these points, and the Agency sees value to allowing them to comment on these views in this rulemaking. Accordingly, the Agency will consider comments on the correctness of the EPA's interpretations and determinations and whether there are alternative interpretations that may be permissible, either as a general matter or specifically as applied to GHG emissions. For example, the Agency will consider comments on the issue of whether it is correct to interpret the ''endangerment finding'' as a finding that is only made once for each source category at the time that the EPA lists the source category or whether the EPA must make a new endangerment finding each time the Agency regulates an additional pollutant by an already-listed source category. Further, the EPA will consider comments on the issue of whether GHG emissions are different in salient respects from traditional emissions such that it would be appropriate to conduct a new ''endangerment finding'' with respect to GHG emissions from a previously listed source category. In addition, the EPA solicits comment on whether the Agency does have a rational basis for regulating CO_2 emissions from new coal-fired electric utility steam generating units and whether it would have a rational basis for declining to do so at this time, in light of, among other things, the following: (i) Ongoing and projected power sector trends that have reduced CO_2 emissions from the power sector, EIA, *Annual Energy Outlook 2018 with projections to 2050* (February 6, 2018), at 102, available at *https://www.eia.gov/outlooks/aeo/pdf/AEO2018.pdf,* due to reduced coal-fired generation, as the EPA discusses in the proposed Affordable Clean Energy rule, 83 FR 44746, 44750–51 (August 31, 2018); and (ii) as noted above, no more than a few new coal-fired EGUs can be expected to be built, which raises questions about whether new coal-fired EGUs contribute significantly to atmospheric CO_2 levels.

[26] CAA section 111(a)(2).

[27] CAA section 111(a)(4). *See* also 40 CFR 60.14 (concerning what constitutes a modification, how to determine the emission rate, how to determine an emission increase, and exempting specific actions that are not, by themselves, considered modifications).

[28] 40 CFR 60.2, 60.14(e).

[29] 40 CFR 60.15.

[30] In the 1970 CAAA, Congress defined ''standard of performance,'' under CAA section 111(a)(1), as—a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction) the Administrator determines has been adequately demonstrated.

In the 1977 CAAA, Congress revised the definition to distinguish among different types of sources, and to require that for fossil fuel-fired sources, the standard: (i) Be based on, in lieu of the ''best system of emission reduction . . . adequately demonstrated,'' the ''best *technological* system of continuous emission reduction . . . adequately demonstrated'' (emphasis added); and (ii) require a specific percentage reduction in emissions. In addition, in the 1977 CAAA, Congress expanded the parenthetical requirement that the Administrator consider the cost of achieving the reduction to also require the Administrator to consider ''any non-air quality health and environment impact and energy requirements.''

In the 1990 CAAA, Congress again revised the definition, this time repealing the requirements that the standard of performance be based on the best technological system and achieve a percentage reduction in emissions, and replacing those provisions with the terms used in the 1970 CAAA version of CAA section 111(a)(1) that the standard of performance be based on the ''best system of emission reduction . . . adequately demonstrated.'' This 1990 CAAA version is the current definition. Even so, because parts of the definition as it read under the 1977 CAAA were retained in the 1990 CAAA, *see* CAA section 111(a)(1), the explanation in the 1977 CAAA legislative history, and the interpretation in the case law, of those parts of the definition in the case law remain relevant to the definition as it reads currently.

[31] *Portland Cement Ass'n* v. *Ruckelshaus,* 486 F.2d 375 (D.C. Cir. 1973); *Essex Chemical Corp.; Portland Cement Ass'n* v. *EPA,* 665 F.3d 177 (D.C. Cir. 2011). *See* also *Delaware* v. *EPA,* No. 13–1093 LEXIS CITE (D.C. Cir. May 1, 2015).

[32] The standard that EPA develops, reflecting the performance of the BSER, commonly takes the form of a numeric emission limit, expressed as a numeric performance level that can either be normalized to a rate of output or input (*e.g.,* tons of pollution per amount of product produced—a so-called rate-based standard), or expressed as a numeric limit on mass of pollutant that may be emitted (*e.g.,* 100 micrograms per cubic meter ($\mu g/m^3$)—or parts per billion). Generally, the EPA does not prescribe a particular technological system that must be used to comply with a standard CAA section 111(b)(5) and (h). Rather, sources generally may select any measure or combination of measures that will achieve the emissions level of the standard of performance. CAA section 111(b)(5). In establishing standards of performance, EPA has significant discretion to create subcategories based on source type, class, or size. CAA section 111(b)(2); *see* also

history of CAA section 111, the EPA's regulatory interpretations of that provision, and relevant court decisions, identify factors for the EPA to consider in making a BSER determination. They include, among others, whether the system of emission reduction is technically feasible, whether the costs of the system are reasonable, the amount of emissions reductions the system would generate,[33] and whether the standard would effectively promote further deployment or development of advanced technology.[34]

The overall approach to determining the BSER, which incorporates the various elements, is as follows: First, the EPA identifies the ''system[s] of emission reduction'' that have been ''adequately demonstrated'' for a particular source category. Second, the EPA determines the ''best'' of these systems after evaluating the extent of emission reductions, costs, any non-air health and environmental impacts, and energy requirements. Third, the EPA selects an achievable standard for emissions—here, the emission rate—based on the performance of the BSER. The remainder of this subsection discusses the various elements in that analytical approach.

1. ''System[s] of Emission Reduction . . . Adequately Demonstrated''

The EPA's first step is to identify ''system[s] of emission reduction . . . adequately demonstrated.'' An ''adequately demonstrated'' system, according to the D.C. Circuit, is ''one which has been shown to be reasonably reliable, reasonably efficient and which can reasonably be expected to serve the interests of pollution control without becoming exorbitantly costly in an economic or environmental way.''[35] It does not mean that the system ''must be in actual routine use somewhere.''[36] Rather, the Court has said, ''[t]he Administrator may make a projection based on existing technology, though that projection is subject to the restraints of reasonableness and cannot be based on 'crystal ball' inquiry.''[37] The EPA has previously explained that the requirement that the standard for emissions be ''achievable'' based on the ''best system of emission reduction . . . adequately demonstrated'' indicates that one of the requirements for the technology or other measures that the EPA identifies as the BSER is that the measure must be technically feasible (81 FR 64538).

2. ''Best''

In determining which adequately demonstrated system of emission reduction is the ''best,'' the EPA considers the following factors:

a. Costs

Under CAA section 111(a)(1), the EPA is required to take into account ''the cost of achieving'' the required emission reductions. In several cases, the D.C. Circuit has elaborated on this cost factor and formulated the cost standard in various ways, stating that the EPA may not adopt a standard the cost of which would be ''exorbitant,''[38] ''greater than the industry could bear and survive,''[39] ''excessive,''[40] or ''unreasonable.''[41] As the EPA has explained in a prior rulemaking, for convenience, the EPA uses ''reasonableness'' to describe costs well within the bounds established by this jurisprudence.

The D.C. Circuit has indicated that the EPA has substantial discretion in its consideration of cost under CAA section 111(a). In several cases, the Court upheld standards that entailed significant costs, consistent with Congress's view that ''the costs of applying best practicable control technology be considered by the owner of a large new source of pollution as a normal and proper expense of doing business.''[42] *See Essex Chemical Corp.* v. *Ruckelshaus,* 486 F.2d 427, 440 (D.C. Cir. 1973), *cert. denied,* 416 U.S. 969 (1974);[43] *Portland Cement Association* v. *Ruckelshaus,* 486 F.2d 375, 387–88 (D.C. Cir. 1973); *Sierra Club* v. *Costle,* 657 F.2d 298, 313 (D.C. Cir. 1981) (upholding standard imposing controls on sulfur dioxide (SO_2) emissions from coal-fired power plants when the ''cost of the new controls . . . is substantial'').[44] Moreover, section 111(a) does not provide specific direction regarding what metric or metrics to use in considering costs, again affording the EPA considerable discretion in choosing a means of cost consideration.[45]

b. Non-Air Quality Health and Environmental Impacts

Under CAA section 111(a)(1), the EPA is required to take into account ''any non-air quality health and environmental impact'' in determining the BSER. As the D.C. Circuit has explained, this requirement makes explicit that a system cannot be ''best'' if it does more harm than good due to cross-media environmental impacts.[46]

c. Energy Considerations

Under CAA section 111(a)(1), the EPA is required to take into account ''energy requirements.'' As discussed below, the EPA may consider energy requirements on both a source-specific basis and a sector-wide, region-wide or nationwide basis. Considered on a source-specific basis, ''energy requirements'' entail, for example, the impact, if any, of the system of emission reduction on the source's own energy needs.

d. Amount of Emissions Reductions

As the EPA has previously explained, although the definition of ''standard of performance'' does not by its terms identify the amount of emissions from the category of sources or the amount of emission reductions achieved as factors the EPA must consider in determining the ''best system of emission reduction,'' the D.C. Circuit has stated that the EPA must in fact do so. *See* 81 FR at 64529; *See Sierra Club* v. *Costle,* 657 F.2d at 326.[47]

Lignite Energy Council v. *EPA,* 198 F. 3d 930, 933 (D.C. Cir. 1999).

[33] *See Sierra Club* v. *Costle,* 657 F.2d 298, 326 (D.C. Cir. 1981).

[34] *See id.* at 347.

[35] *Essex Chem. Corp.* v. *Ruckelshaus,* 486 F.2d 427, 433 (D.C. Cir. 1973), *cert. denied,* 416 U.S. 969 (1974).

[36] *Portland Cement Ass'n,* 486 F.2d at 391 (citations omitted) (discussing the Senate and House bills and reports from which the language in CAA section 111 grew).

[37] *Id.* (citations omitted).

[38] *Lignite Energy Council* v. *EPA,* 198 F.3d 930, 933 (D.C. Cir. 1999).

[39] *Portland Cement Ass'n* v. *EPA,* 513 F.2d 506, 508 (D.C. Cir. 1975).

[40] *Sierra Club* v. *Costle,* 657 F.2d at 343 (D.C. Cir. 1981).

[41] *Id.*

[42] 1977 House Committee Report at 184.

[43] The costs for these standards were described in the rulemakings. *See* 36 FR 24876 (December 23, 1971), 37 FR 5767, 5769 (March 21, 1972).

[44] Indeed, in upholding the EPA's consideration of costs under the provisions of the Clean Water Act authorizing technology-based standards based on performance of a best technology taking costs into account, courts have also noted the substantial discretion delegated to the EPA to weigh cost considerations with other factors. *Chemical Mfr's Ass'n* v. *EPA,* 870 F.2d 177, 251 (5th Cir. 1989); *Ass'n of Iron and Steel Inst.* v. *EPA,* 526 F.2d 1027, 1054 (3d Cir. 1975); *Ass'n of Pacific Fisheries* v. *EPA,* 615 F.2d 794, 808 (9th Cir. 1980).

[45] See, *e.g., Husqvarna AB* v. *EPA,* 254 F.3d 195, 200 (D.C. Cir. 2001) (where CAA section 213 does not mandate a specific method of cost analysis, the EPA may make a reasoned choice as to how to analyze costs).

[46] *Portland Cement,* 486 F. 2d at 384; *Sierra Club,* 657 F.2d at 331; *see* also *Essex Chemical Corp.,* 486 F.2d at 439 (remanding standard to consider solid waste disposal implications of the BSER determination).

[47] *Sierra Club* v. *Costle,* 657 F.2d 298 (D.C. Cir. 1981) was governed by the 1977 CAAA version of the definition of ''standard of performance,'' which revised the phrase ''best system'' to read, ''best *technological* system.'' As noted above, the 1990 CAAA deleted ''technological,'' and thereby returned the phrase to how it read under the 1970 CAAA. The court's interpretation of this phrase in *Sierra Club* to require consideration of the amount of air emissions reductions remains valid for the phrase ''best system.''

e. Sector or Nationwide Component of the BSER Factors

The D.C. Circuit has also interpreted CAA section 111 to allow (but not require) the EPA to consider the various factors it is required to consider on a national or regional level and over time, not only on a plant-specific level or as of the time of the rulemaking.[48] [49]

3. Achievability of the Standard for Emissions

The definition of ''standard of performance'' provides that the emission limit (*i.e.,* the ''standard for emissions'') that the EPA promulgates must be ''achievable'' based on performance of the BSER. *See* 81 FR at 64539–40 (discussing D.C. Circuit case law for requirements for achievability).

4. Expanded Use and Development of Technology

The D.C. Circuit has made clear that Congress intended for CAA section 111 to create incentives for new technology, and therefore, the EPA is required to consider technological innovation as one of the factors in determining the ''best system of emission reduction.'' [50]

5. Overall Agency Discretion To Balance the Factors

The D.C. Circuit has made clear that the EPA has broad discretion in determining the appropriate standard of performance under the definition in CAA section 111(a)(1), quoted above. Specifically, in *Sierra Club,* the Court explained that ''section 111(a) explicitly instructs the EPA to balance multiple concerns when promulgating a NSPS,'' [51] and emphasized that ''[t]he text gives the EPA broad discretion to weigh different factors in setting the standard.'' [52] In *Lignite Energy Council* v. *EPA,* 198 F.3d 930 (D.C. Cir. 1999), the Court reiterated:

Because section 111 does not set forth the weight that should be assigned to each of these factors, we have granted the agency a great degree of discretion in balancing them. . . . EPA's choice [of the 'best system'] will be sustained unless the environmental or economic costs of using the technology are exorbitant. . . . EPA [has] considerable discretion under section 111.[53]

B. Authority To Revise Existing Regulations

The EPA's ability to revisit existing regulations is well-grounded in the law. Specifically, the EPA has inherent authority to reconsider, repeal, or revise past decisions to the extent permitted by law so long as the Agency provides a reasoned explanation. *See Motor Vehicle Manufacturers Association of the United States* v. *State Farm Mutual Automobile Insurance Co.,* 463 US 29, 56–57 (1983) (''an agency changing its course must supply a reasoned analysis,'' *quoting Greater Boston Television Corp.* v. *FCC,* 143 F.2d 841, 842 (D.C. Cir.)). The CAA complements the EPA's inherent authority to reconsider prior rulemakings by providing the Agency with broad authority to prescribe regulations as necessary. *See* 42 U.S.C. 7601(a). The authority to reconsider prior decisions exists in part because the EPA's interpretations of statutes it administers ''[are not] instantly carved in stone,'' but must be evaluated ''on a continuing basis.'' *Chevron U.S.A. Inc.* v. *NRDC, Inc.,* 467 U.S. 837, 863–64 (1984). This is true, as is the case here, when review is undertaken ''in response to . . . a change in administrations.'' *National Cable & Telecommunications Ass'n* v. *Brand X Internet Services,* 545 U.S. 967, 981 (2005). Indeed, ''[a]gencies obviously have broad discretion to reconsider a regulation at any time.'' *Clean Air Council* v. *Pruitt,* 862 F.3d 1, 8–9 (D.C. Cir. 2017).

C. Authority To Regulate CO_2 From Fossil Fuel-Fired EGUs

The EPA's authority for this proposed rule is CAA section 111(b)(1). In the 2015 Rule, the EPA discussed the requirements of that provision and why the Rule met them (80 FR 64529–31). The EPA summarizes that discussion here, but is not re-opening any of the issues discussed: CAA section 111(b)(1)(A) requires the Administrator to establish a list of source categories to be regulated under section 111. A category of sources is to be included on the list ''if in [the Administrator's] judgment it causes, or contributes significantly to, air pollution which may reasonably be anticipated to endanger public health and welfare.'' This determination is commonly referred to as an ''endangerment finding'' and that phrase encompasses both the ''causes or contributes significantly'' component and the ''endanger public health and welfare'' component of the determination. Once the Administrator lists a source category under section 111(b)(1)(A), the Administrator then promulgates, under section 111(b)(1)(B), ''standards of performance for new sources within such that category.''

In the 2015 Rule, the EPA promulgated standards for CO_2 emissions from sources in two source categories, fossil fuel-fired electric utility steam generating units and combustion turbines. The EPA explained that because it was not listing a new source category, it was not required to make a new endangerment finding with regard to the affected sources, and the EPA added that in any event, the required endangerment finding concerned the source category, and not individual pollutants. The EPA further explained that section 111(b) does not specify what pollutants the EPA should regulate once it lists a source category, so that the EPA may exercise its discretion to regulate particular pollutants as long as the EPA provides a rational basis for doing so. In the 2015 Rule, the EPA described its rational basis for regulating CO_2 emissions from fossil fuel-fired EGUs. The EPA added that even if it were required to make an endangerment finding for those emissions in order to regulate them, the same facts that provided the rational basis would qualify as an endangerment finding.

IV. Rationale for Proposed Applicability Criteria

The current non-fossil applicability exemption is based strictly on the combustion of non-fossil fuels (*e.g.,* biomass). To be considered a non-fossil fuel-fired EGU, the EGU must be both (1) capable of combusting over 50 percent non-fossil fuel and (2) limit the use of all fossil fuels to an annual capacity factor of 10 percent or less. The current language does not take heat input from non-combustion sources (*e.g.,* solar thermal) into account. Certain solar thermal installations have natural gas backup burners that are over 250 MMBtu/h. As currently written, these solar thermal installations would not be eligible to be considered non-

[48] *Sierra Club,* 657 F.2d at 327–28 (quoting 44 FR 33583/3–33584/1), 331 (citations omitted) (citing legislative history). *See* 81 FR at 64539; 79 FR 1430, 1466 (January 8, 2014) (explaining that although the D.C. Circuit decided *Sierra Club* before the *Chevron* case was decided in 1984, the D.C. Circuit's decision could be justified under either *Chevron* step 1 or 2. 79 FR 1430, 1466 (January 8, 2014)).

[49] The D.C. Circuit's authorization for EPA to consider the factors on a national or regional level does not refer to the types of controls or actions that may be part of the BSER, rather, it refers to the factors EPA uses to evaluate the impacts of those controls or actions.

[50] *Sierra Club,* 657 F.2d at 346–47.

[51] *Id.,* 657 F.2d at 319.

[52] *Id.,* 657 F.2d at 321; *see* also *New York* v. *Reilly,* 969 F. 2d 1147, 1150 (D.C. Cir. 1992) (because Congress did not assign the specific weight the Administrator should assign to the statutory elements, ''the Administrator is free to exercise [her] discretion'' in promulgating an NSPS).

[53] *Lignite Energy Council,* 198 F.3d at 933. *See* also *NRDC* v. *EPA,* 25 F.3d 1063, 1071 (D.C. Cir. 1994) (EPA did not err in its final balancing because ''neither RCRA nor the EPA's regulations purports to assign any particular weight to the factors listed in subsection (a)(3). That being the case, the Administrator was free to emphasize or deemphasize particular factors, constrained only by the requirements of reasoned agency decision making.'').

fossil units since they are not capable of deriving more than 50 percent of the heat input from the combustion of non-fossil fuels. Therefore, solar thermal installations that include backup burners could meet the applicability criteria of 40 CFR part 60, subpart TTTT even if the burners are limited to an annual capacity factor of 10 percent or less. Amending the applicability language to include heat input derived from non-combustion sources would allow these facilities to avoid applicability with 40 CFR part 60, subpart TTTT by limiting the use of the natural gas burners to less than 10 percent of the capacity factor of the backup burners. These EGUs would readily comply with the emissions standard, but the reporting and recordkeeping would increase costs for these EGUs. The proposed amended non-fossil applicability language of changing ''combusting'' to ''deriving'' will assure that 40 CFR part 60, subpart TTTT continues to cover the fossil fuel-fired EGUs, properly understood, that it was intended to cover, while minimizing unnecessary costs to EGUs fueled primarily by renewable energy. The corresponding change in the base load rating to include the heat input from non-combustion sources is necessary to determine the relative heat input from fossil and non-fossil sources.

The definition of design efficiency (*i.e.,* the efficiency of converting thermal energy to useful energy output) is used to determine if an EGU meets the electric sales criteria and is relevant to both new and existing EGUs. EGUs that sell less electricity than the electric sales criteria are not included in the applicability of subpart TTTT. The sales criteria is based in part of the individual EGU design efficiency. The current definition includes several specific options for determining the design efficiency. Since the 2015 final rule, the EPA has become aware that owners/operators of certain existing units do not have records of the original design efficiency. These units are therefore not able to readily determine if they meet the applicability criteria and are subject to the existing source 111(d) requirements. Many of these units are CHP units and it is highly likely they do not meet the applicability criteria. However, the current language would require them to conduct additional testing to demonstrate this. To minimize the compliance burden and to provide additional flexibility to the regulated community, the proposed amendment to the definition of design efficiency would allow the Administrator to approve alternate test methods to determine the design efficiency. For existing CHP units with large useful thermal outputs that would clearly not meet the electric sales applicability criteria, this could potentially include the use of historical operating data.

For CHP units, the current approach for determining net electric sales for applicability purposes allows the owner/operator to subtract the purchased power of the thermal host facility. The intent of the approach is to determine applicability similarly for third-party developers and CHP units owned by the thermal host facility.[54] However, as currently written, each third-party CHP unit would subtract the entire electricity use of the thermal host facility when determining its net electric sales. It is clearly not the intent of the provision to allow multiple third-party developers that serve the same thermal host to all subtract the purchased power of the thermal host facility when determining net electric sales. This would result in counting the purchased power multiple times. In addition, it is not the intent of the provision to allow a CHP developer to provide a trivial amount of useful thermal output to multiple thermal hosts and then subtract all of the thermal hosts' purchased power when determining net electric sales for applicability purposes. The proposed amendment would set a limit to the amount of thermal host purchased power that a third-party CHP developer can subtract for electric sales when determining net electric sales equivalent to the percentage of useful thermal output provided to the host facility by the specific CHP unit. This approach would eliminate both circumvention of the intended applicability by sales of trivial amounts of useful thermal output and double counting of thermal host-purchased power.

Finally, during the 2015 rulemaking, the EPA identified the Washington County (GA) and Holcomb (KS) EGU projects as ''projects under development'' that would not be able to meet the standard of performance without a complete redesign (80 FR 64542–43). As a result, the EPA determined that it would not be appropriate to apply the standard to those projects and excluded them. The EPA added that if it received information suggesting that either will be built, the Agency would propose a standard of performance specifically for the project. It is not clear if these projects will be constructed, and, if so, whether they would be able to meet the standard proposed in this action. For this reason, the EPA is not proposing to amend the manner in which the 2015 Rule addressed these projects. Thus, the proposed standard would not apply to these projects, and if the Agency receives information suggesting that either will be built, the EPA will propose a standard of performance specifically for the project. However, the EPA also requests comment on whether the projects should be covered by the standard proposed in this action (Comment C–5)

V. Rationale for Proposed Emission Standards for New and Reconstructed Fossil Fuel-Fired Steam Generating Units

In the 2015 Rule, the EPA determined that partial CCS was the BSER for newly constructed coal-fired steam generating units. The EPA determined that partial CCS had reasonable costs (the levelized cost of electricity (LCOE) was comparable to the costs of two then-current projects to add nuclear capacity, and the percentage increase in capital costs was comparable to increases that the industry had shown it could absorb),[55] was technically feasible in the majority of the U.S., achieved meaningful emission reductions, and promoted technology development. For the reasons discussed immediately below, on the basis of updated information, the EPA proposes that partial CCS does not qualify as the BSER; and for the reasons discussed further below, the EPA proposes that highly efficient generation technology is the BSER.

A. Review of the 2015 BSER Analysis

1. Review of Reasonable Cost Criteria

In the 2015 Rule, as part of the partial CCS BSER determination, the EPA evaluated the costs for new base load electricity generating options to determine what was a ''reasonable'' cost. Specifically, the EPA determined that the LCOE for a new non-natural gas fossil fuel-fired power plant would be ''reasonable'' if it was consistent with the LCOE associated with the construction of a new nuclear power plant. The EPA argued that the

[54] For contractual reasons, many developers of CHP units sell all the generated electricity to the electricity distribution grid even though in actuality a significant portion of the generated electricity is used onsite. Owners/operators of both the CHP unit and thermal host can subtract the site purchased power when determining net electric sales. Third party developers that do not own the thermal host can also subtract the purchased power of the thermal host when determining net electric sales for applicability purposes.

[55] The two projects are SCE&G and Santee Cooper's V.C. Summer Nuclear Generating Station and Georgia Power and Southern Company's Vogtle Electric Generating Station.

increased costs (relative to a newly constructed natural gas combined cycle EGU) were reasonable because utilities had indicated to the EPA that they valued the fuel diversity provided by coal-fired EGUs (80 FR 64510). The EPA also determined that an increase in the capital cost of slightly more than 20 percent was reasonable when compared to previous CAA rulemakings affecting the power sector (80 FR 64560). Since 2015, additional facts have come to light that have led the EPA to reassess these determinations and therefore to reassess the reasonableness of the cost of partial CCS.

Projections in 2015 from the EPA, EIA, and utility planners consistently showed NGCC as the lowest cost option for new intermediate and base load generation. Consistent with the 2015 Rule, current utility forecast models continue to project that few, if any, new coal-fired power plants will be built in the U.S. in the subsequent decade.[56] However, these models do not necessarily account for certain source-specific considerations that power plant developers use to determine what type of generation technology to construct. The EPA explained in the 2015 Rule that it was possible that circumstances would arise under which a developer would find it advantageous to build a new coal-fired EGU, for example, for purposes of fuel diversification (80 FR 64513), and the EPA has not received information since the 2015 Rule that would cause it to rule out that possibility. In the event a new coal-fired EGU is constructed in the U.S., in the absence of the requirements of 40 CFR part 60, subpart TTTT, as finalized in 2015, the EPA believes that the majority of large coal-fired EGUs would adopt the use of supercritical steam conditions and the majority of small coal-fired EGUs would use the best available subcritical steam conditions. This is consistent with the analysis included in the 2015 final rule.

In addition, as part of the 2015 rulemaking the EPA received public comments stating that there is value in maintaining the ability to develop non-natural gas-fired base load generation that is not captured in economic dispatch models (80 FR 64559). These values can include, but are not limited to: Historically stable fuel prices; fuel security (*i.e.,* the ability to store significant quantities of fuel onsite), and site-specific jobs and economic development considerations (*e.g.,* local mining and power plant jobs, maintaining an active rail line, maintaining the property tax base, and, in the case of coal refuse, remediation of existing environmental concerns). The EPA also noted that a number of integrated resource plans (IRPs)[57] recognize significant value in these fuel diversity considerations (80 FR 64526, 64563). Several utilities included nuclear and coal-fired options in their resource plans expressly to preserve fuel diversity within their portfolios.[58] These utility sector plans justified ''prudent'' costs (that were significantly higher than the projected least cost option) to maintain fuel diversity. Based on these factors, in the 2015 rulemaking, the EPA developed metrics for determining reasonable costs, *i.e.,* a cost level for performance standards at which new coal-fired EGUs can still be part of the future fuel diversity mix. These cost indicators were (1) the LCOE of other options for new non-natural gas-fired base load generation (*e.g.,* nuclear) and (2) the percentage increase in capital cost.

a. Levelized Cost of Electricity (LCOE) Comparison

(1) Background

As part of the 2015 rulemaking, the EPA assumed that developers valued fuel diversity and were therefore willing to pay a premium for non-natural gas-fired dispatchable base load generation. The EPA concluded that the LCOE of new nuclear (and biomass) generation was one appropriate indicator of the value of maintaining the option to develop new non-natural gas-fired base load generation. For this metric, the EPA used cost data from EIA[59] and U.S. Department of Energy National Energy Technology Laboratory (DOE/NETL)[60] to project the cost at which a new coal-fired EGU with partial CCS would have substantially similar levelized cost compared to new nuclear capacity. Table 4 includes the summary table of the EPA's cost projections from the preamble to the 2015 final rule (*See* 80 FR 64562, Table 8). The data in Table 4 reflect the EPA's 2015 determination that the cost of full carbon capture was not reasonable.[61] However, the EPA further determined that the cost of the specified partial CCS level in Table 4 was reasonable because they were comparable to the costs of new nuclear capacity. The increase in the LCOE from a supercritical pulverized coal unit due to partial CCS ranged from approximately 20 to 30 percent.

TABLE 4—PREDICTED COST AND CO_2 EMISSION LEVELS FOR A RANGE OF POTENTIAL NEW GENERATION TECHNOLOGIES FROM THE 2015 RULE

Technology	Emissions (lb CO_2/MWh-gross)	LCOE* ($/MWh)
SCPC—no CCS (bit)	1,620	76–95
SCPC—no CCS (low rank)	1,740	75–94
SCPC + ~16% CCS (bit)	1,400	92–117
SCPC + ~ 25% CCS (low rank)	1,400	95–121
Nuclear (EIA)	0	87–115
Nuclear (Lazard)	0	92–132
Biomass (EIA)		94–113

[56] Power sector modeling does not predict the construction of any new coal-fired EGUs. Therefore, based on modeled impacts, any GHG requirements for new coal-fired EGUs would have no significant costs or benefits.

[57] An Integrated Resource Plan (IRP) is a publicly available long-term resource plan outlining a utility's resource needs, considering both supply and demand side resources, to meet future energy demands reliably and cost effectively.

[58] U.S. EPA, *Technical Support Document: Review of Electric Utility Integrated Resource Plans,* July 31, 2015, available in the rulemaking docket at *https://www.regulations.gov/document?D=EPA-HQ-OAR-2013-0495-11775.*

[59] EIA, *Levelized Cost and Levelized Avoided Cost of New Generation Resources in the Annual Energy Outlook 2015. June 2015.* Available at *https://www.eia.gov/outlooks/archive/aeo15/pdf/electricity_generation.pdf.*

[60] U.S. DOE NETL, *Cost and Performance Baseline for Fossil Energy Plants Supplement: Sensitivity to CO_2 Capture Rate in Coal-Fired Plants,* DOE/NETL–2015/1720, June 22, 2015, available at *https://www.netl.doe.gov/energy-analyses/temp/SupplementSensitivity toCO2CaptureRateinCoalFiredPowerPlants_062215.pdf.*

[61] A further indication of the unfavorable economics of full capture CCS may be found in the recent cancellation by the Canadian firm, SaskPower of its planned CCS retrofits at additional units at the Boundary Dam facility, in Saskatchewan, Canada, due to high costs. *See* C. Marshall, ''Landmark project puts coal expansion on ice,'' *Greenwire,* July 10, 2016 (subscription required).

TABLE 4—PREDICTED COST AND CO_2 EMISSION LEVELS FOR A RANGE OF POTENTIAL NEW GENERATION TECHNOLOGIES FROM THE 2015 RULE—Continued

Technology	Emissions (lb CO_2/MWh-gross)	LCOE* ($/MWh)
Biomass (Lazard)		87–116
IGCC	1,430	94–120
NGCC	1,000	** 52–86

* The emissions and LCOE (2011 $) for the SCPC cases, IGCC, and NGCC are based on the NETL ''Sensitivity to CO_2 Capture Rate'' report. The nuclear and biomass LCOE (2011 $) are based on data from EIA and Lazard. The LCOE ranges include an uncertainty of −15%/+30% on capital costs for SCPC and IGCC cases and an uncertainty of −10%/+30% on capital costs for nuclear and biomass cases. LCOE estimates displayed in this table for SCPC units with partial CCS as well as for IGCC units use a higher financing cost rate in comparison to the SCPC unit without capture.

** This range represents a natural gas price from $5/MMBtu to $10/MMBtu.

(2) Comparison With Biomass-Fired Power Plants

While the EPA included biomass in the 2015 rulemaking LCOE analysis, the EPA noted that new nuclear power, which, besides natural gas combustion turbines, is the principal other option often considered for providing new base load power (79 FR 1477). Biomass-fired EGUs are smaller in scale [62] and not as closely analogous to coal-fired generation as is nuclear power. EIA projects that average net additional biomass generation capacity amounts to less than 100 MW annually. The largest domestic biomass-fired EGU is less than 200 MW and the largest international biomass-fired EGUs are less than 300 MW. Similar to coal refuse-fired EGUs, biomass-fired EGUs are limited geographically because they tend to be located in areas with large quantities of biomass that can be cost effectively delivered to the plant. Based on these considerations, the EPA does not consider biomass to be an appropriate comparison for coal-fired generation.

(3) Comparison With Nuclear-Fueled Power Plants

(a) Levelized Cost of Electricity (LCOE)

In the 2015 analysis, the EPA assumed nuclear generation and coal-fired generation were similarly attractive for purposes of fuel diversity. As part of this review, the EPA is reevaluating whether that assumption is valid. Specifically, the EPA is requesting comment on whether nuclear capacity is more attractive than coal as an option for providing fuel diversity (Comment C–6). Nuclear projects have no emissions of criteria pollutants, hazardous air pollutants (HAPs),[63] or GHGs. Particularly in light of potential future costs associated with GHG emissions, nuclear projects provide a significant price stability guarantee. In addition, the incremental generating costs for nuclear projects are lower than those for coal-fired EGUs, thus, nuclear EGUs would be expected to dispatch more frequently and provide more actual non-natural gas generation per amount of installed capacity.[64] Therefore, to the extent that nuclear projects are more attractive than coal-fired EGUs for providing fuel diversity, developers could be willing to pay more of a premium for nuclear projects than for coal-fired EGUs.

On the other hand, more recent information, since the 2015 Rule, indicates that the LCOE of a new nuclear EGU is in fact higher than what developers may be willing to accept. In 2015, multiple new advanced Generation III+ nuclear units were under construction in the U.S.[65] [66] including, at that time, two new units each at the Summer and Vogtle nuclear power plants in South Carolina and Georgia, respectively. However, since the 2015 Rule, both the Summer and Vogtle projects have experienced significant delays and cost overruns. South Carolina Electric and Gas (SCE&G), majority owner of Summer, has now abandoned completion of both reactors and has raised rates at least nine times to cover the increasing costs of the reactors.[67] While over budget and behind schedule, construction of both the Vogtle units continues. They are scheduled to be completed in 2021 and 2022. Furthermore, there appear to be no new nuclear projects under construction or that have received regulatory approval at this time. According to EIA, which reports data on recently constructed EGUs and planned EGU additions, including EGUs under construction, EGUs that have received regulatory approvals but that have not commenced construction, and planned projects that have not received regulatory approvals, the only planned nuclear project is the Utah Associated Municipal Power Systems (UAMPS) Carbon Free Power Project. This project proposes to use small modular nuclear reactors developed with funding from the DOE. However, this project has not yet received all of the required regulatory approvals to proceed. The EPA solicits comment on the extent to which new nuclear energy projects can serve as a comparison point, for purposes of fuel diversity, for new coal-fired EGUs (Comment C–7).

In the 2015 Rule, the partial CCS costs were based largely on the report, ''Cost and Performance Baseline for Fossil Energy Plants Supplement: Sensitivity to CO_2 Capture Rate in Coal-Fired Power Plants,'' June 22, 2015 (DOE/NETL–2015/1720). The EPA used the reported costs without any significant adjustments. In this rulemaking, the EPA is proposing to make refinements to the CO_2 transmission and storage (T&S) costs and EGU capacity factors. That is, as described below, the EPA is proposing to adjust the T&S costs based on the amount of CO_2 captured and adjust the capacity factor based on the increase in variable operating costs due to the impact of partial CCS. Accounting for these factors revises the LCOE with partial CCS upwards. The EPA also proposes in the alternative to use the NETL costs without any significant adjustments, similar to the approach used in the 2015 Rule. The EPA is not aware of any more recent, detailed, or transparent costing analysis specific to coal-fired EGUs with or without carbon capture technology. The EPA invites the

[62] Biomass-fired EGUs tend to have challenges in securing and transporting large amounts of biomass.

[63] HAP are toxic air pollutants regulated under CAA section 112.

[64] EIA used a 90 percent capacity factor for nuclear when calculating the LCOE in the 2015 Rule. According to EIA, the average nuclear EGU capacity factors was 92 percent in 2017.

[65] EIA, *Form EIA–860 Detailed Data,* 2014, available at *https://www.eia.gov/electricity/data/eia860/,3_1_Generator_Y2014.xls,* ''Proposed'' sheet.

[66] As of the promulgation of the 2015 Rule, 4,400 MW of new nuclear capacity was under construction with 2019–20 commercial operating dates.

[67] G. Blade, ''Santee Cooper, SCANA abandon Summer nuclear plant construction,'' *Utility Dive,* July 31, 2017, available at *https://www.utilitydive.com/news/santee-cooper-scana-abandon-summer-nuclear-plant-construction/448262/.*

public to identify any additional costing information.

First, the CO_2 T&S costs in the NETL baseline reports are not included in the reported capital cost or operation and maintenance (O&M) costs but are treated separately and added to the LCOE. Specifically, the combined transport and storage costs for geologic storage (not accounting for any revenues from the sale of CO_2) equaled $11 per metric ton of captured CO_2. This cost represents annual transportation through a 100-kilometer (km) (62 mile) CO_2 pipeline and storage in a deep saline formation in the Midwest of 3.2 million tons of CO_2.[68] The EPA used this value in all the partial capture cases as well. In this rule, to account for economies of scale, the EPA is proposing to adjust the T&S costs based on the amount of CO_2 captured. To estimate the T&S costs, the EPA is using the FE/NETL CO_2 Transport Cost Model and the FE/NETL CO_2 Saline Storage Cost Model with the same general assumptions described in ''Performance Baseline for Fossil Energy Plants, Volume 1a: Bituminous Coal (PC) and Natural Gas to Electricity, Revision 3,'' July 6, 2015 (DOE/NETL–2015/1723) and adjusting the metric megatons of CO_2 transported and stored.[69] Table 5 shows the resulting total estimated T&S costs for various amounts of captured CO_2.

TABLE 5—CO_2 TRANSPORT AND STORAGE COSTS FOR VARIOUS AMOUNTS OF CAPTURE

Megatonne (Mt)/yr	Total T&S cost (2016 $/tonne)
4.2	9.6
3.2	11
2.6	12
2.0	13
1.4	16
0.62	29

The EPA is using the best fit trendline to estimate the T&S costs for various amounts of CO_2 capture. The trendline predicts that costs would increase substantially at lower levels of capture. As stated previously, the EPA also proposes in the alternative to use an $11 metric ton T&S costs consistent with the NETL costing approach and the 2015 Rule.

Second, as part of the 2015 rulemaking, for the LCOE calculations, consistent with the NETL calculations, as noted above, the EPA assumed a constant capacity factor[70] (*i.e.,* electric sales) regardless of the amount of CCS installed on the representative (*i.e.,* model) coal-fired EGU. This simplified approach captured the fixed and operating costs of CCS but did not account for the impact of economic dispatch (*e.g.,* it did not include analysis of the interaction of the affected EGU with the grid or other EGUs on an hourly basis) and loss of potential revenue due to lower electric sales.

However, electricity is a unique commodity in that it cannot (at present) be stored at a large scale at a reasonable cost. Therefore, electric grid operators need to make plans and take actions to match supply and demand in real time. Multiple factors influence which EGUs supply power to the grid to satisfy system load (*e.g.,* transmission and operational constraints) at any given point, and in which order. In the simplest terms, economic dispatch is used to satisfy the grid load at minimal costs. In the economic dispatch model, EGUs with the lowest marginal (*i.e.,* operating) costs are dispatched first. Those EGUs increase output until all the load is satisfied or until the EGUs cannot supply additional power. If needed, EGUs with higher operating costs are then dispatched to satisfy demand. The process continues by dispatching more expensive units until the grid load is satisfied. The marginal cost of the final generator needed to meet load sets the system marginal cost. Owners and operators of generators are paid based on the system marginal cost. Therefore, net revenue is the difference between the variable operating costs and the system marginal cost.

Importantly, economic dispatch only accounts for the costs directly associated with power plant operations and does not consider any fixed costs. This is important because historically units with high fixed costs (*e.g.,* coal-fired and nuclear EGUs) have low operating costs, dispatch often, and typically run as base load units. For example, nuclear units tend to have operating costs on the order of $15 to $20 per MWh and capacity factors of greater than 90 percent. These units would be able to recover their high fixed costs by spreading them out over many MWh of electric sales. Units with low fixed costs but high operating costs (*e.g.,* simple cycle combustion turbines) have historically tended to dispatch last and provide peaking power. With natural gas prices of $4 per MMBtu, the operating costs of simple cycle units are approximately $40 per MWh and capacity factors are less than 10 percent in most cases. Therefore, an increase in operating costs of $20 per MWh can change an EGU from a high capacity factor base load unit to a peaking unit with limited operation. Emission control equipment can impact both the fixed costs and operating costs of an EGU. Another important aspect of economic dispatch, which may be unique to the electricity generation sector, is that the end user (*i.e.,* consumer) has historically had limited, if any, choice in what technology is used to generate electricity. Therefore, electric generators compete strictly on the basis of their variable costs, with no ability to differentiate their product.

In deregulated markets, a new coal-fired EGU must compete directly against all other forms of generation, including existing coal-fired EGUs and natural gas-fired combined cycle units. A developer of a new coal-fired EGU could anticipate revenues from capacity payments, various ancillary services, and to the extent the new unit is dispatched, energy payments. In a deregulated market, each of these revenue streams is priced through competitive market-based structures. As described earlier, revenue from energy payments will largely be determined based on variable operating costs. Any requirements that impact variable operating costs could impact the ability of the owner/operator of a new coal-fired EGU to obtain adequate revenues to cover the generation investment and recover costs.

In the 2015 Rule, commenters indicated that competitive electricity markets only allow for the entry of competitively-priced power. Therefore, a new coal plant with partial CCS that was compliant with an NSPS requirement based on the use of CCS might not be competitive compared to older coal plants with no CCS requirements (even if the older plants are less thermally efficient). The EPA responded that, given current and projected market conditions, any new coal-fired EGU would likely only be built in a location where it would be expected to operate at a high capacity factor (*e.g.,* as a base load unit). However, at least in deregulated markets, economic dispatch is still a factor for base load units and can change annual capacity factors by multiple percentage points. Moreover,

[68] Use of the T&S costs for the Illinois Basin (*i.e.,* Midwest) are consistent with the NETL costing approach. According to NETL, T&S costs would be similar for the East Texas Basin. However, T&S costs for the Williston Basin are estimated to be 40 percent higher, and T&S costs for the Power River Basin are approximately double.

[69] For additional detail on CO_2 T&S costing see section 2.7.3 CO_2 Transport and Storage in volume 1a, revision 3 of the NETL baseline reports and the T&S technical support document that is available in the docket.

[70] EPA used an 85 percent capacity factor, consistent with the NETL LCOE calculations.

an increasing number of coal-fired power plants are changing from base load to variable load. Accordingly, the EPA is proposing to include the impact of economic dispatch in determining the costs of a potential new coal-fired EGU. Inclusion of these costs is a more refined representation of the impact of the BSER determination. As stated previously, the EPA is proposing in the alternative that the Agency not account for economic dispatch and instead use the same capacity factors regardless of variable operating costs, for the same reasons as the EPA stated in the 2015 Rule.[71]

To estimate the impacts at a national level of the increase in variable operating costs due to partial CCS, the EPA analyzed the dispatch of coal-fired EGUs relative to variable operating costs.[72] Based on a review of the variable operating costs and capacity factors in the Annual Energy Outlook 2018 and fuel prices reported under EIA form 923, the EPA determined that capacity factors for coal-fired EGUs decrease approximately 1.5 percent for each $1/MWh increase in operating costs. Table 6 shows the operating costs of various generating technologies. The capacity factors for coal-fired EGUs have been adjusted based on a baseline of the relevant coal rank supercritical EGU having a capacity factor of 85 percent.

TABLE 6—PROPOSED T&S COSTS AND CAPACITY FACTORS *

Technology	Captured CO_2 (Mt)	T&S costs ($/tonne)	Variable operating costs ($/MWh)	Amended CF (percent)
Subcritical PC (bit)			32.3	83.5
Supercritical PC (bit)			31.3	85.0
SCPC + ~16% CCS (bit)	520,000	30	36.9	76.6
Supercritical PC (low rank)			28.0	85.0
Ultra-supercritical PC (low rank)			27.4	85.8
SCPC + ~ 26% CCS (low rank)	1,000,000	20	36.3	72.5
Combined Cycle CT (NG)			33.1	
Simple Cycle CT (NG)			50.7	

* Variable operating costs calculated using $2.61/MMBtu for bituminous coal, $2.09/MMBtu for low rank coal, and $4.73/MMBtu for natural gas. Captured CO_2 based on an 85 percent capacity factor. Costs are in 2016 $. Variable operating costs is also referred to as incremental generating costs. Simple cycle CT variable operating costs were estimated by adjusting the combined cycle efficiency to 33 percent.

The variable operating costs shown in Table 6 demonstrate part of the reason why the U.S. generation mix is changing so dramatically with the decrease in the price of natural gas. Fuel costs comprise approximately two thirds to three quarters, depending on the coal type, of the variable operating costs for coal-fired EGUs. In comparison, fuel costs comprise over 90 percent of the variable operating costs for combined cycle EGUs. Therefore, declining natural gas prices can have a dramatic impact on the competitiveness of natural gas-fired EGUs relative to coal-fired EGUs. While the variable operating costs in Table 6 are based on long term projections for the price of natural gas, spot process can be significantly lower. When natural gas is available at $4/MMBtu or less, the variable operating costs of combined cycle units can drop below those of certain coal-fired EGUs and displace those units in the dispatch order. The data further show that due to the relatively high operating costs of CCS compared to other environmental controls,[73] a BSER based on partial CCS increases the variable operating costs of new coal plants to significantly greater than existing coal-fired EGUs without GHG controls. Therefore, in an economic dispatch system, a new coal-fired EGU with partial CCS would dispatch after the majority of existing coal-fired EGUs.[74] In markets with significant quantities of coal-fired generation, this could have a significant impact on the economic viability of a new coal-fired EGU. Table 7 shows the LCOE at an 85 percent capacity factor and $11/tonne T&S costs compared to an LCOE using the amended T&S costs (based on the amount of CO_2 captured) and using an adjusted capacity factor (based on the variable operating costs). The revised LCOE numbers account for both the amended approach to calculating T&S costs and the change in capacity factor.

TABLE 7—PREDICTED COST AND CO_2 EMISSION LEVELS FOR A RANGE OF POTENTIAL NEW GENERATION TECHNOLOGIES

Technology	LCOE * ($/MWh)	Amended LCOE ** ($/MWh)
Subcritical PC (bit)	81.2	82.1
Supercritical PC (bit)	81.7	81.7
SCPC + ~16% CCS (bit)	96.2	105.4
Supercritical PC (low rank)	85.2	85.2
Ultra-supercritical PC (low rank)	87.6	87.0

[71] One approach developers could take to reduce the impact on the capacity factor could be to construct a smaller EGU. While this would not impact capacity factors strictly based on simplified economic dispatch (*i.e.,* at the same variable operating costs the unit would still dispatch after units with lower variable operating costs) multiple factors impact dispatch and a smaller unit might provide local grid support that would allow it to operate at higher capacity factors.

[72] Fuel costs comprise approximately two-thirds to three-fourths of the variable operating costs for a coal-fired EGU.

[73] The EPA notes that unlike other environmental controls, there is limited regulatory requirements or incentive to reduce GHG emissions aside from the NSPS requirements. For example, local or regional programs could require reductions in criteria pollutant from all EGUs and/or owners/operators of EGUs can accrue regulatory benefits in other regulatory programs due to criteria pollutant reductions (*e.g.,* offsets and emission credits). These programs minimize the impact of the environmental controls on dispatch because costs are spread more evenly to the entire EGU fleet.

[74] This could create a perverse environmental incentive to operate existing coal more than it otherwise would. A utility-system dispatch model would be required to estimate the potential overall environmental impacts.

TABLE 7—PREDICTED COST AND CO_2 EMISSION LEVELS FOR A RANGE OF POTENTIAL NEW GENERATION TECHNOLOGIES—Continued

Technology	LCOE * ($/MWh)	Amended LCOE ** ($/MWh)
SCPC + ~ 26% CCS (low rank)	109.0	122.8

* 85 percent capacity factor and $11/tonne T&S.
** Capacity factor adjusted based on variable operating costs and T&S costs adjusted based on amount of captured CO_2.

Assuming a constant 85 percent capacity factor and $11/tonne T&S costs, the LCOE for a bituminous-fired SCPC with partial CCS is 18 percent higher than a SCPC without CCS. However, when the refined T&S and capacity factors are accounted for, the relative increase in LCOE for a bituminous-fired SCPC with partial CCS is 29 percent higher than SCPC without CCS, a 63 percent increase in the relative LCOE impact of partial CCS. These costs do not account for any of the potential benefits of reduced criteria and GHG emissions due to the use of partial CCS. The EPA solicits comment on if these should be factored into the analysis, and if so, appropriate metrics to accounting for these benefits (Comment C–8). Furthermore, the revised LCOE costs are over 10 percent higher than the nuclear cost metric. Furthermore, even with only the T&S adjustment, the revised LCOE are five percent higher than the nuclear metric. The results of this analysis support the EPA's proposal to revise the 2015 determination that partial CCS is BSER for coal-fired EGUs. The EPA notes that these costs are for coal-fired EGUs that are using geologic sequestration (GS) and do not account for any specific economic incentives (*e.g.,* the federal tax credits for carbon capture, which are available only for new facilities that commence construction before January 1, 2024, Internal Revenue Code §§ 45Q(a)(3)-(4), (d)—which, in turn, is before the end of the 8-year period in which the EPA is required to review and, if necessary, revise the standard of performance that is the subject of this rulemaking, CAA section 111(b)(1)(B)). If the owner/operator were in a location where it could sell the byproduct CO_2 (*e.g.,* for enhanced oil recovery or for use in the food industry) variable operating costs could be reduced relative to an EGU without partial CCS and electric sales would be expected to increase, offsetting some of the control costs. For example, as discussed in the 2015 Rule, two coal-fired EGUs elected to install carbon capture technology and sold the CO_2 to the food industry without any federal funding for the capture technology (80 FR 64550). This type of utilization of CO_2 has the potential to both develop capture technologies and increase economic options to reduce emissions. While sale of the captured CO_2 improves the overall economics of a new coal-fired EGUs, the EPA recognizes that there are places where opportunities to sell captured CO_2 for utilization may not be presently available. Therefore, consistent with approach adopted in the 2015 Rule, the EPA is assuming no revenues from the sale of captured CO_2 (80 FR 64572).

(b) Consideration of Capital Cost Increases

In the 2015 rulemaking, commenters from industry recommended that the EPA should separately consider the significant capital costs of partial CCS. In response to these comments, the EPA evaluated the impact of 2015 GHG standards on the capital costs of new fossil-steam generation and compared the same to the capital costs of prior EPA regulations. The EPA determined that the incremental capital costs of partial CCS were reasonable because they were comparable to the percentage capital costs increase in prior regulations and because the utility industry has demonstrated the capacity to successfully absorb capital costs of this magnitude in the past (80 FR 64559). Specifically, in the 2015 final rule, the EPA concluded that an increase of 21 to 22 percent for capital coats was reasonable (80 FR 64560).

The EPA cited several comparable rulemakings. First, the 1971 NSPS for coal-fired EGUs increased costs by $19 million (M) for a 600 MW plant. These costs consisted of $3.6 M for particulate matter (PM) controls, $14.4 M for SO_2 controls, and $1 M for nitrogen oxide ($NO_X$) controls; the capital cost of air pollution control devices added 15.8 percent to the $120 M capital cost of a new EGU. In that case, the baseline cost was primarily for a coal-fired EGU with limited environmental controls. In addition, a retrospective Congressional Budget Office (CBO) study of the 1978 EGU NSPS amendments estimated that those amendments increased the capital costs for a new EGU by 10 to 20 percent. There, the baseline costs and overall absolute costs were higher than the 1971 NSPS because they included the cost of controls required by the 1971 NSPS. Since the 1978 NSPS, additional environmental controls have further increased the baseline costs to construct a new coal-fired EGU. These additional costs include, but are not limited to, NSPS amendments that established selective catalytic reduction (SCR) as the BSER for NO_X controls in place of low NO_X combustion controls and more stringent SO_2 and PM standards, rulemakings that require mercury (Hg) controls, and rulemakings that limit the use of once-through cooling. All of these additional environmental control requirements increase the baseline costs of constructing a new coal-fired EGU. Therefore, at the same percentage increase in capital costs, absolute costs are much higher. A comparable analysis would require that the additional control costs due to previous rulemakings be accounted for in the baseline costs when determining an appropriate percent increase in capital costs. The EPA notes that even without accounting for the different cost basis, the absolute increase in capital costs was higher for the 2015 Rule than previous EGU NSPS rulemakings. It should also be noted that the previous NSPS rulemakings generally concerned multiple pollutants and adopted multiple requirements based on multiple control technologies, which makes it more challenging to compare them with the current rulemaking, which in turn concerns, as a practical matter, a single air pollutant—CO_2—and a single set of controls.

Furthermore, the fact that the utility industry was able to absorb 20 percent increases in cost due to pollution control in the past does not necessarily mean the industry could do so today. For example, when previous NSPS rulemakings with significant costs for new coal-fired EGUs were completed, electricity demand was growing and few alternatives existed for intermediate and base load generation. At that time, a new coal-fired EGU built by a regulated utility could anticipate operating at a high capacity factor for several decades.

The utility sector is markedly different today. Currently, many coal-fired EGUs operate at variable load and it would be more difficult for an owner/operator of a new coal-fired EGU to recoup the additional control costs. Based on these assessments, the EPA is proposing that the increase in capital costs due to partial CCS are not reasonable.

In addition, in the 2015 Rule, the EPA cited the *Portland Cement Ass'n* ruling that upheld a 12 percent increase in capital costs as reasonable (*See* 80 FR 64560, citing 486 F.2d at 387–88). As stated previously, the EPA is proposing in this rule that the increase in capital costs due to partial CCS are not reasonable. In any event, *Portland Cement Ass'n* is not relevant because, as the EPA further noted in the 2015 Rule, the costs of control equipment (capital and operating) for the Portland Cement NSPS could be passed on without substantially affecting competition with construction substitutes such as steel, asphalt, and aluminum. *Id., citing Portland Cement Ass'n* v. *Ruckelshaus,* 513 F.2d 506, 508 (DC Cir. 1975). However, in the 2015 Rule, the EPA did not account for the loss of sales (*i.e.,* revenue) in the electricity market. As described previously, at least in deregulated markets, for coal-fired EGUs, an increase in operating costs has an impact on dispatch order and thus product (*i.e.,* electricity) sales, and therefore, the overall cost of the partial CCS BSER determination. That is, the ability of EGUs to pass along their capital costs to consumers depends on their ability to pass along their operating costs to consumers. However, higher operating costs that impact the EGU dispatch order cannot be passed on to end users as easily (and profit margins cannot be narrowed as easily) without affecting coal-fired generation's competitiveness with alternate forms of electricity generation. This means that EGUs cannot pass along their capital costs as easily as other industries.

(c) Other Measures of Reasonable Costs

The EPA has reviewed the rationale for a dozen GHG permits for EGUs and other industrial facilities that were permitted between 2011 and 2017. Aside from industrial sources with existing, nearly pure CO_2 process streams (*e.g.,* a natural gas processing facility) situated near an existing CO_2 pipeline (*i.e.,* a few hundred feet) that could implement CO_2 capture at little or no net cost, none of the GHG permits considered CCS to be a reasonable cost control technology. Energy efficiency was considered the appropriate control technology for the majority permit determinations. The fact that all of the EGU permit determinations rejected CCS as a reasonable control technology supports the conclusion that CCS is not an appropriate BSER.

2. Whether CCS Is Adequately Demonstrated

In the 2015 Rule, the EPA found that partial CCS was ''adequately demonstrated'' under CAA section 111(a)(1), a requirement that, as noted above, incorporates the concept of technical feasibility. However, upon further review, the EPA is proposing to revise its analysis and determine that CCS is not adequately demonstrated in certain key respects, as described in this section.

a. Availability of Geologic Sequestration (GS)

In the 2015 Rule, the EPA noted that, as a practical matter, the issue of whether all new steam-generating EGUs can implement partial CCS depends on the geographic scope of suitable GS sites. Therefore, as part of that rulemaking, the EPA performed a geographic analysis [75] in which the Agency examined areas of the country with sequestration potential in deep saline formations, oil and gas reservoirs, unmineable coal seams, and active, enhanced oil recovery (EOR) operations; information on existing and probable, planned or under study CO_2 pipelines; and areas within a 100-km (62-mile) area of locations with sequestration potential. The distance of 100 km was consistent with the assumptions underlying the NETL cost estimates for transporting CO_2 by pipeline. Based on the geographic analysis performed, the EPA determined that GS sites were widely available and that a steam-generating plant with partial CCS, sited near an area suitable for GS, could serve power demand in a large area, notwithstanding that the area itself might not contain sequestration sites. As part of the review for this action, the EPA has re-evaluated these determinations. In addition, the EPA has reviewed the impact of water availability with respect to geographic availability of CCS.

Since the 2015 Rule, the EPA has updated its analysis on geographic availability. Using updated information from NETL,[76] the Agency has identified the geographic extent of potential GS in deep saline formations and oil and gas reservoirs. The updated data show relatively minimal changes in estimated storage resources, with most of the changes occurring in Wyoming and Midwestern states (Kentucky, Michigan, Illinois, Indiana and North Dakota) as a result of additional characterization and assessment studies by the DOE Regional Carbon Sequestration Partnerships.[77] In addition, the EPA has updated its list of counties where active EOR operations are occurring, based on data reported to the EPA Greenhouse Gas Reporting Program (GHGRP) (*See* 40 CFR part 98, subpart UU, Injection of Carbon Dioxide, 2011–2017 data).[78] The GHGRP data show four additional counties where active EOR operations have occurred since the EPA's analysis in 2015. Finally, the Agency has updated its information on existing CO_2 pipelines based on Department of Transportation data along with the locations of pipelines that are probable, planned or under study. In general, these updates do not significantly change the EPA's understanding of which areas are amenable to GS.

The NETL Carbon Storage Atlas (Atlas) used for the EPA's analysis of geographic availability provides a high-level overview of prospective resources across the United States. This assessment represents the fraction of pore volume of porous and permeable sedimentary rocks available for CO_2 storage and accessible to injected CO_2 via drilled and completed wellbores. The estimates in the Atlas do not take into account economic or regulatory constraints, only physical constraints (*i.e.,* the accessible parts of geologic formations via wellbores). The deployment of partial CCS is site-specific and its application will depend on local market and geologic conditions. Therefore, the cost of deploying partial CCS will be highly variable on a geographic basis. While storage capacity appears large in the Atlas, site-specific technical, regulatory, and economic considerations will ultimately impact how much of that resource is economically available. That is, the Atlas shows an estimate of potential storage areas, but not economically

[75] U.S. EPA, *Technical Support Document: Geographic Availability,* July 31, 2015, available in the rulemaking docket at *https://www.regulations.gov/document?D=EPA-HQ-OAR-2013-0495-11772.*

[76] U.S. DOE NETL, *Carbon Storage Atlas, Fifth Edition,* September 2015, available at *https://www.netl.doe.gov/research/coal/carbon-storage/atlasv.*

[77] For deep saline formations, the low-end estimate of storage resource increased from 2,100 billion metric tons to 2,379 billion metric tons, and the high-end estimate increased from 20,014 billion metric tons to 21,633 billion metric tons. For oil and gas reservoirs, the storage resource was previously estimated at 225 billion metric tons, and is now estimated at a low-end estimate of 186 billion metric tons and a high-end estimate of 232 billion metric tons.

[78] U.S. EPA, *Greenhouse Gas Reporting Program,* available at *https://www.epa.gov/ghgreporting.* Data reported as of August 19, 2018.

viable storage areas (*i.e.,* areas where projects make business and financial sense). Additionally, the various types of geologic formations assessed in the Atlas have been characterized to varying degrees. That is, there is more uncertainty in the assessment of certain types of formations as compared to others. The maturity of oil and gas exploration and production in certain parts of the United States makes sequestration potential in these reservoirs relatively well understood. However, there are still limitations to the feasibility of GS in all oil and gas reservoirs identified as areas of potential storage in the Atlas. Additionally, despite showing large potential, saline storage has not yet been demonstrated to be available, both from a geographical perspective as well as economically, at all locations. For example, the major milestone saline project from Archer Daniels Midland is underway, but only reflects the feasibility of saline injection and storage at one location in the United States. This project is still in its early stages and has not yet proven that GS in saline formations can be done throughout the United States (at scale) in wide geographic regions with highly diverse geologic conditions. The project is sized at one million metric tons per year and may not demonstrate the full application of saline storage necessary for a large power project.

Regarding the third type of geologic formation assessed in the Atlas, unmineable coal seams, the EPA has changed its assumptions since the 2015 analysis. While the Atlas includes potential availability of unmineable coal seams, the EPA has excluded this type of formation from potential GS areas. As part of its 2015 analysis, the EPA expressed its view unmineable coal seams offered the potential for geologic storage and explained the technical process by which it thought that CO_2 could be injected underground to enhance methane recovery (also known as enhanced coalbed methane recovery) while adsorbing to the coal surface (80 FR 64576). NETL identified states that it considered had the potential for storage in unmineable coal seams. Some of these areas, including Iowa and Missouri, have little to no EOR or saline sequestration potential and generate electricity at coal-fired EGUs. Several successful small-scale demonstration projects had been performed to evaluate the potential for GS in unmineable coal seams, and research to optimize CO_2 storage in coals was ongoing. However, upon further review, the EPA now believes that the processes and technologies associated with GS at unmineable coal seams are still being developed and, in the years since the EPA expressed the understanding and expectations underlying this aspect of its analysis in the 2015 Rule, there have been no large-scale demonstrations of GS associated with unmineable coal seams.[79] In the 2015 rulemaking, the EPA had found that the largest pilot project, the Allison Unit CO_2-ECBM pilot in New Mexico, stored 270,000 metric tons of CO_2 from 1995–2001 (an average of 45,000 tons per year).[80] Recent DOE Regional Carbon Sequestration Partnership projects have injected CO_2 volumes ranging from 90 tons to 16,700 tons.[81] While these projects demonstrated some degree of potential for GS in unmineable coal seams, most were in the nature of pilot programs undertaken to evaluate project designs and collect data to better understand the mechanisms of injection and CO_2 storage. Therefore, the project durations and injected amounts were limited. The limited duration and amounts of the tests may have affected the outcomes, as some tests began to show decreases in the effectiveness of CO_2 injection over time due to swelling of the coals. This observation raises doubts regarding the feasibility of larger-scale GS in unmineable coal seams at this time. For example, in the Pump Canyon test, the effectiveness of CO_2 storage was believed to be limited due to the small amount of CO_2 injected.[82] The amount of CO_2 injected in these tests was significantly less than projects at deep saline formations or at oil and gas reservoirs where CO_2 was injected in the million-ton range. The EPA now believes that additional research using larger scale and longer duration tests in unmineable coal seams is needed to improve the understanding and modeling of CO_2 storage in coals. Unmineable coal seams have not been shown to be a suitable GS technology option for purposes of this action; however, such formations could have potential applicability in the future. Therefore, unmineable coal seams have been excluded from potential GS areas in the analysis underlying this proposal. The elimination of unmineable coal seams reduces the geographic availability of sequestration areas by approximately 4 percent.[83]

For these reasons, GS may not be as widely geographically available as assumed in the 2015 analysis. Further work being conducted by DOE to devise and develop technologies that can improve wellbore integrity, increase reservoir storage efficiency, quantitatively assess and mitigate risks, and confirm permanent storage of CO_2 through reliable, cost-effective, multilevel monitoring programs in storage complexes in diverse geologic settings would help determine actual availability of GS in all types of formations. Additionally, work on the DOE Carbon Storage Assurance Facility Enterprise (CarbonSAFE) initiative, an effort to develop an integrated CCS storage complex constructed and permitted for operation in the 2025 timeframe, will increase understanding of the feasibility of GS across the United States and further characterize the availability of GS.

b. Water Availability

Currently available amine-based solvent capture systems require water for process makeup and cooling. As part of the 2015 rulemaking, multiple commenters expressed concerns that the EPA's determination that partial CCS was BSER was inappropriate because of increased water consumption impacts and geographical (or other) water availability/scarcity issues limiting or eliminating CCS implementation. The EPA acknowledged that, similar to other air pollution controls, such as a wet flue gas desulfurization scrubber, post-combustion amine-based capture systems result in increased water consumption. However, the EPA evaluated the issue and found the water use to be manageable (80 FR 64593). The Agency stated that the studies[84]

[79] See, *e.g.,* M. Godec *et al.,* ''CO_2-ECBM: A Review of its Status and Global Potential,'' *Energy Procedia* 63: 5858–5869 (2014), available at *https://doi.org/10.1016/j.egypro.2014.11.619;* IEAGHG, *Potential Implications on Gas Production from Shales and Coals for Geological Storage of CO_2,* Report Number 2013/10, September 2013, available at *http://www.ieaghg.org/docs/General_Docs/Reports/2013-10.pdf.*

[80] *Id.*

[81] J. Litynski *et al.,* ''Using CO_2 for enhanced coalbed methane recovery and storage, *CBM Review,* June 2014, available at *https://www.netl.doe.gov/File%20Library/Research/Carbon-Storage/Project-Portfolio/CBM-June-2014.pdf.*

[82] M. Godec *et al.,* ''CO_2-ECBM: A Review of its Status and Global Potential,'' *Energy Procedia* 63: 5858–5869 (2014), available at *https://doi.org/10.1016/j.egypro.2014.11.619;* IEAGHG, *Potential Implications on Gas Production from Shales and Coals for Geological Storage of CO_2,* Report Number 2013/10 (September 2013), available at *http://www.ieaghg.org/docs/General_Docs/Reports/2013-10.pdf.*

[83] Based on an analysis of the information provided in U.S. DOE NETL, *Carbon Storage Atlas, Fifth Edition,* September 2015, available at *https://www.netl.doe.gov/research/coal/carbon-storage/atlasv* and areas within 100 km (62 miles) of these locations. The geographic area decreased by 411,156 square km (158,748 square miles).

[84] *See* comments of UARG at p. 84 (Docket entry: EPA–HQ–OAR–2013–0495–9666) citing Haibo Zhai, *et al.,* ''Water Use at Pulverized Coal Power Plants with Post-Combustion Carbon Capture and Storage,'' *Environ. Sci. Technol.,* 45:2479–85 (2011);

referenced by commenters that indicated significant increases in water use from CCS cooling and process operations compared to coal-fired EGUs without CCS were for cases where full CCS (90 percent or greater capture) is implemented, and were therefore of limited relevance to its determination that *partial* CCS was BSER.

In the 2015 Rule, the EPA examined water use predicted from the updated DOE/NETL studies to determine the magnitude of increased water usage for a new SCPC EGU implementing partial CCS to meet the final standard of 1,400 lb CO_2/MWh-gross. The EPA in 2015 determined that the results showed that a new SCPC unit that implements 16 percent partial CCS to meet the final standard would see an increase in water consumption (the difference between the predicted water withdraw and discharge) of about 6.4 percent compared to an SCPC with no CCS and the same net power output. Further, the EPA expressed the view that there would be additional opportunities to minimize the water usage at such a facility. For example, the SaskPower Boundary Dam Unit #3 post-combustion capture project captures water from the flue gas and recycles the water, resulting in decreased withdrawal of fresh water. In addition, while the Agency did not find IGCC to be the BSER, the predicted water consumption for the new IGCC unit was nearly 20 percent less than that predicted for the new SCPC unit without CCS (and almost 25 percent less than the SCPC unit meeting the final standard). The EPA also predicted that water consumption at a new NGCC unit would be less than half that for a new SCPC EGU with the same net output.

In the 2015 Rule, the EPA's water use increase comparison, which was summarized in Table 13 of the 2015 final rule preamble (80 FR 64592), was evaluated based on a bituminous-fired EGU with a wet scrubber and a cooling tower. While this is one common configuration for an EGU boiler and associated air pollution control device, this does not account for other boiler configurations and other air pollution control devices. Certain regions of the country with an arid climate and/or scarce water availability often use boiler and pollution control devices that minimize water use. While the absolute amount of water required for CO_2 capture equipment is relatively constant on a gallon per ton of captured CO_2 basis across various boiler types, the percentage increase in water requirements is not. A more appropriate percentage increase comparison for arid western markets and other locations in water-scarce environments is a subbituminous-fired PC unit with spray drying or a fluidized bed unit and a cooling tower. To estimate the increased water consumption for low rank coal-fired EGUs, the EPA used the NETL partial capture report for bituminous coal-fired EGUs to determine the increased water requirements per amount of CO_2 captured. The EPA then applied the increased water use relationship to the 2011 baseline report that included model plants burning low rank coal.

As shown in Table 8, the percent increase in water use for EGUs burning low rank coals is four times as large as for bituminous-fired EGUs. The EPA is proposing that this increase in water requirements is so great that it could be prohibitively expensive for developers to secure sufficient quantities of water in arid regions of the country.[85] [86]

TABLE 8—PREDICTED WATER CONSUMPTION

Technology	Raw water consumption (gpm/MWnet) [1]	Increase in water use compared to no CCS (%) [87]
SCPC − no CCS (bit)	7.4	.....
SCPC + ~16% CCS (bit)	7.9	7.7
SCPC − no CCS (low rank))	3.8	.....
SCPC + ~ 26% CCS (low rank)	4.9	28

[1] MWnet = megawatts-net.
[2] SCCFB = supercritical circulating fluidized bed.

In addition to the configurations cited in the NETL report, other boiler configurations use even less water. For example, Black Hills Power Corporation's 110-MW Wygen III is a pulverized coal power plant near Gillette, Wyoming. The plant, which came online in 2010, fires Powder River Basin coal and has an air pollution control system comprised of selective catalytic reduction, dry flue gas desulfurization (FGD), and a fabric filter baghouse. This type of ''dry'' plant was built with minimal water requirements due to dry cooling and dry lime FGD for acid gas control. As described elsewhere in the preamble, this type of boiler design is one of the configurations likely to be considered for future coal-fired EGUs. However, carbon capture technologies are limited to using conventional wet cooling technologies. The EPA is unaware of any demonstration, pilot, or large-scale projects using dry cooling technologies with carbon capture technologies. Therefore, requiring CCS on a plant of this design would substantially increase the plant's water-use requirements.

All CCS systems that are currently available require substantial amounts of water to operate. These water requirements would limit the geographic availability of potential future EGU construction to areas of the country with sufficient water resources.

U.S. DOE NETL, *Water Requirements for Existing and Emerging Thermoelectric Plant Technologies* at 13 DOE/NETL–402/080108, August 2008, April 2009 revision.

[85] Part of the rationale that the water requirements are too great is that the water requirements for partial CCS are roughly double that of the water requirements for a spray dryer used for SO_2 control.

[86] In the 2015 final rule, the EPA referenced SaskPower Boundary Dam's lignite-fired Unit #3 post-combustion capture project that recovers water from the flue gas and recycles it, resulting in decreased need for withdrawal of fresh water from the adjacent reservoir. However, specific data on how much water was captured/saved was not cited. In retrospect, the EPA now believes that it should have considered that for new lignite-fired power plants owners/operators would likely dry the lignite prior to combustion. Drying lignite both decreases the capital cost of a new boiler island and increases boiler efficiency. However, it results in less water in the flue gas, limiting the amount that can be captured/recycled. The same might be the case for new subbituminous coal-fired EGUs—they would likely dry the coal prior to combustion so less water would be available in the flue gas for recovery and reuse.

[87] In the 2015 rulemaking, the raw water consumption for a SCPC with no CCS (bit) was reported as 4,095 gallons per minute (gpm) instead of 4,045 gpm. This resulted in a reported increase in water use of 6.4 percent instead of 7.7 percent.

To establish water availability, the EPA has, for this proposal, reviewed annual average rainfall totals as an estimation of water availability. This approach indicates that the Western U.S. (*i.e.,* areas west of a line running from central Texas to North Dakota), excluding the Pacific Northwest, has lower amounts of water available for EGUs. In addition, a comparison of areas of the country with lower rainfall amounts shows considerable overlap with areas of the country with sequestration sites. This suggests that many sequestration sites might not have sufficient water resources to operate CO_2 capture equipment. Therefore, this, in combination with the EPA's proposed determination that its earlier understanding of the scope of geologic sequestration site availability was an overestimation (by some 4 percent), has led the EPA to propose a revision to its 2015 findings and a new determination that the overall geographic availability of CCS is too limited to be considered as BSER.

In the 2015 Rule, EPA also stated that a new IGCC unit required nearly 20 percent less water than a new bituminous coal-fired SCPC unit without CCS (and almost 25 percent less than the SCPC unit meeting the final standard). The DOE/NETL reports indicate that IGCC designs are available that use less water than comparative PC units for low rank coals as well. However, in an April 2017 independent engineering report on the Kemper IGCC Project,[88] one of the concerns noted was the underestimation of the amount of water needed for the process water system. The report noted that the initially planned 5 million gallons of storage was insufficient, that a new 1.7-million-gallon temporary tank was to be installed and that additional permanent water storage tank capacity should be considered. Based on this, the EPA is soliciting comment on whether IGCC reduces the amount of water use by coal-fired EGUs (Comment C–9).

c. Review of Technical Feasibility of Carbon Capture Equipment

In the 2015 Rule, the EPA determined that CO_2 capture technology was technically feasible based on EGUs that had previously and were currently using post-combustion carbon capture technology (especially Boundary Dam), commercial vendors that offered carbon capture technology and other performance guarantees, a review of the literature, and industry and technology developers' pronouncements of the feasibility and availability of CCS technologies. Since the 2015 rulemaking, the Petra Nova CCS project, located at NRG's W.A. Parish power generating station near Houston, Texas, has begun operations, and is reported to be the world's largest post-combustion carbon capture system.[89]

While the carbon capture technology at the Boundary Dam project is currently operating, that project experienced multiple issues with the performance of the capture technology during its first year of operation (2014–15). During that time, the capture equipment was operating with lower reliability than designed, and, as a result, SaskPower renegotiated its CO_2 supply contract with Cenovus to avoid paying penalties for not supplying the agreed amount of CO_2 for the company's EOR projects. These problems included the amine chemistry and the CO_2 compression system. While the Petra Nova project is currently operating, it has not demonstrated the integration of the thermal load of the capture technology into the EGU steam generating unit (*i.e.,* boiler) steam cycle. Rather, the parasitic electrical and steam load are supplied by a new 75 MW co-located natural gas-fired CHP facility. The EPA solicits comment on whether Boundary Dam's first-year operational problems cast doubt on the technical feasibility of fully integrated CCS (Comment C–10). For example, would an EGU with a fully integrated steam cycle that draws steam from the steam turbine to regenerate the amine be able to operate during periods when the carbon capture system is not operating?

The EPA notes that while both these projects are currently operating, both received significant government support to mitigate the financial risks associated with the CCS technology. Because no independent commercial CCS projects are in operation, the EPA solicits comment on whether the fact that Boundary Dam and Petra Nova were dependent on government support casts doubt on the technical feasibility of CCS, *e.g.,* whether it raises concerns as to the extent to which developers are willing to accept the risks associated with the operation and long-term reliability of CCS technology (Comment C–11).

While the EPA did not find that a new IGCC EGU is part of the final BSER, the Agency did note that IGCC without CCS is a viable alternative compliance option. However, both the Edwardsport and Kemper IGCC facilities had significant cost overruns. In fact, the Kemper IGCC's technology challenges, escalating costs, and project management issues resulted in the company suspending startup and operations activities involving the lignite gasification portion of the energy facility, leaving only the natural gas combined cycle plant in operation.[90] The EPA solicits comment on the extent to which the issues with these IGCC EGUs cast doubt on the economic viability of IGCC as an option for new generation (Comment C–12).

B. Identification of the Revised BSER

The EPA evaluated six different control technology configurations as potentially representing the BSER for new and reconstructed coal-fired EGUs: (1) The use of partial CCS, (2) conversion to (or co-firing with) natural gas, (3) the use of CHP, (4) the use of a hybrid power plant, (5) the use of IGCC technology, and (6) efficient generation. This section discusses each of these alternatives, including the technical systems that the EPA considered for the BSER, evaluations of each system, and the reasons for determining that the most efficient generating technology meets the criteria to qualify as the BSER. The discussion includes the rationale for selecting the proposed standards of performance based on those BSER.

As noted above, the EPA determines the best demonstrated system based on the following key considerations, among others:

- The system of emission reduction must be technically feasible.
- The costs of the system must be reasonable. The EPA may consider the costs on the source level, the industrywide level, and, at least in the case of the power sector, on the national level in terms of the overall costs of electricity and the impact on the national economy over time.

[88] This project received federal assistance under the Energy Policy Act of 2005 (EPAct05). *See* 2015 rule, 80 FR at 64526, n.74. The EPA is not proposing to revise or re-open the interpretation of EPAct05 that the EPA included in the 2015 rule. *Id.* at 64541–64542. Thus, because the EPA is considering information about the Kemper project in conjunction with other information that is not from facilities affected by EPAct05, EPAct05 does not preclude the EPA from considering such Kemper information.

[89] As with the Kemper project discussed above, this project received federal assistance under EPAct05. *See* 2015 rule, 80 FR at 64526, n.74. As with the Kemper project, because EPA is considering information about the Petra Nova project in conjunction with other information that is not from facilities affected by EPAct05, EPAct05 does not preclude EPA from considering the Petra Nova information.

[90] URS Corp., *IM Monthly Report—Mississippi Public Service Commission: Kemper IGCC Project,* April 2017, available at *http://www.psc.state.ms.us/executive/pdfs/2017/Kemper/Monthly%20Report%20April%202017%20Executive%20Summary.pdf.*

• The EPA must also consider energy impacts, and, as with costs, may consider them on the level of the source, the region, and on the nationwide structure of the power sector over time.

• According to the D.C. Circuit caselaw, the EPA must consider the amount of emissions reductions that the system would generate, and that CAA section 111 is designed to promote the development and implementation of technology. Moreover, the EPA has discretion to weigh these various considerations, may determine that some merit greater weight than others, and may vary the weighting depending on the source category.

1. Partial CCS

As described previously, under the revised analysis set forth in this proposal, the EPA proposes that the cost of partial CCS is not reasonable. In addition, when the availability of water and geologic sequestration sites are considered together, the EPA finds that partial CCS is not widely geographically available. In addition, the EPA is soliciting comment on whether there is sufficient information about the long-term reliability of carbon capture technology and sequestration capture technology to assess the technical feasibility of CCS (Comment C–13). Therefore, the EPA proposes to rescind our finding that partial CCS satisfies the BSER criteria and proposes to find that it does not.

2. Conversion to or Co-Firing With Natural Gas

While co-firing with natural gas in a utility steam generating unit a technically feasible option to reduce CO_2 emission rates, it is an inefficient way to generate electricity compared to use of an NGCC. For cases where the natural gas could be co-fired without any capital investment (*e.g.,* sufficient natural gas is available at the site) or impact on the performance or operation of the affected EGU, the costs of CO_2 reduction would be between approximately $40 to $70 per ton of CO_2 avoided (that is, $40/ton for bituminous coal and $70/ton for subbituminous coal), depending on the coal rank burned in the boiler. This calculation only accounts for the relative costs and CO_2 emission rates of the fuel and does not account for potential adverse or positive impacts on the operation of the boiler. While natural gas prices have fallen significantly over the past decade, long term price projections forecast that natural gas will still be significantly more expensive than coal on a $/MMBtu basis. The higher fuel costs from co-firing would increase both the LCOE and variable operating costs of the unit. As described earlier, due to economic dispatch, the unit would be expected to have lower electricity sales, and therefore generate less revenue and less marginal and overall profit. Further, if an owner/operator is required to burn natural gas for compliance purposes, it would likely have to enter into firm service contracts as opposed to interruptible service contracts for natural gas, which would increase its costs for natural gas. Potential positive aspects include a reduction in pre-post combustion control criteria pollutant and HAP emission rates. Due to these lower pre-post combustion emission rates, post-combustion control requirements are reduced and savings could be realized due to both lower capital and O&M post combustion control costs and/or the cost of emission allowances under certain pollution control programs. Most pollutants, and especially NO_X, would be reduced in proportion to the amount of natural gas burned.

Natural gas reburning (NGR) is a combustion technology in which a portion of the main fuel heat input is diverted to locations above the burners, creating a secondary combustion zone called the reburn zone. In NGR, natural gas is injected to produce a slightly fuel rich reburn zone. Overfire air (OFA) is added above the reburn zone to complete burnout. NGR requires 15 to 20 percent of furnace heat input from natural gas and OFA and has been demonstrated to reduce NO_X emissions by 39 to 67 percent on several existing coal-fired boilers in applications ranging in size from 33 to 600 MW in the U.S. and up to 800 MW internationally. With NGR at 15 and 20 percent of the heat input to a coal-fired boiler, the CO_2 emission rate would be reduced by 6 to 10 percent.

Fuel lean gas reburning (FLGR™), also known as controlled gas injection, is a process in which natural gas is injected above the main combustion zone at a lower temperature zone than in NGR. FLGR™ is different from NGR because the gas is injected in a manner that optimizes the furnace's stoichiometry on a localized basis. By doing this, the process avoids creating a fuel-rich zone and maintains overall fuel-lean conditions. The FLGR™ technology achieves NO_X control using less than 10 percent natural gas heat input without the requirement for OFA. FLGR™ has a capital cost of approximately $8/kW [91] and been demonstrated to reduce NO_X emissions by 33 to 45 percent. At a 10 percent heat input reburn rate, the CO_2 emission rate of a coal-fired EGU would be reduced by 4 to 5 percent. Based strictly on the difference in fuel prices, co-firing 10 percent natural gas would only increase the LCOE of a coal-fired EGU by approximately 2 or 3 percent. However, variable operating costs would increase between approximately 7 to 9 percent, impacting dispatch and energy revenue for the EGU.

In addition, while many recently constructed coal-fired power plants routinely use natural gas or other fuels such as low sulfur fuel oil for start-up operations and, if needed, to maintain the EGU in ''warm stand-by,'' some areas of the U.S. have natural gas pipeline infrastructure limitations. These areas either currently lack access to natural gas transportation infrastructure or face capacity constraints in their existing natural gas pipelines (*i.e.,* they are not able to greatly increase purchase volumes with the existing infrastructure).[92] For new coal-fired EGUs wishing to locate in these areas, it could be either infeasible or extremely costly to co-fire natural gas. The EPA solicits comment on the cost to add natural gas capability to areas of the county without sufficient infrastructure to support a new natural gas-fired EGU (Comment C–14).

While co-firing natural gas might be a viable option for specific coal-fired EGUs, the EPA is not proposing natural gas co-firing as part of the BSER for multiple reason. First, as discussed previously, a significant benefit of a new coal-fired power plant is the fuel diversity value that it brings. Requiring the EGU to burn natural gas defeats the purpose of constructing the EGU in the first place. Further, not all areas of the country have cost-effective access to natural gas. Co-firing natural gas is an inefficient use of the nation's natural gas resources, which is relevant under the ''energy requirements'' criterion for BSER. Combined cycle EGUs are more efficient at using natural gas to generate electricity and it would not be environmentally beneficial for utilities to combust natural gas in less steam generating units to satisfy a facility specific emissions standard. Finally, at this time, the EPA does not have

[91] Breen, *Fuel Lean Gas Reburn (FLGR) Solutions,* available at *http://breenes.com/wp-content/uploads/2017/07/FLGR_ljv4singles.pdf.*

[92] Maps of natural gas pipelines and underground storage facilities are available from EIA, *https://www.eia.gov/naturalgas/archive/analysis_publications/ngpipeline/index.html.* Information on pending projects are available from EIA and the Federal Energy Regulatory Commission (FERC), *https://www.eia.gov/naturalgas/pipelines/EIA-NaturalGasPipelineProjects.xlsx* and *https://www.ferc.gov/industries/gas/indus-act/pipelines/pending-projects.asp*

sufficient information to analyze the overall impact of co-firing natural gas, particularly impacts on dispatch.

3. Combined Heat and Power (CHP)

CHP, also known as cogeneration, is the simultaneous production of electricity and/or mechanical energy and useful thermal output from a single fuel. CHP requires less fuel to produce a given energy output, and because less fuel is burned to produce each unit of energy output, CHP reduces air pollution and GHG emissions. CHP has lower emission rates and can be more economic than separate electric and thermal generation. However, a critical requirement for a CHP facility is that it primarily generates thermal output and generates electricity as a byproduct and must therefore be physically close to a thermal host that can consistently accept the useful thermal output. For coal-fired EGUs, it can be particularly difficult to locate a thermal host with sufficiently large thermal demands such that the useful thermal output would impact the emissions rate. The refining, chemical manufacturing, pulp and paper, food processing, and district energy industries tend to have large thermal demands. However, the thermal demand at these facilities is generally only sufficient to support a smaller coal-fired power plant, approximately a maximum of 100 MW. This would limit the geographically available locations where new coal-fired generation could be constructed in addition to limiting size. Furthermore, even if a sufficiently large thermal host were in close proximity, the owner/operator of the EGU would be required to rely on the continued operation of the thermal host for the life of the EGU. If the thermal host were to shut down, the EGU would be unable to comply with the emissions standard. This reality would likely result in difficulty in securing funding for the construction of the EGU and could also lead the thermal host to demand discount pricing for the delivered useful thermal output. For these reasons, the EPA proposes it is not practicable to find that CHP is BSER.

4. Hybrid Power Plant

Hybrid power plants combine two or more forms of energy input into a single facility with an integrated mix of complementary generation methods. While there are multiple types of hybrid power plants, the most relevant type for this proposal is the integration of solar energy (*e.g.,* concentrating solar thermal) with a fossil fuel-fired EGU. Both coal-fired and NGCC EGUs have operated using the integration of concentrating solar thermal energy for use in boiler feed water heating, preheating makeup water, and/or producing steam for use in the steam turbine or to power the boiler feed pumps.

One of the benefits of integrating solar thermal with a fossil fuel-fired EGU is the lower capital and O&M costs of the solar thermal technology. This is due to the ability to use equipment (*e.g.,* HRSG, steam turbine, condenser, *etc.*) already included at the fossil fuel-fired EGU. Another advantage is the improved electrical generation efficiency of the non-emitting generation. For example, solar thermal often produces steam at relatively low temperatures and pressures, and the conversion of the thermal energy in the steam to electricity is relatively low. In a hybrid power plant, the lower quality steam is heated to higher temperatures and pressures in the boiler (or HSRG) prior to expansion in the steam turbine, where it produces electricity. Upgrading the relatively low-grade steam produced by the solar thermal facility in the boiler improves the relative conversion efficiencies of the solar thermal to electricity process. The primary incremental costs of the non-emitting generation in a hybrid power plant is the costs of the mirrors, additional piping, and a steam turbine that is 10 to 20 percent larger than that in a comparable fossil only EGU to accommodate the additional steam load during sunny hours. A drawback of integrating solar thermal is that the larger steam turbine will operate at part loads and reduced efficiency when no steam is provided from the solar thermal panels during periods when the sun is not shining (*i.e.,* the night and cloudy weather). This limits the amount of solar thermal that can be integrated into the steam cycle at a fossil fuel-fired EGU.

In the 2018 Annual Energy Outlook [93] (AEO 2018), the levelized cost of concentrated solar power (CSP) without transmission costs or tax credits is $161/MWh. Integrating solar thermal into a fossil fuel EGU reduces the capital cost and O&M expenses of the CSP portion by 25 and 67 percent compared to a stand-alone CSP EGU respectively.[94] This results in an effective LCOE for the integrated CSP of $104/MWh. Assuming the integrated CSP is sized to provide 10 percent of the maximum steam turbine output and the relative capacity factors of the coal-fired boiler and the CSP (those capacity factors are 85 and 25 percent, respectively) the overall annual generation due to the concentrating solar thermal would be 3 percent of the hybrid EGU output. This would result in a three percent reduction in the overall CO_2 emissions and a one percent increase in the LCOE, without accounting for any reduction in the steam turbine efficiency. However, these costs do not account for potential reductions in the steam turbine efficiency due to being oversized relative to a non-hybrid EGU. Without this information, the EPA does not have sufficient information to evaluate costs and overall impact, and therefore cannot propose this technology as the BSER.

In addition, solar thermal facilities require locations with abundant sunshine and significant land area in order to collect the thermal energy. Existing concentrated solar power projects in the U.S. are primarily located in California, Arizona, and Nevada with smaller projects in Florida, Hawaii, Utah, and Colorado. Not all areas of the U.S. have both sufficient space and the abundant sunshine to successfully operate a hybrid power plant. The EPA proposes that due to the limited geographic availability of concentrated solar thermal projects, the Agency cannot propose this technology as BSER.

An alternate, but similar, approach for coal-fired EGUs to integrate lower-emitting generation would be to use natural gas-fired combustion turbines, fuel cells, or other combustion technology. These alternatives can reheat or preheat boiler feed water (minimizing the steam that is otherwise extracted from the steam turbine), preheat makeup water and combustion air, produce steam for use in the steam turbine or to power the boiler feed pumps, or use the exhaust directly in the boiler to generate steam. In theory, this could lower generation costs as well the GHG emissions rate for a coal-fired EGU. The EPA is aware of only one coal-fired EGU currently integrating lower-emitting combustion technology,[95] does not have sufficient information to evaluate costs, and therefore cannot propose this technology as the BSER.

[93] EIA, *Annual Energy Outlook 2018,* February 6, 2018, available at *https://www.eia.gov/outlooks/aeo/.*

[94] B. Alqahtani and D. Patiño-Echeverri, Duke University, Nicholas School of the Environment, ''Integrated Solar Combined Cycle Power Plants: Paving the Way for Thermal Solar,'' *Applied Energy* 169:927–936 (2016).

[95] The Gerstein power plant, unit K, in Germany integrates a natural gas-fired combustion turbine that discharges the exhaust directly into the coal-fired boiler. This essentially creates a combined cycle EGU with a coal-fired heat recovery steam generator.

5. IGCC

The EPA also considered whether IGCC technology represents the BSER for new power plants using coal or other solid fossil fuels. While gasification is available and used in other industrial sectors (*e.g.,* petroleum refining) there are relatively few IGCC EGUs. According to the NETL baseline fossil reports, IGCC units are projected to have a lower gross-output based emission rates compared to SCPC. However, the design net emission rates and absolute amount of emissions to the atmosphere tend to be materially similar so there are limited, if any, net GHG benefits. Furthermore, the emissions data for the IGCC facilities in the EPA database does not include the output from the steam turbine. As a result, it is not possible to verify the gross emissions rate or estimate the net emissions rate. Therefore, the EPA does not currently have sufficient information based on actual operating data to evaluate whether IGCC meets the BSER requirements. In addition, the NETL baseline fossil fuel reports indicate that IGCC LCOE costs are 20 percent higher, and the incremental generating costs are 4 percent higher, than a comparable SCPC. However, the two most recent IGCC EGUs constructed in the U.S. (Edwardsport and Kemper) both experienced significant cost overruns. In fact, the technical complexity and costs of the Kemper project were so great that the gasification project was abandoned and the facility is currently operating as a natural gas-fired combined cycle facility. Based on consideration of these factors, the EPA is not proposing IGCC as the BSER.

6. Energy Efficient Power Generation

This section describes the technology that the EPA proposes for the BSER: the most efficient generation technology available, which is the use supercritical [96] steam conditions (*i.e.,* a SCPC or supercritical circulating fluidized bed (CFB) boiler) for large EGUs, and the use of the best available subcritical steam conditions for small EGUs in combination with the best operating practices and dry cooling. The use of higher steam temperatures and pressures (*e.g.,* supercritical steam conditions) increases the efficiency of converting the thermal energy in the steam to electrical energy. Best operating practices, include, but are not limited to, installing and maintaining equipment (*e.g.,* economizers, feedwater heaters, etc.) in such a way to maximize overall efficiency and to operate the steam generating unit to maximize overall efficiency (*e.g.,* minimize excess air, optimize soot blowing, etc.). The cooling (*i.e.,* condensing) system also has a significant impact on efficiency. Once through cooling systems use an open system where cooling water is extracted directly from a water body and returned to the same water body at a high temperature. This type of cooling result in the most efficient operation. However, once through system have greater environmental impacts and new EGUs use either cooling towers or dry cooling systems. Cooling towers are closed systems where the water extracted for cooling is evaporated in the cooling tower. Cooling towers reduce water impacts compared to once through systems, but still require substantial amounts of water to operate. Dry cooling systems use air heat exchangers to provide cooling and minimize water impacts. However, these systems are also the least efficient.

a. Reasonable Costs

Advanced generation technologies enhance operational efficiency compared to lower efficiency designs. Such technologies are technically feasible and present little incremental capital cost compared to other types of technologies that may be considered for new and reconstructed sources. In addition, due to the lower variable operating costs, more efficient designs would be expected to dispatch more often and sell more electricity, thereby offsetting increases in capital costs. It should be noted that this cost evaluation is not an attempt to determine the affordability of advanced generation in a business or economic sense (*i.e.,* the reasonableness of the imposed cost is not determined by whether there is an economic payback within a predefined time period). Table 9 lists the capital costs, variable operating costs, design emission rates, and LCOE for various boiler designs.

TABLE 9—COST AND EMISSION RATES OF COAL-FIRED EGUS (2016 $) [97]

Technology [98]	Total as spent capital ($/kW)	Variable operating costs ($/MWh)	Design emissions rate (lb CO_2/MWh-net)	LCOE ($/MWh)
Subcritical PC (bit)	2,850	32.3	1,780	81.2
Supercritical PC (bit)	2,940	31.3	1,710	81.7
IGCC (bit)	3,590	32.0	1,730	97.9
Supercritical PC (low rank)	3,340	28.0	1,890	85.2
Ultra-supercritical PC (low rank)	3,520	27.4	1,840	87.6

b. Non-Air Quality Health and Environmental Impacts and Energy Requirements

Highly efficient generation reduces all environmental and energy impacts compared to less efficient generation. Even when operating at the same input-based emissions rate, the more efficient a unit is, the less fuel is required to produce the same level of output, so overall emissions are reduced for all pollutants. Supercritical steam conditions, compared to subcritical, reduce all pollutants between approximately 3 to 5 percent. More

[96] Subcritical coal-fired boilers are designed and operated with a steam cycle below the critical point of water (22 MPa (3,205 psi)). EGUs using supercritical steam conditions operate at pressures greater than 22 MPa and temperatures greater than 550 °C (1,022 °F). Increasing the steam pressure and temperature increases the amount of energy within the steam, so that more energy can be extracted by the steam turbine, which in turn leads to increased efficiency and lower emissions.

[97] The primary sources of information are the NETL baseline fossil reports. The EPA converted the dollar year to 2016 values and estimated low rank subcritical and bituminous ultra-supercritical based on the ratios in the relevant baseline fossil reports. Consistent with the NETL partial CCS approach, costs are ''next-of-a-kind'' rather than first of a kind (80 FR at 64,570/3). First of a kind costs are higher than ''next-of-a-kind'' costs but are expected to decrease (as is normally the case) with the completion of additional projects and DOE/NETL research.

[98] The NETL design values are 16.5 MPa (2,400 pounds per square inch gauge (psig)) () and 566 °C (1,050 °F) for subcritical EGUs, 24 MPa (3,500 psig) and 593 °C (1,100 °F) for supercritical EGUs, and 28 MPa (4,000 psig) and 650 °C (1,200 °F) for ultra-supercritical EGUs.

efficient EGUs also have lower auxiliary (*i.e.,* parasitic) loads so that impacts on energy requirements are also reduced.

c. Extent of Reductions in CO_2 Emissions

In the 2015 Rule, the EPA found that highly efficient generation did not represent BSER in part because it would not result in meaningful emission reductions and did not promote the development of control technology. That conclusion was based on the assumption that any new coal-fired EGU built in the U.S. would use highly efficient generation even in the absence of 40 CFR part 60, subpart TTTT.

Close to 90 percent of the large coal-fired EGUs that have commenced operation since 2010 in the U.S. use either supercritical steam conditions or IGCC technology. The remainder of the capacity uses subcritical steam conditions. However, according to data submitted to the EPA's Clean Air Markets Division (CAMD), the average 2017 reported emissions rate of all large coal-fired boilers that commenced operation since 2010 was 1,938 lb CO_2/MWh-gross. This is two percent higher than the proposed standard. The sole small coal-fired EGU reporting emissions that commenced operation since 2010 in the U.S. uses subcritical steam conditions and had a reported annual emissions rate of 2,200 lb CO_2/MWh-gross, nine percent higher than the proposed standard. Therefore, if a new coal-fired EGU were to be constructed, the EPA estimates that the proposed BSER standards would result in reductions in emissions of approximately two percent for large EGUs and nine percent for small EGUs when compared to the expected emissions for new EGUs absent an NSPS establishing standards for GHG emissions. Fuel costs makeup a significant portion of the variable operating costs of a coal-fired EGUs and owners/operators of EGUs currently have a financial incentive to maximize efficiency and minimize CO_2 emissions. While achievable, the proposed emission rates would require owners/operators of a new coal-fired EGU to both construct a highly efficient EGU and operate and maintain it to minimize CO_2 emissions.

d. Technical Feasibility

The use of supercritical steam conditions has been demonstrated by multiple facilities since the 1970s. Between 2013 and 2017, 327 gigawatts (GW) of coal-fired EGUs entered operation globally in 15 countries. The new capacity is split roughly equally between subcritical, supercritical, and ultra-supercritical steam conditions. Subcritical units tend to be smaller (*i.e.,* less than 300 MW) and supercritical units tend to be approximately 500 MW. Ultra-supercritical EGUs tend to be larger (*e.g.,* 800 MW) and have been built in China, Germany, South Korea, Netherlands, Malaysia, and Japan. Materials capable of withstanding ultra-supercritical steam conditions of 30 MPa (4,350 psi) and 620 °C (1,120 °F) have been demonstrated internationally at coal-fired boilers.[99] In addition, vendors are offering designs capable of withstanding advanced ultra-supercritical steam conditions of 33 MPa and 670 °C.[100] Furthermore, using supercritical steam also allows the use of a second reheat cycle, which further increases efficiency.

As stated in the 2015 Rule, the smallest supercritical coal-fired EGU is approximately 200 MW, and steam turbines that operate on supercritical steam are currently not commercially available for smaller coal-fired EGUs. Consequently, developers of a small EGU that wished to use supercritical steam conditions would have to have a steam turbine designed specifically for that project, substantially increasing the cost of the project. Therefore, for smaller new and reconstructed EGUs the maximum economically viable steam pressure and temperature for which steam turbines are currently available are 21 MPa (3,000 psi) and 570 °C (1,060 °F). Above this pressure, the steam would be supercritical. Also, using subcritical steam conditions limits the steam cycle to use of a single steam reheat cycle. Therefore, it is not technically feasible for smaller EGUs to use a second reheat cycle to improve efficiency.

e. Promotion of the Development and Implementation of Technology

As noted above, the case law makes clear that the EPA is to consider the effect of its selection of BSER on technological innovation or development, but that the EPA also has the authority to weigh this against the other factors. Selecting highly efficient generation technology as the BSER offers an opportunity to encourage the development and implementation of improved control technology. This technology is readily transferrable to other countries, existing EGUs, and other industries.

According to EIA, demand in India and Southeast Asia is projected to drive an increase in coal use over the next two decades. Coal is often the fuel of choice because it is abundant, inexpensive, secure, and easy to store. Clean coal technologies are critical to ensuring that these economies develop in a more environmentally sustainable way. According to the World Electric Power database, sixty percent of the new coal-fired capacity in India and Southeast Asia between 2013 and 2017 uses subcritical steam conditions. Although supercritical technology is already developed, establishing it as the basis for control requirements in the U.S. for new and reconstructed sources would help establish it in other nations, resulting in a reduction in global CO_2 emissions. The EPA considers that the proposed BSER will promote the development and implementation of viable control technologies.

f. Nationwide, Longer-Term Perspective of Impacts on the Energy Sector

Designating the most efficient generation technology as the BSER for new and reconstructed coal-fired utility boilers and IGCC units will not have significant impacts on nationwide electricity prices. This is because (1) the additional costs of the use of efficient generation will, on a nationwide basis, be small because few, if any, new coal-fired projects are expected, and because at least some of these can be expected to incorporate efficient generation technology in any event; and (2) the technology does not add significant costs. For similar reasons, designation of the most efficient generation technology as the BSER for reconstructed new coal-fired utility boilers and IGCC units will not have adverse effects on the structure of the power sector, will promote fuel diversity, and will not have adverse effects on the supply of electricity.

Based on the reasonable cost, technical feasibility, and emission reductions the EPA proposes that efficient generation in combination with the best operating practices is the BSER for new coal-fired EGUs.

C. Reconstructed EGUs

In the 2015 Rule, the EPA explained the background of, and requirements for, reconstructed EGUs, evaluated various control technology configurations to determine the BSER for reconstructed coal-fired boiler and IGCC EGUs, and selected efficiency improvements achieved through the use of the most efficient generation technology. The EPA explained that this technology was technically feasible, had sufficient emission reductions, had reasonable costs, and had some opportunity for technological

[99] Isogo unit 2 (located in Japan) has a reheat temperature of 620 °C and Avedore 2 (located in Denmark) operates at 30 MPa.

[100] *https://www.ge.com/power/steam/steamh.*

innovation. The EPA is taking the same approach in this rulemaking and is not proposing to change the BSER technology. However, since the BSER is the same, the Agency is proposing to use the emissions analysis as for new EGUs for reconstructed EGUs as well. For each of the subcategories, that is, the BSER and emissions standard for reconstructed EGUs is the same as for new EGUs.

D. Coal Refuse Subcategory

Coal refuse (also called waste coal) is a combustible material containing a significant amount of coal mixed with rock, shale, slate, clay and other material that is reclaimed from refuse piles remaining at the sites of past or abandoned coal mining operations. In the April 2012 proposal, the EPA solicited comment on subcategorizing EGUs that burn over 75 percent coal refuse on an annual basis (the EGU NSPS for criteria pollutants contain such a subcategory). Multiple commenters supported a subcategory, citing numerous environmental benefits of remediating coal refuse piles. The EPA declined to adopt a subcategory and explained that the costs faced by coal refuse facilities to install partial CCS were similar for coal-fired EGUs burning any of the primary coals (*i.e.,* bituminous, subbituminous, and lignite). Further, the final applicable requirements and standards in the rule did not entirely preclude the development of new coal refuse-fired units without CCS, for example, through the exclusion for industrial CHP units. Many existing coal refuse-fired units are relatively small and designed as CHP units. Due to the expense of transporting coal refuse long distances, the EPA projected that any new coal refuse-fired EGU would likely be relatively small. Moreover, sites with sufficient thermal demand exist such that the unit could be designed as an industrial CHP facility and the requirements of 40 CFR part 60, subpart TTTT would not apply.

Under the 2015 partial CCS BSER determination, due to lower efficiencies and higher uncontrolled emission rates, coal refuse-fired EGUs would have had to install a slightly higher percentage of partial CCS, increasing costs roughly in proportion to the percentage increase in partial CCS. These increase in costs were determined to be sufficiently similar and a subcategory for coal refuse-fired EGUs was not necessary. However, as described previously the proposed BSER (and the corresponding emissions rate) for coal-fired EGUS (including coal refuse-fired EGUs) is efficient generation and not the use of partial CCS. Therefore, the cost rationale for not providing a subcategory for coal refuse-fired EGUs is not necessarily applicable. For multiple reasons, coal refuse-fired EGUs have higher uncontrolled emission rates. Coal refuse generally has lower energy density (British thermal units per pound (Btu/lb) of fuel) due to its high ash content along with a higher emissions rate on a pound of CO_2 per million British thermal unit (lb CO_2/MMBtu) basis. Unlike with ''wet'' coals such as lignite, there are limited options for upgrading the energy density of coal refuse. This lower energy density leads to inherently lower efficiency steam generating units. Furthermore, certain coal refuse piles have high sulfur contents. While remediating these piles through combustion provides significant multimedia environmental benefits, combusting these fuels presents challenging problems. To control sulfur emissions, significant quantities of limestone are added to the fluidized bed boilers. This not only decreases efficiency (due to the additional fuel required to calcine the limestone) but leads to chemically created CO_2 (released when the limestone is calcined to lime) that is released through the stack. These factors make it difficult for coal refuse-fired EGUs to achieve the same output-based GHG emission rates of EGUs burning primary coals. While coal refuse-fired EGUs do not report sufficient emissions data to the EPA's CAMD to determine their emission rates, based on normalization of emissions data, a coal refuse-fired EGU would emit approximately 20 percent more than a comparable bituminous-fired EGU. Therefore, if there is not a subcategory for coal refuse-fired EGUs, a developer of a new coal refuse-fired EGU would be required to install controls beyond the BSER technology basis.

In the 2015 Rule, the EPA concluded that, due to their relatively small size, new coal refuse-fired EGUs would likely be designed as CHP units and would therefore not be subject to 40 CFR part 60, subpart TTTT. However, the EPA has conducted a more recent analysis of the makeup of existing coal refuse-fired EGUs, which calls this conclusion into question. There are 18 existing coal refuse-fired EGUs that range from 400 to 2,500 MMBtu/h heat input. Only half of these units are CHP units, and the other half are strictly electricity production facilities. As stated previously, coal refuse-fired EGUs tend to be located close to existing coal refuse piles, and there is no assurance that a suitable thermal host will locate in those areas. Without a thermal host, the coal refuse-fired unit would not qualify as a CHP unit, and, instead, would become subject to 40 CFR part 60, subpart TTTT. Consequently, the EPA is proposing to revise our conclusion that all new coal refuse-fired EGUs have the ability to avoid applicability with 40 CFR part 60, subpart TTTT.

Considering these factors, the EPA proposed that the BSER for coal refuse-fired EGUs is the use of the best available subcritical steam conditions in combination with the best operating practices. One benefit of creating a subcategory for coal refuse-fired EGUs is to not discourage the development of these projects and to recognize the multimedia environmental benefits of remediating coal refuse piles.[101] The non-air quality environmental benefits include the remediation of acid seepage and leachate production, low soil fertility, and reclaiming land for productive use. An additional consideration is that existing coal refuse piles are slowly combusting in place and the CO_2 will eventually be released to the atmosphere so net GHG emissions are lower than those measured at the stack.

E. Determination of the Level of the Standard

Once the EPA has determined that a particular system or technology represents BSER, the CAA authorizes the Administrator to establish NSPS emission standards for new units that reflect the application of that BSER. In this case, the EPA proposes to determine that BSER is supercritical steam technology for large EGUs, and subcritical steam technology for small EGUs and coal refuse-fired EGUs. However, the Act prohibits the Administrator from expressly requiring sources to use any particular technology, such as supercritical steam conditions (*See* CAA section 111(b)(5), (h)). These provisions also ensure that NSPS standards do not preclude development of future technologies that may be even more efficient than the current supercritical systems. For new and reconstructed coal-fired boiler and IGCC EGUs, the EPA proposes to find that the best available steam conditions—which qualify as the BSER—support a standard of 1,900 lb CO_2/MWh-gross for large EGUs (*i.e.,* those with a nameplate heat input greater than 2,000 MMBtu/h), 2,000 lb CO_2/MWh-gross for small EGUs (*i.e.,* those with a nameplate heat input less

[101] The criteria pollutant coal-fired EGU NSPS subcategorizes coal refuse-fired EGUs in part due to the environmental benefits of remediating coal refuse piles.

than or equal 2,000 MMBtu/h), and 2,200 lb CO_2/MWh-gross for coal refuse-fired EGUs. Compliance with these standards would be determined on a 12-operating month rolling average basis. These levels of the standard are based on the emissions performance that can be achieved by a large pulverized or CFB coal-fired EGU using supercritical steam conditions and small and coal refuse-fired EGUs using subcritical steam conditions.

To determine what emission rates are currently achieved by existing coal-fired EGUs, the EPA reviewed annual generation and CO_2 emissions data from 2008 through 2017 for all coal-fired EGUs that submitted continuous emissions monitoring system (CEMS) data to the EPA's emissions collection and monitoring plan system (ECMPS). The data was sorted by the lowest maximum annual emissions rate for each unit to identify long term emission rates on a lb CO_2/MWh-gross basis that have been demonstrated by the existing coal fleet. Since an NSPS is a never-to-exceed standard, the EPA is proposing that long-term data are more appropriate than shorter term data to use in determining an achievable standard. These long-term averages account for degradation and variable operating conditions, and the EGUs should be able to maintain their current emission rates, as long as the units are properly maintained. While annual emission rates indicate a particular standard is achievable for certain EGUs in the short term, they are not necessarily representative of emission rates that can be maintained over an extended period using the most efficient available steam cycle (*i.e.,* the BSER), the range of fuel types that are burned, or all cooling systems.

Specifically, EGUs with the lowest annual emission rates use wet cooling systems and do not use dry cooling systems. Both recirculating cooling towers and once-through cooling systems require substantial amounts of water. In fact, the power sector is one of the largest freshwater consumers in the U.S.[102] Water usage by the power sector strongly depends on the generation technology. For example, combined cycle units use much less cooling water, because significantly less heat energy remains that is required to be removed by cooling at the outlet of the steam turbine of a combined cycle unit compared to a coal-fired EGU of the same capacity.

Dry cooling systems, however, may be necessary for a particular EGU due to limited water availability or desirable to eliminate the adverse environmental impacts caused by cooling tower intake structures. A drawback of dry cooling systems is that the EGU is unable to reach as low of a condensing temperature as with either a recirculating cooling tower or a once-through open system and is therefore less efficient. The EPA is aware of four existing coal-fired EGUs using a dry cooling system. Three are located in Wyoming, and one is located in Virginia. While the projects in Wyoming use this type of system in part or in whole due to the arid climate, the project in Virginia demonstrates that water use concerns are likely applicable to areas with larger amounts of rainfall as well. To further determine the likelihood that a developer of a new coal-fired EGU would want to use a dry cooling system, the EPA reviewed the cooling system of combined cycle units. More than 15 percent of operating natural gas-fired combined cycled capacity in the U.S. uses dry cooling technology.[103] Based on analysis of form EIA–860 data, these dry cooling systems are located throughout the U.S., further indicating that water use concerns are more widespread than just arid locations with limited rainfall. Therefore, the EPA is proposing that the NSPS for coal-fired EGUs should account for the use of dry cooling by setting higher emission rates that account for the lower efficiency of EGUs using dry cooling. The EPA is soliciting comment on whether it is appropriate to subcategorize based on geography and, if so, how that subcategorization should be done (Comment C–15). One potential approach would be to add a provision allowing the Administrator to approve alternate emissions standards for coal-fired EGUs located in areas without access to sufficient water to operate a cooling tower. Paragraph 60.4330(b) of the combustion turbine criteria pollutant NSPS (40 CFR part 60, subpart KKKK) includes a similar provision. That provision allows the Administrator to approve alternate SO_2 standards for a combustion turbine without access to natural gas and located in an area where removal of sulfur compounds would cause more environmental harm than good.

In order to determine the 12-operating month average emissions rate that is achievable by application of the BSER, the EPA analyzed data reported by owners/operators of EGUs to the CAMD database to identify the best performing (*i.e.,* the best operated and maintained) EGUs. The EPA normalized the emissions rate data to account for factors that the Agency has information on and that engineering equations can be used to account for design efficiency differences between EGUs based on the factors. The design factors include the steam cycle (*i.e.,* steam temperature and pressure and the number of reheat cycles), coal type (which impacts both boiler efficiency and emissions on a lb CO_2/MMBtu basis), cooling type (*i.e.,* dry, recirculating cooling tower, and open), and average ambient temperature. The EPA identified the single best EGU based on this normalized emissions rate. The EPA selected this single best unit to account for site specific factors about which the Agency does not have specific information. These factors include, but are not limited to, (1) design factors influencing efficiency (*e.g.,* number of feedwater heaters, economizer efficiency, combustion and soot blowing optimization, and an exposed structure or main building enclosure) and (2) O&M practices (*e.g.,* percent excess air, operator training, and prioritizing efficiency related repairs). The owner/operator of a new EGU would be able to incorporate the best EGU design parameters and O&M practices. The EPA then adjusted the emissions data for the best performing EGU by applying engineering equations for the EGU design factors (steam cycle, *etc.*) that impact the theoretical efficiency and the CO_2 emissions rate. For example, if a particular unit had no steam reheat cycle, the EPA estimated the theoretical increase in efficiency for a similar unit with a single reheat cycle.

Factors for which owners/operators have more limited influence include the condenser technology and ambient temperature. For example, designers can specify ultra-supercritical steam conditions compatible with state-of-the art metallurgy, multiple stages of feedwater heating, and double steam reheat cycles to optimize efficiency gains attributable to increasing the average temperature at which heat is supplied to the cycle. However, designers have fewer options for lowering the temperature at which heat is rejected from an affected EGU because this low-temperature constraint is largely determined by the available cooling reservoir and local ambient

[102] Water use in coal to Power Applications, available at *https://www.netl.doe.gov/research/Coal/energy-systems/gasification/gasifipedia/water-usage.*

[103] ''Some U.S. electricity generating plants use dry cooling,'' *Today in Energy,* EIA, 29 August 2018, *https://www.eia.gov/todayinenergy/detail.php?id=36773.*

conditions. Consistent with the 2015 Rule, to account for the impact of ambient conditions, the EPA conservatively normalized the emission rate data to 20 °C, with one exception. Since coal refuse-fired EGUs are located in more temperate regions, the EPA assumed 10 °C for coal refuse-fired EGUs. In the 2015 rulemaking, the EPA assumed that a new large EGU would use some type of a wet cooling tower, but specifically accounted for air cooled condensers (*i.e.,* dry cooling) only for the small EGU subcategory. However, as described previously, the EPA is proposing to account for dry cooling for both large and small EGUs.

The EPA calculated 12-month CO_2 emission rates by dividing the sum of the CO_2 emissions by the sum of the gross electrical energy output over the same period. The best performing large EGU is Weston 4, which is a supercritical subbituminous-fired EGU located in Wisconsin, with an emissions rate of 1,780 lb CO_2/MWh-gross, measured over 12-operating months with 99-percent confidence. Based on the normalization of the Weston 4 data using various steam cycles and fuels, as well as dry cooling, the proposed emissions rate of 1,900 lb CO_2/MWh-gross is achievable for EGUs burning subbituminous, petroleum coke, and lignite using ultra-supercritical steam conditions and dry cooling. An EGU burning bituminous coal and dry cooling would be able to comply using supercritical steam conditions. Based on data submitted to ECMPS, 25 existing EGUs have maintained annual emission rates of 1,900 lb CO_2/MWh-gross over the past 10 years. While this includes a broad range of EGU types, it does not include any lignite-fired EGUs or coal-fired EGUs using dry cooling. The lowest emitting lignite-fired EGU is emitting at approximately 2,000 lb CO_2/MWh-gross, and the lowest emitting coal-fired EGU using dry cooling is emitting at approximately 2,100 lb CO_2/MWh-gross. However, no lignite-fired or coal-fired EGU using dry cooling is using ultra-supercritical steam conditions. The EPA has concluded that additional efficiency technologies could be incorporated into new units to allow a new EGU burning lignite with dry cooling to comply with the proposed standard.

The best performing small EGU is Wygen III, which is a subcritical subbituminous-fired EGU located in Wyoming, with a 12-operating month, 99-percent confidence emissions rate of 2,170 lb CO_2/MWh-gross. Wygen III has relatively low steam temperatures and pressures [104] and does not have a reheat cycle. Based on the normalization of the Wygen III data to the most efficient subcritical conditions and dry cooling,[105] the proposed 2,000 lb CO_2/MWh-gross emissions rate is achievable for any solid fuel other than coal refuse using the best available subcritical steam conditions and dry cooling. Based on data submitted to ECMPS, five small bituminous-fired EGUs have maintained a maximum annual emissions rate of 2,000 lb CO_2/MWh-gross over the reviewed 10-year period. These EGUs commenced operation between 1957 and 1960 and range in size from 1,400 MMBtu/h to 2,000 MMBtu/h. Four of these EGUs use once-through open cooling systems, and one uses a recirculating cooling tower for steam condensing. These long-term averages account for degradation and variable operating conditions and the EGUs should be able to maintain their current emission rates as long as the units are properly maintained. Normalization of the Wygen III data for a coal refuse-fired EGU indicates that a standard of 2,200 lb CO_2/MWh-gross is achievable for a coal refuse-fired EGU.

While the EPA is proposing these standards of performance, the Agency is also taking comment on a range of potential emission standards. Specifically, the EPA solicits comment on the following emission standard ranges:

- For new and reconstructed fossil fuel-fired steam generating units and IGCC units with a heat input rating that is greater than 2,000 MMBtu/h, a range of 1,700—1,900 lb CO_2/MWh-gross (Comment C–16);
- For new and reconstructed fossil fuel-fired steam generating units and IGCC units with a heat input rating of 2,000 MMBtu/h or less, a range of 1,800—2,000 lb CO_2/MWh-gross (Comment C–17);
- For new and reconstructed coal refuse-fired steam generating units and IGCC units, a range of 2,000–2,200 lb CO_2/MWh-gross (Comment C–18);

While some domestic coal-fired EGUs have maintained annual emission rates of 1,700 lb CO_2/MWh-gross, no existing coal-fired units have demonstrated multi-year performance at 1,700 lb CO_2/MWh-gross. Based on normalized Weston 4 data, this emissions rate could be met by a bituminous-fired EGU using supercritical steam conditions, a subbituminous-fired EGU using ultra-supercritical steam conditions, and petroleum coke and lignite-fired EGUs using the best available ultra-supercritical steam conditions and a cooling tower.[106] Three existing coal-fired EGUs have maintained a maximum annual emissions rate of 1,800 lb CO_2/MWh-gross over the reviewed 10-year period. These units include two supercritical bituminous-fired EGUs and one supercritical subbituminous-fired EGU. The EGUs commenced operation between 2008 and 2012 and range in size from 5,200 MMBtu/h to 7,900 MMBtu/h. All use recirculating cooling towers for condensing. Based on normalized Weston 4 data, an emission rate of 1,800 lb CO_2/MWh-gross is achievable for bituminous-fired EGUs using the best available subcritical steam condition; and subbituminous and dried lignite-fired EGUs using supercritical steam conditions when paired with a cooling tower.[107] An EGU burning undried lignite or petroleum coke could comply using ultra-supercritical steam conditions and a cooling tower.[108] However, a key assumption for achieving an 1,800 lb CO_2/MWh-gross emissions rate is the use of a cooling tower. With dry cooling, an 1,800 lb CO_2/MWh-gross emissions rate is only achievable for a bituminous-fired EGU using ultra-supercritical steam conditions. Based on normalized Weston 4 data, a 1,900 lb CO_2/MWh-gross emissions rate is achievable for bituminous-fired EGUs using the best available subcritical steam condition; and subbituminous, dried lignite, and petroleum coke-fired EGUs using supercritical steam conditions when paired with dry cooling. An EGU burning undried lignite could comply using ultra-supercritical steam conditions and dry cooling. The EPA proposes that a standard above 1,900 lb CO_2/MWh-gross for large units would not promote the use of the best available steam conditions.

For small EGUs, based on the normalization of the Wygen III emissions data, an emissions rate of 1,800 lb CO_2/MWh-gross is achievable for bituminous-fired EGUs using the best available subcritical steam conditions with either a cooling tower or dry cooling. In order to achieve this emissions rate, however, EGUs burning other solid fuels would be required to

[104] 11 MPa steam pressure and 541° C main steam temperature with no reheat cycle.

[105] The best available subcritical steam conditions are 21 MPa steam pressure and 570° C main and reheat steam temperature.

[106] Best available ultra-supercritical steam conditions are 650 °C (1,400 °F) and 36 MPa (5,000 psi).

[107] 24 MPa steam pressure and 593 °C main and reheat steam temperature (supercritical steam conditions).

[108] 30 MPa steam pressure and 600 °C main and 620 °C reheat steam temperature (ultra-supercritical steam conditions).

use additional compliance options such as co-firing natural gas, a hybrid power plant, integration of non-emitting generation technologies, or combined heat and power. Based on the normalization of the Wygen III emissions data, an emissions rate of 1,900 lb CO_2/MWh-gross could be met by any coal-fired EGU using the best available subcritical steam conditions and a cooling tower. However, only bituminous and subbituminous-fired EGUs could comply with this emissions rate using dry cooling. Without additional controls (*e.g.,* co-firing natural gas) EGUs burning dried lignite, petroleum coke, and undried lignite are only able to comply with an emissions rate of 2,000 lb CO2/MWh-gross using dry cooling. The EPA proposes that a standard above 2,000 lb CO_2/MWh-gross for small units would not appropriately promote the use of the best available efficiency technologies.

For all reconstructed EGUs, large and small, the EPA is soliciting comment on an emission standard consistent with the proposed standard for new small EGUs (*i.e.,* all reconstructed EGUs would have a standard of 2,000 lb CO_2/MWh-gross) (Comment C–19). While multiple organizations are evaluating repowering existing subcritical EGUs with supercritical topping cycles,[109] the EPA is only aware of a single EGU where this was actively considered—the Ferrybridge unit in the United Kingdom. The addition of a supercritical topping cycle is projected to reduce the heat rate for a large EGU by between 4 to 8 percent. While this would entail a substantial reduction in emissions, based on existing emissions data some large EGUs would still not be able to comply with an emissions rate of 1,900 lb CO_2/MWh-gross even with an 8 percent reduction in the emissions rate. For these units, additional efficiency improvements would also have to be conducted as part of the reconstruction project. The EPA is soliciting comment on whether a single standard regardless of size for reconstructed EGUs is appropriate and whether the existing reconstruction exemption in the general provisions (*i.e.,* a reconstructed EGU will be exempt from the requirement to meet the standard if the Administrator determines the standard is not technically or economically achievable (40 CFR 60.15(b)(2))) is sufficient to account for circumstances where a large reconstructed EGU would not be able to achieve the proposed emissions standard (Comment C–20).

F. Format of the Output-Based Standard

For all newly constructed units, the proposed standards are expressed on a gross output emission rate basis consistent with current monitoring and reporting requirements under 40 CFR part 75.[110] For a non-CHP EGU, gross output is the electricity generation measured at the generator terminals. In addition, the EPA is proposing equivalent net-output-based standards as a compliance alternative. Net output is the gross electrical output less the unit's total parasitic (*i.e.,* auxiliary) power requirements. A parasitic load for an EGU is a load or device powered by electricity, steam, hot water, or directly by the gross output of the EGU that does not contribute electrical, mechanical, or useful thermal output. In general, parasitic energy demands include less than 7.5 percent of non-IGCC and non-CCS coal-fired station power output and approximately 15 percent of non-CCS IGCC-based coal-fired station power output. Net output is used to recognize the environmental benefits of: (1) EGU designs and control equipment that use less auxiliary power; (2) fuels that require less emissions control equipment; and (3) higher efficiency motors, pumps, and fans. Thus, allowing compliance through net output would enable owners/operators of these types of units to pursue projects that reduce auxiliary loads for compliance purposes.

Owners/operators of utility boilers have multiple technology pathways available to comply with the actual emission standard, and the choice of both control technologies and fuel impact the overall auxiliary load. In the 2015 Rule, for utility boilers and IGCC units, the EPA finalized only gross-output-based standards. The rationale for not including an alternate net-output-based standard was that the Agency did not have sufficient information to establish an appropriate net-output-based standard that would not impact the identified BSER for these types of units. Therefore, the Agency could not identify an appropriate assumed auxiliary load to establish an equivalent net-output-based standard.

Since the proposed BSER determination has changed, the EPA is proposing CO_2 standards for steam generating units in a format similar to the 40 CFR part 60, subpart TTTT standards for combustion turbines and current EGU NSPS format for criteria pollutants. Thus, the proposed standards establish a gross-output-based standard. This allows owners/operators of new EGU to comply with the CO_2 emissions standard under Part 60 using the same data currently collected under Part 75.[111] However, in the 2015 Rule, many permitting authorities commented that the environmental benefits of using net-output-based standards can outweigh any additional complexities for particular units.[112] The EPA expects permitting authorities to continue to move toward net-output-based standards and have concluded that it is appropriate to support the expanded use of net-output-based standards. Therefore, the EPA is proposing to allow owners/operators of sources to elect between gross-output-based and net-output-based standards.

The EPA is proposing to use the current 40 CFR part 60, subpart TTTT procedures for requesting the use of the alternate net-output-based standard (40 CFR 60.5520(c)). Specifically, the owner/operator would be required to petition the Administrator in writing to comply with the alternate applicable net-output-based standard. If the Administrator grants the petition, this election would be binding and would be the unit's sole means of demonstrating compliance. Owners/operators complying with the net-output-based standard must similarly petition the Administrator to switch back to complying with the gross-output-based standard. This flexibility is particularly important for IGCC co-production (*i.e.,* to produce useful by-products and chemicals along with electricity) facilities. The implementing authority (*e.g.,* delegated state permitting authority) will best be able to identify the appropriate format for facilities of this type.

The EPA is not proposing to revise or reopening the 2015 Rule's (1) approach

[109] A supercritical topping cycle adds a new supercritical steam turbine that exhausts at the temperature, pressure, and flow of the existing steam turbine, allowing for reuse of existing infrastructure.

[110] 79 FR 1447–48.

[111] Additionally, having an NSPS standard that is measured using the same monitoring equipment as required under the operating permit minimizes compliance burden. If a combustion turbine were subject to both a gross and net emission limit, more expensive higher accuracy monitoring could be required for both measurements.

[112] In the 2015 rulemaking, the EPA solicited comment on a range of options for the form of the final standards. Many commenters supported gross-output-based standards, maintaining that a net-output standard penalizes the operation of air pollution control equipment and EGUs located in hot and/or dry areas of the country. Commenters further disagreed that a net-output standard provides any significant incentive to minimize auxiliary loads. Other commenters, however, maintained that the final rule should strictly require compliance on a net output-basis. They believed that this is the only way for the standards to minimize the carbon footprint of the electricity delivered to consumers. In general, both sets of commenters believed it appropriate to include net-output-based standards as an option in the final rule.

for determining the emissions rate for CHP units with useful thermal output that meet the applicability criteria or (2) expression of the standards in the form of limits on only emissions of CO_2, and not the other constituent gases of the air pollutant GHGs.[113]

VI. Rationale for Proposed Emission Standards for Modified Fossil Fuel-Fired Steam Generating Units

In CAA section 111(a)(4), a ''modification'' is defined as ''any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant'' not previously emitted. The EPA, through regulations, has determined that certain types of changes are exempt from consideration as a modification.[114] As discussed in the 2015 rulemaking, the EPA has historically been notified of only a limited number of NSPS modifications[115] involving fossil steam generating units and therefore predicted that few of these units would trigger the modification provisions and be subject to the final standards. Given the limited information that the Agency has about past modifications, the EPA concluded that it lacked sufficient information to establish standards of performance for all types of modifications at steam generating units. Instead, the EPA determined that it was appropriate to establish standards of performance for larger modifications, such as major facility upgrades involving, for example, the refurbishing or replacement of steam turbines and other equipment upgrades that could result in substantial increases in a unit's hourly CO_2 emissions rate. The Agency determined that it had adequate information regarding (1) the types of modifications that could result in large increases in hourly CO_2 emissions, (2) the types of measures available to control emissions from sources that undergo such modifications, and (3) the costs and effectiveness of such control measures, upon which to establish standards of performance for modifications with large emissions increases. The EPA concluded that the BSER for steam generating units that conduct modifications resulting in an hourly increase in CO_2 emissions (mass per hour) of more than 10 percent (''large'' modifications) was each affected unit's own best potential performance as determined by that unit's historical performance. The EPA deferred establishing standards for modified sources that conduct modifications resulting in an hourly increase in CO_2 emissions (mass per hour) of less than or equal to 10 percent (''small'' modifications). Therefore, sources that conduct small modifications did not fall within the definition of ''new source'' in section 111(a)(2) and continued to be an ''existing source'' as defined in section 111(a)(6).

In this proposal, the EPA is soliciting comment on a BSER and standard of performance for fossil fuel-fired steam generating EGUs that conduct small modifications. The BSER and associated standard of performance for which the EPA solicits comment are similar to the BSER and standard for fossil fuel-fired steam generating EGUs that conduct large modifications. To explain this solicitation of comment, it is convenient to refer to the 2015 Rule's discussion of the BSER and standard for large modifications (80 FR 64597–64600). However, the EPA is not proposing to revise or reopening the BSER or final standard for fossil fuel-fired steam generating EGUs that conduct large modifications (except that, as noted above, the EPA is proposing to revise the maximum stringency of the standard). The EPA is also not proposing standards of performance for fossil fuel-fired stationary combustion turbines that conduct modifications.

A. Identification of the BSER

The 2015 Rule provided that a steam generating EGU that undertook a large modification was required to meet a unit-specific CO_2 emission limit determined by that unit's best demonstrated historical performance (*i.e.,* the best annual performance during the years from 2002 to the time of the modification).[116] The EPA determined that this standard based on each unit's own best historical performance could be met through a combination of best operating practices and equipment upgrades and that these steps could be implemented cost effectively at the time when a source was undertaking a large modification. To account for facilities that had already implemented best practices and equipment upgrades, the final rule also specified that modified facilities did not have to meet an emission standard more stringent than the corresponding standard for reconstructed steam generating units.

In this action, the EPA is soliciting comment on a similar, but not identical, BSER and standard of performance for fossil fuel-fired steam generating EGUs that undertake small modifications (Comment C–21). The EPA believes that there are potentially different circumstances surrounding a small versus large modification. It seems highly unlikely that an owner or operator could inadvertently make a physical change in, or change in the method of operation of, a fossil fuel-fired steam-generating EGU that would result in an increase of hourly CO_2 emissions of more than 10 percent. As stated in the final 2015 Rule, such an increase in CO_2 emissions would likely come as a result of a significant capital investment in, or a significant change in the method of operation of, the affected EGU.

However, it is conceivable that an owner or operator could make a small physical change in, or change in the method of operation of, a fossil fuel-fired steam-generating EGU that results in an increase of hourly CO_2 emissions of less than 10 percent. If there is an applicable standard of performance for such ''small'' modifications, then the EGU could trigger the modification provisions and become a unit subject to federally-enforced CAA section 111(b) emission standards and, if the source had previously become subject to a CAA section 111(d) state program, it would no longer be subject to that program. The EPA solicits comment on the types of changes in operation or physical changes to a unit that could result in small increases in hourly CO_2 emissions (Comment C–22).

In this action, the Agency is seeking comment on the need for a standard for a small modification and, if needed, on the BSER and appropriate standard of performance (Comment C–23). As with the 2015 Rule's BSER for fossil fuel-fired EGUs conducting large modifications, the EPA solicits comment on identifying the BSER for such units conducting small modifications as also heat rate or efficiency improvements.

1. Reasonable Costs

Any efficiency improvement made by EGUs for the purpose of reducing CO_2 emissions will also reduce the amount of fuel that EGUs consume to produce the same electricity output. The cost attributable to CO_2 emission reductions, therefore, is the net cost of achieving

[113] As noted above, in the 2009 Endangerment Finding, EPA defined the relevant ''air pollution'' as the atmospheric mix of six long-lived and directly-emitted greenhouse gases: carbon dioxide (CO_2), methane (CH_4), nitrous oxide (N_2O), hydrofluorocarbons (HFCs), perfluorocarbons (PFCs), and sulfur hexafluoride (SF_6). 74 FR 66497.

[114] 40 CFR 60.2, 60.14(e).

[115] NSPS modifications resulting in increases in hourly emissions of criteria pollutants.

[116] For the 2002 reporting year, EPA introduced new automated checks in the software that integrated automated quality assurance (QA) checks on the hourly data. Thus, EPA believes that the data from 2002 and forward are of higher quality.

heat rate improvements after any savings from reduced fuel expenses. The EPA estimates that, on average, the savings in fuel cost associated with heat rate improvements would be sufficient to cover much of the associated costs, and thus that the net costs of heat rate improvements associated with reducing CO_2 emissions from affected EGUs are relatively low.

The EPA recognizes that our cost analysis just described will characterize the costs for some EGUs more accurately than others because of differences in EGUs' individual circumstances. The EPA further recognize that reduced generation from coal-fired EGUs will tend to reduce the fuel savings associated with heat rate improvements, thereby raising the effective cost of achieving the CO_2 emission reductions from the heat rate improvements. Nevertheless, the EPA still expect that most of the investment required to capture the technical potential for CO_2 emission reductions from heat rate improvements would be offset by fuel savings, and that the net costs of implementing heat rate improvements as an approach to reducing CO_2 emissions from modified fossil fuel-fired EGUs are reasonable.

2. Reductions in CO_2 Emissions

This approach would achieve reasonable reductions in CO_2 emissions from the affected modified units as those units will be required to meet an emission standard that is consistent with more efficient operation. In light of the limited opportunities for emission reductions from retrofits, these reductions are adequate.

3. Technical Feasibility

A standard that is based on a site-specific, previously achieved emissions rate is technically feasible because there are a large number of available technologies and equipment upgrades, as well as best operating and maintenance practices, that EGU owners or operators may use to improve an EGU's efficiency.

4. Promotion of the Development and Implementation of Technology

As noted previously, the case law makes clear that the EPA is to consider the effect of its selection of the BSER on technological innovation or development, but that the EPA also has the authority to balance this factor against the various other factors (*See Sierra Club,* 657 F.2d at 346–47). With regard to the selection of emissions controls, modified sources face inherent constraints that newly constructed greenfield and reconstructed sources do not. As a result, modified sources present different, and in some ways more limited, opportunities for technological innovation or development. In this case, the standards promote technological development by promoting further development and market penetration of equipment upgrades and process changes that improve plant efficiency.

B. Determination of the Level of the Standard

An existing source that undergoes a modification should be able to at least match its best emission rate since 2002 because with the modification, it is expanding its capacity and therefore appears to be interested in upgrading and appears to believe that it will continue to operate for the long term. The EPA believes that any source that meets those conditions should be able to make whatever additional investment is necessary to assure that it meets its most efficient emission rate since 2002. Improving its efficiency in that manner should be consistent with its long-term operational goals. On the other hand, an existing source that is not undertaking that type of upgrade is differently situated. For example, it may not expect to operate over the long-term and it may have limited funds available for upgrades. Thus, it should be subject to the 111(d) rule's requirements, which assume that it can apply the EPA-identified heat rate improvement measures, but allow the state to determine whether all of those measures are appropriate, and further allow the state to grant a variance.

In the 2015 Rule, the final standard of performance for a steam generating unit implementing a large modification was a unit-specific emission limit based on that unit's own best one-year historical performance. The EPA determined that such a standard was achievable for a unit implementing a large (likely capital intensive and pre-planned) modification because the necessary upgrades could be implemented at the same time as the large modification. However, a unit that undertakes a small change may trigger the modification requirement, even without a large capital expenditure or coinciding with a pre-planned outage. The EPA solicits comment on the appropriate standard of performance for such EGUs (Comment C–24). In particular, the EPA solicits comment on whether the 2015 unit-specific emission limit is also appropriate for an EGU that conducts a small modification (Comment C–25).

To assess the potential heat rate improvement for existing coal-fired EGUs, the EPA looked at 11 years of historical gross heat rate data from 2007 to 2017 for 574 coal-fired EGUs that reported both heat input and gross electricity output to the Agency in 2017. The Agency used the 2007 to 2017 data to calculate several ''benchmark'' heat rates for each unit. This included calculating the 1-year average heat rate, the 2-year rolling average heat rate, and the 3-year rolling average heat rate. Within each of these groups, the EPA then selected the best (lowest) heat rate and fourth best heat rate. In all, the Agency calculated heat rate improvement potential using six different ''benchmarks'' (1-year best, 1-year fourth best, 2-year best, 2-year fourth best, 3-year best, and 3-year fourth best.). Within each category, each unit's ''benchmark'' heat rate has been used to calculate a gross electricity output weighted average across the unit population. The difference between the gross electricity output weighted average for a ''benchmark'' category and the 2017 gross electricity output weighted average (baseline) indicates the heat rate improvement potential. The heat rate improvement potential has been calculated nationally and at each regional interconnection: East, West, and Texas. Table 10 below shows the results expressed as a percent difference between the 2017 baseline heat rate and each ''benchmark.'' Nationally the range in heat rate improvement varies between 2 and 6.6 percent depending on which ''benchmark'' is used.

TABLE 10—POTENTIAL HEAT RATE IMPROVEMENT USING DIFFERENT BENCHMARKS

[Nationally and by regional interconnection]

Interconnect	2017 Heat rate (Btu/kWh [1])	Best one-year average (percent)	Fourth best one-year average (percent)	Best two-year rolling average (percent)	Fourth best two-year rolling average (percent)	Best three-year average (percent)	Fourth best three-year rolling average (percent)
National	9,849	6.6	2.9	5.4	2.4	4.6	2.0

TABLE 10—POTENTIAL HEAT RATE IMPROVEMENT USING DIFFERENT BENCHMARKS—Continued

[Nationally and by regional interconnection]

Interconnect	2017 Heat rate (Btu/kWh [1])	Best one-year average (percent)	Fourth best one-year average (percent)	Best two-year rolling average (percent)	Fourth best two-year rolling average (percent)	Best three-year average (percent)	Fourth best three-year rolling average (percent)
East	9,780	6.6	2.8	5.4	2.3	4.6	1.9
West	10,045	6.1	2.4	4.8	2.1	3.9	1.8
Texas	10,097	7.0	3.6	6.0	3.1	5.3	2.8

[1] Btu/kWh = British thermal units per kilowatt-hour.

The EPA solicits comment on which, if any, of these formulations should be used to determine the unit-specific standard of performance for a fossil fuel-fired steam generating unit that implements small modifications (Comment C–26). For example, should the EPA finalize a standard of performance that requires a steam generating unit that implements a small modification to meet an emission limit consistent with its best 1-year average emission or an emission limit consistent with its fourth best 2-year rolling average or some other emission limit? The EPA solicits comment on this approach and on any other methods to determine an appropriate unit-specific standard that takes into consideration the inherent differences in small modifications versus large modifications (Comment C–27).

VII. Interactions With Other EPA Programs and Rules

Nothing in this rulemaking changes the EPA's regulations or processes for determining whether a source is subject to permitting under the Prevention of Significant Deterioration (PSD) program or title V for its GHG emissions, nor does it require any additional revisions to State Implementation Plans for PSD applicability purposes or State title V Programs.

With respect to PSD, the CAA specifies that the best available control technology (BACT) cannot be less stringent than any applicable standard of performance under section 111. *Id.* Thus, in determining GHG BACT for a new EGU, if the EGU meets the applicability criteria of 40 CFR part 60, subpart TTTT, permitting authorities currently must consider the emission levels established under 40 CFR part 60, subpart TTTT as a controlling floor in the BACT review. If the EPA finalizes these proposed changes to 40 CFR part 60, subpart TTTT, permitting authorities will need to consider the amended 40 CFR part 60, subpart TTTT when determining the minimum level of GHG control that represents BACT for an affected EGU.

With respect to the title V operating permits program, this rule does not affect whether sources are subject to the requirement to obtain a title V operating permit. The 2015 rule included revisions to the fee requirements of the 40 CFR part 70 and part 71 operating permit rules under title V of the CAA to avoid inadvertent consequences for fees that would be triggered by the promulgation of the first CAA section 111 standard to regulate GHGs. In order to avoid excess fees from GHG emissions, the EPA revised the definition of regulated pollutant (for presumptive fee calculation) in 40 CFR 70.2 and regulated pollutant (for fee calculation) in 40 CFR 71.2 to exempt GHG emissions. This regulatory amendment had the effect of excluding GHG emissions from being subject to the statutory ($/ton) fee rate set for the presumptive minimum calculation requirement of part 70 and the fee calculation requirements of part 71. *See* 80 FR at 64632–64638; *Updated Guidance on EPA Review of Fee Schedules for Operating Permit Programs Under Title V,* Peter Tsirigotis, Director of the Office of Air Quality Planning and Standards, U.S. EPA, at 14–16 (Mar. 27, 2018). The EPA is not proposing to revise or reopening these provisions of the 2015 Rule, and nothing in this proposed rulemaking would require any additional changes to the title V regulations.

VIII. Summary of Cost, Environmental, and Economic Impacts

As discussed in the economic impact analysis accompanying this action, substantial new construction of coal-fired steam units is not anticipated under existing prevailing and anticipated future conditions. Therefore, the economic impact analysis concludes that this final rule will result in no or negligible costs overall on owners and operators of newly constructed EGUs during the 8-year NSPS review cycle (*See* CAA section 111(b)(1)(B)). This analysis reflects the best data available to the EPA at the time the modeling was conducted. As with any modeling of future projections, many of the inputs are uncertain. In this context, notable uncertainties, in the future, include the cost of fuels, the cost to operate existing power plants, the cost to construct and operate new power plants, infrastructure, demand, and policies affecting the electric power sector. The modeling conducted for this economic impact analysis is based on estimates of these variables, which were derived from the data currently available to the EPA. However, future realizations could deviate from these expectations as a result of changes in wholesale electricity markets, federal policy intervention, including mechanisms to incorporate value for onsite fuel storage, or substantial shifts in energy prices. The results presented in this economic impact analysis are not a prediction of what will happen, but rather a projection describing how this proposed regulatory action may affect electricity sector outcomes in the absence of unexpected shocks. The results of this economic impact analysis should be viewed in that context.

With regard to modified and reconstructed fossil fuel-fired steam generating units, this action proposes amended standards for reconstructed sources and the maximally stringent standard for modified sources. Historically, few EGUs have notified the EPA that they have modified under the modification provision of section 111(b), and similarly only one EGU, over the history of the NSPS program,[117] has notified the EPA that it has reconstructed. Moreover, approximately half of existing coal refuse-fired facilities are potentially exempt from this standard as CHP units. Based on this information, the EPA anticipates that few, if any, EGUs will take actions during the period of analysis that would be considered NSPS modifications or reconstruction and, as a result, be

[117] That is, from 1975, when EPA promulgated the regulations establishing the requirements for reconstructions, 40 FR 58420 (Dec. 16, 1975) (promulgating 40 CFR 60.15).

subject to the standards of performance proposed in this action.

A. What are the air impacts?

The EPA does not anticipate that this proposed rule will result in significant CO_2 emission changes by 2026. As explained immediately above, the EPA does not anticipate the construction of new coal-fired steam generating units and expects few, if any, coal-fired EGUs to trigger the proposed NSPS modification or reconstruction standard for these sources.

B. What are the energy impacts?

This proposed rule is not anticipated to have an effect on the supply, distribution, or use of energy. As previously stated, the EPA projects few, at most, new reconstructed or modified EGUs.

C. What are the compliance costs?

The EPA does not believe this proposed rule will have compliance costs associated with it, because, the EPA projects there to be, at most, few new, modified, or reconstructed fossil fuel-fired steam generating units that will trigger the provisions the EPA is proposing. The economic impact analysis includes an illustrative analysis of the potential project-level costs of this proposed action relative to the 2015 Rule's standards.

D. What are the economic and employment impacts?

The EPA does not anticipate that this proposed rule will result in economic or employment impacts because, the EPA projects there to be, at most, few new, modified, or reconstructed coal-fired steam generating units EGUs that will trigger the provisions the EPA is proposing. Likewise, the EPA believes this rule will not have any impacts on the price of electricity, employment or labor markets, or the U.S. economy.

E. What are the benefits of the proposed standards?

As previously stated, the EPA does not anticipate emission changes resulting from the rule as the EPA projects there to be, at most, few new, modified, or reconstructed coal-fired steam generating units that will trigger the provisions the EPA is proposing. Therefore, there are no direct climate or human health benefits associated with this rulemaking.

IX. Request for Comments

The EPA requests comments on all aspects of the proposed rulemaking, including the economic impact analysis (Comment C–28). All significant comments received will be considered in the development and selection of the final rule. The EPA is specifically soliciting comments on alternate compliance options (Comment C–29).

A. Subcategorization by Fuel Type

Except for coal refuse, the EPA is not proposing subcategorization by fuel type, but the Agency is soliciting comments on that approach (Comment C–30). The EPA is not proposing to subcategorize by fuel type for multiple reasons. Subcategorizing by fuel type could have the perverse impact of both increasing emissions and decreasing compliance options. Due to averaging, if the subcategorization is based on the fuel with the highest percentage heat input, owner/operators could have an incentive to burn sufficient amounts of higher emitting fuels in order to qualify for the higher emissions standard. For example, a facility that blends subbituminous and lignite would have a regulatory incentive to burn higher amounts of lignite than subbituminous coal (even though coal is lower emitting) in order to have a less stringent NSPS emissions rate. If the standard is determined based on the actual percentage of each fuel burned, that would limit the ability of owners/operators of coal-fired EGUs to use natural gas or other lower emitting fuels as compliance options because the emissions standard would become more stringent with increasing percentages of natural gas use. Both of these subcategorization by fuel type approaches fail to recognize the environmental benefit of lower emitting (*e.g.,* cleaner) fuels or integrated non-emitting (*i.e.,* renewable) electric generation. The proposed fuel neutral standard is consistent with the emissions standards in the criteria pollutant NSPS and is achievable for all coal types. This approach both incentivizes the use of lower emitting fuels and allows the use of natural gas and/or integrated renewable generation as compliance options.

B. Low Duty Cycle Subcategory

Due to the low variable operating costs of highly efficient coal-fired EGUs, any affected coal-fired EGU would likely operate at high capacity factors. This is confirmed by review of the hourly operating data from highly efficient coal-fired EGUs. As existing coal-fired generation EGUs retire and additional energy storage technologies enter the market, the EPA expects the remaining coal-fired EGUs to continue to operate at high loads. However, during periods of low electric demand, coal-fired EGUs may reduce load to approximately 45 percent as an alternate to shutting down completely. While efficiency is reduced at this load, it is high enough to maintain power generation, continue operation of the pollution control equipment, and allow the unit to ramp up relatively quickly as demand increases. Based on this, the EPA is soliciting comment on establishing separate emissions standards for steam generating units operating at partial load (Comment C–31).

Based on the data reviewed, maximum coal-fired EGU efficiency tends to be achieved when the EGU operates at between 80 to 90 percent load. Efficiency is relatively stable down to about 65 percent load [118] and up to 100 percent load. EGUs operating above or below those load levels experience noticeable reductions in efficiency. Due to maintenance concerns, EGUs would not operate above 100 percent of the rated load for extended periods of time. Also, brief periods of lower efficiencies will not have an appreciable impact on a 12-operating month rolling average emissions rate, so the Agency is not proposing to establish a subcategory for operation above 100 percent load. However, coal-fired EGUs operating at low loads (below approximately 65 percent) lose efficiency and could have difficulty in complying with an emissions standard that reflects the efficiencies achieved at higher operating loads unless they co-fire natural gas. Therefore, the EPA is soliciting comment on whether it would be appropriate to establish a subcategory for steam generating units during 12-month rolling average periods when the unit is not operated at high capacity factors (Comment C–32). Specifically, the Agency is considering a subcategory for units that operate at less than a 65 percent duty cycle on a rolling average basis during any 12-operating month period. Duty cycle is defined as the average operating load. It is different from capacity factor in that periods of no operation are not considered when calculating the duty cycle. The EPA is considering using duty cycle instead of capacity factor for several reasons. First, a standard based on capacity factor is more difficult to establish since it is a less precise measurement. A unit operating at a 65 percent capacity factor could either be operated at a constant 65 percent load or at 100 percent load 65 percent of the time and not operate for 35 percent of the time. For identical

[118] Sliding pressure steam generating units are able to maintain efficiency at part-load operation better then constant pressure steam generating units.

units, these operating profiles could result in substantially different emission rates. A duty cycle subcategorization approach assures that units are not deemed to be in the low load subcategory because of periods of non-operation. Specifically, the EPA is considering that during periods when these units are operated as non-base load units (12-operating month average duty cycle is less than 65 percent) an alternate emission standard would apply. The emission standards the EPA is soliciting comment on during non-base load operation for the subcategorized sources are 2,100 lb CO_2/MWh-gross for sources with a nameplate heat input rating of greater than 2,000 MMBtu/h, 2,200 lb CO_2/MWh-gross for sources with a heat input rating of less than or equal to 2,000 MMBtu/h, and 2,400 lb CO_2/MWh-gross for coal refuse-fired steam generating units (Comment C–33).[119]

The EPA is also soliciting comment on establishing a part load heat input-based standard (similar to the part load standard for combustion turbines) as an alternate or in place of the low duty cycle output-based standard (Comment C–34). The advantage of a heat input-based standard is that it is a constant value based on the fuel burned and is independent of efficiency and provides a clear compliance option regardless of the level of degradation of efficiency that results from operation at low loads. However, this approach does not directly recognize the environmental benefit of efficient operation at part load. To incorporate recognition of the environmental benefit of energy efficiency into the heat input-based standard, the EPA proposes to conclude that it is not appropriate to base a heat input standard on the emissions rate of bituminous coal (the lowest emitting coal on a heat input basis). While compliance would be straight forward for bituminous-fired EGUs and would only require a small amount of co-firing for units burning other coals, basing a heat input standard on the emissions rate of bituminous coal would not recognize the environmental benefit of efficient part load operation. This could have the perverse environmental impact of increasing emissions. Owners and operators of EGUs that are expected to dispatch at part loads would have limited regulatory incentive to assure that the unit is operated efficiently. In fact, there would be a regulatory incentive to operate the unit at lower duty cycles specifically to qualify for the part load standard.

Based on this, the EPA solicits comment on whether only a more stringent heat input-based standard would be appropriate (Comment C–35). The alternate heat input-based standard the EPA is considering would be based on the heat input-based emissions rate of 200 lb CO_2/MMBtu. This approach has the advantage of allowing for a clear path for continuous compliance, while at the same time recognizing the environmental benefit of efficient operation across all load levels. Due to the price of natural gas relative to coal, owner/operators of EGUs would have a financial incentive to operate their units as efficiently as possible so they could comply with the full load standard with as low an average duty cycle as possible (*i.e.,* below 65 percent) without co-firing natural gas and/or fuel oil. Less efficient EGUs operating below a 65 percent duty cycle, and well maintained efficient EGUs operating at substantially lower duty cycles or idle conditions, could co-fire approximately 15 percent natural gas to demonstrate compliance. The EPA is soliciting comment on whether this is a reasonable requirement (Comment C–36). Specifically, as traditionally coal-fired EGUs shift from base load use towards being reserved for capacity requirements (*e.g.,* peaking units) natural gas often becomes the primary fuel due to the ability to reduce expenses from operation of post-combustion emissions control equipment.

The EPA is also soliciting comment on several related issues. First, the Agency soliciting comment on the cutoff point for the low duty cycle standard (Comment C–37). The EPA is currently considering a range of between 50 to 70 percent average duty cycle. In addition, the EPA is soliciting comment on whether the low duty cycle subcategory should be based on percent of potential electric sales instead of a heat input-based capacity factor (Comment C–38). While this approach is similar to a heat input-based capacity factor approach, it would use the same calculational procedure as for combustion turbines. The primary difference is that EGUs that generate power for use on site (*e.g.,* combined heat and power units) would not be subject to the output-based standard as frequently. Finally, the EPA is soliciting comment on whether IGCC units should also have a low duty cycle subcategory or if a single standard should apply at all load levels (Comment C–39). IGCC units are particularly well suited to burn natural gas efficiently and co-firing would allow compliance at all load levels.

C. Commercial Demonstration Permit

The steam generating unit criteria pollutant NSPS (subpart Da) includes a provision to assure that NSPS requirements do not discourage the development and implementation of innovative and emerging technologies. Specifically, the commercial demonstration permit (40 CFR 60.47Da) provides a procedure for owner/operators of new coal-fired EGUs proposing to demonstrate an emerging technology to apply to the Administrator for a slightly less stringent standard than would otherwise be required. The commercial demonstration permit section of the EGU criteria pollutant NSPS was included in the original 1979 rulemaking (44 FR 33580) and was later updated in the 2012 amendments (77 FR 9304) to assure that the NSPS recognizes the environmental benefit of the development of new and emerging technologies. The rationale for this provision includes that the innovative technology waiver under section 111(j) of the CAA does not by itself offer adequate support for certain capital-intensive technologies, as it does not provide sufficient time for amortization (44 FR 33580). The authority to issue these permits is predicated on the D.C. Circuit Court's opinion in *Essex Chemical Corp.* v. *Ruckelshaus,* 486 F. 2d 42 (D.C. Cir. 1973); NSPS should be set to avoid unreasonable costs or other impacts. Similar provisions for emerging technologies are included in the industrial-commercial-institutional steam generating unit criteria pollutant NSPS (52 FR 47839).

Standards requiring a high level of performance, such as the proposed standards for GHG emissions, might discourage the continued development of some new technologies. The EPA recognizes that owners/operators in the utility sector may not accept the risk of using new and innovative technologies as the emission reduction efficiencies of such technologies have not been fully demonstrated. As such, owners/operators may prefer conventional, demonstrated technologies. Therefore, it is desirable that standards of performance accommodate and foster the continued development of emerging technologies. Special provisions may be needed to encourage the continued development and use of technologies that show promise in achieving levels of performance comparable or superior to those achieved by the use of fully demonstrated conventional technologies, but at reduced cost or with

[119] Based on review of hourly emissions data, part load emission rates are approximately 10 percent higher than the minimum full load emissions rate. To maintain the minimum full load emissions rate, a unit would have to co-fire approximately 20 percent natural gas when operating at part load.

other offsetting environmental or energy benefits. Establishing less stringent percent reduction requirements for emerging technologies may substantially reduce financial risk and increases the likelihood that owners and operators of new coal-fired EGUs will install and operate emerging technologies. The experience gained in utilizing emerging technologies will, in turn, foster their continued development. Unlike most other air pollutants, GHG pollution has limited direct health impacts and can persist in the atmosphere for decades or millennia, depending on the specific GHG. This special characteristic makes transfer of control technologies and long-term technology innovation particularly important factors when considering appropriate control options for GHG emissions.

To mitigate the potential negative impact on emerging technologies, the EPA is soliciting comment on whether it should include a commercial demonstration permit provision in 40 CFR part 60, subpart TTTT (Comment C–40). The EPA believes that this provision would encourage the development of new technologies and compensate for problems that may arise when applying them to commercial-scale units. The technologies the EPA is currently considering include pressurized fluidized bed technology, alternate power cycle working fluid (*e.g.,* supercritical CO_2), additional energy recovery using integrated thermo-electric materials, a supercritical CO_2 Brayton cycle, an integrated organic rankine cycle, integrated hybrid photovoltaic-solar thermal, integrated novel energy storage technologies, and novel carbon capture technologies. Specifically, the Administrator (in consultation with DOE) would issue commercial demonstration permits for the first 1,000 MW of full-scale demonstration units of each emerging technology. Owners/operators of the units that are granted a commercial demonstration permit would be exempt from the otherwise applicable standards of subpart TTTT and would instead be subject to less stringent emission standards. To encourage the continued development of emerging technologies, standards should be set low enough to be reasonably attainable, but stringent enough to ensure a minimum level of CO_2 emissions to protect human health and the environment. Although there is some uncertainty on setting a precise standard, the standards the EPA is considering would be 100 lb CO_2/MWh higher than the proposed standards for new and reconstructed units using conventional technologies. The proposed commercial demonstration permit standards would provide flexibility for innovative and emerging technologies and ensure the NSPS does not preclude the development of these technologies while at the same time maintaining the emission standards for traditional control technologies. The EPA is also soliciting comment on whether other innovative emerging technologies should be included (Comment C–41). Specifically, the Agency is interested in commenters' views with regard to other innovative boiler designs, new materials that would allow for the use of advanced ultra-supercritical steam conditions, supercritical topping cycles, and alternate cooling technologies.

The EPA selected these particular technologies for the following reasons. Pressurized fluidized bed technology combines a pressurized circulating fluidized bed boiler with a combustion turbine. This combination essentially creates a coal-fired combined cycle power plant and has the potential to improve the efficiency and reduce the environmental impact (on both a criteria pollutant and GHG emissions basis) of using coal to generate electricity. However, it is still a relatively developing technology and has only been deployed on a limited basis worldwide. Traditional coal-fired power plants use water as the working fluid in a rankine cycle. Water is heated to create steam that is then expanded through a steam turbine to generate electricity. The use of alternate working fluids, such as supercritical CO_2, has the potential to increase the efficiency of converting thermal energy to electricity. However, these systems have not yet been fully demonstrated.

Coal-fired power plants generate significant quantities of relatively low-temperature heat (*i.e.,* waste heat) that cannot be used by the traditional rankine cycle. This heat is currently sent to the power plant cooling system (*e.g.,* cooling tower). If this energy could be recovered to produce additional electricity, it could significantly reduce the environmental impact of power generation. Thermoelectric materials are materials that generate electricity due to temperature differences across the material. Organic rankine cycle use working fluids with boiler points lower than that of water and can generate electricity from lower temperature sources of heat. Both of these technologies have the potential to recover useful energy from the waste heat from power plants, but neither has been fully demonstrated.

Hybrid power plants combined multiple forms of power generation in a single integrated system. The integration of solar thermal with traditional fossil fuel-fired power plants has been demonstrated at multiple facilities. A promising technology that could expand the opportunities for additional hybrid fossil fuel-fired EGUs is the integration of hybrid photovoltaic-solar thermal. Hybrid photovoltaic-solar thermal first concentrates the solar energy onto photovoltaic cells that convert a portion of that energy directly into electricity. As a result of the concentrated solar energy, the photovoltaic cells are heated, and additional useful thermal output energy is recovered from the ''hot'' photovoltaic cells. This approach is potentially more efficient than either standalone photovoltaic or solar thermal EGUs. The recovered thermal energy from hybrid photovoltaic-solar thermal is relatively low and has limited potential for direct integration into the thermal cycle. However, it could potentially be integrated into coal-fired power plants for boiler feedwater heating or the generation of low pressure steam. However, the integration of hybrid photovoltaic-solar thermal power has not been demonstrated on a fossil fuel-fired EGU, so the efficiency gains cannot be estimated. A developer of a new coal-fired EGU would therefore be unable to rely on this technology to guarantee compliance with the NSPS until the technology is further developed.

At the utility level, energy storage devices have historically provided improved power quality (*i.e.,* frequency and voltage) and help to manage the amount of power required to supply (*i.e.,* generation) and load (*i.e.,* customers demand) during periods of peak power demand. With the advent of increasing amounts of variable generation energy storage technology can help integrate renewable energy efficiently into the electric grid. Since renewable generation generally provides electricity based on local conditions (*e.g.,* when the wind is blowing or the sun is shining) and is not dispatched by grid operators to satisfy demand, large amounts of renewable generation can result in excess power generation (*i.e.,* grid oversupply) that results in dispatchable generators operating in a non-optimal manner and decreasing operating efficiency. Low-cost energy storage technologies with high electricity-in to electricity-out round-trip efficiency [120] could help to balance load and generation allowing for the integration of additional renewable

[120] Round-trip efficiency is the ratio of the energy recovered from the energy storage device and the energy put into the device.

generation while maintaining a dependable power supply and allowing for the operation of dispatchable power plants at peak operating efficiencies. A high round trip efficiency is necessary to assure that the losses in the energy storage technology are less than the increase in emissions that would result from operating the dispatchable fossil fuel-fired EGUs under conditions that result in lower operating efficiencies.

Utility scale energy storage systems are classified into mechanical, electrochemical, chemical, electrical, and thermal energy storage systems. While some of these technologies are well demonstrated (*e.g.,* pumped storage), other novel technologies are still in development. A developer installing a novel energy storage device to allow the EGU to operate at closer to maximum efficiency would not be able to guarantee the cycle efficiency or reliability of the energy storage technology and would therefore not be able to rely on the integration for compliance purposes. Demonstrating innovative energy storage technologies could help address barriers reducing costs and accelerating market acceptance.

An owner or operator of a new or reconstructed coal-fired EGU who wished to demonstrate a novel carbon capture technology could face multiple difficulties in demonstrating continuous compliance. First, novel carbon capture technologies by nature prevent quantitative assessment of their continuous performance. If the capture system were taken down for repair or modification, the entire facility might have to be taken off line to assure continuous compliance. In addition, due to the additional auxiliary load and increased stack emissions per MWh of electricity generated, the captured CO_2 would need to be sequestered for the unit to demonstrate continuous compliance. Sequestering relatively small amounts of CO_2 could be technically challenging and cost prohibitive, therefore limiting the development of more cost-effective capture technologies. Without the commercial demonstration permit provision, it would be difficult for an owner/operator of a coal-fired EGU to support a CCS demonstration project while still maintaining compliance with the NSPS emissions standard.

Allowing the Administrator to approve commercial demonstration permits would limit regulatory impediments to improvements in GHG reduction technologies. If the Administrator finds (in consultation with DOE) that a given emerging technology (taking into consideration all areas of environmental impact, including air, water, solid waste, toxics, and land use) offers superior overall environmental performance, permission to operate in compliance with alternative standards could then be granted by the Administrator. A mere modification of an existing demonstrated technology will not be viewed as emerging technologies and will not be approved for a commercial demonstration permit. The EPA is requesting comment on additional technologies that should be considered, as well as the maximum magnitude of the demonstration permits (Comment C–42). In particular, the Agency is considering including DOE demonstration projects as emerging technologies and potential candidates for the commercial demonstration permit. This would assure that the NSPS would continue to accommodate alternate technologies as they become available.

D. Applicability to Industrial EGUs

In simple terms, the current applicability provisions require that an EGU be capable of combusting over 250 MMBtu/h of fossil fuel and be capable of selling 25 MW to a utility distribution system in order to be subject to 40 CFR part 60, subpart TTTT. These applicability provisions exclude industrial EGUs. However, since the affected EGU includes ''integrated equipment that provides electricity or useful thermal output,'' certain large processes might be included as part of the EGU and meet the applicability criteria. For example, the high-temperature exhaust from an industrial process (*e.g.,* calcining kilns, dryer, or metals processing) that consumes fossil fuel could be sent to a heat recovery steam generator. If the industrial process is over 250 MMBtu/h heat input and the electric sales exceed the applicability criteria, then the unit could be subject to 40 CFR part 60, subpart TTTT. This is potentially problematic for multiple reasons. First, it is difficult to determine the useful output of the EGU since part of the useful output is included in the industrial process. In addition, the fossil fuel that is combusted might have a relatively high CO_2 emissions rate on a lb/MMBtu basis, making it problematic to meet the emissions standard. Finally, the compliance costs associated with 40 CFR part 60, subpart TTTT could discourage the development of environmentally beneficial projects.

To avoid these outcomes, the EPA is soliciting comment on amendments to the applicability provisions (Comment C–43). One option the Agency considering is amending the provisions to include an industrial unit exemption (Comment C–44). This exemption would apply to any EGU where greater than 50 percent of the heat input is derived from an industrial process that does not produce any electrical or mechanical output or useful thermal output that is used outside the affected EGU. In addition, the EPA soliciting comment on excluding fuels that are combusted to comply with another EPA regulation (*e.g.,* control of HAP emissions) from being considered a fossil fuel (Comment C–45).

The current approach owner/operators of CHP units use to calculate net-electric sales and net energy output includes that ''at least 20.0 percent of the total gross or net energy output consists of electric or direct mechanical output.'' It is unlikely that a CHP with a relatively low electric output (*i.e.,* less than 20 percent) would meet the applicability criteria. However, if a CHP unit with less than 20 percent of the total output consisting of electricity were to meet the applicability criteria, the net-electric sales and net energy output would be calculated the same as for a traditional non-CHP EGU. Even so, it is not clear that these CHP units would have less environmental benefit per unit of electricity produced than more traditional CHP units. The EPA is therefore soliciting comment on eliminating the restriction that CHP produce at least 20 percent electrical or mechanical output to qualify for the CHP specific method for calculating net-electric sales and net energy output (Comment C–46).

The current electric sales applicability exemption for non-CHP steam generating units includes the provision that steam generating units have ''*always been subject to a federally enforceable permit* limiting annual net electric sales to one-third or less of their potential electric output (*e.g.,* limiting hours of operation to less than 2,920 hours annually) or limiting annual electric sales to 219,000 MWh or less'' (emphasis added). The justification for this restriction includes that the 40 CFR part 60 subpart Da applicability language includes ''constructed for the purpose of . . .'' and the Agency concluded that the intent was defined by permit conditions (80 FR 64544). This applicability criterion is important for determining applicability with both the new source section 111(b) requirements and if existing steam generating units are subject to the existing source section 111(d) requirements. For steam generating units that commenced construction after September 18, 1978, the applicability date of 40 CFR part 60 subpart Da,

applicability would be relatively clear by what criteria pollutant NSPS is applicable to the facility. However, for steam generating units that commenced construction prior to September 18, 1978 or where the owner/operator determined that criteria pollutant NSPS applicability was not critical to the project (*e.g.,* emission controls were sufficient to comply with either the EGU or industrial boiler criteria pollutant NSPS) owners/operators might not have requested an electric sales permit restriction be included in the operating permit. Under the current applicability language, some onsite steam generating unit electric generators could be covered by the existing source section 111(d) requirements even if they have never sold electricity to the grid. The EPA is soliciting comment on amending the electric sales exemption to read have ''*have never sold more than one-third of their potential electric output or 219,000 MWh, whichever is greater, and are* ~~*always been*~~ subject to a federally enforceable permit limiting annual net electric sales to one-third or less of their potential electric output (*e.g.,* limiting hours of operation to less than 2,920 hours annually) or limiting annual electric sales to 219,000 MWh or less'' (emphasis added) (Comment C–47). EGUs that reduce current generation would continue to be covered as long as they sold more than ⅓ of their potential electric output at some time in the past.

E. Non-Sequestration of Captured Carbon

While carbon capture technology is not included in the proposed BSER, the EPA recognizes that there are potential site-specific situations where a developer elects to install carbon capture technology. For example, a developer might wish to evaluate a particular capture technology or to sell the captured CO_2. However, 40 CFR part 60, subpart TTTT as currently written requires that captured CO_2 be geologically sequestered or stored in a different manner that is as effective as geologic sequestration. Captured CO_2 that is sold to the food industry would not currently qualify for emission reduction because it results in near term releases rather than in permanent sequestration. However, a different situation can be envisioned in which the captured CO_2 could be considered to offset CO_2 generated specifically for the food industry and from a life cycle perspective it would be as effective as sequestration at reducing emissions. Therefore, to accommodate non geologic sequestration and to support the effective utilization and management of CO_2, the EPA is soliciting comment on amending the second sentence of paragraph 60.555(g) to read ''To receive a waiver, the applicant must demonstrate to the Administrator that its technology will store captured CO_2 as effectively as geologic sequestration *or the CO_2 will be used as an input to an industrial process where the life cycle emissions are reducing emissions as effective as geologic sequestration,* and that the proposed technology will not cause or contribute to an unreasonable risk to public health, welfare, or safety.'' (emphasis added) (Comment C–48)

F. Additional Amendments

The EPA is soliciting comment on multiple less significant amendments. These amendments either would be either strictly editorial and would not change any of the requirements of subpart TTTT or are intended to add additional compliance flexibility. For additional information on these amendments, see the regulatory text track changes technical support document. First, the EPA is considering editorial amendments to define acronyms the first time they are used in the regulatory text (Comment C–49). Second, the EPA is considering adding International System of Units (SI) equivalent for owners/operators of stationary combustion turbines complying with a heat input-based standard (Comment C–50). Third, the EPA is considering fixing errors in the current subpart TTTT regulatory text referring to part 63 instead of part 60 (Comment C–51). Fourth, as a practical matter owners/operators of stationary combustion turbines subject to the heat input-based emissions standard need to maintain records of electric sales to demonstrate that they are not subject to the output-based emissions standard. Therefore, the EPA is soliciting comment on adding specific requirement that owner/operators maintain records of electric sales to demonstrate they did not sell electricity above the threshold that would trigger the output-based standard (Comment C–52). Next, the EPA is soliciting comment on if the ANSI, ASME, and ASTM test methods should be updated to include more recent versions of the test methods (Comment C–53). Finally, the EPA is soliciting comment on adding additional compliance flexibilities for EGUs either serving a common electric generator or using a common stack (Comment C–54). Specifically, for EGUs serving a common electric generator should the Administrator be able to approve alternate methods for determining energy output? For EGUs using a common stack, the EPA is soliciting comment on if specific procedures should be added for apportioning the emissions and/or if the Administrator should be able to approve site specific alternate procedures.

G. Non-Base Load Combustion Turbines

As noted in the General Information section above, in the 2015 Rule, the EPA set separate standards for base load and non-base load stationary combustion turbines. The electric sales threshold between the two subcategories is based on the design efficiency of the combustion turbine. Stationary combustion turbines qualify as non-base load, and thus for a less stringent standard of performance, if they have net electric sales equal to or below their design efficiency (not to exceed 50 percent) multiplied by their potential electric output, 80 FR at 64,601 (*e.g.,* a 40 percent efficient combustion turbine can sell up to 40 percent of its potential electrical output), but if their sales exceed that level, they are treated as base load and subject to a more stringent standard of performance. For additional discussion on this approach, *see* the 2015 Rule (80 FR 64609 to 64612).

Recently, stakeholders have expressed concerns about this approach for distinguishing between base load and non-base load turbines. They posit a scenario under which increased utilization of wind and solar resources, combined with low natural gas prices, would result in certain types of simple cycle turbines being deemed attractive to operate for a longer period of time than had been contemplated at the time the 2015 Rule was being developed. Specifically, stakeholders have observed that in some regional electricity markets with large amounts of wind generation, some of the most efficient new simple cycle turbines—aeroderivative turbines—could be called on to operate at capacity factors greater than their design efficiency; however, if they were to be operated at those higher capacity factors, they would become subject to the more stringent standard of performance for base load turbines, which they would not be able to meet. As a result, according to these stakeholders, the owners or operators of the aeroderivative turbines would have to curtail their generation and less efficient turbines would be called on to run, which would result in higher emissions.

Although, as noted above, the EPA is not re-opening the standards promulgated in the 2015 Rule for combustion turbines, the EPA is soliciting comment on the concerns identified by stakeholders to determine the extent of the potential issue

identified above and, if necessary, potential remedies. Specifically, the EPA is soliciting information, including seeking supporting data and documentation, on whether there have been, or are anticipated to be, circumstances (*e.g.,* high utilization of wind or solar resources or low natural gas prices) in which simple cycle stationary combustion aeroderivative turbines (*i.e.,* those that are subject to standards of performance in 40 CFR part 60 subpart TTTT) have been or may be called upon to operate in excess of the non-base load threshold described in the 2015 Rule (Comment C–55). The EPA is also requesting information on whether, and the extent to which, these aeroderivative turbines are different in design and operation than frame simple cycle turbines and NGCC units, including fast start NGCC units (Comment C–56). The EPA is also requesting information on the environmental consequences, if any, of the aeroderivative combustion turbines having to forego continued operation in such circumstances (*e.g.,* is a more efficient turbine being displaced by a higher emitting turbine or utility boiler?) (Comment C–57). The EPA is also soliciting comment on remedies that the Agency should consider, if necessary, to address this potential concern. For example, should the EPA consider creating a separate subcategory and standard of performance for simple cycle aeroderivative turbines? Should the EPA consider changing the formula used to calculate allowable operating hours for non-baseload combustion turbines? Should the Agency consider creating a process by which owners or operators could petition the EPA to increase the allowable operating hours for non-baseload combustion turbines on a case-by-case basis if they could demonstrate that, given the composition of the regional grid they belong to, the increase would result in better overall environmental outcome? (Comment C–58). The EPA will evaluate all comments and any new information and, if warranted, will initiate a subsequent rulemaking to address any issues raised from this solicitation of comment.

X. Statutory and Executive Order Reviews

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

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

This action is a significant regulatory action that was submitted to the Office of Management and Budget (OMB) for review. Any changes made in response to OMB recommendations have been documented in the docket. The EPA prepared an economic impact analysis of the potential costs and benefits associated with this action. This analysis is contained in the *Economic Impact Analysis for the Review of Standards of Performance for Greenhouse Gas Emissions from New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units.* The economic impact analysis includes an illustrative analysis of the potential difference in project-level costs of constructing a coal-fired EGU under this proposed standard relative to the 2015 standard.

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

This action is expected to be an Executive Order 13771 regulatory action. There are no quantified cost estimates for this proposed rule because the EPA does not anticipate this action to result in costs or cost savings. For more information on this conclusion please see the *Economic Impact Analysis for the Review of Standards of Performance for Greenhouse Gas Emissions from New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units.*

C. Paperwork Reduction Act (PRA)

This action does not impose any new information collection burden under the provisions of the PRA. The information required by the rule is already collected and reported by other regulatory programs. OMB has previously approved the information collection activities contained in the existing 40 CFR part 75 and 98 regulations and has assigned OMB control numbers 2060–0626 and 2060–0629, respectively.

D. Regulatory Flexibility Act (RFA)

I certify that this action will not have a significant economic impact on a substantial number of small entities under the RFA. In making this determination, the impact of concern is any significant adverse economic impact on small entities. An agency mat certify that a rule will not have a significant economic impact on a substantial number of small entities if the rule relieves regulatory burden, has no net burden, or otherwise has a positive economic effect on the small entities subject to the rule. The EPA does not project any new, modified, or reconstructed coal-fired electric utility steam generating units. As such, this proposed rule would not impose significant requirements on those sources, including any that are owned by small entities. The EPA has, therefore, concluded that this action will have no net regulatory burden for all directly regulated small entities.

E. Unfunded Mandates Reform Act (UMRA)

This action does not contain an unfunded mandate of $100 million or more as described in UMRA, 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments. This action is not expected to impact state, local, or tribal governments.

F. Executive Order 13132: Federalism

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

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

This action does not have tribal implications, as specified in Executive Order 13175. It would neither impose substantial direct compliance costs on tribal governments, nor preempt Tribal law. The EPA is aware of three coal-fired EGUs located in Indian Country, but is not aware of any EGUs owned or operated by tribal entities. The EPA notes that this action would only affect existing sources such as the three coal-fired EGUs located in Indian Country, if those EGUs were to take actions constituting modifications or reconstructions as defined under the EPA's NSPS regulations. However, as previously stated, the EPA does not project any new, reconstructed, or modified EGUs. Thus, Executive Order 13175 does not apply to this action.

The EPA will hold meetings with tribal environmental staff during the public comment period to inform them of the content of this proposal and will offer further consultation with tribal elected officials where it is appropriate. The EPA specifically solicits additional comment from tribal officials on this proposed rule.

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

The EPA interprets Executive Order 13045 as applying only to those regulatory actions that concern health or safety risks that the EPA has reason to believe may disproportionately affect children, per the definition of ''covered regulatory action'' in section 2–202 of the Executive Order. This action is not subject to Executive Order 13045 because it does not concern an environmental health or safety risk.

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

This action is not a ''significant energy action'' because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. This proposed action is not anticipated to have impacts on emissions, costs, or energy supply decisions for the affected electric utility industry.

J. National Technology Transfer and Advancement Act (NTTAA)

This action involves technical standards. Therefore, the EPA conducted a search to identify potentially applicable voluntary consensus standards (VCS). However, the Agency identified no such standards. Therefore, the EPA has decided to continue to use technical standard Method 19 of 40 CFR part 60, appendix A. The EPA invites the public to identify potentially applicable VCS and to explain why such standards should be used in this action (Comment C–59).

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

The EPA believes that this action does not have disproportionately high and adverse human health or environmental effects on minority populations, low-income populations, and/or indigenous peoples, as specific in Executive Order 12898 (59 FR 7629, February 16, 1994), because it does not affect the level of protection provided to human health or the environment. As previously stated, the EPA does not project any fossil fuel-fired electric utility steam generating units would be affected by this action.

XI. Statutory Authority

The statutory authority for this action is provided by sections 111, 301, 302, and 307(d)(1)(C) of the CAA as amended (42 U.S.C. 7411, 7601, 7602, 7607(d)(1)(C)). This action is also subject to section 307(d) of the CAA (42 U.S.C. 7607(d)).

List of Subjects in 40 CFR Part 60

Environmental protection, Administrative practice and procedure, Air pollution control, Intergovernmental relations, Reporting and recordkeeping requirements.

Dated: December 6, 2018.

Andrew R. Wheeler,

Acting Administrator.

For the reasons set out in the preamble, title 40, chapter I, part 60 of the Code of Federal Regulations is proposed to be amended as follows:

PART 60—Standards of Performance for New Stationary Sources

■ 1. The authority citation for part 60 continues to read as follows:

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

Subpart TTTT—[Amended]

■ 2. Section 60.5509 is amended by revising paragraph (b)(2) to read as follows:

§ 60.5509 Am I subject to this subpart?

* * * * *

(b) * * *

(2) Your EGU is capable of deriving 50 percent or more of the heat input from non-fossil fuel at the base load rating and is also subject to a federally enforceable permit condition limiting the annual capacity factor for all fossil fuels combined of 10 percent (0.10) or less.

* * * * *

■ 3. Section 60.5520 is amended by revising paragraphs (a) and (c) to read as follows:

§ 60.5520 What CO_2 emissions standard must I meet?

(a) For each affected EGU subject to this subpart, you must not discharge from the affected EGU any gases that contain CO_2 in excess of the applicable CO_2 emission standard specified in Table 1, 2, or 3 of this subpart, consistent with paragraphs (b), (c), and (d) of this section, as applicable.

* * * * *

(c) As an alternate to meeting the requirements in paragraph (b) of this section, an owner or operator of an EGU may petition the Administrator in writing to comply with the alternate applicable net energy output standard. If the Administrator grants the petition, beginning on the date the Administrator grants the petition, the affected EGU must comply with the applicable net energy output-based standard included in this subpart. Your operating permit must include monitoring, recordkeeping, and reporting methodologies based on the applicable net energy output standard. For the remainder of this subpart, where the term ''gross or net energy output'' is used, the term that applies to you is ''net energy output.'' Owners or operators complying with the net output-based standard must petition the Administrator to switch back to complying with the gross energy output-based standard.

* * * * *

■ 4. Section 60.5525 is amended by revising the introductory text, the introductory text of paragraph (c), and paragraphs (c)(1)(i) and (ii), (c)(2), and (c)(3) to read as follows:

§ 60.5525 What are my general requirements for complying with this subpart?

Combustion turbines qualifying under § 60.5520(d)(1) are not subject to any requirements in this section other than the requirement to maintain fuel purchase records for permitted fuel(s). For all other affected sources, compliance with the applicable CO_2 emission standard of this subpart shall be determined on a 12-operating-month rolling average basis. See Table 1, 2, or 3 of this subpart for the applicable CO_2 emission standards.

* * * * *

(c) Within 30 days after the end of the initial compliance period (*i.e.,* no more than 30 days after the first 12-operating-month compliance period), you must make an initial compliance determination for your affected EGU(s) with respect to the applicable emissions standard in Table 1, 2, or 3 of this subpart, in accordance with the requirements in this subpart. The first operating month included in the initial 12-operating-month compliance period shall be determined as follows:

(1) * * *

(i) Section 60.5555(c)(3)(i), for units subject to the Acid Rain Program; or

(ii) Section 60.5555(c)(3)(ii)(A), for units that are not in the Acid Rain Program.

(2) For an affected EGU that has commenced commercial operation (as defined in § 72.2 of this chapter) prior to October 23, 2015:

(i) If the date on which emissions reporting is required to begin under § 75.64(a) of this chapter has passed prior to October 23, 2015, emissions reporting shall begin according to § 60.5555(c)(3)(i) (for Acid Rain program units), or according to § 60.5555(c)(3)(ii)(B) (for units that are not subject to the Acid Rain Program). The first month of the initial

compliance period shall be the first operating month (as defined in § 60.5580) after the calendar month in which the rule becomes effective; or

(ii) If the date on which emissions reporting is required to begin under § 75.64(a) of this chapter occurs on or after October 23, 2015, then the first month of the initial compliance period shall be the first operating month (as defined in § 60.5580) after the calendar month in which emissions reporting is required to begin under § 60.5555(c)(3)(ii)(A).

(3) For a modified or reconstructed EGU that becomes subject to this subpart, the first month of the initial compliance period shall be the first operating month (as defined in § 60.5580) after the calendar month in which emissions reporting is required to begin under § 60.5555(c)(3)(iii).

■ 5. Section 60.5535 is amended by revising paragraphs (f) and (g) to read as follows:

§ 60.5535 How do I monitor and collect data to demonstrate compliance?

* * * * *

(f) In accordance with §§ 60.13(g) and 60.5520, if two or more affected EGUs that implement the continuous emission monitoring provisions in paragraph (b) of this section share a common exhaust gas stack and are subject to the same emissions standard in Table 1, 2, or 3 of this subpart, you may monitor the hourly CO_2 mass emissions at the common stack in lieu of monitoring each EGU separately. If you choose this option, the hourly gross or net energy output (electric, thermal, and/or mechanical, as applicable) must be the sum of the hourly loads for the individual affected EGUs and you must express the operating time as ''stack operating hours'' (as defined in § 72.2 of this chapter). If you attain compliance with the applicable emissions standard in § 60.5520 at the common stack, each affected EGU sharing the stack is in compliance.

(g) In accordance with §§ 60.13(g) and 60.5520 if the exhaust gases from an affected EGU that implements the continuous emission monitoring provisions in paragraph (b) of this section are emitted to the atmosphere through multiple stacks (or if the exhaust gases are routed to a common stack through multiple ducts and you elect to monitor in the ducts), you must monitor the hourly CO_2 mass emissions and the ''stack operating time'' (as defined in § 72.2 of this chapter) at each stack or duct separately. In this case, you must determine compliance with the applicable emissions standard in Table 1, 2, or 3 of this subpart by summing the CO_2 mass emissions measured at the individual stacks or ducts and dividing by the total gross or net energy output for the affected EGU.

■ 6. Section 60.5540 is amended by revising the introductory text of paragraph (a) and paragraph (b) to read as follows:

§ 60.5540 How do I demonstrate compliance with my CO_2 emissions standard and determine excess emissions?

(a) In accordance with § 60.5520, if you are subject to an output-based emission standard or you burn non-uniform fuels as specified in § 60.5520(d)(2), you must demonstrate compliance with the applicable CO_2 emission standard in Table 1, 2, or 3 of this subpart as required in this section. For the initial and each subsequent 12-operating-month rolling average compliance period, you must follow the procedures in paragraphs (a)(1) through (7) of this section to calculate the CO_2 mass emissions rate for your affected EGU(s) in units of the applicable emissions standard (*i.e.,* either kg/MWh or lb/MMBtu). You must use the hourly CO_2 mass emissions calculated under § 60.5535(b) or (c), as applicable, and either the generating load data from § 60.5535(d)(1) for output-based calculations or the heat input data from § 60.5535(d)(2) for heat-input-based calculations. Combustion turbines firing non-uniform fuels that contain CO_2 prior to combustion (*e.g.,* blast furnace gas or landfill gas) may sample the fuel stream to determine the quantity of CO_2 present in the fuel prior to combustion and exclude this portion of the CO_2 mass emissions from compliance determinations.

* * * * *

(b) In accordance with § 60.5520, to demonstrate compliance with the applicable CO_2 emission standard, for the initial and each subsequent 12-operating-month compliance period, the CO_2 mass emissions rate for your affected EGU must be determined according to the procedures specified in paragraph (a)(1) through (7) of this section and must be less than or equal to the applicable CO_2 emissions standard in Table 1, 2, or 3 of this part, or the emissions standard calculated in accordance with § 60.5525(a)(2).

■ 7. Section 60.5555 is amended by revising paragraph (a)(2)(v) to read as follows:

§ 60.5555 What reports must I submit and when?

(a) * * *

(2) * * *

(v) Consistent with § 60.5520, the CO_2 emissions standard (as identified in Table 1, 2, or 3 of this part) with which your affected EGU must comply; and

* * * * *

■ 8. Section 60.5560 is amended by revising paragraph (f) to read as follows:

§ 60.5560 What records must I maintain?

* * * * *

(f) You must keep records of the calculations you performed to assess compliance with each applicable CO_2 mass emissions standard in Table 1, 2, or 3 of this subpart.

* * * * *

■ 9. Section 60.5580 is amended by revising the definitions for ''Base load rating'' and ''Design efficiency,'' revising paragraph (2) of the definition for ''Net-electric sales,'' and revising the definition for ''Violation'' to read as follows:

§ 60.5580 What definitions apply to this subpart?

* * * * *

Base load rating means the maximum amount of heat input (fuel) that an EGU can combust on a steady state basis plus the maximum amount of heat input derived from non-combustion source (*e.g.,* solar thermal), as determined by the physical design and characteristics of the EGU at ISO conditions. For a stationary combustion turbine, *base load rating* includes the heat input from duct burners.

* * * * *

Design efficiency means the rated overall net efficiency (*e.g.,* electric plus useful thermal output) on a lower heating value basis at the base load rating, at ISO conditions, and at the maximum useful thermal output (*e.g.,* CHP unit with condensing steam turbines would determine the design efficiency at the maximum level of extraction and/or bypass). Design efficiency shall be determined using one of the following methods: ASME PTC 22 Gas Turbines (incorporated by reference, see § 60.17), ASME PTC 46 Overall Plant Performance (incorporated by reference, see § 60.17), ISO 2314 Gas turbines—acceptance tests (incorporated by reference, see § 60.17), or an alternative approved by the Administrator.

* * * * *

Net-electric sales means: * * *

(2) For combined heat and power facilities where at least 20.0 percent of the total gross energy output consists of electric or direct mechanical output and at least 20.0 percent of the total gross energy output consists of useful thermal output on an annual basis, the gross electric sales to the utility power distribution system minus the

applicable percentage of purchased power of the thermal host facility or facilities. The applicable percentage of purchase power for CHP facilities is determined based on the percentage of the total thermal load of the host facility supplied to the host facility by the CHP facility. For example, if a CHP facility serves 50 percent of a thermal hosts thermal demand, the owner/operator of the CHP facility would subtract 50 percent of the thermal hosts electric purchased power when determining net-electric sales.

* * * * *

Violation means a specified averaging period over which the CO_2 emissions rate is higher than the applicable emissions standard located in Table 1, 2, or 3 of this subpart.

■ 10. Re-designate Table 3 of Subpart TTTT of Part 60 as Table 4 of Subpart TTTT of Part 60.

■ 11. Revise the heading of Table 1 of Subpart TTTT of Part 60 to read as follows:

Table 1 of Subpart TTTT of Part 60—CO_2 Emission Standards for Affected Steam Generating Units and Integrated Gasification Combined Cycle Facilities That Commenced Construction After January 8, 2014, but Before December 21, 2018, and Reconstruction or Modification After June 18, 2014, but Before December 21, 2018

[**Note:** Numerical values of 1,000 or greater have a minimum of 3 significant figures and numerical values of less than 1,000 have a minimum of 2 significant figures]

* * * * *

■ 12. Add new Table 3 of Subpart TTTT of Part 60 to read as follows:

Table 3 of Subpart TTTT of Part 60—CO_2 Emission Standards for Affected Steam Generating Units and Integrated Gasification Combined Cycle Facilities That Commenced Construction, Reconstruction, or Modification After December 21, 2018 (Net Energy Output-Based Standards Applicable as Approved by the Administrator)

[**Note:** Numerical values of 1,000 or greater have a minimum of 3 significant figures and numerical values of less than 1,000 have a minimum of 2 significant figures]

Affected EGU	CO_2 emission standard
Newly constructed and reconstructed steam generating unit or IGCC that has base load rating of 2,100 GJ/h (2,000 MMBtu/h) or less.	910 kg CO_2/MWh (2,000 lb CO_2/MWh) of gross energy output; or 980 kg CO_2/MWh (2,160 lb CO_2/MWh) of net energy output.
Newly constructed and reconstructed steam generating unit or IGCC that has base load rating greater than 2,100 GJ/h (2,000 MMBtu/h).	870 kg CO_2/MWh (1,900 lb CO_2/MWh) of gross energy output; or 940 kg CO_2/MWh (2,070 lb CO_2/MWh) of net energy output.
Newly constructed and reconstructed steam generating unit or IGCC units that burn 75 percent or more (by heat input) coal refuse on a 12-operating month rolling average basis.	1,000 kg CO_2/MWh (2,200 lb CO_2/MWh) of gross energy output; or 1,080 kg CO_2/MWh (2,380 lb CO_2/MWh) of net energy output.
Modified steam generating unit or IGCC	A unit-specific emission limit determined by the unit's best historical annual CO_2 emission rate (from 2002 to the date of the modification); the emission limit will be no more stringent than: 1. 910 kg CO_2/MWh (2,000 lb CO_2/MWh) of gross energy output; or 980 kg CO_2/MWh (2,160 lb CO_2/MWh) of net energy output for units with a base load rating of 2,100 GJ/h (2,000 MMBtu/h) or less; or 2. 870 kg CO_2/MWh (1,900 lb CO_2/MWh) of gross energy output; or 940 kg CO_2/MWh (2,070 lb CO_2/MWh) of net energy output for units with a base load rating of greater than 2,100 GJ/h (2,000 MMBtu/h); or 3. 1,000 kg CO_2/MWh (2,200 lb CO_2/MWh) of gross energy output; or 1,080 kg CO_2/MWh (2,380 lb CO_2/MWh) of net energy output for units that burn 75 percent or more (by heat input) coal refuse on a 12-operating month rolling average basis.

[FR Doc. 2018–27052 Filed 12–19–18; 8:45 am]

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Part IV

Department of Defense
General Services Administration
National Aeronautics and Space Administration

48 CFR Chapter 1

Federal Acquisition Regulations; Final Rules

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Chapter 1

[Docket No. FAR 2018–0001, Sequence No. 6]

Federal Acquisition Regulation; Federal Acquisition Circular 2019–01; Introduction

AGENCY: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Summary presentation of a final rule.

SUMMARY: This document summarizes the Federal Acquisition Regulation (FAR) rule agreed to by the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) in this Federal Acquisition Circular (FAC) 2019–01. A companion document, the *Small Entity Compliance Guide* (SECG), follows this FAC. The FAC, including the SECG, is available via the internet at *http://www.regulations.gov*.

DATES: For effective date see the separate document, which follows.

FOR FURTHER INFORMATION CONTACT: Ms. Cecelia Davis, Procurement Analyst, at 202–219–0202 for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat Division at 202–501–4755. Please cite FAC 2019–01, FAR case 2015–017.

RULE LISTED IN FAC 2019–01

Subject	FAR case	Analyst
Combating Trafficking in Persons—Definition of ''Recruitment Fees''	2015–017	Davis.

SUPPLEMENTARY INFORMATION: A summary for the FAR rule follows. For the actual revisions and/or amendments made by this FAR Case, refer to the specific item number and subject set forth in the document following this item summary. FAC 2019–01 amends the FAR as follows:

Combating Trafficking in Persons—Definition of ''Recruitment Fees'' (FAR Case 2015–017)

This final rule amends the Federal Acquisition Regulation (FAR) to provide a definition of ''recruitment fees'' in FAR subpart 22.17 and the associated clause at FAR 52.222–50 to further implement the FAR policy on combating trafficking in persons. One element in combating trafficking in persons is to prohibit contractors from charging employees or potential employees recruitment fees.

This final rule will not have a significant economic impact on a substantial number of small entities.

Federal Acquisition Circular (FAC) 2019–01 is issued under the authority of the Secretary of Defense, the Administrator of General Services, and the Administrator for the National Aeronautics and Space Administration.

Unless otherwise specified, all Federal Acquisition Regulation (FAR) and other directive material contained in FAC 2019–01 is effective December 20, 2018 except for FAR Case 2015–017, which is effective January 22, 2019.

Dated: December 10, 2018.

William F. Clark,

Director, Office of Government-wide Acquisition Policy, Office of Acquisition Policy, Office of Government-wide Policy.

Dated: December 14, 2018.

Kim Herrington,

Acting Principal Director, Defense Pricing and Contracting.

Dated: December 11, 2018.

Jeffrey A. Koses,

Senior Procurement Executive/Deputy CAO, Office of Acquisition Policy, U.S. General Services Administration.

Dated: December 13, 2018.

William G. Roets, II,

Acting Assistant Administrator, Office of Procurement National Aeronautics and Space Administration.

[FR Doc. 2018–27540 Filed 12–19–18; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 22 and 52

[FAC 2019–01; FAR Case 2015–017; Docket No. 2015–0017; Sequence No. 1]

RIN 9000–AN02

Federal Acquisition Regulation: Combating Trafficking in Persons—Definition of ''Recruitment Fees''

AGENCY: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: DoD, GSA, and NASA are issuing a final rule amending the Federal Acquisition Regulation (FAR) to provide a definition of ''recruitment fees'' to further implement the FAR policy on combating trafficking in persons. One element in combating trafficking in persons is to prohibit contractors from charging employees recruitment fees.

DATES: *Effective Date:* January 22, 2019.

FOR FURTHER INFORMATION CONTACT: Ms. Cecelia L. Davis, Procurement Analyst, at 202–219–0202 for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat Division at 202–501–4755. Please cite FAC 2019–01, FAR Case 2015–017.

SUPPLEMENTARY INFORMATION:

I. Background

This rulemaking is intended to clarify the prohibition on the charging of recruitment fees set forth in FAR subpart 22.17 and clause 52.222–50. This regulatory language reflects a final rule published by DoD, GSA, and NASA on January 29, 2015 (FAR Case 2013–001, 80 FR 4967) to implement Executive Order (E.O.) 13627, entitled ''Strengthening Protections Against Trafficking in Persons in Federal Contracts,'' and title XVII of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2013, entitled ''Ending Trafficking in Government Contracting.'' Pursuant to FAR 22.1703(a) and 52.222–50(b),

which became effective on March 2, 2015, contractors, contractor employees, subcontractors, subcontractor employees, and their agents are prohibited from charging employees recruitment fees. This second rulemaking is meant to clarify the prohibition in the 2015 rule by defining ''recruitment fees'' for purposes of the prohibition (*e.g.,* fees for processing applications, fees for acquiring visas).

Prior to the publication of the 2015 rule, in November 2014, the Government Accountability Office (GAO) issued report GAO–15–102, which recommended that agencies ''develop a more precise definition of recruitment fees.'' The GAO explained that without a clear definition, agencies would face challenges enforcing the prohibition. The Senior Policy Operating Group for Combating Trafficking In Persons (established under the President's Interagency Task Force for Monitoring and Combatting Trafficking in Persons) agreed with the GAO's conclusion and requested that the Federal Acquisition Regulatory Council (FAR Council) consider developing a definition for the term ''recruitment fees'' to create consistency and certainty for contracting parties. In response, the FAR Council published an early engagement opportunity on a draft definition on the Defense Acquisition Regulations System's website, with interested parties encouraged to submit feedback through March 2015. The original posting and results are currently available at: *https://www.acq.osd.mil/dpap/dars/archive/2015/early_engagement_opportunity_2015.html.* After review of the comments, DoD, GSA, and NASA published a proposed rule in the **Federal Register** at 81 FR 29244 on May 11, 2016, to provide a definition of ''recruitment fees'' in FAR subpart 22.17 Combating Trafficking in Persons, and the associated clause at FAR 52.222–50, Combating Trafficking in Persons. The objective of the proposed rule, and this final rule, is to identify the types of charges and fees that contractors, subcontractors, and their employees or agents are prohibited from charging to employees or potential employees, under the Government policy on combating trafficking in persons. Additionally, the rule enables clarity and consistency in the application and enforcement of the prohibition. Twenty-eight respondents submitted comments on the proposed rule.

II. Discussion and Analysis

The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (the Councils) reviewed the public comments in the development of the final rule. A discussion of the comments and the changes made to the rule as a result of those comments are provided as follows:

A. Summary of Significant Changes

The following significant changes from the proposed rule were made in the final rule as a result of the comments received.

Definition. For ease of reading and clarification, the wording and paragraphs in the definition are restructured. In addition—

- In the introductory text of the definition, the phrase ''regardless of the manner'' of imposition or collection of the fee has been expanded to ''regardless of the time, manner, or location.''
- Several additional illustrative examples of prohibited fees have been added to the definition for clarification, *e.g.,* fees associated with obtaining permanent or temporary labor certification; processing of applications; immigration documents such as passports; government-mandated levies such as border crossing fees or worker welfare funds; transportation and subsistence costs while in transit or from the airport or disembarkation point to the worksite; security deposits, bonds, and insurance; or equipment charges.
- The second paragraph of the definition clarifies that a recruitment fee is still a recruitment fee regardless of whether collected by an employee or a third party, whether licensed or unlicensed, including labor brokers.

B. Analysis of Public Comments

1. Scope of the Definition ''Recruitment Fees''

Comment: Many respondents indicated they agreed with the scope of the proposed definition of ''recruitment fees.''

Response: Noted.

a. Too Narrow

Comment: Many respondents indicated the definition of ''recruitment fees'' was too narrow and should be expanded to be sufficiently broad to encompass anything of value. One respondent warned against a definition that would give recruiting parties the ability to define or ''reallocate'' fee elements of the recruiting process outside of the definition. Many respondents stated it was extremely important not to cordon off some fees from recruitment fees, because any ''cordoned fees'' would fall outside of enforcement. These respondents believed that all costs and fees associated with bringing an employee on board should be treated as recruitment fees. Many respondents also expressed concern that the definition may not be broad enough to cover ''all costs of bringing an employee on board'' if that prospective employee lived in a rural area, far from the city center where job applications, passports, and visas are processed.

Response: This category of comments is addressed in the responses to the more specific categories of comments on this rule.

b. Too Broad

Comment: Many respondents stated the proposed definition was too broad. These respondents thought that the proposed definition improperly classified costs associated with valid preconditions or prequalifications as recruitment fees. One respondent thought that the definition implied that it was not permitted for employers to require proof of identification, because proof of identification can cost money to obtain. Three respondents stated the purpose of the rule was to distinguish misleading and fraudulent behavior designed to elicit fees illegally from those actions that may be part of the ethical hiring practices. Several respondents asked that the proposed definitions be modified to reflect fraudulent or misleading conduct of recruiters. Two respondents stated not all costs and fees associated with hiring an employee should be treated as recruitment fees since companies have legitimate business interests in identifying and hiring qualified candidates. Another respondent indicated there were legitimate costs any individual should bear when they presented themselves at the factory door for employment and other de minimis costs, such as a bus fare to work which employees properly bear. One respondent stated it was inappropriate for liability to attach along every link in the labor recruitment chain, regardless of intent, knowledge, or ability to prevent the conduct in question, because of the potentially severe penalties that could be imposed.

Response: This category of comments is addressed in the responses to the more specific categories of comments on this rule.

2. General Elements of the Definition

a. Introductory Text

i. Use of the Phrase ''Include, But Are Not Limited To''

Comment: One respondent cautioned against any approach that is restricted to enumerating the various costs that could fall under the definition of ''recruitment fees.'' As such, any enumerated list should begin with the phrase

''recruitment fees include, but are not limited to.'' However, another respondent recommended striking out ''not limited to'' and adding ''any'' as this language could encompass very small cost items and incidentals that should not be included in the definition due to the cost to track.

Response: The phrase ''include, but are not limited to'' has been relocated and serves as the introduction to a list of examples of recruitment fees, in paragraph (1) of the definition. These revisions to the definition clarify the term ''recruitment fees'' and prevent it from being overly broad. The definition has been revised to make clear that it comprises a broad principle, and then provides illustrative examples of recruitment fees in paragraph (1) of the definition. The examples are meant to be helpful, but are not intended to be exhaustive or capture every possible example of a recruitment fee. Therefore, if a fee is associated with the recruiting process, but is not listed in the example, it would still be captured by the standard in the rule.

ii. Potential Employees

Comment: Many respondents concurred with the inclusion of fees charged to potential employees, because they thought that the practice of charging workers recruitment fees should be prohibited even if a worker ends up working on another contract or is never hired at all.

Response: Although the phrase ''assessed against employees or potential employees'' has been removed from the definition of ''recruitment fees'' in the final rule, because to whom the fee is charged is not an integral part of the definition, the final rule amends the existing FAR prohibition on charging recruitment fees to employees by adding the phrase ''potential employees'' at FAR 22.1703(a)(5) and (6) and 52.222–50(b)(5) and (6) and (h)(3)(iii) so that employers and contractors are prohibited from charging both employees and potential employees recruitment fees.

iii. Legitimate and Necessary Business Practices and Costs

Comment: Several respondents commented that the definition should only cover fraudulent or misleading practices, as opposed to legitimate and necessary business practices and costs.

One respondent considered the definition to be unclear as to whether the term ''recruitment fees'' only applied to fees charged by the recruiter or employer on top of, or in addition to, legitimate and necessary costs, or whether it also applied to the underlying costs. The respondent concurred with the intent to prevent trafficking in persons by eliminating the possibility that a job candidate be required to pay for his or her position through the imposition of recruitment fees or similar costs. The respondent stated that this goal can be achieved while also preserving the legitimate and necessary business practice of, and the legitimate costs associated with, employee recruitment.

Another respondent recommended amending the definition to prohibit recruitment fees assessed against employees or potential employees, associated with the recruiting process, ''with the knowledge and intent to defraud or mislead such employees or potential employees.'' According to the respondent, this would distinguish between the illegal conduct of a recruiter (contractor or other third party) and standard hiring activities and would not undermine the intent of the E.O. 13627 and the governing statutes to discover individuals or contractors systemically engaging in the prohibited activities or attempting to entrap individuals in a life of indentured servitude or slavery. According to the respondent, in some cases, the rule can be viewed as criminalizing the human resources process of overseas hiring, which the respondent trusted is not the intended purpose of defining ''recruitment fees.'' This respondent suggested that the rule should distinguish between fraudulent or misleading practices in recruiting employees tied to the prohibited costs and those traditionally ministerial human resources tasks performed during the hiring process by contractors, contractor employees, or their agents, such as submitting applications or interviewing job candidates.

Similarly, another respondent stated that the definition ignores the key element of whether the employer intends to defraud or deceive the employee, which is suggested as the core indicator of whether there is vulnerability to human trafficking. The respondent suggested that in many cases this rule conflates human trafficking with legitimate interactions that occur as part of the recruitment and hiring process.

Response: With regard to distinguishing between fraudulent or misleading practices and legitimate business costs, FAR subpart 22.17 and clause 52.222–50 already prohibit charging recruitment fees to employees. The purpose of this rule is to provide a definition of ''recruitment fees,'' not to create exceptions for when recruitment fees may be charged, such as under nonfraudulent circumstances. The standard is whether the fees are associated with the recruiting process.

Additionally, the introductory paragraph of the definition has been revised to clarify that the standard is that ''recruitment fees'' are fees associated with the recruiting process. The introductory paragraph of the definition has been revised to highlight and make clear this standard so that employers and contractors have clarity regarding the existing FAR prohibition on charging employees recruitment fees and ensure that employees and potential employees are not charged such fees. It is important to note that fees that fall within the definition of recruitment fees may still be incurred as part of normal business practices; they just cannot be passed on to employees or potential employees.

iv. Timing

Comment: Many respondents commented that the definition should apply regardless of when fees are imposed or collected. Many respondents suggested inclusion of ''or timing'' after the phrase ''regardless of the manner'' (*i.e.,* to read ''regardless of the manner or timing of their imposition or collection''). Many respondents stated that timing is important to include, since fees can take the form of kickbacks after arrival at the jobsite, fees at the end of a job for future recruitment, for safe passage home, for return of collateral at the end of a job, etc. The respondents further stated that the definition needs to clearly state that recruitment fees may be paid long after recruitment is technically over, but are still recruitment fees, regardless of when the fees are accrued, charged, or collected. One respondent noted that in some countries, such as Singapore and Taiwan, labor agents or brokers are legally allowed ongoing placement fees that are deducted from the workers' pay, which are just recruitment fees shifted in time. This respondent noted that the proposed definition should note that prohibited fees include fees connected with the ''recruiting process and employment relationship'' in order to clarify that the scope of the rule relates to more than just fees connected with the sourcing, recruiting, and hiring of the worker.

Response: The definition in the final rule has been amended to include the phrase ''regardless of the time, manner, or location of imposition or collection of the fee.'' The Councils agree that the timing of the fees is not relevant to the question of whether a fee is a recruitment fee since the operative standard is whether the fees are

associated with the recruiting process, even if imposed or collected later in time.

v. Adding Additional Terms to the Definition

Comment: One respondent recommended adoption of a definition of fees that is broad in time, term, and form to ensure the utmost protection of vulnerable individuals from exploitation by unethical recruitment practices. The respondent noted that recruitment fees are not limited solely to the act of recruiting of a worker, but also encompass hiring, transportation, onboarding, ongoing employment, separation, and the return trip to the worker's home country. According to the respondent, any prohibition against fees needs to take this continuum into account, as each of these fees, when levied individually or collectively at the outset or during the course of employment, can facilitate debt bondage and exacerbate the likelihood that forced labor will occur.

Response: The definition has been revised to state ''regardless of the time, manner, or location of imposition or collection of the fee.''

vi. Equating to Prohibition Against Kickbacks

Comment: One respondent suggested the following addition to the definition of ''recruitment fees'':

''The items identified in this section are illustrative only. They are not a comprehensive list of all possible costs charged to a prospective/current worker that would be prohibited under the rule. Rather, for purposes of application, the same meaning given a kickback as identified in FAR 3.502–1 will apply to the solicitation of anything of value from the worker as a condition to receiving employment under the contract.''

This respondent stated that by referencing an applicable and well-settled standard under the law, it will more clearly define the boundaries and limitations of the prohibitions against fees.

Response: The final rule clarifies that the definition is based upon a broad principle and an illustrative list of examples. The definition is not limited by the examples, as explained further in the response to comment 2.a.i.

The Councils decline to adopt the same meaning as kickback, as defined in FAR section 3.502–1. Reference to a kickback defined in section 3.502–1 is not necessarily relevant to this rule and section 3.502–1 could be viewed as limiting the definition of ''recruitment fees.'' Under this final rule, a kickback as understood colloquially is a recruitment fee if it is associated with the recruiting process.

vii. ''Assessed''

Comment: One respondent stated that the rule should clarify the meaning of the term ''assessed'' as used in the proposed definition of ''recruitment fees.''

Response: The term ''assessed'' was removed from the definition, because it is redundant and could potentially limit the FAR prohibition on charging employees or potential employees recruitment fees.

b. Paragraph (2) of Definition

i. Third Parties

Comment: Several respondents commented on the list of third parties in paragraph (2) of the definition.

Two respondents commented that a number of third parties, including recruiters, staffing firms, subsidiaries or affiliates, subcontractors, and the vaguely defined ''agents,'' whose actions to seek recruitment fees from an individual not yet employed by the contractor, may be unknown to the contractor. According to the respondents, this could result in liability for the contractor when actions of third parties, unrelated to the contractor recruitment or hiring, violate the prohibition on charging of recruitment fees. One respondent noted that the definition does not limit such prohibited fee or payment actions to those done for the purpose of employment on a specific contract to which the clauses pertain. These respondents recommended that the Councils clarify that fees or other payments made by third parties have to relate directly to the contractor and/or contract to which compliance is sought.

However, another respondent suggested a change in subparagraph (2)(v), from ''Any agent or employee of such entities . . .'' to ''Any agent or employee of such entities, including 'subagents' or other licensed or unlicensed representatives . . . .'' According to this respondent, the worker may often pay recruitment fees to locally-based subagents prior to direct contact with the employer's official representative.

A respondent also thought the rule was not clear as to when a contractor's recruitment fees obligations become effective and noted that on occasion, companies will fill open positions on contracts with third country nationals who have been brought into the performance country by another contractor for a different contract.

Response: FAR subpart 22.17 already prohibits charging recruitment fees to employees. Subpart 22.17 also prescribes the clause at 52.222–50, which makes this prohibition a requirement in contracts. The FAR does not contain any exceptions to this prohibition for a second recruiting process. Paragraph (2) of the definition makes clear that regardless of who actually collects the fee, if the fee is imposed in association with the recruiting process, it is still a recruitment fee under the definition. The Councils have reformatted paragraph (2) of the definition for greater clarity. Paragraph (2)(v) of the definition in the rule has been revised to add the phrase ''whether licensed or unlicensed.'' The term subagent was not added, because the phrase ''collected by an employer or third party'' already covers subagents, and the list of examples is meant to be illustrative and nonexhaustive, with the phrase ''including, but not limited to.''

ii. ''Remitted in Connection With Recruitment''

Comment: One respondent stated that the term ''remitted in connection with recruitment'' in paragraph (2) of the definition of ''recruitment fees'' is confusing and out of context with the remainder of the paragraph, which describes varying types of payment or remunerations that could be considered ''recruitment fees,'' but it has no other clear meaning with respect to recruitment fees or is duplicative or circular in its meaning, and should be stricken from the definition.

Response: The phrase ''remitted in connection with recruitment'' has been deleted from the definition. This standard is adequately covered in the introductory paragraph of the definition, *i.e.,* that a fee is considered a recruitment fee if it is associated with the recruiting process.

3. Should the Definition of Recruitment Fee Vary Depending on—

a. Whether the job is a professional high-paying, high-skill job, or an unskilled, low-paying job?

Comment: Numerous respondents supported a definition that does not vary based on salary or skill level, and stated that attempting to define different recruitment fees for different skill levels may create loopholes that could be exploited by employers changing employee titles and terminology.

One respondent commented that there are legitimate circumstances where fees are appropriate, particularly when the laborer in question is a professional,

white collar, or a highly-skilled worker who is well compensated for his or her abilities.

Another respondent stated that fees associated with recruiting for professional, highly-skilled jobs are treated the same as fees associated with recruiting for low-skilled jobs, which may increase costs and delays in providing professional, high-skilled workers to contracting agencies. The concern was that the definition is so broad that it may encompass not only the recruitment fees that are trafficking-related, but also the myriad customary pre-qualifications for professional employment that are not trafficking-related. For example, a Federal agency's solicitation may include minimum qualifications for professional positions, such as a security clearance or a professional certification, or both. Applying the broad definition of recruitment fee to include security clearances and professional certifications may have the unintended consequence of interfering with contractors' recruitment of professional employees, something the Council explicitly stated it wanted to avoid. Therefore, the respondent recommends that the definition exclude those costs and charges associated with pre-conditions or pre-qualifications for professional, highly-skilled labor.

One respondent stated that in terms of skill level, those needing the protection seem to be the workers pursuing unskilled, low-paying jobs; therefore, the definition should apply to them.

Response: The purpose of this rule is to provide a definition of ''recruitment fees'' in FAR subpart 22.17. Subpart 22.17 already prohibits the charging of recruitment fees to employees. The final rule does not include an exception for providing professional high–paying, high-skilled jobs as it is outside the scope of this rule to address exceptions. If a fee is associated with the recruiting process, it is a recruitment fee, regardless of the industry or type of job.

b. Location of job?

Comment: Numerous respondents supported a definition that does not vary based on location of the job. One respondent stated that in terms of location, it is difficult to see where or why the definition should change or vary, and while there are different approaches in some countries, having a single approach is needed for effective and efficient implementation.

Another respondent recommended that costs and charges associated with pre-conditions or pre-qualifications for professional, highly-skilled labor should be excluded from the definition when the requirement relates directly to an underlying solicitation requirement or when part of a recruitment effort is in the continental United States, where the risk of trafficking in labor, particularly among the professional workforce, is far lower.

Response: As explained in the response to comment 3.a., subpart 22.17 prohibits the charging of recruitment fees to employees. The purpose of this rule is to provide a definition of ''recruitment fees,'' not to create exceptions for when recruitment fees may be charged, such as in certain locations. If a fee is associated with the recruiting process, it is a recruitment fee, regardless of the location of employment.

4. Are the Boundaries of the Proposed Definition Clear?

a. Definition Is Not Clear as to the Type of Fee Included

Comment: Many respondents stated that the current definition is not clear. One respondent believed that the definition is ambiguous and can be interpreted in dramatically different ways including being limitless (comprising not only a fee that a recruiter or employer attempts to charge to a job candidate or new employee, in exchange for access to a job, but also any and all actual and legitimate costs associated with the recruiting process). The respondent stated that another reasonable and good faith interpretation of the proposed definition of ''recruitment fees'' is to read it as including only those fees (or fees that are disguised as costs) that a recruiter or employer may attempt to charge a job candidate that are on top of, or in addition to, necessary and actual costs associated with recruitment. The respondent noted that if the intent is to only include fees that a recruiter or employer may attempt to charge a job candidate on top of, or in addition to, legitimate and necessary costs associated with the recruitment of employees, but also all underlying costs associated with the recruiting process, they suggested that that intent should be more clearly stated.

Response: See response to comment 2.a.iii.

b. Definition Should Include Additional Terms To Clarify

One respondent stated the definition is clear more or less but it should note that prohibited fees include fees connected with the ''recruiting process and employment relationship'' in order to clarify that the scope of the rule relates to more than just fees connected with sourcing, recruitment, and hiring of the worker. This respondent noted that there are other fees charged to the workers after the commencement of employment that should also be prohibited.

Other respondents recommended that the definition make clear that it covers fees charged by agents and/or officials in both origin and destination countries as well as sometimes in transit countries. The respondents also suggested, to make clearer that the definition includes fees that may be gathered long after ''recruitment'' is over, adding ''includes wage deductions and/or withholdings made by the end employer'' after the phrase ''regardless of the manner of their imposition or collection'' at the end of the sentence in paragraph (1) of the definition.

Response: The definition has been revised to make clear that if a fee is associated with the recruiting process, it is a recruitment fee. Therefore, a fee that is charged during employment can be a recruitment fee if it was associated with the recruiting process, regardless of timing. An additional phrase regarding timing and location has been inserted into the definition, as explained in response to comment 2.a.iv. In addition, see response to comment 7.g.

c. Definition Should Include a Statement of Principles

Comment: One respondent thought that it is important the definition applies regardless of the manner of collection and the payee, and referenced paragraph (2) of the proposed definition. The respondent noted that the term ''recruitment'' can be very limiting and provide opportunity for fees or costs to simply be renamed or classified in another way, without further clarification in the rule. The respondent suggested that a statement or set of principles might be helpful and suggested the following: ''All fees, costs associated with recruitment, hiring, on boarding, ongoing employment and end of employment and return to home country,'' or ''Fees at any stage of the recruitment process; during or after employment,'' or ''All fees incurred once an offer has been made or accepted.''

Response: Noted. The final definition retains paragraph (2). The definition has a statement of principles that a recruitment fee is any fee that is associated with the recruiting process. The definition has been revised to insert the phrase ''regardless of the time, manner, or location'' to make clear that all fees that are imposed in association with the recruitment process are captured by the definition, as explained

in the responses to comments 2.a.iv. and 4.b.

d. Definition Should Include a Time Cut-Off

Comment: One respondent stated the boundaries of the proposed rule are clear, but it would be clearer to use a time cut-off (for example, the stage at which a candidate is provisionally selected for the role) as a point at which recruitment costs should be covered. It suggested that contractors should not be put in a position where they are required to reimburse potential employees for the incidental unknown costs of submitting their initial application or attending the initial interview. This respondent suggested that a time-cutoff would need to be carefully defined so that it couldn't be used as a loophole to charge fees to the candidates. It stated that all costs directly associated with selection such as skills testing, medical assessment, qualifications verification, security clearance, etc. should always be included in the recruitment fee and therefore not charged to the candidate.

Response: The definition in the final rule has been amended to include the phrase ''regardless of the time, manner, or location of imposition or collection of the fee.'' The timing of the fees is not relevant to the question of whether or not a fee is a recruitment fee since the operative standard is whether the fees are associated with the recruiting process, even if imposed or collected later in time, as explained in the response to comment 2.a.iv.

5. As a general matter, is the illustrative list of recruitment fees helpful in understanding what costs an employee may not be charged? If not, why?

Comment: Many of the respondents noted that although they were in support of an illustrative list of recruitment fees to serve as examples, they recommended that the regulation also adopt a functionalist approach and prohibit economic arrangements that make workers more vulnerable to coercion. One respondent was in support of an illustrative list of recruitment fees, but thought that the list was under inclusive.

Two respondents were supportive but thought that guiding principles would be helpful to add, and noted as a justification, that terminology may differ by industry or region of the world. One respondent cautioned against only putting forth an enumerated list without language suggesting that the list could be more expansive.

One respondent recommended eliminating a list and including a standard of either recruitment fees or fees that have fraudulent intent. Another respondent supported a list, but cautioned that it shouldn't be seen as an exhaustive list and suggested that there should not be fees or costs charged of any kind to the employee, directly or indirectly.

Response: The definition has been revised to make clear that the introductory paragraph provides the standard for defining ''recruitment fees.'' The definition adopts a ''functionalist approach'' using the phrases ''any type of fees, including charges, costs, assessments, or other financial obligations,'' ''associated with the recruiting process,'' and ''regardless of the time, manner, or location of imposition or collection of the fee.'' The phrase ''associated with the recruiting process'' is the principal concept in the definition of ''recruitment fees.''

All fees meeting this definition, *i.e.,* associated with the recruitment process, are recruitment fees whether or not the fees are included as examples in paragraph (1) of the definition. The definition also captures indirect fees by noting that any fee associated with the recruiting process is a recruitment fee regardless of the timing of it, the type of fee, how it is paid, or to whom it is paid. In addition, any fee that is associated with the recruiting process is captured by the definition, whether or not there was fraudulent intent, as explained in the response to comment 2.a.iii.

6. What, if any, of the specifically enumerated fees in the proposed definition should be excluded or otherwise modified?

Comment: Many of the respondents recommended keeping all of the types of fees enumerated.

Response: The majority of the enumerated fees in the proposed rule are retained in the final rule. Specific modifications are discussed in the following paragraphs.

a. For Soliciting, Identifying, Considering, Interviewing, Referring, Retaining, Transferring, Selecting, Testing, Training, Providing New-Hire Orientation, Recommending, or Placing Employees or Potential Employees

Comment: Many of the respondents expressed support for all of the items. One respondent recommended specifying the parameters of training to include courses recruiters lead victims to believe they need, regardless of whether the training is mandatory. Another respondent suggested eliminating the word ''transferring'' for the reason that physical transfers should be covered in transportation.

Response: These remain covered by the rule. ''Training'' captures legitimate and illegitimate training associated with the recruiting process, if the fee is charged to the worker for training. The term ''transferring'' is not entirely duplicative of the word ''transportation'' and, therefore, is retained. For example, should workers be charged a ''transfer'' fee for changing hands from one recruiter to another recruiter, that would be a cost associated with the recruiting process.

b. For Covering the Cost, in Whole or in Part, of Advertising

Comment: Many respondents supported keeping this language in the definition.

Response: The rule captures this in paragraph (1)(ii) of the definition, but the language has been streamlined.

c. For Any Activity Related to Obtaining Permanent or Temporary Labor Certification

Comment: Many respondents expressed support for this. One respondent suggested removing ''any activity related to'' and adding ''passport, visa, identification documents.''

Response: The Councils removed ''any activity related to'' and replaced it with ''including any associated fees.'' The rule captures passports, visas, and identity documents in paragraph (1)(iii), (1)(v), and (1)(vi) in the definition.

d. For Processing Petitions

Comment: Many respondents expressed support for processing petitions.

Response: This is retained in the final rule at paragraph (1)(iv) in the definition.

e. For Visas and Any Fee That Facilitates an Employee Obtaining a Visa Such as Appointment and Application Fees

Comment: Many respondents expressed support for this. One respondent recommended that F–1 visa fees be exempt because the primary purpose of the F–1 visa is to study at an academic institution, and not employment.

Response: Noted. If the fee for a visa is one that is associated with the recruiting process for employment, then it falls under the definition and is prohibited.

f. For Government-Mandated Costs, Such as Border Crossing Fees

Comment: Many respondents supported inclusion. Two respondents referenced the private sector Electronic

Industry Citizenship coalition (EICC) Code of Conduct Interpretive Guidance, which includes border crossing fees.

Response: Noted. Border crossing fees are listed in the definition as an example of a recruitment fee in paragraph (1)(x) of the definition.

g. For Procuring Photographs and Identity Documentation, Including Any Nongovernmental Passport Fees

Comment: Many respondents recommended keeping this. Two respondents commented that the inclusion of fees ''for procuring photographs and identity documentation, including any nongovernmental passport fees'' added confusion to the definition of ''recruitment fees.'' Two respondents referenced the private sector EICC Code of Conduct, which prohibits charging workers the costs associated with documentation such as new passports and identity documents, as instructive.

Response: Noted. The definition provides that recruitment fees include fees for ''acquiring photographs and identity or immigration documents, such as passports, including any associated fees'' that are associated with the recruiting process.

Comment: One respondent provided a general comment that the inclusion of paragraph (1)(vii) fees ''for procuring photographs and identity documentation, including any nongovernmental passport fees'' in the definition of ''recruitment fees'' ''adds confusion and implies that it is not allowed to require provision of an identity card for employment.''

Response: The Councils do not agree that the definition implies that an employer cannot require a job applicant to provide a form of valid identification as part of the application process. The FAR already has the prohibition on charging employees recruitment fees. Therefore, an employer, as part of the recruiting process, cannot charge or seek reimbursement from an employee or applicant for fees associated with acquiring photographs and identity or immigration documents.

Comment: Using the example of requiring a job candidate to possess a passport or other identity document, one respondent offered two different interpretations of the definition—one which, in addition to disguised costs, ''does not include the actual cost of the passport'' and one which, in addition to disguised fees or costs, ''also includes the actual cost of the passport, to be paid to the appropriate government agency in the job candidate's home country.''

Response: In an effort to clarify the ambiguity surrounding this example of what is considered a recruitment fee, the Councils revised the definition to include fees for ''Acquiring photographs and identity or immigration documents, such as passports, including any associated fees.'' (See paragraph (1)(vi) in the definition). This does not imply that an employer cannot require an applicant to possess a valid form of identification when applying for a job. The regulation does, however, restrict an employer or its agents from directly charging an employee for these items when associated with the recruiting process. The essential element is that the worker is not required to pay the employer, labor recruiter, or any agent of the employer for these expenses. For example, an employer cannot charge a new hire employee for a new passport required for the position.

Comment: In direct response to the Councils' question, one respondent stated that, ''de minimis expenses such as the fee for a passport photo (without any markup) can be borne by the worker.'' Similarly, one respondent recommended ''removing this clause as these are small cost incidentals which should be the responsibility of the worker.''

Response: The final definition does not quantify the extent of the fees when it provides that a recruitment fee is any fee that is ''associated with the recruiting process.'' The underlying FAR rule prohibits the charging of recruitment fees to employees. The purpose of this rule is to provide a definition of ''recruitment fees'', not to create exceptions for when recruitment fees may be charged. Therefore, the final definition does not contain a de minimis exception to the prohibition on charging employees when a fee is ''associated with the recruiting process.''

Comment: One respondent stated that ''the proposed definition requires that fees be paid by employers even when those fees are permitted by federal immigration law to be borne by the employee . . . .'' The respondent asserted that the proposed rule is ambiguous as written and, by way of example, cited a scenario in which ''a worker chooses on his/her own accord to pay for their passport photos and obtain their passport so they can make themselves a more attractive employment prospect for a job in the U.S.'' In this scenario, the respondent asserts that the employer's obligation is uncertain. Similarly, another respondent stated that ''voluntary renewal of one's own passport, including the cost of obtaining new photographs, and payment for replacement of a lost passport or visa'' should not be treated as prohibited recruitment fees.

Response: Recruitment fees include costs to acquire photographs and identity or immigration documents such as passports, which are associated with the recruiting process. Were there to be a situation of an individual who is not involved with a recruiting process but chooses to acquire a passport, such fees not associated with the recruiting process would not fall under the definition. Similarly, renewal of a passport if for leisure travels, for example, and not associated with a recruiting process, would not fall under the definition.

h. Charged as a Condition of Access to the Job Opportunity, Including Procuring Medical Examinations and Immunizations and Obtaining Background, Reference and Security Clearance Checks and Examinations; Additional Certifications

Comment: One respondent supports inclusion of these fees. Another respondent proposed that the FAR Councils break paragraph (1)(viii) into two separate subparagraphs with the first paragraph as ''For the cost of procuring medical examinations and immunizations and obtaining background, reference and security clearance checks and examinations; ''additional certifications'' and the second paragraph as ''Charged as a condition of access to the job opportunity by any entity enumerated in paragraph (2) below, and/or for any reason listed in this section.''

Response: Fees that are charged as a condition of access to the job opportunity, and are associated with the recruiting process, are captured under this definition. It is deemed unnecessary to make the other requested change.

Comment: One respondent listed the practice of requiring job candidates to demonstrate a successful medical pre-screening in order to be eligible to apply for an open position as another example of a legitimate cost the respondent thought should be paid by the candidate. The respondent offered two different interpretations of the rule as presently drafted. The first interpretation excluded the actual cost of the medical screening from the definition of ''recruitment fees'' and the second interpretation included the actual cost of the medical exam in the definition of proscribed fees. As with the previous section, the respondent recommended that subsection (1)(viii) be excluded from the definition or clarified.

Response: Regarding medical screening, if the medical screening is associated with the recruiting process, it falls under this definition and is a recruitment fee, along with any associated fees.

Comment: One respondent expressed concern that the proposed definition including fees or costs ''charged as a condition of access to the job opportunity,'' along with the catch-all phrase ''additional certifications,'' could encompass any pre-condition or pre-qualification requirement for professional, high-skill positions—including educational or license requirements. The respondent expressed concern that this definition would include ''customary pre-qualifications for professional employment'' that are not typically associated with human trafficking (*e.g.,* holding a security clearance or professional certification such as Project Management Professional).

Response: This rule provides a definition of recruitment fees. The underlying FAR rule prohibits the charging of recruitment fees to employees. The purpose of this rule is to provide a definition of ''recruitment fees,'' not to create exceptions for when recruitment fees may be charged. The standard is whether the fee is associated with the recruiting process. If the certification is being charged in order to access the job opportunity and is associated with the recruiting process, then it is a recruitment fee. If degrees or certifications are obtained outside of any recruiting process, such as professional certifications earned years earlier in school, then they would not meet the standard of ''associated with the recruiting process'' (see response to comment 7.o.).

i. For an Employer's Recruiters, Agents or Attorneys, or Other Notary or Legal Fees

Comment: Many respondents support inclusion of these fees.

Response: Noted.

j. For Language Interpreters or Translators

There were no specific comments in response to this item, apart from the respondents expressing general support for each of the enumerated fees.

7. What, if any, fees not included in the proposed definition should be added?

a. Submitting Applications, Making Recommendations, Recruiting, Reserving, Committing, Soliciting, Identifying, Considering, Interviewing, Referring, Retaining, Transferring, Selection, or Placing Potential Job Applicants

Comment: Many respondents specifically supported including these fees.

Response: The final definition captures each of these fees, whether or not specifically mentioned, to the extent they are fees associated with the recruiting process. Of the five types of fees not listed already in the definition in the proposed rule at paragraph (1)(i)—*i.e.,* ''submitting applications, making recommendations, recruiting, reserving, committing''—four of them are already captured as fees ''associated with the recruiting process'' and by the language in paragraph (1)(i). Fees for ''submitting applications'' are captured by the language in paragraph (1)(iv) and have been added to the final definition for greater clarity to that paragraph.

b. Labor Broker Services, Both One Time and Recurring

Comment: Several respondents supported including these fees. One respondent noted that the fees should be paid by the employer.

Response: The final definition makes clear that it encompasses fees for ''labor broker services'' by referencing fees ''collected by an employer or third party,'' including agents, recruiters, labor brokers, staffing firms, and subcontractors, among other entities, in paragraph (2). Further, temporal issues and recurrence are addressed by the insertion in paragraph (1) of the language ''regardless of the time, manner, or location of imposition or collection of the fee.''

c. Exit Clearances, and Security Clearances Associated With Visas

Comment: Several respondents supported including these fees. Another respondent suggested adding ''and nongovernmental passport fees'' after ''For visas.''

Response: The final definition includes these fees by referencing ''government-mandated fees'' at paragraph (1)(x) and fees associated with acquiring visas at paragraph (1)(v).

d. Sending, Transit, and Receiving Country Government-Mandated Fees, Levies, and Insurance

Comment: Numerous respondents supported including these fees.

Response: Government-mandated fees and levies are included in the final definition at paragraph (1)(x). Insurance is addressed under section 7.m. of these comments.

e. Pre-Employment Medical Examinations or Vaccinations in the Sending Country

Comment: One respondent supported including these fees.

Response: The definition in the proposed rule included these fees at paragraph (1)(viii), and the final definition includes these fees at paragraph (1)(vii). The final definition also addresses questions regarding location of fees charged or paid including in countries of origin, countries of transit, and countries of performance or ''receiving countries'' in paragraph (1) as the definition states that it is a fee that is associated with the recruiting process ''regardless of the time, manner, or location of imposition or collection of the fee.''

f. Receiving Country Medical Examinations

Comment: One respondent supported including these fees.

Response: The final definition includes these fees at paragraph (1)(vii). The final definition also addresses questions regarding location of fees charged or paid including in countries of origin, countries of transit, and countries of performance or ''receiving countries'' in paragraph (1) as the definition states that it is a fee that is associated with the recruiting process ''regardless of the time, manner, or location of imposition or collection of the fee.''

g. Transportation and Subsistence Costs While in Transit, Including, But Not Limited to, Airfare or Costs of Other Modes of International Transportation, Terminal Fees, and Travel Taxes Associated With Travel From Sending Country to Receiving Country and the Return Journey at the End of the Contract

Comment: Numerous respondents supported including transportation fees.

Response: The final definition includes these fees at paragraph (1)(xi). Costs imposed on workers in association with the recruiting process, for travel from the country of origin to the country of performance, and the return journey, are included in the final definition for clarity as to the transportation costs. For example, while a worker is being recruited, if a worker is made to pay a lump sum for a return ticket and a destination ticket, that cost would fall under the final definition. This is distinct from the affirmative obligation to provide or cover the costs of return transportation at FAR 22.1703(a)(7).

h. Transportation and Subsistence Costs From the Airport or Disembarkation Point to the Worksite

Comment: Numerous respondents supported including transportation costs.

Response: See response to comment 7.g.

i. Security Deposits and Bonds

Comment: Many respondents supported including security deposits and bonds. One respondent noted that security deposits and bonds are similar to collateral requirements and can be used to keep workers in debt bondage.

Response: Noted. The definition includes these fees at paragraph (1)(xii) in the definition.

j. The Inclusion of a Collateral Requirement, Such as Land Deeds, in Contracts

Comment: Two respondents supported including collateral requirements. One respondent noted that anytime a worker is required to offer something of value as collateral it leaves the worker vulnerable to forced labor.

Response: The final definition encompasses collateral requirements in paragraph 1 by including ''other financial obligations'' and in paragraph (2)(i) in the definition by referring to fees ''paid in property or money.'' In addition, paragraph (1)(xii) in the definition prohibits fees charged for security deposits and bonds which, like other forms of collateral, are held to prevent or dissuade employees from leaving the job.

k. Contract Breach Fees

Comment: Many respondents supported including contract breach fees. Many respondents noted that breach fees are designed to cover the costs of recruitment expenses borne by the employer or recruiter or to compensate the employer or recruiter for forgone profits. This respondent suggested that breach fees are actually recruitment fees in another form—instead of being paid upfront they are delayed until the termination of employment. They also noted that using these fees to compensate employers or recruiters for lost profits should not be a cost borne by the employee, and that breach fees increase the relative power of employers and recruiters over employees.

Response: The term ''contract breach fee'' is not specifically included in the final definition. However, if the fee is associated with the recruiting process, regardless of when the fee is charged or what it is called, it falls under the definition in the final rule. The practices described by respondents' concern fees charged to the employee to cover the costs of recruitment. Therefore, such fees are prohibited, regardless of when the fee to the employee is charged. Employers are prohibited from charging employees any fee, including when called a ''contract breach fee,'' if the fee is associated with the recruiting process.

l. An Employer's Recruiters, Agents or Attorneys, or Other Notary or Legal Fees

Comment: Several respondents supported including these fees.

Response: The definition in the proposed rule included these fees at paragraph (1)(ix) and definition includes them at paragraph (1)(viii).

m. Insurance

Comment: Numerous respondents supported including insurance. One respondent suggested that the language should read, ''any associated insurance costs over and above those mandated by governments''.

Another respondent suggested the language, ''all insurance fees, including, but not limited to health, medical, and dental insurance.''

One respondent noted that insurance could be used fraudulently and cited one case in which the victim made the trafficker the beneficiary of her work life insurance, because the trafficker told the beneficiary that she could not put a family member down. The trafficker promised to send the money to the victim's family should anything ever happen to her.

Response: A fee to purchase insurance, in association with the recruiting process, is included under (1)(xii) of the definition. This does not include a situation where an employee purchases insurance separate and apart from the recruiting process, such as if an employee who has been employed by a company, chooses to start purchasing dental insurance.

n. Contributions to Worker Welfare Funds or Government Provided Benefits in Sending Countries Required to be Paid by Suppliers

Comment: Two respondents supported including these fees.

Response: The definition encompasses these fees under paragraph (1)(x), which prohibits charging workers for government-mandated fees.

o. Other

Comment: One respondent suggested including ''providing advice'' and ''arranging for travel and/or accompanying the applicant on that travel,'' noting that recruiters often make employees who have never traveled abroad feel that this is a service they need to pay for.

Response: The final definition includes these fees at (1)(ix).

Comment: One respondent suggested including ''any activity related to labor procurement'' and noted that recruiters often charge workers for a variety of costs incurred in the duration of the recruiting process.

Response: The standard is whether the ''charges, costs, assessments, or other financial obligations'' are ''associated with the recruiting process.'' Paragraph (1) of the definition lists examples for further clarity incorporating more examples than in the proposed rule. However, the list is not intended to be exhaustive and other fees not listed are recruitment fees if they are ''associated with the recruiting process.''

Comment: One respondent suggested including bribes and kickback payments made by an employer or any of its agents.

Response: These fees were included in the proposed definition and are included in the definition in the final rule at paragraph (2)(iv).

Comment: Many respondents suggested including fees that relate to pre-departure training or ''onboarding fees'' such as skills tests, additional certifications beyond those required for job eligibility, and pre-departure orientation.

Response: As noted above, fees for certifications for accessing the job opportunity are listed in (1)(vii) of the definition as an example of a recruitment fee, if the fee is charged in association with the recruiting process, without regard to the question of eligibility. If degrees or certifications are obtained outside of any recruiting process, such as professional certifications earned years earlier in school, then they would not meet the standard of ''associated with the recruiting process.'' In contrast, if for example, workers are asked to pay a fee, while they are being recruited, to take a language course or obtain a certification from the employer in the specific skill set of their job, those costs would be associated with the recruiting process. Fees for skills testing and orientation are included in the definition as examples in paragraph (1)(i).

Comment: One respondent suggested including fees that would be charged to the worker for equipment, such as laptop computers.

Response: Paragraph (1)(xiii) of the definition lists equipment charges as an

example of a cost that can be associated with the recruiting process.

Comment: One respondent suggested adding ''or of any activity related to labor procurement.'' Another respondent suggested adding ''and overhead.''

Response: Overhead costs are included generally in the examples in paragraph (1)(i) of the definition. Regarding activities related to labor procurement, the language has been streamlined to make clear that the definition captures fees for activities associated with the recruiting process.

Comment: Two respondents suggested including ''ongoing fees.'' One respondent noted that some countries allow labor brokers to deduct recruitment fees from workers' paychecks on an ongoing basis.

Response: The definition in the final rule addresses the temporal aspect of fees charged in the introduction paragraph as it includes fees ''associated with the recruiting process, regardless of the time, manner, or location of imposition or collection of the fee.''

8. Need for Advanced Notice of Proposed Rulemaking

Comment: One respondent stated that the proposed rule contains an extensive list of questions to public respondents and feels that these questions should have been addressed through information collection and research prior to issuing it as a proposed rule. The respondent recommended that research should have been done in the ''Early Engagement Opportunity'' that closed in March 2015. An advanced notice of proposed rulemaking would have been more appropriate than the ''Early Engagement Opportunity.'' According to the respondent, the proposed definition places on the public the onus to conduct analysis and provide information that the Councils should have addressed before issuing the proposed rule.

Response: The ''Early Engagement Opportunity'' promoted substantive public input early in the process, similar to what might have been solicited through an advanced notice of proposed rulemaking. Asking questions in the preamble to the proposed rule did not put an unfair burden on the public, but provided the public an opportunity to provide input on the proposed rule and potential alternatives to the rule.

9. Economic Analysis of Benefits and Costs Under Executive Order 12866

Comment: One respondent stated that the proposed rule is designated a ''significant'' rulemaking and is subject to Office of Information and Regulatory Affairs (OIRA) review. The respondent stated that the Councils have not conducted any economic analysis of benefits and costs under Executive Order's 12866 and 13563. The respondent further stated that the proposed rule does not provide either quantitative or qualitative assessment of alternatives. The respondent noted that Executive Order 12866 requires the agencies to consider the alternative of no regulation. According to the respondent, a simple survey of potentially affected contractors would have provided useful data regarding the extent to which different types of charges to employees are made and could have informed assessment of the incidence and severity of impacts of including or excluding certain types of charges under the definition.

Response: As detailed further in section IV, DoD, GSA, and NASA have concluded that there is a regulatory cost impact associated with this final rule.

The ''Early Engagement Opportunity'' and the proposed rule provided opportunity for the public, including potentially affected contractors, to provide data on the potential impact of the rule. The questions asked in the preamble identified some of the alternatives that the Councils were considering, and specifically requested comment on these alternatives.

The alternative of ''no regulation'' is not helpful, because the FAR already prohibits the charging of recruitment fees to employees or potential employees per the E.O. and the final rule (FAR Case 2013–001) published in 2015 in the **Federal Register** at 80 FR 4967. This rule is meant to clarify the 2015 rule by identifying the types of expenses that are considered to be recruitment fees for purposes of the prohibition (*e.g.,* fees for processing applications, fees for acquiring visas). Leaving the term undefined will perpetuate inconsistent interpretation and enforcement of the FAR requirement.

10. Comments Regarding the Initial Regulatory Flexibility Analysis Under Executive Order 13563

For comments and responses relating to the initial regulatory flexibility analysis, see section VII of this preamble.

11. Issues Outside the Scope of the Current Rule

Comment: One respondent raised the issue of providing workers, in their home country, with a contract in a language that workers understand that specifies certain working terms. The respondent also suggested that receiving companies should keep notarized documents certifying that they have paid recruiters all recruiting fees and receipts of such, and should compensate workers who paid any recruitment fees.

Response: These issues are outside the scope of a definition for the term ''recruitment fees.'' Additionally, the FAR already contains, at 22.1703(a)(5)(i), the requirement that contractors, contractor employees, subcontractors, and subcontractor employees, and their agents not use ''misleading or fraudulent practices during the recruitment of employees or offering of employment, such as failing to disclose, in a format and language accessible to the worker, basic information.''

Comment: One respondent stated that from a practical standpoint the proposed rule as currently written fails to provide guidance or direction on several issues that frequently arise for contractors performing work overseas. The respondent thought that the scope of the contractor's obligation is currently unclear as it relates to the utilization of employment websites. This respondent stated that it isn't uncommon for companies to utilize commercial or local employment websites to identify potential job candidates and thought that under the proposed rule it isn't clear who has the obligation to vet those websites. The respondent suggested including guidance in the rule related to this type of situation would be very helpful so that contractors fully understand their obligations.

Response: These issues are out of the scope of the definition of ''recruitment fees.''

III. Applicability to Contracts at or Below the Simplified Acquisition Threshold and for Commercial Items, Including Commercially Available Off-the-Shelf Items

This rule does not affect the applicability of FAR clause 52.222–50, Combating Trafficking in Persons. Pursuant to 41 U.S.C. 1905 and 1906, the FAR Council signed determinations on January 20, 2015, that Title XVII of the NDAA for FY 2013 (as implemented in FAR clause 52.222–50), should apply to contracts and subcontracts in amounts not greater than the simplified acquisition threshold, except for the requirement for certification and a compliance plan; and the acquisition of commercial items (other than commercially available off-the-shelf items). Likewise, pursuant to 41 U.S.C. 1907, the Administrator for Federal Procurement Policy signed a determination on the same date that

Title XVII of the NDAA for FY 2013 (as implemented in FAR clause 52.222–50), should apply to contracts for the acquisition of commercially available off-the-shelf items, except for the requirement for a compliance plan and certification.

IV. Expected Cost Impact to the Public

DoD, GSA, and NASA have concluded that there is a regulatory cost impact associated with this final rule. However, as explained in this section, some costs associated with the rule are difficult to quantify.

Since 2015, FAR 22.1703(a)(6) and the associated clause at FAR 52.222–50(b)(6) have prohibited Government contractors from charging their employees recruitment fees. This prohibition was published in a final rule (FAR Case 2013–001) to implement Title XVII of the NDAA for FY 2013 and E.O. 13627, Strengthening Protections Against Trafficking in Persons in Federal Contracts, dated September 25, 2012. The prohibition took effect on March 2, 2015 (80 FR 4967). The prohibition did not prevent contractors from charging fees for recruitment services; it simply precluded such fees from being charged to prospective or actual employees on Government contracts or subcontracts. To the extent these fees were being paid by employees, the rule effectively shifted these costs so that they are borne by contractors that have hired the recruiters or to the contractors themselves (if they are handling recruitment activities in-house).

This rule clarifies the 2015 rule by identifying the types of expenses that are considered to be recruitment fees for purposes of the prohibition (*e.g.,* fees for processing applications, fees for acquiring visas). Similar to the 2015 rule, this rule does not prohibit the entity performing recruitment from charging for its services; it only protects prospective or actual contract and subcontract employees from having to bear the costs. It is possible, if not likely, that some contractors will be required to pay higher costs to recruiters as they switch from unethical to ethical recruitment companies. However, no assertion of such higher costs were made by the commenters in response to this rulemaking, presumably because contractors have already been taking action to eliminate unethical recruitment companies from their supply chains as a result of the recruitment fee prohibitions that went into effect in 2015.

Equally important, this final rule does not change FAR rules addressing the allowability of costs in FAR Part 31—meaning the rules governing what recruitment costs may be otherwise reimbursed to a prime contractor remain unchanged.

Because the FAR did not originally provide a definition of ''recruitment fees,'' there has been some disparity in the interpretation of what constitutes a recruitment fee. For this reason, DoD, GSA and NASA are unable to quantify the net change in burden due to the addition of the definition.

DoD, GSA, and NASA have calculated the cost of regulatory familiarization with the new definition, based on FPDS data for FY 2017, estimating that for the first year 89,565 entities will be subject to the prohibition, 30 minutes per entity; and due to turnover and new entrants, 20 percent of that amount in subsequent years. The estimated public cost for familiarization, calculated in 2016 dollars at a 7 percent discount rate in perpetuity is as follows:

Annualized	$.8 million.
Present Value	$11.9 million.
Annualized Value Costs as of 2016 if Year 1 is 2019.	$.7 million.

V. Executive Orders 12866 and 13563

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

VI. Executive Order 13771

This final rule is considered an E.O. 13771 regulatory action. The total estimated annualized cost of this rule will be $.8 million (with a total present value of $11.9 million). The annualized value as of 2016 if year 1 is 2019 is $.7 million. More details on the costs associated with this rule can be found in the expected cost impact section of this preamble (section IV).

VII. Regulatory Flexibility Act

DoD, GSA, and NASA have prepared a final regulatory flexibility analysis (FRFA) consistent with the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* The FRFA is summarized as follows:

The purpose of this final rule is to provide a standard definition of ''recruitment fees'' in order to clarify how the Government treats this prohibited practice associated with labor trafficking on Government contracts.

The objective of this final rule is to clarify the types of charges and fees that contractors, subcontractors, and their employees or agents are prohibited from charging to employees or potential employees, under the Government policy on combating trafficking in persons.

One respondent submitted the following comment on the initial regulatory flexibility analysis published in the proposed rule:

Comment: According to the respondent, the initial regulatory flexibility analysis of the impact on small entities is without meaningful content. The respondent stated that such a pre-proposal research survey as recommended for the cost benefit analysis could have also provided the data those agencies cited as needed, but missing, for analysis of small business impacts under the Regulatory Flexibility Act.

Response: The initial regulatory flexibility analysis laid out the number of small entities that could potentially be affected, and how they could be impacted by this rule. DoD, GSA, and NASA invited comments from small business concerns and other interested parties on the expected impact of the rule on small entities. As noted, only one respondent raised this concern. While the anticipated costs associated with this rule are difficult to quantify, Section IV, above, provides an overview of cost estimates. The Councils anticipate that any such impact will be outweighed by the expected benefits of this rule.

This final rule will apply to all entities, whether small or other than small, that are contractors or subcontractors on U.S. Government contracts. As of 2018, there were about 450,000 active registrants in the System for Award Management (SAM). Approximately 75 percent of those registrants (338,000) certified to meeting the size standard as small for their primary NAICS code. However, there would be no actual impact from this rule unless the small entity was planning to charge or allow another entity acting on their behalf to charge, a recruitment fee to an employee or potential employee, which is already prohibited under FAR clause 52.222–50, Combating Trafficking in Persons. There is no data available to estimate this impact. Further, for the definition of ''small business,'' the Regulatory Flexibility Act refers to the Small Business Act, which in turn allows the U.S. Small Business Administration (SBA) Administrator to specify detailed definitions or standards (5 U.S.C. 601(3) and 15 U.S.C. 632(a)). The SBA regulations at 13 CFR 121.105 discuss who is a small business: ''(a)(1) Except for small agricultural cooperatives, a business concern eligible for assistance from SBA as a small business is a business entity organized for profit, with a place of business located in the United States, and which operates primarily within the United States or which makes a significant contribution to the U.S. economy through payment of taxes or use of American

products, materials or labor.'' Therefore, this final regulatory flexibility analysis does not need to address impact on foreign small entities with Government contracts or subcontracts that are not small businesses as defined by the Small Business Act.

There were no significant alternatives identified that would meet the objective of the rule.

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

VIII. Paperwork Reduction Act

The Paperwork Reduction Act (44 U.S.C. Chapter 35) applies. Although there are information collection requirements associated with FAR 52.222–50 and FAR 52.222–56 (OMB Control Number 9000–0188, which has been extended to September 30, 2021), this case does not impact the information collection requirement, because it just adds a definition of ''recruitment fees'' to FAR 52.222–50.

List of Subjects in 48 CFR Parts 22 and 52

Government procurement.

Dated: December 10, 2018.

William F. Clark,

Director, Office of Government-wide Acquisition Policy, Office of Acquisition Policy, Office of Government-wide Policy.

Therefore, DoD, GSA and NASA are issuing a final rule amending 48 CFR parts 22 and 52 as set forth below:

■ 1. The authority citation for parts 22 and 52 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

PART 22—APPLICATION OF LABOR LAWS TO GOVERNMENT ACQUISITIONS

■ 2. Amend section 22.1702 by adding, in alphabetical order, the definition ''Recruitment fees'' to read as follows:

22.1702 Definitions.

* * * * *

Recruitment fees means fees of any type, including charges, costs, assessments, or other financial obligations, that are associated with the recruiting process, regardless of the time, manner, or location of imposition or collection of the fee.

(1) Recruitment fees include, but are not limited to, the following fees (when they are associated with the recruiting process) for—

(i) Soliciting, identifying, considering, interviewing, referring, retaining, transferring, selecting, training, providing orientation to, skills testing, recommending, or placing employees or potential employees;

(ii) Advertising;

(iii) Obtaining permanent or temporary labor certification, including any associated fees;

(iv) Processing applications and petitions;

(v) Acquiring visas, including any associated fees;

(vi) Acquiring photographs and identity or immigration documents, such as passports, including any associated fees;

(vii) Accessing the job opportunity, including required medical examinations and immunizations; background, reference, and security clearance checks and examinations; and additional certifications;

(viii) An employer's recruiters, agents or attorneys, or other notary or legal fees;

(ix) Language interpretation or translation, arranging for or accompanying on travel, or providing other advice to employees or potential employees;

(x) Government-mandated fees, such as border crossing fees, levies, or worker welfare funds;

(xi) Transportation and subsistence costs—

(A) While in transit, including, but not limited to, airfare or costs of other modes of transportation, terminal fees, and travel taxes associated with travel from the country of origin to the country of performance and the return journey upon the end of employment; and

(B) From the airport or disembarkation point to the worksite;

(xii) Security deposits, bonds, and insurance; and

(xiii) Equipment charges.

(2) A recruitment fee, as described in the introductory text of this definition, is a recruitment fee, regardless of whether the payment is—

(i) Paid in property or money;

(ii) Deducted from wages;

(iii) Paid back in wage or benefit concessions;

(iv) Paid back as a kickback, bribe, in-kind payment, free labor, tip, or tribute; or

(v) Collected by an employer or a third party, whether licensed or unlicensed, including, but not limited to—

(A) Agents;

(B) Labor brokers;

(C) Recruiters;

(D) Staffing firms (including private employment and placement firms);

(E) Subsidiaries/affiliates of the employer;

(F) Any agent or employee of such entities; and

(G) Subcontractors at all tiers.

* * * * *

■ 3. Amend section 22.1703 by—

■ a. Revising paragraph (a)(5)(i); and

■ b. Removing from paragraph (a)(6) ''employees'' and adding ''employees or potential employees'' in its place.

The revisions read as follows:

22.1703 Policy.

* * * * *

(a) * * *

(5)(i) Using misleading or fraudulent practices during the recruitment of employees or offering of employment, such as failing to disclose, in a format and language understood by the employee or potential employee, basic information or making material misrepresentations during the recruitment of employees regarding the key terms and conditions of employment, including wages and fringe benefits, the location of work, the living conditions, housing and associated costs (if employer or agent provided or arranged), any significant costs to be charged to the employee or potential employee, and, if applicable, the hazardous nature of the work;

* * * * *

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 4. Amend section 52.212–5 by—

■ a. Revising the date of the clause and paragraphs (b)(33)(i) and (e)(1)(xiii)(A); and

■ b. In the Alternate II, revising the date and paragraph (e)(1)(ii)(K)(*1*).

The revisions read as follows:

52.212–5 Contract Terms and Conditions Required To Implement Statutes or Executive Orders—Commercial Items.

* * * * *

Contract Terms and Conditions Required To Implement Statutes or Executive Orders—Commercial Items (JAN 2019)

* * * * *

(b) * * *

* * * * *

_ (33)(i) 52.222–50, Combating Trafficking in Persons (JAN 2019) (22 U.S.C. chapter 78 and E.O. 13627).

* * * * *

(e)(1) * * *

(i) * * *

(xiii) * * *

_ (A) 52.222–50, Combating Trafficking in Persons (JAN 2019) (22 U.S.C. chapter 78 and E.O. 13627).

* * * * *

Alternate II (JAN 2019). * * *

* * * * *

(e)(1) * * *

(ii) * * *

(K) _ (*1*) 52.222–50, Combating Trafficking in Persons (JAN 2019) (22 U.S.C. chapter 78 and E.O. 13627).

* * * * *

■ 5. Amend section 52.213–4 by revising the date of the clause and paragraphs (a)(2)(viii) and (b)(1)(viii)(A) to read as follows:

52.213–4 Terms and Conditions—Simplified Acquisitions (Other Than Commercial Items).

* * * * *

Terms and Conditions—Simplified Acquisitions (Other Than Commercial Items) (JAN 2019)

(a) * * *

(2) * * *

(viii) 52.244–6, Subcontracts for Commercial Items (JAN 2019).

* * * * *

(b) * * *

(1) * * *

(viii)(A) 52.222–50, Combating Trafficking in Persons (JAN 2019) (22 U.S.C. chapter 78 and E.O. 13627) (Applies to all solicitations and contracts).

* * * * *

■ 6. Amend section 52.222–50 by—

■ a. Revising the date of the clause;

■ b. Adding to paragraph (a), in alphabetical order, the definition ''Recruitment fees'';

■ c. Revising paragraph (b)(5)(i);

■ d. Removing from paragraph (b)(6) ''employees'' and adding ''employees or potential employees'' in its place; and

■ e. Removing from paragraph (h)(3)(iii) ''employee,'' and adding ''employee or potential employee,'' in its place.

The revisions and addition read as follows:

52.222–50 Combating Trafficking in Persons.

* * * * *

Combating Trafficking in Persons (JAN 2019)

(a) * * *

Recruitment fees means fees of any type, including charges, costs, assessments, or other financial obligations, that are associated with the recruiting process, regardless of the time, manner, or location of imposition or collection of the fee.

(1) Recruitment fees include, but are not limited to, the following fees (when they are associated with the recruiting process) for—

(i) Soliciting, identifying, considering, interviewing, referring, retaining, transferring, selecting, training, providing orientation to, skills testing, recommending, or placing employees or potential employees;

(ii) Advertising;

(iii) Obtaining permanent or temporary labor certification, including any associated fees;

(iv) Processing applications and petitions;

(v) Acquiring visas, including any associated fees;

(vi) Acquiring photographs and identity or immigration documents, such as passports, including any associated fees;

(vii) Accessing the job opportunity, including required medical examinations and immunizations; background, reference, and security clearance checks and examinations; and additional certifications;

(viii) An employer's recruiters, agents or attorneys, or other notary or legal fees;

(ix) Language interpretation or translation, arranging for or accompanying on travel, or providing other advice to employees or potential employees;

(x) Government-mandated fees, such as border crossing fees, levies, or worker welfare funds;

(xi) Transportation and subsistence costs—

(A) While in transit, including, but not limited to, airfare or costs of other modes of transportation, terminal fees, and travel taxes associated with travel from the country of origin to the country of performance and the return journey upon the end of employment; and

(B) From the airport or disembarkation point to the worksite;

(xii) Security deposits, bonds, and insurance; and

(xiii) Equipment charges.

(2) A recruitment fee, as described in the introductory text of this definition, is a recruitment fee, regardless of whether the payment is—

(i) Paid in property or money;

(ii) Deducted from wages;

(iii) Paid back in wage or benefit concessions;

(iv) Paid back as a kickback, bribe, in-kind payment, free labor, tip, or tribute; or

(v) Collected by an employer or a third party, whether licensed or unlicensed, including, but not limited to—

(A) Agents;

(B) Labor brokers;

(C) Recruiters;

(D) Staffing firms (including private employment and placement firms);

(E) Subsidiaries/affiliates of the employer;

(F) Any agent or employee of such entities; and

(G) Subcontractors at all tiers.

* * * * *

(b) * * *

(5)(i) Use misleading or fraudulent practices during the recruitment of employees or offering of employment, such as failing to disclose, in a format and language understood by the employee or potential employee, basic information or making material misrepresentations during the recruitment of employees regarding the key terms and conditions of employment, including wages and fringe benefits, the location of work, the living conditions, housing and associated costs (if employer or agent provided or arranged), any significant costs to be charged to the employee or potential employee, and, if applicable, the hazardous nature of the work;

* * * * *

■ 7. Amend section 52.244–6 by revising the date of the clause and paragraph (c)(1)(xiii)(A) to read as follows:

52.244–6 Subcontracts for Commercial Items.

* * * * *

Subcontracts for Commercial Items (JAN 2019)

* * * * *

(c)(1) * * *

(xiii)(A) 52.222–50, Combating Trafficking in Persons (JAN 2019) (22 U.S.C. chapter 78 and E.O. 13627).

* * * * *

[FR Doc. 2018–27541 Filed 12–19–18; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF DEFENSE GENERAL SERVICES ADMINISTRATION NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Chapter 1

[Docket No. FAR 2018–0001, Sequence No. 6]

Federal Acquisition Regulation; Federal Acquisition Circular 2019–01; Small Entity Compliance Guide

AGENCY: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Small entity compliance guide.

SUMMARY: This document is issued under the joint authority of DOD, GSA, and NASA. This *Small Entity Compliance Guide* has been prepared in accordance with section 212 of the Small Business Regulatory Enforcement

Fairness Act of 1996. It consists of a summary of the rule appearing in Federal Acquisition Circular (FAC) 2019–01, which amends the Federal Acquisition Regulation (FAR). An asterisk (*) next to a rule indicates that a regulatory flexibility analysis has been prepared. Interested parties may obtain further information regarding this rule by referring to FAC 2019–01, which precedes this document. These documents are also available via the internet at *http://www.regulations.gov.*

DATES: December 20, 2018.

FOR FURTHER INFORMATION CONTACT: Ms. Cecelia Davis at 202–219–0202 for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat Division at 202–501–4755. Please cite FAC 2019–01, FAR Case 2015–017.

RULE LISTED IN FAC 2019–01

Subject	FAR case	Analyst
* Combating Trafficking in Persons—Definition of "Recruitment Fees"	2015–017	Davis.

SUPPLEMENTARY INFORMATION: A summary for the FAR rule follows. For the actual revisions and/or amendments made by this FAR Case, refer to the specific item number and subject set forth in the document following this item summary. FAC 2019–01 amends the FAR as follows:

Combating Trafficking in Persons—Definition of ''Recruitment Fees'' (FAR Case 2015–017)

This final rule amends the Federal Acquisition Regulation (FAR) to provide a definition of ''recruitment fees'' in FAR subpart 22.17 and the associated clause at FAR 52.222–50 to further implement the FAR policy on combating trafficking in persons. One element in combating trafficking in persons is to prohibit contractors from charging employees or potential employees recruitment fees.

This final rule will not have a significant economic impact on a substantial number of small entities.

Dated: December 10, 2018.

William F. Clark,

Director, Office of Government-wide Acquisition Policy, Office of Acquisition Policy, Office of Government-wide Policy.

[FR Doc. 2018–27544 Filed 12–19–18; 8:45 am]

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